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Contents

Federal Register

Vol. 86, No. 75

Wednesday, April 21, 2021

Agency for International Development
RULES
Procedures for the Review and Clearance of Guidance Documents; Rescission; Correction, 20632

Agricultural Marketing Service
NOTICES
Supply Chains for the Production of Agricultural Commodities and Food Products, 20652–20654

Agriculture Department
See Agricultural Marketing Service
See Food and Nutrition Service

Air Force Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 20666–20667

Army Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 20670
Privacy Act; Systems of Records, 20667–20670

Children and Families Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 20700–20701
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Early Head Start—Child Care Partnerships Sustainability Study, 20699–20700

Coast Guard
RULES
Safety Zone:
Gulf of Mexico, Port Fouchon, LA, 20636–20637
Tugs Champion, Valerie B, Nancy Anne and Barges Kokosing I, Kokosing II, Kokosing IV Operating in the Straits of Mackinac, MI, 20633–20635
Special Local Regulation:
Blessing of the Fleet, Tiburon, CA, 20633
Opening Day on San Francisco Bay, San Francisco, CA, 20632–20633

Commerce Department
See Economic Development Administration
See Foreign-Trade Zones Board
See International Trade Administration
See National Oceanic and Atmospheric Administration

Defense Department
See Air Force Department
See Army Department
See Engineers Corps
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 20670–20673
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Construction Wage Rate Requirements, Price Adjustment (Actual Method), 20699

Delaware River Basin Commission
RULES
Comprehensive Plan and Special Regulations with Respect to High Volume Hydraulic Fracturing; Rules of Practice and Procedure Regarding Project Review Classifications and Fees, 20628–20631

Drug Enforcement Administration
NOTICES
Bulk Manufacturer of Controlled Substances Application:
Research Triangle Institute, 20713
Decision and Order:
Javaid A. Perwaiz, MD, 20732–20734
Mark A. Wimbley, MD, 20713–20728
Michael Jones, MD, 20728–20732
Importer of Controlled Substances Application:
Research Triangle Institute, 20734–20738
Scottsdale Research Institute, 20738–20739
Order:
The Pharmacy Place, 21008–21048

Economic Development Administration
NOTICES
Trade Adjustment Assistance; Petitions, 20658

Energy Department
See Federal Energy Regulatory Commission
See Western Area Power Administration
NOTICES
Preliminary Analysis Regarding Energy Efficiency Improvements in ANSI/ASHRAE/IES Standard 90.1–2019, 20674–20676

Engineers Corps
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 20673–20674

Environmental Protection Agency
PROPOSED RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
California; Mojave Desert Air Quality Management District, 20643–20645
California; Sacramento Metro Air Quality Management District, 20645–20647
Nebraska; Revisions to Title 129 of the Nebraska Administrative Code; Chapter 39 Visible Emissions from Diesel-powered Motor Vehicles, 20642–20643
NOTICES
Meetings:
Board of Scientific Counselors Executive Committee, 20692
Pesticide Product Registration:
Applications for New Active Ingredients, April 2021, 20692–20693
Applications for New Uses—April 2021, 20691–20692

Export-Import Bank
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application for Short-Term Letter of Credit Export Credit Insurance Policy, 20694

Federal Aviation Administration
RULES
Airworthiness Directives:
The Boeing Company Airplanes, 20621–20625
Statement of Policy:
Waiving Ground Safety Regulations at Cape Canaveral Air Force Station, Vandenberg Air Force Base, Wallops Flight Facility, and Kennedy Space Center, 20625–20627
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Notice of Proposed Outdoor Laser Operation(s), 20784–20785
Dispose of 1.93 Acres of Land at Eastern Slopes Regional Airport, Fryeburg, ME, 20785
Petition for Exemption; Summary:
Airlines for America, 20784–20786

Federal Communications Commission
PROPOSED RULES
Petitions for Reconsideration of Action in Rulemaking Proceeding, 20647
Television Broadcasting Services:
Peoria and Oswego, IL; Correction, 20648
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 20694–20696
Meetings, 20696–20697

Federal Deposit Insurance Corporation
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 20697–20698

Federal Energy Regulatory Commission
RULES
Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators; Correction, 20627
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 20684–20686
Application and Establishing Intervention Deadline:
Gulf States Transmission LLC, 20686–20688
Application:
Bard College, NY, 20681–20682
Daybreak Power, Inc., 20676–20677
Transcontinental Gas Pipe Line Company, LLC, 20677–20679
Combined Filings, 20676, 20680–20681
Effectiveness of Exempt Wholesale Generator Status:
Lily Solar, LLC; Trent River Solar, LLC; PGR Lessee P, LLC; et al., 20683
Filing of Supplement to Facilities Surcharge Settlement:
Enbridge Energy, Limited Partnership, 20679
Meetings:
Electric Transmission Incentives Policy under Section 219 of the Federal Power Act; Workshop, 20682
Electrification and the Grid of the Future; Technical Conference, 20677
The Office of Public Participation; Virtual Spanish Listening Session, 20683–20684
Request for Partial Waiver:
Kentucky Municipal Energy Agency, 20683
Waiver Period for Water Quality Certification Application:
Transcontinental Gas Pipe Line Co., LLC, 20682
Walden Hydro, LLC, 20679

Federal Railroad Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 20786–20787, 20789–20790
Surface Transportation Project Delivery Program:
California High-Speed Rail Authority Audit Report, 20787–20789

Federal Reserve System
NOTICES
Change in Bank Control:
Acquisitions of Shares of a Bank or Bank Holding Company, 20698–20699

Fish and Wildlife Service
RULES
Endangered and Threatened Species:
Designation of Critical Habitat for the Western Distinct Population Segment of the Yellow-billed Cuckoo, 20798–21005

Food and Nutrition Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
School Meals Operations Study: Evaluation of the COVID–19 Child Nutrition Waivers and Child Nutrition Programs, 20654–20658

Foreign-Trade Zones Board
NOTICES
Application for Subzone Expansion:
Lam Research Corp., Foreign-Trade Zone 18, San Jose, CA, 20658–20659

General Services Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Construction Wage Rate Requirements, Price Adjustment (Actual Method), 20699

Geological Survey
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Current and Future Landsat User Requirements, 20705–20706

Health and Human Services Department
See Children and Families Administration
See Indian Health Service
See National Institutes of Health

Homeland Security Department
See Coast Guard
See U.S. Citizenship and Immigration Services
See U.S. Immigration and Customs Enforcement

NOTICES
Meetings:
President's National Infrastructure Advisory Council, 20703

Indian Affairs Bureau
NOTICES
Helping Expedite and Advance Responsible Tribal Homeownership Act Approval:
Standing Rock Sioux Tribe of North & South Dakota Leasing Ordinance, 20706–20707

Indian Health Service
PROPOSED RULES
Acquisition Regulations; Buy Indian Act; Procedures for Contracting:
Reopening and Extension of Comment Period, 20648–20649

Institute of Museum and Library Services
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
2022–2024 Grants to States Program State Program Reporting System Forms, 20743
2022–2024 National Medal for Museum and Library Service Nomination Form, 20742–20743

Interior Department
See Fish and Wildlife Service
See Geological Survey
See Indian Affairs Bureau
See Land Management Bureau
See Office of Natural Resources Revenue

International Trade Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China, 20659–20661
Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Polyester Textured Yarn from India, 20659
Refillable Stainless Steel Kegs from the People's Republic of China, 20661

International Trade Commission
NOTICES
Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Prestressed Concrete Steel Wire Strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine; Scheduling of the Final Phase, 20711–20712
Investigations; Determinations, Modifications, and Rulings, etc.:
Certain Skin Rejuvenation Resurfacing Devices, Components Thereof, and Products Containing the Same, 20712–20713

Justice Department
See Drug Enforcement Administration
NOTICES
Privacy Act; Systems of Records, 20739–20742

Land Management Bureau
NOTICES
Meetings:
Resource Advisory Council Subcommittee on Public Lands, Alaska, 20707–20708

National Aeronautics and Space Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Construction Wage Rate Requirements, Price Adjustment (Actual Method), 20699

National Foundation on the Arts and the Humanities
See Institute of Museum and Library Services

National Highway Traffic Safety Administration
NOTICES
Receipt of Petition:
Decision that Nonconforming Model Year 2020–2021 GMC Sierra 1500 Trucks are Eligible for Importation, 20791–20792
Decision that Nonconforming Model Year 2020–2021 GMC Sierra 2500HD Trucks are Eligible for Importation, 20790–20791
Decision that Nonconforming Model Year 2020–2021 GMC Sierra 3500HD Trucks are Eligible for Importation, 20792–20793

National Institutes of Health
NOTICES
Meetings:
Eunice Kennedy Shriver National Institute of Children Health and Human Development, 20702
National Institute of Allergy and Infectious Diseases, 20701–20702
National Library of Medicine, 20701–20703

National Oceanic and Atmospheric Administration
RULES
Endangered and Threatened Species:
Designating Critical Habitat for the Central America, Mexico, and Western North Pacific Distinct Population Segments of Humpback Whales, 21082–21157
Pacific Halibut Fisheries:
Catch Sharing Plan, 20638–20641
PROPOSED RULES
Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic:
Reef Fish Fishery of the Gulf of Mexico; Gray Triggerfish Management Measures, 20649–20651
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application and Reports for Scientific Research and Enhancement Permits under the Endangered Species Act, 20661–20662
List of Gear by Fisheries and Fishery Management Council, 20665
North Pacific Observer Program Safety and Security Survey, 20664
Pacific Islands Region Seabird-Fisheries Interaction Recovery Reporting, 20663–20664
StormReady, TsunamiReady, TsunamiReady Supporter, & StormReady Supporter Application Forms, 20662–20663
Western and Central Pacific Fisheries Convention Vessel Information Family of Forms, 20665–20666

National Science Foundation
NOTICES
Application of Emergency Provision under the Antarctic Conservation Act, 20743–20744

Nuclear Regulatory Commission
NOTICES
Meetings:
Advisory Committee on the Medical Uses of Isotopes, 20745–20746
Role of Artificial Intelligence Tools in United States Commercial Nuclear Power Operations, 20744–20745

Office of Natural Resources Revenue
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Accounts Receivable Confirmations Reporting, 20710–20711
Indian Oil and Gas Valuation, 20708–20709

Personnel Management Office
NOTICES
Excepted Service, 20746–20753

Postal Regulatory Commission
NOTICES
New Postal Products, 20753

Presidential Documents
PROCLAMATIONS
Special Observances:
Honoring the Victims of the Tragedy in Indianapolis, IN (Proc. 10181), 20615
National Crime Victims' Rights Week (Proc. 10182), 20617–20618
National Volunteer Week (Proc. 10183), 20619–20620

Railroad Retirement Board
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 20753–20754

Securities and Exchange Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 20755–20757, 20759, 20776–20779, 20781
Joint Industry Plan:
National Market System Plan Governing the Consolidated Audit Trail, 21050–21080
Meetings:
Small Business Capital Formation Advisory Committee, 20754–20755
Self-Regulatory Organizations; Proposed Rule Changes:
Cboe Exchange, Inc., 20760–20772
Financial Industry Regulatory Authority, Inc., 20772–20774
Nasdaq BX, Inc., 20779–20781
Nasdaq PHLX, LLC, 20774–20776
The Nasdaq Stock Market, LLC, 20757–20759

Social Security Administration
RULES
Rescission of Rules on Improved Agency Guidance Documents, 20631–20632
NOTICES
Privacy Act; Matching Programs, 20781–20782

Surface Transportation Board
NOTICES
Control:
Canadian Pacific Railway Limited; Canadian Pacific Railway Company; Soo Line Railroad Company; Central Maine & Quebec Railway US Inc.; Dakota, Minnesota & Eastern Railroad Corporation; and Delaware & Hudson Railway Company, Inc.; Kansas City Southern; The Kansas City Southern Railway Company; Gateway Eastern Railway Company; and The Texas Mexican Railway Company, 20782–20783

Trade Representative, Office of United States
NOTICES
List of Countries Denying Fair Market Opportunities for Government-Funded Airport Construction Projects, 20784

Transportation Department
See Federal Aviation Administration
See Federal Railroad Administration
See National Highway Traffic Safety Administration

U.S. Citizenship and Immigration Services
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Medical Certification for Disability Exceptions, 20704–20705

U.S. Immigration and Customs Enforcement
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Student and Exchange Visitor Information System, 20704

Veterans Affairs Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application for Conversion, 20793–20794
Designation of Certifying Official(s), 20795–20796
Direct Deposit Enrollment/Change, 20794–20795
MATIC Authorization, 20796
Vendor Information Pages Verification Program, 20794

Western Area Power Administration
NOTICES
Rate Order:
Loveland Area Projects and Western Area Colorado Missouri Balancing Authority, 20688–20689
Loveland Area Projects, Western Area Colorado Missouri Balancing Authority, and Colorado River Storage Project, 20689–20691

Separate Parts In This Issue

Part II
Interior Department, Fish and Wildlife Service, 20798–21005

Part III
Justice Department, Drug Enforcement Administration, 21008–21048

Part IV
Securities and Exchange Commission, 21050–21080

Part V
Commerce Department, National Oceanic and Atmospheric Administration, 21082–21157

Reader Aids
Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, and notice of recently enacted public laws.

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CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

3 CFR

Proclamations:

10181.....20615
10182.....20617
10183.....20619

14 CFR

39.....20621
415.....20625
417.....20625
431.....20625
435.....20625

18 CFR

35.....20627
401.....20628
440.....20628

20 CFR

426.....20631

22 CFR

212.....20632

33 CFR

100 (2 documents) 20632, 20633
165 (2 documents) 20633, 20636

40 CFR

Proposed Rules:

52 (3 documents) 20642, 20643, 20645

47 CFR

Proposed Rules:

25.....20647
73.....20648

48 CFR

Proposed Rules:

32.....20648
352.....20648

50 CFR

17.....20798
223.....21082
224.....21082
226.....21082
300.....20638

Proposed Rules:

622.....20649

Federal Register
Vol. 86, No. 75
Wednesday, April 21, 2021

Presidential Documents

Title 3—

The President

Proclamation 10181 of April 16, 2021

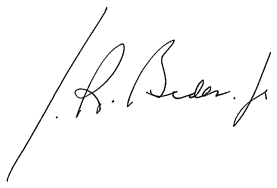
Honoring the Victims of the Tragedy in Indianapolis, Indiana

By the President of the United States of America

A Proclamation

As a mark of respect for the victims of the senseless acts of violence perpetrated on April 15, 2021, in Indianapolis, Indiana, 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, April 20, 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 sixteenth day of April, 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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Presidential Documents

Proclamation 10182 of April 16, 2021

National Crime Victims' Rights Week, 2021

By the President of the United States of America

A Proclamation

Millions of people in the United States are victims of crime every year. Some endure horrific acts of violence, some have personal possessions damaged or stolen, and others are defrauded or exploited financially. Whatever the crime, many victims lose something that can never be fully recovered: a sense of trust and safety. Yet we find inspiration and hope in their stories of triumph over adversity and resilience in the wake of tragedy. During this 40th National Crime Victims' Rights Week, we support crime victims throughout the United States and the many dedicated people who serve them.

The Biden-Harris Administration recognizes that true justice requires that victims get the support and assistance they need. Today, victims have access to quality services in their communities through the more than 7,000 local programs funded by the Federal Crime Victims Fund, as well as from other sources of Federal funding, including supplemental funding for victim services in the American Rescue Plan. In spite of this network of support, persistent barriers still prevent many victims from obtaining the support and services they need and the justice they deserve. Fewer than half of violent victimizations are reported to police, and research shows that even fewer reports of rapes or sexual assaults are brought to the attention of law enforcement. There are a variety of reasons why many victims of crime are less likely to report a crime, including fear of negative interactions with law enforcement or the criminal justice system, which disproportionately impacts victims from communities of color. Together, we must commit to the accountability and reform necessary to build trust, increase access to services, and improve public safety.

We must also listen to the voices of those who have experienced gun violence. Gun violence not only impacts its victims, but also their families, friends, colleagues, first responders, and local communities. These brave voices—along with the majority of gun-owners who support commonsense measures to keep our communities safe—are speaking up and speaking out for public policy that will put a stop to the violence. My Administration is committed to doing everything we can to end the epidemic of gun violence.

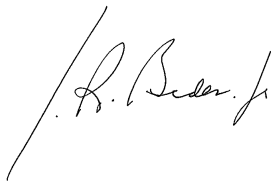
Supporting crime victims is part of a larger effort to advance equity and fairness in our society. The Office for Victims of Crime at the Department of Justice is investing in efforts to improve access to services and safety for victims and communities that have been historically marginalized and underserved, as well as support community initiatives to prevent violence. My Administration is taking action to address the surge in anti-Asian violence and harassment, including efforts to prevent hate crimes and build trust with law enforcement. My Administration is also working closely with Tribal governments to help victims in American Indian and Alaska Native communities, and supporting community-driven efforts to reach victims of hate crimes.

Every crime victim deserves justice and the assurance that their safety, wellbeing, and welfare will be protected. We must work together to prevent

crimes and ensure that all victims have a place to turn, and the support they need to recover.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim April 18 through April 24, 2021, as National Crime Victims' Rights Week. I call upon all Americans to observe this week by participating in events that raise awareness of victims' rights and services and by volunteering to serve victims in need.

IN WITNESS WHEREOF, I have hereunto set my hand this sixteenth day of April, 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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Presidential Documents

Proclamation 10183 of April 16, 2021

National Volunteer Week, 2021

By the President of the United States of America

A Proclamation

We are living in a moment that calls for hope and light and love. Hope for our futures, light to see our way forward, and love for one another. Volunteers provide all three. Service—the act of looking out for one another—is part of who we are as a Nation. Our commitment to service reflects our understanding that we can best meet our challenges when we join together. This week, we recognize the enduring contributions of our Nation's volunteers and encourage more Americans to join their ranks.

The tremendous power of volunteers and volunteerism has been on dramatic display in our response to the COVID–19 pandemic. All across the country, retired doctors and nurses, students and veterans, personnel from across the Federal Government, and countless others have given their time and talent to administer vaccines, staff vaccination centers, boost testing, tracing, and other life-saving public health measures, and provide food, water, and other necessities to those at heightened risk so they can remain safely at home.

Volunteers of all ages and walks of life have stepped forward in other ways to meet this moment. When a severe winter storm left millions without power in Texas and wildfires ravaged our Western States, neighbors from near and far provided food, shelter, and support. Throughout this unprecedented year, people across America have given help and hope by checking on isolated seniors, helping the jobless, and tutoring students to help them stay on track in school. Their compassion reminds us that even in our darkest hours, Americans look out for one another.

To meet the unprecedented challenges of today and build back better for tomorrow, we must unite around a renewed commitment to service and to civic duty. As we work to defeat the pandemic, strengthen our economy, address racial inequity, and tackle the climate crisis, we need more Americans to get involved. Government cannot do the job alone, but government—working together with nonprofits and community organizations, the private sector, and the American people—can make our country stronger, more prosperous, and ready for the future.

When more Americans step forward to serve, it renews our sense of community and strengthens our democracy. Acts of service unite people from different backgrounds and allow us to truly see and hear one another.

By helping others, volunteers also help themselves. They learn new skills, expand their professional networks, connect with neighbors, and experience the satisfaction that comes from serving a larger cause. Service can provide a pathway to employment, education, and other career-building opportunities. As we reopen our economy and build back better, volunteerism can help the unemployed find work and make our communities more resilient and prepared.

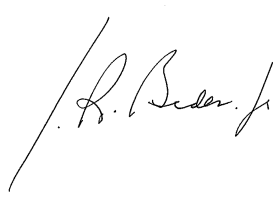
The Biden-Harris Administration is committed to expanding service opportunities for Americans, including opportunities that enable us to confront the toughest challenges faced by our Nation. The American Rescue Plan includes a historic investment in AmeriCorps to make national service more

accessible. We seek to enable more service members and volunteers to support vaccination efforts, tackle the growing hunger crisis, address learning loss, and meet other critical community needs.

During National Volunteer Week, we celebrate the millions of Americans who volunteer and encourage more to follow their path. Every American has something to give. No matter your age, background, or where you come from, you can have an impact through service. Vice President Harris and I salute every American who takes time to help their neighbors, and we applaud the extraordinary faith-based, nonprofit, national service, military service, and community organizations that make this service possible.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim April 18 through April 24, 2021, as National Volunteer Week. I call upon all Americans to observe this week by volunteering in service projects across the country and pledging to make service a part of their daily lives.

IN WITNESS WHEREOF, I have hereunto set my hand this sixteenth day of April, 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.



[FR Doc. 2021–08415
Filed 4–20–21; 8:45 am]
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Rules and Regulations

Federal Register
Vol. 86, No. 75
Wednesday, April 21, 2021

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

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0480; Product Identifier 2019–NM–041–AD; Amendment 39–21498; AD 2021–08–04]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2013–07–09, which applied to certain The Boeing Company Model 737–700, –700C, –800, and –900ER series airplanes, Model 747–400F series airplanes, and Model 767–200 and –300 series airplanes. AD 2013–07–09 required a general visual inspection for affected serial numbers of the crew oxygen mask stowage box units, and replacement or re-identification as necessary. This AD retains the requirements of AD 2013–07–09 and expands the applicability. This AD was prompted by a determination that the affected parts may be installed on airplanes outside the original applicability of AD 2013–07–09. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective May 26, 2021.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of May 20, 2013 (78 FR 22178, April 15, 2013).

ADDRESSES: For Boeing service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.* For Intertechnique service information identified in this final rule, contact Aerotechnics, 61 rue Pierre Curie BP 1, 78373 Plaisir, CEDEX, France; phone: +33 1 6486 6964; internet *https://www.zodiacaerospace.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0480.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0480; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Nicole Tsang, Aerospace Engineer, Cabin Safety and Environmental Systems Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3959; email: *Nicole.S.Tsang@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2013–07–09, Amendment 39–17413 (78 FR 22178, April 15, 2013) (AD 2013–07–09). AD 2013–07–09 applied to certain The Boeing Company Model 737–700, –700C, –800, and –900ER series airplanes, Model 747–400F series airplanes, and Model 767–200 and –300 series airplanes. The NPRM published in the **Federal Register** on June 25, 2019 (84 FR 29818). The NPRM was prompted by reports indicating that certain crew oxygen mask stowage box units were possibly delivered with a burr in the inlet fitting. The burr might break loose during test or operation, and might pose an ignition source or cause an inlet valve to jam. The NPRM was also prompted by a determination that the affected parts may be installed on airplanes outside the original applicability of AD 2013–07–09. The NPRM proposed to continue to require a general visual inspection for affected serial numbers of the crew oxygen mask stowage box units, and replacement or re-identification as necessary. The NPRM also proposed to expand the applicability to include those other airplanes. The FAA is issuing this AD to address this possible ignition source, which could result in an oxygen-fed fire; or an inlet valve jam in a crew oxygen mask stowage box unit, which could result in restricted flow of oxygen.

The FAA issued a supplemental NPRM (SNPRM) that published in the **Federal Register** on November 5, 2020 (85 FR 70526). The SNPRM proposed to continue to require a general visual inspection for affected serial numbers of the crew oxygen mask stowage box units, and replacement or re-identification as necessary. The SNPRM also proposed to expand the applicability to include additional airplane models.

Comments

The FAA gave the public the opportunity to participate in developing this AD. The following presents the comments received on the SNPRM and the FAA's response to each comment.

Support for the SNPRM

The Air Line Pilots Association, International (ALPA) and Boeing expressed support for the SNPRM. Additional comments from ALPA are addressed below.

Effect of Winglets on Accomplishment of the Proposed Actions

Aviation Partners Boeing stated that the installation of blended or split scimitar winglets per Supplemental Type Certificate (STC) ST01219SE on Model 737CL airplanes (Model 737–200, –300, –400, and –500 series airplanes), and blended winglets per STC ST01518SE on Model 757 airplanes, does not affect the accomplishment of the manufacturer's service instructions.

The FAA agrees with the commenter that STC ST01219SE and STC ST01518SE do not affect the accomplishment of the manufacturer's

service instructions. Therefore, the installation of STC ST01219SE or STC ST01518SE does not affect the ability to accomplish the actions required by this AD. The FAA has not changed this AD in this regard.

Request To Shorten the Compliance Time

ALPA requested that the FAA shorten the compliance time of the proposed AD from 24 months to 12 months. ALPA noted that several commenters on the NPRM requested an extended compliance time, and that it is not in favor of an extension.

The FAA disagrees with the commenter's request. ALPA did not provide justification for its request. As noted in the SNPRM, in developing an appropriate compliance time for this action, the FAA considered the safety implications, parts availability, and normal maintenance schedules for the timely accomplishment of the inspection and replacement or re-identification as necessary. Further, operators are always permitted to accomplish the requirements of an AD at a time earlier than the specified compliance time. In addition, to reduce the compliance time of the proposed AD would necessitate (under the provisions of the Administrative Procedure Act) reissuing the notice, reopening the period for public comment, considering additional comments subsequently received, and eventually issuing a final rule. That procedure could add unwarranted time to the rulemaking process. In light of this, and in consideration of the amount of time that has already elapsed since issuance of the original notice, the FAA has determined that further delay of this AD is not appropriate. The FAA has not changed this AD in this regard.

Request To Allow a Records Review Based on Certain Additional Criteria

United Parcel Service Co. (UPS) requested that the introductory text to paragraph (i) of the proposed AD be revised to allow a records review in lieu of the specified inspection, provided it can be conclusively determined that the serial number is not an affected (suspect) part (one that is identified in the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011). UPS noted that paragraph (i) of the proposed AD would allow a records review if the serial number of the crew oxygen mask stowage box unit could be conclusively determined. UPS noted that it has identified scenarios where the serial number may not be conclusively known, but the unit can be confirmed to not be one of the affected units. UPS explained that Boeing was not consistent in providing serial numbers for the units with delivery documents. However, UPS noted that through records showing when units were changed, as well as knowing the date of production of a given aircraft, UPS can conclusively determine that the units with the affected serial numbers were not installed on a given aircraft.

The FAA agrees with the commenter's request for the reasons provided. The FAA has revised the introductory text to paragraph (i) of this AD to clarify that a records review is also acceptable if it can be conclusively determined that the serial number is not one that is identified in the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011.

Request To Revise Manufacturing Date Range

United Airlines requested that paragraph (i)(1) of the proposed AD be revised to specify that units with a manufacturing date outside the range of July 2007 through November 2007 inclusive (instead of July 12, 2007, through November 20, 2007, inclusive) do not need to be replaced. United Airlines also requested that similar revisions be made to the introductory text to paragraph (i) of the proposed AD, and paragraphs (i)(2), (j)(1), and (j)(2) of the proposed AD. United Airlines stated that the manufacture date on the mask stowage box units typically shows only the month and year (in MMYYYY format). The commenter noted that determining the exact calendar date of manufacture may not be possible, and without a specific serial number, the manufacturer would not be able to narrow down the date.

The FAA partially agrees with the commenter's request. The FAA agrees that determining the exact date of manufacture may not be possible because the manufacturer date on the mask stowage box units typically shows only the month and year. The FAA has therefore revised paragraph (i)(1) of this AD to specify that units with a manufacturing date outside the range of July 2007 through November 2007 inclusive do not need to be replaced. The FAA has also revised paragraph (j)(1) of this AD to specify that units where the serial number is unreadable or undetermined, but the manufacturing date can conclusively be determined to be outside the range of July 2007 through November 2007 inclusive, may be installed on an airplane. However, the FAA has determined that the commenter's suggested revisions to the introductory text to paragraph (i) of this AD are not needed because the introductory text to paragraph (i) of this AD only requires determining the serial number and does not specify actions based on whether or not the serial number can be determined. In addition, the FAA has determined that the commenter's suggested revisions to paragraphs (i)(2) and (j)(2) of this AD are not needed because the actions in those paragraphs are only applicable for units with a known serial number that is identified in table 2 of the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011 (those that need re-identification).

Request To Allow Use of Aircraft Maintenance Manual (AMM)

Delta Air Lines (Delta) requested confirmation that it may use the respective fleet's AMM to perform removals and installations if any of the affected units are found on its airplanes. Delta noted that paragraph (i) of the proposed AD does not specify instructions for removal or replacement. Delta asked for confirmation that using the applicable AMM for these tasks would not require it to obtain an alternative method of compliance (AMOC).

The FAA agrees that the commenter's intended approach is acceptable for compliance with this AD and that no AMOC is needed to use the applicable AMM. The AMMs for the affected airplanes contain adequate instructions for removal and installation of the affected units. No change to this AD is necessary.

Clarification of Certain Actions

The FAA has revised paragraph (i)(1) of this AD to clarify conditions that require replacement of a crew oxygen mask stowage box unit, which includes an unreadable or undetermined serial number, except as otherwise specified.

The FAA has also revised paragraph (j)(1) of this AD to clarify conditions that prohibit the installation of a crew oxygen mask stowage box unit, which includes an unreadable or undetermined serial number, except as specified otherwise.

Conclusion

The FAA reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this AD with the changes described previously, and minor editorial changes. The FAA has determined that these minor changes:

• Are consistent with the intent that was proposed in the SNPRM for addressing the unsafe condition; and

• Do not add any additional burden upon the public than was already proposed in the SNPRM.

The FAA also determined that these changes will not increase the economic burden on any operator or increase the scope of this AD.

Related Service Information Under 1 CFR Part 51

This AD requires Boeing Alert Service Bulletin 737–35A1121, Revision 1, dated November 7, 2011; Boeing Alert Service Bulletin 747–35A2126, Revision 1, dated September 29, 2011; Boeing Alert Service Bulletin 767–35A0057, Revision 1, dated November 17, 2011; and Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011; which the Director of the Federal Register approved for incorporation by reference as of May 20, 2013 (78 FR 22178, April 15, 2013). This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 3,723 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection (retained action from AD 2013-07-09) (40 airplanes).	1 work-hour × $85 per hour = $85	$0	$85	$3,400
Inspection (new action) (3,683 airplanes)	1 work-hour × $85 per hour = $85	0	85	313,055

The FAA has received no definitive data that would enable providing cost estimates for the on-condition actions specified in this AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

The FAA has determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Will not affect intrastate aviation in Alaska, and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by

■ a. Removing Airworthiness Directive (AD) 2013–07–09, Amendment 39–17413 (78 FR 22178, April 15, 2013); and

■ b. Adding the following new AD:

2021–08–04 The Boeing Company: Amendment 39–21498; Docket No. FAA–2019–0480; Product Identifier 2019–NM–041–AD.

(a) Effective Date

This airworthiness directive (AD) is effective May 26, 2021.

(b) Affected ADs

This AD replaces AD 2013–07–09, Amendment 39–17413 (78 FR 22178, April 15, 2013) (AD 2013–07–09).

(c) Applicability

This AD applies to all The Boeing Company airplanes, certificated in any category, as identified in paragraphs (c)(1) through (5) of this AD.

(1) Model 737–200, –300, –400, –500, –600, –700, –700C, –800, –900, and –900ER series airplanes.

(2) Model 737–8 and 737–9 airplanes.

(3) Model 747–200B, 747–200C, 747–200F, 747–400, 747–400D, and 747–400F series airplanes.

(4) Model 757–200, –200PF, –200CB, and –300 series airplanes.

(5) Model 767–200, –300, –300F, and –400ER series airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 35, Oxygen.

(e) Unsafe Condition

This AD was prompted by reports indicating that certain crew oxygen mask stowage box units were possibly delivered with a burr in the inlet fitting. The burr might break loose during test or operation, and might pose an ignition source or cause an inlet valve to jam. This AD was also prompted by a determination that the affected parts may be installed on airplanes outside the applicability of AD 2013–07–09. The FAA is issuing this AD to address this possible ignition source, which could result in an oxygen-fed fire; or an inlet valve jam in a crew oxygen mask stowage box unit, which could result in restricted flow of oxygen.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Retained Inspection and Corrective Action, With No Changes

This paragraph restates the requirements of paragraph (g) of AD 2013–07–09 with no changes. For The Boeing Company Model 737 airplanes as identified in Boeing Alert

Service Bulletin 737–35A1121, Revision 1, dated November 7, 2011; The Boeing Company Model 747 airplanes as identified in Boeing Alert Service Bulletin 747–35A2126, Revision 1, dated September 29, 2011; and The Boeing Company Model 767 airplanes as identified in Boeing Alert Service Bulletin 767–35A0057, Revision 1, dated November 17, 2011: Within 24 months after May 20, 2013 (the effective date of AD 2013–07–09), do a general visual inspection to determine if the serial number of the crew oxygen mask stowage box unit is identified in the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–35A1121, Revision 1, dated November 7, 2011; Boeing Alert Service Bulletin 747–35A2126, Revision 1, dated September 29, 2011; or Boeing Alert Service Bulletin 767–35A0057, Revision 1, dated November 17, 2011; as applicable. A review of airplane maintenance records is acceptable in lieu of this inspection if the serial number of the crew oxygen mask stowage box unit can be conclusively determined from that review.

(1) If any crew oxygen mask stowage box unit has a serial number identified in table 1 of the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011: Before further flight, replace the crew oxygen mask stowage box unit with a new or serviceable unit in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–35A1121, Revision 1, dated November 7, 2011; Boeing Alert Service Bulletin 747–35A2126, Revision 1, dated September 29, 2011; or Boeing Alert Service Bulletin 767–35A0057, Revision 1, dated November 17, 2011; as applicable.

(2) If any crew oxygen mask stowage box unit has a serial number identified in table 2 of the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011: Before further flight, add the letter ''I'' to the end of the serial number (identified as ''SER'') on the identification label, in accordance with the Accomplishment Instructions of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011; and reinstall in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–35A1121, Revision 1, dated November 7, 2011; Boeing Alert Service Bulletin 747–35A2126, Revision 1, dated September 29, 2011; or Boeing Alert Service Bulletin 767–35A0057, Revision 1, dated November 17, 2011; as applicable.

(3) If no crew oxygen mask stowage box unit has a serial number identified in the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011: Unless a records review was done to determine the serial number, before further flight, reinstall the crew oxygen mask stowage box unit, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–35A1121, Revision 1, dated November 7, 2011; Boeing Alert Service Bulletin 747–35A2126, Revision 1, dated September 29, 2011; or Boeing Alert Service Bulletin 767–35A0057, Revision 1, dated November 17, 2011; as applicable.

(h) Retained Parts Installation Prohibition, With No Changes

This paragraph restates the requirements of paragraph (h) of AD 2013–07–09 with no changes. For airplanes identified in paragraph (g) of this AD: As of May 20, 2013 (the effective date of AD 2013–07–09), no person may install a crew oxygen mask stowage box unit with a serial number listed in the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011, on any airplane.

(i) New Inspection and Corrective Action

For airplanes other than those identified in paragraph (g) of this AD: Within 24 months after the effective date of this AD, do a general visual inspection to determine if the serial number of the crew oxygen mask stowage box unit is identified in the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011. A review of airplane maintenance records is acceptable in lieu of this inspection if the serial number of the crew oxygen mask stowage box unit can be conclusively determined from that review, or if it can be conclusively determined that the serial number is not one that is identified in the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011.

(1) If any crew oxygen mask stowage box unit has a serial number identified in table 1 of the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011, or the crew oxygen mask stowage box unit has a serial number that is unreadable or undetermined: Before further flight, replace the crew oxygen mask stowage box unit with a new or serviceable unit. If any crew oxygen mask stowage box unit's serial number is unreadable or undetermined, but the manufacturing date can conclusively be determined to be outside the range of July 2007 through November 2007 inclusive, the crew oxygen mask stowage box unit does not need to be replaced.

(2) If any crew oxygen mask stowage box unit has a serial number identified in table 2 of the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011: Before further flight, add the letter ''I'' to the end of the serial number (identified as ''SER'') on the identification label, in accordance with the Accomplishment Instructions of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011; and reinstall the crew oxygen mask stowage box unit.

(j) New Parts Installation Prohibition

(1) For airplanes other than those identified in paragraph (g) of this AD: As of the effective date of this AD, no person may install a crew oxygen mask stowage box unit with a serial number identified in table 1 of the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011; or any crew oxygen mask stowage box unit with a serial number that is unreadable or undetermined unless the manufacturing date can conclusively be determined by a review of the airplane maintenance records to be outside the range of July 2007 through November 2007 inclusive.

(2) For airplanes other than those identified in paragraph (g) of this AD: As of the effective date of this AD, no person may install a crew oxygen mask stowage box unit with a serial number identified in table 2 of the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011, on any airplane, unless that crew oxygen mask stowage box unit has been modified as required by paragraph (i)(2) of this AD.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (l) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by the Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) AMOCs approved previously for AD 2013–07–09 are approved as AMOCs for the corresponding provisions of this AD.

(l) Related Information

For more information about this AD, contact Nicole Tsang, Aerospace Engineer, Cabin Safety and Environmental Systems Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3959; email: *Nicole.S.Tsang@faa.gov.*

(m) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(3) The following service information was approved for IBR on May 20, 2013 (78 FR 22178, April 15, 2013).

(i) Boeing Alert Service Bulletin 737–35A1121, Revision 1, dated November 7, 2011.

(ii) Boeing Alert Service Bulletin 747–35A2126, Revision 1, dated September 29, 2011.

(iii) Boeing Alert Service Bulletin 767–35A0057, Revision 1, dated November 17, 2011.

(iv) Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011.

(4) For Boeing service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.*

(5) For Intertechnique service information identified in this AD, contact Aerotechnics, 61 rue Pierre Curie BP 1, 78373 Plaisir, CEDEX, France; phone: +33 1 6486 6964; internet *https://www.zodiacaerospace.com.*

(6) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(7) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fedreg.legal@nara.gov,* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on March 30, 2021.

Ross Landes,

Deputy Director for Regulatory Operations, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–08213 Filed 4–20–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 415, 417, 431, and 435

Statement of Policy on Waiving Ground Safety Regulations at Cape Canaveral Air Force Station, Vandenberg Air Force Base, Wallops Flight Facility, and Kennedy Space Center

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Policy statement.

SUMMARY: This action establishes the FAA's policy applicable to waivers of FAA ground safety requirements for licensed commercial launch and reentry activities at certain Federal ranges. The Federal ranges that currently meet the criteria for application of this policy are: Cape Canaveral Air Force Station, Vandenberg Air Force Base, Wallops Flight Facility, and Kennedy Space Center.

DATES: The policy described herein was effective November 3, 2020.

FOR FURTHER INFORMATION CONTACT: For additional information concerning this action, contact Randy Repcheck, Acting Executive Director, Office of Operational Safety, via letter: 800 Independence Ave. SW, Washington, DC 20591; via email: *9-AST-Inquiries@faa.gov;* via phone: 202–267–7793.

SUPPLEMENTARY INFORMATION: The Commercial Space Launch Act of 1984, as amended and codified at 51 U.S.C. 50901–50923, authorizes the Department of Transportation, and the FAA through delegation, to oversee, license, and regulate commercial launch and reentry activities, and the operation of launch and reentry sites as carried out by U.S. citizens or within the United States. Section 50905(b)(3) allows the Secretary to waive a requirement, including the requirement to obtain a license, for an individual applicant if the Secretary decides that the waiver is in the public interest and will not jeopardize the public health and safety, safety of property, and national security and foreign policy interests of the United States.[1] This policy statement provides public notice of the FAA's approach to evaluating waiver applications under 51 U.S.C. 50905(b)(3) with respect to ground safety requirements at Federal launch ranges. It does not have the force and effect of law and is not meant to bind the public in any way. It is intended only to provide clarity to the public regarding existing requirements under the law and agency policies.

I. Background

The FAA has worked in partnership for launch safety with the U.S. Air Force (AF) since 2001 and the National Aeronautics and Space Administration (NASA) since 2007. An objective of these interagency partnerships has been to maintain common safety standards and practices for launch across the Federal Government. These agencies formed the Common Standards Working Group (CSWG), which is tri-chaired by FAA, AF, and NASA. The CSWG is a forum to maintain common safety standards and practices between the agencies for both commercial and Government launch activities. The CSWG is comprised of range safety personnel from Cape Canaveral Air Force Station (CCAFS), Vandenberg Air Force Base (VAFB), Wallops Flight Facility (WFF), and Kennedy Space Center (KSC).

In 2006, the FAA issued a final rule that established the launch site safety assessment (LSSA) process.[2] The LSSA is an FAA assessment of a Federal launch range to determine if the range requirements and practices satisfy FAA safety regulations. Subpart C of 14 CFR part 415 describes how the FAA reviews the safety of licensed launches from Federal launch ranges.

Subpart C recognizes that a launch operator may use an LSSA to demonstrate compliance with FAA safety requirements.[3]

The FAA has completed LSSAs for CCAFS, VAFB, WFF, and it is in the process of finalizing an LSSA for KSC. In the initial assessments for CCAFS, VAFB, and WFF, the FAA did not find any substantial differences between the requirements and practices of these Federal ranges and FAA regulations because 14 CFR part 417 was derived largely from existing Federal launch range safety requirements. Similarly, in developing the LSSA for KSC, the FAA likewise concluded that KSC's requirements and practices were not substantially different from FAA ground safety regulations. The FAA has maintained and updated the initial assessments for CCAFS, VAFB, and WFF to account for changes in processes at these Federal ranges and in FAA regulations. Where the range's requirement or practice did not meet FAA regulations, the FAA either made a determination that the range's requirement provides for an equivalent level of safety to the FAA's requirement, waived the FAA requirement, or required the operator to comply with the FAA requirement. In addition to the LSSA process, the FAA, through its participation in the CSWG, has gained significant insight into the ground safety requirements and practices for CCAFS, VAFB, WFF, and KSC.

The 2015 Commercial Space Launch Competitiveness Act directed the Secretary of Transportation to consult with the Secretary of Defense, Administrator of NASA, and other agencies, as appropriate, to identify and evaluate requirements imposed on commercial space launch and reentry operators to protect the public health and safety, safety of property, national security interests, and foreign policy interests of the United States.[4] It also directed the Secretary of Transportation to resolve any inconsistencies and remove any outmoded or duplicative

[1] The Secretary may not grant a waiver under this section that would permit the launch or reentry of a launch vehicle or a reentry vehicle without a license or permit if a human being will be on board.

[2] 71 FR 50508 (Aug. 25, 2006).

[3] 14 CFR 415.31(a).

[4] U.S. Commercial Space Launch Competitiveness Act, Public Law 114–90, sec. 113(c)(1), 129 Stat. 704, 714 (2015).

Federal requirements or approvals applicable to any commercial launch of a launch vehicle or commercial reentry of a reentry vehicle. The FAA has been working with AF and NASA to fulfill this mandate.

In the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232, Sec. 1606, 132 Stat. 2107), Congress directed that the Secretary of Defense may not impose any requirement on a licensee or transferee that is duplicative of, or overlaps in intent with, any requirement imposed by the Secretary of Transportation under Title 51.[5]

II. Discussion of the Policy

A. Ground Safety Under Part 417 for Expendable Launch Vehicles

Section 415.31(a) states, in relevant part, that the FAA will issue a safety approval to a license applicant proposing to launch from a Federal launch range if the applicant has contracted with the Federal launch range for the provision of safety-related launch services and property, provided the LSSA shows that the range's launch services and launch property satisfy part 417.

Subpart E of part 417 contains the FAA's public safety requirements that apply to ground safety at launch sites in the United States, including Federal launch ranges. Under § 417.402(b), the FAA will accept a launch operator's proposed ground safety process for an expendable launch vehicle from a Federal launch range without further demonstration of compliance to the FAA if:

(1) A launch operator has contracted with a Federal launch range for the provision of ground safety process; and

(2) the FAA has assessed the Federal launch range through its launch site safety assessment and found that the Federal launch range's ground safety process satisfies the requirements of subpart E.

In such cases, the FAA treats the Federal launch range's process as that of a launch operator.

Generally, under subpart E, the FAA requires an operator to conduct a ground safety analysis for launch vehicle hardware, ground hardware including launch site and ground support equipment, launch processing, and post-launch operations. This analysis must identify each potential hazard, associated cause, and hazard control that a launch operator must establish and maintain to keep each identified hazard from affecting the public. An operator must identify and control hazards that extend beyond the launch location under the control of a launch operator, including hazards arising from associated payloads. These hazards include, but are not limited to, blast overpressure and fragmentation resulting from an explosion, fire and deflagration, sudden release of a hazardous material, and inadvertent ignition of a propulsive launch vehicle payload, stage, or motor. The FAA requires an operator to institute hazard controls, which may include safety clear zones, designated hazard areas, or other means of protecting the public from hazardous operations. In addition, an operator also has to identify and control launch location hazards, which are hazards that stay within the confines of the location under the control of a launch operator.

It is against these subpart E requirements that the FAA assesses a Federal range's process to determine if the range's process satisfies FAA requirements. If it does not, the FAA addresses the difference by issuing equivalent level of safety determinations or waivers, or—if necessary—requiring compliance with the FAA's requirements.

B. Ground Safety Under Part 431 for Reusable Launch Vehicles

Section 431.35(c) requires, in part, that an applicant demonstrate that the launch of a reusable launch vehicle complies with acceptable risk criteria by employing a system safety process to identify the hazards and assess the risks to public health and safety and the safety of property associated with the mission. The FAA requires this system safety process to identify and assess hazards associated with both licensed ground and flight activities. This system safety process must identify the same types of ground safety hazards and related ground safety hazard controls as detailed above with regard to part 417, subpart E; however, there is no formally prescribed LSSA process under part 431. Therefore, operators must meet all of the safety requirements in part 431, regardless of whether the FAA has completed an LSSA for the relevant Federal launch range or not.

C. Waiver

As noted, Congress has directed Federal agencies involved in commercial launches to eliminate duplicative requirements. Accordingly, it is the FAA's policy to use its authority in 51 U.S.C. 50905(b)(3), as delegated by the Secretary, to waive ground safety requirements for launches conducted from certain Federal ranges, when appropriate, if an operator has contracted with the Federal range for the provision of the ground safety process. Specifically, the FAA generally will, upon the applicant's showing, waive the requirements in §§ 415.31(a) and 417.402(b) to the extent that those provisions require an LSSA to verify that a Federal range's ground safety process satisfies the requirements of subpart E of part 417. Additionally, the FAA generally will, upon the applicant's showing, grant a partial waiver of § 431.35(c) to the extent that section requires a system safety process for the ground portion of launch at these Federal ranges.[6] Although the FAA sets forth this general policy for evaluating and issuing waivers, the FAA reserves its discretion to deny or withdraw a waiver if, under the particular circumstances, the FAA finds that it is not in the public interest or will jeopardize the public health and safety, safety of property, or national security and foreign policy interests of the United States.

The FAA finds that this policy is in the public interest because it reduces duplicative requirements imposed by Federal authorities on commercial space operators. This policy responds to repeated Congressional direction to remove overlapping requirements. Removing duplicative Federal government requirements increases efficiency in launch application processing and approval for both Government and commercial stakeholders. Removing duplicative requirements will also result in a clear delineation of responsibility between Federal actors with regard to oversight over different portions of launch, which is expected to reduce confusion and improve safety of the public.

The FAA further finds that this policy would not jeopardize public health and safety, safety of property, or the national security and foreign policy interests of the United States. This policy will apply only to Federal ranges: (1) With which the FAA has a long-term working relationship through the CSWG, and (2) that have a cadence of both commercial and government launches that facilitates highly-developed and well-understood processes and requirements. To date, those ranges include: CCAFS, VAFB,

[5] The Secretary of the Air Force may waive this limitation when necessary to avoid negative consequences for the national security space program after notifying the Secretary of Transportation.

[6] This partial waiver of § 431.35(c) also applies to applications for a reentry vehicle other than a reusable launch vehicle under part 435, consistent with § 435.33. The section covers both ground safety and flight safety requirements. This waiver policy will extend only to the requirements for ground safety.

WFF, and KSC. As mentioned previously, the FAA has been working with AF and NASA launch personnel through the CSWG since 2001 and 2007, respectively. The longevity of this working relationship has allowed for insight into the requirements and practices at these ranges sufficient to provide FAA confidence that these ranges will ensure public safety during ground operations. The FAA has found that these Federal ranges have processes, procedures, and requirements that account for hazards to public safety associated with launch vehicle hardware, ground hardware including launch site and ground support equipment, launch processing, and post-launch operations. Constant dialogue through the CSWG will keep the FAA updated on requirements and practices at these ranges and will allow the FAA to intervene if necessary. Furthermore, the cadence of launches has provided these Federal ranges with unparalleled experience with both commercial and government launches. This experience informs the requirements at these ranges and provides the FAA further confidence that the requirements and processes at these ranges satisfy the FAA's statutory mandate to protect the public. In summary, the FAA has found that satisfaction of the criteria above has established a level of confidence with regard to the ranges' ground safety processes, procedures, and requirements that it is an appropriate basis on which to waive these FAA requirements.

Under this policy, the FAA will not continue to update LSSAs for ground safety for these launch sites; rather, the FAA will continue to work with AF and NASA through the CSWG to ensure consistency of requirements for ground safety at Federal and non-Federal launch ranges. The FAA retains its authority, however, to deny or withdraw any waiver, or to withdraw this policy, if it determines that public health and safety, safety of property, or national security and foreign policy interests of the United States would be jeopardized.

III. Determination of Maximum Probable Loss

The FAA determines the maximum probable loss (MPL) from covered claims by a third party for bodily injury or property damage, and the United States, its agencies, and its contractors and subcontractors for covered property damage or loss, resulting from licensed activity. The MPL determination forms the basis for financial responsibility requirements issued in a license order. The FAA calculates the MPL taking into account the hazards associated with the licensed activity. The MPL amount for both the ground and flight portions of a licensed activity is detailed in the license orders.

The FAA's process for determining MPL will not change as a result of this policy statement. The FAA will continue to calculate MPL for both ground and flight portions of launch at CCAFS, VAFB, WFF, and KSC. Furthermore, the FAA does not expect this policy to impact the MPL amounts for licensed activities at these Federal ranges.

IV. Implementation

The FAA currently requires an applicant seeking to conduct a launch from a Federal range to show evidence of an agreement with the Federal range in its license application. 14 CFR 417.13(a). This agreement must provide for access to and use of property and services required to support a licensed launch from that facility.

An applicant seeking a waiver consistent with this policy statement should include in its application the following:

''[INSERT COMPANY NAME] is seeking a waiver, consistent with the policy statement published at [INSERT **FEDERAL REGISTER** CITATION], to operate from [INSERT FEDERAL LAUNCH RANGE]. [INSERT COMPANY NAME] will utilize the ground safety processes and services at this location, and comply with any ground safety requirements imposed by the agreement dated [INSERT DATE OF AGREEMENT WITH FEDERAL RANGE].''

The applicant should also provide the FAA its agreement with the Federal range in accordance with regulations.

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. This document is intended only to provide clarity to the public regarding existing requirements under the law or clarify agency policies.

Wayne R. Monteith,

Associate Administrator for Commercial Space Transportation.

[FR Doc. 2021–07353 Filed 4–20–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM18–9–002; Order No. 2222–A]

Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators; Correction

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule; correction.

SUMMARY: The Federal Energy Regulatory Commission published a document in the **Federal Register** of March 30, 2021 concerning arguments raised on rehearing of its final rule amending its regulations to remove barriers to the participation of distributed energy resource aggregations in the capacity, energy, and ancillary service markets operated by Regional Transmission Organizations and Independent System Operators. The document contained an error.

DATES: This correction is effective June 1, 2021.

FOR FURTHER INFORMATION CONTACT: Christopher Chaulk (Legal Information), Office of the General Counsel—Energy Markets, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6720.

SUPPLEMENTARY INFORMATION:

Correction

■ In FR Doc. 2021–06089 (174 FERC ¶ 61,197) beginning on page 16511 in the issue of Tuesday, March 30, 2021, make the following correction: On page 16527, in the third column, in the 21st line, in the Words of Issuance, the text ''the Commission is proposing to amend . . .'' is corrected to read ''the Commission is amending. . . .''

Dated: April 15, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–08132 Filed 4–20–21; 8:45 am]

BILLING CODE 6717–01–P

DELAWARE RIVER BASIN COMMISSION

18 CFR Parts 401 and 440

Comprehensive Plan and Special Regulations With Respect to High Volume Hydraulic Fracturing; Rules of Practice and Procedure Regarding Project Review Classifications and Fees

AGENCY: Delaware River Basin Commission.

ACTION: Final rule.

SUMMARY: The Delaware River Basin Commission is amending its Comprehensive Plan and adopting new regulations to prohibit high volume hydraulic fracturing in hydrocarbon-bearing rock formations within the Delaware River Basin. The Commission is simultaneously adopting unrelated amendments to its rules concerning the classification of projects for review under Section 3.8 of the Compact and regulatory program fees.

DATES: This final rule is effective May 21, 2021.

FOR FURTHER INFORMATION CONTACT: Pamela M. Bush, Esquire, 609–477–7203, *pam.bush@drbc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Delaware River Basin Commission (''DRBC'' or ''Commission'') is a Federal-interstate compact agency charged with managing the water resources of the Delaware River Basin on a regional basis without regard to political boundaries. Its members are the governors of the four basin states—Delaware, New Jersey, New York and Pennsylvania—and the North Atlantic Division Commander of the U.S. Army Corps of Engineers, representing the Federal Government.

When the potential for developing natural gas from tight shale formations within the Basin using high volume hydraulic fracturing (''HVHF'') and horizontal drilling techniques and the risks to water resources posed by such activities became known to the Commission, Commission staff undertook a scientific, technical, regulatory, and policy analysis to determine the appropriate response in light of the Commission's statutory mission and Comprehensive Plan.

An important milestone occurred on September 13, 2017, when the DRBC Commissioners by a Resolution for the Minutes directed the Executive Director to prepare and publish for public comment a revised set of draft regulations, to include, among other things, ''prohibitions relating to the production of natural gas utilizing horizontal drilling and hydraulic fracturing within the basin.'' In accordance with the Commissioners' directive, the Commission proposed amendments to its Comprehensive Plan and to its Special Regulations at 18 CFR part 440, including a prohibition on HVHF within the Basin. The Commission simultaneously proposed amendments to its Administrative Manual—Rules of Practice and Procedure, 18 CFR part 401, concerning the classification of projects for review under Section 3.8 of the Compact (§ 401.35) and regulatory program fees (§ 401.43). See 83 FR 1586, January 12, 2018. Also see, 21 DE Reg. 526, January 1, 2018; 50 N.J.R. 717, February 5, 2018; NYS Register, January 3, 2018 p. 5; and 48 Pa. B. 255, January 13, 2018. Some of the proposed amendments to part 401 were related to the new part 440 and others were not; however, only the changes unrelated to part 440 are being adopted as final rules.

The changes unrelated to HVHF do not substantively alter Commission requirements or fees, but better align the rules with the Commission's practices, eliminate unnecessary language, clarify language that has been misconstrued, and in instances replace the discretion of the Executive Director with that of the Commission. The changes to project review classifications: (1) Retain Commission review of alterations to wetlands of less than 25 acres where a state or a federal level review and permit system is not in effect, while eliminating additional triggers for such review; (2) remove the provision for review of regional wastewater treatment plans developed pursuant to the Federal Water Pollution Control Act because the basin states have effective programs for the transparent development and implementation of such plans; (3) replace the discretion of the Executive Director with that of the Commission to require review under Section 3.8 of the Compact of any project having a potential substantial water quality impact on waters classified as Special Protection Waters; and (4) clarify that the Commission as a whole, not merely any single agency of a signatory party, may determine that a project in an excluded classification is required to be submitted for review under Section 3.8 of the Compact. The changes to regulatory program fees replace the term ''docket application fee'' with the more accurate term ''application fee,'' because project review does not always involve a ''docket.''

Extensive opportunity for public input on the proposed rules was provided during the public comment period that took place from November 30, 2017 to March 30, 2018. In addition to accepting written comments, the Commission accepted oral comment at six public hearings, one of which was conducted through an operator-assisted toll-free teleconference to avoid the need for travel to a hearing location. During the comment period, the Commission received a total of 8,903 comment submissions (8,680 in writing and 223 at public hearings). In many cases, a single comment submission included numerous detailed comments. A Comment and Response Document was prepared and adopted by the Commission to address the comments received from the public.

Together with the other materials gathered during the development of its regulation, the Commission reviewed the extensive public comments, including consultant reports, scientific literature and other statements and materials submitted, and examined the experience of other jurisdictions with HVHF. Based upon its review, the Commission by Resolution No. 2021–01 on February 25, 2021, found and determined that:

1. As the scientific and technical literature and the reports, studies, findings and conclusions of other government agencies reviewed by the Commission have documented, and as the more than a decade of experience with high volume hydraulic fracturing in regions outside the Delaware River Basin have evidenced, despite the dissemination of industry best practices and government regulation, high volume hydraulic fracturing and related activities have adversely impacted surface water and groundwater resources, including sources of drinking water, and have harmed aquatic life in some regions where these activities have been performed.

2. The region of the Delaware River Basin underlain by shale formations is comprised largely of rural areas dependent upon groundwater resources; sensitive headwater areas considered to have high water resource values; and areas draining to DRBC Special Protection Waters.

3. The geology of the region in which shale formations potentially containing natural gas are located in the Basin is characterized by extensive geologic faults and fractures providing preferential pathways for migration of fluids (including gases).

4. If commercially recoverable natural gas is present in the Delaware River Basin and if HVHF were to proceed in the Basin, then:

a. Spills and releases of hydraulic fracturing chemicals, fluids and wastewater would adversely impact surface water and groundwater, and losses of well integrity would result in subsurface fluid (including gas) migration, impairing drinking water resources, and other uses established in the Comprehensive Plan.

b. The fluids released or migrating would contain pollutants, including salts, metals, radioactive materials, organic compounds, endocrine-disrupting and toxic chemicals, and chemicals for which toxicity has not been determined, impairing the water uses protected by the Comprehensive Plan.

c. HVHF activities and their impacts would be dispersed over and adversely affect thousands of acres of sensitive water resource features, including, among others, forested groundwater infiltration areas, other groundwater recharge locations, and drainage areas to Special Protection Waters, where few existing roads are designed to safely carry the heavy industrial traffic required to support HVHF, prevent dangerous spills or provide access to remediate spills that occur.

5. For these reasons and other grounds described in the administrative record for this rulemaking:

a. High-volume hydraulic fracturing and related activities pose significant, immediate and long-term risks to the development, conservation, utilization, management, and preservation of the water resources of the Delaware River Basin and to Special Protection Waters of the Basin, considered by the Commission to have exceptionally high scenic, recreational, ecological, and/or water supply values.

b. Controlling future pollution by prohibiting high volume hydraulic fracturing in the Basin is required to effectuate the Commission's Comprehensive Plan, avoid injury to the waters of the Basin as contemplated by the Comprehensive Plan and protect the public health and preserve the waters of the Basin for uses in accordance with the Comprehensive Plan.

The Commission's Comment and Response Document responds to comments regarding the risks to water resources posed by HVHF, and the potential and observed adverse impacts of HVHF and related activities on water resources. In addition, it addresses comments concerning: The Commission's authority; the intersection of Commission, state and Federal rules; the proposed rule text; basis and background documents; economic impacts; the relationship of HVHF and related activities to DRBC's Comprehensive Plan, rules and policies; public health; chemical disclosures; climate change; renewable energy; policies and reports on the Susquehanna River Basin; the public input process; compliance and enforcement; constitutional challenges and other matters.

Changes From the Draft Rule

Upon adopting its final rules concerning HVHF, the Commission withdrew proposed § 440.4—Exportation of water for hydraulic fracturing of oil and natural gas wells and § 440.5—Produced Water (and importation of wastewater), and revised § 440.2—Definitions to eliminate terms associated solely with the two deleted sections. Within part 401, comprising the Commission's Rules of Practice and Procedure, proposed amendments to § 401.35—Classification of Projects for Review concerning the importation and exportation of water and wastewater into and from the Basin were withdrawn. Also, within part 401, proposed amendments to § 401.43—Regulatory Program Fees related to wastewater treatability studies were withdrawn. The final rules were revised to eliminate all references to the deleted sections, and public comments specific to these sections are not addressed in the Commission's Comment and Response document. The topics of water exportation and wastewater importation will be addressed as appropriate through one or more separate Commission actions.

The Comprehensive Plan amendments and final rules replace the Executive Director Determinations of May 19, 2009, June 14, 2010 and July 23, 2010. The Resolution for the Minutes of May 5, 2010, which postponed the Commission's consideration of well pad projects until the adoption of final rules, expires by its own terms.

Additional Materials

Additional materials can be found on the Commission's website, *www.drbc.net,* at *https://www.state.nj.us/drbc/about/regulations/final-rule_hvhf.html.* These include links to Resolution No. 2021–01 of February 25, 2021 adopting the final rule; the Commission's Comment and Response Document; a mark-up comparing the final to the proposed rule text for 18 CFR part 440; and mark-ups comparing the amended to the existing rule text for 18 CFR 401.35 and 401.43.

The Commission's notice of proposed rulemaking, proposed rule text, written comments received, and transcripts of public hearings can be found on the Commission's website at *https://www.nj.gov/drbc/meetings/proposed/notice_hydraulic-fracturing.html.*

A summary of Commission actions with respect to hydraulic fracturing for oil and gas extraction prior to the Commission's September 13, 2017 directive is available at: *https://www.nj.gov/drbc/programs/natural/archives.html.*

List of Subjects

18 CFR Part 401

Administrative practice and procedure, Fees, Project review, Water pollution control, Water resources.

18 CFR Part 440

Natural gas, Water pollution control, Water resources.

For the reasons set forth in the preamble, the Delaware River Basin Commission amends 18 CFR chapter III as follows:

PART 401—RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 401 continues to read as follows:

Authority: Delaware River Basin Compact (75 Stat. 688), unless otherwise noted.

Subpart C—Project Review Under Section 3.8 of the Compact

■ 2. Amend § 401.35 as follows:
■ a. Revise paragraphs (a) introductory text, (a)(2) and (15), and (b)(14) through (17);
■ b. Remove paragraph (b)(18);
■ c. Revise paragraph (c);
■ d. Remove paragraph (d).

The revisions read as follows:

§ 401.35 Classification of projects for review under section 3.8 of the Compact.

(a) Except as the Commission may specially direct by notice to the project owner or sponsor, a project in any of the following classifications will be deemed not to have a substantial effect on the water resources of the Basin and is not required to be submitted under Section 3.8 of the Compact:

* * * * *

(2) A withdrawal from ground water when the daily average gross withdrawal during any 30 consecutive day period does not exceed 100,000 gallons;

* * * * *

(15) Draining, filling, or otherwise altering marshes or wetlands when the area affected is less than 25 acres; provided, however, that areas less than 25 acres shall be subject to Commission review and action where neither a state

nor a Federal level review and permit system is in effect;

* * * * *

(b) * * *

(14) Landfills and solid waste disposal facilities affecting the water resources of the Basin;

(15) State and local standards of flood plain regulation;

(16) Electric generating or cogenerating facilities designed to consumptively use in excess of 100,000 gallons per day of water during any 30-day period; and

(17) Any other project that the Commission may specially direct by notice to the project sponsor or land owner as having a potential substantial water quality impact on waters classified as Special Protection Waters.

(c) Regardless of whether expressly excluded from review by paragraph (a) of this section, any project or class of projects that in the view of the Commission could have a substantial effect on the water resources of the basin may, upon special notice to the project sponsor or landowner, be subject to the requirement for review under section 3.8 of the Compact.

■ 3. Amend § 401.43 as follows:

■ a. Revise paragraphs (b)(1) introductory text, (b)(1)(iii) introductory text, (b)(2)(i), (b)(4)(iii), and (c); and

■ b. In paragraph (e), in table 1, revise the table heading and the heading for the middle column.

The revisions read as follows:

§ 401.43 Regulatory program fees.

* * * * *

(b) * * *

(1) *Application fee.* Except as set forth in paragraph (b)(1)(iii) of this section, the application fee shall apply to:

* * * * *

(iii) *Exemptions.* The application fee shall not apply to:

* * * * *

(2) * * *

(i) Except as provided in paragraph (b)(2)(ii) of this section, an annual monitoring and coordination fee shall apply to each active water allocation or wastewater discharge approval issued pursuant to the Compact and implementing regulations in this part, regardless of whether the approval was issued by the Commission in the form of a docket, permit or other instrument, or by a Signatory Party Agency under the One Permit Program rule (§ 401.42).

* * * * *

(4) * * *

(iii) *Modification of a DRBC approval.* Following Commission action on a project, each project revision or modification that the Executive Director deems substantial shall require an additional application fee calculated in accordance with paragraph (e) of this section and subject to an alternative review fee in accordance with paragraph (b)(3) of this section.

* * * * *

(c) *Indexed adjustment.* On July 1 of every year, beginning July 1, 2017, all fees established by this section will increase commensurate with any increase in the annual April 12-month Consumer Price Index (CPI) for Philadelphia, published by the U.S. Bureau of Labor Statistics during that year.[1] In any year in which the April 12-month CPI for Philadelphia declines or shows no change, the application fee and annual monitoring and coordination fee will remain unchanged. Following any indexed adjustment made under this paragraph (c), a revised fee schedule will be published in the **Federal Register** by July 1 and posted on the Commission's website. Interested parties may also obtain the fee schedule by contacting the Commission directly during business hours.

* * * * *

(e) * * *

TABLE 1 TO § 401.43—APPLICATION FEES

* * *	Application fee	* * *
*	* * * *	*

* * * * *

■ 4. Add part 440 to read as follows:

PART 440—HIGH VOLUME HYDRAULIC FRACTURING

Sec.

440.1 Purpose, authority, and relationship to other requirements.
440.2 Definitions.
440.3 High volume hydraulic fracturing (HVHF).

Authority: Delaware River Basin Compact (75 Stat. 688).

§ 440.1 Purpose, authority, and relationship to other requirements.

(a) *Purpose.* The purpose of this part is to protect and conserve the water resources of the Delaware River Basin. To effectuate this purpose, this section establishes standards, requirements, conditions, and restrictions to prevent or reduce depletion and degradation of surface and groundwater resources and to promote sound practices of water resource management.

(b) *Authority.* This part implements Sections 3.1, 3.2(a), 3.2 (b), 3.6(b), 3.6(h), 4.1, 5.2, 7.1, 13.1 and 14.2(a) of the Delaware River Basin Compact.

(c) *Comprehensive Plan.* The Commission has determined that the provisions of this part are required for the immediate and long range development and use of the water resources of the Basin and are therefore incorporated into the Commission's Comprehensive Plan.

(d) *Relationship to other Commission requirements.* The provisions of this part are in addition to all applicable requirements in other Commission regulations in this chapter, dockets, and permits.

(e) *Severability.* The provisions of this part are severable. If any provision of this part or its application to any person or circumstances is held invalid, the invalidity will not affect other provisions or applications of this part, which can be given effect without the invalid provision or application.

(f) *Coordination and avoidance of duplication.* In accordance with and pursuant to section 1.5 of the Delaware River Basin Compact, to the fullest extent it finds feasible and advantageous the Commission may enter into an Administrative Agreement (Agreement) with any Basin state or the Federal Government to coordinate functions and eliminate unnecessary duplication of effort. Such Agreements will be designed to: Effectuate intergovernmental cooperation, minimize the efforts and duplication of state and Commission staff resources wherever possible, ensure compliance with Commission-approved requirements, enhance early notification of the general public and other interested parties regarding proposed activities in the Basin, indicate where a host state's requirements satisfy the Commission's regulatory objectives, and clarify the relationship and project review decision making processes of the states and the Commission for projects subject to review by the states under their state authorities and by the Commission under Section 3.8 and Articles 6, 7, 10 and 11 of the Compact.

§ 440.2 Definitions.

For purposes of this part, the following terms and phrases have the meanings provided. Some definitions differ from those provided in regulations of one or more agencies of the Commission's member states and the Federal Government.

[1] Consumer Price Index—U/Series ID: CUURA102SA0/Not Seasonally Adjusted/Area: Philadelphia-Wilmington-Atlantic City, PA–NJ–DE–MD/Item: All items/Base Period: 1982–84=100.

Basin is the area of drainage into the Delaware River and its tributaries, including Delaware Bay.

Commission is the Delaware River Basin Commission (DRBC) created and constituted by the Delaware River Basin Compact.

Fracturing fluid(s) is a mixture of water (whether fresh or recycled) and/or other fluids and chemicals or other additives, which are injected into the subsurface and which may include chemicals used to reduce friction, minimize biofouling of fractures, prevent corrosion of metal pipes or remove drilling mud damage within a wellbore area, and propping agents such as silica sand, which are deposited in the induced fractures.

High volume hydraulic fracturing (HVHF) is hydraulic fracturing using a combined total of 300,000 or more gallons of water during all stages in a well completion, whether the well is vertical or directional, including horizontal, and whether the water is fresh or recycled and regardless of the chemicals or other additives mixed with the water.

Hydraulic fracturing is a technique used to stimulate the production of oil and natural gas from a well by injecting fracturing fluids down the wellbore under pressure to create and maintain induced fractures in the hydrocarbon-bearing rock of the target geologic formation.

Person is any natural person, corporation, partnership, association, company, trust, Federal, state, or local governmental unit, agency, or authority, or other entity, public or private.

Water resource(s) is water and related natural resources in, on, under, or above the ground, including related uses of land, which are subject to beneficial use, ownership, or control within the hydrologic boundary of the Delaware River Basin.

§ 440.3 High volume hydraulic fracturing (HVHF).

(a) *Determination.* The Commission has determined that high volume hydraulic fracturing poses significant, immediate and long-term risks to the development, conservation, utilization, management, and preservation of the water resources of the Delaware River Basin and to Special Protection Waters of the Basin, considered by the Commission to have exceptionally high scenic, recreational, ecological, and/or water supply values. Controlling future pollution by prohibiting such activity in the Basin is required to effectuate the Comprehensive Plan, avoid injury to the waters of the Basin as contemplated by the Comprehensive Plan, and protect the public health and preserve the waters of the Basin for uses in accordance with the Comprehensive Plan.

(b) *Prohibition.* High volume hydraulic fracturing in hydrocarbon bearing rock formations is prohibited within the Delaware River Basin.

Dated: April 13, 2021.

Pamela M. Bush,

Commission Secretary and Assistant General Counsel.

[FR Doc. 2021–07998 Filed 4–20–21; 8:45 am]

BILLING CODE P

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 426

[Docket No. SSA–2020–0002]

RIN 0960–AI54

Rescission of Rules on Improved Agency Guidance Documents

AGENCY: Social Security Administration.

ACTION: Final rule.

SUMMARY: We are rescinding our rules on improved agency guidance documents. We published the rules pursuant to an Executive order (E.O.) entitled, ''Promoting the Rule of Law Through Improved Agency Guidance Documents,'' signed October 9, 2019. The October 2019 E.O. has been revoked by an E.O. entitled, ''Revocation of Certain Executive Orders Concerning Federal Regulation,'' signed January 20, 2021. We are rescinding these rules because the January 2021 E.O. requires the heads of Federal agencies to take steps promptly to rescind any regulations that implement or enforce the October 2019 E.O.

DATES: This final rule will be effective May 21, 2021.

FOR FURTHER INFORMATION CONTACT: Jennifer Dulski, Office of Regulations and Reports Clearance, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 966–2341. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION: On August 20, 2020, we published a final rule, ''Improved Agency Guidance Documents,'' in the **Federal Register**.[1] This final rule, which had an effective date of September 21, 2020, added 20 CFR part 426 to our regulations to implement E.O. 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents.'' [2]

On January 20, 2021, the President issued E.O. 13992, ''Revocation of Certain Executive Orders Concerning Federal Regulation.'' [3] E.O. 13992 revoked several E.O.s, including E.O. 13891, and directed heads of agencies to ''promptly take steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing the [revoked] Executive Orders.'' Because we promulgated the final rule, ''Improved Agency Guidance Documents,'' to implement E.O. 13891, we must now rescind this rule.

We are removing from our regulations and reserving 20 CFR part 426, consisting of §§ 426.5 through 426.25. The regulations that we are removing set forth the definition of ''guidance document'' in E.O. 13891, discuss the nonbinding nature of guidance documents, set forth procedures to request withdrawal or modification of guidance documents, and set forth additional requirements and procedures for significant guidance documents as prescribed by E.O. 13891. In addition, we will remove the website we created to comply with the requirements of E.O. 13891 (*www.ssa.gov/guidance*). Although we will remove the site at *www.ssa.gov/guidance,* the documents that are referenced and linked on that site—such as Social Security rulings, the Program Operations Manual, the Hearings, Appeals and Litigation Law manual, and Chief Judge Bulletins—will still be publicly available on our website, *www.ssa.gov.*

Rulemaking Analyses and Notices

Regulatory Procedures

We follow the Administrative Procedure Act (APA) rulemaking procedures in 5 U.S.C. 553 when we develop regulations. Generally, the APA requires that an agency provide prior notice and opportunity for public comment before issuing a final rule. Under 5 U.S.C. 553(b)(3)(A), agencies are not required to provide prior notice and opportunity for the public to comment for a rule that is an interpretative rule, a general statement of policy, or a rule of agency organization, procedure, or practice. When we published our final rule, ''Improved Agency Guidance Documents,'' we explained that it was exempt from the requirement to provide prior notice and opportunity for public

[1] 85 FR 51337.

[2] 84 FR 55235 (October 15, 2019).

[3] 86 FR 7049 (January 25, 2021).

comment because it was a rule of ''agency organization, procedure, or practice'' that merely explained our processes to implement E.O. 13891.[4] For the same reason, we find this rule is exempt from the requirement to provide prior notice and opportunity for public comment because it is, likewise, a rule of ''agency organization, procedure, or practice.'' It merely explains we will no longer follow the processes and procedures prescribed by the revoked E.O. 13891.

E.O. 12866, as Supplemented by E.O. 13563

We have consulted with the Office of Management and Budget (OMB) and determined that this final rule does not meet the criteria for a significant regulatory action under E.O. 12866 and is not subject to OMB review.

E.O. 13132 (Federalism)

We analyzed this final rule in accordance with the principles and criteria established by E.O. 13132, and determined that the final rule will not have sufficient federalism implications to warrant the preparation of a federalism assessment. We also determined that this final rule will not preempt any State law or State regulation or affect the States' abilities to discharge traditional State governmental functions.

Regulatory Flexibility Act

We certify that this final rule will not have a significant economic impact on a substantial number of small entities, because it affects individuals or States only. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

Paperwork Reduction Act

The rescission of this final rule does not create any new or affect any existing collections and, therefore, does not require Office of Management and Budget approval under the Paperwork Reduction Act.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.006 Supplemental Security Income)

List of Subjects in 20 CFR Part 426

Guidance, Social Security.

The Commissioner of Social Security, Andrew Saul, having reviewed and approved this document, is delegating the authority to electronically sign this document to Faye I. Lipsky, who is the primary Federal Register Liaison for SSA, for purposes of publication in the **Federal Register**.

Faye I. Lipsky,

Federal Register Liaison, Office of Legislation and Congressional Affairs, Social Security Administration.

PART 426—[REMOVED AND RESERVED]

■ For the reasons set out in the preamble, and under the authority of E.O. 13992, we remove and reserve part 426, consisting of §§ 426.5 through 426.25.

[FR Doc. 2021–08113 Filed 4–20–21; 8:45 am]

BILLING CODE 4191–02–P

AGENCY FOR INTERNATIONAL DEVELOPMENT

22 CFR Part 212

RIN 0412–AB00

Procedures for the Review and Clearance of USAID's Guidance Documents; Rescission; Correction

AGENCY: U.S. Agency for International Development (USAID).

ACTION: Final rule rescission; correction.

SUMMARY: The U.S. Agency for International Development is correcting a final rule rescission that was published in the **Federal Register** on April 9, 2021. This rule rescinded the regulation published on January 5, 2021, titled ''Procedures for the review and clearance of USAID's Guidance Documents,'' to comply with the Executive order (E.O.) titled ''Revocation of Certain Executive Orders Concerning Federal Regulation,'' signed on January 20, 2021, which specifically requires the revocation of the E.O. titled ''Promoting the Rule of Law Through Improved Agency Guidance Documents,'' signed on October 9, 2019. In the final rule, the date for the E.O. ''Promoting the Rule of Law Through Improved Agency Guidance Documents,'' year was incorrect. This document corrects that error.

DATES: Effective April 21, 2021.

FOR FURTHER INFORMATION CONTACT: Jenna Giandoni, *jgiandoni@usaid.gov,* 202–921–5093.

SUPPLEMENTARY INFORMATION: In FR Doc. 2021–07314, which published in the **Federal Register** on Friday, April 9, 2021 at 86 FR 18444, the following corrections are made:

1. On page 18444, in the third column, in the **SUMMARY**, correct the year ''2010'' to read ''2019'' in two places.

2. On page 18445, in the first column, in the second paragraph of the **SUPPLEMENTARY INFORMATION**, correct the year ''2010'' to read ''2019''.

Ruth Buckley,

Acting Performance Improvement Officer/ Acting Office Director, Bureau for Management Office of Management Policy, Budget and Operational Performance.

[FR Doc. 2021–08081 Filed 4–20–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2021–0218]

Special Local Regulations for Marine Events; Opening Day on San Francisco Bay, San Francisco, CA

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the special local regulations for the annual Opening Day on the San Francisco Bay Boat Parade on April 25, 2021 to provide for the safety of life on navigable waterways in the San Francisco Bay during this event. Our regulation for marine events in Northern California identifies the regulated area for this event in San Francisco, CA. During the enforcement period, unauthorized persons or vessels are prohibited from entering into, transiting through, or anchoring in the regulated area, unless authorized by the Patrol Commander (PATCOM) or other Federal, State, or local law enforcement agencies on scene to assist the Coast Guard in enforcing the regulated area.

DATES: The regulations in 33 CFR 100.1103 will be enforced for the Opening Day on San Francisco Bay regulated area listed in item number 2 in Table 1 to § 100.1103 from 11:30 a.m. to 2 p.m. on April 25, 2021.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email Petty Officer David Robey, Waterways Management, U.S. Coast Guard; telephone (415) 399–7440, email *SFWaterways@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulations in 33 CFR 100.1103, Table 1 to § 100.1103, Item number 2 for the Opening Day on San Francisco Bay regulated area from 11:30 a.m. to 2 p.m. on April 25, 2021. This action is being

[4] 85 FR at 51338.

taken to provide for the safety of life on navigable waterways during this event. Our regulation for marine events within Northern California, Table 1 to § 100.1103, item number 2, specifies the location of the regulated area for the Opening Day on San Francisco Bay Boat Parade which will occur in the San Francisco Bay. From 11:30 a.m. to 2 p.m. on April 25, 2021 the regulated area will be in effect in the navigable waters, from surface to bottom, defined by a line drawn from Fort Point; thence easterly approximately 5,000 yards; thence easterly to the Blossom Rock Bell Buoy; thence westerly to the Northeast corner of Pier 39; thence returning along the shoreline to the point of origin.

During the enforcement period, under the provisions of 33 CFR 100.1103(b), if you are the operator of a vessel in the regulated area you must comply with directions from the Patrol Commander or other Official Patrol, defined as a Federal, State, or local law enforcement agency on scene to assist the Coast Guard in enforcing the regulated area. During the enforcement period, if you are the operator of a vessel that participates in the marine event within the regulated area, you must follow the parade route determined by the marine event sponsor and comply with directions from the Patrol Commander or other Official Patrol.

In addition to this notice of enforcement in the **Federal Register,** the Coast Guard plans to provide notification of this enforcement period via the Local Notice to Mariners. If the Captain of the Port determines that the regulated area need not be enforced for the full duration stated in this notice of enforcement, a Broadcast Notice to Mariners may be used to grant general permission to enter the regulated area.

Dated: April 15, 2021.

Marie B. Byrd,

Captain, U.S. Coast Guard, Captain of the Port, San Francisco.

[FR Doc. 2021–08211 Filed 4–20–21; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2021–0217]

Special Local Regulations for Marine Events; Blessing of the Fleet, Tiburon, CA

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the special local regulations for the annual Blessing of the Fleet Boat Parade on April 25, 2021 to provide for the safety of life on the navigable waters of Raccoon Strait during this event. Our regulation for marine events in Northern California identifies the regulated area for this event in Raccoon Strait near Tiburon, CA. During the enforcement period, unauthorized persons or vessels are prohibited from entering into, transiting through, or anchoring in the regulated area, unless authorized by the Patrol Commander (PATCOM) or other Federal, State, or local law enforcement agencies on scene to assist the Coast Guard in enforcing the regulated area.

DATES: The regulations in 33 CFR 100.1103 will be enforced for the Blessing of the Fleet regulated area listed in item number 1 in Table 1 to § 100.1103 from 8:30 a.m. to 1:30 p.m. on April 25, 2021.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email Petty Officer David Robey, Waterways Management, U.S. Coast Guard; telephone (415) 399–7440, email *SFWaterways@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulation in 33 CFR 100.1103, Table 1 to § 100.1103, item number 1 for the Blessing of the Fleet regulated area from 8:30 a.m. to 1:30 p.m. on April 25, 2021. This action is being taken to provide for the safety of life on navigable waterways during this event. Our regulation for marine events within Northern California, Table 1 to § 100.1103, item number 1, specifies the location of the regulated area for the Blessing of the Fleet which will occur in Raccoon Strait in the San Francisco Bay. From 8:30 a.m. to 1:30 p.m. on April 25, 2021 the regulated area will be in effect and is defined as the navigable waters, from surface to bottom, between a line drawn from Bluff Point on the southeastern side of Tiburon Peninsula to Point Campbell on the northern edge of Angel Island, and a line drawn from Peninsula Point on the southern edge of Tiburon Peninsula to Point Stuart on the western edge of Angel Island. This notice of enforcement applies to the entire regulated area.

During the enforcement period, under the provisions of 33 CFR 100.1103(b) if you are the operator of a vessel in the regulated area you must comply with directions from the Patrol Commander or other Official Patrol, defined as a Federal, State, or local law enforcement agency on scene to assist the Coast Guard in enforcing the regulated area. During the enforcement period, if you are the operator of a vessel that participates in the regulated area, you must follow the parade route determined by the marine event sponsor and comply with directions from the Patrol Commander or other Official Patrol.

In addition to this notice of enforcement in the **Federal Register,** the Coast Guard plans to provide notification of this enforcement period via the Local Notice to Mariners.

If the Captain of the Port determines that the regulated area need not be enforced for the full duration stated in this notice of enforcement, a Broadcast Notice to Mariners may be used to grant general permission to enter the regulated area.

Dated: April 15, 2021.

Marie B. Byrd,

Captain, U.S. Coast Guard, Captain of the Port, San Francisco.

[FR Doc. 2021–08210 Filed 4–20–21; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2021–0204]

RIN 1625–AA00

Safety Zone; Tugs Champion, Valerie B, Nancy Anne and Barges Kokosing I, Kokosing II, Kokosing IV Operating in the Straits of Mackinac, MI

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Temporary interim rule with request for comment.

SUMMARY: The Coast Guard is establishing a temporary safety zone for the navigable water within a 500-yard radius of several tugs and barges in the Straits of Mackinac. The safety zone is needed to protect personnel, vessels, and the marine environment from the potential hazards created by the work, inspection, surveying and the removal and replacement of cables for the Straits of Mackinac. Entry of vessels or persons into the zone is prohibited unless specifically authorized by the Captain of the Port Sault Sainte Marie or their designated representative. Due to the lengthy duration of this safety zone, the Coast Guard is accepting and reviewing public comments until May 7, 2021. While this rule is being enforced

beginning April 20, 2021, the Coast Guard reserves the right to modify the safety zone if an issue is raised by the public comments that requires such a modification.

DATES: This rule is effective without actual notice from April 21, 2021 through September 30, 2021. For the purposes of enforcement, actual notice will be issued from April 20, 2021 through April 21, 2021. Comments and related materials will be accepted and reviewed by the Coast Guard through May 7, 2021.

ADDRESSES: Submit comments and material online at *http://www.regulations.gov* (see section II of the **SUPPLEMENTARY INFORMATION** for additional details). To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2021–0204 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email CWO4 Robert A. Gruschow or LT Deaven S. Palenzuela, Sector Sault Sainte Marie Waterways Management Division, U.S. Coast Guard at (906) 253–2462/(906) 635–3223 or email *ssmprevention@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

1. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online at *http://www.regulations.gov* by typing the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

2. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking.

III. Background Information and Regulatory History

The Coast Guard is issuing this temporary interim rule with an abridged opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable. The final details of the specific dates, vessels names, and safety zone distances concerning the safety zones were not finalized within a sufficient time to allow for notice and a subsequent 30-day comment period before work, inspection, surveying and the replacement and the removal of multiple cables. Delaying this rule to allow for a notice and full comment period would be impracticable because it would inhibit the Coast Guard's ability to protect the public from the potential hazards associated with aforementioned operation commencing on April 20, 2021.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. For the same reasons discussed in the preceding paragraph, delaying the effective date of this rule would be impracticable because immediate action is needed to respond to the potential safety hazards associated with the work, inspections, and surveying of underwater infrastructure.

IV. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port Sault Sainte Marie (COTP) has determined that potential hazards associated with the work, inspection, and surveying of underwater infrastructure in the Straits of Mackinac starting April 20, 2021 will be a safety concern for anyone within a 500-yard radius of the tugs and barges. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while the operation is conducted.

V. Discussion of the Rule

This rule establishes a safety zone from April 20, 2021 to September 30, 2021. The safety zone will cover all navigable waters within 500 yards of the tugs and barges being used to work, inspect, survey and remove/replace cables in the Straits of Mackinac. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while the operation is conducted. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

VI. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size and location of the safety zone. Vessel traffic will be able to safely transit around this safety zone which would impact a small designated area of the Straits of Mackinac. Moreover, the Coast Guard will issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone, and the rule would allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their

fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone that will prohibit entry within 500 yards of tugs and barges used to work, inspect, survey and remove/replace cables in the Straits of Mackinac. It is categorically excluded from further review under paragraph L[60(a)] of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T09–0274 to read as follows:

§ 165.T09–0274 Safety Zone; Tugs Champion, Valerie B, Nanacy Anne and Barges Kokosing I, Kokosing II, Kokosing IV operating in the Straits of Mackinac, MI.

(a) *Location.* The following areas are safety zones: All navigable water within 500 yards of the Tugs Valerie B, Nancy Anne, Champion and Barges Kokosing I, III, and IV while conducting work, inspection, surveying and removing/replacing cables in the Straits of Mackinac.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Sault Sainte Marie (COTP) in the enforcement of the safety zone.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23, entry into, transiting, or anchoring within the safety zone described in paragraph (a) of this section is prohibited unless authorized by the Captain of the Port, Sault Sainte Marie, or his designated representative.

(2) Before a vessel operator may enter or operate within the safety zones, they must obtain permission from the Captain of the Port, Sault Sainte Marie, or his designated representative via VHF Channel 16 or telephone at (906) 635–3233. Vessel operators given permission to enter or operate in the safety zone must comply with all orders given to them by the Captain of the Port, Sault Sainte Marie, or his designated representative.

(d) *Enforcement period.* This section will be enforced from April 20, 2021 to September 30, 2021.

Dated: April 15, 2021.

A.R. Jones,

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

[FR Doc. 2021–08196 Filed 4–20–21; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2021–0264]

RIN 1625–AA00

Safety Zone; Gulf of Mexico, Port Fouchon, LA

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for all navigable waters within a ½ mile radius around a capsized vessel in the Gulf of Mexico, near Port Fourchon, LA. The temporary safety zone is needed to protect life and property during emergency search and rescue and salvage operations surrounding the capsized vessel. Entry of vessels or persons into this zone and movement of vessels within this zone is prohibited unless specifically authorized by the Captain of the Port Marine Safety Unit Houma or a designated representative.

DATES: This rule is effective without actual notice from 12:01 a.m. until 11:59 p.m. on April 21, 2021. For the purposes of enforcement, actual notice will be used from April 14, 2021 through April 20, 2021.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2021–0264 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email the Lieutenant Commander Joe Hart, Incident Management Team, U.S. Coast Guard; telephone 504–628–4177, email *secnolaIMT@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. A safety zone is necessary to facilitate search and rescue and salvage operations surrounding a capsized vessel. Immediate action is needed to respond to the potential safety hazards associated with recovery operations. We we must establish this safety zone by April 14, 2021 and and lack sufficient time to provide a reasonable comment period and then consider those comments before issuing the rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be against the public interest because immediate action is needed to respond to an ongoing search and rescue and salvage operations.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Marine Safety Unit Houma (COTP) has determined that potential hazards associated with the response operations on April 14, 2021, will be a safety concern for anyone within a ½ mile radius around the capsized vessel at position 29–00.000 N, 090–12.000 W. This rule is needed to protect life and property on the navigable waters while response operation are ongoing.

IV. Discussion of the Rule

This rule establishes a temporary safety zone from April 14, 2021 through April 21, 2021. The safety zone will cover all navigable waters within half mile radius around position 29–00.000 N, 090–12.000 W in the Gulf of Mexico, near Port Fouchon, LA. The duration of the zone is intended to protect life and property on these navigable waters for the duration of emergency response operations related to the capsized vessel. No vessel or person will be permitted to enter and move within the safety zone without obtaining permission from the COTP or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard assigned to units under the operational control of USCG Marine Safety Unit Houma. Vessels requiring entry into this safety zone must request permission from the COTP or a designated representative. They may be contacted on VHF–FM Channel 16 or 67. Persons and vessels permitted to enter or to move within this safety zone must transit at their slowest safe speed and comply with all lawful directions issued by the COTP or the designated representative. The COTP or a designated representative will inform the public of the enforcement periods and changes through Broadcast Notices to Mariners (BNMs), Local Notices to Mariners (LNMs), and/or Marine Safety Information Bulletins (MSIBs) as appropriate.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the limited scale of the safety zone and the ease of vessel traffic navigating around said zone.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone that will prohibit entry within a ½ mile radius of vessels and machinery being used by personnel response operations to a capsized vessel. It is categorically excluded from further review under paragraph L60 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is not required but will be made available in the docket if necessary. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T08–0264 to read as follows:

§ 165.T08–0264 Safety Zone; Gulf of Mexico, Port Fourchon, LA.

(a) *Location.* The following area is a safety zone: all navigable waters within a ½ mile radius of the capsized vessel and emergency response operations taking place at 29–00.000 N, 090–12.000 W.

(b) *Effective period.* This section is effective without actual notice from 12:01 a.m. until 11:59 p.m. on April 21, 2021. For the purposes of enforcement, actual notice will be used from April 14, 2021 through April 20, 2021.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23, entry into or remaining within this zone is prohibited unless authorized by the Captain of the Port Marine Safety Unit (COTP) or designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard assigned to units under the operational control of USCG Marine Safety Unit Houma.

(2) Vessels requiring entry into this safety zone must request permission from the COTP or a designated representative. They may be contacted on VHF–FM Channel 16 or 67 or by telephone at (504) 365–2200.

(3) Persons and vessels permitted to enter this safety zone must transit at their slowest safe speed and comply with all lawful directions issued by COTP or the designated representative.

(d) *Information broadcasts.* The COTP or a designated representative will inform the public of the enforcement times and date for this safety zone through Broadcast Notices to Mariners (BNMs), Local Notices to Mariners (LNMs), and/or Marine Safety Information Bulletins (MSIBs) as appropriate.

Dated: April 14, 2021.

K.J. McCormack,

Commander, U.S. Coast Guard, Acting Captain of the Port Marine Safety Unit Houma.

[FR Doc. 2021–08059 Filed 4–20–21; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 210415–0082]

RIN 0648–BK27

Pacific Halibut Fisheries; Catch Sharing Plan

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

ACTION: Final rule.

SUMMARY: This final rule implements the Pacific Halibut Catch Sharing Plan for the International Pacific Halibut Commission's regulatory Area 2A off of Washington, Oregon, and California. In addition, this final rule implements management measures governing the 2021 recreational fisheries that are not implemented through the International Pacific Halibut Commission. These measures include the recreational fishery seasons, allocations, and management measures for Area 2A. These actions are intended to conserve Pacific halibut and provide angler opportunity where available.

DATES: This rule is effective on April 20, 2021.

ADDRESSES: Additional information regarding this action may be obtained by contacting the Sustainable Fisheries Division, NMFS West Coast Region, 1201 NE Lloyd Boulevard, Suite 1100, Portland, OR 97232. For information regarding all halibut fisheries and general regulations not contained in this rule, contact the International Pacific Halibut Commission, 2320 W Commodore Way, Suite 300, Seattle, WA 98199–1287.

FOR FURTHER INFORMATION CONTACT: Kathryn Blair, phone: 503–231–6858, fax: 503–231–6893, or email: *kathryn.blair@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Northern Pacific Halibut Act of 1982 (Halibut Act) gives the Secretary of Commerce (Secretary) responsibility for implementing the provisions of the Halibut Convention between the United States and Canada (16 U.S.C. 773–773k). The Halibut Act requires that the Secretary adopt regulations to carry out the purposes and objectives of the Halibut Convention and Halibut Act (16 U.S.C. 773(c)). The Halibut Act also authorizes the regional fishery management councils having authority for a particular geographic area to develop regulations in addition to, but not in conflict with, regulations issued by the International Pacific Halibut Commission (IPHC) to govern the Pacific halibut catch in U.S. Convention waters (16 U.S.C. 773c(c)).

At its January 25–29, 2021 annual meeting, the IPHC recommended an Area 2A catch limit of 1,510,000 pounds (lb) (684.9 metric tons (mt)) for 2021. This catch limit is derived from the Area 2A total constant exploitation yield (TCEY) of 1,650,000 lb (748.4 mt), which includes commercial discards and bycatch estimates calculated using a formula developed by the IPHC. The Area 2A catch limit and commercial fishery allocations are adopted by the IPHC and were published in the **Federal Register** on March 9, 2021 (86 FR 13475) after acceptance by the Secretary of State, with concurrence from the Secretary of Commerce, in accordance with 50 CFR 300.62. Additionally, the March 9, 2021 (86 FR 13475) final rule contains annual domestic management measures and IPHC regulations that are published each year under NMFS' authority to implement the Halibut Convention (50 CFR 300.62).

Since 1988, the Council has developed and NMFS has approved annual Catch Sharing Plans that allocate the IPHC regulatory Area 2A Pacific halibut catch limit between treaty Indian and non-Indian harvesters, and among non-Indian commercial and recreational (sport) fisheries. In 1995, the Council recommended, and NMFS approved, a long-term Area 2A Catch Sharing Plan (60 FR 14651; March 20, 1995). NMFS has been approving adjustments to the Area 2A Catch Sharing Plan based on Council recommendations each year to address the changing needs of these fisheries. While the full Catch Sharing Plan is not published in the **Federal Register**, it is made available on the Council and NMFS websites.

This rule approves the Council's 2021 Catch Sharing Plan for IPHC regulatory Area 2A. The 2021 Catch Sharing Plan was developed through the Council's public process. This rule implements recreational Pacific halibut fishery management measures for 2021, which include season opening and closing dates, retention of groundfish species, allowable gear, and opening closed areas that are set in NMFS regulations. Further details of the changes made for the 2021 Catch Sharing Plan are described in the proposed rule and are not repeated here.

As described above, NMFS is adopting recreational fishery management measures, including season dates for the 2021 fishery. The Catch Sharing Plan includes a framework for setting days open for fishing by subarea; under this framework, each state submits final recommended season dates annually to NMFS during the proposed rule comment period. This final rule contains dates for the recreational fisheries (though referred to as ''sport'' in IPHC documents, ''recreational'' will be used in this rule) based on the 2021 Catch Sharing Plan as recommended by the Council and the recommended dates submitted by the states during public comment on the proposed rule.

2021 Annual Recreational Management Measures

The recreational fishing subareas, subquotas, fishing dates, and daily bag limits are as follows, except as modified under the inseason actions consistent with 50 CFR 300.63(c). All recreational fishing in Area 2A is managed on a ''port of landing'' basis, whereby any halibut landed into a port counts toward the quota for the area in which that port is located, and the regulations governing the area of landing apply, regardless of the specific area of catch.

Washington Puget Sound and the U.S. Convention Waters in the Strait of Juan de Fuca

The quota for the area in Puget Sound and the U.S. waters in the Strait of Juan de Fuca, east of a line extending from 48°17.30′ N lat., 124°23.70′ W long. north to 48°24.10′ N lat., 124°23.70′ W long., is 78,291 lb (35.5 mt).

(a) The fishing seasons are:

(i) For the area in Puget Sound and the U.S. waters in the Strait of Juan de Fuca, east of a line at approximately 123°49.60′ W long., fishing is open April 22–24, April 29–May 1; May 6–8, 13–15, 20–22, 28–30; June 3–5, 10–12, 17–19, and 24–26, or until there is not sufficient quota for another full day of fishing and the area is closed by the IPHC. Any closure will be announced on the NMFS hotline at (206) 526–6667 or 800–662–9825.

(ii) For the area in U.S. waters in the Strait of Juan de Fuca, approximately between 124°23.70′ W long. and 123°49.60′ W long., fishing is open May 6, 8, 13, 15, 20, 22, 28–30; June 3–5, 10–12, 17–19, 24–26, or until there is not sufficient quota for another full day of fishing and the area is closed by the IPHC. Any closure will be announced on the NMFS hotline at (206) 526–6667 or 800–662–9825.

(b) The daily bag limit is one halibut of any size per day per person.

Washington North Coast Subarea

The quota for landings into ports in the area off the north Washington coast, west of a line at approximately 124°23.70′ W long. and north of the Queets River (47°31.70′ N lat.), is 128,928 lb (58.5 mt).

(a) The fishing seasons are:

(i) Fishing is open May 6, 8, 13, 15, 20, 22, 28, 30; June 3, 5, 10, 12, 17, 19, 24, and 26, or until there is not sufficient quota for another full day of fishing and the area is closed by the IPHC. Any closure will be announced on the NMFS hotline at (206) 526–6667 or 800–662–9825.

(b) The daily bag limit is one halibut of any size per day per person.

(c) Recreational fishing for groundfish and halibut is prohibited within the North Coast Recreational Yelloweye Rockfish Conservation Area (YRCA). It is unlawful for recreational fishing vessels to take and retain, possess, or land halibut taken with recreational gear within the North Coast Recreational YRCA. A vessel fishing with recreational gear in the North Coast Recreational YRCA may not be in possession of any halibut. Recreational vessels may transit through the North Coast Recreational YRCA with or without halibut on board. The North Coast Recreational YRCA is a C-shaped area off the northern Washington coast intended to protect yelloweye rockfish. The North Coast Recreational YRCA is defined in groundfish regulations at 50 CFR 660.70(b).

Washington South Coast Subarea

The quota for landings into ports in the area between the Queets River, WA (47°31.70′ N lat.), and Leadbetter Point, WA (46°38.17′ N lat.), is 63,636 lb (28.9 mt).

(a) This subarea is divided between the all-depth fishery (the Washington South coast primary fishery), and the incidental nearshore fishery in the area from 47°31.70′ N lat. south to 46°58.00′ N lat. and east of a boundary line approximating the 30-fathom (fm) (55-meters (m)) depth contour. This area (the Washington South coast, northern nearshore area) is defined by straight lines connecting all of the following points in the order stated as described by the following coordinates:

(1) 47°31.70′ N lat, 124°37.03′ W long;

(2) 47°25.67′ N lat, 124°34.79′ W long;

(3) 47°12.82′ N lat, 124°29.12′ W long;

(4) 46°58.00′ N lat, 124°24.24′ W long.

The primary fishery season dates are May 6, 9, 13, 16, 20, 23, 27; June 17, 20, 24, 27, or until there is not sufficient quota for another full day of fishing and the area is closed by the IPHC. Any closure will be announced on the NMFS hotline at (206) 526–6667 or 800–662–9825. If sufficient quota remains, the fishing season in the nearshore area commences the Saturday subsequent to the closure of the primary fishery and continues seven days per week until 63,636 lb (28.9 mt) is projected to be taken by the two fisheries combined and the fishery is closed by the IPHC or on September 30, whichever is earlier. If the fishery is closed prior to September 30, and there is insufficient quota remaining to reopen the Washington South coast, northern nearshore area for another fishing day, then any remaining quota may be transferred in-season to another Washington coastal subarea by NMFS.

(b) The daily bag limit is one halibut of any size per day per person.

(c) Seaward of the boundary line approximating the 30-fm (55-m) depth contour and during days open to the primary fishery, lingcod may be taken, retained and possessed when allowed by groundfish regulations at 50 CFR 660.360(c).

(d) Recreational fishing for groundfish and halibut is allowed within the South Coast Recreational YRCA and Westport Offshore Recreational YRCA. The South Coast Recreational YRCA is defined at 50 CFR 660.70(e). The Westport Offshore Recreational YRCA is defined at 50 CFR 660.70(f).

Columbia River Subarea

The quota for landings into ports in the area between Leadbetter Point, WA (46°38.17′ N lat.), and Cape Falcon, OR (45°46.00′ N lat.), is 18,662 lb (8.5 mt)

(a) This subarea is divided into an all-depth fishery and a nearshore fishery. The nearshore fishery is allocated 500 lb (0.23 mt) of the subarea allocation. The nearshore fishery extends from Leadbetter Point (46°38.17′ N lat., 124°15.88′ W long.) to the Columbia River (46°16.00′ N lat., 124°15.88′ W long.) by connecting the following coordinates in Washington: 46°38.17′ N lat., 124°15.88′ W long. 46°16.00′ N lat., 124°15.88′ W long., and connecting to the boundary line approximating the 40-fm (73-m) depth contour in Oregon. The nearshore fishery opens May 10, and continues on Monday, Tuesday, and Wednesday each week until the nearshore allocation is taken, or on September 30, whichever is earlier. The all-depth fishing season is open May 6, 9, 13, 16, 20, 23, 27; June 3, 6, 10, 13, 17, 20, 24, 27, or until there is not sufficient quota for another full day of fishing and the area is closed by the IPHC, or on September 30, whichever is earlier. Any closure will be announced on the NMFS hotline at (206) 526–6667 or 800–662–9825. Subsequent to this closure, if there is insufficient quota remaining in the Columbia River subarea for another fishing day, then any remaining quota may be transferred inseason to another Washington and/or Oregon subarea by NMFS. Any remaining quota would be transferred to each state in proportion to its contribution.

(b) The daily bag limit is one halibut of any size per day per person.

(c) Pacific Coast groundfish may not be taken and retained, possessed or landed when halibut are on board the vessel, except sablefish, Pacific cod, flatfish species, yellowtail rockfish, widow rockfish, canary rockfish, redstriped rockfish, greenstriped rockfish, silvergray rockfish, chilipepper, bocaccio, blue/deacon rockfish, and lingcod caught north of the Washington-Oregon border (46°16.00′ N lat.) may be retained when allowed by Pacific Coast groundfish regulations, during days open to the all-depth Pacific halibut fishery. Long-leader gear (as defined at 50 CFR 660.351) may be used to retain groundfish during the all-depth Pacific halibut fishery south of the Washington-Oregon border, when allowed by Pacific Coast groundfish regulations.

(d) Taking, retaining, possessing, or landing halibut on groundfish trips is allowed in the nearshore area on days not open to all-depth Pacific halibut fisheries.

Oregon Central Coast Subarea

The quota for landings into ports in the area off Oregon between Cape Falcon (45°46.00′ N lat.) and Humbug Mountain (42°40.50′ N lat.), is 273,403 lb (124 mt).

(a) The fishing seasons are:

(i) The first season (the ''inside 40-fm'' fishery) commences May 1, and continues 7 days a week, in the area shoreward of a boundary line approximating the 40-fm (73-m) depth contour, or until the sub-quota for the central Oregon ''inside 40-fm'' fishery of 32,808 lb (14.9 mt), or any inseason revised subquota is estimated to have been taken and the season is closed by the IPHC, or on October 31, whichever is earlier. The boundary line approximating the 40-fm (73-m) depth contour between 45°46.00′ N lat. and 42°40.50′ N lat. is defined at 50 CFR 660.71(o).

(ii) The second season (spring season), which is for the ''all-depth'' fishery, is open May 13–15, 20–22; June 3–5, 10–12, 17–19; and July 1–3. The allocation to the all-depth fishery is 172,244 lb (78.1 mt). If sufficient unharvested quota remains for additional fishing

days, the season will re-open July 15–17 and 29–31. Notice of the re-opening will be announced on the NMFS hotline (206) 526–6667 or (800) 662–9825.

(iii) The third season (summer season), which is for the ''all-depth'' fishery, will be open August 5–7, 19–21; September 2–4; 16–18, September 30-October 2; October 14–16, 28–30; and will continue until the combined spring season and summer season quotas in the area between Cape Falcon and Humbug Mountain, OR, are estimated to have been taken and the area is closed by the IPHC. NMFS will announce on the NMFS hotline (206) 526–6667 or (800) 662–9825 in July whether the fishery will re-open for the summer season in August. Additional fishing days may be opened if sufficient quota remains after the last day of the first scheduled open period. If, after this date, an amount greater than or equal to 60,000 lb (27.2 mt) remains in the combined all-depth and inside 40-fm (73-m) quota, the fishery may re-open every Thursday, Friday and Saturday, beginning August 5, 6, and 7, and ending when there is insufficient quota remaining, whichever is earlier. If, after September 7, an amount greater than or equal to 30,000 lb (13.6 mt) remains in the combined all-depth and inside 40-fm (73-m) quota, and the fishery is not already open every Thursday, Friday and Saturday, the fishery may re-open every Thursday, Friday and Saturday, beginning September 9, 10, and 11, and ending October 31. After September 7, the bag limit may be increased to two fish of any size per person, per day. NMFS will announce on the NMFS hotline (206) 526–6667 or (800) 662–9825 whether the summer all-depth fishery will be open on such additional fishing days, what days the fishery will be open, and what the bag limit is.

(b) The daily bag limit is one halibut of any size per day per person, unless otherwise specified. NMFS will announce on the NMFS hotline (206) 526–6667 or (800) 662–9825 any bag limit changes.

(c) During days open to all-depth halibut fishing when the groundfish fishery is restricted by depth, when halibut are on board the vessel, no groundfish, except sablefish, Pacific cod, and other species of flatfish (sole, flounder, sanddab), may be taken and retained, possessed or landed, except with long-leader gear (as defined at § 660.351), when allowed by groundfish regulations. During days open to all-depth halibut fishing when the groundfish fishery is open to all depths, any groundfish species permitted under the groundfish regulations may be retained, possessed or landed if halibut are on board the vessel. During days open to nearshore halibut fishing, flatfish species may be taken and retained seaward of the seasonal groundfish depth restrictions if halibut are on board the vessel.

(d) When the all-depth halibut fishery is closed and halibut fishing is permitted only shoreward of a boundary line approximating the 40-fm (73-m) depth contour, halibut possession and retention by vessels operating seaward of a boundary line approximating the 40-fm (73-m) depth contour is prohibited.

(e) Recreational fishing for groundfish and halibut is prohibited within the Stonewall Bank YRCA. It is unlawful for recreational fishing vessels to take and retain, possess, or land halibut taken with recreational gear within the Stonewall Bank YRCA. A vessel fishing in the Stonewall Bank YRCA may not possess any halibut. Recreational vessels may transit through the Stonewall Bank YRCA with or without halibut on board. The Stonewall Bank YRCA is an area off central Oregon, near Stonewall Bank, intended to protect yelloweye rockfish. The Stonewall Bank YRCA is defined at 50 CFR 660.70(g).

Southern Oregon Subarea

The quota for landings into ports in the area south of Humbug Mountain, OR (42°40.50′ N lat.) to the Oregon/California Border (42°00.00′ N lat.) is 8,000 lb (3.6 mt).

(a) The fishing season commences on May 1, and continues 7 days per week until the subquota is taken, or October 31, whichever is earlier.

(b) The daily bag limit is one halibut per person with no size limit.

(c) During days open to the Pacific halibut fishery, when halibut are on board the vessel, no groundfish except sablefish, Pacific cod, and other species of flatfish (sole, flounder, sanddab), may be taken and retained, possessed or landed, except with long-leader gear (as defined at § 660.351) when allowed by groundfish regulations.

California Coast Subarea

The quota for landings into ports south of the Oregon/California Border (42°00.00′ N lat.) and along the California coast is 39,260 lb (17.8 mt).

(a) The fishing season will be open May 1 through November 15, or until the subarea quota is estimated to have been taken and the season is closed by the IPHC, whichever is earlier. NMFS will announce any closure by the IPHC on the NMFS hotline (206) 526–6667 or (800) 662–9825.

(b) The daily bag limit is one halibut of any size per day per person.

Comments and Responses

NMFS published the proposed rule on February 12, 2021 (86 FR 9312). NMFS accepted public comments on the Council's recommended modifications to the 2021 Area 2A Catch Sharing Plan and the proposed 2021 annual management measures through March 15, 2021. NMFS received two comments from state agencies—the Oregon Department of Fish and Wildlife (ODFW) and the California Department of Fish and Wildlife (CDFW), and two comments from stakeholders.

Comment 1: ODFW submitted a comment recommending final recreational fishing season dates for the 2021 season for the Central Oregon Coast subarea. ODFW hosted a public meeting and an online survey following the IPHC annual meeting. Based on stakeholder input, past effort, and tidal events posing a safety risk to anglers, ODFW recommended season dates for the spring and summer Central Oregon Coast fisheries. For spring, ODFW recommended open dates on May 13, 14, 15; May 20, 21, 22; June 3, 4, 5; June 10, 11, 12; June 17, 18, 19; and July 1, 2, 3. In the event that there is remaining subarea allocation following the initial open dates, ODFW recommended the spring fishery open on July 15, 16, 17 and July 29, 30, 31. ODFW recommended summer fishery dates on August 5, 6, 7; August 19, 20, 21; September 2, 3, 4; September 16, 17, 18; September 30, October 1, 2; October 14, 15, 16; and October 28, 29, 30; or until the total 2021 all-depth catch limit for the subarea is taken.

Response: NMFS concurs that the ODFW-recommended season dates are appropriate. There are a few differences between the spring and summer season dates NMFS published in the proposed rule and those recommended by ODFW. However, based on the rationale provided by ODFW, NMFS has updated the recreational fishery season dates off of Oregon to those recommended by ODFW in this final rule.

Comment 2: CDFW submitted a comment concurring with the season dates for the fisheries off of California that NMFS published in the proposed rule for the 2021 season. CDFW hosted an online survey following the IPHC annual meeting. Based on public comments received on Pacific halibut fisheries in California and fishing performance in recent years, CDFW recommended season dates of May 1–November 15, or until quota has been attained, whichever comes first.

Response: NMFS concurs that these season dates are appropriate and affirms

the recreational fishery season dates off of California in this final rule.

Comment 3: NMFS received one public comment in support of approving the 2021 Pacific Halibut Catch Sharing Plan. This comment also expresses concern for the need of adequate enforcement.

Response: NMFS concurs that approving the 2021 Pacific Halibut Catch Sharing Plan is appropriate. With regards to the commenters' concern regarding enforcement, NMFS agrees that monitoring of our fisheries is an important component of sustainable fisheries management. NMFS notes that enforcement during the Pacific halibut fisheries is a multi-agency effort with state and federal entities. In 2020, there were 117 hours of air patrols, 1441 hours of at-sea patrols, and a total of 518 enforcement actions.

Comment 4: NMFS received one public comment suggesting the Washington recreational fishing season start later in the summer for safer fishing weather, and be set to co-occur with recreational salmon fisheries.

Response: NMFS does not concur with starting the fishing season later or shifting the season to align with recreational salmon fisheries in 2021. The season dates in the proposed rule were recommended by the Washington Department of Fish and Wildlife (WDFW) to the Council at the November meeting, after WDFW engaged with their stakeholders through public meetings. NMFS concurs with WDFW's season dates, as they are a consolidated recommendation from both the Council and Washington stakeholders.

Changes From the Proposed Rule

As described in the response to Comment 1 above, NMFS changed season dates off of Oregon in this final rule.

Classification

Regulations governing the U.S. fisheries for Pacific halibut are developed by the International Pacific Halibut Commission (IPHC), the Pacific Fishery Management Council, the North Pacific Fishery Management Council (Council), and the Secretary of Commerce. Section 5 of the Halibut Act (16 U.S.C. 773c) allows the Regional Council having authority for a particular geographical area to develop regulations governing the allocation and catch of halibut in U.S. Convention waters as long as those regulations do not conflict with IPHC regulations. This action is consistent with the Council's authority to allocate halibut catches among fishery participants in the waters in and off Washington, Oregon, and California.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS finds good cause to waive the 30-day delay in the date of effectiveness and make this rule effective on April 20, 2021, in time for the start of recreational Pacific halibut fisheries on April 22, 2021, pursuant to 5 U.S.C. 553(d)(3). The 2021 Catch Sharing Plan provides the framework for the annual management measures and setting subarea allocations based on annual catch limits set by the IPHC. This rule implements 2021 Area 2A subarea allocations as published in the proposed rule (86 FR 9312, February 12, 2021) for the recreational Pacific halibut fishery based on the formulas set in the Catch Sharing Plan and using the 2021 Area 2A catch limit for Pacific halibut set by the IPHC and published by NMFS on March 9, 2021 (86 FR 13475).

This rule relieves multiples restrictions: (1) Providing for the first opening of the recreational fishery subareas on April 22, 2021 for the Washington Puget Sound and the U.S. Convention Waters in the Strait of Juan de Fuca subarea; (2) based on the total Area 2A catch limit, the 2021 recreational fishery subarea allocations implemented in this rule are higher than in 2020, allowing for additional fishing opportunity; and (3) approving the changes to the Catch Sharing Plan to open previously closed areas and allow for retention of certain groundfish species.

Additionally, delaying the effective date of this rule would be contrary to the public interest. The Council's 2021 Catch Sharing Plan approved in this rule includes changes that respond to the needs of the fisheries in each state, including fisheries that begin in late April. A delay in the effectiveness of this rule for 30 days would result in the fisheries not opening on their intended timelines and on the dates the affected public are expecting. The recreational Pacific halibut fisheries have high participation, and some subareas close months before the end of the season due to quota attainment. If the fisheries do not open on their intended timelines, fishing opportunity is lost, potentially causing economic harm to communities at recreational fishing ports. The Council also recommended removing prohibition on fishing within two Rockfish Conservation Areas and allowing anglers fishing for halibut in the Columbia River and Oregon subareas to retain certain groundfish species in order to be consistent with changes implemented in the 2021–2022 groundfish harvest specifications final rule (85 FR 79880; December 11, 2020). This rule is needed for consistency with groundfish regulations, and to provide more angler opportunity by permitting retention of more groundfish species than were previously allowed in regulation.

Therefore, allowing the 2020 Catch Sharing Plan to remain in place would not respond to the needs of the fishery and would be in conflict with the Council's final recommendation for 2021. A delay in effectiveness could cause economic harm to the associated fishing communities by reducing fishing opportunity at the start of the fishing year. As a result of the potential harm to fishing communities that could be caused by delaying the effectiveness of this final rule, NMFS finds good cause to waive the 30-day delay in the date of effectiveness and make this rule effective upon publication in the **Federal Register**.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities for purposes of the Regulatory Flexibility Act. The factual basis for the certification was published in the proposed rule and is not repeated here. As a result, a regulatory flexibility analysis was not required and none was prepared.

This rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

Dated: April 16, 2021.

Samuel D. Rauch, III,

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

[FR Doc. 2021–08242 Filed 4–20–21; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 86, No. 75
Wednesday, April 21, 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.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2021–0244; FRL–10022–55–Region 7]

Air Plan Approval; Nebraska; Revisions to Title 129 of the Nebraska Administrative Code; Chapter 39 Visible Emissions From Diesel-Powered Motor Vehicles

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve revisions to the State Implementation Plan (SIP) submitted by the State of Nebraska on July 16, 2020. This proposed action will amend the SIP to revise title 129 of the Nebraska Administrative Code by removing a portion of the SIP that addresses visible emissions from diesel-powered motor vehicles. Visible emissions from diesel-powered motor vehicles are addressed in the state statute. Therefore, these proposed revisions remove duplicative language that is redundant to the state statute. The proposed revisions do not substantively change any existing statutory or regulatory requirement or impact the stringency of the SIP or air quality nor do they impact the State's ability to attain or maintain the National Ambient Air Quality Standards. The EPA's proposed approval of this rule revision is in accordance with the requirements of the Clean Air Act (CAA).

DATES: Comments must be received on or before May 21, 2021.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–R07–OAR–2021–0244 to *https://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received will be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Written Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Allie Donohue, Environmental Protection Agency, Region 7 Office, Air Quality Planning Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219; telephone number: (913) 551–7986; email address: *donohue.allie@epa.gov*

SUPPLEMENTARY INFORMATION: Throughout this document ''we,'' ''us,'' and ''our'' refer to the EPA.

Table of Contents

I. Written Comments
II. What is being addressed in this document?
III. Have the requirements for approval of a SIP revision been met?
IV. What action is the EPA taking?
V. Incorporation by Reference
VI. Statutory and Executive Order Reviews

I. Written Comments

Submit your comments, identified by Docket ID No. EPA–R07–OAR–2021–0244, at *https://www.regulations.gov.* Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

II. What is being addressed in this document?

The EPA is proposing to amend Nebraska's SIP to include revisions to title 129 of the Nebraska Administrative Code. The EPA is proposing to approve revisions to the Nebraska SIP submitted by the State of Nebraska on July 16, 2020. Specifically, the EPA is proposing to amend the Nebraska SIP by removing a portion of the SIP as follows: Title 129. Chapter 39. Visible Emissions from Diesel-powered Motor Vehicles. EPA is proposing approval of these revisions as they do not substantively change any existing statutory or regulatory requirement. These revisions do not impact the stringency of the SIP or air quality.

Nebraska statutes 60–6,363, 60–6,364, 60–6,365, and 60–6,367 continue to provide the state of Nebraska the authority to use smokemeter tests and enforce against excessive opacity from diesel powered motor vehicles.[1] Nebraska statute 60–6,363 defines diesel-powered motor vehicle, motor vehicle, smoke, smokemeter, opacity, and smoke control systems. Nebraska Statute 60–6,364 lists exceptions to the definition of diesel-powered motor vehicles.

Title 129, Chapter 39 states, ''No person shall operate a diesel-powered motor vehicle on any public street or highway in such a manner that smoke discharged from the exhaust is of a shade or density equal to or darker than that designated as No. 1 on the Ringelmann Chart or an equivalent opacity of twenty percent (20%) for ten (10) consecutive seconds or longer.'' Nebraska statute 60–6,365 has the same requirements with the exclusion of the phrase, ''public street.'' EPA finds that this term does not impact the stringency of the SIP. Title 129. Chapter 39 also states, ''A suspected violator may demand that the suspected vehicle be tested by an approved smokemeter prior to a trial on the alleged violation,'' which is also listed in Nebraska statute 60–6,367 verbatim. Title 129. Chapter 39 states, ''smokemeter tests shall be conducted (a) by or under the supervision of a person or testing facility authorized by the Director to conduct such tests, and (b) by installing an approved smokemeter on the exhaust pipe and operating the suspected vehicle in a manner similar to the manner of operation at the time of the alleged violation.'' Nebraska statute 60–

[1] Nebraska state statutes can be found at *https://nebraskalegislature.gov/laws/browse-chapters.php?chapter=60.*

6,367 repeats this statement but replaces the phrase ''in a manner similar to the manner of operation'' with the phrase ''at engine revolutions per minute equivalent to the engine revolution per minute.'' EPA finds that this change in phrasing does not impact the stringency of the SIP.

Nebraska statutes 60–6,363, 60–6,364, 60–6,365, and 60–6,367 will continue to provide Nebraska the authority to use smokemeter tests and regulate visible emissions from diesel-powered motor vehicles. The SIP revision being proposed for approval by this action removes a redundant regulation from the SIP and does not have an adverse effect on air quality in Nebraska.

III. Have the requirements for approval of a SIP revision been met?

The state submission has met the public notice requirements for SIP submissions in accordance with 40 CFR 51.102. The submission also satisfied the completeness criteria of 40 CFR part 51, appendix V. The State provided public notice of this SIP revision from September 28, 2019, to November 6, 2019, and held a public hearing on November 7, 2019. In a letter to the state dated November 7, 2019, the EPA stated that the agency ''has no comment on the proposed repeal of this regulation.'' EPA further recommended that NDEE include a justification that the rule is redundant to state statute. The SIP revision meets the substantive requirements of the CAA, including section 110 and implementing regulations.

IV. What action is the EPA taking?

The EPA is proposing to amend the Nebraska SIP by approving the State's request to remove Title 129 Section 39. Visible Emissions from Diesel-powered Vehicles. The removal of this portion of the SIP will ensure consistency between state and federally-approved rules. The EPA has determined that these changes will not adversely impact air quality because the regulation duplicates the State's statute, which applies in the same jurisdiction.

The EPA is processing this as a proposed action because we are soliciting comments on this proposed action. Final rulemaking will occur after consideration of any comments.

V. Incorporation by Reference

In this document, the EPA is proposing to amend regulatory text that includes incorporation by reference. As described in the proposed amendments to 40 CFR part 52 set forth below, the EPA is proposing to remove provisions of the EPA-Approved Nebraska Regulations from the Nebraska State Implementation Plan, which is incorporated by reference in accordance with the requirements of 1 CFR part 51.

VI. Statutory and Executive Order Reviews

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

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

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter.

Dated: April 15, 2021.

Edward H. Chu,

Acting Regional Administrator, Region 7.

For the reasons stated in the preamble, the EPA proposes to amend 40 CFR part 52 as set forth below:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart CC—Nebraska

■ 2. In § 52.1420, the table in paragraph (c) is amended by removing the entry ''129–39'' under the heading ''Title 129-Nebraska Air Quality Regulations''.

[FR Doc. 2021–08274 Filed 4–20–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2021–0222; FRL–10022–80–Region 9]

Air Plan Approval; California; Mojave Desert Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a revision to the Mojave Desert Air Quality Management District (MDAQMD or ''District'') portion of the California State Implementation Plan (SIP). This revision concerns the regulation of emissions of volatile organic compounds (VOCs) from wood products coating operations. We are proposing to approve a local rule to regulate these emission sources under the Clean Air Act (CAA or the Act). We are taking comments on this proposal and plan to follow with a final action.

DATES: Comments must be received on or before May 21, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2021–0222 at *https://www.regulations.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Robert Schwartz, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 972–3286 or by email at *schwartz.robert@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to the EPA.

Table of Contents

I. The State's Submittal
A. What rule did the State submit?
B. Are there other versions of this rule?
C. What is the purpose of the submitted rule revisions?
II. The EPA's Evaluation and Action
A. How is the EPA evaluating the rule?
B. Does the rule meet the evaluation criteria?
C. Public Comment and Proposed Action
III. Incorporation by Reference
IV. Statutory and Executive Order Reviews

I. The State's Submittal

A. What rule did the State submit?

Table 1 lists the rule addressed by this proposal with the date that it was amended by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULE

Local agency	Rule No.	Rule title	Amended	Submitted
MDAQMD	1114	Wood Products Coating Operations	08/24/2020	11/18/2020

On March 12, 2021, the EPA determined that the submittal for MDAQMD Rule 1114 met the completeness criteria in 40 CFR part 51 Appendix V, which must be met before formal EPA review.

B. Are there other versions of this rule?

We approved an earlier version of Rule 1114 into the SIP on July 2, 2019 (84 FR 31682). The MDAQMD adopted revisions to the SIP-approved version on August 24, 2020, and CARB submitted them to us on November 18, 2020. If we take final action to approve the August 24, 2020 version of Rule 1114, this version will replace the previously approved version of the rule in the SIP.

C. What is the purpose of the submitted rule revisions?

Emissions of VOCs contribute to the production of ground-level ozone, smog and particulate matter, which harm human health and the environment. Section 110(a) of the CAA requires states to submit regulations that control VOC emissions. Rule 1114 establishes VOC content limits for coatings and adhesives used on new wood surface coated room furnishings (''products''), and those used for refinishing, repairing, preserving or restoring wood products. It also establishes requirements for coatings application methods, surface preparation and cleanup, add-on control systems, and work practices. The District revised Rule 1114 by reducing the VOC content limit for high solids stains, reducing the allowable volume of coatings and/or strippers used in order to qualify for an exemption to the rule, and incorporating work practice standards and implementation plans consistent with the EPA's Control Techniques Guideline (CTG) for this source category.[1] The EPA's technical support document (TSD) has more information about this rule.

II. The EPA's Evaluation and Action

A. How is the EPA evaluating the rule?

Rules in the SIP must be enforceable (see CAA section 110(a)(2)), must not interfere with applicable requirements concerning attainment and reasonable further progress or other CAA requirements (see CAA section 110(l)), and must not modify certain SIP control requirements in nonattainment areas without ensuring equivalent or greater emissions reductions (see CAA section 193).

Generally, SIP rules must require reasonably available control technology (RACT) for each category of sources covered by a CTG document as well as each major source of VOCs in ozone nonattainment areas classified as Moderate or above (see CAA section 182(b)(2)). The MDAQMD regulates an ozone nonattainment area classified as a Severe-15 nonattainment area for the 2008 8-hour ozone national ambient air quality standard (NAAQS), and as a Severe-15 nonattainment area for the 2015 8-hour ozone NAAQS (40 CFR 81.305). Therefore, this rule must implement RACT.

Guidance and policy documents that we used to evaluate enforceability, revision/relaxation and rule stringency requirements for the applicable criteria pollutants include the following:

1. ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' 57 FR 13498 (April 16, 1992); 57 FR 18070 (April 28, 1992).

2. ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' EPA, May 25, 1988 (the Bluebook, revised January 11, 1990).

3. ''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001 (the Little Bluebook).

4. ''Control Techniques Guidelines: Control of Volatile Organic Compound Emissions from Wood Furniture Manufacturing Operations.'' EPA 453/R–96–007, April 1996.

[1] ''Control of Volatile Organic Compound Emissions from Wood Furniture Manufacturing Operations'' (EPA–453/R–96–007, April 1996).

B. Does the rule meet the evaluation criteria?

This rule meets CAA requirements and is consistent with relevant guidance regarding enforceability, RACT, and SIP revisions. The TSD has more information on our evaluation.

C. Public Comment and Proposed Action

As authorized in section 110(k)(3) of the Act, the EPA proposes to fully approve the submitted rule because it fulfills all relevant requirements. We will accept comments from the public on this proposal until May 21, 2021. If we take final action to approve the submitted rule, our final action will incorporate this rule into the federally enforceable SIP.

III. Incorporation by Reference

In this rule, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the MDAQMD rule described in Table 1 of this preamble. The EPA has made, and will continue to make, these materials available through *https://www.regulations.gov* and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

IV. Statutory and Executive Order Reviews

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

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

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: April 15, 2021.

Deborah Jordan,

Acting Regional Administrator, Region IX.

[FR Doc. 2021–08188 Filed 4–20–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2020–0414; FRL–10022–71–Region 9]

Air Plan Approval; California; Sacramento Metro Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a revision to the Sacramento Metropolitan Air Quality Management District (SMAQMD) portion of the California State Implementation Plan (SIP). This revision concerns emissions of oxides of nitrogen (NO_X) from water heaters, boilers and process heaters. We are proposing to approve a local rule to regulate these emission sources under the Clean Air Act (CAA or the Act). We are taking comments on this proposal and plan to follow with a final action.

DATES: Comments must be received on or before May 21, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2020–0414 at *https://www.regulations.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please

contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Robert Schwartz, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 972–3286 or by email at *schwartz.robert@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to the EPA.

Table of Contents

I. The State's Submittal
A. What rule did the State submit?
B. Are there other versions of this rule?
C. What is the purpose of the submitted rule revision?
II. The EPA's Evaluation and Action
A. How is the EPA evaluating the rule?
B. Does the rule meet the evaluation criteria?
C. The EPA's Recommendations To Further Improve the Rule
D. Public Comment and Proposed Action
III. Incorporation by Reference
IV. Statutory and Executive Order Reviews

I. The State's Submittal

A. What rule did the State submit?

Table 1 lists the rule addressed by this proposal with the dates that it was adopted by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULE

Local agency	Rule No.	Rule title	Amended	Submitted
SMAQMD	414	Water Heaters, Boilers and Process Heaters Rated Less Than 1,000,000 Btu per Hour.	10/25/2018	01/23/2019

On July 23, 2019, the submittal for SMAQMD Rule 414 was deemed by operation of law to meet the completeness criteria in 40 CFR part 51 Appendix V, which must be met before formal EPA review.

B. Are there other versions of this rule?

We approved an earlier version of Rule 414 into the SIP on April 5, 2011 (76 FR 67366). The SMAQMD adopted revisions to the SIP-approved version on October 25, 2018, and CARB submitted them to us on January 23, 2019.

C. What is the purpose of the submitted rule revision?

Emissions of NO_X contribute to the production of ground-level ozone, smog and paticulate matter, which harm human health and the environment. Section 110(a) of the CAA requires states to submit regulations that control NO_X emissions. Rule 414 limits NO_X emissions from water heaters, boilers and process heaters rated less than 1 million Btu/hr.[1] The revised rule adds an exemption for hot water pressure washers (''washers'') in addition to several housekeeping changes. Washers unintentionally fell within the definition of water heaters subject to Rule 414 when it was originally adopted in 1996 but have never been regulated by the rule.[2] Washers are portable, installation of emissions controls is difficult/impractical, and there are currently no commercially available certified washers within the District that meet the rule's NO_X emissions limits.[3] The District has never taken emissions reductions credit for this source because washers were never counted as part of the emissions inventory.[4] Therefore, the emissions reductions forgone (theoretical emissions reductions if this source had been included from the outset) has no impact on the rule's reduction commitment. Further, the emissions forgone are estimated to be only 0.1 to 0.3 percent of the 0.71 tons/day reduction commitment for Rule 414. The small forgone emissions will have no practical impact on the District's attainment plans for the 2008 or 2015 ozone national ambient air quality standards or reasonable further progress. The EPA's technical support document (TSD) has more information about this rule.

II. The EPA's Evaluation and Action

A. How is the EPA evaluating the rule?

Rules in the SIP must be enforceable (see CAA section 110(a)(2)), must not interfere with applicable requirements concerning attainment and reasonable further progress or other CAA requirements (see CAA section 110(l)), and must not modify certain SIP control requirements in nonattainment areas without ensuring equivalent or greater emissions reductions (see CAA section 193).

Generally, SIP rules must require reasonably available control technology (RACT) for each major source of NO_X in ozone nonattainment areas classified as Moderate or above (see CAA sections 182(b)(2) and 182(f)). The SMAQMD regulates an ozone nonattainment area classified as Severe-15 for the 2008 8-hour ozone National Ambient Air Quality Standards (NAAQS) and Moderate for the 2015 NAAQS (40 CFR 81.305). However, because this rule does not affect major sources, it does not need to implement section 182(b)(2) RACT. While section 182(b)(2) RACT does not apply, the Sacramento Federal Ozone Nonattainment Area is subject to the SIP requirement to provide for the implementation of all reasonably available control measures (RACM) and for attainment of the NAAQS. Guidance and policy documents that we used to evaluate enforceability, revision/relaxation and rule stringency requirements for the applicable criteria pollutants include the following:

1. ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' 57 FR 13498 (April 16, 1992); 57 FR 18070 (April 28, 1992).

2. ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' EPA, May 25, 1988 (the Bluebook, revised January 11, 1990).

3. ''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region IX, August 21, 2001 (the Little Bluebook).

4. ''State Implementation Plans; Nitrogen Oxides Supplement to the General Preamble; Clean Air Act Amendments of 1990 Implementation of Title I; Proposed Rule,'' (the NO_X Supplement), 57 FR 55620, November 25, 1992.

5. ''Alternative Control Techniques Document—NO_X Emissions from Industrial/Commercial/Institutional (ICI) Boilers,'' EPA 453/R–94–022 (March 1994).

6. ''Alternative Control Techniques Document—NO_X Emissions from Process Heaters (Revised),'' EPA–453/R–93–034 1993/09 (September 1993).

[1] British thermal unit (Btu) per hour: The amount of heat required to raise the temperature of one pound of water from 59 °F to 60 °F at one atmosphere.

[2] SMAQMD, Statement of Reasons, Rule 414, Water Heaters, Boilers and Process Heaters Rated Less Than 1,000,000 Btu per Hour, and Rule 419, NO_X from Miscellaneous Combustion Units, Proposed Amendments September 24, 2018, p.5, 18.

[3] Email dated March 8, 2021, from Kevin J. Williams, Ph.D., Program Supervisor, SMAQMD, to Doris Lo, Manager, Rules Office, Air and Radiation Division, Region IX, US EPA.

[4] Id.

B. Does the rule meet the evaluation criteria?

This rule meets CAA requirements and is consistent with relevant guidance regarding enforceability, RACM, and SIP revisions. The TSD has more information on our evaluation.

C. The EPA Recommendations To Further Improve the Rule

The TSD includes recommendations for the next time the local agency modifies the rule.

D. Public Comment and Proposed Action

As authorized in section 110(k)(3) of the Act, the EPA proposes to fully approve the submitted rule because it fulfills all relevant requirements. We will accept comments from the public on this proposal until May 21, 2021. If we take final action to approve the submitted rule, our final action will incorporate this rule into the federally enforceable SIP.

III. Incorporation by Reference

In this rule, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the SMAQMD rule described in Table 1 of this preamble. The EPA has made, and will continue to make, these materials available through *https://www.regulations.gov* and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

IV. Statutory and Executive Order Reviews

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

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

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

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

Dated: April 15, 2021.

Deborah Jordan,

Acting Regional Administrator, Region IX.

[FR Doc. 2021–08187 Filed 4–20–21; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[IB Docket No. 18–314; Report No. 3171; FRS 21230]

Petitions for Reconsideration of Action in Rulemaking Proceeding

AGENCY: Federal Communications Commission.

ACTION: Petitions for Reconsideration.

SUMMARY: Petitions for Reconsideration (Petitions) have been filed in the Commission's rulemaking proceeding by Tom Stroup, on behalf of the Satellite Industry Association, Joseph A. Goldes, on behalf of Iridium Constellation LLC, and David Goldman, on behalf of Space Exploration Technologies Corp.

DATES: Oppositions to the Petitions must be filed on or before May 6, 2021. Replies to an opposition must be filed on or before May 17, 2021.

ADDRESSES: Federal Communications Commission, 45 L Street NE, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Clay DeCell, International Bureau, (202) 418–0803 or *Clay.DeCell@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, Report No. 3171, released April 12, 2021. The full text of the Petitions can be accessed online via the Commission's Electronic Comment Filing System at: *http://apps.fcc.gov/ecfs/.* The Commission will not send a Congressional Review Act (CRA) submission to Congress or the Government Accountability Office pursuant to the CRA, 5 U.S.C. 801(a)(1)(A), because no rules are being adopted by the Commission.

Subject: Further Streamlining Part 25 Rules Governing Satellite Services, FCC 20–159, published at 86 FR 11880, March 1, 2021, in IB Docket No. 18–314. This document is being published pursuant to 47 CFR 1.429(e). *See also* 47 CFR 1.4(b)(1) and 1.429(f), (g).

Number of Petitions Filed: 3.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2021–08189 Filed 4–20–21; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 21–54; RM–11879; DA 21–163; FR ID 21651]

Television Broadcasting Services; Peoria and Oswego, Illinois; Correction

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; correction.

SUMMARY: The Federal Communications Commission published a document in the **Federal Register** of April 12, 2021, concerning a petition for rulemaking filed by Four Seasons Peoria, LLC (Petitioner), licensee of television station WAOE, channel 10, Peoria, Illinois, requesting an amendment of the DTV Table of Allotments to delete channel 10 at Peoria, Illinois, and substitute channel 10 at Oswego, Illinois. The document contained an incomplete address for counsel of petitioner.

DATES: April 21, 2021.

FOR FURTHER INFORMATION CONTACT: Shaun Maher, Media Bureau, at (202) 418–2324 or *Shaun.Maher@fcc.gov*.

SUMMARY:

Correction

In FR Doc. 2021–07442, in the **Federal Register** of April 12, 2021, on page 18934, in the second column, correct the **ADDRESSES** caption to read:

ADDRESSES: Federal Communications Commission, Office of the Secretary, 45 L Street NE, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: Joan Stewart, Esq., Wiley Rein LLP, 1776 K Street NW, Washington, DC 20006.

Dated: April 14, 2021.

Thomas Horan,

Chief of Staff, Media Bureau.

[FR Doc. 2021–08269 Filed 4–20–21; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

48 CFR Parts 32 and 352

[Docket No. O1–2012–0005]

RIN 0917–AA18

Acquisition Regulations; Buy Indian Act; Procedures for Contracting; Reopening and Extension of Comment Period

AGENCY: Indian Health Service (IHS), HHS.

ACTION: Proposed rule; reopening and extension of comment period.

SUMMARY: The Indian Health Service (IHS) is reopening and extending the comment period for the proposed rule entitled ''Acquisition Regulations; Buy Indian Act; Procedures for Contracting.'' This action is being taken in response to requests from stakeholders to extend the comment period to allow additional time for interested persons to submit comments on the proposed rule.

DATES: IHS is reopening and extending the comment period on the proposed rule published November 10, 2020 (85 FR 71596) for 60 days. Submit either electronic or written comments on the proposed rule by June 21, 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 June 21, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of June 21, 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

You may send comments identified by docket number OI–2012–0005 using any of the following methods:

Carl Mitchell, Director, Division of Regulatory Policy Coordination (DRPC), Office of Management Services (OMS), Indian Health Service, 5600 Fishers Lane, Mail Stop 09E70, Rockville, MD 20857.

Tiffani Redding, Director, Office of Recipient Integrity Coordination (ORIC), Department of Health and Human Services, Office of the Assistant Secretary for Financial Resources (ASFR), Room 533H, Hubert H. Humphrey Building, 200 Independence Avenue SW, Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this proposed rule contact:

Carl Mitchell, Director, Division of Regulatory Policy Coordination (DRPC), Office of Management Services, Indian Health Service, 301–443–6384, *carl.mitchell@ihs.gov;* or Santiago Almaraz, Acting Director Office of Management Services, Indian Health Service, 301–443–4872, *santiago.almaraz@ihs.gov.*

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 10, 2020 (85 FR 71596), the Indian Health Service (IHS) published a proposed rule entitled ''Acquisition Regulations; Buy Indian Act; Procedures for Contracting'' with a 60-day comment period.

Comments have been received from tribes and tribal entities requesting an extension of the comment period due to the encompassing of the holiday season during the original comment period, as well as the disproportionately high impact of the pandemic on Indian Country. Both of these events have delayed stakeholders from being able to perform a complete and full review of the proposed rule and provide comments within the initial 60-day comment period.

IHS has concluded that it is reasonable to reopen and extend the comment period for an additional 60

days to allow any interested persons to submit comments on the proposed rule.

Approved: April 06, 2021.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2021–07455 Filed 4–20–21; 8:45 am]

BILLING CODE 4165–16–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 210415–0081]

RIN 0648–BK34

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Gray Triggerfish Management Measures

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to implement management measures described in a framework action to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP), as prepared by the Gulf of Mexico Fishery Management Council (Council). If implemented, this proposed rule would modify catch limits in the Gulf of Mexico (Gulf) exclusive economic zone (EEZ) for gray triggerfish. The purpose of this proposed rule and the framework action is to modify the catch limits, as applicable, consistent with the most recent interim analysis for gray triggerfish and to achieve optimum yield (OY) for the stock.

DATES: Written comments must be received on or before May 21, 2021.

ADDRESSES: You may submit comments on the proposed rule, identified by ''NOAA–NMFS–2021–0030'' by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter ''*NOAA–NMFS–2021–0030*'', in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Kelli O'Donnell, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Electronic copies of the framework action, which includes an environmental assessment, a regulatory impact review, and a Regulatory Flexibility Act (RFA) analysis, may be obtained from the Southeast Regional Office website at *https://www.fisheries.noaa.gov/action/framework-action-modification-gray-triggerfish-catch-limits*.

FOR FURTHER INFORMATION CONTACT: Kelli O'Donnell, Southeast Regional Office, NMFS, telephone: 727–824–5305, email: *Kelli.ODonnell@noaa.gov*.

SUPPLEMENTARY INFORMATION: The Gulf reef fish fishery, which includes gray triggerfish, is managed under the FMP. The FMP was prepared by the Council and is implemented by NMFS through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Steven Act).

Background

The Magnuson-Stevens Act requires NMFS and regional fishery management councils to prevent overfishing and to achieve, on a continuing basis, the OY from federally managed fish stocks to ensure that fishery resources are managed for the greatest overall benefit to the nation, particularly with respect to providing food production and recreational opportunities, and protecting marine ecosystems.

Gray triggerfish in the Gulf EEZ are managed using both commercial and recreational sector measures with each sector having its own annual catch limit (ACL) and annual catch target (ACT). The sector allocation of the stock ACL, which equals the acceptable biological catch (ABC), is 21 percent commercial and 79 percent recreational and was implemented in 2008 through Amendment 30A to the FMP (73 FR 38139; July 3, 2008). Inseason accountability measures (AMs) for gray triggerfish specify that if commercial and/or recreational landings meet or are projected to meet the respective sector's ACT, that sector will close for the remainder of the fishing year. For the commercial sector, the post-season AM specifies that if the commercial ACL is exceeded despite the quota closure, then the following fishing year's commercial ACL and ACT (commercial quota) will be reduced by the amount of the prior-year's commercial ACL overage. For the recreational sector, if the recreational ACL is exceeded and gray triggerfish are overfished then in the following fishing year the recreational ACL and ACT would be reduced by the amount of the ACL overage in the prior fishing year. The current gray triggerfish ACLs, ACTs (set at 5 percent and 10 percent less than the commercial and recreational sector ACLs, respectively), and inseason AMs for both sectors and the post season AM for the recreational sector, were established in 2013, through Amendment 37 to the FMP (78 FR 27084; May 9, 2013). The postseason AM for the commercial sector was established in 2008, through Amendment 30A to the FMP (73 FR 38139).

The most recent Southeast Data, Assessment, and Review (SEDAR) stock assessment for gray triggerfish was completed and reviewed by the Council's Scientific and Statistical Committee (SSC) in October 2015 (SEDAR 43). SEDAR 43 indicated that the gray triggerfish stock was not experiencing overfishing but remained overfished and would not be rebuilt by the end of 2017 as previously projected. As a result of SEDAR 43, the Council's SSC made recommendations for an increased overfishing limit (OFL) based on a fixed maximum fishing mortality threshold, which is independent of rebuilding, and ABCs based on an 8, 9, or 10-year rebuilding timeline. Because of the stock not rebuilding as anticipated, the Council decided not to change the ABC, sector ACLs, and sector ACTs set by Amendment 37 but to change the rebuilding timeline to rebuild the stock by 2025. Amendment 46 implicitly adopted the SSC's recommendations for an increased OFL by including alternatives with an ABC that was higher than the *status quo* OFL. Amendment 44 to the FMP, implemented in 2017 (82 FR 61488; December 28, 2017), updated the stock status to not overfished but did not revise the sector ACLs or ACTs.

Between 2012 and 2019, the commercial sector has exceeded its ACL of 64,100 lb (29,075 kg), round weight, two times, in both 2012 and 2018. During that same time frame, the recreational sector has exceeded its ACL of 241,200 lb (109,406 kg), round weight, five times, in 2012, 2013, 2016, 2018, and 2019.

At its September 2020 meeting, the Council's SSC accepted a 2020 gray triggerfish interim analysis conducted by the NMFS Southeast Fisheries Science Center (SEFSC). Unlike full SEDAR stock assessments, interim analyses are designed to occur between regular SEDAR assessments to determine trends in stock condition and project future catch advice. While interim analyses take less time to complete, they cannot be used to determine if a stock is making progress towards rebuilding. Based on the interim analysis, abundance trends of the Gulf gray triggerfish stock suggest an increase in biomass that could support additional removals. The Council's SSC determined the interim analysis was suitable for providing ABC catch advice through 2023. From the interim analysis, the Council's SSC recommended the gray triggerfish stock ABC be increased to 456,900 lb (207,246 kg), round weight, for 2021 and subsequent fishing years, with the request that another interim analysis be completed in 2023. The Council's SSC previously recommended an increased OFL (1,220,000 lb (553,383 kg), round weight) that was implicitly adopted by Amendment 46 and was not examined by this interim analysis.

In January 2021, the Council took final action on this framework action, consistent with the most recent interim analysis for gray triggerfish, and recommendations from the Council's SSC, the SEFSC, and the Council's Reef Fish Advisory Panel (Reef Fish AP) to increase the commercial and recreational catch limits for Gulf gray triggerfish, in order to achieve OY consistent with the requirements of the Magnuson-Stevens Act.

Management Measures Contained in This Proposed Rule

This proposed rule would revise the commercial and recreational ACLs and ACTs consistent with the interim analysis and the Council's SSC, SEFSC, and the Council's Reef Fish AP recommendations.

Commercial ACL and ACT

If implemented, this proposed rule would increase the Gulf gray triggerfish commercial ACL from 64,100 lb (29,075 kg), round weight, to 95,949 lb (43,522 kg), round weight, for the 2021, and subsequent fishing years based on the current ACL sector allocation of 21 percent commercial. To determine the new ACT, the Council used its ACL/ACT control rule to determine the buffer to be applied to the commercial ACL to account for updated information. Application of the control rule indicated that an 8 percent buffer is appropriate between the commercial ACL and ACT. This is an increase from the current buffer of 5 percent. Using a more recent time series, the control rule yielded a larger buffer due to the number of times sector landings exceeded the commercial ACL during the time series, current stock status (the stock is rebuilding), and the precision of landings data. The 8 percent buffer applied to the proposed commercial ACL, revises the commercial ACT (commercial quota) from 60,900 lb (27,624 kg), round weight to 88,273 lb (40,040 kg), round weight, for the 2021, and subsequent fishing years. The increased buffer between the commercial ACL and ACT is expected to reduce the risk of the commercial sector exceeding its ACL as well as reduce the likelihood of overfishing the gray triggerfish stock. NMFS notes that the commercial sector has never exceeded the commercial ACL that is proposed in this rule.

Recreational ACL and ACT

If implemented, this proposed rule would increase the Gulf gray triggerfish recreational ACL from 241,200 lb (109,406 kg), round weight, to 360,951 lb (163,725 kg), round weight, for the 2021, and subsequent fishing years based on the ACL sector allocation of 79 percent recreational. To determine the new recreational ACT, the ACL/ACT control rule was applied to determine the buffer using updated information. The control rule yielded a 24 percent buffer between the recreational ACL and ACT. This is an increase from the current 10 percent buffer. The reason for the buffer increase was the result of past ACL overages, the stock is rebuilding, a more recent time series being applied, and the precision of landings data. When the buffer is applied to the proposed recreational ACL, the ACT would be increased from 217,100 lb (98,475 kg), round weight, to 274,323 lb (124,431 kg), round weight, for the 2021, and subsequent fishing years.

NMFS notes that recreational landings in the 2013, 2016, and 2018 fishing years, have exceeded the recreational ACL proposed in this rule. The increased buffers between the recreational ACL and ACT are expected to reduce the risk of the recreational sector exceeding its ACL.

Measure in the Framework Action but not Codified in This Proposed Rule

In addition to the other measures contained in this proposed rule, the framework action would also revise the Gulf gray triggerfish stock ABC. As a result of the gray triggerfish interim analysis, and the recommendation of the Council's SSC, the framework action would increase the Gulf gray triggerfish stock ABC from 305,300 lb (138,482 kg), round weight, to 456,900 lb (207,246 kg), round weight. The stock ACL would remain equal to the stock ABC. A buffer between the stock ABC and ACL was not recommended by the Council's Reef Fish AP as a result of wanting to retain the management approach currently in use for gray triggerfish by the Council of setting the stock ACL equal to the ABC. In addition, the increased ABC is 37.5 percent of the OFL (1,220,000 lb (553,383 kg), round weight). This large difference between the ABC and OFL reduces the risk of overfishing of the gray triggerfish stock.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the framework action, the FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination follows.

A description of this proposed rule, why it is being considered, and the objectives of this proposed rule are contained in the preamble. The Magnuson-Stevens Act provides the statutory basis for this proposed rule.

This proposed rule would apply to all federally-permitted commercial vessels and recreational anglers that fish for or harvest gray triggerfish in Federal waters of the Gulf. It would not directly apply to or regulate charter vessels and headboats (for-hire vessels). For-hire vessels sell fishing services to recreational anglers. The proposed changes to the gray triggerfish management measures would not directly alter the services sold by these vessels. Any change in demand for these fishing services, and associated economic effects, as a result of this proposed rule would be a consequence of a behavioral change by anglers, secondary to any direct effect on anglers and, therefore, an indirect effect of the proposed rule. Because the effects on for-hire vessels would be indirect, they

fall outside the scope of the RFA. Furthermore, for-hire captains and crew are allowed to retain gray triggerfish under the recreational bag limit; however, they are not allowed to sell these fish. As such, for-hire captains and crew would be directly affected only as recreational anglers. Recreational anglers who would be directly affected by this proposed rule are not considered small entities under the RFA, and are, therefore, outside the scope of this analysis. 5 U.S.C. 603. Small entities include ''small businesses,'' ''small organizations,'' and ''small governmental jurisdictions.'' 5 U.S.C. 601(6) and 601(3)–(5). Recreational anglers are not businesses, organizations, or governmental jurisdictions. In summary, only the impacts on commercial vessels will be further discussed.

As of December 8, 2020, there were 831 vessels with Federal limited access valid or renewable Gulf reef fish permits, 62 of which had longline endorsements. On average from 2015 through 2019, there were 263 federally permitted commercial vessels each year with reported landings of gray triggerfish in the Gulf. Their average annual vessel-level gross revenue from all species for 2015 through 2019 was approximately $158,000 (2019 dollars) and gray triggerfish accounted for less than 0.3 percent of this revenue. The maximum annual revenue from all species reported by a single one of the commercial vessels that landed Gulf gray triggerfish from 2015 through 2019 was approximately $2.37 million (2019 dollars).

For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide. All of the commercial fishing businesses directly regulated by this proposed rule are believed to be small entities based on the NMFS size standard. No other small entities that would be directly affected by this rule have been identified.

This proposed rule would modify the commercial and recreational ACLs and ACTs for gray triggerfish consistent with the most recent interim analysis for gray triggerfish, and recommendations from the Council's SSC, the SEFSC, and the Council's Reef Fish AP. Under the proposed rule, the commercial ACT would increase by 27,373 lb (12,416 kg), round weight, which if harvested in full, would correspond to an estimated increase in annual ex-vessel revenue of $56,115 (2019 dollars). Divided by the average number of commercial vessels with reported landings of gray triggerfish from 2015 through 2019, this would be an annual increase of approximately $213 per vessel. Economic benefits to each vessel may vary based on individual fishing practices. However, such distributional effects cannot be quantified with available data. If annual commercial landings are less than the proposed new ACT, the positive economic effects associated with this rule would be reduced accordingly.

The information provided above supports a determination that this proposed rule would not have a significant adverse economic impact on a substantial number of small entities. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, no new reporting, record-keeping, or other compliance requirements are introduced by this proposed rule. This proposed rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 622

Annual catch limit, Fisheries, Fishing, Gray triggerfish, Gulf, Quota, Reef fish.

Dated: April 16, 2021.

Samuel D. Rauch III,

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

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

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

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

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

■ 2. In § 622.39, revise paragraph (a)(1)(vi) to read as follows:

§ 622.39 Quotas.

* * * * *

(a) * * *

(1) * * *

(vi) Gray triggerfish—88,273 lb (40,040 kg), round weight.

* * * * *

■ 3. In § 622.41, revise the last sentence of paragraph (b)(1) and revise paragraph (b)(2)(iii) to read as follows:

§ 622.41 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (AMs).

* * * * *

(b) * * *

(1) * * * The commercial ACL is 95,949 lb (43,522 kg), round weight.

(2) * * *

(iii) The recreational ACL for gray triggerfish is 360,951 lb (163,725 kg), round weight. The recreational ACT for gray triggerfish is 274,323 lb (124,431 kg), round weight.

* * * * *

[FR Doc. 2021–08248 Filed 4–20–21; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 86, No. 75
Wednesday, April 21, 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

Agricultural Marketing Service

[Document Number AMS–TM–21–0034]

Supply Chains for the Production of Agricultural Commodities and Food Products

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice; request for public comments.

SUMMARY: On February 24, 2021, President Biden issued an Executive Order on ''America's Supply Chains,'' which directs several Federal agency actions to secure and strengthen America's supply chains. One of these directions is for the Secretary of Agriculture (the Secretary) to submit, within one year, a report to the President that assesses the supply chains for the production of agricultural commodities and food products. This notice requests comments and information from the public to assist the U.S. Department of Agriculture (USDA) in preparing the report required by the Executive Order. Through this notice, USDA is also requesting public comment to inform our thinking regarding how stimulus relief programs and spending related to food supply chain resilience as authorized by the Consolidated Appropriations Act, 2021 (CAA), and the American Rescue Plan Act of 2021 (ARPA) can help to increase durability and resilience within the U.S. food supply.

DATES: Comments must be received by May 21, 2021.

ADDRESSES: All written comments in response to this notice should be posted online at *www.regulations.gov.* Comments received will be posted without change, including any personal information provided. All comments should reference the docket number AMS–TM–21–0034, the date of submission, and the page number of this issue of the **Federal Register**. Comments may also be sent to Dr. Melissa R. Bailey, Agricultural Marketing Service, USDA, Room 2055–S, STOP 0201, 1400 Independence Avenue SW, Washington, DC 20250–0201. Comments will be made available for public inspection at the above address during regular business hours or via the internet at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Melissa R. Bailey, Agricultural Marketing Service, at (202) 205–9356; or by email at *melissa.bailey@usda.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On February 24, 2021, President Biden issued Executive Order 14017, ''America's Supply Chains'' (86 FR 11849) (E.O. 14017). E.O. 14017 focuses on the need for resilient, diverse, and secure supply chains to ensure U.S. economic prosperity and national security. Such supply chains are needed to address conditions that can reduce critical manufacturing capacity and the availability and integrity of critical goods, products, and services. In relevant part, E.O. 14017 directs that, within one year, the Secretary shall submit a report to the President, through the Assistant to the President for National Security Affairs (APNSA) and the Assistant to the President for Economic Policy (APEP), on the supply chains for the production of agricultural commodities and food products. This notice requests comments and information from the public to assist USDA in preparing the report required by E.O. 14017. Further, USDA will use public comments received through this notice to inform our thinking regarding how stimulus relief programs and spending related to food supply chain resilience as authorized by the CAA and the ARPA can help to increase durability and resilience within the U.S. food supply. We are particularly interested in comments addressing local and regional food systems, creating new market opportunities (including for value-added agriculture and value-added products), facilitating fair and competitive markets (including traceability and supply chain transparency), advancing efforts to transform the food system, meeting the needs of the agricultural workforce, supporting and promoting consumers' nutrition security, particularly for low-income populations, and supporting the needs of socially disadvantaged and small to mid-sized producers and processors.

In developing this report, the Secretary will consult with the heads of appropriate agencies, and will be advised by all relevant components of USDA, including but not limited to the Office of the Chief Economist, Office of Homeland Security, Agricultural Marketing Service, Animal and Plant Health Inspection Service, Food Safety and Inspection Service, Agricultural Research Service, Economic Research Service, National Institute of Food and Agriculture, Rural Development, Farm Service Agency, Risk Management Agency, Natural Resources Conservation Service, Food and Nutrition Service, and Foreign Agricultural Service.

II. Written Comments

USDA is particularly interested in comments and information directed to the policy objectives listed in E.O. 14017 as they affect agricultural and food products supply chains, including but not limited to the following elements:

(i) The critical goods and materials underlying agricultural and food product supply chains. Under section 6(b) of E.O. 14017, ''critical goods and materials'' means goods and raw materials currently defined under statute or regulation as ''critical'' materials, technologies, or infrastructure;

(ii) other essential goods and materials underlying agricultural and food product supply chains, including digital products, and infrastructure. Under section 6(d) of E.O. 14017, ''other essential goods and materials'' means those that are essential to national and economic security, emergency preparedness, or to advance the policy set forth in section 1 of E.O. 14017, but not included within the definition of ''critical goods and materials.'' USDA also will consider ''other essential goods and materials'' relative to nutrition security given its related importance to national and economic security. USDA is particularly interested in comments on the following goods and materials pertaining to agricultural and food supply chain resilience including, but not limited to: Seed, fertilizer, pesticides, livestock/animal health, feed and feed additives, plant health, soil

health, water (availability, quality, access, infrastructure), energy (availability, access, infrastructure), viability of pollinators, the agricultural workforce (sufficiency, reliability, documentation, health and well-being), access to capital/financing, access to farm production tools (including for farmers interested in value-added agriculture such as USDA organic certification), access to critical food distribution assets (shipping containers, cold chain equipment, and materials such as packaging) and technology, access to food processing and markets (including traceability and transparency), and access to training, education, and technical assistance;

(iii) the manufacturing or other capabilities necessary to produce the materials identified in subsections (i) and (ii) of this section, including emerging capabilities. USDA is particularly interested in comments on the processing and distribution, capacity, and access issues associated with food production across all agricultural commodities, the varying scales at which processing is available (including availability for small to mid-size producers), the geographic distribution of such processing (*e.g.,* availability to local and regional producers and food hubs), access to transportation hubs and export facilities, and cold chain infrastructure and capacity, access to packaging (including the availability of sustainable packaging), as well as the ownership and financial viability of such facilities;

(iv) the defense, intelligence, cyber, homeland security, health, climate, environmental, natural, market, economic, geopolitical, human-rights or forced-labor risks or other contingencies that may disrupt, strain, compromise, or eliminate the supply chain—including risks posed by supply chains' reliance on digital products that may be vulnerable to failures or exploitation, and risks resulting from the elimination of, or failure to develop domestically, the capabilities identified in subsection (iii) of this section—and that are sufficiently likely to arise so as to require reasonable preparation for their occurrence;

(v) the resilience and capacity of American manufacturing supply chains, including food processing (*e.g.,* meat, poultry, and seafood processing) and distribution, and the industrial and agricultural base—whether civilian or defense—of the United States to support national, economic, and nutrition security, emergency preparedness, and the policy identified in section 1 of E.O. 14017, in the event any of the contingencies identified in subsection (iv) of this section occurs, including an assessment of:

(A) The manufacturing or other needed capacities of the United States, including the ability to modernize to meet future needs, including food processing (such as meat, poultry, and seafood processing) and distribution;

(B) gaps in domestic manufacturing capabilities, including nonexistent, extinct, threatened, or single-point-of-failure capabilities;

(C) supply chains with a single point of failure, single or dual suppliers, or limited resilience, especially for subcontractors, as defined by section 44.101 of title 48, Code of Federal Regulations (Federal Acquisition Regulation). USDA is particularly interested in comments related to the role of market concentration and consolidation in agricultural sectors and how it affects food system resilience, including potential system failures in the face of supply chain disruptions;

(D) the location and geographic distribution of key manufacturing and production assets, with any significant risks identified in subsection (iv) of this section posed by the assets' physical location or the distribution of these facilities. USDA is interested in comments on the risks associated with the current geographic distribution and diversification of where U.S. crops and livestock are grown/raised, processed, and marketed;

(E) exclusive or dominant supply of critical goods and materials and other essential goods and materials, as identified in subsections (i) and (ii) of this section, by or through nations that are, or are likely to become, unfriendly or unstable;

(F) the availability of substitutes or alternative sources for critical goods and materials and other essential goods and materials, as identified in subsections (i) and (ii) of this section. For example, USDA encourages commenters to consider agricultural products that could be domestically grown but are not practically available today for various reasons, and to describe whether and how such products (or their alternatives) could be made available through supply chain resilience efforts;

(G) current domestic education and manufacturing workforce skills for the relevant sector and identified gaps, opportunities, and potential best practices in meeting the future workforce needs for the relevant sector;

(H) the need for research and development capacity to sustain leadership in the development of critical goods and materials and other essential goods and materials, as identified in subsections (i) and (ii) of this section. USDA is particularly interested in comments related to education, technical assistance, capacity building, organizational development, and support necessary for success in U.S. agriculture and food production, processing, distribution, and marketing, including how to best target support for socially disadvantaged producers and processors, tribal communities, small businesses, beginning farmers and ranchers, and other key stakeholder groups;

(I) the role of transportation systems in supporting existing supply chains and risks associated with those transportation systems; and

(J) the risks posed by climate change to the availability, production, or transportation of critical goods and materials and other essential goods and materials, as identified in subsections (i) and (ii) of this section. Given the risks posed, USDA is particularly interested in the potential to retool, reengineer, or develop new capacity that would address the risks, improve efficiency, and have a climate benefit due to lower energy use, less food waste, or hasten capture of by-products and co-products (among other benefits).

(vi) allied and partner actions, including whether United States allies and partners have also identified and prioritized the critical goods and materials and other essential goods and materials identified in subsections (i) and (ii) of this section, and possible avenues for international engagement;

(vii) the primary causes of risks for any aspect of the agricultural and food production supply chains assessed as vulnerable pursuant to subsection (v) of this section;

(viii) a prioritization of the critical goods and materials and other essential goods and materials, including digital products, identified in subsections (i) and (ii) of this section for the purpose of identifying options and policy recommendations. The prioritization shall be based on statutory or regulatory requirements; importance to national, economic, and nutrition security, emergency preparedness, and the policy set forth in section 1 of E.O. 14017;

(ix) specific policy recommendations important to transforming the food system and increasing reliance in the supply chain for the sector. Such recommendations may include sustainably reshoring supply chains and developing domestic supplies, cooperating with allies and partners to identify alternative supply chains, building redundancy into domestic supply chains, ensuring and enlarging stockpiles, developing workforce capabilities, enhancing access to

financing, expanding research and development to broaden supply chains, addressing risks due to vulnerabilities in digital products relied on by supply chains, addressing risks posed by climate change, strengthening supply chains' ability to promote nutrition security, and any other recommendations. For example, as a part of this assessment, USDA is interested in recommendations that could improve local and regional food production, processing, packaging, and distribution, particularly for small to mid-sized producers and processors; support national nutrition security and health; address agricultural workforce needs; strengthen market transparency (such as traceability); and address disproportionate impacts on socially disadvantaged communities. As USDA implements stimulus relief programs and spending authorized by the CAA and ARPA, we seek public comments on targeting funds toward food supply chain resiliency. USDA's initial thinking includes, but is not limited to, funding, through a combination of grants or loans, needs such as: Supply chain retooling to address multiple needs at once (*i.e.,* achieving both climate benefits and addressing supply gaps or vulnerabilities concurrently), expansion of local and regional food capacity and distribution (*e.g.,* hubs, cooperative development, cold chain improvements, infrastructure), development of local and regional meat and poultry processing and seafood processing and distribution, and food supply chain capacity building for socially disadvantaged communities. USDA notes that we will also consider public comments received during USDA's March 19, 2021, listening session and associated written comments on Coronavirus Response Grants related to CAA funding as part of the information considered for this Executive Order report;

(x) any executive, legislative, regulatory, and policy changes and any other actions to strengthen the capabilities identified in subsection (iii) of this section, and to prevent, avoid, or prepare for any of the contingencies identified in subsection (iv) of this section; and

(xi) proposals for improving the Government-wide effort to strengthen supply chains, including proposals for coordinating actions with ongoing efforts that could be considered duplicative of the work of E.O. 14017 or with existing Government mechanisms that could be used to implement E.O. 14017 in a more effective manner.

USDA encourages commenters, when addressing the elements above, to structure their comments using the same text as identifiers for the areas of inquiry to which their comments respond. This would assist USDA in more easily reviewing and summarizing the comments received in response to these specific comment areas. For example, a commenter submitting comments responsive to ''(i) critical and essential goods and materials underlying agricultural and food product supply chains'' would use that same text as a heading in the public comment followed by the commenter's specific comments in this area.

III. Requirements for Written Comments

The *http://www.regulations.gov* website allows users to provide comments by filling in a ''Type Comment'' field or by attaching a document using an ''Upload File'' field. USDA prefers that comments be provided in an attached document. USDA prefers submissions in Microsoft Word (.doc files) or Adobe Acrobat (.pdf files). If the submission is in an application format other than Microsoft Word or Adobe Acrobat, please indicate the name of the application in the ''Type Comment'' field. Please do not attach separate cover letters to electronic submissions; rather, include any information that might appear in a cover letter within the comments. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file, so that the submission consists of one file instead of multiple files. Comments (both public comments and non-confidential versions of comments containing business confidential information) will be placed in the docket and open to public inspection. Comments may be viewed on *http://www.regulations.gov* by entering docket number AMS–TM–21–0034 in the search field on the home page. All filers should name their files using the name of the person or entity submitting the comments. Anonymous comments are also accepted. Communications from agencies of the United States Government will not be made available for public inspection. Anyone submitting business confidential information should clearly identify the business confidential portion at the time of submission, file a statement justifying nondisclosure and referring to the specific legal authority claimed, and provide a non-confidential version of the submission. The nonconfidential version of the submission will be placed in the public file on *http://www.regulations.gov.* For comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters ''BC.'' Any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL'' on the top of that page. The non-confidential version must be clearly marked ''PUBLIC.'' The file name of the nonconfidential version should begin with the character ''P.'' The ''BC'' and ''P'' should be followed by the name of the person or entity submitting the comments or rebuttal comments. If a public hearing is held in support of this supply chain assessment, a separate **Federal Register** notice will be published providing the date and information about the hearing.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2021–08152 Filed 4–20–21; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: School Meals Operations Study: Evaluation of the COVID–19 Child Nutrition Waivers and Child Nutrition Programs

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on this proposed information collection. This collection is a revision of a currently approved collection for the School Meals Operations (SMO) Study (OMB control number 0584–0607, expiration date 08/31/2022) with updated survey instruments for school year (SY) 2021–2022. This study will collect data from State agencies and public school food authorities (SFAs), including disaggregated administrative data and data on the continued use and effectiveness of the CN COVID–19 waivers.

DATES: Written comments must be received on or before June 21, 2021.

ADDRESSES: Comments may be sent to: Holly Figueroa, Food and Nutrition Service, U.S. Department of Agriculture, 1320 Braddock Pl, 5th floor, Alexandria, VA 22314. Comments may also be submitted via fax to the attention of Holly Figueroa at 703–305–2576 or via email to *Holly.Figueroa@usda.gov.*

Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov,* and follow the online instructions for submitting comments electronically.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection should be directed to Holly Figueroa at *holly.figueroa@usda.gov* or 703–305–2105.

SUPPLEMENTARY INFORMATION: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions that were used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Title: School Meals Operations Study: Evaluation of the COVID–19 Child Nutrition Waivers and Child Nutrition Programs (formerly entitled School Meals Operations Study: State Agency COVID–19 Child Nutrition Waivers Evaluation).

Form Number: N/A.

OMB Number: 0584–0607.

Expiration Date: 08/31/2022.

Type of Request: Revision of a currently approved collection.

Abstract: FNS administers the school-based Child Nutrition (CN) Programs (*i.e.,* the school meal programs) in partnership with States and local SFAs. Section 28(a) of the Richard B. Russell National School Lunch Act authorizes the U.S. Department of Agriculture Secretary to conduct annual national performance assessments of the school meal programs. FNS plans to conduct this annual assessment through the School Meals Operations (SMO) Study in SY 2021–2022. FNS will also use the SMO Study to fulfill States' reporting requirements on the nationwide waivers approved by FNS pursuant to section 2202 of the Families First Coronavirus Response Act (FFCRA) (Pub. L. 116–127). This notice covers the second iteration of the SMO Study, which will collect data from State and local agencies on the CN COVID–19 waivers as well as data on state and local CN program operations during SYs 2020–2021 and 2021–2022. Participation in the SMO Study will fulfill States' statutory reporting requirements for the CN COVID–19 nationwide waivers used in fiscal year (FY) 21 and FY 22, which correspond roughly to SYs 2020–21 and 2021–22, respectively.

The SMO Study is a revision of the previously approved Child Nutrition Program Operations Study II (CN–OPS II, OMB control number 0584–0607). It is designed to collect timely data on policy, administrative, and operational issues in the school-based CN Programs, which contributes to budget preparation, development and implementation of program policy and regulations, and identification of areas for technical assistance and training. Because the COVID–19 pandemic changed the way that school meal programs operated for SY 2020–2021, with other CN programs such as the Child and Adult Care Food Program and the Summer Food Service Program being used in place of or in combination with the National School Lunch and School Breakfast Programs (NSLP and SBP) to provide meals to students, the SMO Study will collect administrative and web survey data from States on each of these programs. Specifically, this study will help FNS obtain:

1. General descriptive data on the characteristics of CN Programs to inform the budget process and answer questions about topics of current policy interest;

2. Data on program operations to identify potential topics for training and technical assistance for SFAs and State Agencies (SAs) responsible for administering the CN programs;

3. Administrative data to identify program trends and predictors;

4. Information on the use and effectiveness of the CN COVID–19 waivers, which will be used to satisfy States' reporting requirements on these waivers under FFCRA.

The activities to be conducted subject to this notice include:

- Collecting disaggregated administrative data for FY 2021 and FY 2022 from 67 State Agency Directors that are currently only reported in aggregate on forms FNS–10, Report of School Program Operations, FNS–418, Report of the Summer Food Service Program for Children, and FNS–44, Report of the Child and Adult Care Food Program (which are approved under OMB# 0584–0594, Food Programs Reporting System (FPRS), expiration date 07/31/2023)
- Conducting two web surveys of 67 State Agency Directors to meet the statutory reporting requirements of the CN COVID–19 waivers separately for SY 2020–21 and SY 2021–22 within the one-year timelines set by the FFCRA
- Conducting one web survey of 1,266 public SFA Directors

The first year of the SMO Study, which sought clearance for data collection in SY 2020–2021, was cleared by the Office of Management and Budget on March 4, 2021 (School Meals Operations Study: State Agency COVID–19 Child Nutrition Waivers Evaluation, OMB control number 0584–0607, expiration date 08/31/2022). The Year 1 collection only included the state-level data collection components (web survey and administrative data collection) because it was repurposed to meet States' statutory reporting requirements for the nationwide CN COVID–19 waivers by gathering information on the use and effectiveness of the waivers from March–September 2020. This notice covers the second iteration of the SMO Study, which intends to collect data in SY 2021–2022 from both States and public SFAs and in SY 2022–23 from States only. The administrative data collection components subject to this notice will cover FY 2021 (October 2020–September 2021) and FY 2022 (October 2021–September 2022), which correspond roughly to SYs 2020–21 and 2021–22, respectively, while the web surveys will ask about program operations and the use and impacts of the CN COVID–19 waivers during SYs 2020–2021 and 2021–2022. The State-level surveys and administrative data collections will be used to satisfy States' reporting requirements on the CN COVID–19 nationwide waivers pursuant to the FFCRA.

Note: Personally identifiable information (PII) will not be used to retrieve survey records or data.

Affected Public: State, Local, and Tribal Governments: Respondent groups identified include: (1) SFA Directors for public schools, and (2) State Agency Directors from all 50 States, 5 territories and the District of Columbia.

Estimated Number of Respondents: The total estimated number of respondents is 1,339. This includes (1) 67 State Agency Directors (in some States, CN programs are administered by multiple agencies); the State Agency Directors are expected to participate in both of the administrative data collections (FY 21 and FY 22) and State

Agency Director surveys subject to this notice (3 of the 67 State Agency Directors are also expected to participate in the pretest, which will only be conducted once), and (2) 1,272 SFA Directors. Six SFA Directors are expected to participate in the pre-test of the SFA Director web survey; these pretest participants are unique respondents and will not be included in the sample for the SFA survey. An additional 1,266 public SFA Directors will be included in the sample for the SFA Director web survey, of which 1,012 are expected to respond. The total number of respondents also includes 254 non-respondents whom FNS expects will not respond to the study activities.

Estimated Number of Responses per Respondent: State Agency Director respondents will be asked to complete an initial telephone meeting and respond to the FNS–10, –418 and –44 administrative data requests one time annually (two times total, in SY 2021–22 and SY 2022–23). SFA Director respondents will be asked to complete their web survey one time in SY 2021–22, while State Agency Directors will be asked to complete two web surveys in SY 2021–22 (fall of 2021 and spring/summer of 2022), each of which will focus on different sets of CN COVID–19 nationwide waivers in order to meet the statutory reporting timeline of one-year for each set of waivers under the FFCRA. In the event of non-response, State Agency Directors may receive reminder emails, a phone call, and a last chance postcard until the target of 67 respondents is reached. Similarly, SFA Directors who do not respond may receive reminders via email, phone, or post card until the target number of 1,012 respondents is reached. FNS estimates that respondents will average 6.65 responses (7,211 responses/1,085 respondents) across the entire collection, with non-respondents averaging 10.71 responses (2,720 responses/254 non-respondents). Across all participants in the collection (respondents and non-respondents) the average number of responses is 7.42 (9,931 responses/1,339 total respondents).

Estimated Total Annual Responses: 9,931.

Estimated Time per Response: The estimated time per response ranges from 3 minutes (0.0501 hours) to 6 hours depending on the instrument, as shown in the table below, with an average estimated time for all participants of 20 minutes (0.34 hours) per response.

Estimated Total Annual Burden on Respondents: 3,408.40 hours. See the table below for estimated total annual burden for each type of respondent.

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Table 1. Total estimated annualized burden – hours.

			Responsive					Non-Responsive					All
Type of respondents	Type of survey instruments	Sample Size	Number of respondents	Frequency of response	Total Annual responses	Hours per response	Annual burden (hours)	Number of Non-respondents	Frequency of response	Total Annual responses	Hours per response	Annual burden (hours)	Total Annual hour burden
State Agency Directors	Web survey and administrative data pre-test and debrief	3	3	1	3	4	12	0	0	0	0	0	12.00
	Study support email (from FNS RO to SA)	67	67	2	134	0.0501	6.7134	0	0	0	0	0	6.71
	Study support email (from SA to SFA)	67	67	1	67	0.33	22.11	0	0	0	0	0	22.11
	Advance letter	67	67	1	67	0.0501	3.3567	0	0	0	0	0	3.36
	Advance email	67	67	2	134	0.0501	6.7134	0	0	0	0	0	6.71
	Initial Telephone Meeting Agenda	67	67	2	134	0.33	44.22	0	0	0	0	0	44.22
	FNS-10 Administrative Data Request for FY 2021 and FY 2022	55	55	2	110	6.0	660	0	0	0	0	0	660.00
	FNS-418 Administrative Data Request for FY 2021 and FY 2022	53	53	2	106	4.0	424	0	0	0	0	0	424.00
	FNS-44 Administrative data request for FY 2021 and FY 2022	55	55	2	110	6.0	660	0	0	0	0	0	660.00
	Web survey for FY 21 (SY 2020-21) and FY 22 (SY 2021 and 22)	67	67	2	134	1.0	134	0	0	0	0	0	134.00
	Brochure	67	67	2	134	0.0501	6.7134	0	0	0	0	0	6.71
	Invitation email	67	34	2	68	0.0501	3.4068	33	2	66	0.0501	3.3066	6.71
	Reminder email	33	24	4	96	0.0501	4.8096	9	2	18	0.0501	0.9018	5.71
	Telephone reminder script	12	8	2	16	0.0835	1.336	4	2	8	1	8	9.34
	Last chance post card	4	4	2	8	0.0501	0.401	0	0	0	0	0	0.40
SFA Directors	Web survey pre-test & debrief	6	6	1	6	1.0	6	0	0	0	0	0	6.00
	Study support email (from SA to SFA)	1,266	1,266	1	1266	0.0501	63.4266	0	0	0	0	0	63.43
	Advance letter and invitation	1,266	1,012	1	1012	0.0501	50.7012	254	1	254	0.0501	12.7254	63.43
	Web survey	1,266	1,012	1	1012	1.0	1012	254	1	254	0.0501	12.7254	1024.73
	Brochure	1,266	1,012	1	1012	0.0501	50.7012	254	1	254	0.0501	12.7254	63.43
	Invitation email	1,266	317	1	317	0.0501	16	949	1	949	0.0501	47.54	63.43
	Reminder email	949	570	2	1,140	0.0501	57.11	379	1	379	0.0501	19	76.10
	Telephone reminder script	379	95	1	95	0.0835	7.93	284	1	284	0.0835	24	31.65
	Last chance post card	284	30	1	30	0.0501	1.50	254	1	254	0.0501	13	14.23
TOTAL		**1,339**	**1,085**	**6.65**	**7,211**	**0.451**	**3,255.04**	**254**	**10.71**	**2,720**	**0.056**	**153.36**	**3,408.40**

Cynthia Long,

Acting Administrator, Food and Nutrition Service.

[FR Doc. 2021–08212 Filed 4–20–21; 8:45 am]

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DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration, U.S. Department of Commerce.

ACTION: Notice and opportunity for public comment.

SUMMARY: The Economic Development Administration (EDA) has received petitions for certification of eligibility to apply for Trade Adjustment Assistance from the firms listed below. Accordingly, EDA has initiated investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each of the firms contributed importantly to the total or partial separation of the firms' workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

SUPPLEMENTARY INFORMATION:

LIST OF PETITIONS RECEIVED BY EDA FOR CERTIFICATION OF ELIGIBILITY TO APPLY FOR TRADE ADJUSTMENT ASSISTANCE

[3/20/2021 through 4/13/2021]

Firm name	Firm address	Date accepted for investigation	Product(s)
The Albany Distilling Company, Inc	78 Montgomery Street, Albany, NY 12207.	3/25/2021	The firm produces alcoholic beverages.
Vincent Piazza, Jr. & Sons Seafood, Inc	1201 Sams Avenue, Harahan, LA 70123	3/30/2021	The firm processes and distributes seafood.
Advanced Tool, Inc	9169 River Road, Marcy, NY 13403	4/2/2021	The firm manufactures industrial tools.
BNL Technologies, Inc. d/b/a Micronet ...	20525 Manhattan Place, Torrance, CA 90501.	4/2/2021	The firm manufactures computer hard drives.
New England Union Company, Inc	107 Hay Street, West Warwick, RI 02893.	4/2/2021	The firm manufactures metal pipes and metal pipe fittings.

Any party having a substantial interest in these proceedings may request a public hearing on the matter. A written request for a hearing must be submitted to the Trade Adjustment Assistance Division, Room 71030, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than ten (10) calendar days following publication of this notice. These petitions are received pursuant to section 251 of the Trade Act of 1974, as amended.

Please follow the requirements set forth in EDA's regulations at 13 CFR 315.8 for procedures to request a public hearing. The Catalog of Federal Domestic Assistance official number and title for the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance for Firms.

Bryan Borlik,

Director.

[FR Doc. 2021–08176 Filed 4–20–21; 8:45 am]

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DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–59–2021]

Foreign-Trade Zone 18—San Jose, California; Application for Subzone Expansion; Lam Research Corporation; Newark, California

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the City of San Jose, grantee of FTZ 18, requesting an expansion of Subzone 18F on behalf of Lam Research Corporation in Newark, California. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a-81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on April 14, 2021.

Subzone 18F consists of the following sites: Site 1 (29.28 acres)—4650 Cushing Parkway, Fremont, Alameda County; Site 4 (14.82 acres)—1 and 101 Portola Avenue, Livermore, Alameda County; Site 5 (7.3 acres)—7364 Marathon Drive and 7150 Patterson Pass Road, Unit G, Livermore, Alameda County; Site 7 (0.91 acres)—6757 Las Positas Road, Livermore, Alameda County; Site 8 (0.44 acres)—7888 Marathon, Drive, Livermore, Alameda County; Site 9 (2.17 acres)—41707 Christy Street, Fremont, Alameda County; Site 12 (0.98 acres)—7650 Marathon Drive, Livermore, Alameda County; Site 13 (3.49 acres)—6551 West Schulte Road, Tracy, San Joaquin County; Site 14 (8.56 acres)—1201 Voyager Street, Livermore, Alameda County; Site 15 (2.77 acres)—20427 Corsair Boulevard, Hayward, Alameda County; and Site 16 (3.62 acres)—4405 Cushing Parkway, Fremont, Alameda County. The applicant is now requesting authority to expand the subzone to include an additional site (6.2 acres) located at 6753 Mowry Avenue, Newark, Alameda County, which would be designated as Site 17. The expanded subzone would be subject to the existing activation limit of FTZ 18.

In accordance with the FTZ Board's regulations, Qahira El-Amin of the FTZ Staff is designated examiner to review the application and make recommendations to the FTZ Board.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is June 1, 2021. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to June 15, 2021.

A copy of the application will be available for public inspection in the ''Reading Room'' section of the FTZ Board's website, which is accessible via *www.trade.gov/ftz.*

For further information, contact Qahira El-Amin at *Qahira.El-Amin@trade.gov.*

Dated: April 15, 2021.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2021–08260 Filed 4–20–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–885, C–533–886]

Polyester Textured Yarn from India: Rescission of Antidumping Duty and Countervailing Duty Administrative Reviews; 2019–2020

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) is rescinding the administrative reviews of the antidumping duty (AD) and countervailing duty (CVD) orders on polyester textured yarn from India for the periods of review (POR) July 1, 2019, through December 31, 2020 (AD) and May 3, 2019, through December 31, 2020 (CVD), based on the timely withdrawal of the requests for review.

DATES: Applicable April 21, 2021.

FOR FURTHER INFORMATION CONTACT: Samantha Kinney (AD) or Janae Martin (CVD), AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2285 or (202) 482–0238, respectively.

SUPPLEMENTARY INFORMATION:

Background

On January 5, 2021, Commerce published in the **Federal Register** a notice of opportunity to request administrative reviews of the AD and CVD orders on polyester textured yarn from India.[1] On February 1, 2021, Sanathan Textiles Private Limited (Sanathan) requested administrative reviews of the AD and CVD orders for the PORs July 1, 2019, through December 31, 2020 (AD), and May 3, 2019, through December 31, 2020 (CVD).[2] Pursuant to these requests, Commerce initiated AD and CVD administrative reviews with respect to Sanathan, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).[3] Subsequent to the initiation of these administrative reviews, Sanathan timely withdrew its requests for these reviews.[4] No other party requested an administrative review of the AD or CVD order on polyester textured yarn from India.

Rescission of Administrative Reviews

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the party that requested a review withdraws its request within 90 days of the date of publication of the notice of initiation. As stated above, Sanathan withdrew its requests for administrative reviews by the established 90-day deadline and there were no other requests for review. As a result, Commerce is rescinding these reviews in their entirety, in accordance with 19 CFR 351.213(d)(1).

Assessment

Commerce will instruct U.S. Customs and Border Protection (CBP) to assess antidumping and countervailing duties on all appropriate entries at rates equal to the cash deposit of estimated antidumping and countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, during the periods July 1, 2019, through December 31, 2020 (AD), and May 3, 2019, through December 31, 2020 (CVD), in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue assessment instructions to CBP no earlier than 35 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 and countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the presumption that reimbursement of antidumping and countervailing duties occurred and the subsequent assessment of doubled antidumping and countervailing duties.

Notification Regarding Administrative Protective Orders

This notice also serves as a final reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the 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.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(l) of the Act, and 19 CFR 351.213(d)(4).

Dated: April 16, 2021.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2021–08257 Filed 4–20–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–016]

Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Notice of Court Decision Not in Harmony With the Results of Antidumping Administrative Review; Notice of Amended Final Results

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On January 29, 2021, the U.S. Court of International Trade (CIT) issued its final judgment in *Shandong Yongtai Group Co., Ltd.* v. *United States,* Consol. Court No. 18–00077, sustaining the Department of Commerce (Commerce)'s first remand results pertaining to the administrative review

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 86 FR 291 (January 5, 2021).

[2] *See* Sanathan's Letters, ''Polyester Texture yarn from India (A–533–885)—Request for Administrative Review of Anti-dumping duty order on behalf of Sanathan Textiles,'' dated February 1, 2021; and ''Polyester Texture yarn from India (C–533–886)—Request for Administrative Review of Countervailing duty order on behalf of Sanathan Textiles,'' dated February 1, 2021.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 86 FR 12599 (March 4, 2021).

[4] *See* Sanathan's Letters, ''Polyester Texture yarn from India (A–533–885)—Withdrawal Request for Administrative Review of Anti-dumping duty order on behalf of Sanathan Textiles,'' dated March 12, 2021; and ''Polyester Texture yarn from India (C–533–886)—Withdrawal Request of Request for Administrative Review of Countervailing duty order on behalf of Sanathan Textiles,'' dated March 12, 2021.

of the antidumping duty (AD) order on certain passenger vehicle and light truck tires (passenger tires) from the People's Republic of China (China) covering the period of review (POR) January 27, 2015, through July 31, 2016. Commerce is notifying the public that the CIT's final judgment is not in harmony with Commerce's final results of the administrative review, and that Commerce is amending the final results with respect to the dumping margin assigned to Shandong Yongtai Chemical Co., Ltd. and its successor-in-interest Shandong Yongtai Group Co., Ltd.

DATES: Applicable February 8, 2021.

FOR FURTHER INFORMATION CONTACT: Toni Page, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1398.

SUPPLEMENTARY INFORMATION:

Background

On March 16, 2018, Commerce published its *Final Results* in the 2015–2016 AD administrative review of passenger tires from China.[1] In that proceeding, Commerce granted separate rate status to Shandong Yongtai Group Co., Ltd. (Yongtai Group), but did not grant separate rate status to Shandong Yongtai Chemical Co., Ltd. (Yongtai Chemical) because Yongtai Group did not identify any record information that would allow Commerce to determine that Yongtai Chemical merited a separate rate or whether Yongtai Group was the successor-in-interest of Yongtai Chemical.[2] Yongtai Group argued that it was the successor-in-interest of Yongtai Chemical and that Commerce should have granted separate status to Yongtai Chemical as well.[3]

Yongtai Group appealed Commerce's *Final Results.* On November 27, 2019, the CIT remanded the *Final Results* to Commerce to further consider the separate rate status of Yongtai Chemical and/or to consider whether Yongtai Group was the successor-in-interest to Yongtai Chemical.[4] Following the CIT's *Passenger Tires AR1 Remand Order,* Commerce determined it was appropriate to reopen the record for this remand to solicit information from Yongtai Group to determine whether it is the successor-in-interest to Yongtai Chemical. On January 28, 2020, Commerce issued a supplemental questionnaire to Yongtai Group soliciting information needed to perform our successor-in-interest analysis.[5] On February 11, 2020, Yongtai Group filed its response to Commerce's questionnaire.[6]

In its final remand redetermination, issued in March 2020, Commerce determined, after reconsidering the record evidence submitted by Yongtai Group in its separate rate application and in the Yongtai Group Remand SQR, that there was sufficient information on the record to find Yongtai Group to be the successor-in-interest to Yongtai Chemical and grant separate rate status to Yongtai Chemical.[7] The CIT sustained Commerce's final redetermination and severed this action from the consolidated action with *Qingdao Sentury Co. Ltd.* v. *United States,* Court No. 18–00079 and *Pirelli Tyre Co. Ltd.* v. *United States,* Court No. 18–00080.[8]

Timken Notice

In its decision in *Timken,*[9] as clarified by *Diamond Sawblades,*[10] the Court of Appeals for the Federal Circuit held that, pursuant to section 516A(c) and (e) of the Tariff Act of 1930, as amended (the Act), Commerce must publish a notice of court decision that is not ''in harmony'' with a Commerce determination and must suspend liquidation of entries pending a ''conclusive'' court decision. The CIT's January 29, 2021, judgment constitutes a final decision of the CIT that is not in harmony with Commerce's *Final Results.* Thus, this notice is published in fulfillment of the publication requirements of *Timken.*

Amended Final Results

Because there is now a final court judgment, Commerce is amending its *Final Results* with respect to Yongtai Group and Yongtai Chemical as follows:

Exporter or producer	Estimated weighted-average dumping margin from final determination (percent)	Estimated weighted-average dumping margin for remand redetermination (percent)
Shandong Yongtai Group Co., Ltd. formerly known as Shandong Yongtai Chemical Co., Ltd	*	2.96

* Only Yongtai Group received a separate rate of 2.96 percent in the *Final Results.*

Cash Deposit Requirements

Commerce will issue revised cash deposit instructions to U.S. Customs and Border Protection (CBP).

Liquidation of Suspended Entries

Previously, the CIT enjoined Commerce from liquidating entries that were: (1) Exported by Shandong Yongtai Chemical Co., Ltd.; (2) the subject of the United States Department of Commerce's final determination in certain passenger vehicle and light truck tires from the PRC, 83 FR 11,690 (Mar. 16, 2018); (3) entered, or withdrawn from warehouse for consumption, on or after: (a) January 27, 2015, up to and including July 25, 2015; and (b) August 6, 2015, up to and including July 31, 2016. Because the CIT's ruling was not

[1] *See Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2015–2016,* 83 FR 11690 (March 16, 2018) (*Final Results*), and accompanying Issues and Decision Memorandum (IDM).

[2] *See Final Results* IDM at Comment 12.

[3] *Id.*

[4] *See Shandong Yongtai Group Co.* v. *United States,* 415 F. Supp. 3d. 1303 (CIT 2019) (*Passenger Tires AR1 Remand Order*).

[5] *See* Yongtai Group's Letter, ''Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China Supplemental Questionnaire Re: Shandong Yongtai Group Co., Ltd.,'' dated January 28, 2020.

[6] *See* Yongtai Group's Letter, ''Supplemental Questionnaire Response of Shandong Yongtai Group Co., Ltd. (formerly Shandong Yongtai Chemical Co., Ltd.), First Administrative Review of the Antidumping Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China (REMAND),'' dated February 11, 2020 (Yongtai Group Remand SQR).

[7] *See Final Results of Redetermination Pursuant to Court Remand, Shandong Yongtai Group Co.* v. *United States,* Consol. Ct. No. 18–00077, Slip Op. 19–150 (March 3, 2020).

[8] *See Shandong Yongtai Group Co.* v. *United States,* Consol. Ct. No. 18–00077, CIT Slip Op. 21–10 (January 29, 2021).

[9] *See Timken Co.* v. *United States,* 893 F.2d 337 (Fed. Cir. 1990) (*Timken*).

[10] *See Diamond Sawblades Manufacturers Coalition* v. *United States,* 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond Sawblades*).

appealed and was upheld by a final and conclusive court decision, the injunction enjoying liquidation of such entries has dissolved. Commerce intends to instruct CBP to assess antidumping duties on such entries, in accordance with 19 CFR 351.212(b). We will instruct CBP to assess antidumping duties on all such entries when the importer-specific ad valorem assessment rate is not zero or de minimis. Where an import-specific ad valorem assessment rate is zero or de minimis,[11] we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

Notification to Interested Parties

This notice is issued and published in accordance with sections 516A(c) and (e) and 777(i)(1) of the Act.

Dated: April 14, 2021.

Christian Marsh,

Acting Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2021–08259 Filed 4–20–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–094]

Refillable Stainless Steel Kegs From the People's Republic of China; Rescission of Countervailing Duty Administrative Review; 2019

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) is rescinding the first administrative review of the countervailing duty (CVD) order on refillable stainless steel kegs from the People's Republic of China (China) for the period of review (POR) December 13, 2019, through December 31, 2019, based on the timely withdrawal of the request for review.

DATES: Applicable April 21, 2021.

FOR FURTHER INFORMATION CONTACT: Theodore Pearson, 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) 482–2631.

SUPPLEMENTARY INFORMATION:

Background

On December 2, 2020, Commerce published a notice of opportunity to request an administrative review of the CVD order on refillable stainless steel kegs from China for the POR December 13, 2019, through December 31, 2019.[1] In accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(b), Commerce received a timely-filed request for an administrative review from Ningbo Master International Trade Co., Ltd. (Ningbo Master.[2] Commerce received no other requests for administrative review.

On February 4, 2021, pursuant to this request and in accordance with 19 CFR 351.221(c)(1)(i), Commerce published a notice initiating an administrative review of the CVD order on refillable stainless steel kegs from China with respect to Ningbo Master.[3] On March 30, 2021, Ningbo Master withdrew its request for an administrative review.[4]

Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the party or parties that requested a review withdraws the request within 90 days of the publication date of the notice of initiation of the requested review. As noted above, Ningbo Master withdrew its request for review within 90 days of the publication date of the notice of initiation. No other parties requested an administrative review of the order. Therefore, in accordance with 19 CFR 351.213(d)(1), we are rescinding this in its entirety.

Assessment

Commerce intends to instruct U.S. Customs and Border Protection (CBP) to assess countervailing duties on all appropriate entries of refillable stainless steel kegs from China during the POR. Countervailing duties shall be assessed at rates equal to the cash deposit of estimated countervailing 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 no earlier than 35 days after the date of publication of this notice in the **Federal Register**.

Notification Regarding Administrative Protective Orders

This notice serves as a reminder to all 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/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 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: April 16, 2021.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2021–08243 Filed 4–20–21; 8:45 am]

BILLING CODE 3510–DS–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; Application and Reports for Scientific Research and Enhancement Permits Under the Endangered Species Act

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 June 21, 2021.

ADDRESSES: Interested persons are invited to submit written comments to

[11] *See* 19 CFR 351.106(c)(2).

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 85 FR 77431 (December 2, 2020).

[2] *See* Ningbo Master's Letter, ''Refillable Stainless Steel Kegs from the People's Republic of China—Request for Administrative Review,'' dated December 31, 2020.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 86 FR 8166 (February 4, 2021).

[4] *See* Ningbo Master's Letter, ''Refillable Stainless Steel Kegs from the People's Republic of China—Withdrawal of Request for Administrative Review,'' dated March 30, 2021.

Adrienne Thomas, NOAA PRA Officer, at *Adrienne.thomas@noaa.gov.* Please reference OMB Control Number 0648–0402 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 Gary Rule, NOAA Fisheries, 1201 NE Lloyd Blvd. Suite 1100, Portland, OR 97232, (503) 230–5424 or *gary.rule@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) imposed prohibitions against the taking of endangered species. Section 10 of the ESA allows permits authorizing the taking of endangered species for research/enhancement purposes. The corresponding regulations established procedures for persons to apply for such permits. In addition, the regulations set forth specific reporting requirements for such permit holders. The regulations contain two sets of information collections: (1) Applications for research/enhancement permits, and (2) reporting requirements for permits issued.

The required information is used to evaluate the impacts of the proposed activity on endangered species, to make the determinations required by the ESA prior to issuing a permit, and to establish appropriate permit conditions. To issue permits under ESA Section 10(a)(1)(A), the National Marine Fisheries Service (NMFS) must determine that (1) such exceptions were applied for in good faith, (2) if granted and exercised, will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy set forth in Section 2 of the ESA.

II. Method of Collection

Information may be collected through the internet, email, of paper format.

III. Data

OMB Control Number: 0648–0402.

Form Number(s): None.

Type of Review: Regular submission (extension of a currently approved collection).

Affected Public: Federal government; State, local, or tribal government; business or other for-profit organizations.

Estimated Number of Respondents: 160.

Estimated Time per Response: Permit applications, 12 hours; permit modification requests 6 hours; annual or final reports, 2 hours.

Estimated Total Annual Burden Hours: 835.

Estimated Total Annual Cost to Public: $500 in recordkeeping/reporting costs.

Respondent's Obligation: Required to Obtain or Retain Benefits.

Legal Authority: The Endangered Species Act of 1973 (16 U.S.C. 1531 *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. 2021–08268 Filed 4–20–21; 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; StormReady, TsunamiReady, TsunamiReady Supporter, & StormReady Supporter Application Forms

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 June 21, 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 0648–0419 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 Melody Magnus or Doug Hilderbrand, StormReady Focal Points, National Weather Service, at *melody.magnus@noaa.gov* or *douglas.hilderbrand@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Weather Service (NWS) established the StormReady program in 1999 and the TsunamiReady program in 2002 to help communities, counties, Indian nations, universities and colleges, military bases, government sites, commercial enterprises and other groups reduce the potential for weather-related and tsunami hazards through advanced planning, education, and awareness. The program encourages

communities to take a new, proactive approach to improving local hazardous weather operations by providing emergency managers with clear-cut guidelines on how to improve their hazardous weather operations. By participating in this program, local agencies earn recognition for their jurisdiction by meeting guidelines established by the NWS in partnership with federal, state, and local emergency management professionals. Information and details on the StormReady and TsunamiReady programs are located at *https://www.weather.gov/stormready/* and *https://www.weather.gov/tsunamiready/.*

A Supporter is an organization, business, facility, or local government entity actively engaged in weather safety and preparedness that is unable to meet all the requirements of the full StormReady or TsunamiReady program. Sites may be eligible based on the bylaws of the local NWS StormReady Advisory Board and endorsement of local emergency management. A local StormReady Advisory Board has final approval for Supporter designation.

StormReady/TsunamiReady are voluntary programs that provide guidance and incentive to officials interested in improving their hazardous weather operations. The government will use the information collected by the StormReady/TsunamiReady application to determine whether a community has met all of the guidelines to receive StormReady/TsunamiReady recognition.

II. Method of Collection

The information is collected via a digital or paper form. The form is accessible on the internet in PDF. Requirements are verified by NWS staff via an in person or virtual site visit.

III. Data

OMB Control Number: 0648–0419.

Form Number(s): None.

Type of Review: Regular. Extension of a current information collection.

Affected Public: Government agencies, Tribal Nations, businesses or other for profit organizations.

Estimated Number of Respondents: 125 per year.

Estimated Time per Response: 1 hour for application; 1 hour to meet with National Weather Service representative.

Estimated Total Annual Burden Hours: 250 hours.

Estimated Total Annual Cost to Public: None.

Respondent's Obligation: Voluntary.

Legal Authority: None.

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. 2021–08266 Filed 4–20–21; 8:45 am]

BILLING CODE 3510–KE–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 Region Seabird-Fisheries Interaction Recovery Reporting

AGENCY: National Oceanic and 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 June 21, 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 0648–0456 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 Walter Ikehara, Fishery Information Specialist, NMFS Pacific Islands Region, 1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818, (808) 725–5175, *walter.ikehara@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension of a currently approved information collection.

The National Marine Fisheries Service (NMFS) implemented Federal regulations at 50 CFR 665.815(b) requiring Hawaii-based longline fisherman to safely handle and release short-tailed albatrosses (*Phoebastria albatrus*) (STAL) caught incidentally during fishing operations. These regulations satisfy the Terms and Conditions of the U.S. Fish and Wildlife Service's (USFWS) November 2000 ''Biological Opinion for the Effects of the Hawaii-based Longline Fleet on the Short-tailed Albatross (*Phoebastra albatrus*) [FWS 1–2–1999–F–02R]'' (revised November 18, 2002, October 8, 2004, and January 6, 2012) (BiOp) issued pursuant to Section 7 of the Endangered Species Act (ESA). Following the retrieval of the albatross from the ocean, the vessel operator must record the condition of the bird on a recovery data form. A veterinarian will use the information to provide advice to the vessel operator for caring for the bird. If the albatross is dead, the vessel operator must attach an identification tag to the carcass to assist U.S. Fish and Wildlife Service (USFWS) biologists in follow-up studies on the specimen. This collection is one of the terms and conditions contained in the Endangered Species Act Section 7 biological opinion

issued by USFWS and is intended to maximize the probability of the long-term survival of short-tailed albatross accidentally taken by longline gear.

II. Method of Collection

Respondents have a choice of either electronic or paper forms. Methods of submittal include email or electronic forms, or mail or facsimile transmission of paper forms within 72 hours of landing.

III. Data

OMB Control Number: 0648–0456.

Form Number(s): None.

Type of Review: Regular submission, extension of a current information collection.

Affected Public: Business or other for-profit organizations; individuals or households.

Estimated Number of Respondents: 1.

Estimated Time per Response: 3 hours.

Estimated Total Annual Burden Hours: 3.

Estimated Total Annual Cost to Public: $100 in recordkeeping/reporting costs, mainly for at-sea communication costs.

Respondent's Obligation: Mandatory.

Legal Authority: 50 CFR 665.815.

IV. Request for Comments

We are soliciting public comments to permit the Department 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 information collection request. 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. 2021–08272 Filed 4–20–21; 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; North Pacific Observer Program Safety and Security Survey

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 helps 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 November 23, 2020 (85 FR 74694) during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic Atmospheric Administration (NOAA).

Title: North Pacific Observer Program Safety and Security Survey.

OMB Control Number: 0648–0759.

Form Number(s): None.

Type of Request: Regular submission [extension of a current information collection].

Number of Respondents: 300.

Average Hours Per Response: 10 minutes.

Total Annual Burden Hours: 50.

Needs and Uses: NMFS certified observers are a vital part of fisheries management. Observers are deployed to collect fisheries data in the field; observers often deploy to vessels and work alongside fishers for weeks and months at a time. The work environment observers find themselves in can be challenging, especially if the observer finds themselves a target for victim type violations such as sexual harassment, intimidation, or even assault. NOAA Fisheries' Office of Law Enforcement prioritizes investigations into allegations of sexual harassment, hostile work environment, assault and other complaints which may affect observers individually. However, it is difficult for a person to disclose if they have been a victim of a crime, and law enforcement cannot respond if no complaint is submitted. The true number of observers who have experienced victim type crimes is unknown, and the reasons why they do not report is also unclear. More information is needed to understand how many observers per year experience victim type crimes, and why they chose not to report to law enforcement.

The survey will also investigate the reasons that prevented observers from reporting these violations. The results of the survey will provide the Office of Law Enforcement a better understanding of how often observers are victimized, which will enable them to reallocate resources as needed, conduct more training for observers to ensure they know how to report, conduct training to ensure people understand what constitutes a victim crime, and to increase awareness of potential victimizations. Additionally, the survey results will help law enforcement understand the barriers to disclosure, so enforcement may begin to address these impediments so they no longer prevent observers from disclosure.

Affected Public: Federal Government.

Frequency: Annual.

Respondent's Obligation: Voluntary.

Legal Authority: Magnuson-Stevens Fishery Conservation and Management Act.

This information collection request may be viewed at *www.reginfo.gov.* 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 *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 either the title of the collection or the OMB Control Number 0648–0759.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2021–08271 Filed 4–20–21; 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; List of Gear by Fisheries and Fishery Management Council

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 June 21, 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 0648–0346 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 Chris Wright, (301) 427–8570 or *Chris.Wright@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension of a currently approved information collection by the NOAA's National Marine Fisheries Service, Office of Sustainable Fisheries. Under the provisions of the Magnuson-Stevens Fishery and Conservation and Management Act (Magnuson-Stevens Act) [16 U.S.C. 1801 *et seq.*], as amended by the Sustainable Fisheries Act [Pub. L. 104–297], the Secretary of Commerce (Secretary) is required to publish a list of all fisheries under authority of each Regional Fishery Management Council (Council) and all such fishing gear used in such fisheries (see section 305(a) of the Magnuson-Stevens Act). The list has been published and appears in 50 CFR part 600.725(v). Any person wishing to use gear not on the list, or engage in a fishery not on the list, must provide the appropriate Council or the Secretary, in the case of Atlantic highly migratory species, with 90 days of advance notice. If the Secretary takes no action to prohibit such a fishery or use of such a gear, the person may proceed.

II. Method of Collection

The respondent provides written notice. No form is used.

III. Data

OMB Control Number: 0648–0346.

Form Number(s): None.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 6.

Estimated Time per Response: 90 minutes.

Estimated Total Annual Burden Hours: 9.

Estimated Total Annual Cost to Public: $60.00.

Respondent's Obligation: Mandatory.

Legal Authority: Magnuson-Stevens Act.

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. 2021–08270 Filed 4–20–21; 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; Western and Central Pacific Fisheries Convention Vessel Information Family of Forms

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 June 21, 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 0648–0595 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 Emily Reynolds, Fishery Policy Analyst, NOAA Fisheries, 1845 Wasp Blvd., Bldg. #176, Honolulu, HI 96818, (808)–725–5039, *emily.reynolds@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension of a currently approved information

collection. National Marine Fisheries Service (NMFS) has issued regulations under authority of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFCIA; 16 U.S.C. 6901 *et seq.*) to carry out the obligations of the United States under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Convention), including implementing the decisions of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC or Commission). The regulations include requirements for the owners or operators of U.S. vessels to: (1) Apply for and obtain a WCPFC Area Endorsement if the vessel is used for fishing for highly migratory species on the high seas in the Convention Area (50 CFR 300.212), (2) complete and submit a Foreign Exclusive Economic Zone (EEZ) Form if the vessel is used for fishing for highly migratory species in the Convention Area in areas under the jurisdiction of any nation other than the United States (50 CFR 300.213), and (3) request and obtain an IMO number if the vessel is used for fishing for highly migratory species on the high seas or in areas under the jurisdiction of any nation other than the United States (50 CFR 300.217(c)). An IMO number is the unique number issued for a vessel under the ship identification number scheme established by the International Maritime Organization or, for vessels that are not strictly subject to that scheme, the unique number issued by the administrator of that scheme using the scheme's numbering format, sometimes known as a Lloyd's Register number or LR number.

The application for WCPFC Area Endorsements calls for specified information about the vessel and its operator that is not already collected via the application for high seas fishing permits issued under 50 CFR 300.333. The Foreign EEZ Form calls for specified information about the vessel, its owners and operators and any fishing authorizations issued by other nations. The information required to obtain an IMO number is not submitted to NMFS directly, but to a third party and serves to ensure that IMO numbers are issued for certain categories of vessels. This information collected under the three requirements is used by NOAA, the U.S. Coast Guard, and the Commission to monitor the size and composition of the HMS fleets in the Convention Area for compliance-related and scientific purposes and to ensure that IMO numbers are issued for certain categories of vessels.

II. Method of Collection

All information is to be submitted in hard copy via mail or through electronic reporting.

III. Data

OMB Control Number: 0648–0595.

Form Number(s): None.

Type of Review: Regular submission of a currently approved collection.

Affected Public: Business or other for-profit organizations; individuals or households.

Estimated Number of Respondents: 46.

Estimated Time per Response: WCPFC Area Endorsement Application: 60 minutes; Foreign EEZ Form: 90 minutes; IMO number application: 30 minutes.

Estimated Total Annual Burden Hours: 45.

Estimated Total Annual Cost to Public: $2,555.

Respondent's Obligation: Mandatory.

Legal Authority: WCPFCIA; 16 U.S.C. 6901 *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. 2021–08267 Filed 4–20–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2020–HQ–0012]

Submission for OMB Review; Comment Request

AGENCY: Department of the Air Force, Department of Defense (DoD).

ACTION: 30-day information collection notice.

SUMMARY: The Department of Defense 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 May 21, 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: Air Force Embedded Care Access Interview Guide, OMB Control Number 0701–XXXX.

Type of Request: New.

Number of Respondents: 30.

Responses per Respondent: 1.

Annual Responses: 30.

Average Burden per Response: 0.5 hours.

Annual Burden Hours: 15 hours.

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.

Frequency: Annually.

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: April 15, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–08200 Filed 4–20–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2021–HQ–0005]

Privacy Act of 1974; System of Records

AGENCY: Department of the Army, Department of Defense (DoD).

ACTION: Notice of a modified system of records.

SUMMARY: The Department of the Army is modifying and renaming the United States Military Entrance Processing Command (USMEPCOM) Integrated Resource System (USMIRS), A0601–270. As the executive agent, the Department of the Army uses the USMIRS to determine the qualifications of applicants for the Armed Forces of the United States through aptitude testing, medical examination, identity verification, background screening, and administrative processing. Records will also be used to determine patterns and trends in the military population, and for statistical analyses.

DATES: This system of records modification is effective upon publication; however, comments on the Routine Uses will be accepted on or before May 21, 2021. The Routine Uses are effective at the close of the comment period.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: https://www.regulations.gov.*

Follow the instructions for submitting comments.

* *Mail:* 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 and docket number 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 *https://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Mr. Myron Wong, Department of the Army, U.S. Army Records Management and Declassification Agency, ATTENTION: Army Privacy and Civil Liberties Office, 9301 Chapek Road (Building 1458), Fort Belvoir, VA 22060–5605, or by calling 571–515–0243.

SUPPLEMENTARY INFORMATION: The USMEPCOM consists of 65 Military Entrance Processing Stations (MEPS) and one Remote Processing Station (RPS) in the United States. The USMIRS conducts aptitude tests, processes medical examinations, and determines acceptability of individuals for entry into the Armed Forces of the United States based on each Service's eligibility standards. The USMIRS also determines acceptability, administratively processes, allocates, and inducts Selective Service System registrants when required; and provides aptitude and medical examination services for other Federal agencies as requested. The USMIRS interfaces with recruiting capabilities for the Services using standard DoD data elements to share data between USMEPCOM and all the Armed Services recruiting and accession commands. Additionally, the USMIRS shares data with the Social Security Administration (SSA) and the United States Citizenship and Immigration Services (USCIS) for identity vetting and to verify eligibility to work in the United States. Applicant information is retained by the USMIRS for various statistical analyses to identify trends and reduce duplicative processes.

This system of records is being modified to alter the system name, modify the system number to remove ''DoD'' at the end, and to comply with requirements in Office of Management and Budget (OMB) Circular No. A–108 (2016). This modified system of records also expands the purposes of the system of records, the categories of individuals, and the categories of records by, among other things, including language concerning the system's support of Selective Service registration processes and support for other Federal agencies. The modifications include new and modified routine uses specifying, among other things, the potential sharing of information to authorized representative agents of Federal, state, local, territorial/tribal, international, or foreign agencies for legal, security, health, or other administrative reasons. Changes have also been made to the following sections: System manager; system location; authorities; retrieval of records; procedures for record access and notification, and contesting records; and safeguards.

In addition, the system of records is being modified to reflect major changes to the policies and practices for the retention and disposal of records due to a recent retention schedule change approved by the National Archives and Records Administration (NARA). The change in the system's retention policy was required to support the mobilization requirements in accordance with DoD policy (DoD Instruction 1352.01) and to prevent potential fraudulent enlistments using duplicated Social Security numbers. These changes will require the system to securely retain electronic data in a cloud computing environment to meet business needs prior to being securely archived offsite in a Federal Records Center on encrypted physical storage media.

The DoD notices for systems of records subject to the Privacy Act of 1974, as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy, Civil Liberties, and

Transparency Division website at *https://dpcld.defense.gov*.

In accordance with 5 U.S.C. 552a(r) and OMB Circular No. A–108, the DoD has provided a report of this system of records to the OMB and to Congress.

Dated: April 14, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

SYSTEM NAME AND NUMBER:

United States Military Entrance Processing Command (USMEPCOM) Integrated Resource System (USMIRS), A0601–270.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Primary location: United States Military Entrance Processing Command (USMEPCOM), 2834 Green Bay Road, North Chicago, IL 60064–3094; digital cloud storage provided by Amazon Web Services (AWS) GovCloud (US), 12900 Worldgate Drive, Building: IAD21, Herndon, VA 20170. Segments exist at Military Entrance Processing Stations (MEPS) throughout the continental United States, Alaska, Hawaii, and Puerto Rico; official mailing addresses are available on the USMEPCOM web page at *https://www.mepcom.army.mil/MEPS.aspx*.

SYSTEM MANAGER(S):

Commander, U.S. Military Entrance Processing Command, 2834 Green Bay Road, North Chicago, IL 60064–3094. Deputy Director, J–6/Information Technology Directorate, (847) 688–3680, ext. 7701.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; 10 U.S.C. Subtitle A, General Military Law, Part II, Personnel (Chapter 31, Enlistments and Chapter 33, Original Appointments of Regular Officers in Grades Above Warrant Officer Grades); 10 U.S.C. 3013, Secretary of the Army; 10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 8013, Secretary of the Air Force; DoD Directive (DoDD) 1145.02E, United States Military Entrance Processing Command (USMEPCOM); DoD Instruction (DoDI) 1304.02, Accession Processing Data Collection Forms; DoDI 1304.12E, DoD Military Personnel Accession Testing Programs; DoDI 1304.26, Qualification Standards for Enlistment, Appointment and Induction; DoDI 6130.03, Medical Standards for Appointment, Enlistment, or Induction in the Military Services; DoD Manual 1145.02, Military Entrance Processing Station (MEPS); USMEPCOM Regulation 680–3, Entrance Processing and Reporting System Management; and E.O. 9397 (SSN), as amended.

PURPOSE(S) OF THE SYSTEM:

The USMIRS is the official accession system for the Department of Defense (DoD). The USMEPCOM uses it to determine qualifications of applicants for the Armed Forces of the United States through aptitude testing, medical examination, identity verification, background screening, and administrative processing. The USMIRS is also used to determine qualifications for special category, non-enlistment applicants for Selective Service registration, and other Federal agency applicants when required. Accession data for the Services is reported to the Defense Manpower Data Center (DMDC) for applicant processing, reporting requirements, and quality assurance. Records are also used to determine patterns and trends in the military population, support mobilization, prevent fraudulent enlistments, and for statistical analyses.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All individuals who report to a military entrance test site or MEPS for aptitude testing and/or medical examination to determine their fitness for entry into the U.S. Armed Forces (Army, Navy, Air Force, Marine Corps, and Coast Guard). Individuals may also include Selective Service System inductees and special category non-enlistment applicants from Federal agencies such as the Central Intelligence Agency, Federal Bureau of Investigation, Federal Aviation Administration, and other uniformed services such as the United States Public Health Service Commissioned Corps or the National Oceanic and Atmospheric Administration Commissioned Officer Corps (as required).

CATEGORIES OF RECORDS IN THE SYSTEM:

Personally identifying data to include: Full name and other names used; Social Security Number (SSN), DoD Identification (DoD ID) number, alien registration number, selective service registration number; gender; date and place of birth; race and ethnic origin; height, weight, eye color; biometric data (fingerprints and digital photograph); and driver's license number.

Other personal data to include: Marital status; citizenship and immigration status; religious preference, home and mobile telephone number; home and mailing address; state of permanent residence; personal email address; languages spoken; prior employment; background investigation.

Dependent family member data (emergency contact information) to include: Family members' full names and other names used; date of birth; marital status; home, mobile and work telephone number; and home and work address.

Prior military personnel data to include: Branch; service computation dates; type of discharge; separation reason codes; lost time (absent without leave and desertion); and DoD ID number.

RECORD SOURCE CATEGORIES:

The individuals. The individuals' data is also received from records maintained by the DMDC. Information may also be provided by education and financial institutions, law enforcement agencies, the Office of Personnel Management, Social Security Administration, Department of Homeland Security, Department of the Treasury, and other Federal, state and local agencies.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, the records contained in this system may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

a. To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the Federal Government when necessary to accomplish an agency function related to this system of records.

b. To the appropriate Federal, State, local, territorial, tribal, foreign, or international law enforcement authority or other appropriate entity where a record, either alone or in conjunction with other information, indicates a violation or potential violation of law, whether criminal, civil, or regulatory in nature.

c. To any component of the Department of Justice for the purpose of representing the DoD, or its components, officers, employees, or members in pending or potential litigation to which the record is pertinent.

d. In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body or official, when the DoD or other Agency representing the DoD determines that the records are

relevant and necessary to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

e. To the National Archives and Records Administration for the purpose of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

f. To a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

g. To appropriate agencies, entities, and persons when (1) the DoD suspects or confirms a breach of the system of records; (2) the DoD determines as a result of the suspected or confirmed breach there is a risk of harm to individuals, the DoD (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 the DoD's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

h. To another Federal agency or Federal entity, when the DoD 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.

i. To such recipients and under such circumstances and procedures as are mandated by Federal statute or treaty.

j. To Federal, State and local health departments for compliance with public health communicable disease reporting laws in accordance with 42 U.S.C. 264.

k. To the Social Security Administration (SSA) and the United States Citizenship and Immigration Services (USCIS) to verify eligibility to work in the United States as required by 8 U.S.C. 1101 and 8 U.S.C. 1324a.

l. To the Central Intelligence Agency, Federal Bureau of Investigation, and Federal Aviation Administration; and other uniformed services such as the United States Public Health Service Commissioned Corps or the National Oceanic and Atmospheric Administration Commissioned Officer Corps when medically processing special category non-enlistment applicants on behalf of those agencies.

m. To the Selective Service System (SSS) to report processing of inductees in support of a military draft, and for the purpose of updating the SSS registrant database as required by 50 U.S.C. 3802.

n. To other Federal, state, local, territorial or tribal, international, or foreign agencies, and to financial institutions, in order to obtain information relevant and necessary to USMEPCOM's qualification determinations for the individuals covered by this system of records.

o. To designated officers and employees of Federal, State, local, territorial, tribal, international, or foreign agencies in connection with the hiring or retention of an employee, the conduct of a suitability or security investigation, the letting of a contract, or the issuance of a license, grant or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter and the Department deems appropriate.

p. To foreign or international law enforcement, security, or investigatory authorities to comply with requirements imposed by, or to claim rights conferred in, international agreements and arrangements, including those regulating the stationing and status in foreign countries of DoD military and civilian personnel.

q. To appropriate Federal, State, local, territorial, tribal, foreign, or international agencies for the purpose of counterintelligence activities authorized by U.S. law or Executive Order, or for the purpose of executing or enforcing laws designed to protect the national security or homeland security of the United States, including those relating to the sharing of records or information concerning terrorism, homeland security, or law enforcement.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records may be stored electronically or on paper in secure facilities in a locked drawer behind a locked door. Electronic records may be stored locally on digital media; in agency-owned cloud environments; or in vendor Cloud Service Offerings certified under the Federal Risk and Authorization Management Program (FedRAMP).

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by individual's name, Social Security Number (SSN), DoD Identification Number, USMIRS automatic identification and data capture (AIDC) identification code (barcode), and/or biometric data (fingerprint).

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All hardcopy applicant records are retained at each MEPS for a period ranging between 2 years, 3 years, or a maximum of 7 years, as defined by individual qualification status, then destroyed.

The USMIRS will retain electronic qualified applicant processing records in the system until no longer needed for conducting business. The records will then be placed on physical storage media and transferred to the Federal Records Center (FRC). The FRC will destroy the records when the applicant turns 43 years old. USMIRS will retain electronic permanently disqualified applicant processing records in the system until no longer needed for conducting business. The records will then be placed on physical storage media and transferred to the FRC. The FRC will destroy the records after 99 years.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Administrative safeguards include periodic security audits, regular monitoring of users' security practices, employment of methods to ensure only authorized personnel have access to personal information, all personnel are required to have appropriate background checks conducted prior to attaining system access, and privileged users are required to attain and maintain certification in accordance with DoD Directive 8140.01 and DoD 8570.01–M. Technical safeguards include user ID and password, intrusion detection system, encryption, external certificate authority, biometrics, firewall, virtual private network, DoD public key infrastructure certificates, common access card, and security technical implementation guides. Physical safeguards include security guards, identification badges, key cards, safes, and cipher locks. All USMIRS servers are stored in either a data center or locked server/communications room.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Commander, U.S. Military Entrance Processing Command, FOIA/PA Officer (J–1/MEHR–PR), 2834 Green Bay Road, North Chicago, IL 60064–3094. Individuals should provide their full name, current address telephone number, and other personal identifying data that would assist in

locating the records. In addition, the requester must provide either a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).''

CONTESTING RECORD PROCEDURES:

The DoD rule for accessing, contesting and appealing agency determinations by the individual concerned are published in 32 CFR part 310 or may be obtained from the system manager.

NOTIFICATION PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Commander, U.S. Military Entrance Processing Command, FOIA/PA Officer (J–1/MEHR–PR), 2834 Green Bay Road, North Chicago, IL 60064–3094. Individuals should provide their full name, current address telephone number, and other personal identifying data that would assist in locating the records. In addition, the requester must provide either a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).''

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

November 3, 2010, 75 FR 67700; February 25, 2005, 70 FR 9284.

[FR Doc. 2021–08286 Filed 4–20–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID USA–2021–HQ–0003]

Submission for OMB Review; Comment Request

AGENCY: The U.S. Corps of Engineers, Department of Defense (DoD).

ACTION: 30-day information collection notice.

SUMMARY: The Department of Defense 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 May 21, 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: Pacific Northwest Households Recreation Use Surveys; OMB Control Number 0710–0021.

Type of Request: Extension.

Main Survey

Number of Respondents: 9,200.
Responses per Respondent: 1
Annual Responses: 9,200.
Average Burden per Response: 20 minutes.
Annual Burden Hours: 3,067.

Non-Respondent Follow Up Survey

Number of Respondents: 500.
Responses per Respondent: 1.
Annual Responses: 500.
Average Burden per Response: 10 minutes.
Annual Burden Hours: 83.3.
Total Burden Hours: 3,150.3.

Needs and Uses: The U.S. Army Corps of Engineers, Bonneville Power Administration (BPA), and Bureau of Reclamation (BOR), are jointly developing an environmental impact statement (EIS), referred to as the Columbia River System Operations (CRSO) EIS. As part of the EIS, the Corps is tasked with evaluating changes in the economic value provided by water-based recreation. The purpose of this survey effort is to gather information that will support development of a water-based recreational demand model for the Columbia River Basin in Washington, Oregon, Idaho, and western Montana. The proposed design involves a mail survey for preliminary screening to identify eligible recreators, followed by a telephone survey of eligible recreators to collect data on recreational trips and activities within the region. The model will be used to evaluate recreational impacts associated with alternatives identified within the CRSO EIS.

Affected Public: Individuals or households.

Frequency: One time.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. Vlad Dorjets.

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: April 15, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–08231 Filed 4–20–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2021–OS–0027]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: Information collection notice.

SUMMARY: Consistent with the *Paperwork Reduction Act of 1995* and its implementing regulations, this

document provides notice DoD is submitting an Information Collection Request to the Office of Management and Budget (OMB) to collect information from military members on gender issues, including issues relating to sexual harassment, gender discrimination, and sexual assault, as well as the culture and climate of the units/organizations in which Service members serve. DoD requests emergency processing and OMB authorization to collect the information after publication of this notice for a period of six months.

DATES: Comments must be received by May 21, 2021.

ADDRESSES: The Department has requested emergency processing from OMB for this information collection request by 30 days after publication of this notice. Interested parties can access the supporting materials and collection instrument as well as submit comments and recommendations to OMB at *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. Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Angela James, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION: Sexual assault, sexual harassment, and gender discrimination remain a major concern across the DoD and for members of Congress. In February 2004, the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) testified before the Senate Armed Services Committee on the prevalence of sexual assault in the DoD and the programs and policies planned to address the issues. In accordance with legislative requirements, the USD(P&R) issued memoranda to the Services that provides DoD policy guidance on sexual assault that included a new standard definition, response capability, training requirements, response actions, and reporting guidance throughout the Department. The Sexual Assault and Prevention Response Office (SAPRO) supported implementation of the new policy and requires data to assess the prevalence of sexual assault in the Department and the effectiveness of the programs they have implemented.

The Workplace and Gender Relations Surveys will assess the attitudes and opinions of military members on gender issues, including issues relating to sexual harassment, gender discrimination, and sexual assault, as well as the culture and climate of the units/organizations in which Service members serve. The objective of the WGR surveys is to provide the policy offices of the USD(P&R) with current data on (1) the positive and negative trends for professional and personal relationships between Service members; (2) the specific types of assault that have occurred and the number of times in the preceding year; (3) the effectiveness of DoD policies designed to improve professional relationships between male and female Service members; (4) the effectiveness of current processes for complaints, reports, and investigations; and, (5) specific issues related to sexual harassment, sexual assault, and gender discrimination that may inform the Department's prevention and response efforts.

Title; Associated Form; and OMB Number: Workplace and Gender Relations Survey Active/Reserve; OMB Control Number 0704–WGRM.

Type of Request: New collection.

Number of Respondents: 202,800.

Responses per Respondent: 1.

Annual Responses: 202,800 responses.

Average Burden per Response: 30 minutes.

Annual Burden Hours: 101,400 hours.

Affected Public: Individuals or households.

Frequency: Biennially (*i.e.* every other year).

Respondent's Obligation: Voluntary.

Request for Comments: Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information collected has practical utility; (2) the accuracy of DoD's estimate of the burden (including hours and cost) of the proposed collection of information; (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 automated collection techniques or the use of other forms of information technology.

Dated: April 15, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–08223 Filed 4–20–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

[Docket ID: DoD–2021–OS–0002]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: 30-day information collection notice.

SUMMARY: The Department of Defense 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 May 21, 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; Aassociated Form; and OMB Number: Needs Assessment of Child and Youth Non-Medical Counseling; 0704–XXXX.

Type of Request: New.

Number of Respondents: 180.

Responses per Respondent: 1.

Annual Responses: 180.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 45 hours.

Needs and Uses: In order for the DoD to best and most efficiently serve the needs of military children, it is important to know how the CYB–MFLC program fits within the landscape of family and child support systems to meet the needs and expectations of stakeholders. It is also important to identify where gaps in services remain and to identify the emerging needs of military children and youth that could be potentially filled or addressed by the CYB–MFLC program. Assessing how prevalent those needs and gaps are, and whether there is variation in these needs across locations, will inform modifications to the program to strengthen alignment of the scope of its services with other sources of support, resulting in improved coordinated care for military children in the school environment.

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: April 15, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–08198 Filed 4–20–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2021–HA–0025]

Proposed Collection; Comment Request

AGENCY: The Office of the Assistant Secretary of Defense for Health Affairs, Department of Defense (DoD).

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Defense Health Agency 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 June 21, 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 Department of Defense (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.

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 Defense Health Agency (DHA), ATTN: Frank Bradt, 5109 Leesburg Pike, Skyline 6, Suite 701, Falls Church, VA 22041, or call at (202) 380–6107.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Enterprise Blood Management System (EBMS): Enterprise Blood Management System—Donor (EBMS–D) and Enterprise Blood Management System—Transfusion (EBMS–T); ASBP Form 572; OMB Control Number 0720–0057.

Needs and Uses: EBMS is a family of related automated information systems (AIS) comprised of two separate and distinct commercial-off-the-shelf (COTS) software applications that provides the Military Health System (MHS) with a comprehensive enterprise wide Enterprise Blood Management System—Donor (EBMS–D) and a Enterprise Blood Management System—Transfusion (EBMS–T). EBMS–D employs two separate COTS software applications, Mediware Corporation's LifeTrak Donor™ and LifeTrak Lab & Distribution™. EBMS–D is a technology modernization effort intended to enhance the DoD Blood Program capabilities for Donor Centers through the seamless integration of blood products inventory management, transport, availability, and most importantly, blood and blood products traceability from collection to disposition within the electronic health record (EHR). EBMS–T employs two separate COTS software applications, Mediware Corporation's HCLL™ (Transfusion) and KnowledgeTrak™ (Learning Management). EBMS–T is an effort intended to enhance the DoD Blood Program capabilities for a seamless integration of blood banking and transfusion activities, products inventory management, transport, availability, and most importantly traceability from transfusion to disposition or destruction within the electronic health record (EHR).

EBMS has built-in safeguards to limit access and visibility of personal or sensitive information in accordance with the Privacy Act of 1974. The application will account for everyone that donates blood and receives a blood transfusion in the MHS—Active Duty, Reserves, National Guard, government civilian, contractors and volunteers assigned or borrowed—this also includes non-appropriated fund employees and foreign nationals.

Affected Public: Individuals and households.

Annual Burden Hours: 766.

Number of Respondents: 4,600.

Responses per Respondent: 1.

Annual Responses: 4,600.

Average Burden per Response: 10 minutes.

Frequency: On occasion.

Dated: April 15, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–08226 Filed 4–20–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

[Docket ID: DoD–2020–HA–0006]

Submission for OMB Review; Comment Request

AGENCY: The Office of the Assistant Secretary of Defense for Health Affairs, Department of Defense (DoD).

ACTION: 30-day information collection notice.

SUMMARY: The Department of Defense 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 May 21, 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: TRICARE Plus Enrollment/Disenrollment Application; DD–2853 and DD–2854; OMB Control Number 0720–0028.

Type of Request: Revision.

Number of Respondents: 3,305.

Responses per Respondent: 1.

Annual Responses: 3,305.

Average Burden per Response: 7 minutes.

Annual Burden Hours: 386.

Needs and USES: These collected instruments serve as an application for enrollment and disenrollment in the Department of Defense's TRICARE Plus Health Plan established in accordance with Title 10 U.S.C. 1099. The information hereby provides the TRICARE contractors with the necessary data to determine beneficiary eligibility and to identify the selection of a health care option.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Dr. James Crowe.

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: April 15, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–08208 Filed 4–20–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2020–OS–0007]

Submission for OMB Review; Comment Request

AGENCY: The Office of the Under Secretary of Defense Comptroller, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The Department of Defense 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 May 21, 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: Request for Information Regarding Deceased Debtor, DD Form 2840; OMB Control Number 0730–0015.

Type of Request: Revision.

Number of Respondents: 300.

Responses per Respondent: 1.

Annual Responses: 300.

Average Burden per Response: 20 minutes.

Annual Burden Hours: 100.

Needs and Uses: The information collection requirement is necessary to obtain information on deceased debtors from probate courts. Probate courts review their records to see if an estate was established. They provide the name and address of the executor or lawyer handling the estate. From the information obtained, DFAS submits a claim against the estate for the amount due to the United States.

Affected Public: State, local, and tribal governments.

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: April 15, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–08222 Filed 4–20–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Corps of Engineers

[Docket ID: USA–2021–HQ–0002]

Submission for OMB Review; Comment Request

AGENCY: The U.S. Corps of Engineers, Department of Defense (DoD).

ACTION: 30-day information collection notice.

SUMMARY: The Department of Defense 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 May 21, 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: U.S. Army Corps of Engineers Customer Service Survey, ENG Form 5065, OMB Control Number 0710–0012.

Type of Request: Extension.

Number of Respondents: 1,000.

Responses per Respondent: 1.

Annual Responses: 1,000.

Average Burden per Response: 10 minutes.

Annual Burden Hours: 167.

Needs and Uses: The information collection requirement is necessary for the Corps to conduct surveys of customers served by our district offices, currently a total of 38 offices. Only voluntary opinions will be solicited and no information requested on the survey instrument will be mandatory. The survey form will be provided to the applicants when they receive a regulatory product, primarily a permit decision or wetland determination. The information collected will be used to assess whether Regulatory business practices or policies warrant revision to better serve the public. Without this survey the Corps would have to rely on less structured, informal methods of obtaining public input. The data collection instrument was minimized for respondent burden, while maximizing data quality. The following strategies were used to achieve these goals: 1. Questions are clearly written, 2. The questionnaire is of reasonable length, 3. The questionnaire includes only items that have been shown to be successful in previous analyses and ease in navigation.

Affected Public: Individuals or households; Business or other for-profit; Not-for-profit institutions; Farms; State, local, or tribal government.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. Vlad Dorjets.

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: April 15, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–08262 Filed 4–20–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF ENERGY

[EERE–2020–BT–DET–0017]

Preliminary Analysis Regarding Energy Efficiency Improvements in ANSI/ASHRAE/IES Standard 90.1–2019

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of availability.

SUMMARY: The U.S. Department of Energy (DOE) is announcing the availability of a Preliminary Energy Savings Analysis of ANSI/ASHRAE/IES Standard 90.1–2019 (Preliminary Analysis). DOE welcomes written comments from interested parties on any subject within the scope of this Preliminary Analysis.

DATES: DOE will accept written comments and information on the Preliminary Analysis no later than May 21, 2021.

ADDRESSES: A copy of the Preliminary Analysis is available at *https://www.energycodes.gov/sites/default/files/documents/20210407_Standard_90.1-2019_Determination_TSD.pdf.*

Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the instructions for submitting comments. Alternatively, interested persons may submit comments by email to the following address: *2019Standard2020DET0017@ee.doe.gov.* Include docket number EERE–2020–BT–DET–0017 and/or RIN number 1904–AF12 in the subject line of the message. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.

Although DOE has routinely accepted public comment submissions through a variety of mechanisms, including postal mail and hand delivery/courier, the Department has found it necessary to make temporary modifications to the comment submission process in light of the ongoing Covid-19 pandemic. DOE is currently accepting only electronic submissions at this time. If a commenter finds that this change poses an undue hardship, please contact the parties listed below to discuss the need for alternative arrangements. Once the Covid-19 pandemic health emergency is resolved, DOE anticipates resuming all of its regular options for public comment submission, including postal mail and hand delivery/courier.

Docket: The docket, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at *http://www.regulations.gov.* All documents in the docket are listed in the *http://www.regulations.gov* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available. A link to the docket on can be found at: *http://www.regulations.gov/docket?D=EERE-2020-BT-DET-0017.* The *http://www.regulations.gov* web page will contain instructions on how to access all documents, including public comments, in the docket. See section II for further information on how to submit comments through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT:

Mr. Jeremiah Williams; U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, 1000 Independence Avenue SW, EE–5B, Washington, DC 20585. Telephone: (202) 287–1941; *Jeremiah.Williams@ee.doe.gov.*

Mr. Matthew Ring; U.S. Department of Energy, Office of the General Counsel, 1000 Independence Avenue SW, GC–33, Washington, DC 20585; Telephone: (202) 586–2555; *Matthew.Ring@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background
II. Public Participation

I. Background

Title III of the Energy Conservation and Production Act, as amended (ECPA), establishes requirements for DOE to review consensus-based building energy conservation standards. (42 U.S.C. 6831 *et seq.*) Section 304(b), as amended, of ECPA provides that whenever the ANSI/ASHRAE/IESNA Standard 90.1–1989 (Standard 90.1–1989 or 1989 edition), or any successor to that code, is revised, the Secretary of Energy (Secretary) must make a determination, not later than 12 months after such revision, whether the revised code would improve energy efficiency in commercial buildings, and must

publish notice of such determination in the **Federal Register**. (42 U.S.C. 6833(b)(2)(A)) If the Secretary makes an affirmative determination, within two years of the publication of the determination, each State is required to certify that it has reviewed and updated the provisions of its commercial building code regarding energy efficiency with respect to the revised or successor code and include in its certification a demonstration that the provisions of its commercial building code, regarding energy efficiency, meet or exceed the revised Standard. (42 U.S.C. 6833(b)(2)(B)(i))

Standard 90.1–2019, the most recent edition, was published in October 2019, triggering the statutorily required DOE review process. The Standard is developed under ANSI-approved consensus procedures,[1] and is under continuous maintenance under the purview of an ASHRAE Standing Standard Project Committee (commonly referenced as SSPC 90.1). ASHRAE has an established program for regular publication of addenda, or revisions, including procedures for timely, documented, consensus action on requested changes to the Standard. More information on the consensus process and ANSI/ASHRAE/IES Standard 90.1–2019[2] is available at *https://www.ashrae.org/resources--publications/bookstore/standard-90-1.*

In addition, on January 20, 2021, the President issued Executive Order 13990, ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.'' 86 FR 7037 (Jan. 25, 2021). The Executive Order directed DOE to consider publishing for notice and comment a proposed rule suspending, revising, or rescinding the final technical determination regarding the ASHRAE Standard 90.1–2016 by May 2021. *Id.* at 86 FR 7038. In response, DOE has conducted this preliminary analysis of Standard 90.1–2019 so that DOE's determination under section 304(b) of ECPA reflects the most recent version of Standard 90.1, and to facilitate State and local adoption of the Standard, which will improve energy efficiency in the nation's commercial buildings.

To meet the statutory requirement, DOE conducted a preliminary analysis to quantify the expected national energy savings associated with Standard 90.1–2019 relative to the previous 2016 version. The preliminary results of this analysis indicate national savings of:

- 4.7 percent *site* energy savings;
- 4.3 percent *source* energy savings;
- 4.3 percent energy *cost* savings, and;
- 4.2 percent *carbon emissions.*

A copy of the Preliminary Analysis is available at *https://www.energycodes.gov/sites/default/files/documents/20210407_Standard_90.1-2019_Determination_TSD.pdf.* DOE welcomes written comments from interested parties on any subject within the scope of the Preliminary Analysis.

States can experience significant benefits by updating their codes to reflect current construction standards, a total estimated $51.59 billion in energy cost savings and 405.51 MMT of avoided CO_2 emissions in commercial buildings (cumulative 2010 through 2040), or $2.24 billion in annual energy cost savings and 17.57 MMT in annual avoided CO2 emissions (annually by 2030).[3]

II. Public Participation

DOE will accept comments, data, and information regarding the Preliminary Analysis no later than the date provided in the **DATES** section at the beginning of this notice. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this notice.

Submitting comments via http://www.regulations.gov. The *http://www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies Office staff only. Your contact information will not be publicly viewable, except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Do not submit to *http://www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through *http://www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section below.

DOE processes submissions made through *http://www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *http://www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email. Comments and documents submitted via email also will be posted to *http://www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter, including your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, that are written in English, and that are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign Form Letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This

[1] See *https://www.ansi.org/aboutansi/overview/.*

[2] ANSI—American National Standards Institute; ASHRAE—American Society of Heating, Refrigerating, and Air-Conditioning Engineers; IES—Illuminating Engineering Society.

[3] *https://www.energycodes.gov/about/results.* Financial benefits are calculated by applying historical and future fuel prices to site energy savings and by discounting future savings to 2016 dollars. Historical and future real fuel prices are obtained through EIA's AEO 2015 report (EIA 2015). A real discount factor of 5% is applied to discount future energy cost savings.

reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: One copy of the document marked ''confidential'' including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. Submit these documents via email. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

Signing Authority

This document of the Department of Energy was signed on April 15, 2021, by Kelly Speakes-Backman, Principal Deputy Assistant Secretary and Acting Assistant Secretary for Energy Efficiency and Renewable Energy, 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 April 16, 2021.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2021–08203 Filed 4–20–21; 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 Number: PR21–44–000.

Applicants: The East Ohio Gas Company.

Description: Tariff filing per 284.123(b),(e)+(g): Operating Statement of The East Ohio Gas Company 4/1/2021 to be effective 4/1/2021 under PR21–44.

Filed Date: 4/13/2021.

Accession Number: 202104135177.

Comments Due: 5 p.m. ET 5/4/2021.

284.123(g) Protests Due: 5 p.m. ET 6/14/2021.

Docket Numbers: RP21–735–000.

Applicants: Northern Natural Gas Company.

Description: § 4(d) Rate Filing: 20210414 Negotiated Rate to be effective 4/14/2021.

Filed Date: 4/14/21.

Accession Number: 20210414–5107.

Comments Due: 5 p.m. ET 4/26/21.

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 date(s). 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: April 15, 2021.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2021–08220 Filed 4–20–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 15088–000]

Daybreak Power, Inc.; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On January 19, 2021, Daybreak Power, Inc., filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), to study the feasibility of the Halverson Canyon Pumped Storage Project to be located near Lake Roosevelt in Lincoln County, Washington. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed pumped storage project would use the Bureau of Reclamation's Lake Roosevelt as the lower reservoir and consist of the following new facilities: (1) A 399-foot-high, rockfill concrete face upper reservoir with an estimated usable volume of approximately 29,000 acre-feet, at a maximum operating elevation of 2,400 feet mean sea level (msl); (2) a 10,015-foot long water conveyance system connecting the upper and lower reservoirs composed of three 35-feet diameter headrace tunnels, nine 13-feet diameter penstocks, and nine 15-feet diameter draft tubes; (3) a 754-foot-long, 82-foot-wide, 128-foot-high powerhouse containing nine 295–MW fixed-speed pump turbine/generation units for a combined capacity of approximately 2,650 megawatts; (4) a 5-mile-long 765 kilovolts (kV) transmission line connecting the powerhouse with Bonneville Powers Creston substation; and (5) appurtenant facilities. The project intake would be on federal land. The estimated annual generation of the Halverson Canyon Pumped Storage Project would be approximately 8,899,000 megawatt-hours.

Applicant Contact: Mr. Jim Day, CEO Daybreak Power Inc., 4075 Wilson Blvd., 8th Floor Arlington, VA 22203; phone: (703) 624–4971; email: *jim@daybreakpower.com*.

FERC Contact: Ingrid Brofman; phone: (202)-502–8347; email: *Ingrid.brofman@ferc.gov*.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end

of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include the docket number P–15088–000.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's website at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–15088) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: April 14, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–08126 Filed 4–20–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD21–12–000]

Electrification and the Grid of the Future; Supplemental Notice of Technical Conference

As first announced in the Notice of Technical Conference issued in this proceeding on March 2, 2021, the Federal Energy Regulatory Commission (Commission) will convene a Commissioner-led technical conference in the above-referenced proceeding on Thursday, April 29, 2021, from 10:00 a.m. to 6:00 p.m. Eastern Time. The conference will be held electronically. Attached to this Supplemental Notice is an agenda for the technical conference, which includes the final conference program.

Discussions at the conference may involve issues raised in proceedings that are currently pending before the Commission. These proceedings include, but are not limited to:

Michigan Electric Transmission Company, LLC, Docket No. ER21–424;

Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators, Docket No. RM18–9.

The conference will be open for the public to attend electronically. There is no fee for attendance. Registration for the conference is not required. Information on this technical conference, including a link to the webcast, will be posted on the conference's event page on the Commission's website, *https://www.ferc.gov/news-events/events/technical-conference-discuss-electrification-and-grid-future-04292021,* prior to the event.

The conference will be transcribed. Transcripts of the conference will be available for a fee from Ace-Federal Reporters, Inc., (202) 347–3700.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov,* call toll free (866) 208–3372 (voice) or (202) 208–8659 (TTY), or send a fax to (202) 208–2106 with the required accommodations.

For more information about this technical conference, please contact:

Michael Hill (Technical Information), Office of Energy Policy and Innovation, (202) 502–8703, *Michael.Hill@ferc.gov*

Sarah Greenberg (Legal Information), Office of General Counsel, (202) 502–6230, *Sarah.Greenberg@ferc.gov*

Sarah McKinley (Logistical Information), Office of External Affairs, (202) 502–8004, *Sarah.Mckinley@ferc.gov*

Dated: April 14, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–08128 Filed 4–20–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP21–110–000]

Transcontinental Gas Pipe Line Company, LLC; Notice of Application and Establishing Intervention Deadline

Take notice that on April 1, 2021, Transcontinental Gas Pipe Line Company, LLC (Transco), P.O. Box 1396, Houston, Texas 77251, filed an application under section 7(b) of the Natural Gas Act (NGA), and Part 157 of the Commission's regulations requesting that the Commission authorize the abandonment of its Eugene Island Block 184 ''A–ROW'' Platform and supply laterals extending from Eugene Island Blocks 195 and 215 to Eugene Island Block 184 ''A–ROW'' Platform; and from Eugene Island Block 184 ''A–ROW'' Platform to Eugene Island Block 129 ''A'' located in Offshore, Louisiana. Transco states that the requested abandonment will have no impact on the daily design capacity of, or operating conditions on, Transco's pipeline system, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions regarding the proposed project should be directed to Andre Pereira, Regulatory Analyst, Lead, Transcontinental Gas Pipe Line Company, LLC, P.O. Box 1396, Houston, Texas 77251, by phone (713) 215–4362, or by email at *andre.s.pereira@williams.com.*

Pursuant to Section 157.9 of the Commission's Rules of Practice and Procedure,[1] within 90 days of this Notice the Commission staff will either: Complete its environmental review and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or environmental assessment (EA) for this proposal. The filing of an EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and

[1] 18 CFR (Code of Federal Regulations) § 157.9.

the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Public Participation

There are two ways to become involved in the Commission's review of this project: You can file comments on the project, and you can file a motion to intervene in the proceeding. There is no fee or cost for filing comments or intervening. The deadline for filing a motion to intervene is 5:00 p.m. Eastern Time on May 6, 2021.

Comments

Any person wishing to comment on the project may do so. Comments may include statements of support or objections to the project as a whole or specific aspects of the project. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please submit your comments on or before May 6, 2021.

There are three methods you can use to submit your comments to the Commission. In all instances, please reference the Project docket number CP21–110–000 in your submission.

(1) You may file your comments electronically by using the eComment feature, which is located on the Commission's website at *www.ferc.gov* under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You may file your comments electronically by using the eFiling feature, which is located on the Commission's website (*www.ferc.gov)* under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address below [2]. Your written comments must reference the Project docket number (CP21–110–000).

Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426

The Commission encourages electronic filing of comments (options 1 and 2 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Persons who comment on the environmental review of this project will be placed on the Commission's environmental mailing list, and will receive notification when the environmental documents (EA or EIS) are issued for this project and will be notified of meetings associated with the Commission's environmental review process.

The Commission considers all comments received about the project in determining the appropriate action to be taken. However, the filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding. For instructions on how to intervene, see below.

Interventions

Any person, which includes individuals, organizations, businesses, municipalities, and other entities,[3] has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure [4] and the regulations under the NGA [5] by the intervention deadline for the project, which is May 6, 2021. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. [For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene.] For more information about motions to intervene, refer to the FERC website at *https://www.ferc.gov/resources/guides/how-to/intervene.asp.*

There are two ways to submit your motion to intervene. In both instances, please reference the Project docket number CP21–110–000 in your submission.

(1) You may file your motion to intervene by using the Commission's eFiling feature, which is located on the Commission's website (*www.ferc.gov)* under the link to Documents and Filings. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Intervention.'' The eFiling feature includes a document-less intervention option; for more information, visit *https://www.ferc.gov/docs-filing/efiling/document-less-intervention.pdf;* or

(2) You can file a paper copy of your motion to intervene, along with three copies, by mailing the documents to the address below.[6] Your motion to intervene must reference the Project docket number CP21–110–000.

Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426

The Commission encourages electronic filing of motions to intervene (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov*.

Motions to intervene must be served on the applicant either by mail or email at: P.O. Box 1396, Houston, Texas 77251 or at *andre.s.pereira@williams.com.* Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online. Service can be via email with a link to the document.

[2] Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

[3] 18 CFR 385.102(d).

[4] 18 CFR 385.214.

[5] 18 CFR 157.10.

[6] Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

All timely, unopposed [7] motions to intervene are automatically granted by operation of Rule 214(c)(1).[8] Motions to intervene that are filed after the intervention deadline are untimely, and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations.[9] A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *http://www.ferc.gov* using the ''eLibrary'' link as described above. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to *www.ferc.gov/docs-filing/esubscription.asp.*

Intervention Deadline: 5:00 p.m. Eastern Time on May 6, 2021.

Dated: April 15, 2021.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2021–08214 Filed 4–20–21; 8:45 am]

BILLING CODE 6717–01–P

[7] The applicant has 15 days from the submittal of a motion to intervene to file a written objection to the intervention.

[8] 18 CFR 385.214(c)(1).

[9] 18 CFR 385.214(b)(3) and (d).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR21–9–000]

Enbridge Energy, Limited Partnership; Notice of Filing of Supplement to Facilities Surcharge Settlement

Take notice that on April 14, 2021, pursuant to 18 CFR 385.602, Enbridge Energy, Limited Partnership, with the support of the Canadian Association of Petroleum Producers, submitted a Supplement to the Facilities Surcharge Settlement approved by the Commission on June 30, 2004, in Docket No. OR04–2–000, at 107 FERC ¶ 61,336 (2004).

Initial comments and reply comments on the Settlement Supplement should be submitted on or before the dates indicated below.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene, or protest must serve a copy of that document on the Applicant.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Comment Date: 5:00 p.m. Eastern Time on May 4, 2021.

Reply Comments: 5:00 p.m. Eastern Time on May 14, 2021.

Dated: April 15, 2021.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2021–08217 Filed 4–20–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4428–011]

Walden Hydro, LLC; Notice of Waiver Period for Water Quality Certification Application

April 15, 2021.

On April 2, 2021, Walden Hydro, LLC filed with the Federal Energy Regulatory Commission a copy of its application for a Clean Water Act section 401(a)(1) water quality certification submitted to New York State Department of Environmental Conservation (New York DEC), in conjunction with the above captioned project. Pursuant to 40 CFR 121.6, we hereby notify the New York DEC of the following:

Date of Receipt of the Certification Request: April 1, 2021

Reasonable Period of Time to Act on the Certification Request: One year.

Date Waiver Occurs for Failure to Act: April 1, 2022.

If New York DEC fails or refuses to act on the water quality certification request by the above waiver date, then the agency's certifying authority is deemed waived pursuant to section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1).

Dated: April 15, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–08239 Filed 4–20–21; 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: EC21–56–000.
Applicants: Duke Energy Indiana, LLC, GIC Infra Holdings Pte. Ltd.
Description: Joint Motion for Leave to Answer and Answer to Protest of Duke Energy Indiana, LLC and GIC Infra Holdings Pte. Ltd.
Filed Date: 3/26/21.
Accession Number: 20210326–5177.
Comments Due: 5 p.m. ET 4/23/21.

Docket Numbers: EC21–79–000.
Applicants: Crystal Lake Wind III, LLC, Crystal Lake Wind Energy III, LLC.
Description: Application for Authorization Under Section 203 of the Federal Power Act of Crystal Lake Wind III, LLC, et al.
Filed Date: 4/15/21.
Accession Number: 20210415–5099.
Comments Due: 5 p.m. ET 5/6/21.

Take notice that the Commission received the following electric rate filings:.

Docket Numbers: ER21–255–003.
Applicants: Taylor Creek Solar, LLC.
Description: Compliance filing: Taylor Creek Solar, LLC Compliance Filing to be effective 12/29/2020.
Filed Date: 4/15/21.
Accession Number: 20210415–5250.
Comments Due: 5 p.m. ET 5/6/21.

Docket Numbers: ER21–454–002.
Applicants: Southern California Edison Company.
Description: Tariff Amendment: 2nd Refiling TOT Revisions to Incorporate Letter Agreements to be effective 6/15/2021.
Filed Date: 4/15/21.
Accession Number: 20210415–5125.
Comments Due: 5 p.m. ET 5/6/21.

Docket Numbers: ER21–455–002.
Applicants: Southern California Edison Company.
Description: Tariff Amendment: 2nd Refiling WDAT Revisions to Incorporate Curtailment and Qualifying Facilities to be effective 6/15/2021.
Filed Date: 4/15/21.
Accession Number: 20210415–5160.
Comments Due: 5 p.m. ET 5/6/21.

Docket Numbers: ER21–456–002.
Applicants: Southern California Edison Company.
Description: Tariff Amendment: 2nd Refiling WDAT Revisions to Incorporate Letter Agreements to be effective 6/15/2021.
Filed Date: 4/15/21.
Accession Number: 20210415–5207.
Comments Due: 5 p.m. ET 5/6/21.

Docket Numbers: ER21–1181–001.
Applicants: Southwest Power Pool, Inc.
Description: Tariff Amendment: 3127R3 Montana-Dakota Utilities Co. NITSA NOA to be effective 2/1/2021.
Filed Date: 4/15/21.
Accession Number: 20210415–5097.
Comments Due: 5 p.m. ET 5/6/21.

Docket Numbers: ER21–1209–001.
Applicants: Mid-Atlantic Interstate Transmission, LLC, PJM Interconnection, L.L.C.
Description: Tariff Amendment: MAIT submits amendment to ECSA No. 5921 to be effective 4/27/2021.
Filed Date: 4/15/21.
Accession Number: 20210415–5288.
Comments Due: 5 p.m. ET 5/6/21.

Docket Numbers: ER21–1270–001.
Applicants: Alabama Power Company.
Description: Tariff Amendment: Rabun Gap Enhanced Reliability Upgrade Construction Agreement Errata Filing to be effective 2/23/2021.
Filed Date: 4/15/21.
Accession Number: 20210415–5272.
Comments Due: 5 p.m. ET 5/6/21.

Docket Numbers: ER21–1683–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 6011; Queue No. AD1–125 to be effective 3/18/2021.
Filed Date: 4/15/21.
Accession Number: 20210415–5038.
Comments Due: 5 p.m. ET 5/6/21.

Docket Numbers: ER21–1685–000.
Applicants: Tri-State Generation and Transmission Association, Inc.
Description: Compliance filing: Order No. 864 Compliance Filing to be effective 2/25/2020.
Filed Date: 4/15/21.
Accession Number: 20210415–5141.
Comments Due: 5 p.m. ET 5/6/21.

Docket Numbers: ER21–1686–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: Letter Agreement—Sky River, LLC and SCE SA No. 263 to be effective 4/16/2021.
Filed Date: 4/15/21.
Accession Number: 20210415–5171.
Comments Due: 5 p.m. ET 5/6/21.

Docket Numbers: ER21–1687–000.
Applicants: New York Independent System Operator, Inc., Niagara Mohawk Power Corporation.
Description: § 205(d) Rate Filing: Joint TPIA among NYISO, NMPC and LS Power SA No. 2612 CEII to be effective 4/2/2021.
Filed Date: 4/15/21.
Accession Number: 20210415–5188.
Comments Due: 5 p.m. ET 5/6/21.

Docket Numbers: ER21–1688–000.
Applicants: Harmony Florida Solar, LLC.
Description: Compliance filing: Harmony Florida Solar, LLC Compliance Filing to be effective 12/29/2020.
Filed Date: 4/15/21.
Accession Number: 20210415–5235.
Comments Due: 5 p.m. ET 5/6/21.

Docket Numbers: ER21–1689–000.
Applicants: Duke Energy Florida, LLC.
Description: Tariff Cancellation: DEF–FL Solar 10—Termination of E&P Agmt RS 329 to be effective 6/15/2021.
Filed Date: 4/15/21.
Accession Number: 20210415–5263.
Comments Due: 5 p.m. ET 5/6/21.

Docket Numbers: ER21–1690–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: Tri-State Generation and Transmission Association, Inc. Normalization Filing to be effective 6/15/2021.
Filed Date: 4/15/21.
Accession Number: 20210415–5317.
Comments Due: 5 p.m. ET 5/6/21.

Take notice that the Commission received the following qualifying facility filings:

Docket Numbers: QF21–689–000.
Applicants: Caleco Solar Farm LLC.
Description: Form 556 of Caleco Solar Farm LLC.
Filed Date: 4/14/21.
Accession Number: 20210414–5048.
Comments Due: Non-Applicable.

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: April 14, 2021.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2021–08221 Filed 4–20–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 15021–000]

Bard College, New York; Notice of Application Accepted For Filing, Intent To Waive Scoping, and Soliciting Motions To Intervene And Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Exemption from Licensing.

b. Project No.: 15021–000.

c. Date filed: December 23, 2019.

d. *Applicant:* Bard College, New York.

e. *Name of Project:* Annandale Micro Hydropower Project (Annandale Project).

f. *Location:* On Saw Kill, a tributary of the Hudson River, in the Town of Red Hook, Dutchess County, New York. The project does not occupy federal land.

g. *Filed Pursuant to:* Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2705, 2708 (2018), *amended by* the Hydropower Regulatory Efficiency Act of 2013, Public Law 113–23, 127 Stat. 493 (2013).

h. *Applicant Contact:* Randy Clum, Director, Buildings and Grounds, Bard College, 30 Campus Road, Annandale-on-Hudson, NY 12504; and/or Joel Herm/Jan Borchert, Current Hydro, Inc., PO Box 224, Rhinebeck, NY 12572.

i. *FERC Contact:* Monir Chowdhury, (202) 502–6736 or *monir.chowdhury@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* 60 days from the issuance date of this notice. All reply comments must be filed with the Commission within 75 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file motions to intervene and protests using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.aspx.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/QuickComment..* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–15021–000.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted but is not ready for environmental analysis at this time.

l. *The Annandale Project would consist of:* (1) An existing 240-foot-long dam with a maximum height of 13 feet impounding a 3-acre reservoir at a normal pool elevation of 148 feet North American Vertical datum of 1988; (2) one new 9-foot-wide, 9-foot-long, 8-foot-high concrete tank with a spiral internal shape and housing a 10-kilowatt gravitational vortex turbine-generator unit; (3) a new 60-foot-long, 480-volt underground generator lead connecting the turbine-generator unit with an electrical panel that is connected to a step-up transformer via a new 10-foot-long, 480-volt underground transmission line; (4) a new 50-foot-long, 7.6-kilovolt underground transmission line connecting the step-up transformer to the local grid; and (5) appurtenant facilities. The project is estimated to generate an average of 51 megawatt-hours annually. The applicant proposes to operate the project in a run-of-river mode.

m. A copy of the application can be viewed on the Commission's website at *https://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support.

Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support

n. Due to the small size and location of this project, the applicant's close coordination with federal and state agencies during preparation of the application, and studies completed during pre-filing consultation, we intend to waive scoping and expedite the licensing process. Based on a review of the application and resource agency consultation letters including comments filed to date, Commission staff intends to prepare a NEPA document to address resource issues identified during the pre-filing period. Commission staff does not anticipate that any new issues would be identified through additional scoping. The NEPA document will assess the potential effects of project operation on geology and soils, aquatic, terrestrial, threatened and endangered species, recreation, cultural and historic resources, and flooding upstream of the dam.

o. Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified intervention deadline date, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified intervention deadline date. Applications for preliminary permits will not be accepted in response to this notice.

A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit a development application. A notice of intent must be served on the applicant(s) named in this public notice.

p. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must: (1) Bear in all capital letters the title ''PROTEST,'' ''MOTION TO INTERVENE,'' ''NOTICE OF INTENT TO FILE COMPETING APPLICATION,'' ''COMPETING APPLICATION,'' ''COMMENTS,'' or ''REPLY COMMENTS;'' (2) set forth in

the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

q. *Updated procedural schedule and final amendments:* The application will be processed according to the following procedural schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Issue Notice of Ready for Environmental Analysis	July 9, 2021.

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: April 15, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–08232 Filed 4–20–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RM20–10–000; AD19–19–000]

Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act; Notice of Workshop

Take notice that Federal Energy Regulatory Commission (Commission) staff will convene a workshop to discuss certain performance-based ratemaking approaches, particularly shared savings, that may foster deployment of transmission technologies. Commissioners may attend and participate in the workshop.

Transmission technologies, as deployed in certain circumstances, may enhance reliability, efficiency, and capacity, and improve the operation of new or existing transmission facilities. The workshop will discuss issues related to shared savings approaches [1] for transmission technologies seeking incentives under Federal Power Act section 219.[2] The workshop will focus on how to calculate *ex ante* and *ex post* benefit analyses for transmission technologies seeking incentives. Specifically, the workshop will explore the maturity of the modeling approaches for various transmission technologies; the data needed to study the benefits/costs of such technologies; issues pertaining to access to or confidentiality of this data; the time horizons that should be considered for such studies; and other issues related to verifying forecasted benefits. The workshop may also discuss other issues, including whether and how to account for circumstances in which benefits do not materialize as anticipated. The workshop may also explore other performance-based ratemaking approaches for transmission technologies seeking incentives under Federal Power Act section 219, particularly market-based incentives.[3]

The workshop will be held on September 10, 2021, from approximately 9:00 a.m. to 5:00 p.m. Eastern Time. At this time, the workshop is expected to be held remotely. A supplemental notice will be issued prior to the workshop with further details regarding the agenda and organization, as well as the details for accessing the workshop.

Individuals interested in participating as panelists should submit a self-nomination email by 5:00 p.m. on May 21, 2021 to *Samin.Peirovi@ferc.gov.* Each nomination should indicate the proposed panelist's name, contact information, organizational affiliation, and what topics the proposed panelist would speak on.

The workshop will be open for the public to attend electronically. There is no fee for attendance.

Commission workshops are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–208–8659 (TTY) or send a fax to 202–208–2106 with the required accommodations.

For more information about this workshop, please contact:

Samin Peirovi (Technical Information) Office of Energy Policy and Innovation, (202) 502–8080, *samin.peirovi@ferc.gov*

Meghan O'Brien (Legal Information) Office of the General Counsel, (202) 502–6137, *meghan.o'brien@ferc.gov*

Sarah McKinley (Logistical Information) Office of External Affairs, (202) 502–8004, *sarah.mckinley@ferc.gov*

Dated: April 15, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–08237 Filed 4–20–21; 8:45 am]

BILLING CODE 6717–01–P

[1] *See, e.g.,* WATT Coalition and Advanced Energy Economy July 1, 2020 Comments.

[2] 16 U.S.C. 824s(b)(3).

[3] *See, e.g.,* Potomac Economics July 1, 2020 Comments at 11–12, 19; Independent Market Monitor for PJM July 1, 2020 Comments at 7–15.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP21–94–000]

Transcontinental Gas Pipe Line Company, LLC; Notice of Waiver Period for Water Quality Certification Application

On April 5, 2021, Transcontinental Gas Pipe Line Company, LLC submitted to the Federal Energy Regulatory Commission (Commission) a copy of its application for a Clean Water Act section 401(a)(1) water quality certification filed with the Pennsylvania Department of Environmental Protection (PA DEP), in conjunction with the above captioned project. Pursuant to 40 CFR 121.6, we hereby notify the PA DEP of the following:

Date of Receipt of the Certification Request: March 31, 2021.

Reasonable Period of Time to Act on the Certification Request: One year.

Date Waiver Occurs for Failure to Act: March 31, 2022.

If PA DEP fails or refuses to act on the water quality certification request by the above waiver date, then the agency's certifying authority is deemed waived pursuant to section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1).

Dated: April 13, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–08127 Filed 4–20–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Effectiveness of Exempt Wholesale Generator Status

Lily Solar, LLC	EG21–64–000
Trent River Solar, LLC	EG21–65–000
PGR Lessee P, LLC	EG21–66–000
Aquamarine Westside, LLC.	EG21–67–000
Aquamarine Lessee, LLC	EG21–68–000
Westlands Transmission, LLC.	EG21–69–000
Western Trail Wind, LLC	EG21–70–000
Helena Wind, LLC	EG21–71–000
Sparta Solar, LLC	EG21–72–000
Old 300 Solar Center, LLC	EG21–73–000
Silverstrand Grid, LLC	EG21–74–000
Ventura Energy Storage, LLC.	EG21–75–000
Chevron Power Holdings Inc..	EG21–79–000
BRP Alvin BESS LLC	EG21–80–000
Prospero II Master Tenant, LLC.	EG21–81–000
Prospero Solar II, LLC	EG21–82–000
BRP Magnolia BESS LLC	EG21–83–000
BRP Odessa Southwest BESS LLC.	EG21–84–000
BRP Angleton BESS LLC	EG21–85–000
BRP Heights BESS LLC	EG21–86–000
BRP Brazoria BESS LLC	EG21–87–000

Take notice that during the month of March 2021, the status of the above-captioned entities as Exempt Wholesale Generators became effective by operation of the Commission's regulations. 18 CFR 366.7(a) (2020).

Dated: April 15, 2021.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2021–08216 Filed 4–20–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL21–67–000]

Kentucky Municipal Energy Agency; Notice of Request for Partial Waiver

Take notice that on April 8, 2021, pursuant to section 292.402 of the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR 292.402, Kentucky Municipal Energy Agency (KYMEA), on behalf of itself and its authorizing member municipal electric utilities,[1] submitted a request for partial waiver of certain obligations imposed on KYMEA and its authorizing Members through the Commission's regulations [2] implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, as amended (PURPA),[3] as more fully explained in the request.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Comment Date: 5:00 p.m. Eastern time on April 30, 2021.

Dated: April 13, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–08124 Filed 4–20–21; 8:45 am]

BILLING CODE 6717–01–P

[1] The authorizing Members are: Barbourville Utility Commission of the City of Barbourville, Kentucky; City of Bardwell, Kentucky; Cities Utilities Commission of the City of Corbin, Kentucky; Electric and Water Plant Board of the City of Frankfort, Kentucky; City of Falmouth, Kentucky; City of Madisonville, Kentucky; City of Paris, Kentucky; and City of Providence, Kentucky.

[2] 18 CFR 292.303(a) and .303(b).

[3] 16 U.S.C. 824a–3.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD21–9–000]

The Office of Public Participation; Notice of Virtual Spanish Listening Session

The Federal Energy Regulatory Commission (Commission) staff will convene, in the above-referenced proceeding, a virtual Spanish listening session on Tuesday, May 4, 2021, from 3:00 p.m. to 4:30 p.m. Eastern time, to solicit public input on public participation and engagement, language justice, and issues facing environmental justice communities by Commission proceedings in order for the Commission to establish and operate the Office of Public Participation (OPP).

The listening session will be open to the public and audio-only. Call-in information, including preregistration, can be found on the OPP website. The listening session will have consecutive Spanish translation, the operator will be bilingual, and an audio recording and transcript will be posted on the OPP website after the event. For questions about the listening session, please send an email to *OPPWorkshop@ferc.gov.*

The listening sessions will be accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–502–8659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

Kimberly D. Bose,

Secretary.

Los Estados Unidos de América Comisión Reguladora De Energía Federal

La Oficina de Participación Pública Legajo No. AD21–9–000

Anuncio De Sesión Virtual Para Escuchar En Español

(14 de Abril, 2021)

Personal de la Comisión Reguladora de Energía Federal (Comisión) convocará, en el procedimiento referido arriba, una sesión virtual para escuchar

en español el martes 4 de mayo del 2021 desde las 3:00 p.m. hasta las 4:30 p.m., hora del este, para solicitar aporte público sobre participación y compromiso público, justicia de lenguaje, y asuntos de justicia ambiental enfrentados por comunidades afectadas por procedimientos de la Comisión para la Comisión establecer y operar la Oficina de Participación Pública (OPP).

La sesión virtual para escuchar estará abierta al público y será solo audio. Para mayor información, incluyendo el proceso de pre-registro, puede ir al sitio web de la OPP. La sesión para escuchar tendrá traducción consecutiva, el operador será bilingüe; y posterior al evento, la grabación de audio y transcripción estarán disponibles en el sitio web de la OPP. Por favor dirigir preguntas sobre la sesión virtual para escuchar, al correo electrónico: *OPPWorkshop@ferc.gov.*

Las sesiones virtuales para escuchar estarán accesibles de acuerdo con la sección 508 del Acta de Rehabilitación de 1973. Para ayuda con accesibilidad, por favor enviar un correo electrónico a: *accessibility@ferc.gov* o llamar gratis al 1–866–208–3372 (voce) o 202–502–8659 (TTY), o enviar FAX al 202–208–2106 con las acomodaciones requeridas.

Dated: April 14, 2021.

Kimberly D. Bose,

Secretaria.

[FR Doc. 2021–08130 Filed 4–20–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC21–18–000]

Commission Information Collection Activities (FERC–725Y); Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission.

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 the currently approved information collection, FERC–725Y, Mandatory Reliability Standard (Personnel Performance, Training, and Qualifications).

DATES: Comments on the collection of information are due June 21, 2021.

ADDRESSES: You may submit copies of your comments (identified by Docket No. IC21–18–000) by one of the following methods:

Electronic filing through *http://www.ferc.gov,* is preferred.

- *Electronic Filing:* Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.
- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery:
  - *Mail via U.S. Postal Service Only:* Addressed to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.
  - *Hand (including courier) delivery:* Deliver to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 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–725Y, Mandatory Reliability Standard (Personnel Performance, Training, and Qualifications).

OMB Control No.: 1902–0279.

Type of Request: Three-year extension of the FERC–725Y information collection requirements with no changes to the reporting requirements.

Abstract: The FERC–725Y information collection is intended to help ensure the safe and reliable operation of the interconnected grid through the retention of suitably trained and qualified personnel in positions that can impact the reliable operation of the Bulk-Power System. The Commission uses the FERC–725Y to implement the Congressional mandate of the Energy Policy Act of 2005 to develop mandatory and enforceable Reliability Standards to better ensure the reliability of the nation's Bulk-Power System. FERC–725Y ensures that personnel performing or supporting real-time operations on the Bulk Electric System (BES) are trained using a systematic approach. The Reliability Standard requires entities to maintain records subject to review by the Commission and North American Electric Reliability Corporation (NERC) to ensure compliance with the Reliability Standard.

Reliability Standard PER–005–2 requires entities to maintain records subject to review by the Commission and NERC to ensure compliance with the Reliability Standard. This Reliability Standard contains of six Requirements:

- R1 requires reliability coordinators, balancing authorities, and transmission operators to develop and implement a training program for system operators
- R2 requires transmission owners to develop and implement a training program for system operators
- R3 requires reliability coordinators, balancing authorities, transmission operators and transmission owners to verify the capabilities of their identified personnel
- R4 requires reliability coordinators, balancing authorities, transmission operators and transmission owners to provide those personnel with emergency operations training using simulation technology
- R5 requires reliability coordinators, balancing authorities, and transmission operators develop and implement training for system operators whose job functions can impact BES real-time reliability tasks
- R6 requires applicable generator operators to develop and implement training for certain of their dispatch personnel at a centrally located dispatch center

Reliability Standard PER–006–1 ensures that personnel are trained on specific topics essential to reliability to perform or support Real-Time operations of the Bulk Electric System.

- R1 identifies generator operator plant personnel responsible for Real-time control and carrying out Operating instructions are trained on the operational functionality of Protection Systems and Remedial Action Schemes that affect the output of generating facility(ies) it operates

Type of Respondents: Transmission owners and generator owners.

Estimate of Annual Burden: [1] Our estimate below regarding the number of respondents is based on the NERC compliance registry as of February 5, 2021.

[1] 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, reference 5 Code of Federal Regulations 1320.3.

The Commission estimates the additional annual reporting burden and cost as follows:

	Number and type of respondents [2]	Annual number of responses per respondent	Total number of responses	Avg. burden and cost per response [3]	Total annual burden hours and total annual cost ($)	Cost per respondent ($)
	(1)	(2)	(1) * (2) = (3)	(4)	(3) * (4) = (5)	(5) ÷ (1)
FERC–725Y in Docket No. IC21–18–000 (Reliability Standard PER–005–2)						
Annual Evaluation and Update of Training Program.	(RC, BA, TOP, TO, GOP) 1,148	1	1,148	8 hrs.; $561.52	9,184 hrs.; $644,624.96.	$561.52
Retention of Records	(RC, BA, TOP, TO, GOP) 1,148	1	1,148	10 hrs.; $433.80 ..	11,480 hrs.; $498,002.40.	433.80
FERC–725Y (Reliability Standard PER–006–1)						
GOP; Reporting Req. R1	937 [4]	1	937	5 hrs.; $350.95	4,685 hrs.; $328,840.15.	350.95
GOP; Recordkeeping Req.	937	1	937	10 hrs.; $433.80 ..	9,370 hrs.; $406,470.60.	433.80
Total	.....	.....	.....	.....	34,719 hrs.; $1,877,938.11.	.....

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: April 14, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–08125 Filed 4–20–21; 8:45 am]

BILLING CODE 6717–01–P

[2] For PER–005–2 and PER–006–1: RC=Reliability Coordinator; BA=Balancing Authority; TOP=Transmission Operator; TO=Transmission Owner; GOP=Generator Operator. To eliminate counting the same number multiple times the figure reflects the number of US unique entities (1,148) accounts for overlaps between RC, BA, TOP, TO and GOP. The NERC compliance registry table February 5, 2021 was used preform analysis.

[3] The estimates for cost per response are loaded hourly wage figure (includes benefits) is based on two occupational categories for 2020 found on the Bureau of Labor Statistics website (*http://www.bls.gov/oes/current/naics2_22.htm*):

- Electrical Engineer (Occupation Code: 17–2071): $70.19 (to calculate the reporting requirements).
- Office and Administrative Support (Occupation Code: 43–0000): $43.38 (to calculate the recordkeeping requirements).

[4] The number of US unique GOPs is 937 taken from the NERC compliance registry information of February 5, 2021.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC21–15–000]

Commission Information Collection Activities (FERC–716); Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission.

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 the currently approved information collection, FERC–716 (Good Faith Requests for Transmission Service and Good Faith Responses by Transmitting Utilities Under Sections 211(a) and 213(a) of the Federal Power Act (FPA)).

DATES: Comments on the collection of information are due June 21, 2021.

ADDRESSES: You may submit copies of your comments (identified by Docket No. IC21–15–000) by one of the following methods:

Electronic filing through *http://www.ferc.gov,* is preferred.

- *Electronic Filing:* Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.
- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery:

○ *Mail via U.S. Postal Service Only:* Addressed to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

○ *Hand (including courier) delivery:* Deliver to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 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–716, Good Faith Requests for Transmission Service and Good Faith Responses by Transmitting Utilities Under Sections 211(a) and 213(a) of the Federal Power Act (FPA).

OMB Control No.: 1902–0170.

Type of Request: Three-year extension of the FERC–716 information collection requirements with no changes to the current reporting requirements.

Abstract: The Commission uses the information collected under the requirements of FERC–716 to implement the statutory provisions of

sections 211 and section 213 of the Federal Power Act as amended and added by the Energy Policy Act 1992. FERC–716 also includes the requirement to file a section 211 request if the negotiations between the transmission requestor and the transmitting utility are unsuccessful. For the initial process, the information is not filed with the Commission. However, the request and response may be analyzed as a part of a section 211 action. The Commission may order transmission services under the authority of FPA 211.

The Commission's regulations in the Code of Federal Regulations (CFR), 18 CFR 2.20, provide standards by which the Commission determines if and when a valid good faith request for transmission has been made under section 211 of the FPA. By developing the standards, the Commission sought to encourage an open exchange of data with a reasonable degree of specificity and completeness between the party requesting transmission services and the transmitting utility. As a result, 18 CFR 2.20 identifies 12 components of a good faith estimate and 5 components of a reply to a good faith request.

Type of Respondents: Transmission Requestors and Transmitting Utilities.

Estimate of Annual Burden: [1] The Commission estimates the annual public reporting burden for the information collection as:

FERC–716 (GOOD FAITH REQUESTS FOR TRANSMISSION SERVICE AND GOOD FAITH RESPONSES BY TRANSMITTING UTILITIES UNDER SECTIONS 211(a) AND 213(a) OF THE FEDERAL POWER ACT (FPA))

	Number of respondents	Annual number of responses per respondent	Total number of responses	Average burden and cost per response [2]	Total annual burden hours and total annual cost ($)	Cost per respondent ($)
	(1)	(2)	(1) * (2) = (3)	(4)	(3) * (4) = (5)	(5) ÷ (1)
Information exchange between parties	6	1	6	100 hrs.; $8,300	600 hrs.; $49,800	$8,300
Application submitted to FERC if parties' negotiations are unsuccessful.	6	1	6	2.5 hrs.; $207.50	15 hrs.; $1,245	207.50
Total			12		615 hrs.; $51,045	8,507.50

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: April 14, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–08129 Filed 4–20–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP21–116–000]

Gulf States Transmission LLC; Notice of Application and Establishing Intervention Deadline

Take notice that on April 6, 2021, Gulf States Transmission LLC (Gulf States) 1300 Main Street, Houston, Texas 77002, filed in Docket No. CP21–116–000, an abbreviated application pursuant to Section 7(b) of the Natural Gas Act (NGA), and Part 157 of the Commission's regulations requesting authorization to abandon by sale to ETC Haynesville LLC (ETCH) the Gulf States interstate pipeline system in its entirety consisting of approximately 10 miles of 12-inch and 20-inch pipelines, meter and regulator stations, receipt and delivery points, and related and appurtenant facilities (collectively referred to as the Pipeline System) located in Harrison County, Texas, and Caddo Parish, Louisiana. Gulf States is also requesting authority to abandon its: (i) NGA Section 7 certificate of public convenience and necessity for the acquisition, construction, and operation of the Pipeline System; (ii) blanket certificate issued under Part 157, Subpart F of the Commission's regulations; and (iii) Part 284 blanket certificate to provide open access transportation; as well as the cancellation of its FERC Gas Tariff, Second Revised Volume No. 1, including all rate schedules therein, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

[1] 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.

[2] The estimates for cost per response are derived using the following formula: Average Burden Hours per Response × $83/hour = Average Cost per Response. The cost per hour figure is the FERC 2020 average salary plus benefits. Subject matter experts found that industry employment costs closely resemble FERC's regarding the FERC–716 information collection.

Any questions regarding this filing may be directed to Blair Lichtenwalter, Senior Director of Certificates, Gulf States Transmission LLC, 1300 Main Street, Houston, Texas 77002; by phone at (713) 989–2605, or by email at *blair.lichtenwalter@energytransfer.com.*

Pursuant to Section 157.9 of the Commission's Rules of Practice and Procedure,[1] within 90 days of this Notice the Commission staff will either: complete its environmental review and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or environmental assessment (EA) for this proposal. The filing of an EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Public Participation

There are two ways to become involved in the Commission's review of this project: you can file comments on the project, and you can file a motion to intervene in the proceeding. There is no fee or cost for filing comments or intervening. The deadline for filing a motion to intervene is 5:00 p.m. Eastern Time on May 6, 2021.

Comments

Any person wishing to comment on the project may do so. Comments may include statements of support or objections to the project as a whole or specific aspects of the project. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please submit your comments on or before May 6, 2021.

There are three methods you can use to submit your comments to the Commission. In all instances, please reference the Project docket number CP21–116–000 in your submission.

(1) You may file your comments electronically by using the eComment feature, which is located on the Commission's website at *www.ferc.gov* under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You may file your comments electronically by using the eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address below[2]. Your written comments must reference the Project docket number (CP21–116–000).

Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426

The Commission encourages electronic filing of comments (options 1 and 2 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.* Persons who comment on the environmental review of this project will be placed on the Commission's environmental mailing list, and will receive notification when the environmental documents (EA or EIS) are issued for this project and will be notified of meetings associated with the Commission's environmental review process.

The Commission considers all comments received about the project in determining the appropriate action to be taken. However, the filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding. For instructions on how to intervene, see below.

Interventions

Any person, which includes individuals, organizations, businesses, municipalities, and other entities,[3] has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure[4] and the regulations under the NGA[5] by the intervention deadline for the project, which is May 6, 2021. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as the your interest in the proceeding. [For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene.] For more information about motions to intervene, refer to the FERC website at *https://www.ferc.gov/resources/guides/how-to/intervene.asp.*

There are two ways to submit your motion to intervene. In both instances, please reference the Project docket number CP21–116–000 in your submission.

(1) You may file your motion to intervene by using the Commission's eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Intervention.'' The eFiling feature includes a document-less intervention option; for more information, visit *https://www.ferc.gov/docs-filing/efiling/document-less-intervention.pdf.;* or

(2) You can file a paper copy of your motion to intervene, along with three copies, by mailing the documents to the address below.[6] Your motion to intervene must reference the Project docket number CP21–116–000.

Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426

The Commission encourages electronic filing of motions to intervene (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Motions to intervene must be served on the applicant either by mail or email at: Gulf States Transmission LLC, 1300 Main Street, Houston, Texas 77002; or at *blair.lichtenwalter@energytransfer.com.* Any subsequent submissions by an intervenor must be served on the

[1] 18 CFR (Code of Federal Regulations) 157.9.

[2] Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

[3] 18 CFR 385.102(d).

[4] 18 CFR 385.214.

[5] 18 CFR 157.10.

[6] Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online. Service can be via email with a link to the document.

All timely, unopposed[7] motions to intervene are automatically granted by operation of Rule 214(c)(1).[8] Motions to intervene that are filed after the intervention deadline are untimely, and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations.[9] A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at www.f*erc.gov* using the ''eLibrary'' link as described above. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to *www.ferc.gov/docs-filing/esubscription.asp.*

Intervention Deadline: 5:00 p.m. Eastern Time on May 6, 2021.

Dated: April 15, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–08240 Filed 4–20–21; 8:45 am]

BILLING CODE 6717–01–P

[7] The applicant has 15 days from the submittal of a motion to intervene to file a written objection to the intervention.

[8] 18 CFR 385.214(c)(1).

[9] 18 CFR 385.214(b)(3) and (d).

DEPARTMENT OF ENERGY

Western Area Power Administration

Loveland Area Projects and Western Area Colorado Missouri Balancing Authority—Rate Order No. WAPA–197

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of proposed transmission, energy and generator imbalance, and losses formula rates for use under the Western Energy Imbalance Service (WEIS) Market.

SUMMARY: The Rocky Mountain Region (RMR) of the Western Area Power Administration (WAPA) proposes to convert its existing rates for short-term sales for RMR to use under the WEIS Market to new long-term formula rates for use October 1, 2021, through September 30, 2024. The existing formula rates (approved under the WAPA Administrator's short-term rate authority) expire on September 30, 2021. No changes are being proposed to the existing formula rates under the rates for short-term sales Rate Schedules L–NFJDT (joint dispatch transmission), L–AS4 (energy imbalance), L–AS9 (generator imbalance), and L–AS7 (balancing authority real power losses).

DATES: A consultation and comment period will begin April 21, 2021 and end May 21, 2021. RMR will accept written comments at any time during the 30-day consultation and comment period.

ADDRESSES: Written comments and requests to be informed of Federal Energy Regulatory Commission (FERC) actions concerning the proposed formula rates submitted by WAPA to FERC for approval should be sent to: Mr. Timothy A. Vigil, Acting Regional Manager, Rocky Mountain Region, Western Area Power Administration, 5555 East Crossroads Boulevard, Loveland, CO 80538–8986, or email: *LAPtransadj@wapa.gov.* RMR will post information about the proposed formula rates and written comments received to its website at: *https://www.wapa.gov/regions/RM/rates/Pages/2021-Long-Term-Rates---WEIS-Market.aspx.*

FOR FURTHER INFORMATION CONTACT: Mrs. Sheila D. Cook, Rates Manager, Rocky Mountain Region, Western Area Power Administration, (970) 685–9562 or email: *scook@wapa.gov.*

SUPPLEMENTARY INFORMATION: On March 9, 2017, FERC approved and confirmed LAP transmission and LAP, WACM, and Colorado River Storage Project ancillary services formula rates under Rate Schedules L–NT1 (network), L–FPT1 (firm point-to-point), L–NFPT1 (non-firm point-to-point), L–UU1 (unreserved use), L–AS1 (scheduling and dispatch), L–AS2 (reactive supply and voltage control (VAR) support), L–AS3 (regulation), L–AS4 (energy imbalance), L–AS5 (spinning reserves), L–AS6 (supplemental reserves), L–AS7 (transmission losses), and L–AS9 (generator imbalance) under Rate Order No. WAPA–174 for a 5-year period through September 30, 2021.[1] On December 29, 2020, WAPA's Administrator approved rates for short-term sales for RMR to use under the WEIS Market, which superseded the previously approved Rate Schedules L–AS4 (energy imbalance), L–AS9 (generator imbalance), and L–AS7 (transmission losses) and which created a new Rate Schedule, L–NFJDT (joint dispatch transmission), for the 8-month period February 1, 2021, through September 30, 2021.

The existing formula rates under the rates for short-term sales provide sufficient revenue to recover annual costs within the cost recovery criteria set forth in Department of Energy (DOE) Order RA 6120.2. RMR proposes that the long-term formula-based rates would take effect October 1, 2021. The proposed formula rates would remain in effect until September 30, 2024, or until WAPA changes the formula rates through another public rate process pursuant to 10 CFR part 903, whichever occurs first. For more information on the proposed rates, please see the customer brochure located on RMR's website at: *https://www.wapa.gov/regions/RM/rates/Pages/2021-Long-Term-Rates---WEIS-Market.aspx.*

Under a separate rate extension process, Rate Order No. WAPA–196, RMR is concurrently proposing to extend the remaining 5-year formula rates under Rate Schedules L–NT1 (network), L–FPT1 (firm point-to-point), L–NFPT1 (non-firm point-to-point), L–UU1 (unreserved use), L–AS1 (scheduling and dispatch), L–AS2 (VAR support), L–AS3 (regulation), L–AS5 (spinning reserves), and L–AS6 (supplemental reserves) for this same 3-year period, October 1, 2021, through September 30, 2024.

This 3-year period would allow RMR time to refine the WEIS Market implementation and investigate the potential expansion of and participation in the Southwest Power Pool (SPP) Regional Transmission Organization (RTO) in the Western Interconnection.

[1] Order Confirming and Approving Rate Schedules on a Final Basis, FERC Docket Nos. EF16–5–000 and EF16–5–001, 158 FERC ¶ 62,181 (2017).

The potential expansion of the SPP RTO would have significant impacts on the above rate methodologies. Putting rates in place for the next three years would also allow time for RMR to evaluate what changes would need to be made to these rates before conducting a major rate adjustment process and putting all the necessary formula rates in place for a new 5-year period that would begin on October 1, 2024.

Legal Authority

DOE's procedures for public participation in power and transmission rate adjustments (10 CFR part 903) were published in 1985 and 2019.[2] The proposed action constitutes a minor rate adjustment, as defined by 10 CFR 903.2(e). In accordance with 10 CFR 903.15(a) and 10 CFR 903.16(a), WAPA has determined it is not necessary to hold public information and public comment forums for this rate action but is initiating a 30-day consultation and comment period to give the public an opportunity to comment on the proposed formula rates. RMR will review and consider all timely public comments at the conclusion of the consultation and comment period and will make amendments or adjustments to the proposal as appropriate. Proposed rates would then be approved on an interim basis.

WAPA is establishing the formula rates for LAP and WACM in accordance with section 302 of the DOE Organization Act (42 U.S.C. 7152).[3]

By Delegation Order No. 00–037.00B, effective November 19, 2016, the Secretary of Energy delegated: (1) The authority to develop power and transmission rates to WAPA's Administrator; (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary of Energy; and (3) the authority to confirm, approve, and place into effect on a final basis, or to remand or disapprove such rates to FERC. By Delegation Order No. S1–DEL–S4–2021, effective February 25, 2021, the Acting Secretary of Energy also delegated the authority to confirm, approve, and place such rates into effect on an interim basis to the Under Secretary for Science (and Energy). By Redelegation Order No. 00–002.10E, effective February 14, 2020, the Under Secretary of Energy (to whom such authority was delegated by the Secretary of Energy in Delegation Order No. 00–002.00S from January 15, 2020, until that delegation was rescinded on February 25, 2021) redelegated the authority to confirm, approve, and place such rates into effect on an interim basis to the Assistant Secretary for Electricity. By Redelegation Order No. 00–002.10–05, effective July 8, 2020, the Assistant Secretary for Electricity further redelegated the authority to confirm, approve, and place such rates into effect on an interim basis to WAPA's Administrator. The delegations and redelegations not affirmatively rescinded remain valid.

Availability of Information

All brochures, studies, comments, letters, memorandums, or other documents that RMR initiates or uses to develop the proposed formula rates are available for inspection and copying at the Rocky Mountain Region, located at 5555 East Crossroads Boulevard, Loveland, Colorado. Many of these documents and supporting information are also available on WAPA's website at: *https://www.wapa.gov/regions/RM/rates/Pages/2021-Long-Term-Rates---WEIS-Market.aspx.*

Ratemaking Procedure Requirements

Environmental Compliance

WAPA is in the process of determining whether an environmental assessment or an environmental impact statement should be prepared or if this action can be categorically excluded from those requirements.[4]

Determination Under Executive Order 12866

WAPA has an exemption from centralized regulatory review under Executive Order 12866; accordingly, no clearance of this notice by the Office of Management and Budget is required.

Signing Authority

This document of the Department of Energy was signed on April 9, 2021, by Tracey A. LeBeau, Interim Administrator, Western Area Power Administration, 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 April 16, 2021.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2021–08192 Filed 4–20–21; 8:45 am]

BILLING CODE 6450–01–P

[2] 50 FR 37835 (Sept. 18, 1985) and 84 FR 5347 (Feb. 21, 2019).

[3] This Act transferred to, and vested in, the Secretary of Energy the power marketing functions of the Secretary of the Department of the Interior and the Bureau of Reclamation (Reclamation) under the Reclamation Act of 1902 (ch. 1093, 32 Stat. 388), as amended and supplemented by subsequent laws, particularly section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)) and section 5 of the Flood Control Act of 1944 (16 U.S.C. 825s); and other acts that specifically apply to the projects involved.

[4] In compliance with the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321–4347); the Council on Environmental Quality Regulations for implementing NEPA (40 CFR parts 1500–1508); and DOE NEPA Implementing Procedures and Guidelines (10 CFR part 1021).

DEPARTMENT OF ENERGY

Western Area Power Administration

Loveland Area Projects, Western Area Colorado Missouri Balancing Authority, and Colorado River Storage Project—Rate Order No. WAPA–196

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of proposed extension of transmission and ancillary services formula rates.

SUMMARY: The Rocky Mountain Region (RMR) of the Western Area Power Administration (WAPA) proposes to extend existing formula rates for the Loveland Area Projects (LAP), the Western Area Colorado Missouri Balancing Authority (WACM), and the Colorado River Storage Project (CRSP) through September 30, 2024. The extended formula rates are unchanged from the existing formula rates applicable to LAP transmission services under rate schedules L–NT1 (network), L–FPT1 (firm point-to-point), L–NFPT1 (non-firm point-to-point), and L–UU1 (unreserved use), and applicable to LAP, WACM, and CRSP ancillary services under rate schedules L–AS1 (scheduling and dispatch), L–AS2 (reactive supply and voltage control (VAR) support), L–AS3 (regulation), L–AS5 (spinning reserves), and L–AS6 (supplemental reserves) that expire on September 30, 2021.

DATES: A consultation and comment period will begin April 21, 2021 and end May 21, 2021. RMR will accept written comments at any time during the consultation and comment period.

ADDRESSES: Written comments and requests to be informed of Federal Energy Regulatory Commission (FERC) actions concerning the proposed extension submitted by WAPA to FERC

for approval should be sent to: Mr. Timothy A. Vigil, Acting Regional Manager, Rocky Mountain Region, Western Area Power Administration, 5555 East Crossroads Boulevard, Loveland, CO 80538–8986, or email: *LAPtransadj@wapa.gov.* RMR will post information about the proposed formula rate extension and written comments received to its website at: *https://www.wapa.gov/regions/RM/rates/Pages/2021-Rate-Extension.aspx.*

FOR FURTHER INFORMATION CONTACT: Mrs. Sheila D. Cook, Rates Manager, Rocky Mountain Region, Western Area Power Administration, (970) 685–9562 or email: *scook@wapa.gov.*

SUPPLEMENTARY INFORMATION: On March 9, 2017, FERC approved and confirmed LAP transmission and LAP, WACM, and CRSP ancillary services formula rates under Rate Schedules L–NT1 (network), L–FPT1 (firm point-to-point), L–NFPT1 (non-firm point-to-point), L–UU1 (unreserved use), L–AS1 (scheduling and dispatch), L–AS2 (VAR support), L–AS3 (regulation), L–AS4 (energy imbalance), L–AS5 (spinning reserves), L–AS6 (supplemental reserves), L–AS7 (transmission losses), and L–AS9 (generator imbalance) under Rate Order No. WAPA–174 for a 5-year period through September 30, 2021.[1] On December 29, 2020, WAPA's Administrator approved rates for short-term sales for RMR to use under the Western Energy Imbalance Service (WEIS) Market, which superseded rate schedules L–AS4 (energy imbalance), L–AS9 (generator imbalance), and L–AS7 (transmission losses) for the 8-month period of February 1, 2021, through September 30, 2021.

In accordance with 10 CFR 903.23(a),[2] RMR is proposing to extend the remaining 5-year formula rates under Rate Schedules L–NT1 (network), L–FPT1 (firm point-to-point), L–NFPT1 (non-firm point-to-point), L–UU1 (unreserved use), L–AS1 (scheduling and dispatch), L–AS2 (VAR support), L–AS3 (regulation), L–AS5 (spinning reserves), and L–AS6 (supplemental reserves) for the period of October 1, 2021, through September 30, 2024. The existing formula rates provide sufficient revenue to pay all annual costs, including interest expense, and repay investment within the allowable period consistent with the cost recovery criteria set forth in Department of Energy (DOE) Order RA 6120.2.

In accordance with 10 CFR 903.23(a), WAPA has determined that it is not necessary to hold public information or public comment forums for this rate action but is initiating a 30-day consultation and comment period to give the public an opportunity to comment on the proposed extension. RMR will review and consider all timely public comments at the conclusion of the consultation and comment period and adjust the proposal as appropriate.

Under a separate rate adjustment process, Rate Order No. WAPA–197, RMR is concurrently proposing to put long-term rates in place for RMR to use under the WEIS Market under Rate Schedules L–AS4 (energy imbalance), L–AS9 (generator imbalance), L–AS7 (balancing authority real power losses), and L–NFJDT (joint dispatch transmission) for this same 3-year period, October 1, 2021, through September 30, 2024.

This 3-year period would allow RMR time to refine the WEIS Market implementation and investigate the potential expansion of, and participation in, the Southwest Power Pool (SPP) Regional Transmission Organization (RTO) in the Western Interconnection. The potential expansion of the SPP RTO would have significant impacts on the above rate methodologies. Putting rates in place for the next three years would also allow time for RMR to evaluate what changes would need to be made to these rates before conducting a major rate adjustment process and putting all necessary formula rates in place for a new 5-year period that would begin on October 1, 2024.

Legal Authority

By Delegation Order No. 00–037.00B, effective November 19, 2016, the Secretary of Energy delegated: (1) The authority to develop power and transmission rates to WAPA's Administrator; (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary of Energy; and (3) the authority to confirm, approve, and place into effect on a final basis, or to remand or disapprove such rates to FERC. By Delegation Order No. S1–DEL–S4–2021, effective February 25, 2021, the Acting Secretary of Energy also delegated the authority to confirm, approve, and place such rates into effect on an interim basis to the Under Secretary for Science (and Energy). By Redelegation Order No. 00–002.10E, effective February 14, 2020, the Under Secretary of Energy (to whom such authority was delegated by the Secretary of Energy in Delegation Order No. 00–002.00S from January 15, 2020, until that delegation was rescinded on February 25, 2021) redelegated the authority to confirm, approve, and place such rates into effect on an interim basis to the Assistant Secretary for Electricity. By Redelegation Order No. 00–002.10–05, effective July 8, 2020, the Assistant Secretary for Electricity further redelegated the authority to confirm, approve, and place such rates into effect on an interim basis to WAPA's Administrator. The delegations and redelegations not affirmatively rescinded remain valid.

Ratemaking Procedure Requirements

Environmental Compliance

WAPA previously determined that this action fits within the class listed in Appendix B to Subpart D of 10 CFR part 1021.410: Categorical exclusions applicable to B4.3: Electric power marketing rate changes and B4.4: Power marketing services and activities, which do not require preparation of either an environmental impact statement (EIS) or an environmental assessment (EA).[3] Specifically, WAPA has determined that this rulemaking is consistent with activities identified in B4, Categorical Exclusions Applicable to Specific Agency Actions (see 10 CFR part 1021, Appendix B to Subpart D, Part B4. A copy of the categorical exclusion determination is available on WAPA's website at *https://www.wapa.gov/regions/RM/environment/Pages/CX2016.aspx.* Look for file entitled, ''2016–077 Prop Formula Rate Adjust for Transmission Ancillary Services and Sales of Surplus Prods 031016.''

Determination Under Executive Order 12866

WAPA has an exemption from centralized regulatory review under Executive Order 12866; accordingly, no clearance of this notice by the Office of Management and Budget is required.

Signing Authority

This document of the Department of Energy was signed on April 9, 2021, by Tracey A. LeBeau, Interim Administrator, Western Area Power Administration, 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,

[1] Order Confirming and Approving Rate Schedules on a Final Basis, FERC Docket Nos. EF16–5–000 and EF16–5–001, 158 FERC ¶ 62,181 (2017).

[2] 50 FR 37835 (Sept. 18, 1985) and 84 FR 5347 (Feb. 21, 2019).

[3] The determination was done in compliance with the National Environmental Policy Act (NEPA) of 1969, as amended, 42 U.S.C. 4321–4347; the Council on Environmental Quality Regulations for implementing NEPA (40 CFR parts 1500–1508); and DOE NEPA Implementing Procedures and Guidelines (10 CFR part 1021).

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 April 16, 2021.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2021–08191 Filed 4–20–21; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2021–0080; FRL–10022–57]

Pesticide Product Registration; Receipt of Applications for New Uses—April 2021

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received applications to register new uses for pesticide products containing currently registered active ingredients. Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on these applications.

DATES: Comments must be received on or before May 21, 2021.

ADDRESSES: Submit your comments, identified by the docket identification (ID) number and the File Symbol or the EPA registration number of interest as shown in the body of this document, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave., NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *https://www.epa.gov/dockets/where-send-comments-epa-dockets.*

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Charles Smith, Biopesticides and Pollution Prevention Division (7511P), main telephone number: (703) 305–7090, email address: *BPPDFRNotices@epa.gov;* or Marietta Echeverria, Registration Division (7505P), main telephone number: (703) 305–7090, email address: *RDFRNotices@epa.gov.* The mailing address for each contact person is: Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460–0001.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *https://www.epa.gov/dockets/commenting-epa-dockets.*

II. Registration Applications

EPA has received applications to register new uses for pesticide products containing currently registered active ingredients. Pursuant to the provisions of FIFRA section 3(c)(4) (7 U.S.C. 136a(c)(4)), EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipt of these applications does not imply a decision by the Agency on these applications.

Notice of Receipt—New Uses

1. *EPA Registration Number or File Symbol:* 0F8868, 100–1592. *Docket ID number:* EPA–HQ–OPP–2021–0154. *Applicant:* Syngenta Crop Protection LLC, P.O. Box 18300 Greensboro, NC 27419–8300. *Active ingredient:* Cyantraniliprole and Abamectin. *Product type:* Insecticide/Miticide. *Proposed Use:* Inadvertent residues in or on sugarcane. *Contact:* RD.

2. *EPA File Symbol:* 7173–GNO. *Docket ID number:* EPA–HQ–OPP–2021–0252. *Applicant:* Liphatech, Inc., 3600 W Elm Street, Milwaukee, WI 52309. *Active Ingredient:* Chlorophacinone. *Product type:* Rodenticide. *Proposed Use:* Non-food areas in and around herbs and spices; forest areas; grass forage, fodder, and hay; nongrass animal feeds (forage, fodder, straw, and hay); cereal grains; edible seed crops; oil seed crops; fiber crops; vegetable crops; pastures. *Contact:* RD.

3. *File Symbol:* 56336–IR. *Docket ID number:* EPA–HQ–OPP–2021–0159. *Applicant:* Suterra LLC, 20950 NE Talus Place, Bend, OR 97701. *Active ingredient:* (3S, 6R), (3S, 6S)-3-Methyl-6-isopropenyl-9-decen-1-yl acetate. *Product type:* Insecticide. *Proposed use:* Biochemical arthropod mating disruptor for California Red Scale (*Aonidiella aurantii*). *Contact:* BPPD.

4. *EPA Registration Number:* 59639–201. *Docket ID number:* EPA–HQ–OPP–2021–0204. *Applicant:* Valent U.S.A. LLC, 4600 Norris Canyon Road, P.O. Box 5075, San Ramon, CA 94583–0975. *Active ingredient:* Mandestrobin (2*RS*)-2-{2-[(2,5-dimethylphenoxy)methyl]phenyl}-2-methoxy-*N*-methylacetamide. *Product type:* Fungicide. *Proposed use:* Lettuce, head and Lettuce, leaf. *Contact:* RD.

Authority: 7 U.S.C. 136 *et seq.*

Dated: April 8, 2021.

Delores Barber,

Director, Information Technology and Resources Management Division, Office of Program Support.

[FR Doc. 2021–08229 Filed 4–20–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2015–0765; FRL–10022–47–ORD]

Board of Scientific Counselors (BOSC) Executive Committee Meeting—May 2021

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public meeting.

SUMMARY: The Environmental Protection Agency (EPA), Office of Research and Development (ORD), gives notice of a virtual meeting of the Board of Scientific Counselors (BOSC) Executive Committee (EC) to review the draft reports of the Air and Energy (AE) and Chemical Safety for Sustainability and Health and Environmental Risk Assessment (CSS–HERA) subcommittees.

DATES: The meeting will be held over one day via videoconference on Tuesday, May 25, 2021, from 2 p.m. to 5 p.m. (EDT). Attendees must register by May 24, 2021.

Meeting times are subject to change. This meeting is open to the public. Comments must be received by May 24, 2021, to be considered by the Executive Committee. Requests for the draft agenda or making a presentation at the meeting will be accepted until May 24, 2021.

ADDRESSES: Instructions on how to connect to the videoconference will be provided upon registration at *https://www.eventbrite.com/e/us-epa-bosc-executive-committee-meeting-registration-145321324995.*

Submit your comments to Docket ID No. EPA–HQ–ORD–2015–0765 by one of the following methods:

- *www.regulations.gov:* Follow the online instructions for submitting comments.
- *Note:* comments submitted to the *www.regulations.gov* website are anonymous unless identifying information is included in the body of the comment.
- *Email:* Send comments by electronic mail (email) to: *ORD.Docket@epa.gov,* Attention Docket ID No. EPA–HQ–ORD–2015–0765.
- *Note:* comments submitted via email are not anonymous. The sender's email will be included in the body of the comment and placed in the public docket which is made available on the internet.

Instructions: All comments received, including any personal information provided, will be included in the public docket without change and may be made available online at *www.regulations.gov.* Information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute will not be included in the public docket, and should not be submitted through *www.regulations.gov* or email. For additional information about the EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/dockets/.*

Public Docket: Publicly available docket materials may be accessed *Online* at *www.regulations.gov.*

Copyrighted materials in the docket are only available via hard copy. The telephone number for the ORD Docket Center is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer (DFO), Tom Tracy, via phone/voicemail at: (202) 564–6518; or via email at: *tracy.tom@epa.gov.*

Any member of the public interested in receiving a draft agenda, attending the meeting, or making a presentation at the meeting should contact Tom Tracy no later than May 24, 2021.

SUPPLEMENTARY INFORMATION: The Board of Scientific Counselors (BOSC) is a federal advisory committee that provides advice and recommendations to EPA's Office of Research and Development on technical and management issues of its research programs. The meeting agenda and materials will be posted to *https://www.epa.gov/bosc.*

Proposed agenda items for the meeting include, but are not limited to, the following: Review the draft reports of the AE and CSS–HERA subcommittees.

Information on Services Available: For information on translation services, access, or services for individuals with disabilities, please contact Tom Tracy at (202) 564–6518 or *tracy.tom@epa.gov.* To request accommodation of a disability, please contact Tom Tracy at least ten days prior to the meeting to give the EPA adequate time to process your request.

Authority: Pub. L. 92–463, 1, Oct. 6, 1972, 86 Stat. 770.

Mary Ross,

Director, Office of Science Advisor, Policy and Engagement.

[FR Doc. 2021–08279 Filed 4–20–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2021–0083; FRL–10022–58]

Pesticide Product Registration; Receipt of Applications for New Active Ingredients—April 2021

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received applications to register pesticide products containing active ingredients not included in any currently registered pesticide products. Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on these applications.

DATES: Comments must be received on or before May 21, 2021.

ADDRESSES: Submit your comments, identified by docket identification (ID) number and the File Symbol of interest as shown in the body of this document, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave., NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *https://www.epa.gov/dockets/where-send-comments-epa-dockets.*

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

FOR FURTHER INFORMATION CONTACT: Charles Smith, Biopesticides and Pollution Prevention Division (7511P), main telephone number: (703) 305–7090, email address: *BPPDFRNotices@epa.gov.* The mailing address for this contact person is: Office of Pesticide

Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW. Washington, DC 20460–0001. As part of the mailing address, include the contact person's name, division, and mail code.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *https://www.epa.gov/dockets/commenting-epa-dockets.*

II. Registration Applications

EPA has received applications to register pesticide products containing active ingredients not included in any currently registered pesticide products. Pursuant to the provisions of FIFRA section 3(c)(4) (7 U.S.C. 136a(c)(4)), EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipt of these applications does not imply a decision by the Agency on these applications. For actions being evaluated under EPA's public participation process for registration actions, there will be an additional opportunity for public comment on the proposed decisions. Please see EPA's public participation website for additional information on this process (*https://www.epa.gov/pesticide-registration/public-participation-process-registration-actions*).

A. Notice of Receipt—New Active Ingredients

1. *File Symbol:* 2375–E. *Docket ID number:* EPA–HQ–OPP–2020–0734. *Applicant:* Chr. Hansen, Inc., 9015 W Maple St., Milwaukee, WI 53214. *Product name:* CH2970/CH3000. *Active ingredients:* Fungicide and nematicide—*Bacillus paralicheniformis* strain CH2970 at 20.0% and *Bacillus subtilis* strain CH3000 at 31.0%. *Proposed use:* Seed treatment and soil application.

2. *File Symbol:* 2375–E. *Docket ID number:* EPA–HQ–OPP–2020–0734. *Applicant:* Chr. Hansen, Inc., 9015 W Maple St., Milwaukee, WI 53214. *Product name:* CH3000. *Active ingredient:* Fungicide and nematicide—*Bacillus subtilis* strain CH3000 at 100.0%. *Proposed use:* For manufacturing use.

3. *File Symbol:* 2375–R. *Docket ID number:* EPA–HQ–OPP–2020–0734. *Applicant:* Chr. Hansen, Inc., 9015 W Maple St., Milwaukee, WI 53214. *Product name:* CH2970. *Active ingredient:* Fungicide and nematicide-*Bacillus paralicheniformis* strain CH2970 at 100.0%. *Proposed use:* For manufacturing use.

4. *File Symbol:* 29964–GR. *Docket ID number:* EPA–HQ–OPP–2021–0218. *Applicant:* Pioneer Hi-Bred International, Inc., 7100 NW 62nd Ave., P.O. Box 1000, Johnston, IA 50131–1000. *Product name:* DP915635 Maize. *Active ingredient:* Insecticide—Ophioglossum pendulum IPD079Ea insecticidal protein and the genetic material necessary for its production in corn event DP–915635–4 at <0.000046%. *Proposed use:* Plant-incorporated protectant.

5. *File Symbol:* 70506–GIT. *Docket ID number:* EPA–HQ–OPP–2021–0225. *Applicant:* UPL NA Inc., 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406. *Product name:* G1957aa. *Active ingredients:* Biochemicals for tobacco sucker control—n—Nonanol (C9) at 16.2% and n-Undecanol (C11) at 32.4%. *Proposed use:* Biochemical spray.

6. *File Symbols:* 92188–R, 92188–E, 92188–G, 92188–U, 92188–L, 92188–A, and 92188–T. *Docket ID number:* EPA–HQ–OPP–2021–0226. *Applicant:* Elemental Enzymes Ag & Turf LLC, 1685 Galt Industrial Blvd., St. Louis, MO 63132. *Product names:* Vismax Tree & Vine, Fig22-Bt Peptide Technical, Vismax Spectrum, Vismax Row Crop, Vismax Injection, Vismax Specialty Crop, and Vismax Seed Treatment. *Active ingredient:* Biochemical plant regulator and local and systemic resistance inducer—Fig22-Bt Peptide at 0.012% (Vismax Tree & Vine, Vismax Spectrum, and Vismax Specialty Crop), at 70% (Fig22-Bt Peptide Technical), at 0.0020% (Vismax Row Crop), and at 0.0048% (Vismax Injection and Vismax Seed Treatment). *Proposed use:* Biochemical plant regulator and local and systemic resistance inducer for use on food and non-food crops and plants, for use as a seed treatment, and for manufacturing.

7. *File Symbols:* 94218–R and 94218–E. *Docket ID number:* EPA–HQ–OPP–2021–0219. *Applicant:* Biofungitek, S.L., c/o Compliance Services International, 7501 Bridgeport Way West, Lakewood, WA 94899. *Product names:* (0178) Thyme Oil, Red and NSTKI–014. *Active ingredient:* Biochemical fungicide—Thyme Oil at 100% (0178) Thyme Oil, Red) and 1.75% (NSTKI–014). *Proposed use:* Biochemical fungicide for use on agricultural crops, turf, and ornamentals.

8. *File Symbol:* 95220–E. *Docket ID number:* EPA–HQ–OPP–2021–0211. *Applicant:* Ag Chem Resources, LLC, 10120 Dutch Iris Dr., Bakersfield, CA 93311. *Product name:* AgChem1–EP1. *Active ingredient:* Nematicide—Extract of *Caesalpinia spinosa* at 99.1%. *Proposed use:* For use in or on raw agricultural products and food products.

9. *File Symbol:* 95220–R. *Docket ID number:* EPA–HQ–OPP–2021–0211. Applicant: Ag Chem Resources, LLC, 10120 Dutch Iris Dr., Bakersfield, CA 93311. *Product name:* AgChem1. *Active ingredient:* Nematicide—Extract of *Caesalpinia spinosa* at 99.1%. *Proposed use:* For manufacturing use.

Authority: 7 U.S.C. 136 *et seq.*

Dated: April 8, 2021.

Delores Barber,

Director, Information Technology and Resources Management Division, Office of Program Support.

[FR Doc. 2021–08256 Filed 4–20–21; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice: 2021–6005]

Agency Information Collection Activities: Comment Request; EIB 92–34 Application for Short-Term Letter of Credit Export Credit Insurance Policy

AGENCY: Export-Import Bank of the United States.

ACTION: Submission for OMB review and comments request.

SUMMARY: The Export-Import Banks of the United States (EXIM), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

DATES: Comments must be received on or before June 21, 2021 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *WWW.REGULATIONS.GOV* or by mail to Jean Fitzgibbon, *jean.fitzgibbon@exim.gov,* Export-Import Bank of the United States, 811 Vermont Ave. NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: To request additional information, please Jean Fitzgibbon. 202–565–3620.

SUPPLEMENTARY INFORMATION: The Export-Import Bank of the United States, pursuant to the Export-Import Bank Act of 1945, as amended (12 U.S.C. 635, et.seq.), facilitates the finance of the export of U.S. goods and services. The ''Report of Premiums Payable for Exporters Only'' form will be used by exporters to report and pay premiums on insured shipments to various foreign buyers.

The Application for Short Term Letter of Credit Export Credit Insurance Policy is used to determine the eligibility of the applicant and the transaction for EXIM assistance under its insurance program. EXIM customers are able to submit this form on paper or electronically.

Title and Form Number: EIB 92–34 Application for Short-Term Letter of Credit Export Credit Insurance Policy.

OMB Number: 3048–0009.

Type of Review: Regular.

Need and Use: This form is used by a financial institution (or broker acting on its behalf) to obtain approval for coverage of a short-term letter of credit. The information allows the EXIM staff to make a determination of the eligibility of the applicant and transaction for EXIM assistance under its programs.

The application tool can be reviewed at: *https://www.exim.gov/sites/default/files/pub/pending/eib92-34.pdf.*

Affected Public: This form affects entities involved in the export of U.S. goods and services.

Annual Number of Respondents: 11.

Estimated Time per Respondent: 1 hr.

Annual Burden Hours: 11.

Frequency of Reporting of Use: On occasion.

Government Expenses:

Reviewing Time per Year: 11 hours.

Average Wages per Hour: $42.50.

Average Cost per Year: $468.

(time * wages)

Benefits and Overhead: 20%.

Total Government Cost: $561.

Bassam Doughman,

IT Specialist.

[FR Doc. 2021–08287 Filed 4–20–21; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1048; OMB 3060–1194; FRS 21248]

Information Collections Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before June 21, 2021. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1048.

Title: Section 1.929(c)(1), Composite Interference Contour (CIC).

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities, not-for-profit institutions and state, local or tribal government.

Number of Respondents and Responses: 50 respondents; 50 responses.

Estimated Time per Response: 2 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 309(j).

Total Annual Burden: 100 hours.

Total Annual Cost: No cost.

Privacy Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: The Commission will submit this expiring information collection to the Office of Management and Budget (OMB) for approval of an extension request.

Under 47 CFR 1.929(c)(1) of the Commission's rules, any increase in the composite interference contour (CIC) of a site-based licensee in the Paging and Radiotelephone Service, Rural Radiotelephone Service, or 800 MHz Specialized Mobile Radio Service is a major modification of a license that requires prior Commission approval.

However, in February 2005, the Commission adopted and released final rules which amended section 1.929(c)(1) to specify that expansion of a composite interference contour (CIC) of a site-based licensee in the Paging and

Radiotelephone Service—as well as the Rural Radiotelephone Service and 800 MHz Specialized Mobile Radio Service—over water on a secondary, non-interference basis should be classified as a minor (rather than major) modification of a license. Such reclassification has eliminated the filing requirements associated with these license modifications, but requires site-based licensees to provide the geographic area licensee (on the same frequency) with the technical and engineering information necessary to evaluate the site-based licensee's operations over water.

OMB Control Number: 3060–1194.

Title: AM Station Modulation Dependent Carrier Level (MDCL) Notification Form; FCC Form 338.

Form Number: FCC Form 338.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents and Responses: 100 respondents and 100 responses.

Estimated Hours per Response: 1 hour.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 100 hours.

Total Annual Costs: None.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 154(i), 303, 310 and 533 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality required with this collection of information.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On October 23, 2015, the Commission released the First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry, Revitalization of the AM Radio Service (First R&O), FCC 15–142, MB Docket 13–249. In the First R&O, the Commission adopted its proposal for wider implementation of Modulation Dependent Carrier Level (MDCL) control technologies by amending Section 73.1560(a) of the rules, to provide that an AM station may commence operation using MDCL control technology without prior Commission authority, provided that the AM station licensee notifies the Commission of the station's MDCL control operation within 10 days after commencement of such operation using the Bureau's Consolidated Database System (CDBS).

In September 2011, the Commission's Media Bureau (Bureau) had released an MDCL Public Notice, in which it stated that it would permit AM stations, by rule waiver or experimental authorization, to use MDCL control technologies, which are transmitter control techniques that vary either the carrier power level or both the carrier and sideband power levels as a function of the modulation level. This allows AM licensees to reduce power consumption while maintaining audio quality and their licensed station coverage areas.

There are two basic types of MDCL control technologies. In one type, the carrier power is reduced at low modulation levels and increased at higher modulation levels. In the other type, there is full carrier power at low modulation levels and reduced carrier power and sideband powers at higher modulation levels. Use of any of these MDCL control technologies reduces the station's antenna input power to levels not permitted by Section 73.1560(a) of the Commission's rules.

The MDCL Public Notice permitted AM station licensees wanting to use MDCL control technologies to seek either a permanent waiver of Section 73.1560(a) for those licensees already certain of the particular MDCL control technology to be used, or an experimental authorization pursuant to Section 73.1510 of the Rules for those licensees wishing to determine which of the MDCL control technologies would result in maximum cost savings and minimum effects on the station's coverage area and audio quality. Between release of the MDCL Public Notice and release of the Notice of Proposed Rule Making in MB Docket No. 13–249, FCC 13–139 (NPRM), 33 permanent waiver requests and 20 experimental requests authorizing use of MDCL control technologies had been granted by the Bureau.

AM station licensees using MDCL control technologies have reported significant savings on electrical power costs and few, if any, perceptible effects on station coverage area and audio quality. Accordingly, the NPRM tentatively concluded that use of MDCL control technologies reduces AM broadcasters' operating costs while maintaining a station's current level of service to the public, without interference to other stations. The Commission, therefore, proposed to allow an AM station to commence operation using MDCL control technology by notification to the Commission, without prior Commission authority. Consistent with the Commission's new rule allowing AM broadcasters to implement MDCL technologies without prior authorization, by electronic notification within 10 days of commencing MDCL operations, the Commission created FCC Form 338, AM Station Modulation Dependent Carrier Level (MDCL) Notification. In addition to the standard general contact information, FCC Form 338 solicits minimal technical data, as well as the date that MDCL control operation commenced. This information collection regarding FCC Form 338 needs OMB review and approval.

The following rule section is covered by this information collection: 47 CFR 73.1560(a)(1) specifies the limits on antenna input power for AM stations. AM stations using MDCL control technologies are not required to adhere to these operating power parameters. AM stations may, without prior Commission authority, commence MDCL control technology use, provided that within ten days after commencing such operation, the licensee submits an electronic notification of commencement of MDCL operation using FCC Form 338.

The Commission is now requesting a three-year extension for this collection from the Office of Management and Budget (OMB).

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2021–08190 Filed 4–20–21; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1103; FRS 21637]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility;

the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before June 21, 2021. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1103.

Title: Section 76.41 Franchise Application Process.

Type of Review: Extension of a currently approved collection.

Form Number: N/A.

Respondents: State, local or tribal government, Business or other for-profit entities.

Number of Respondents and Responses: 22 respondents and 40 responses.

Estimated Hours per Response: 0.5 to 4 hours.

Frequency of Response: On occasion reporting requirements; Third party disclosure requirement.

Total Annual Burden: 90 hours.

Total Annual Cost: No cost.

Privacy Impact Assessment: No impact(s).

Nature of Response: Required to obtain or retain benefits. The statutory authority for this collection is contained in 47 U.S.C. 151, 152, 154(i), 157nt, 201, 531, 541 and 542.

Nature and Confidentiality: There is no need for confidentiality required with this collection of information.

Needs and Uses: The information collection requirements are as follows: 47 CFR 76.41(b) requires a competitive franchise applicant to include the following information in writing in its franchise application, in addition to any information required by applicable state and local laws:

(1) The applicant's name;

(2) The names of the applicant's officers and directors;

(3) The business address of the applicant;

(4) The name and contact information of a designated contact for the applicant;

(5) A description of the geographic area that the applicant proposes to serve;

(6) The PEG channel capacity and capital support proposed by the applicant;

(7) The term of the agreement proposed by the applicant;

(8) Whether the applicant holds an existing authorization to access the public rights-of-way in the subject franchise service area;

(9) The amount of the franchise fee the applicant offers to pay; and

(10) Any additional information required by applicable state or local laws.

The information collection requirements contained in 47 CFR 76.41(d) states when a competitive franchise applicant files a franchise application with a franchising authority and the applicant has existing authority to access public rights-of-way in the geographic area that the applicant proposes to serve, the franchising authority grant or deny the application within 90 days of the date the application is received by the franchising authority. If a competitive franchise applicant does not have existing authority to access public rights-of-way in the geographic area that the applicant proposes to serve, the franchising authority must perform grant or deny the application within 180 days of the date the application is received by the franchising authority. A franchising authority and a competitive franchise applicant may agree in writing to extend the 90-day or 180-day deadline, whichever is applicable.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2021–08281 Filed 4–20–21; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[22023]

Open Commission Meeting Thursday, April 22, 2021

April 16, 2021.

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Thursday, April 22, 2021, which is scheduled to commence at 10:30 a.m.

Due to the current COVID–19 pandemic and related agency telework and headquarters access policies, this meeting will be in a wholly electronic format and will be open to the public on the internet via live feed from the FCC's web page at *www.fcc.gov/live* and on the FCC's YouTube channel.

Item No.	Bureau	Subject
1	WIRELINE COMPETITION	*Title:* Implementation of the National Suicide Hotline Improvement Act of 2018 (WC Docket No. 18–336). *Summary:* The Commission will consider a Further Notice of Proposed Rulemaking to increase the effectiveness of the National Suicide Prevention Lifeline by proposing to require covered text providers to support text messaging to 988.
2	OFFICE OF ENGINEERING AND TECHNOLOGY WIRELESS TELE-COMMUNICATIONS AND INTERNATIONAL.	*Title:* Allocation of Spectrum for Non-Federal Space Launch Operations (ET Docket No. 13–115); Amendment of Part 2 of the Commission's Rules for Federal Earth Stations Communicating with Non-Federal Fixed Satellite Service Space Stations (RM–11341); Federal Space Station Use of the 399.9–400.05 MHz Band. *Summary:* The Commission will consider a Report and Order and Further Notice of Proposed Rulemaking that would adopt a new spectrum allocation for commercial space launch operations and seek comment on additional allocations and service rules.

Item No.	Bureau	Subject
3	OFFICE OF ENGINEERING AND TECHNOLOGY.	*Title:* Amendment of Parts 15 and 74 of the Rules for Wireless Microphones in the TV Bands, 600 MHz Guard Band, 600 MHz Duplex Gap, and the 941.5–944 MHz, 944–952 MHz, 952.850–956.250 MHz, 956.45–959.85 MHz, 1435–1525 MHz, 6875–6900 MHz and 7100–7125 MHz Bands (RM–11821; ET Docket No. 21–115). *Summary:* The Commission will consider a Notice of Proposed Rulemaking that proposes to revise the technical rules for Part 74 low-power auxiliary station (LPAS) devices to permit a recently developed, and more efficient, type of wireless microphone system.
4	PUBLIC SAFETY AND HOMELAND SECURITY.	*Title:* Improving 911 Reliability (PS Docket No. 13–75); Amendments to Part 4 of the Commission's Rules Concerning Disruptions to Communications (PS Docket No. 15–80); New Part 4 of the Commission's Rules Concerning Disruptions to Communications; (ET Docket No. 04–35). *Summary:* The Commission will consider a Third Notice of Proposed Rulemaking to promote public safety by ensuring that 911 call centers and consumers receive timely and useful notifications of disruptions to 911 service.
5	PUBLIC SAFETY AND HOMELAND SECURITY.	*Title:* Improving Public Safety Communications in the 800 MHz Band (WT Docket No. 02–55). *Summary:* The Commission will consider an Order to conclude its 800 MHz rebanding program due to the successful fulfillment of this public safety mandate.
6	MEDIA	*Title:* Sponsorship Identification Requirements for Foreign Government-Provided Programming (MB Docket No. 20–299). *Summary:* The Commission will consider a Report and Order to require clear disclosures for broadcast programming that is sponsored, paid for, or furnished by a foreign government or its representative.
7	MEDIA	*Title:* Imposing Application Cap in Upcoming NCE FM Filing Window (MB Docket No. 20–343). *Summary:* The Commission will consider a Public Notice to impose a limit of ten applications filed by any party in the upcoming 2021 filing window for new noncommercial educational FM stations.
8	ENFORCEMENT	*Title:* Enforcement Bureau Action. *Summary:* The Commission will consider an enforcement action.

* * * * *

The meeting will be webcast with open captioning at: *www.fcc.gov/live.* Open captioning will be provided as well as a text only version on the FCC website. Other reasonable accommodations for people with disabilities are available upon request. In your request, include a description of the accommodation you will need and a way we can contact you if we need more information. Last minute requests will be accepted but may be impossible to fill. Send an email to: *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530.

Additional information concerning this meeting may be obtained from the Office of Media Relations, (202) 418–0500. Audio/Video coverage of the meeting will be broadcast live with open captioning over the internet from the FCC Live web page at *www.fcc.gov/live.*

Marlene Dortch,

Secretary.

[FR Doc. 2021–08282 Filed 4–20–21; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

[OMB No. 3064–0203]

Agency Information Collection Activities: Proposed Collection Reinstatement; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the FDIC 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 FDIC wishes to conduct another Small Business Lending Survey and as part of its obligations under the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to take this opportunity to comment on the reinstatement of the related information collection described below (OMB Control No. 3064–0203).

DATES: Comments must be submitted on or before June 21, 2021.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *https://www.FDIC.gov/regulations/laws/federal.*
- *Email: comments@fdic.gov.* Include the name and number of the collection in the subject line of the message.
- *Mail:* Manny Cabeza (202–898–3767), Regulatory Counsel, MB–3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street NW building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Manny Cabeza, Regulatory Counsel, 202–898–3767, *mcabeza@fdic.gov,* MB–3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION: Proposal to reinstate the following collections of information:

1. *Title:* Small Business Lending Survey.

OMB Number: 3064–0203.

Affected Public: FDIC-insured depository institutions.

Obligation to Respond: Voluntary.

Burden Estimate:

Estimated No. of Respondents: 2,000.

Estimated Time per Response: 4 hours.

Frequency of Response: One time.

Total Estimated Annual Burden: 8,000 hours.

General Description of Collection: Small businesses are important to the U.S. economy and banks are important to U.S. small businesses. According to the Small Business Administration, in 2015, small businesses comprised 99.9 percent of all U.S. firms, and almost half (47.5 percent) of private-sector employment. Additionally, from 2000 to 2017, small businesses accounted for 65.9 percent of net new job creation.[1] Given their size and the relative costs of verifying their financial conditions, many small businesses have little or no direct access to capital markets and thus are reliant on bank financing. Indeed, in their 2017 survey of small businesses, the Federal Reserve System finds that banks are the most common source of external credit for small firms.[2] For banks, especially the many banks that primarily engage in commercial lending, small business lending is an important way that they help meet the needs of their communities.

The FDIC's Small Business *Lending* Survey is a nationally-representative survey of banks and their small business lending practices and activities. The survey seeks to understand how banks engage with small businesses and meet their needs, within the context of the fast changing banking industry environment. The first collection of the survey in 2016 (SBLS 2016) sought to examine whether small and large banks engaged differently with small businesses, which could potentially impact small businesses given continued and ongoing banking consolidation. In 2022 the FDIC plans to deploy another Small Business Lending Survey (SBLS 2022) which will repeat some questions from the previous collection and will include new areas of study which are of current interest, in particular, banks' use of financial technology in small business lending and their experiences with the Paycheck Protection Program.

In addition, SBLS 2022 will *improve* upon previous quantitative questions that asked banks about their volume of commercial lending by firm size, which allowed the FDIC to assess how well Consolidated Reports of Income and Condition (commonly referred to as ''Call Report'') data captures actual bank small business lending when used as a proxy measure. Using SBLS 2016 survey data, the FDIC determined that for banks in 2015 with $1 to $10 billion in assets, industry small business lending (defined as lending to firms with less than $10 million in gross annual revenue) was understated on net by approximately 23 percent when using the most common proxy measure—Call Report outstanding commercial and industrial loan balances for loans that were $1 million or less at the time of origination.[3]

The proposed SBLS 2022 *collection* will cover the general topics of:

I. Underwriting and Loan Approval Processes
II. Markets, Competition, and Loan Demand
III. SBA Lending and Securitization
IV. Measurement of Bank Small Business Lending

Questions in the first three *sections* are comprised of qualitative questions, while the fourth set asks respondent banks to provide quantitative loan volumes. The SBLS does not duplicate existing sources of data but rather complements or provides insight into regular collections such as the Call Report.

The SBLS 2022 collection is scheduled to be in the field beginning in May 2022. The collection will be administered by the U.S. Census Bureau via a web interface. Recommendations for which bank staff to answer each section will be made to respondents in order to match the appropriate expertise to relevant questions. Because the SBLS is designed as a nationally-representative survey of banks of all sizes, including community banks, regional banks, and large nationwide banks, the survey is intended be used to make inferences for the entire industry regarding U.S. banks' small business lending activity and practices.

Prior to finalizing the *SBLS* 2022 survey questionnaire, the FDIC seeks to solicit public comment. Interested members of the public may review a copy of the proposed survey questionnaire on the following web page: *https://www.fdic.gov/regulations/laws/federal/2021/sbls-2022-proposed-survey-questionnaire.pdf.*

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on April 15, 2021.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2021–08131 Filed 4–20–21; 8:45 am]

BILLING CODE 6714–01–P

[1] ''Frequently Asked Questions About Small Business'', SBA fact sheet, *https://www.sba.gov/sites/default/files/advocacy/Frequently-Asked-Questions-Small-Business-2018.pdf* (2018).

[2] ''Small Business Credit Survey: Report on Employer Firms'', Federal Reserve report, *https://www.fedsmallbusiness.org/survey/2018/report-on-employer-firms* (2017).

[3] ''Measurement of Small Business Lending Using Call Reports: Further Insights From the Small Business Lending Survey'', FDIC staff study, *https://www.fdic.gov/bank/analytical/cfr/staff-studies/2020-04.pdf* (2020).

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the

Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue, NW, Washington DC 20551–0001, not later than May 6, 2021.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Steven V. Chesney, Las Vegas, Nevada;* to acquire voting shares of First Lena Corporation, and thereby indirectly acquire voting shares of Citizens State Bank, both of Lena, Illinois.

B. Federal Reserve Bank of San Francisco (Sebastian Astrada, Director, Applications) 101 Market Street, San Francisco, California 94105–1579:

1. *The Vanguard Group, Inc., Malvern, Pennsylvania; on behalf of itself, its subsidiaries and affiliates, including investment companies registered under the Investment Company Act of 1940, other pooled investment vehicles, and institutional accounts that are sponsored, managed, or advised by Vanguard;* to acquire additional voting shares of East West Bancorp, Inc., and thereby indirectly acquire voting shares of East West Bank, both of Pasadena, California.

Board of Governors of the Federal Reserve System, April 16, 2021.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2021–08205 Filed 4–20–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0154; Docket No. 2021–0053; Sequence No. 7]

Information Collection; Construction Wage Rate Requirements—Price Adjustment (Actual Method)

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, and the Office of Management and Budget (OMB) regulations, DoD, GSA, and NASA invite the public to comment on a revision and renewal concerning construction wage rate requirements—price adjustment (Actual Method). DoD, GSA, and NASA invite comments on: whether the proposed collection of information is necessary for the proper performance of the functions of Federal Government acquisitions, including whether the information will have practical utility; the accuracy of the 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 the use of automated collection techniques or other forms of information technology. OMB has approved this information collection for use through September 30, 2021. DoD, GSA, and NASA propose that OMB extend its approval for use for three additional years beyond the current expiration date.

DATES: DoD, GSA, and NASA will consider all comments received by June 21, 2021.

ADDRESSES: DoD, GSA, and NASA invite interested persons to submit comments on this collection through *http://www.regulations.gov* and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

Instructions: All items submitted must cite OMB Control No. 9000–0154, Construction Wage Rate Requirements—Price Adjustment (Actual Method). Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two-to-three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Zenaida Delgado, Procurement Analyst, at telephone 202–969–7207, or *zenaida.delgado@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. OMB Control Number, Title, and Any Associated Form(s)

9000–0154, Construction Wage Rate Requirements—Price Adjustment (Actual Method).

B. Need and Uses

This clearance covers the information that contractors must submit to comply with the following Federal Acquisition Regulation (FAR) requirements:

- 52.222–32, Construction Wage Rate Requirements-Price Adjustment (Actual Method). This clause requires contractors to submit at the exercise of each option to extend the term of the contract, a statement of the amount claimed for incorporation of the most current Department of Labor wage determination, and any relevant supporting data, including payroll records, that the contracting officer may reasonably require.

Contracting officers use the information to establish the contract's construction requirements price adjustment to reflect the contractor's actual increase or decrease in wages and fringe benefits.

C. Annual Burden

Respondents: 506.
Total Annual Responses: 506.
Total Burden Hours: 20,240.
Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB Control No. 9000–0154, Construction Wage Rate Requirements—Price Adjustment (Actual Method).

Janet Fry,

Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2021–08199 Filed 4–20–21; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[OMB No.0970–0471]

Proposed Information Collection Activity; Early Head Start–Child Care Partnerships Sustainability Study

AGENCY: Office of Planning, Research, and Evaluation, Administration for Children and Families, HHS.

ACTION: Request for public comment.

SUMMARY: The Administration for Children and Families (ACF) at the U.S. Department of Health and Human Services (HHS) seeks approval to collect information for the Early Head Start–Child Care Partnerships Sustainability Study.

DATES: *Comments due within 60 days of publication.* In compliance with the

requirements of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by emailing *OPREinfocollection@acf.hhs.gov.* Alternatively, copies can also be obtained by writing to the Administration for Children and Families, Office of Planning, Research, and Evaluation, 330 C Street SW, Washington, DC 20201, Attn: OPRE Reports Clearance Officer. All requests, emailed or written should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: This information collection is to provide nationally descriptive, longitudinal data on partnerships between Early Head Start programs and child care providers to inform program planning, technical assistance, and research. The proposed data collection is a follow-up study of the 2015 National Descriptive Study (NDS) of Early Head Start–Child Care Partnerships (OMB 0970–0471) that obtained information about the EHS programs, community-based child care centers, and family child care providers participating in the federal grants supporting the implementation of Early Head Start–child care partnerships (EHS–CCPs). The current information collection request will follow up with EHS programs and child care providers who participated in the NDS to understand whether and how partnerships have been sustained or have dissolved, and which features of partnerships support or impede sustainability. Data collection activities will include surveys of directors of 2015 EHS–CCP grantees and of child care provider directors/managers who were selected for participation in the NDS, as well as semi-structured interviews with a purposive sample of providers whose partnerships have dissolved and have been sustained since 2016.

Respondents: Early Head Start program directors and child care providers.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents (total over request period)	Number of responses per respondent (total over request period)	Avg. burden per response (in hours)	Total burden (in hours)	Annual burden (in hours)
EHS Program Director Survey	335	1	.58	194	65
Sustained Partnership Provider Survey	330	1	.5	165	55
Dissolved Partnership Provider Survey	140	1	.5	70	24
Dissolved Partnership Provider Semi-structured Interview Protocol	48	1	.8	39	13
Sustained Partnership Provider Semi-structured Interview Protocol	24	1	.8	20	7

Estimated Total Annual Burden Hours: 164.

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: Sec. 645A and 649 of the Improving Head Start for School Readiness Act of 2007.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2021–08258 Filed 4–20–21; 8:45 am]

BILLING CODE 4184–22–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Interstate Administrative Subpoena and Notice of Interstate Lien (OMB #0970–0152)

AGENCY: Office of Child Support Enforcement; Administration for Children and Families; HHS.

ACTION: Request for public comment.

SUMMARY: The Administration for Children and Families (ACF) is requesting a 3-year extension of the Interstate Administrative Subpoena and Notice of Interstate Lien forms (OMB #0970–0152, expiration 7/31/2021). There are no changes requested to these forms.

DATES: *Comments due within 30 days of publication.* OMB must make a decision about the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

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.

SUPPLEMENTARY INFORMATION:

Description: The Administrative Subpoena is used by State IV–D agencies to obtain income and other financial information regarding noncustodial parents for purposes of establishing, enforcing, and modifying child support orders. The Notice of Interstate Lien imposes liens in cases with overdue support and allows a State IV–D agency to file liens across state lines, when it is more efficient than involving the other state's IV–D agency. Section 452 (a) (11) of the Social Security Act requires the Secretary of the Department of Health and Human Services to promulgate forms for administrative subpoenas and imposition of liens used by state child support enforcement (Title IV–D) agencies in interstate cases. Section 454(9)(E) of the Social Security Act

requires each state to cooperate with any other state in using the federal forms for issuance of administrative subpoenas and imposition of liens in interstate child support cases.

Respondents: State, local, or tribal agencies administering a child support enforcement program under title IV–D of the Social Security Act.

ANNUAL BURDEN ESTIMATES

Instrument	Annual number of respondents	Annual number of responses per respondent	Average burden hours per response	Annual burden hours
Administrative Subpoena	27,763	1	.50	13,882
Notice of Lien	1,786,988	1	.50	893,494

Estimated Total Annual Burden Hours: 907,376.

Authority: 42 U.S.C. 652; 42 U.S.C. 654.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2021–08249 Filed 4–20–21; 8:45 am]

BILLING CODE 4184–41–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Closed Meetings

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 materials, 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 Library of Medicine Special Emphasis Panel; T15.

Date: July 23, 2021.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Video Assisted Meeting.

Contact Person: Leonid V. Tsap, Ph.D., Scientific Review Officer, Extramural Programs, National Library of Medicine, NIH, 6705 Rockledge Drive, Suite 500, Bethesda, MD 20892–7968, 301–827–7077, *tsapl@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: April 16, 2021.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–08245 Filed 4–20–21; 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 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 Allergy and Infectious Diseases Special Emphasis Panel; PAR21–082, NIAID SBIR Phase II Clinical Trial Implementation Cooperative Agreement (U44 Clinical Trial Required).

Date: May 14, 2021.

Time: 10:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3F52, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Jennifer H. Meyers, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3F52, Rockville, MD 20852, 301–761–6602, *jennifer.meyers@nih.gov*.

(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: April 15, 2021.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–08251 Filed 4–20–21; 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 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 cooperative agreements, 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 Pane; NIAID Clinical Trial Implementation Cooperative Agreements (U01) and SBIR Phase II Clinical Trial Implementation Cooperative Agreements (U44).

Date: May 18, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate cooperative agreement applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E70A, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Soheyla Saadi, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E70A, Rockville, MD 20852, 301–435–0903 *saadisoh@niaid.nih.gov*.

(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: April 15, 2021.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–08252 Filed 4–20–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine Notice of Closed Meetings

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 materials, 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 Library of Medicine Special Emphasis Panel; Scholarly Works G13.

Date: June 25, 2021.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Video Assisted Meeting.

Contact Person: Leonid V. Tsap, Ph.D., Scientific Review Officer, Extramural Programs, National Library of Medicine, NIH, 6705 Rockledge Drive, Suite 500, Bethesda, MD 20892–7968, 301–827–7077, *tsapl@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: April 16, 2021.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–08247 Filed 4–20–21; 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 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 Allergy and Infectious Diseases Special Emphasis Panel; PAR20–139, Investigator Initiated Extended Clinical Trial (R01 Clinical Trial Required).

Date: May 21, 2021.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3F52, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Jennifer H. Meyers, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3F52, Rockville, MD 20852, 301–761–6602, *jennifer.meyers@nih.gov*.

(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: April 15, 2021.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–08250 Filed 4–20–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; 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/or 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 grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Health, Behavior, and Context Subcommittee Health, Behavior, and Context Subcommittee.

Date: June 14, 2021.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: NICHD Offices, 6710B Rockledge Drive, Room 2127B, Bethesda, MD 20892 (Video-Assisted Meeting).

Contact Person: Kimberly L. Houston, MD, Scientific Review Officer, Eunice Kennedy Shriver National Institute of Children Health and Human Development, 6701B Rockledge Drive, Room 2127B, Bethesda, MD 20892, 301–827–4902, *kimberly.houston@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.865, Research for Mothers and Children, National Institutes of Health, HHS)

Dated: April 16, 2021.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–08244 Filed 4–20–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Closed Meetings

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 materials, 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 Library of Medicine Special Emphasis Panel; COI—K99.

Date: July 15, 2021.

Time: 11:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Video Assisted Meeting.

Contact Person: Leonid V. Tsap, Ph.D., Scientific Review Officer, Extramural Programs, National Library of Medicine, NIH, 6705 Rockledge Drive, Suite 500, Bethesda, MD 20892–7968, 301–827–7077, *tsapl@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: April 16, 2021.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–08246 Filed 4–20–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. CISA–2021–0006]

Notice of the President's National Infrastructure Advisory Council Meeting

AGENCY: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

ACTION: Notice of Federal Advisory Committee Act (FACA) meeting; request for comments.

SUMMARY: CISA announces a public meeting of the President's National Infrastructure Advisory Council (NIAC). To facilitate public participation, CISA invites public comments on the agenda items and any associated briefing materials to be considered by the council at the meeting.

DATES:

Meeting Registration: Individual registration to attend the meeting by phone is required and must be received no later than 5:00 p.m. EST on Monday, May 17, 2021. For more information on how to participate, please contact *NIAC@cisa.dhs.gov.*

Speaker Registration: Individuals may register to speak during the meeting's public comment period. The registration must be received no later than 5:00 p.m. EST on Monday, May 17, 2021.

Written Comments: Written comments must be received no later than 5:00 p.m. EST on Monday, May 10, 2021.

Meeting Date: The meeting will be held on Thursday, May 20, 2021 from 1:30 p.m.–3:30 p.m. EST. The meeting may close early if the council has completed its business.

ADDRESSES: The meeting will be held remotely via conference call. For access to the conference call bridge, information on services for individuals with disabilities, or to request special assistance to participate, please email *NIAC@cisa.dhs.gov* by 5:00 p.m. EST on Monday, May 17, 2021.

Comments: Written comments may be submitted on the issues to be considered by the NIAC as described in the **SUPPLEMENTARY INFORMATION** section below and any briefing materials for the meeting. Any briefing materials that will be presented at the meeting will be made publicly available before the meeting at the following website: *www.cisa.gov/niac.*

Comments identified by docket number CISA–2021–0006 may be submitted by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting written comments.
- *Email: NIAC@cisa.dhs.gov.* Include docket number CISA–2021–0006 in the subject line of the message.

Instructions: All submissions received must include the agency name and docket number for this notice. All written comments received will be posted without alteration at *www.regulations.gov,* including any personal information provided. For detailed instructions on sending comments and additional information on participating in the upcoming NIAC meeting, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket and comments received by the NIAC, go to *www.regulations.gov* and enter docket number CISA–2021–0006.

A public comment period is scheduled to be held during the meeting from 3:05 p.m.–3:15 p.m. EST. Speakers who wish to participate in the public comment period must register by emailing *NIAC@cisa.dhs.gov.* Speakers are requested to limit their comments to three minutes and will speak in order of registration. Please note that the public comment period may end before the time indicated, following the last request for comments.

FOR FURTHER INFORMATION CONTACT: Rachel Liang, *Rachel.Liang@cisa.dhs.gov;* 202–936–8300.

SUPPLEMENTARY INFORMATION: The NIAC is established under Section 10 of E.O. 13231 issued on October 16, 2001. Notice of this meeting is given under the Federal Advisory Committee Act (FACA), 5 U.S.C. Appendix (Pub. L. 92–463). The NIAC shall provide the President, through the Secretary of Homeland Security, with advice on the security and resilience of the Nation's critical infrastructure sectors.

Agenda: The NIAC will meet in an open meeting on Thursday, May 20, 2021, to discuss the following agenda items:

I. Opening of Meeting

II. Roll Call of Members

III. Opening Remarks

IV. Workforce and Talent Management Study Update

V. NIAC Member Roundtable Discussion

VI. Public Comment

VII. Closing Remarks

VIII. Adjournment

Public Participation

Meeting Registration Information

Requests to attend via conference call will be accepted and processed in the order in which they are received. Individuals may register to attend the NIAC meeting by phone by sending an email to *NIAC@cisa.dhs.gov.*

Public Comment

While this meeting is open to the public, participation in FACA deliberations are limited to council members. A public comment period will be held during the meeting from approximately 3:05 p.m.–3:15 p.m. EST. Speakers who wish to comment must register in advance and can do so by emailing *NIAC@cisa.dhs.gov* no later than 5:00 p.m. EST on Monday, May 17, 2021. Speakers are requested to limit their comments to three minutes. Please note that the public comment period may end before the time indicated, following the last call for comments.

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, please contact *NIAC@cisa.dhs.gov* by 5:00 p.m. EST on Monday, May 17, 2021.

Rachel Liang,

Designated Federal Officer, President's National Infrastructure Advisory Council, Cybersecurity and Infrastructure Security Agency, Department of Homeland Security.

[FR Doc. 2021–08285 Filed 4–20–21; 8:45 am]

BILLING CODE 9110–9P–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Immigration and Customs Enforcement

[OMB Control Number 1653–0038]

Agency Information Collection Activities: Student and Exchange Visitor Information System (SEVIS); Extension, With Change, of a Currently Approved Collection

AGENCY: U.S. Immigration and Customs Enforcement, Department of Homeland Security.

ACTION: 30-Day notice.

SUMMARY: In accordance with the Paperwork Reductions Act (PRA) of 1995 the Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE) will submit the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance. This information collection was previously published in the **Federal Register** on February 9, 2021, allowing for a 60-day comment period. ICE received one non-substantive comment. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until May 21, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of the 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: For specific questions related to collection activities, please contact Sharon Synder, Student and Exchange Visitor Program, 703–603–3400 or 1–800–892–4829, email: *sevp@ice.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Comments

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, With Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Student and Exchange Visitor Information System (SEVIS).

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* I–17 and I–20; U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary Non-profit institutions and individuals or households. SEVIS is an internet-based data entry, collection, and reporting system. It collects information on SEVP-certified school via the Form I–17, ''Petition for Approval of School for Attendance by Nonimmigrant Student,'' and collects information on the F and M nonimmigrant students that the SEVP-certified schools admit into their programs of study via the Forms I–20s: ''Certificate of Eligibility for Nonimmigrant (F–1) Students Status—For Academic and Language Students'' and ''Certificate of Eligibility for Nonimmigrant (M–1) Students Status—For Vocational Students''. Additionally, there is a revision to add a new data field for city of birth. This additional field allows SEVP to distinguish between applicants with the same name and country of birth. The additional field is not expected to increase the burden per response.

(5) *An estimate of the total number of respondents:* The estimated total number of respondents for this information collection is 47,757.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual burden is 1,019,757 hours.

Dated: April 15, 2021.

Scott Elmore,

PRA Clearance Officer.

[FR Doc. 2021–08123 Filed 4–20–21; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0060]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Medical Certification for Disability Exceptions

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed revision of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until June 21, 2021.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0060 in the body of the letter, the agency name and Docket ID USCIS–2008–0021. Submit comments via the Federal eRulemaking Portal website at *https://www.regulations.gov* under e-Docket ID number USCIS–2008–0021. USCIS is limiting communications for this Notice as a result of USCIS' COVID–19 response actions.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking

information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2008–0021 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Medical Certification for Disability Exceptions.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* N–648; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and Households. USCIS uses the Form N–648 to substantiate a claim for an exception to the requirements of section 312(a) of the Immigration and Nationality Act. By certifying Form N–648, the doctor states that an applicant filing an Application for Naturalization, Form N–400, is unable to complete the English and/or civics requirements because of a physical or developmental disability or mental impairment(s).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection N–648 is 19,527 and the estimated hour burden per response is 2.42 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 47,255 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is 623,888.

Dated: April 15, 2021.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2021–08154 Filed 4–20–21; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX21RB00TU60200; OMB Control Number 1028–0123]

Agency Information Collection Activities; Current and Future Landsat User Requirements

AGENCY: U.S. Geological Survey, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Geological Survey (USGS) are proposing renew an information collection. As required by the Paperwork Reduction Act (PRA) of 1995, and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC.

DATES: Interested persons are invited to submit comments on or before May 21, 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. Send your comments on this information collection request (ICR) by mail to U.S. Geological Survey, Information Collections Officer, 12201 Sunrise Valley Drive MS 159, Reston, VA 20192; or by email to *gs-info_collections@usgs.gov.* Please reference OMB Control Number 1028–0123 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Rudy Schuster, Branch Chief by email at *schusterr@usgs.gov,* or by telephone at (970)226–9165. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the PRA and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of the USGS; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the USGS enhance the quality, utility, and clarity of the information to be collected; and (5) how might the USGS minimize the burden of this collection on the respondents, including through the use 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 can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The USGS National Land Imaging (NLI) Program is currently planning for the next generation of Landsat satellites. These satellites will continue the multi-decadal continuous collection of moderate-resolution, multispectral, remotely-sensed imagery through the Landsat program. Landsat satellite imagery has been available at no cost to the public since 2008, which has resulted in the distribution of millions of scenes each subsequent year, as well tens of thousands of Landsat users registering with USGS to access the data. In order to continue to provide high quality imagery that meets the needs of users, NLI is collecting current and future user requirements for sensor and satellite attributes. These attributes include spatial resolution, spectral bands, frequency of acquisition, and many others. NLI will use the information from this collection to understand if they are currently meeting the needs of their user community and to help determine the features of future Landsat satellites. Questions will be asked to determine user characteristics, current uses of imagery, preferred attributes of Landsat imagery, and benefits of Landsat imagery. Previous surveys were provided to all U.S. Landsat imagery users who were registered with USGS and a large sample of international Landsat users were also invited. However, many changes have occurred, and many Landsat users are not registered with USGS, but instead access Landsat imagery through a variety of new platforms or cloud servers. The current and future user requirements for sensor and satellite attributes information from this user group has not been collected and is essential for future satellite decision-making within the NLI program.

To protect the confidentiality and privacy of survey respondents, the data from the survey will not be associated with any respondent's email address at any time and will only be analyzed and reported in aggregate. All files containing PII will be password-protected, housed on secure USGS servers, and only accessible to the research team. The data from the survey will be aggregated and statistically analyzed and the results will be published in publicly available USGS reports.

Title of Collection: Current and Future Landsat User Requirements.

OMB Control Number: 1028–0123

Form Number: None.

Type of Review: Extension without change of a currently approved collection.

Respondents/Affected Public: General public.

Total Estimated Number of Annual Respondents: 34,800.

Total Estimated Number of Annual Responses: 34,800.

Estimated Completion Time per Response: 20 minutes on average. We estimate that it will take 20 minutes per person to complete the full survey and 5 minutes per person to complete the non-response survey.

Total Estimated Number of Annual Burden Hours: 8,900.

Respondent's Obligation: Voluntary.

Frequency of Collection: One time.

Total Estimated Annual Nonhour Burden Cost: There are no ''non-hour cost'' burdens associated with this collection of information.

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 OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq*).

Timothy Newman,

Program Coordinator, National Land Imaging Program, US Geological Survey.

[FR Doc. 2021–08133 Filed 4–20–21; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[212A2100DD/AAKC001030/A0A501010.999900]

HEARTH Act Approval of Standing Rock Sioux Tribe of North & South Dakota Leasing Ordinance

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Indian Affairs (BIA) approved the Standing Rock Sioux Tribe Leasing Ordinance under the Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012 (HEARTH Act). With this approval, the Tribe is authorized to enter into business, residential, wind and solar leases without further BIA approval.

DATES: BIA issued the approval on April 14, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Sharlene Round Face, Bureau of Indian Affairs, Division of Real Estate Services, 1001 Indian School Road NW, Albuquerque, NM 87104, *sharlene.roundface@bia.gov,* (505) 563–3132.

SUPPLEMENTARY INFORMATION:

I. Summary of the HEARTH Act

The HEARTH Act makes a voluntary, alternative land leasing process available to Tribes, by amending the Indian Long-Term Leasing Act of 1955, 25 U.S.C. 415. The HEARTH Act authorizes Tribes to negotiate and enter into business leases of Tribal trust lands with a primary term of 25 years, and up to two renewal terms of 25 years each, without the approval of the Secretary of the Interior (Secretary). The HEARTH Act also authorizes Tribes to enter into leases for residential, recreational, religious or educational purposes for a primary term of up to 75 years without the approval of the Secretary. Participating Tribes develop Tribal leasing regulations, including an environmental review process, and then must obtain the Secretary's approval of those regulations prior to entering into leases. The HEARTH Act requires the Secretary to approve Tribal regulations if the Tribal regulations are consistent with the Department of the Interior's (Department) leasing regulations at 25 CFR part 162 and provide for an environmental review process that meets requirements set forth in the HEARTH Act. This notice announces that the Secretary, through the Assistant Secretary—Indian Affairs, has approved the Tribal regulations for the Standing Rock Sioux Tribe of North & South Dakota.

II. Federal Preemption of State and Local Taxes

The Department's regulations governing the surface leasing of trust and restricted Indian lands specify that, subject to applicable Federal law, permanent improvements on leased land, leasehold or possessory interests, and activities under the lease are not subject to State and local taxation and may be subject to taxation by the Indian Tribe with jurisdiction. See 25 CFR162.017. As explained further in the preamble to the final regulations, the Federal government has a strong interest in promoting economic development, self-determination, and Tribal sovereignty. 77 FR 72,440, 72,447–48 (December 5, 2012). The principles supporting the Federal preemption of

State law in the field of Indian leasing and the taxation of lease-related interests and activities applies with equal force to leases entered into under Tribal leasing regulations approved by the Federal government pursuant to the HEARTH Act.

Section 5 of the Indian Reorganization Act, 25 U.S.C. 5108, preempts State and local taxation of permanent improvements on trust land. *Confederated Tribes of the Chehalis Reservation* v. *Thurston County,* 724 F.3d 1153, 1157 (9th Cir. 2013) (citing *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973)). Similarly, section 5108 preempts State taxation of rent payments by a lessee for leased trust lands, because ''tax on the payment of rent is indistinguishable from an impermissible tax on the land.'' *See Seminole Tribe of Florida* v. *Stranburg,* 799 F.3d 1324, 1331, n.8 (11th Cir. 2015). In addition, as explained in the preamble to the revised leasing regulations at 25 CFR part 162, Federal courts have applied a balancing test to determine whether State and local taxation of non-Indians on the reservation is preempted. *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136, 143 (1980). The *Bracker* balancing test, which is conducted against a backdrop of ''traditional notions of Indian self- government,'' requires a particularized examination of the relevant State, Federal, and Tribal interests. We hereby adopt the *Bracker* analysis from the preamble to the surface leasing regulations, 77 FR at 72,447–48, as supplemented by the analysis below.

The strong Federal and Tribal interests against State and local taxation of improvements, leaseholds, and activities on land leased under the Department's leasing regulations apply equally to improvements, leaseholds, and activities on land leased pursuant to Tribal leasing regulations approved under the HEARTH Act. Congress's overarching intent was to ''allow Tribes to exercise greater control over their own land, support self-determination, and eliminate bureaucratic delays that stand in the way of homeownership and economic development in Tribal communities.'' 158 Cong. Rec. H. 2682 (May 15, 2012). The HEARTH Act was intended to afford Tribes ''flexibility to adapt lease terms to suit [their] business and cultural needs'' and to ''enable [Tribes] to approve leases quickly and efficiently.'' H. Rep. 112–427 at 6 (2012).

Assessment of State and local taxes would obstruct these express Federal policies supporting Tribal economic development and self-determination, and also threaten substantial Tribal interests in effective Tribal government, economic self-sufficiency, and territorial autonomy. *See Michigan* v. *Bay Mills Indian Community,* 572 U.S. 782, 810 (2014) (Sotomayor, J., concurring) (determining that ''[a] key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on Federal funding''). The additional costs of State and local taxation have a chilling effect on potential lessees, as well as on a Tribe that, as a result, might refrain from exercising its own sovereign right to impose a Tribal tax to support its infrastructure needs. *See id.* at 810–11 (finding that State and local taxes greatly discourage Tribes from raising tax revenue from the same sources because the imposition of double taxation would impede Tribal economic growth).

Similar to BIA's surface leasing regulations, Tribal regulations under the HEARTH Act pervasively cover all aspects of leasing. *See* 25 U.S.C. 415(h)(3)(B)(i) (requiring Tribal regulations be consistent with BIA surface leasing regulations). Furthermore, the Federal government remains involved in the Tribal land leasing process by approving the Tribal leasing regulations in the first instance and providing technical assistance, upon request by a Tribe, for the development of an environmental review process. The Secretary also retains authority to take any necessary actions to remedy violations of a lease or of the Tribal regulations, including terminating the lease or rescinding approval of the Tribal regulations and reassuming lease approval responsibilities. Moreover, the Secretary continues to review, approve, and monitor individual Indian land leases and other types of leases not covered under the Tribal regulations according to the Part 162 regulations.

Accordingly, the Federal and Tribal interests weigh heavily in favor of preemption of State and local taxes on lease-related activities and interests, regardless of whether the lease is governed by Tribal leasing regulations or Part 162. Improvements, activities, and leasehold or possessory interests may be subject to taxation by the Standing Rock Sioux Tribe of North & South Dakota.

Bryan Newland,

Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 2021–08201 Filed 4–20–21; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[20X.LLAK980600. L18200000. LXSIARAC0000]

Notice of Public Meeting: Resource Advisory Council Subcommittee on Public Lands, Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior's Bureau of Land Management (BLM) Alaska Resource Advisory Council (RAC) will meet as indicated below.

DATES: The Alaska RAC will hold a virtual meeting on May 25, 2021. The meeting will be held from 9 a.m. to 5 p.m., but may end earlier or later depending on the needs of group members.

ADDRESSES: The meeting will be held online through the Zoom meeting application. The public can watch the meeting and provide comments through this link: *https://blm.zoomgov.com/j/1611843868.* Written comments can be mailed to: BLM Alaska State Office, Office of Communications, Attn: RAC Coordinator Melinda Bolton; 222 W. 7th Avenue #13, Anchorage, AK 99513. Comments can also be submitted by email (*mbolton@blm.gov*) to the coordinator with the subject line: BLM AK RAC Meeting.

Meeting links, guidance for attendees and the final agenda will be available on the BLM Alaska RAC web page at *https://www.blm.gov/Alaska/RAC* and linked on BLM Alaska news releases and social media posts.

FOR FURTHER INFORMATION CONTACT: Melinda Bolton, RAC Coordinator, by telephone at (907) 271–3342, or by email at *mbolton@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact Ms. Bolton during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The 15-member Alaska RAC serves in an advisory capacity concerning issues relating to land use planning and the management of the public land resources located within the State of Alaska. All meetings are open to the public in their entirety. The meeting

agenda includes discussions on lands and cadastral survey, land use planning projects, and recreation; a Subsistence Board activity update; and nomination and election of a RAC Chairperson.

Interested persons may make oral presentations to the RAC during the meeting or file written statements. Such requests should be made to the RAC Coordinator Melinda Bolton prior to the public comment period. Depending on the number of people who wish to speak and the time available, the time for individual comments may be limited. Individuals who plan to attend and need further information about the meetings, or special assistance such as sign language interpretation or other reasonable accommodations, may contact Melinda Bolton (see **FOR FURTHER INFORMATION CONTACT**).

Before including your address, phone number, email address, or other personal identifying information in your comments, please be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 CFR 1784.4–2.

Chad B. Padgett,

State Director.

[FR Doc. 2021–08195 Filed 4–20–21; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Office of Natural Resources Revenue

[Docket No. ONRR–2011–0021; DS63644000 DR2000000.CH7000212D1113RT; OMB Control Number 1012–0002]

Agency Information Collection Activities: Indian Oil and Gas Valuation, 30 CFR Parts 1202, 1206, and 1207

AGENCY: Office of Natural Resources Revenue (''ONRR''), Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance the Paperwork Reduction Act of 1995 (''PRA''), ONRR is proposing to renew an information collection. Currently, this information collection is authorized by the Office of Management and Budget (''OMB'') under OMB Control Number 1012–0002, which expires on February 28, 2022. This Information Collection Request (''ICR'') pertains to the valuation of oil and gas produced from leases on Indian lands, Indian oil and gas royalties, and required recordkeeping for oil and gas valuation and royalties for Indian Tribes and allottees. ONRR uses forms ONRR–4109, ONRR–4110, ONRR–4295, ONRR–4393, ONRR–4410, and ONRR–4411 as part of these information collection requirements.

DATES: Interested persons are invited to submit comments on or before June 21, 2021.

ADDRESSES: All comment submissions must (1) reference ''OMB Control Number 1012–0002'' in the subject line; (2) be sent to ONRR before the close of the comment period listed under **DATES**; and (3) be sent through one of the following two methods:

- *Electronically via the Federal eRulemaking Portal:* Please visit *https://www.regulations.gov.* In the Search Box, enter the Docket ID Number for this ICR renewal (''ONRR–2011–0021'') and click ''search'' to view the publications associated with the docket folder. Locate the document with an open comment period and click the ''Comment Now!'' button. Follow the prompts to submit your comment prior to the close of the comment period.
- *Email Submissions:* Please submit your comments to *ONRR_regulationsmailbox@onrr.gov* with the OMB Control Number (''OMB Control Number 1012–0002'') listed in the subject line of your email. Email submissions must be postmarked on or before the close of the comment period.

Docket: To access the docket folder to view the ICR **Federal Register** publications, go to *https://www.regulations.gov* and search ''ONRR–2011–0021'' to view renewal notices recently published in the **Federal Register**, publications associated with prior renewals, and applicable public comments received for this ICR. ONRR will make the comments submitted in response to this notice available for public viewing at *https://www.regulations.gov.*

OMB ICR Data: You may also view information collection review data for this ICR, including past OMB approvals, at *https://www.reginfo.gov/public/do/PRASearch.* Under the ''OMB Control Number'' heading enter ''1012–0002'' and click the ''Search'' button located at the bottom of the page. To view the ICR renewal or OMB approval status, click on the most recent entry. On the ''View ICR—OIRA Conclusion'' page, check the box next to ''All'' to display all available ICR information provided by OMB.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, please contact Mr. Glen Reese, Reference & Reporting Management, ONRR, by telephone (303) 231–3160, or by email to *Glen.Reese@onrr.gov.* Individuals who are hearing or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: Pursuant to the PRA, 44 U.S.C. 3501, *et seq.,* and 5 CFR 1320.5, all information collections, as defined in 5 CFR 1320.3, require approval by OMB. ONRR may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. As part of ONRR's continuing effort to reduce paperwork and respondent burdens, ONRR is inviting the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information in accordance with the PRA and 5 CFR 1320.8(d)(1). This helps ONRR to assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand ONRR's information collection requirements and provide the requested data in the desired format.

ONRR is especially interested in public comments addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of ONRR's estimate of the burden for this 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) How might the agency 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 response.

Comments that you submit in response to this notice are a matter of public record. ONRR will include or summarize each comment in its 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 can ask ONRR in your comment to withhold your personal identifying information from public

review, ONRR cannot guarantee that it will be able to do so.

Abstract: The Secretary of the United States Department of the Interior (''Secretary'') is responsible for mineral resource development on Federal and Indian lands and the Outer Continental Shelf. Laws pertaining to Federal and Indian mineral leases are posted at *https://www.onrr.gov/Laws_R_D/PubLaws/index.htm.* Pursuant to the Federal Oil and Gas Royalty Management Act of 1982 (''FOGRMA'') and other laws, the Secretary's responsibilities include maintaining a comprehensive inspection, collection, and fiscal and production accounting and auditing system that: (1) Accurately determines mineral royalties, interest, and other payments owed, (2) collects and accounts for such amounts in a timely manner, and (3) disburses the funds collected. *See* 30 U.S.C. 1701 and 1711. ONRR performs these royalty and revenue management responsibilities for the Secretary. *See* Secretarial Order No. 3306.

(a) General Information: The information collections that ONRR covers in this ICR are found at 30 CFR part 1202, subparts C and J, which pertain to Indian oil and gas royalties; part 1206, subparts B and E, which govern the valuation of oil and gas produced from leases on Indian lands; and part 1207, which pertains to recordkeeping. Indian Tribes and allottees receive all royalties generated from their lands. Determining product valuation is essential to ensure that Indian Tribes and allottees receive payment on the full value of the minerals removed from their lands.

(b) Information Collections: This ICR covers the paperwork requirements under 30 CFR parts 1202, 1206, and 1207 as follows:

(1) *Indian Oil*—Regulations at 30 CFR part 1206, subpart B, govern the valuation of oil produced from Indian oil and gas leases for royalty purposes, and are consistent with mineral leasing and other applicable laws. Generally, these regulations provide that a lessee must determine the value of oil based upon the higher of (1) the gross proceeds under an arm's-length contract; or (2) a major-portion analysis. In some situations, ONRR's regulations require reporting using form ONRR–4110, *Oil Transportation Allowance Report,* as part of these ICR requirements.

ONRR and Tribal audit personnel use the information collected on form ONRR–4110 to evaluate (1) whether lessee-reported transportation allowances are within regulatory allowance limitations and calculated accurately under applicable regulations; and (2) whether the lessee has reported and paid the proper royalty amount. A lessee must use form ONRR–4110 when its transportation allowance includes costs incurred under non-arm's-length or no-contract transportation situations.

(2) *Indian Gas*—Regulations at 30 CFR part 1206, subpart E, govern the valuation of natural gas produced from Indian oil and gas leases for royalty purposes. ONRR's regulations require reporting using ONRR forms ONRR–4109, ONRR–4295, ONRR–4410, and ONRR–4411 as part of these ICR requirements as follows:

(a) ONRR and Tribal audit personnel use the information collected on form ONRR–4109, *Gas Processing Allowance Summary Report,* to evaluate (1) whether lessee-reported processing allowances are within regulatory allowance limitations and calculated under applicable regulations; and (2) whether a lessee has reported and paid the proper royalty amount.

(b) ONRR and Tribal audit personnel use the information collected on form ONRR–4295, *Gas Transportation Allowance Report,* to evaluate (1) whether lessee-reported transportation allowances are within regulatory allowance limitations and calculated under applicable regulations; and (2) whether a lessee has reported and paid the proper royalty amount.

(c) A lessee must use form ONRR–4410, *Accounting for Comparison [Dual Accounting],* to certify when dual accounting is not required on an Indian lease (part A) or to make an election for actual or alternative dual accounting for an Indian lease (part B). Most Indian leases contain the requirement to perform accounting for comparison (dual accounting) for gas produced from the lease. Therefore, a lessee must elect to perform actual dual accounting as defined in 30 CFR 1206.176, or alternative dual accounting as defined in 30 CFR 1206.173.

(d) A lessee uses form ONRR–4411, *Safety Net Report,* when it sells gas production from an Indian oil or gas lease in an ONRR-designated index zone beyond the first index pricing point. The safety net calculation establishes the minimum value of natural gas production from Indian oil and gas leases for royalty purposes. This reporting requirement ensures that Indian lessors receive all royalties due and supports ONRR's compliance activities.

(3) *Indian Oil and Gas*—Regulations at 30 CFR 1206.56(b)(2) and 1206.177(c)(2) and (c)(3) provide that a lessee must submit a form ONRR–4393, *Request to Exceed Regulatory Allowance Limitation,* as part of a valid request to exceed the regulatory allowance limit of 50 percent of royalty value for transportation allowances. OMB approved the form ONRR–4393 under OMB Control Number 1012–0005, which otherwise pertains to Federal oil and gas leases. This form provides ONRR with the necessary data to make a decision on whether to approve or deny the request.

The requirement to report is mandatory for form ONRR–4410 and, under certain circumstances, form ONRR–4411. To obtain certain benefits, a lessee must file forms ONRR–4109, ONRR–4110, ONRR–4295, and ONRR–4393.

Title of Collection: Indian Oil and Gas Valuation, 30 CFR parts 1202, 1206, and 1207.

OMB Control Number: 1012–0002.

Bureau Form Number: Forms ONRR–4109, ONRR–4110, ONRR–4295, ONRR–4393, ONRR–4410, and ONRR–4411.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Businesses.

Total Estimated Number of Annual Respondents: 149 Indian lessees.

Total Estimated Number of Annual Responses: 149.

Estimated Completion Time per Response: 8.85 hours.

Total Estimated Number of Annual Burden Hours: 1,319 hours.

Respondent's Obligation: Required to Obtain or Retain a Benefit.

Frequency of Collection: Annual and on occasion.

Total Estimated Annual Non-Hour Burden Cost: ONRR identified no ''non-hour cost'' burden associated with this collection of information.

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 OMB control number.

The authority for this action is the PRA (44 U.S.C. 3501, *et seq.*).

Kimbra G. Davis,

Director for Office of Natural Resources Revenue.

[FR Doc. 2021–08153 Filed 4–20–21; 8:45 am]

BILLING CODE 4335–30–P

DEPARTMENT OF THE INTERIOR

Office of Natural Resources Revenue

[Docket No. ONRR–2011–0019; DS63644000 DRT000000.CH7000 212D1113RT, OMB Control Number 1012–0001]

Agency Information Collection Activities; Accounts Receivable Confirmations Reporting

AGENCY: Office of Natural Resources Revenue (ONRR), Interior.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (''PRA''), ONRR is proposing to renew an information collection. Currently, the information collection is authorized by the Office of Management and Budget (''OMB'') under OMB Control Number 1012–0001, which expires on February 28, 2022. Through this Information Collection Request (''ICR''), ONRR seeks renewed authority to collect information related to the paperwork requirements under the Chief Financial Officers Act of 1990 (''CFO Act'') covering the collection of royalties and other mineral revenues due, which obligations are accounted for as accounts receivables.

DATES: Interested persons are invited to submit comments on or before June 21, 2021.

ADDRESSES: All comment submissions must (1) reference ''OMB Control Number 1012–0001'' in the subject line; (2) be sent to ONRR before the close of the comment period listed under **DATES**; and (3) be sent through one of the following two methods:

- *Electronically via the Federal eRulemaking Portal:* Please visit *https://www.regulations.gov.* In the Search Box, enter the Docket ID Number for this ICR renewal (''ONRR–2011–0019'') to locate the document and click the ''Comment Now!'' button. Follow the prompts to submit your comment prior to the close of the comment period.
- *Email Submissions:* For comments sent via email, please address them to Ms. Christine Thomas, Regulatory Specialist, ONRR, at *Christine.Thomas@onrr.gov* with the OMB Control Number (''OMB Control Number 1012–0001'') listed in the subject line of your email. Email submissions must be postmarked on or before the close of the comment period.

Docket: To access the docket to view the ICR **Federal Register** publications, go to *https://www.regulations.gov* and search ''ONRR–2011–0019'' to view renewal notices recently published in the **Federal Register**, publications associated with prior renewals, and applicable public comments received for this ICR. ONRR will make the comments submitted in response to this notice available for public viewing at *https://www.regulations.gov.*

OMB ICR Data: You may also view information collection review data for this ICR, including past OMB approvals, at *https://www.reginfo.gov/public/do/PRASearch.* Under the ''OMB Control Number'' heading enter ''1012–0001'' and click the ''Search'' button located at the bottom of the page. To view the ICR renewal or OMB approval status, click on the latest entry (based on the most recent date). On the ''View ICR—OIRA Conclusion'' page, check the box next to ''All'' to display all available ICR information provided by OMB.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, please contact Ms. Jennifer Dougherty, Financial Management, RRCM, ONRR by email at *Jennifer.Dougherty@onrr.gov* or by telephone at (303) 231–3563. Individuals who are hearing or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: Pursuant to the PRA, 44 U.S.C. 3501, *et seq.,* and 5 CFR 1320.5, all information collections as defined in 5 CFR 1320.3, require approval by OMB. ONRR may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

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(2) The accuracy of ONRR's estimate of the burden for this 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) How might the agency 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 response.

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Abstract: The Secretary of the United States Department of the Interior (''Secretary'') is responsible for mineral resource development on Federal and Indian lands and the Outer Continental Shelf. Laws pertaining to Federal and Indian mineral leases are posted at *http://www.onrr.gov/Laws_R_D/PubLaws/default.htm.* Pursuant to the Federal Oil and Gas Royalty Management Act of 1982 (''FOGRMA'') and other laws, the Secretary's responsibilities include maintaining a comprehensive inspection, collection, and fiscal and production accounting and auditing system that: (1) Accurately determines mineral royalties, interest, and other payments owed, (2) collects and accounts for such amounts in a timely manner, and (3) disburses the funds collected. *See* 30 U.S.C. 1701 and 1711. ONRR performs these mineral revenue management responsibilities for the Secretary. *See* Secretarial Order No. 3306.

(a) General Information: ONRR collects, audits, and disburses royalties, interest, and other payments owed by lessees on minerals produced from Federal and Indian lands. Such information is generally available within the records of the lessee of others involved in the development, transport, processing, purchase, or sale of such minerals. Specifically, companies submit financial information to ONRR on a monthly basis by submitting form ONRR–2014 (Report of Sales and Royalty Remittance for oil and gas reported in OMB Control Number 1012–0004), and form ONRR–4430 (Solid Minerals Production and Royalty Report reported in OMB Control Number 1012–

0010). These royalty reports result in accounts receivables and capture most of the mineral revenues that ONRR collects.

The basis for the data that a company submits on forms ONRR–2014 and ONRR–4430 is generally available within the records of the lessee or others involved in developing, transporting, processing, purchasing, or selling such minerals. The information that ONRR collects under this ICR includes data necessary to ensure that ONRR's accounts receivables are accurately based on the value of the mineral production, as reported to ONRR on forms ONRR–2014 and ONRR–4430.

(b) Information Collections: Every year, under the Chief Financial Officers Act of 1990 (''CFO Act''), the Office of Inspector General (''OIG'') or its agent audits the accounts receivable portions of the Department of the Interior's financial statements, which includes accounts receivables based on ONRR forms ONRR–2014 and ONRR–4430. Accounts receivable confirmations are a common practice in the audit business. Due to a continuous increase in scrutiny of financial audits, a third-party confirmation of the validity of ONRR's financial records is necessary.

As part of CFO Act audits, the OIG or its agent selects a sample of accounts receivable items based on forms ONRR–2014 and ONRR–4430 and provides the sample items to ONRR. ONRR then identifies the company names and addresses for the sample items selected and creates accounts receivable confirmation letters. In order to meet the CFO Act's requirements, the letters must be on ONRR letterhead and the Deputy Director for ONRR, or his or her designee, must sign the letters. The letter requests third-party confirmation responses by a specified date on whether ONRR's accounts receivable records agree with royalty payor records for the following items: (1) Customer identification; (2) royalty invoice number; (3) payor assigned document number; (4) date of ONRR receipt; (5) original amount the payor reported; and (6) remaining balance due to ONRR. The OIG or its agent mails the letters to the payors, instructing them to respond directly to confirm the accuracy and validity of selected royalty receivable items and amounts. In turn, it is the responsibility of the payors to verify, research, and analyze the amounts and balances reported on their respective forms ONRR–2014 and ONRR–4430.

Title of Collection: Accounts Receivable Confirmations.

OMB Control Number: 1012–0001.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Businesses.

Total Estimated Number of Annual Respondents: 24 randomly-selected mineral payors from Federal and Indian lands and the OCS.

Total Estimated Number of Annual Responses: 24.

Estimated Completion Time per Response: ONRR estimates that each response will take 15 minutes for payors to complete.

Total Estimated Number of Annual Burden Hours: 6 hours.

Respondent's Obligation: Voluntary.

Frequency of Collection: Annual.

Total Estimated Annual Non-Hour Burden Cost: ONRR did not identify any ''non-hour cost'' burden associated with this collection of information.

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 OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Kimbra G. Davis,

Director, Office of Natural Resources Revenue.

[FR Doc. 2021–08170 Filed 4–20–21; 8:45 am]

BILLING CODE 4335–30–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–1505–1507, 1510–1511, 1513, and 1515 (Final)]

Prestressed Concrete Steel Wire Strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine; Scheduling of the Final Phase of Antidumping Duty Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

DATES: April 9, 2021.

FOR FURTHER INFORMATION CONTACT: Lawrence Jones ((202) 205–3358), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. 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. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: Effective September 23, 2020, the Commission established a general schedule for the conduct of the final phase of its investigations on prestressed concrete steel wire strand (''PC strand'') from Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, Netherlands, Saudi Arabia, South Africa, Spain, Taiwan, Tunisia, Turkey, Ukraine, and the United Arab Emirates,[1] following preliminary determinations by the U.S. Department of Commerce (''Commerce'') that imports of subject PC strand from Argentina, Colombia, Egypt, Netherlands, Saudi Arabia, Taiwan, Turkey, and the United Arab Emirates were being sold at less than fair value (''LTFV'') and subsidized by the government of Turkey.[2] Notice of the scheduling of the

final phase of the Commission's investigations and of a public hearing held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on October 8, 2020 (85 FR 63576). In light of the restrictions on access to the Commission building due to the COVID–19 pandemic, the Commission conducted its hearing through written testimony and video conference on December 10, 2020. All persons who requested the opportunity were permitted to participate.

[1] *Prestressed Concrete Steel Wire Strand from Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, Netherlands, Saudi Arabia, South Africa, Spain, Taiwan, Tunisia, Turkey, Ukraine, and the United Arab Emirates; Scheduling of the Final Phase of Countervailing Duty and Antidumping Duty Investigations,* 85 FR 63576, October 8, 2020.

[2] *Prestressed Concrete Steel Wire from the Republic of Turkey: Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, in Part,* 85 FR 59287, September 21, 2020; *Prestressed Concrete Steel Wire Strand from Argentina, Colombia, Egypt, the Netherlands, Saudi Arabia, the Republic of Turkey, and the United Arab Emirates: Preliminary Affirmative Determinations of Sales at LTFV and Preliminary Affirmative Critical Circumstances Determinations, in Part,* 85 FR 61722, September 30, 2020. *See also* Commerce's additional preliminary determination: *Prestressed Concrete Steel Wire Strand from Taiwan: Preliminary Affirmative Determination of Sales at Less Than Fair Value,* 85 FR 61726, September 30, 2020; and Commerce's postponement of the remaining preliminary determinations: *Prestressed Concrete Steel Wire Strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 85 FR 55413, September 8, 2020.

The Commission subsequently issued its final determinations that an industry in the United States was materially injured by reason of imports of PC strand from Argentina, Colombia, Egypt, Netherlands, Saudi Arabia, Taiwan, Turkey, and the United Arab Emirates provided for in subheading 7312.10.30 of the Harmonized Tariff Schedule of the United States (''HTSUS'') that have been found by the Commerce to be sold in the United States at LTFV and subsidized by the government of Turkey. Commerce has issued final affirmative antidumping duty determinations with respect to PC strand from Indonesia,[3] Italy,[4] Malaysia,[5] South Africa,[6] Spain,[7] Tunisia,[8] and Ukraine.[9] Accordingly, the Commission currently is issuing a supplemental schedule for its antidumping duty investigations on imports of PC strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine. This supplemental schedule is as follows: the deadline for filing supplemental party comments on Commerce's final antidumping duty determinations is April 19, 2021. Supplemental party comments may address only Commerce's final antidumping duty determinations regarding imports of PC strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine. These supplemental final comments may not contain new factual information and may not exceed five (5) pages in length. The supplemental staff report in the final phase of these investigations regarding subject imports from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine will be placed in the nonpublic record on May 4, 2021; and a public version will be issued thereafter.

For further information concerning these investigations see the Commission's notice cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207). Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: : These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

By order of the Commission.

Issued Date: April 15, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–08178 Filed 4–20–21; 8:45 am]

BILLING CODE 7020–02–P

[3] *Prestressed Concrete Steel Wire Strand from Indonesia: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances, In Part,* 86 FR 18495, April 9, 2021.

[4] *Prestressed Concrete Steel Wire Strand from Italy: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Negative Determination of Critical Circumstances,* 86 FR 18505, April 9, 2021.

[5] *Prestressed Concrete Steel Wire Strand from Malaysia: Final Affirmative Determination of Sales at Less Than Fair Value,* 86 FR 18502, April 9, 2021.

[6] *Prestressed Concrete Steel Wire Strand from South Africa: Final Affirmative Determination of Sales at Less Than Fair Value,* 86 FR 18497, April 9, 2021.

[7] *Prestressed Concrete Steel Wire Strand from Spain: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Negative Determination of Critical Circumstances,* 86 FR 18512, April 9, 2021.

[8] *Prestressed Concrete Steel Wire Strand from Tunisia: Final Affirmative Determination of Sales at Less Than Fair Value,* 86 FR 18508, April 9, 2021.

[9] *Prestressed Concrete Steel Wire Strand from Ukraine: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Negative Determination of Critical Circumstances,* 86 FR 18498, April 9, 2021.

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1262]

Certain Skin Rejuvenation Resurfacing Devices, Components Thereof, and Products Containing the Same; Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on March 16, 2021, under section 337 of the Tariff Act of 1930, as amended, on behalf of InMode Ltd. of Israel and Invasix Inc. d/b/a InMode of Lake Forest, California. Supplements to the complaint were filed on April 1 and April 5, 2021. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain skin rejuvenation resurfacing devices, components thereof, and products containing the same by reason of infringement of a claim of U.S. Patent No. 10,799,285 (''the '285 patent''). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute. The complainants request that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. 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. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Katherine Hiner, Office of the Secretary, Docket Services Division, U.S. International Trade Commission, telephone (202) 205–1802.

SUPPLEMENTARY INFORMATION:

Authority:

The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2020).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on April 15, 2021, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of claim 1 of the '285 patent; and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the

plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''skin resurfacing devices, punctile resurfacing systems, radio-frequency microneedling systems, and components of each'';

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

InMode Ltd., Tavor Building Shaar Yokneam, P.O. Box 533, Yokneam 2069206, Israel

Invasix Inc. d/b/a InMode, 20996 Bake Parkway, Suite 106, Lake Forest, CA 92630

(b) The respondents are the following entities alleged to be in violation of section 337, and the parties upon which the complaint is to be served:

ILOODA Co., Ltd., 120 Jangan-ro 458beon-gil, Jangan-gu Suwon, 16200, Republic of Korea

Cutera, Inc., 3240 Bayshore Boulevard, Brisbane, CA 94005

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

The Office of Unfair Import Investigations is not a party to this investigation.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainants of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: April 15, 2021.

Lisa Barton

Secretary to the Commission.

[FR Doc. 2021–08159 Filed 4–20–21; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–823]

Bulk Manufacturer of Controlled Substances Application: Research Triangle Institute

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Notice of application.

SUMMARY: Research Triangle Institute, has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to Supplementary Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before June 21, 2021. Such persons may also file a written request for a hearing on the application on or before June 21, 2021.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on March 18, 2021, Research Triangle Institute, 3040 East Cornwallis Road, Hermann Building, Room 106, Research Triangle Park, North Carolina 27709, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Tetrahydrocannabinols	7370	I

The company plans to bulk manufacture the listed controlled substance synthetically only for distribution to its customers for research and analytical reference standards. No other activity for this drug code is authorized for this registration.

William T. McDermott,

Assistant Administrator.

[FR Doc. 2021–08165 Filed 4–20–21; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 17–11]

Mark A. Wimbley, M.D.; Decision and Order

I. Procedural History

On October 20, 2016, a former Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Mark A. Wimbley, M.D. (hereinafter, Respondent), of Costa Mesa, California. Administrative Law Judge (hereinafter, ALJ) Exhibit (hereinafter, ALJX) 1, (OSC) at 1. The OSC proposed the revocation of and denial of any pending application to modify or renew Respondent's Certificate of Registration No. BW5359004 pursuant to 21 U.S.C. 823(f) and 824(a)(4) for the reason that ''[his] continued registration is inconsistent with the public interest, as that term is defined in 21 U.S.C. 823(f).'' *Id.*

The OSC alleged that Respondent issued prescriptions for controlled substances to four [1] individuals outside the usual course of the professional practice in violation of 21 CFR 1306.04(a) and in violation of California law and the minimum standards of medical practice in California. *Id.* at 2–8. Specifically, the OSC alleged that Respondent ''issued these orders for controlled substances without meeting the minimal medical standards required under California law, including those listed in the 'Guide to the Laws Governing the Practice of Medicine by Physicians and Surgeons,' Medical Board of California, 7th Ed. 2013.'' *Id.* at 7. Additionally, the OSC alleged that for the four listed patients, Respondent failed to do one or more of the following:

perform a physical examination; take appropriate medical history; assess pain, physical and psychological function; make an assessment of any underlying or coexisting diseases or conditions; confirm the patient was taking previously prescribed

[1] The Government withdrew allegations related to one of the patients in its Supplemental Prehearing Statement, so this matter is limited to three patients. ALJX 7, 7–8.

controlled substance medications by checking California's Controlled Substance Utilization and Review System (''CURES'') or performing a urine drug test; order or perform any diagnostic testing; adequately discuss the risks and benefits of the use of controlled substances and other treatment modalities; periodically review the course of pain treatment or gather new information, if any, about the etiology of these patients or their state of health; or refer the patients to seek medical care to treat underlying conditions, such as pain management, orthopedics, behavioral therapy, physical therapy, and the like . . . . in violat[ion] of CA HLTH & S §§ 11150,[2] 11153(a), and 11154(a).

Id. at 7–8.

The OSC further alleged that Respondent ''continued the unlawful practices . . . even after [he] was arrested on December 15, 2015, and charged by the State of California with 12 felony counts of prescribing controlled substances without a legitimate medical purpose.'' *Id.* at 8. Finally, the OSC alleged other violations of California State law, including Cal. Bus. & Prof. Code §§ 2242(a), 2234, 725(a) and Cal. Health & Safety Code § 11190(a). *Id.*

The OSC notified Respondent of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 9–10 (citing 21 CFR 1301.43).

By letter dated November 11, 2016, Respondent timely requested a hearing. ALJX 2 (Request for Hearing), at 1. The matter was placed on the docket of the Office of Administrative Law Judges and assigned to Chief Administrative Law Judge John J. Mulrooney II (hereinafter, the Chief ALJ). On November 15, 2016, the ALJ established a schedule for the filing of prehearing statements. ALJX 3 (Order for Prehearing Statements), at 1–2. After requesting and being granted an extension of time, the Government filed its Prehearing Statement on December 7, 2016, and Respondent filed its Prehearing Statement on December 28, 2016. ALJX 6 (hereinafter, Govt Prehearing) and ALJX 8 (hereinafter, Resp Prehearing). On January 4, 2017, the Chief ALJ issued his Prehearing Ruling that, among other things, set out eight Stipulations already agreed upon and established schedules for the filing of additional joint stipulations and supplemental prehearing statements, which were filed by both the Respondent and the Government on December 28, 2016, and January 25, 2017, respectively. ALJX 11 (Prehearing Ruling), at 1–6; ALJX 9 (hereinafter, Resp Supp Prehearing); ALJX 7 (hereinafter, Govt Supp Prehearing). On January 27, 2017, the Government filed a Motion *In Limine* to limit the testimony of Respondent's proposed expert witness to which Respondent filed an Opposition to Complainant's Motion *In Limine* and Request for Additional Time on January 27, 2017. ALJX 13 (hereinafter, Gov Mot *In Limine*); ALJX 14 (hereinafter, Resp Opposition). The Chief ALJ granted Respondent's request for more time to supplement his prehearing disclosures and denied the Government's Motion to exclude testimony and denied Respondent's motion for ''an indefinite amount of 'more time' to bring motions relating to issues raised in Government's supplemental prehearing statement.'' ALJX 16, at 7–8 (Order Regarding the Parties' Motions). Respondent filed a Second Supplemental Prehearing Statement on February 1, 2017. ALJX 10 (hereinafter, Resp Second Supp Prehearing). The parties filed additional Joint Stipulations [3] of Facts on February 6, 2017, and February 7, 2017. ALJX 17a and 17b; RD, at 3–4. I have reviewed and agree with the procedural rulings of the ALJ during the administration of the hearing.

The hearing in this matter spanned four days.[4] On May 22, 2017, the Government filed its Proposed Findings of Fact and Conclusions of Law and Respondent filed his Closing Brief. ALJX 30 (hereinafter, Govt Posthearing); ALJX 31 (hereinafter, Resp Posthearing). The Recommended Rulings, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge (hereafter, RD) is dated June 1, 2017. The Government filed exceptions to the RD (hereinafter, Govt Exceptions) on June 21, 2017. ALJ Transmittal Letter, at 1. On June 27, 2017, the Chief ALJ transmitted his RD, along with the certified record, to me. *Id.*

Having considered this matter in the entirety, I find that Respondent issued prescriptions beneath the applicable standard of care and outside of the usual course of the professional practice in California, in violation of federal law, and that Respondent also committed violations of state law.

I issue this Decision and Order based on the entire record before me. 21 CFR 1301.43(e). I make the following findings of fact.

II. Findings of Fact

A. Respondent's DEA Registration

Respondent is registered with the DEA as a practitioner-DW/30 in schedules II, IIN, III, IIIN, IV, and V under DEA Certificate of Registration No. BW5359004 at the registered address of 2900 Bristol, A 106, Costa Mesa, CA 92626. Government Exhibit (hereinafter, GX) 1 (Respondent's Certificate of Registration). This registration expired on May 31, 2018.*Id.*[5]

B. The Government's Case

The Government's documentary evidence consisted primarily of medical records and pharmacy records and CURES reports related to three individuals treated by Respondent between October 2014 and July 2016. The Government called three witnesses: A DEA Diversion Investigator (hereinafter, the DI), who participated in the investigation of Respondent; a California State Investigator (hereinafter, the SI); and an expert witness, Dr. Timothy Munzing. RD, at 5–35.

The Government first presented the testimony of the DI, Tr. 15–140, who testified that she took over as the lead diversion investigator on the case during the execution of a search warrant on the Respondent's house in November 2015 on Respondent's residence, office and vehicles. *Id.* at 21–22. She testified that DEA seized some of the medical records in the Respondent's garage, two or three computers, and from one of the cars, ''a few vials of controlled drugs in the center console which were later identified to be hydrocodone'' and another controlled substance that was not labeled. *Id.* at 24–25. The DI testified that Respondent's clinic ''was somewhat in disarray. The boxes of documents were just like random patient documents that were in no order at all.'' *Id.* at 25. The DI stated that ''the

[2] Although the OSC alleged Cal. Health & Safety Code § 11150, I did not see any further mention of this provision in this proceeding, so I am not evaluating it. Further, I agree with the RD that this statute is inapplicable as an independent violation. *See* RD, at 69–70 n.165.

[3] In particular, the Government and Respondent stipulated as to the Respondent's criminal charges, the Respondent's agreement with the District Attorney's Office regarding prescribing and Respondent's state medical license suspension. They further stipulated that the combination hydrocodone products Lortab, Vicodin and Norco, oxycodone (brand names ''Oxycontin'' and ''Roxicodone'') were Schedule II controlled substances; carisoprodol (brand name ''Soma''), diazepam (brand name ''Valium), and alprazolam (brand name ''Xanax'') were Schedule IV controlled substances.'' RD, at 4. I incorporate the stipulated facts herein.

[4] Hearings were held in Los Angeles, California on March 28–31, 2017.

[5] The fact that a registrant allows his registration to expire during the pendency of an OSC does not impact my jurisdiction or prerogative under the Controlled Substances Act (hereinafter, CSA) to adjudicate the OSC to finality. *Jeffrey D. Olsen, M.D.,* 84 FR 68474 (2019).

records were boxed up and brought back to the office. [She] then organized them according to patient, scanned them into the computer, and then placed them into evidence.'' *Id.* at 27.

The DI also testified to her presence at a second state warrant on Respondent's Clinic and vehicles, which was executed on August 30, 2016. Tr. 33, 45; RD, at 9; GX 19 (State Search Warrant and Receipts). She stated that the office was ''less organized'' and there was ''less stuff'' than during the first warrant, and the medical records seized were ''brought back to the DEA office.'' Tr. 46. The DI further testified that the investigators ''went through all the boxes page by page to identify the patients that we were searching for.'' Tr. 58; RD, at 9. She stated that the J.M. and C.B. files in the Government Exhibits include records obtained from both warrants and the R.D. file contains records only obtained as a result of the second warrant, and further that Respondent did not notify her until recently that there were any additional documents for these patients. Tr. 50–56, 58; RD, at 10. The Government's evidence includes three patient files obtained through those search warrants. GX 4, 6, 10–12. The DI also testified to the accuracy of the prescription records that she obtained from pharmacies. Tr. 61–86; GX 3, 5, 7–9, 11, 13. Finally, the DI testified to the methodology she undertook in obtaining the CURES report of the patients and Respondent. Tr. 89–90; GX 20–23.[6]

I agree with the Chief ALJ that the DI's testimony was ''plausible, detailed, consistent, and without any obvious motive to fabricate.'' RD, at 11. Therefore, I agree with the Chief ALJ that her ''testimony is accorded full credibility.'' *Id.*

The Government also presented the testimony of the SI, who is an investigator with the Department of Healthcare Services in California. Tr. 142–185; RD, at 5–8. The SI testified that she was the lead investigator for the State of California and began an investigation when, ''in November 2015, [her] department received a complaint from a Medi-Cal Beneficiary stating that his information was being used to fill prescription drugs, and on those prescriptions the prescriber was [Respondent].'' Tr. 146. The SI stated that she went to the location on the prescriptions and found it empty and had obtained a state search warrant for a new office address, which was executed on August 30, 2016. *Id.* at 149–151. During the search warrant, the SI stated that she had interviewed Respondent in the parking lot and he had stated that the three patients, J.M., R.D. and C.B., were his patients but had been discharged. *Id.* at 162–64; RD, at 6. She also stated that she asked Respondent specifically where all of his ''medical charts'' were and he stated that ''all of them are at this location.'' Tr. 165. The SI further stated that she indicated that the investigators searching Respondent's office ''stated that everything was thoroughly checked twice.'' *Id.* at 158; RD, at 6.

I agree with the Chief ALJ and find that the SI ''had no obvious motivation to be anything but objective, and presented testimony that was sufficiently plausible, detailed, and internally consistent to be accorded full credibility in this recommended decision.'' RD, at 7–8.

The Government's expert witness, Dr. Timothy Munzing, has been employed by Kaiser-Permanente for over thirty-one years, twenty-eight of which he has served as the family medicine program director. GX 16 (Curriculum Vitae of Dr. Munzing); *see also* RD, at 11; Tr. 186–563. The Chief ALJ accepted Dr. Munzing without objection as ''an expert in family medicine, pain management, and the prescribing of controlled substances in California.'' Tr. 211–12. The matters about which Dr. Munzing testified included the general standard of care in California and his review and standard-of-care analysis of the medical records in the Government's Exhibits belonging to three of Respondent's patients.

The Chief ALJ found, and I agree, that Dr. Munzing ''presented testimony that was generally authoritative, consistent, well-supported, objective, and persuasive.'' RD, at 35.

C. The Respondent's Case

Respondent presented the testimony of two witnesses at the hearing, including his own. He also presented [7] supplemental medical records (hereinafter, Respondent's Supplemental Records) that were not included in the Government's Exhibits for the three patients at issue in the case and written reports from his expert. Respondent Exhibit (hereinafter, RX) 3–5, 10, 17. The first witness, Dr. Umer Malik, was offered by Respondent and accepted (without objection) as an expert on the prescribing of controlled substances in the state of California, including required documentation for such prescribing. RD, at 38; Tr. 579–608; 735–851. Dr. Malik graduated from medical school in Pakistan in 2005 and became a board certified physician in internal medicine in the United States in 2010. RD, at 38–39; Tr. 579–80. Dr. Malik has practiced in in-patient and out-patient settings and he ''estimated that he has seen 40 to 50 patients over an extended period of time who were on chronic opioid medications'' and that he has treated 600 to 800 patients in California who were on opiates for chronic pain. RD, at 39 (citing Tr. 583). Dr. Malik also was an ''internal expert reviewer'' for the quality control department when he was at Stanford University and continues to provide external expert review there and also for the Medical Board of California. Tr. 583–84; RD, at 39; *see also* RX 11 (Curriculum Vitae of Dr. Malik).

Dr. Malik testified as to his familiarity with the term ''prescription drug cocktail'' and that he has prescribed opioid medications to over 500 patients. Tr. 588; *see also infra* II.E. He testified regarding the standard of care in California and in the end opined that the prescriptions that he reviewed in Respondent's Supplemental Records were issued within the applicable standard of care in California. Tr. at 743–44. He stated that in preparing his export report, he reviewed RX 3–5. *Id.* at 764–65; Tr. 806. Although he did receive the Government's Exhibits, he did not include them in his reports. *Id.* at 799.

I agree with the Chief ALJ that ''[a]lthough Dr. Malik presented as generally knowledgeable, certain aspects of his testimony undermined the confidence that could otherwise be afforded his opinions.'' RD, at 54. For example, the Chief ALJ noted that Dr. Malik testified that he had no idea that a pharmacy could refuse to fill a prescription presented by a patient, which is ''basic knowledge related to the regulation of controlled substance.'' *Id.* at 54–55 (citing Tr. 798). He further noted that Dr. Malik testified contrary to the DEA regulatory requirement regarding Schedule II controlled substances in 21 CFR 1306.12(a), that '' 'there are physicians who call in for the refills of the benzodiazepines and for the refills of opiates if they have a chronic relationship with the patients.' '' *Id.* at 55 (quoting Tr. 843). Further, the Chief ALJ pointed out that there were inconsistencies with Dr. Malik's written report, including referenced pictures and blank progress notes that did not exist in Respondent's Supplemental Records and inconsistencies regarding how long

[6] I agree with the reasoning of the Chief ALJ in admitting the CURES data in GX 20–22 over the Respondent's objection as to its authenticity. Tr. 93–96.

[7] Respondent included a declaration from Dr. Elliot Felman, who monitored Respondent's compliance with his California Ex Parte Interim Suspension Order. *See* RX 8. I agree with the Chief ALJ that ''because the records that Dr. Felman reviewed post-dated the conduct charged in the [OSC] and does not concern the patients at issue in this matter, any factual representations or opinions expressed in his declaration should be deemed irrelevant.'' RD, at 21 n.3.

Respondent had been seeing a patient. RD, at 55–56 (citing RX 17, at 1; RX 5; Tr. 801–02, 809; RX 10). Ultimately, the Chief ALJ found, and I agree, that with regard to Dr. Malik's testimony, RD, at 56–57.

His knowledge deficits in rudimentary aspects of the CSA and its regulations, his lack of specificity regarding where he located the key aspects of the Supplemental Files upon which he based his opinions and his willingness to reach into the future to essentially bootstrap prescribing decisions made in the past, were all factors that eroded the weight that can be afforded to his expert onions here, and make those opinions less persuasive than the opinions by the Government's expert, Dr. Munzing.

Respondent testified on his own behalf. Tr. 610–734; 860–912. He testified that he attended medical school at the University of California at Los Angeles and trained to become a surgeon, but was in a car accident and ''couldn't really operate.'' Tr. 864; RX 1, at 1–2 (Respondent's Curriculum Vitae). Respondent testified about the courses that he had taken ''primarily on pain management'' and future courses he planned on taking. Tr. 864–65; RX 1, at 3–18; RD, at 35. He also testified about a Medical Board of California disciplinary action, after which he was allowed to prescribe only Schedule V controlled substances. Tr. 871–72; RX 16 (Interim Suspension Order).[8] He testified that he has treated ''more than 500 [patients] probably I think in 10 years'' as a pain management practitioner. Tr. 873–74.

Regarding his medical records, Respondent testified that he ''tried to be extremely well documented,'' but that he ''didn't have a specific system for them. I had the patients, their packets and notes, and they weren't necessarily all together. They might have been. Some might have been somewhere together.'' Tr. 632, 683.

Respondent testified as to the legitimacy of the files for C.B., J.M. and R.D. in RX 3, 4, and 5 (Respondent's Supplemental Records). *Id.* at 610. Respondent testified that on August 30, 2016, a state investigator came to his residence. *Id.* The SI showed Respondent a list of patients and he told her that several of the patients ''and then several other individuals on that list that are not my patients.'' *Id.* at 613. He also stated that the SI told him that ''she [was] investigating Medi-Cal fraud'' and he does not ''treat Medi-Cal patients now.'' *Id.* at 616–17. Respondent explained that he drove to the office to open it for the investigators to execute the search warrant and ''they searched the vehicle several times.'' *Id.* at 619–20. Respondent confirmed that the patient records were not in a file cabinet and that ''there were some by desk'' and he ''had different stacks of paper, different—[he] was trying to organize things for [his] attorney, some things have been taken to the attorney for different parts of this case or another case,'' and the other files ''were in different stacks in different locations in [his] office.'' *Id.* at 621–23. He stated that ''[s]ome of the files like for R.D. were in the car.'' [9] *Id.* at 622. When asked if the SI asked him where the records were for the patients, he answered that ''the main focus of the conversations that I recall was Medi-Cal fraud, a list of people that were not my patients.'' *Id.* at 626. When asked if the files were with his criminal attorneys, he stated, ''I had some things being reviewed because I was changing counsel.'' *Id.* Respondent stated that he found the RX 3, 4, and 5 ''rapidly'' and that ''they came on August 30th'' to conduct the search warrant and ''either that day or in a couple days they were in [his attorney's] office, probably before the 3rd or 4th of September.'' *Id.* at 631.[10]

When asked about whether Respondent had told the DI that all of the medical records should be in his office, Respondent first answered, ''I may have.'' *Id.* at 656. Then when asked again, he stated, ''I mean, it's kind of obvious, isn't it?'' *Id.* Finally, he stated, ''The only particular request she made was the Patient M.C., and I told her exactly where to find the chart.'' *Id.* at 658.

Respondent agreed that medical records should contain exam notes, progress notes, referrals, diagnostic testing, and medications prescribed, red flags, diversion review, and steps to resolve red flags, and that in California Schedule II prescriptions require certain information. *Id.* at 636–37. However, Respondent maintained that the prescriptions at issue in this case were issued within the applicable standard of care in the State of California. *Id.* at 878–86.

During the hearing, in evaluating whether to admit Respondent's Supplemental Records, the Chief ALJ stated that Respondent's credibility is a ''mixed bag. I think he was frequently lacking in detail. He lost patience then answered questions that were not asked of him. Frequently, he would be responsive to his own counsel but almost intentionally unresponsive to Government's counsel.'' Tr. 731–32. Further, in the RD, the Chief ALJ stated that, ''he presented as a defensive, frequently non-responsive, vague [11] witness.'' RD, at 38. Therefore, the Chief ALJ found, and I agree, that ''where the Respondent's testimony conflicts with other credible testimony and evidence, it cannot be afforded full credibility.'' *Id.*

D. Admission of Supplemental Patient Records

During the hearing, over the Government's objections,[12] the Chief ALJ admitted Respondent's Exhibits 3, 4, and 5 (Respondent's Supplemental Records), which consisted of patient records offered by the Respondent that supplemented the patient records found by the Government during the two

[8] As discussed further under *supra* III.A.1, the California Office of Administrative Hearings entered an Interim Suspension Order on December 17, 2016, stating that ''Respondent shall not prescribe any Schedule II, III, or IV controlled substances.'' RX 16, at 7.

[9] Respondent stated that the R.D. records were ''like in a container for files'' in his vehicle ''in the back seat area'' and that the DI did not take those records. *Id.* at 659. Respondent's counsel had stated that the R.D. files were in the ''trunk'' of his car. Tr. 625.

[10] Respondent testified that in 2016, at his Newport Beach office, a toilet had overflowed and some of his records ''got wet,'' but he did not know whether they contained records for these patients. *Id.* at 641. However, Respondent's counsel objected to questioning about Respondent's Supplemental Records, because they were dated ''all after these water incidences'' from November 2015 to April 2016. *Id.* at 645. After the objection, Respondent stated, ''I'm not sure that I made a mistake. What I said is it happened before I moved. It was in 2015.'' He further stated that his house flooded in 2012 and his rental property in 2014 and that he may have lost documents in those floods, but he did not know whether they involved the patients at issue. Tr. 649–52. The SI testified that she saw no evidence of flood damage at his Newport Beach office and she stated that the property manager said he ''was evicted based on complaints and late rent.'' Tr. 172. Ultimately, I do not find any reliable evidence on the record, even from Respondent's own testimony, that Respondent possessed relevant records that were destroyed in these alleged water incidents, and therefore, I do not find these alleged water incidents relevant to these proceedings.

[11] In particular, I found Respondent's testimony regarding the presence of two separate records for the same patient on the same date to be vague and not credible. GX 10, at 67 is a form filled out at the top by R.D. and filled out on the bottom portion by Respondent, dated April 13, 2016. RX 5, at 25 is dated from the same visit; however, it provides a much more detailed account of the visit and is filled out entirely by Respondent. First, Respondent testified that the Respondent's Exhibit notes were written while the patient was sitting there and that the Government Exhibit notes were written ''probably right after he—right after he left.'' Tr. 694. When confronted with the notion that it does not make logical sense that he wrote the detailed notes while the patient was sitting there and then wrote more cursory notes on the form that the Respondent filled out after the patient left, he changed his testimony and stated that he ''wrote the more detailed one [the Respondent's Exhibit] later . . . after the patient left.'' *Id.* He stated, ''I'm writing on another piece of paper. At the same time later, I might finish whatever I need to do in another packet, or I might not. It's not that different.'' *Id.* at 693.

[12] The Government objected to the admission of these records into evidence based on authenticity during and prior to the hearing. *See* ALJX 24 (Notice of Objection on the Basis of Authenticity (March 21, 2017)); Tr. 601.

search warrants. In admitting the records, the Chief ALJ stated that ''the proponent of any exhibit bears the burden of proof to establish that the document is what it purports to be.'' Tr. 731. He further stated, ''Because all of the documents weren't seized, and some of them bore things that I cannot fathom where they came from or how they would be generated later. Because that is true, what I'm going to do is admit the documents and allow you to use them to procure the expert opinion.'' *Id.* at 731–32. The Chief ALJ caveated that he did not ''have a high level of confidence in them'' and that he did not know ''why [Respondent] didn't comply with the [warrant.]'' *Id.* at 732.

In the RD, the Chief ALJ explained that:

> While true that in administrative enforcement proceedings the subsequent discovery of additional medical files can (and often does) raise the potential specter of evidence manufactured to support deficient records, the records offered by the Respondent contained some pages that would have been difficult to manufacture after-the-fact, including test results originating from other offices stamped with facsimile transmittal information and forms that were apparently completed by the patients themselves which are dated before the last search took place.

RD, at 37–38.

I agree with the RD that Respondent's exhibits contained records that could not have been easily manufactured and appear to be legitimate.[13] Furthermore, as the Chief ALJ noted, multiple witnesses testified during the hearing that Respondent's paperwork was in ''complete disarray'' with patient records in piles all over his office, exam rooms and even inside his vehicle. RD, at 36 (citing Tr. 715, 718–19); *see also* Tr. 622–23; Tr. 169. The RD summarized that ''[Respondent] had no filing system, kept no payment or billing receipts, and was paid in cash on those occasions when his patients brought money to him.'' RD, at 36 (citing Tr. 683, 717–19). On the whole the evidence demonstrates that records were a mess and that some of the Respondent's Supplemental Records appeared legitimate. *See* RD, at 38 n.104.[14] Therefore, in spite of the dubious authenticity and origin [15] of some of Respondent's records, I ultimately will agree with the Chief ALJ's decision to admit them into evidence.

E. The Applicable Standard of Care in California

Regarding the applicable standard of care in California, Dr. Munzing testified that on the first visit ''one must determine essentially whether or not this patient actually has a legitimate need for whatever treatment you're going to do.'' Tr. 213. ''[F]or controlled substances the first thing you need to do is take a history.'' *Id.* The history you need to assess includes: ''how long has one had the pain; specifically the area of pain,'' ''did it start gradually'' or ''was there an inciting incident'' and ''the pain level or how severe the pain is, but more importantly, is the—actually, the function.'' *Id.* Dr. Munzing stated that ''function's really more important because function is a little more objective than a number.'' *Id.* at 214. Further, as part of the medical history, ''[o]ne wants to know have you had imaging before, what kind of treatments have you had before, are you been on medicines before.'' *Id.* Also, Dr. Munzing testified that ''I want to know today or in the last couple of weeks, I want to know where things are: pain level, functional level'' and about ''mental health history.'' *Id.* at 214–15. ''Once you've taken a thorough history, then you want to do a thorough exam.'' *Id.* at 216. Dr. Munzing said the exam should be a ''general exam on heart, and lungs, and kidney'' and ''[t]hen hone in on the area of pain.'' *Id.* He stated that ''you want to actually observe it, palpate it, touch it. Is it tender? Look for range of motion.'' *Id.* Additionally, for chronic pain, he stated that you want ''relatively recent imaging.'' *Id.* at 217. Next, he stated that a practitioner would need ''to first of all look for red flags in [the patients'] story.'' *Id.* Dr. Munzing testified that he orders urine drug screens and checks CURES and the Prescription Drug Monitoring Program database (hereinafter, PDMP) ''to make sure that if they say that this is what I'm taking, I ensure that that's consistent.'' *Id.* at 218–19. Finally, Dr. Munzing stated, ''All this needs to be documented.'' In the documentation, he testified that there must be ''both pertinent positives, pertinent negatives, exams, documenting the information.'' *Id.* at 220.

The Government included in its evidence the Medical Board of California, Guide to the Laws Governing the Practice of Medicine (7th Ed. 2013) (hereinafter, the Guide) and the Medical Board of California, Guidelines for Prescribing Controlled Substances for Pain (November 2014). GX 17, 18. Dr. Munzing testified that the guidelines for prescribing controlled substances are meant to ''kind of say here's the things you need to do if you're actually going to prescribe controlled substances.'' Tr. 235. Dr. Munzing further stated that ''[y]ou don't have to do every single one of those, but if you're substantially complying with the standard of care—with the guidelines that would be the standard of care.'' Tr. 228. Regarding documentation, he testified that ''really, the medical record documentation, not only is it a law, is it a requirement, but I think it is that because it really is about patient safety . . . it's for my own recollection of on this date and time this is what was going on.'' *Id.* 239. He also stated that ''if someone else is going to see the patient that way it's an accurate reflection of what's happening at this

[13] RX 5, at 4 is a laboratory report for R.D. that was faxed on May 30, 2016. Tr. 721. RX 3, at 45 is a fax cover sheet for an Operative Report from Dr. Lee's office for C.B. *Id.* at 721–22. Respondent testified that RX 3, at 1 and RX 4, at 1, are filled out by the patient and RX 4, at 2 included the patient's signature. *Id.* at 706–08. RX 5, at 8 includes a ''fax form'' that ''was sent from Perris Family Care Center, and it's—where it refers to the lab results that are back here.'' *Id.* at 709. Respondent testified that he found and provided the records to his attorney ''probably before the 3rd or 4th of September.'' *Id.* at 631. Government counsel noted that RX 3, at 45 also includes a fax time stamp of December 20, 2016, which was after the September timeframe that Respondent claimed he gave the documents to his lawyer. *Id.* at 723.

[14] The DI testified that during the second search in August 2016, investigators found very few documents dated before the date of the first search in November 2015, which may not even be related to the patients in this case. Tr. 137–38. The Chief ALJ found that this strengthened Respondent's position that the Supplemental Records were legitimate. RD, at 38 n.104. However, it is unclear from the record where Respondent's records were at any given time. Respondent stated that he ''was trying to organize things for [his] attorney, some things have been taken to the attorney for different parts of this case or another case.'' Tr. 622. I credit the testimony of the DI and SI regarding their thorough search of Respondent's records. The fact that some of Respondent's Supplemental Records could not be fabricated, indicates that they may have been elsewhere during the searches. It is ultimately unimportant to the resolution of the case, because Respondent only produced Supplemental Records for a portion of the controlled substance prescriptions in this case.

[15] The Government asserts that there are multiple reasons why the records should be discredited. For example, the ''character of Respondent's versions of records removed by law enforcement'' was ''at best cursory, and in most cases blank,'' whereas Respondent's records were ''multipage and extensive,'' and this gave the appearance that they had been ''tailored to address many of the deficiencies alleged in the [OSC].'' Govt Posthearing, at 41 (*comparing, e.g.,* GX 4, at 17–20 with RX 4, at 21–27). ''Moreover, there is complete disparity between the two versions; there are no exam notes in records recovered by law enforcement that are in any way as extensive and complete as those in Respondent's versions, and similarly there are none in Respondent's that are as cursory or vacant as those recovered by law enforcement.'' *Id.* I agree with the Government regarding all of the suspicious circumstances surrounding these records; however, considering the breadth of evidence that the Government has submitted, which the Respondent has not rebutted, I find it unnecessary to make a finding that these records were not legitimate. As explained herein, the Government has more than met its burden in demonstrating that Respondent's registration is inconsistent the public interest, even if I take Respondent's records to be what they claim to be.

date and time. My thought process behind it . . . .'' *Id.* Dr. Munzing testified that the standard of care required documentation ''[i]n the progress note it's vital to see a diagnosis that has something to do with pain in it.'' *Id.* at 241.

The California Guide to the Practice of Medicine sets forth guidelines in managing pain patients, which Dr. Munzing described provides ''almost a outline of what I described a little bit ago. You need to do a history and a physical exam . . . then you come up with a treatment plan.'' Tr. 247 (citing to GX 17, at 59–61). He also stated that the Guide requires that the practitioner ''go over and discuss informed consent with the patient'' and ''periodic review.'' *Id.* at 248. Regarding the Guide's requirements for documentation, Dr. Munzing stated, ''I guess I can't emphasize enough they're incredibly important, again for patient safety and for knowing what happened at any particular time. They're also important, again, for any kind of transfer of care, whether it's temporary or, you know, permanent.'' *Id.* at 249 (citing GX 17, at 65). He further stated that ''you want very thorough documentation for any kind of chronic pain, controlled substance medications, and some of the other areas because they're just higher risk areas.'' *Id.* Dr. Munzing stated that the record retention requirement for Schedule II controlled substances is three years, but ''in reality, everyone I know keeps them indefinitely.'' *Id.* at 250. When asked to summarize what information should be kept in medical records under the standard of care in California, Dr. Munzing said, ''the history, which includes past medical history, the medications; the other medical problems; the vital signs . . . the exam; any additional imaging results, lab results . . . and then the assessment . . . and then what your management plan is going forward.'' Tr. 253–54.

Regarding ''red flags,'' Dr. Munzing testified that they are ''things that kind of are just potential factors for abuse, diversion, misuse'' and include ''doctor shopping, seeing multiple doctors getting controlled substance medications, pharmacy shopping, going to multiple pharmacies.'' Tr. 256–57. When a practitioner is presented with a red flag, he has to ''delve a little deeper'' and ''it depends on what the red flag is.'' *Id.* at 259. For example, if he sees on CURES, that a patient is ''getting what—the combination called the trinity or holy trinity, which is an Oxycodone with a Benzodiazepine with Carisprodol—Soma is the brand name—you put that together, that's a huge red flag because that's a popular combination in the drug culture.'' *Id.* at 260. Finally, he testified that the standard of care requires that ''one needs to document significant red flags.'' *Id.* at 261.

Dr. Munzing also testified that ''when an individual is either taking an opioid or a physician is prescribing it, it's vitally important to calculate the Morphine equivalent dosing (MME). What that does is it translates an opioid, whether it be Oxycodone, or Methadone, or whatever to a base number, which they use Morphine as the base number.'' *Id.* at 288. He further stated that ''[t]he reason it's important is that if you go above 50 milligrams per day of Morphine-equivalent dosing, the amount of overdose risk and death increases. Once you get to 100 milligrams per day—and the CDC is now recommending keep it under 90. If you go over 100, then you have an eightfold risk of overdose in a—per year . . . .'' *Id.* at 288–89.

Regarding the applicable standard of care in California for prescribing controlled substances, Respondent's expert, Dr. Malik, testified, ''If there is no physical examination documented, if there is no history documented, if the doctor's not making a diagnosis, just giving the pain medications, that is breaching the standard of care.'' *Id.* at 787. He further stated that even for minimal risk of opiate abuse patients, ''the recommendations are to do a CURES test, to do a urine toxicology, and to make quick follow up visits. So, yes, it is within the standard of care for a physician to do at least these three things even if the patient comes under the mild opiate risk tool.'' *Id.* at 787–88.

In general, Dr. Malik's and Dr. Munzing's expert opinions regarding the standard of care for prescribing opioids in California were often similar. They both used the Medical Board of California guidelines to formulate their opinions about whether Respondent had met the standard of care. *Id.* at 768; 235. Dr. Malik testified that a physician needed to be in compliance with most of the guidelines to be within the standard of care, whereas, Dr. Munzing described the guidelines as an ''outline'' of what a physician needs to do to meet the standard. *Compare id.* at 744 *with id.* at 247.

In a few areas, the experts diverged. Dr. Malik testified that it is not a breach of the standard of care to prescribe a trinity cocktail,[16] and that there are times when ''the patient has an intractable pain.'' *Id.* at 735–36. He affirmed Dr. Munzing's testimony that physicians do calculate the morphine equivalent of controlled substances and stated that the morphine equivalent ''was designed to have a new medical standard on the basis of which different opiates can be compared based on their potential efficacy in a human's body.'' *Id.* at 736. Dr. Malik testified that it is not a deviation in the standard of care to provide more than 100 milligrams of morphine equivalent dose and per day;'' however, ''a physician has to be more careful, obviously have to be keep [*sic*] an eye on all these side effects, which can happen on a higher dose of MME.'' *Id.* at 737–38. Dr. Malik opined that based on Respondent's exhibits, Respondent was complying with the standard of care in terms of having his patients return to his office on a frequent basis. *Id.* at 738.

Overall, Dr. Malik testified that ''[Respondent is] a very poor documenter'' and that ''[i]t really takes a lot of effort to gather all that information, and think that the documentation is poor on his side, but I also believe that he has followed if not all, most of the recommendations from the guidelines of the Medical Board of California.'' *Id.* at 743. He further stated that ''following a substantial number of those guidelines can bring you to the standard of care.'' *Id.* at 744.

As the Chief ALJ found, issues with Dr. Malik's credibility made his ''opinions less persuasive than the opinions by the Government's expert, Dr. Munzing.'' RD, at 57; *see also supra* II.C. Therefore, I generally apply the standard of care as testified to by Dr. Munzing to the prescriptions[17] at issue in this case.

F. Allegations of Issuing Prescriptions Outside of the Usual Course of the Professional Practice and Prescribing Below the Applicable Standard of Care in California and Violations of State Law

Having read and analyzed all of the record evidence, I agree with the RD's conclusion and find substantial record evidence that Respondent prescribed controlled substances outside of the usual course of the professional practice and below the applicable standard of care in California. RD, at 93–94 (listing sustained allegations). Overall, I find that the record contains substantial evidence that Respondent issued

[16] Dr. Malik testified that he had never heard of the trinity cocktail until two months before he reviewed the records for this case. Tr. 792; RD, at 41.

[17] However, as further explained herein, Dr. Munzing did not opine about whether Respondent's Supplemental Records met the standard of care for prescribing controlled substances. *See infra* F.

numerous controlled substance prescriptions to J.M. and R.D. outside the usual course of the professional practice and beneath the applicable standard of care and in violation of several California laws and that Respondent issued controlled substance prescriptions to C.B. without complying with California law. The Chief ALJ found, and I agree that the record contains substantial evidence that Respondent issued sixteen controlled substance prescriptions to J.M., and eight controlled substance prescriptions to R.D. outside the usual course of the professional practice in violation of 21 CFR 1306.04 and Cal. Health & Safety Code § 11153(a) (Westlaw, Current with urgency legislation through Ch. 2 of 2021 Regular Session),[18] and without a medical examination or legitimate medical indication in violation of Cal. Bus. & Prof. Code § 2242(a) (West, 2016).[19] *Id.* Further, the Chief ALJ found, and I agree, that Respondent issued twelve Schedule II controlled substance prescriptions to J.M., eleven controlled substance prescriptions to R.D. and three controlled substance prescriptions to C.B. without making a record that comports with the requirements of Cal. Health & Safety Code § 11190(a) (Westlaw, Current with urgency legislation through Ch. 2 of 2021 Regular Session).[20] Additionally, the Chief ALJ found, and I agree that Respondent's prescribing on eight dates constituted ''excessive prescribing'' in violation of Cal. Bus. & Prof. Code § 725(a) (Westlaw, Current with urgency legislation through Ch. 2 of 2021 Regular Session).[21] I agree with the Chief ALJ's findings regarding these prescriptions and I further find, as explained below, an additional fourteen controlled substance prescriptions that Respondent issued to R.D. outside the usual course of the professional practice and beneath the applicable standard of care in violation of 21 CFR 1306.04 and Cal. Health & Safety Code § 11153(a).

1. J.M.

(a) J.M.'s Medical Records in Government Exhibits

Dr. Munzing testified in detail as to the contents of each record in the Government's Exhibits for J.M. He stated that the records included documentation of ''Past medical problems'' filled out by the patient, but with no date. Tr. 264–65 (citing GX 4, at 1–2). The records contained an opioid risk tool, which was never added up. *Id.* at 270 (citing GX 4, at 8). The patient filled out ''a depression scale.'' *Id.* at 270–71 (citing GX 4, at 10–11). The records reflected questions about whether an individual is receiving controlled substances or opioids, but ''it's not filled out.'' [22] *Id.* at 272 (citing GX 4, at 12). J.M.'s records included a ''patient assessment questionnaire,'' which ''would typically be a form presumably filled out by the patient when they came in prior to seeing [Respondent].'' *Id.* at 272–73 (citing GX 4, at 13). Dr. Munzing identified GX 4, at 14 as ''essentially the progress note form that would be completed by the physician or provider when they were seeing the patient,'' but that ''there are 10 words here,'' ''there is no information as far as the assessment'' of the tumor listed, ''there should be a management plan there, and that's completely blank.'' *Id.* at 273–74. Dr. Munzing testified that ''[t]his isn't even in the universe of what an appropriate documentation, and exam, and evaluation should be.'' *Id.* at 274. He concluded that if this chart supported a decision to prescribe a controlled substance it would be ''very far below'' the standard of care in California. *Id.* at 274–75. He stated that the documents ''[a]s I went through the standard of care earlier, [the documents] meet, actually, practically none of those.'' *Id.* at 280. On March 31, 2014, the Government's Exhibits include a pain assessment questionnaire and then a corresponding progress note with no writing, but ''a circle on the figure in the general area of the neck and one the general, or the low back,'' which ''transmits no useful information and so it still falls far below the standard of care as we talked before.'' *Id.* 282 (citing GX 4, at 23). On November 4, 2013, the note includes ''complains of right knee pain,'' but [t]here's no assessment and no treatment plan.'' Tr. 286 (citing GX 4, at 34). As such, Dr. Munzing testified that ''it falls completely short of the standard of care.'' *Id.* at 286.

Dr. Munzing also testified that if a patient is on ''Norco [23]'' on a regular basis, the medical files should contain blood work ''most likely at least every year, year and a half, two years'' to check for kidney [24] and liver function, which would not usually have clinical symptoms. Tr. 453–55, 458.[25]

(b) J.M.'s Prescriptions

The Government alleged that Respondent issued a total of thirty-two controlled substance prescriptions on seven dates to J.M. outside the usual course of professional practice and in violation of California law, on October 30, 2014, November 10, 2014, November 20, 2014, November 9, 19 and 29, 2015, April 9, 2016, and April 19, 2016. OSC, at 2–3; RD, at 68–70.

On October 30, 2014, J.M. received a prescription for: 30 milligram tablets of Roxicodone at 55 tablets to be taken one four times a day; 80 milligram tablets of Oxycontin at 46 tablets to be taken one four times a day; 350 milligram tablets of Soma at 40 tablets to be taken one three times a day; and 10 milligram tablets of Valium at 90 tablets to be take one four times a day. Tr. 291–92 (citing GX 3, at 1). Dr. Munzing testified that the closest medical record that corresponded with this visit was on October 10, 2014, which was a pain assessment questionnaire. Tr. 292–93 (citing GX 4, at 19). He further testified that the controlled substance prescriptions were not issued within the California standard of care, because there was no documented ''medical

[18] The relevant portions of Cal. Health & Safety Code § 11153(a) have not been amended during the relevant time period in this matter.

[19] Cal. Bus. & Prof. Code § 2242(a) was amended in 2019. This Decision cites to the law that was in effect during the time of the alleged misconduct and when the OSC was issued. *See* Stats. 2019, c. 741 (A.B.1264), § 1, eff. Oct. 11, 2019.

[20] The relevant portions of Cal. Health & Safety Code § 11190(a) have not been amended during the relevant time period in this matter.

[21] The relevant portions of Cal. Bus. & Prof. Code § 725(a) have not been amended during the relevant time period in this matter.

[22] Respondent's attorney noted during the hearing that many of the forms, *see e.g.,* GX 4, at 5–7, were samples contained in the Guide to Laws Governing the Practice of Medicine in Exhibit 14. Tr. 459–60. However, Dr. Munzing testified, that ''I have no problem with this form. My concern is that if that's all you have and you don't specifically on a specific patient, a specific date, say exactly what your management plan is.'' *Id.* at 460. I find that Dr. Munzing credibly testified that the information on the forms in the Government's Exhibits did not meet the applicable standard of care in California.

[23] Norco is hyrdrocodone/APAP. Tr. 886.

[24] It is noted that Respondent's Exhibits for R.D. included a laboratory report, and Dr. Malik testified that ''the labs basically are complimentary to your history and physical examination.'' Tr. 755 (citing RX 5, at 4). Respondent's Supplemental Record for J.M. did not include lab reports and I find Dr. Munzing's testimony regarding the need for blood work to meet the standard of care to be more credible than Dr. Malik's.

[25] Additionally, Dr. Munzing testified that none of the patient records for J.M., R.D., or C.B. included blood work or any urine drug testing, which he said ''is important because one wants to (a) confirm that they're actually taking what you're prescribing. And equally as important is they're not taking something that you're not prescribing, legal or illegal.'' *Id.* at 456–57. However, when asked on cross examination whether urine screens were required under the standard of care, Dr. Munzing stated that monitoring was required and urine screens were ''increasingly encouraged but not required.'' *Id.* at 458. I am not finding the lack of urine screens to be evidence of a violation of the standard of care; however, it is noted that the Government's Exhibits do not appear to include monitoring of any kind.

justification.'' Tr. 294. Further, Dr. Munzing testified that, ''I see some very alarming things, such as the very high Morphine-equivalent [26] dosing, which when you calculate this out, puts you about 660'' and further that the prescriptions ''qualif[y] for the trinity, or the holy trinity, that we talked about earlier as the oxycodone, carisoprodol or Soma, and benzodiazepine. So not only is there not justification, but I see some very alarming things from that prescription.'' *Id.* at 295. He also noted that the oxycodone was prescribed at the highest dosage available.[27] *Id.* at 298.

On November 10, 2014, Respondent prescribed J.M. 40 tablets of Soma at 350 milligrams per tablet; 40 tablets Valium at 10 milligrams per tablet; 46 tablets of Oxycontin at 80 milligrams per tablet, and 60 tablets of Roxicodone at 30 milligrams per tablet. GX 3, at 3–4. Dr. Munzing testified that there were no corresponding records to demonstrate that Respondent had comported with the standard of care in issuing these prescriptions to J.M. He further testified that the note from the pharmacist on the prescriptions indicated that the pharmacist had spoken to Respondent and ''he says patient's pain is not well controlled,'' but that there was no indication in the patient records that J.M.'s pain was not controlled. Tr. 303 (citing GX 3, at 4). Dr. Munzing testified that these prescriptions also were concerning for being a trinity cocktail and having a morphine equivalent dosage of 495, which was ''still way over the 100 milligram threshold.'' Tr. 310–11. He stated that J.M. is ''at extremely high risk for overdose and death with the dosage, not just the trinity, but the morphine-equivalent dosing that's you know, exceedingly high.'' *Id.* at 487. He concluded that the controlled substance prescriptions were issued outside of the standard of care in California. *Id.* at 310.

On November 20, 2014, Respondent prescribed J.M. 40 tablets of Soma at 350 milligrams per tablet; 40 tablets Valium at 10 milligrams per tablet; 46 tablets of Oxycontin at 80 milligrams per tablet, and 60 tablets of Roxicodone at 30 milligrams per tablet. GX 3, 5–6. Dr. Munzing testified that nothing in the J.M.'s patient file in the Government's Exhibits justify the prescriptions. Tr. 312–13 (citing GX 4, at 17–20). He concluded that the controlled substance prescriptions were issued outside the standard of care in California for ''the same reasons [he] mentioned for the previous two prescriptions,'' including ''the trinity cocktail, the morphine equivalent doing, as well as the fact that the progress notes—there's nothing there to medically justify the appropriateness of these medications.'' Tr. 313.

On November 9, 2015, Respondent prescribed J.M. 40 tablets of Soma at 350 milligrams per tablet; 40 tablets Valium at 10 milligrams per tablet; 40 tablets of Oxycontin at 80 milligrams per tablet, and 55 tablets of Roxicodone at 30 milligrams per tablet. GX 3, 7–6. Dr. Munzing testified that the Government's evidence contained no patient records dated after June 24, 2015 for J.M. Tr. 313–14. On November 19, 2015, Respondent prescribed the same medications at the same dosages and amounts, except that the quantity of oxycodone was 40 tablets. GX 3, at 9–10; Tr. 315. On November 29, 2015, Respondent issued a prescription for the same medications at the same dosages and amounts as the previous prescription to J.M. GX 3, at 11–12. On April 9, 2016, and April 19, 2016, Respondent issued a prescription for the same medications at the same dosages at smaller amounts with the addition of Motrin 600 milligrams at 60 tablets. *Id.* at 13–16.[28] Dr. Munzing testified that the prescriptions ''all fell outside the medically legitimate prescribing for controlled substances'' and for all of the reasons previously stated including the morphine equivalent dosages and the trinity cocktail. Tr. 318–19. He testified that nothing in the medical records would justify prescribing to J.M. that level of opioids and that the state of J.M.'s patient files were ''not even close'' to the standard of care in California. *Id.* at 321. Dr. Munzing testified that to meet the standard of care, Respondent would have needed to include a ''new or updated history,'' ''side effects from the medications,'' ''is it helping you,'' ''an exam'' and a ''treatment plan.'' *Id.* at 322. He further testified that J.M.'s first visit appeared to be November 9, 2012, and the records for J.M.'s first visit were not the type of record that the standard of care required for a first visit. *Id.* at 325–26 (citing GX 4, at 37).

In contrast to Dr. Munzing, Dr. Malik testified based on his review of Respondent's Exhibit 4 for J.M. in Respondent's Supplemental Records. Tr. 747. He stated that ''if you gather all the information from all the progress notes, the documentation was giving me enough information to say it was within the standard of care.'' [29] *Id.*

On cross examination, Dr. Malik stated that he reviewed RX 4 in preparing his expert report contained in RX 10, and that the records for J.M. in this exhibit ranged from November 19,

[26] As discussed in *supra* II.C., Dr. Munzing explained that calculating the morphine equivalent dosing or MME is ''vitally important'' to determine the amount of opioids to prescribe to a patient, and that the Centers for Disease Control and Prevention (CDC) recommends that doctors prescribe less than 90 MME per day and that the risks are high when 50 MME is exceeded. Tr. 288–89; RD, at 73.

[27] Dr. Munzing testified that even if the patient had a tumor on his nerve and Respondent was treating the pain while the patient was ''going through the process of having an ENT review this mass,'' he did ''have concerns with the incredibly high dosage.'' Tr. 523. He further testified on cross examination that a patient's ability to pay to see a specialist is irrelevant to the standard of care. *Id.* at 526. If a patient could not afford a specialist, a responsible physician ''would need to document that I've advise x, x, x, x, and they're not doing it.'' *Id.* He also noted that the prescriptions themselves were ''very expensive'' and that would be something that would be required to be discussed and documented with the patient. *Id.*

[28] On cross-examination, Dr. Munzing testified that it was ''possible'' that the reduction of the oxycodone from 40 to 28 tablets was tapering, but that there was ''no ability to be able to come to that conclusion in light of the sparse progress notes that were available.'' Tr. 474–75. Further, Dr. Munzing testified that ''the prescriptions are not reflecting an active effort on [Respondent] to taper those medicines because one would usually go from three to four times a day, back to three times a day, back to twice a day.'' *Id.* at 487. He additionally testified that for tapering, you ''would actually see not only verbally to the patient documented in the records, but also on the scripts, you would see that there's a progression in tapering over time.'' *Id.* at 544. Dr. Munzing did testify that the reduction of the pills from 46 down to 26 ''could be'' a taper, even though the daily instructions remained the same. Tr. 555. However, he testified that J.M. was still receiving the trinity over the course of prescriptions in the Government's records. Tr. 562. Further, he clearly testified that the standard of care required that tapering would have required documentation as such on both the patient's records and on the prescriptions. It is noted that Respondent's Supplemental Records did include notations regarding tapering for these prescriptions. *See* RX 4, at 23 (''taper off at all medications gradually''). I do not find that the April 2016 prescriptions were issued outside the standard of care due to the additional documentation in the Respondent's Supplemental Records, which was not examined by Government's expert; therefore, whether this reduction was tapering is irrelevant to the violations I am finding.

[29] The Government argued that Dr. Malik's standard of care analysis was flawed, because he created a derivative product of all of Respondent's treatment notes to determine that Respondent had met the standard of care. Govt Posthearing, at 44–45; Govt Exceptions, at 45–46. The Government further argued that this method of justifying a prescription was not consistent with California law. Govt Exceptions, at 19. I agree with the Government and I found this method of Dr. Malik's standard of care analysis to be dubious; however, because I have no expert testimony to refute whether or not this is an appropriate manner to evaluate Respondent's care and no expert review of the Respondent's Exhibits opining that they do not demonstrate that Respondent met the standard of care, I have agreed with the Chief ALJ that Dr. Malik's testimony is unrefuted on the prescriptions that he reviewed as part of Respondent's Exhibits. *See e.g.,* RD, at 70. This issue is not central to the resolution of this case, because I find herein that the Government has established a *prima facie* case that Respondent's registration is inconsistent with the public interest based on the prescriptions that were not included in Respondent's Supplemental Exhibits.

2015, to April 19, 2016. *Id.* at 811. As such, the Government's counsel at the hearing noted that the records in GX 3, included prescriptions for J.M. dated October 30, 2014, November 10, 2014, November 20, 2014, and November 9, 2015, all of which predate the records that Dr. Malik reviewed in preparing his expert report. Tr. 812–13. Dr. Malik was asked to look at GX 4, at 17–20, and was then asked whether the records provided information needed to determine whether the controlled substance is being prescribed for a legitimate medical purpose. *Id.* at 821. He responded that ''there's no physical examination documented here, so only talking about the pain doesn't say anything about anything else. I wouldn't say this is good enough for me to start the patient on the trinity cocktail,'' and he concluded the same regarding the decision to prescribe the high dose of opiates. *Id.* Dr. Malik later stated that if he were basing his evaluation as to whether Respondent met the standard of care in California for controlled substance prescribing based on GX 4, ''[h]e does not meet the standard of care based on only the records provided by the Government.'' *Id.* at 850.

Based on the uncontroverted evidence presented by the Government, I find that the controlled substance prescriptions issued on October 30, 2014, November 10, November 20, 2014, and November 9, 2015,[30] were issued outside the usual course of professional practice and beneath the applicable standard of care in California. *See also* RD, at 69. Furthermore, I agree with the RD, and find that based on the uncontroverted testimony of Dr. Munzing that the record is required to include the patient's name, the date, the character and the quantity of the Schedule II controlled substance[31] prescribed on the records from the visit where the controlled substance was prescribed and the patient's address in the file, Tr. 241–42, the record contains substantial evidence that Respondent did not comply with recordkeeping requirements under Cal. Health & Safety Code § 11190(a) for the same Schedule II prescriptions. RD, at 71. The RD further found, and I agree, that the evidence in neither the Government's Exhibits nor Respondent's Exhibits include a patient's address until after the November 19 and 29, 2015 prescription dates and reflect an incorrect amount of oxycodone than what was prescribed. *Id.* at 72 & n.171 (citing RX 4, at 61–62; RX 4, at 1 (demonstrating the first patient's address recorded on December 9, 2015); *compare* RX 4, at 61 *with* GX 3, at 11–12 (oxycodone quantity of forty on patient record, while prescription was for sixty). Finally, I agree with the RD that Dr. Munzing's testimony regarding Respondent's ''excessive prescribing'' in violation of Cal. Bus. & Prof. Code § 725(a), was ''more persuasive'' than Dr. Malik's. RD, at 74. ''J.M. continuously received OxyContin 80mg and Roxicodone 30mg at either three or four times daily, resulting in a 660 MME daily dose (if each taken four times per day) or a 495 MME daily dose (if each taken three times per day). At a minimum, that is about five times the daily CDC-advised limit that Dr. Munzing explained arises out of the increase in risk to the patient once exceeded.'' *Id.* (citing GX 3). The Chief ALJ found, and I agree, that the Government has established that Respondent's prescribing to J.M. was excessive.[32]

2. R.D.

The Government alleged that Respondent issued a total of thirty controlled substance prescriptions on fifteen dates to R.D. outside the usual course of professional practice and without a legitimate medical purpose and in violation of California law, on July 8, 15, 22, and 29 of 2015; November 4, 11, 18 and 25 of 2015; June 2, 11, 20 and 28 of 2016; and July 6, 14, and 22, 2016. OSC, at 5; RD, at 77–79.

(a) R.D.'s Medical Records in Government Exhibits

The Government's evidence related to R.D. demonstrated a patient questionnaire, dated March 11, 2009. GX 10, at 3. There is a progress note form that ''actually has more information on it,'' but is undated. Tr. 328–29 (citing GX 10, at 4). The patient file also included an opioid risk tool, an undated, unnamed pain scale, a depression checklist, which shows ''kind of on the border of mild depression,'' and a patient agreement. *Id.* at 332 (citing GX 10, at 8–12). The Family and Personal Health History form in the R.D. file stated that the last physical examination date was November 15, 2014, which was ''just over six months before.'' *Id.* at 333; (citing GX 10, at 13). Dr. Munzing testified that the progress note dated May 26, 2015, was deficient under the standard in California for many reasons to include there being no ''assessment, and the treatment plan, all it says is pain management.'' *Id.* at 334 (citing GX 10, at 14). He further testified that the other records for R.D. on May 26, 2015, did not meet the standard of care in California, stating that, ''[t]here's practically no information on them'' and further that the records related to Schedule II controlled substances were inadequate under to California Health and Safety Code 11190. Tr. 344–45 (citing GX 10, at 21–24). Dr. Munzing testified that the records related to R.D. on December 9, 2015, taken together as a whole do not meet the California standard of care. Tr. 354 (citing GX 10, at 43–46). Dr. Munzing further testified that the patient record, dated April 13, 2016, did not fulfill the requirements for listing controlled substances under California law, because there was ''no strength, no amount, no directions . . .'' and that although ''the exam portion for the musculoskeletal is consistent. There are no vital signs listed. There's no heart and lung exam listed,'' and therefore the documentation is not consistent with the standard of care for a controlled substance prescriber in California ''in entirety.'' Tr. 361–63, 365 (citing GX 10, at 67).

(b) R.D.'s Prescriptions

On July 8, July 15, July 22, July 28, 2015, Respondent prescribed R.D. 60 tablets of Norco at 10/350 milligrams per tablet. GX 7, 1–2, 3–4, 5–6, 7–8; Tr. 369–70. Further, the Government presented a dispensing report from White Front Pharmacy that also indicated that on each of these dates, Respondent prescribed R.D. 2 milligrams of alprazolam. GX 8, at 3; Tr.

[30] The Chief ALJ found that the Government had not provided enough evidence to sustain a violation for the remaining prescriptions for which Respondent had provided additional documentation and which Dr. Malik had testified were issued within the standard of care in California, because ''the Government declined to elicit an opinion from its expert Dr. Munzing, regarding the J.M. supplemental file, including whether the Respondent's supplemental paperwork contained in that file brought his prescribing to within the standard of care . . .'' for those prescriptions. RD, at 70. Although I agreed with the Chief ALJ in finding credibility issues with Dr. Malik, *supra* II.C., and I agree with the Government that the origin of the Respondent's Supplemental Records was suspicious, *supra* II.D., I also agree with the Chief ALJ that the Government's failure to rebut the testimony of Respondent's expert regarding the additional files leaves the question of whether the prescriptions in the supplemental files were issued within the standard of care unresolved. I also find that the record contains more than enough uncontroverted evidence to demonstrate that it is against the public interest for Respondent to maintain his registration, and therefore, I have not violations of the DEA regulations for the supplemental file records.

[31] Roxicodone and OxyContin are Schedule II controlled substances. Stip. 5.

[32] Although the RD noted that Dr. Munzing did not ''specifically testify as to what constitutes excessive prescribing in the Respondent's local community,'' his testimony as to the CDC recommendations, which were so extremely exceeded in this case, was sufficient to establish the excessive prescribing. RD, at 73. I agree. I further find that Dr. Malik's testimony on the issue of MMEs was less persuasive than Dr. Munzing's.

370–71. Dr. Munzing testified that the closest date to these prescriptions in Respondent's records for R.D. was May 26, 2015, and that the prescriptions for alprazolam and Norco were issued ''far below the standard of care,'' and the records ''practically have no information written on them.'' Tr. 372, 374–75. Dr. Munzing further testified that the number of Norco pills ''is a pretty hefty amount of Norco'' and that the large number of pills raises the potential for additional risk of diversion or abuse. *Id.* at 377.

On November 4, November 11, November 18, and November 25, 2015, Respondent prescribed R.D. 60 tablets of Norco at 10/350 milligrams per tablet GX 7, 9–10, 11–12, 13–14, 15–16; Tr. 379–85. On November 11, Respondent prescribed an additional 10 pills of 2 milligrams per pill of Xanax. GX 7, at 11. The Government presented a dispensing report from White Front Pharmacy that also indicated that on each of these dates, Respondent prescribed R.D. 10 tablets of alprazolam at 2 milligrams. GX 8, at 4; Tr. 382–83. Dr. Munzing testified that these prescriptions were ''an extreme departure from the standard of care'' based on the records and the amounts. Tr. 384.

On June 2, June 11, June 20, June 28, July 6, July 14, July 22, 2016, Respondent prescribed R.D. 55 tablets of Norco at 10/325 milligrams per tablet. GX 7, at 17–18, 19–20, 21–22, 23–24, 25–26, 27–28, 29–30; Tr. 386. Additionally, on June 2, and July 22, 2016, Respondent prescribed 9 pills of 2 milligrams per pill of Xanax. GX 7, at 17–18, 29–30. The Government presented a dispensing report from White Front Pharmacy that also indicated that on June 11, 20, July 6 and July 14, 2016, Respondent prescribed 9 tablets of alprazolam at 2 milligrams to R.D. GX 8, at 7; Tr. 387–88. Dr. Munzing testified that the closest records to the prescriptions for R.D. were dated April 13, 2016. Tr. 389. He further testified that all of these prescriptions were ''prescribed outside the standard of care'' due to the lack of documentation of the history, imaging, evaluation, and that the amount, although slightly lower than the previous amounts, were still ''a pretty hefty amount'' and raised concerns about diversion and abuse. *Id.* at 389–91. Further, he testified that the combination of the alprazolam and the Norco was a concern, because ''[i]t's been well known for quite some time both in literature and in practice the combination increases the risk of overdoes and potential death.'' *Id.* at 392.

Dr. Munzing also testified that R.D.'s file included a ''huge red flag'' [33] due to his acknowledgement that he had been arrested for drunk driving, and that the standard of care would require a doctor to ''[t]ake a history and document a history and resolve that that's not an issue if you're going—if and when you're going to prescribe controlled substances.'' *Id.* at 393–95; GX 10, at 59; *see also* GX 10, at 68 (acknowledgement of drunk driving). Dr. Munzing explained that R.D. had another unresolved red flag stating that R.D. ran out of medications early, because ''it would indicate that presumably the patient's taking more than—more medications than they have prescribed'' or that ''they were selling, giving—they were diverting the medication.'' Tr. 396–97; GX 10, at 71. He stated that to resolve this red flag under the California standard of care, the physician would need to ''resolve that issue as far as is it a reasonable, appropriate reason for running out early or not,'' and that he saw no resolution of the red flag in the patient file. Tr. 397. Finally, Dr. Munzing testified that R.D.'s file contained a red flag of distance traveled from Perris, California to Costa Mesa, which is approximately 63–65 miles, which is a red flag and would require a practitioner to document the rationale for traveling the distance. *Id.* at 399–401; *see* RD, at 30.[34] Again, he explained that the standard of care in California is that a practitioner must resolve the red flags, ''and document because others are going to be reviewing these charts, and one needs to determine here is a red flag. How is this okay or not okay.'' *Id.* at 402.

Dr. Malik testified based on his review of Respondent's Exhibit 5 for R.D. *Id.* at 751. He stated that in order to determine that Respondent's documentation was within the standard of care, he had to ''go[ ] through a different progress note to compile everything, and in the very end, one particular which [he] had pretty much had everything which the recommendations, our guidelines say.'' *Id.* He further testified that, based on the records that he had reviewed, Respondent had complied with the standard of care in California in prescribing controlled substances to R.D. Tr. 752–53.

On cross examination, Dr. Malik stated that he reviewed RX 5 in preparing his expert report contained in RX 17, and that the records for R.D. in RX 5 ranged from August 26, 2015,[35] to July 6, 2016. *Id.* at 826–30 (citing RX 5, at 82 and 1). As such, the Government's counsel at the hearing noted that the records in GX 7, included prescriptions for Norco dated July 8, 2015, July 15, 2015, July 26, 2015, July 29, 2015, July 14, 2016, July 22, 2016 (Xanax and Norco), which either predated or postdated the records that Dr. Malik reviewed in preparing his expert report. Tr. 831–32 (citing GX 7, at 1–8, 27–30). Further, GX 8 was a dispensing report from a pharmacy demonstrating prescriptions for alprazolam on July 8, 2015, July 15, 22, 29, 2015, July 14, 2016, which either predated or postdated the records that Dr. Malik reviewed in preparing his expert report. Tr. 833–35 (citing GX 8, at 3, 7). Dr. Malik testified that the prescriptions for Xanax and Norco that postdated the Respondent's Supplemental Records would still be within the standard of care because the progress note that he reviewed on July 6, 2016 ''tells about the patient's condition or the overall scenario of the patient for over a period of time.'' Tr. 841–42 (citing GX 7, at 27 and 29).

Based on the uncontroverted evidence presented by the Government, I find that the controlled substance prescriptions issued on July 8, 15, 22, and 29, 2015,[36]

[33] It is noted that although Dr. Malik testified that he saw no red flags in Respondent's exhibits, the forms indicating this red flag were not included in the records that Dr. Malik reviewed. Tr. 763–64. Dr. Malik did testify that a physician ''has to'' evaluate the risk of a patient abusing controlled substance under the California standard of care and document the conversations regarding the red flags in the record. *Id.* at 762; 796. He also testified that driving under the influence would be a red flag. *Id.* at 794.

[34] On cross-examination, Dr. Munzing testified that if R.D. had lived closer at one point to Respondent's office and then moved, ''it certainly could be a resolution of the red flag.'' Tr. 463. Dr. Munzing had testified that he would expect to see ''[a] small notation in the chart,'' but he did not elaborate on whether it would be required under the standard of care if the red flag had already been resolved. *Id.* at 462. I find that the record was ultimately unclear about whether the distance red flag could have been resolved, but there were several other red flags regarding R.D. that were unresolved in the Government's Exhibits. *See also* RD, at 78 n.177 (not sustaining the distance red flag on other grounds).

[35] Although RX 5 included a cholesterol report from June 2, 2014, Dr. Malik testified that it would ''not affect [Respondent's] decision to continue or not continue or change the dose of the pain medications.'' Tr. 830 (citing RX 5, at 4).

[36] The Chief ALJ noted that, as with J.M., the Government's expert and Respondent's expert had testified solely to the legitimacy of the R.D. prescriptions as documented in their respective exhibits. RD, at 76–77. He also noted that the Government had not provided enough evidence to sustain a violation for the prescriptions in Respondent's Supplemental records and which Dr. Malik had testified were issued within the standard of care in California, because Dr. Munzing had not reviewed or testified as to whether Respondent's Supplemental Records were within the standard of care. RD, at 79. As explained in *supra* n.24, I will follow the Chief ALJ's rationale in not including these prescriptions in my consideration of Public Interest Factors Two and Four.

were issued outside the usual course of professional practice and beneath the applicable standard of care in California. *See also* RD, at 77–78.[37] Furthermore, I agree with the RD, and find, based on the uncontroverted testimony of Dr. Munzing, that the records for Schedule II[38] controlled substances are required to include the patient's name, the date, the character and the quantity of the controlled substance prescribed on the records from the visit during which the controlled substance was prescribed and the patient's address must be in the file prior to prescribing, Tr. 241–42, the record contains substantial evidence that Respondent did not comply with recordkeeping requirements under CA Hlth & S § 11190(a) for the same prescriptions. RD, at 84. The RD further found, and I agree, that Respondent's Exhibits for November 4, 11, 25, 2015, and June 20, 28, July 14, and 22, 2016,[39] did not include all of the information that Dr. Munzing testified was necessary for Schedule II controlled substances under California law. *Id.* at 84 (citing RX 5, at 72–73, 66–67, 61–62).[40]

I generally agree with the Chief ALJ that the Government did not adequately demonstrate that the red flags that Dr. Munzing identified with respect to R.D. were unresolved in the prescriptions that coincided with and postdated Respondent's Supplemental Records, because Dr. Munzing never reviewed or opined on the Respondent's files to determine whether the red flags had been resolved. RD, at 82. However, Dr. Munzing identified what he described as a ''huge red flag'' regarding R.D.'s arrest for a DUI, GX 10, at 59, 68, which was documented by R.D. in the April 13, 2016 R.D. records in the Government's Exhibits, and which Dr. Munzing stated ''needs a lot of explanation.'' Tr. 397. Respondent's records for R.D. include dates from April 13, 2016, to July 6, 2016, RX 5, at 1–25, and yet, nowhere in these records, nor in the Government's Exhibits, are any notes that could possibly resolve the red flag of the DUI. There is no mention of alcohol or a DUI on any of the Respondent's exhibits after this date. Dr. Malik testified that a DUI would be a potential red flag, and that ''after fair warning, the physician should stop prescribing these pain medications with the patient anymore, but there have to be significant red flags for that to happen'' and also that these conversations with the patient need to be documented by the doctor. Tr. 794–96. It is apparent that both experts agreed that a DUI is a red flag and must be documented. My reading of the records in evidence shows no mention of the red flag of the DUI and I believe that both experts testified that the DUI must be addressed in some manner, which it is clear from the record that it was not. Therefore, I also find that the controlled substance prescriptions issued to R.D. after the admission that raised the red flag on April 13, 2016, were issued outside of the usual course of the professional practice and beneath the applicable standard of care.[41]

3. C.B.

The Government alleged that Respondent issued a total of eight controlled substance prescriptions on four dates to C.B. outside the usual course of professional practice and without a legitimate medical purpose and in violation of California law. OSC, at 7; RD, at 86.

(a) C.B.'s Medical Records in Government Exhibits

Dr. Munzing testified that C.B.'s medical complaints seemed to be that she had a skiing accident, but that ''[t]he timing of the accident seems to move through the records, whether it be in the late 1990s or early 2000s.'' [42] Tr. 404. The Government's evidence related to patient C.B.'s file consisted of many of the same forms as the files for R.D. and J.M., including Pain Assessment Questionnaires filled out by the patient, *see e.g.,* GX 12, at 22, Pain medication agreements, *id.* at 17, and exam notes that are either blank or have some information filled out, *id.* at 36, 44; Tr. 410–45. The evidence also contains several Controlled Substance Utilization Review and Evaluation System (hereinafter, CURES) reports for C.B. Dr. Munzing testified that the CURES reports ending on April 23, 2015, indicated several red flags, in that there is a ''combination of two different opioids'' prescribed by two different doctors, and ''[t]here is also Suboxone prescribed by Dr. T[ ], and the majority of the time that Suboxone is used, it's used for substance use disorder or addiction . . . '' and ''pharmacy shopping.'' Tr. 416 (citing GX 12, at 40–41). Dr. Munzing testified that the CURES report in April showed similar red flags, including multiple doctors and pharmacies and also the ''trinity'' of controlled substances. Tr. 418 (citing GX 12, at 9–10). Dr. Munzing testified that there is a handwritten note in C.B.'s file stating that patient should not have multiple doctors and that she signed a renewed pain agreement; however, he testified that the note alone does not resolve all of the red flags in the file, such as the combination of medicines, the Suboxone [43] and multiple pharmacies. Tr. 418–21 (citing GX 12, at 10). According to Dr. Munzing, the records in C.B.'s file closer to the time of the Government's allegations, had ''significant missing information,'' such as ''no vital signs,'' ''limited historical information,'' no dosages of the controlled substance, ''no comment as far as whether the patient's getting better, worse, etc.'' Tr. 431 (citing GX 12, at 316–19). Although some of the records were ''the best that [Dr. Munzing had] seen'' in Respondent's records, they were still missing ''aspects of vital signs, of medications prescribed.'' Tr. 436 (citing GX 12, at 322–24).

[37] For R.D., there were additional prescriptions that were issued after the majority of the records in Respondent's Exhibits, which the Chief ALJ designated ''Patient R.D. Group 3 Prescribing Events.'' The Chief ALJ concluded that Respondent had ''produced significant additional documentation that was not considered by Dr. Munzing,'' when he opined that R.D.'s file contained red flags that were not resolved in the documentation. RD, at 82. I agree with the Chief ALJ regarding the limitations of the Government's case based on red flags in the Respondent's Supplemental Records, except for the red flag of the DUI as explained below.

[38] Norco has been a Schedule II controlled substance since October 6, 2014. Stip. 4.

[39] Respondent's Exhibits did not contain any additional records for these particular June and July visits.

[40] I agree with the RD that the Government has demonstrated substantial evidence that Respondent was excessively prescribing to R.D., because Dr. Munzing never testified that the ''hefty amount'' of Norco amounted to excessive prescribing. RD, at 84–85 (citing Tr. 377).

[41] Although I am finding that these additional fourteen prescriptions, in what the Chief ALJ has entitled the Patient R.D. Group 3 prescribing events, RD, at 80–81, were issued outside the usual course of the professional practice and beneath the applicable standard of care in California, even without the finding of these additional violations, there is more than enough evidence on the record to indicate that Respondent's registration is inconsistent with the public interest.

[42] *Compare* GX 12, at 278 (09/08/2004 Questionnaire indicating immediate pain onset in January 2008), *with id.* at 288 (05/12/2004 PAQ indicating pain onset in 1996 from snow skiing accident). *See* RD, at 31 n.74 (full assessment of various dates claimed for pain onset for C.B. file).

[43] The Government's records do include a note regarding ''Cures problems,'' which mentions the Suboxone prescription and that the note states that it was discontinued, but it was unclear whether the psychiatrist was the one who had discontinued the prescription. GX 12, at 22; Tr. 549. Dr. Munzing testified that this note does not resolve the red flag that the patient was ''taking the trinity based on the prescriptions that she was obtaining from two doctors,'' Dr. Munzing testified that there was nothing in the record to demonstrate that the red flag was resolved regardless of the timing being near the surgery. Tr. 550; 562. However, Dr. Munzing did not testify as to whether the Respondent's Supplemental Records included any resolution of the red flag.

(b) C.B.'s Prescriptions

On January 6, January 25, Respondent prescribed C.B. 60 tablets of Vicodin at 7.5/300 milligrams per tablet and 30 tablets of Soma at 350 milligrams per tablet. GX 11, at 1–2, 3–4; Tr. 443–45. Dr. Munzing testified that these prescriptions do not meet the standard of care in California, because ''there's no progress note or evidence that supports the medical justification.'' Tr. 446. On February 11, 2016, Respondent prescribed C.B. 55 tablets of Vicodin at 7.5/300 milligrams per tablet and 55 tablets of Soma at 350 milligrams per tablet. GX 11, at 5–6. Dr. Munzing again testified that this prescription did not meet the standard of care in California, due to the lack of documentation. Tr. 447–48 (citing GX 12, at 325 (Patient records for C.B. dated January 27, 2016)). On March 3, 2016, Respondent prescribed C.B. 50 tablets of Vicodin at 7.5/300 milligrams per tablet and 30 tablets of Soma at 350 milligrams per tablet. GX 11, at 7–8. Dr. Munzing testified that this visit ''does not fall within the standard of care, though in re-review in preparation for this hearing, I think that for this one visit, I would call this a simple departure . . . .'' Tr. 449 (citing GX 12, at 322–24 (Patient records for C.B. dated March 3, 2016)).

Dr. Malik testified that C.B. was prescribed the ''trinity cocktail'' for brief period of time, but that ''for that particular patient, these three medications for a certain period of time after the breast surgery in a patient whose body is already used to a high dose of opiates I think brought enough comfort to her pain.'' Tr. 745. He testified that ''[Respondent's] documentation was probably very down there, pretty bad, but . . . if I can gather all the information from all the records . . . I will say it was all within the standard of care.'' *Id.* at 745–46.

The Chief ALJ found that Respondent's Supplemental Records contained notes that correspond with all of the prescriptions and dates included in the OSC for C.B. RD, at 86 (citing GX 12 and RX 3). I agree with the Chief ALJ that because Dr. Munzing did not consider the detailed records in the Respondent's Supplemental Records and the Government did not present expert testimony regarding whether the Supplemental Records resolved the standard of care issues that Dr. Munzing had identified in the Government's Exhibits, ''Dr. Malik's testimony that the prescribing to C.B. on those dates was within the standard of care based upon a review of that documentation stands unrefuted.'' RD, at 88.

However, the Chief ALJ found, and I agree, that based on the uncontroverted testimony of Dr. Munzing, that the records for Schedule II [44] controlled substances are required to include the patient's name, the date, the character and the quantity of the controlled substance prescribed on the records from the visit during which the controlled substance was prescribed and the patient's address must be in the file prior to prescribing, Tr. 241–42, the record contains substantial evidence that Respondent did not comply with recordkeeping requirements under Cal. Health & Safety Code § 11190(a) for the prescriptions on January 6, February 11, and March 3,[45] 2016 because the records do not include the quantity prescribed. RD, at 89–90 (citing RX 3, at 25, 28, 38, and 42).

Overall, I find that the record contains substantial evidence to support the finding that Respondent issued numerous controlled substance prescriptions to J.M. and R.D. outside the usual course of the professional practice and beneath the applicable standard of care and in violation of several California laws and that Respondent issued controlled substance prescriptions to C.B. without complying with California law.

III. Discussion

A. Allegation That Respondent's Registration Is Inconsistent With the Public Interest

Under Section 304 of the CSA, ''[a] registration . . . to . . . dispense a controlled substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant . . . has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined by such section.'' 21 U.S.C. 824(a)(4). In the case of a ''practitioner,'' defined in 21 U.S.C. 802(21) to include a ''physician,'' Congress directed the Attorney General to consider the following factors in making the public interest determination:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing . . . controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the . . . distribution[ ] or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

21 U.S.C. 823(f). These factors are considered in the disjunctive. *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003).

According to Agency decisions, I ''may rely on any one or a combination of factors and may give each factor the weight [I] deem[ ] appropriate in determining whether'' to revoke a registration. *Id.; see also Jones Total Health Care Pharmacy, LLC* v. *Drug Enf't Admin.,* 881 F.3d 823, 830 (11th Cir. 2018) (citing *Akhtar-Zaidi* v. *Drug Enf't Admin.,* 841 F.3d 707, 711 (6th Cir. 2016); *MacKay* v. *Drug Enf't Admin.,* 664 F.3d 808, 816 (10th Cir. 2011); *Volkman* v. *U. S. Drug Enf't Admin.,* 567 F.3d 215, 222 (6th Cir. 2009); *Hoxie* v. *Drug Enf't Admin.,* 419 F.3d 477, 482 (6th Cir. 2005). Moreover, while I am required to consider each of the factors, I ''need not make explicit findings as to each one.'' *MacKay,* 664 F.3d at 816 (quoting *Volkman,* 567 F.3d at 222); *see also Hoxie,* 419 F.3d at 482. ''In short, . . . the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest; what matters is the seriousness of the registrant's misconduct.'' *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 462 (2009). Accordingly, as the Tenth Circuit has recognized, findings under a single factor can support the revocation of a registration. *MacKay,* 664 F.3d at 821.

Under DEA's regulation, ''[a]t any hearing for the revocation . . . of a registration, the . . . [Government] shall have the burden of proving that the requirements for such revocation . . . pursuant to . . . 21 U.S.C. [§] 824(a) . . . are satisfied.'' 21 CFR 1301.44(e). In this matter, while I have considered all of the factors, the Government's evidence in support of its *prima facie* case is confined to Factors Two and Four.[46] I address Factor One briefly

[44] Vicodin is and has been a Schedule II controlled substance since October 6, 2014. Stip. 4.

[45] The Chief ALJ noted that the record on this date appeared to reflect what might be considered to be a quantity, but it was inconsistent with the actual prescription. RD, at 90 n.208 (citing RX 3, at 22–27, GX 12, at 322–24).

[46] I agree with the Chief ALJ with regard to Factor Three that ''although the record contains evidence of a pending criminal matter (Stips. 3, 9), there is no evidence in the record that the Respondent has been convicted of a crime related to controlled substances.'' RD, 60 n.146. Therefore, I find that Factor Three does not weigh for or against revocation in this case. Although this hearing was completed several years ago and the criminal case may have come to a conclusion in the interim, I am not taking notice of any additional facts on the record, as I find that doing so is unnecessary based on the completeness of the record that is before me.

because Respondent introduced evidence into the record that is potentially relevant to Factor One as explained below. Overall, I find that the Government's evidence with respect to Two and Four satisfies its *prima facie* burden of showing that Respondent's continued registration would be ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4). I further find that Respondent failed to produce sufficient evidence to rebut the Government's *prima facie* case.

1. Factor One—the Recommendation of the Appropriate State Licensing Board or Professional Disciplinary Authority

In determining the public interest, the ''recommendation of the appropriate State licensing board or professional disciplinary authority . . . shall be considered.'' 21 U.S.C. 823(f)(1). Two forms of recommendations appear in Agency decisions: (1) A recommendation to DEA directly from a state licensing board or professional disciplinary authority (hereinafter, appropriate state entity), which explicitly addresses the granting or retention of a DEA COR; and (2) the appropriate state entity's action regarding the licensure under its jurisdiction on the same matter that is the basis for the DEA OSC. *John O. Dimowo, M.D.,* 85 FR 15800, 15810 (2020); *see also Vincent J. Scolaro, D.O.,* 67 FR 42060, 42065 (2002).

In this case, neither the Medical Board of California (hereinafter, the State Board) nor any other state entity has made a direct recommendation to the Agency regarding whether the Respondent's registration should be suspended or revoked. However, during the hearing, Respondent introduced an ''Interim Suspension Order'' (hereinafter, Suspension Order) issued by the State of California Office of Administrative Hearings on December 7, 2016. RD, at 95 (citing RX 16). The Suspension Order stated that ''Respondent shall not prescribe any Schedule II, III, or IV controlled substances.'' RX 16, at 7. Respondent argued that ''a petition for Interim Suspension Order to stop [Respondent] from practicing altogether was denied by the California Medical Board after they found he was not a danger to public safety, and [Respondent] is permitted to continue practicing medicine.'' Resp Posthearing, at 7.

The fact that the State Board did not choose to immediately suspend Respondent's state medical license carries minimal-to-no weight under Factor One, because there is no evidence that the State Board would have made the same decision after a full hearing on the merits was completed, and additionally, the State Board did significantly restrict Respondent's prescribing authority pending a full determination on the allegations.[47] Accordingly, the terms of the State Board Order have been considered, but I find that they have no impact on the public interest inquiry in this case. *See John O. Dimowo, M.D.,* 85 FR at 15810.

2. Factors Two and/or Four—The Respondent's Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Related to Controlled Substances

(a) Allegation That Respondent Issued Prescriptions for Controlled Substances Outside the Usual Course of the Professional Practice

According to the CSA's implementing regulations, a lawful prescription for controlled substances is one that is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). The Supreme Court has stated, in the context of the CSA's requirement that schedule II controlled substances may be dispensed only by written prescription, that ''the prescription requirement . . . ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse . . . [and] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006).

In defense of Respondent's continued registration, he has submitted supplemental records, which are far more detailed than the records in the Government's Exhibits. RX 3–5. However, Respondent's Supplemental Records only address a subset of the prescriptions at issue in this case, and the Government has established through unrefuted expert testimony that the records that Respondent did not supplement constituted ''an extreme departure from'' the standard of care in California. Tr. 384. Even Respondent's own expert testified that the records in the Government's Exhibits alone did not justify the prescriptions to J.M. *Id.* at 850.

The end result remains that Respondent issued numerous controlled substance prescriptions beneath the applicable standard of care and outside of the usual course of the professional practice in California. DEA decisions have found that ''just because misconduct is unintentional, innocent, or devoid of improper motive, [it] does not preclude revocation or denial. Careless or negligent handling of controlled substances creates the opportunity for diversion and [can] justify the revocation of an existing registration . . .'' *Bobby D. Reynolds, N.P., Tina L. Killebrew, N.P., & David R. Stout, N.P.,* 80 FR 28643, 28662 (2015) (quoting *Paul J. Caragine, Jr.* 63 FR 51592, 51601 (1998).

The violations I have found demonstrate that Respondent repeatedly violated the applicable standard of care and state law and that his conduct was not an isolated occurrence, but occurred with multiple patients. *See Wesley Pope, M.D.,* 82 FR 42961, 42986 (2017).

The Respondent asserted that ''[t]he fact is that [Respondent's] biggest failure was over documenting not under documenting.'' Resp Posthearing, at 6. This is simply not true based on the facts on the record. If Respondent's Supplemental Records are legitimate, an assumption to which I have applied a large degree of latitude in this case, he has not presented supplemental records to support many of the controlled substances prescriptions in the Government's *prima facie* case. Therefore, I cannot assume that this so-called ''over documentating'' exists. Furthermore, Respondent's own expert testified with regard to Respondent's Supplemental Records that ''[Respondent is] a very poor documenter,'' which directly contradicts Respondent's assertion. *Id.* at 743.

''Diversion occurs whenever controlled substances leave 'the closed system of distribution established by the CSA . . . .'" *Id.* (citing *Roy S. Schwartz,* 79 FR 34360, 34363 (2014)). In this case, I have found that Respondent issued controlled substance prescriptions without complying with his obligations under the CSA and California law. *See George Mathew, M.D.,* 75 FR 66138, 66148 (2010)).

Furthermore, Agency decisions highlight the Agency's interpretation that ''[c]onscientious documentation is

[47] In *Dimowo,* the Acting Administrator found that ''[a]lthough statutory analysis [of the CSA] may not definitively settle . . . [the breadth of the cognizable state 'recommendation' referenced in Factor One], the most impartial and reasonable course of action is to continue to take into consideration all actions indicating a recommendation from an appropriate state;'' however, *Dimowo* also limited the ''recommendations'' DEA would consider to the ''actions of an appropriate state entity on the same matters, particularly where it rendered an opinion regarding the practitioner's medical practice in the state due to the same facts alleged in the DEA OSC.'' *John O. Dimowo,* 85 FR at 15810. In this case, I have no indication that the State Board would make a similar decision after a full adjudication, and even in the interim, the State Board did significantly restrict Respondent's ability to prescribe controlled substances.

repeatedly emphasized as not just a ministerial act, but a key treatment tool and vital indicator to evaluate whether the physician's prescribing practices are 'within the usual course of professional practice.' '' *Cynthia M. Cadet, M.D.,* 76 FR 19450, 19464 (2011). DEA's ability to assess whether controlled substances registrations are consistent with the public interest is predicated upon the ability to consider the evidence and rationale of the practitioner at the time that he prescribed a controlled substance—adequate documentation is critical to that assessment. Here, Respondent's sparse documentation, and even his organization of such documentation, made it impossible to evaluate his prescribing practices in any meaningful way. Further, as Dr. Munzing stated regarding maintaining accurate and complete records, ''I guess I can't emphasize enough they're incredibly important, again for patient safety and for knowing what happened at any particular time. They're also important, again, for any kind of transfer of care, whether it's temporary or, you know, permanent.'' *Id.* at 249. Therefore, recordkeeping is not only important for compliance, but also for the safety of the patients.

I find that in issuing prescriptions to J.M. and R.D. beneath the applicable standard of care and outside the usual course of the professional practice in California, Respondent violated 21 CFR 1306.04(a) (''A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice'').

(b) Allegations of Violations of California [48] Law

California law also requires that a ''prescription for a controlled substance shall only be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his or her professional practice.'' Cal. Health & Safety Code § 11153(a). Therefore, I find that, similarly to 21 CFR 1306.04(a), the record contains substantial evidence that Respondent violated this provision with respect to some of the prescriptions for J.M. and R.D. in *supra* II.F.1.b. I also find based on the uncontroverted evidence that Respondent issued these same controlled substance prescriptions without documenting a medical examination or legitimate medical indication in violation of Cal. Bus. & Prof. Code § 2242(a).

Additionally, California law states that ''repeated acts of clearly excessive prescribing, furnishing, dispensing, or administering of drugs or treatment . . . as determined by the standard of the community of licensees is unprofessional conduct for a physician.'' Cal. Bus. & Prof. Code § 725(a). The Chief ALJ opined, and I agreed, that the record contains substantial evidence that Respondent's prescribing to J.M. was excessive in violation of this California provision of law. *Supra* II.F.1.b.

California Health & Safety Code § 11190(a) requires that practitioners who prescribe Schedule II controlled substances must keep certain specific records, to include, ''[t]he character, including the name and strength, and quantity of controlled substances involved.'' Cal. Health & Safety Code § 11190(a)(3) (Westlaw, current with all laws through Ch. 372 of 2020 Regular Session). I found above that Respondent's recordkeeping for all three patients—J.M., R.D. and C.B.—were missing elements of the required specific records, and therefore, I find that the record contains substantial evidence that Respondent was in violation of this provision of state law and this is evidence that Respondent's registration is not in the public interest under Factors 2 and 4. *Supra* II.F.1.b, F.2, & F.3.

Ultimately I find that the record contains substantial evidence that Respondent issued multiple prescriptions of high dosages of controlled substances to multiple patients beneath the applicable standard of care and outside the usual course of the professional practice and in violation of state law. I therefore find that Factors Two and Four weigh in favor of revocation. *See Wesley Pope,* 82 FR 14944, 14985 (2017).

3. Factor Five

Under Factor Five, the Administrator considers ''[s]uch other conduct which may threaten the public health and safety.'' 5 U.S.C. 823(f)(5). Although Factor Five is broad, DEA decisions have qualified its breadth by limiting the considerations made under that factor to those where there is ''a substantial relationship between the conduct and the CSA's purpose of preventing drug abuse and diversion.'' *Zvi H. Perper, M.D.,* 77 FR 64131, 64141 (2012) (citing *Tony T. Bui,* 75 FR 49979, 49988 (2010)).

The Government alleged that ''[d]espite being arrested and charged for unlawfully prescribing, Respondent continued to prescribe to J.M., R.D., and C.B. in violation of state and federal law.'' Govt Posthearing, at 39. Therefore, the Government argued that ''it is thus clear that being arrested and later arraigned for allegedly unlawfully prescribing was not enough of a deterrent for Respondent to stop such conduct. That he would continue to do so highlights the egregious nature of his actions and heightens the probability that Respondent is 'a probable or possible threat . . . to the public health and safety.' '' *Id.* (citing *Drezer,* 76 FR at 19386 n.2). Respondent argued that his ''prescribing after his arrest was not unlawful because there was a legitimate medical purpose.'' Resp Posthearing, at 6.

Until Respondent had entered into an agreement with the Orange County District Attorney's Office on August 30, 2016, whereby he ''agreed to not prescribe Schedule II–IV controlled substances,'' it was not *per se* a violation of this agreement for him to prescribe controlled substances in these schedules to these patients; however, the fact that I have found that in some instances, he continued to violate federal and California law after his arrest on December 15, 2015, certainly demonstrates both the egregious nature of his actions and the improbability of his ability to meaningfully prevent the reoccurrence of similar acts. *See* Stips. 3&10. In this case, I agree with the Chief ALJ that this particular misconduct has already been considered under Factors Two and Four, and I believe that, in this case, the Government's arguments regarding the deterrent effect of his arraignment and the issues of trust that this misconduct necessarily implicates are more appropriately considered in my assessment of the correct sanction for Respondent as set forth below. *See* RD, at 92–93.

Overall, I conclude that the Government has met its *prima facie* burden of showing that Respondent's continued registration is ''inconsistent with the public interest.'' I further find that Respondent did not rebut the Government's *prima facie* case.

IV. Sanction

Where, as here, the Government has met its *prima facie* burden of showing that Respondent's continued registration is inconsistent with the public interest due to his violations pertaining to controlled substance prescribing and non-compliance with federal and state

[48] The OSC alleged a violation of Cal. Health & Safety Code § 11154(a) (prescribing to persons not under practitioner's treatment) and OSC, at 8. Although listed in the Government's briefings, I did not find any explanation on the record regarding the legal theory supported by evidence on the record specifically related to this citation; therefore, I am not evaluating it in the final decision. *See, e.g.,* Govt Posthearing, at 32.

law, the burden shifts to the Respondent to show why he can be entrusted with a new registration. *Garrett Howard Smith, M.D.,* 83 FR 18882, 18910 (2018) (collecting cases).

The CSA authorizes the Attorney General to ''promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this subchapter.'' 21 U.S.C. 871(b). This authority specifically relates ''to 'registration' and 'control,' and 'for the efficient execution of his functions' under the statute.'' *Gonzales* v. *Oregon,* 546 U.S. at 259. A clear purpose of this authority is to ''bar[ ] doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking.'' *Id.* at 270. In efficiently executing the revocation and suspension authority delegated to me under the CSA for the aforementioned purposes, I review the evidence and argument Respondent submitted to determine whether or not he has presented ''sufficient mitigating evidence to assure the Administrator that [she] can be trusted with the responsibility carried by such a registration.'' *Samuel S. Jackson, D.D.S.,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller, M.D.,* 53 FR 21931, 21932 (1988)). '' 'Moreover, because ''past performance is the best predictor of future performance,'' *ALRA Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), [the Agency] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [the registrant's] actions and demonstrate that [registrant] will not engage in future misconduct.' '' *Jayam Krishna-Iyer,* 74 FR at 463 (quoting *Medicine Shoppe,* 73 FR 364, 387 (2008)); *see also Jackson,* 72 FR at 23853; *John H. Kennnedy, M.D.,* 71 FR 35705, 35709 (2006); *Prince George Daniels, D.D.S.,* 60 FR 62884, 62887 (1995). The issue of trust is necessarily a fact-dependent determination based on the circumstances presented by the individual respondent; therefore, the Agency looks at factors, such as the acceptance of responsibility and the credibility of that acceptance as it relates to the probability of repeat violations or behavior and the nature of the misconduct that forms the basis for sanction, while also considering the Agency's interest in deterring similar acts. *See Arvinder Singh, M.D.,* 81 FR 8247, 8248 (2016).

In evaluating the degree of a respondent's acceptance of responsibility required to entrust him with a registration, in *Mohammed Asgar, M.D.,* 83 FR 29569, 29572 (2018), the Agency looked for ''unequivocal acceptance of responsibility when a respondent has committed knowing or intentional misconduct.'' *Id.* (citing *Lon F. Alexander, M.D.,* 82 FR 49704, 49728 (2017)). The Chief ALJ found, and I agree, that ''[t]he record is devoid of any inclination on the part of the Respondent to accept any level of responsibility for his prescribing, unequivocal or otherwise. He remains doggedly committed to the proposition that he did nothing wrong.'' RD, at 97 (citing Tr. 882). Respondent's assertion that ''[t]he fact is that [Respondent's] biggest failure was over documenting not under documenting'' is unsupported by the record evidence and demonstrates no acknowledgment of fault or wrongdoing. Resp Posthearing, at 6. *See Hoxie* v. *Drug Enf't Admin.,* 419 F.3d at 483 (''The DEA properly considers the candor of the physician'' and ''admitting fault'' is an ''important factor[] in determining whether the physician's registration should be revoked'').

Respondent's mitigating evidence has reduced the number of violations found in this case; however, I see no evidence from Respondent that demonstrates that he will ''prevent the re-occurrence of similar acts.'' *Jeri Hassman, M.D.* 75 FR 8194, 8236 (2010). Acceptance of responsibility is an important part of that demonstration. *Id.* In fact, as noted herein, the evidence indicates that Respondent will do nothing to prevent the reoccurrence of similar acts, because after being arrested under allegations of the same state law violations at issue in this case, the record contains substantial evidence that in some instances, Respondent continued the unlawful prescribing activity and continued to violate state recordkeeping law. *See supra* II.F.2&3.

The Agency also looks to the egregiousness and extent of the misconduct which are significant factors in determining the appropriate sanction. *Garrett Howard Smith, M.D.,* 83 FR at 18910 (collecting cases). I agree with the Chief ALJ that ''the record evidence here establishes that [Respondent] doled out a steady stream of powerful controlled drugs without applying and documenting even the most rudimentary of applicable standards of care and treatment, which is sufficiently egregious to militate in favor of revocation.'' RD, at 99–100. In addition, Respondent's lack of recordkeeping in the prescriptions in the Government's Exhibits was not simply inadequate. Dr. Munzing described Respondent's records for J.M. and R.D. respectively as ''not even close'' to and ''an extreme departure from'' the standard of care in California; therefore, I would characterize Respondent's misconduct as egregious. Tr. 321, 384.

In sanction determinations, the Agency has historically considered its interest in deterring similar acts, both with respect to the respondent in a particular case and the community of registrants. *See Joseph Gaudio, M.D.,* 74 FR 10083, 10095 (2009); *Singh,* 81 FR at 8248. With regard to general deterrence, I agree with the Chief ALJ that ''[t]o continue the Respondent's registration privileges on the present record would send a message to the regulated community that no meaningful consequences will likely result from repeatedly and unabashedly prescribing controlled substances while maintaining sparse, unintelligible, incomplete documentation and storing it in random piles in a manner that makes it virtually unavailable (to the prescriber, to his patients or their future caretakers, or to anyone else) in the absence of a scavenger hunt by any federal or state regulators seeking to evaluate compliance.'' RD, at 99. Furthermore, as previously discussed, I have no confidence that any measure short of revocation would specifically deter Respondent from future misconduct, given that he continued his woefully inadequate medical recordkeeping and prescribing practices after he was arrested for similar behavior. *See Singh, M.D.,* 81 FR at 8248 (''until . . . [a] Respondent can convincingly show he [or she] accepts the authority of the law and those bodies charged with enforcing it and regulating his [or her] activities, granting [ ] a DEA registration will gravely endanger the public.'').

Here, there is insufficient evidence in the record to demonstrate that Respondent can be entrusted with a registration. *See Leo R. Miller, M.D.,* 53 FR at 21932 (describing revocation as a remedial measure ''based upon the public interest and the necessity to protect the public from individuals who have misused controlled substances or their DEA Certificate of Registration and who have not presented sufficient mitigating evidence to assure the Administrator that they can be trusted with the responsibility carried by such a registration.'').

Accordingly, I shall order the sanctions the Government requested, as contained in the Order below.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration BW5359004 issued to Mark A. Wimbley, M.D. Further,

pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Mark A. Wimbley, M.D., to renew or modify this registration, as well as any other applications of Mark A. Wimbley, M.D. for additional registration in California. This Order is effective May 21, 2021.

D. Christopher Evans,

Acting Administrator.

[FR Doc. 2021–08171 Filed 4–20–21; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Michael Jones, M.D.; Decision and Order

On September 19, 2019, the Drug Enforcement Administration (hereinafter, DEA or Government) Administrative Law Judge Charles Wm. Dorman (hereinafter, ALJ), issued an Order Granting Government's Motion for Summary Disposition and Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision (hereinafter, RD) on the action to revoke the DEA Certificate of Registration Number BJ5665281 of Michael Jones, M.D. The ALJ transmitted the record to me on October 15, 2019, and asserted that no exceptions were filed by either party. ALJ Transmittal Letter, at 1. Having reviewed and considered the entire administrative record before me, I adopt the ALJ's RD with minor modifications, where noted herein.*A

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. BJ5665281 issued to Michael Jones, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Michael Jones to renew or modify this registration, as well as any other pending application of Michael Jones, for additional registration in Louisiana. This Order is effective May 21, 2021.

D. Christopher Evans,

Acting Administrator.

Paul E. Soeffing, Esq., for the Government

Robert C. Jenkins, Esq., for the Respondent

Order Granting Government's Motion for Summary Disposition and Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge

The Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (''DEA''), issued an Order to Show Cause (''OSC''), dated June 19, 2019, proposing to revoke the Certificate of Registration (''COR''), Number BJ5665281, of Michael Jones, M.D. (''Dr. Jones'' or ''Respondent''), and to deny any applications for renewal or modification of such registration, and any applications for any other DEA registrations, pursuant to 21 U.S.C. 824(a)(5). The OSC alleges that revocation is warranted because Respondent has been mandatorily excluded from all federal health care programs under 42 U.S.C. 1320a–7(a).

The Office of Administrative Law Judges (''OALJ'') received a copy of the OSC on June 19, 2019. OSC, at 1. Dr. Jones, through counsel, filed a hearing request on July 19, 2019, the 30th day from the date of the OSC. Thus, Dr. Jones's hearing request was timely filed.

On July 19, 2019, I issued an Order for Prehearing Statements (''OPHS''), directing the parties to file prehearing statements and establishing a date for a telephonic prehearing conference. OPHS, at 1–2. The Government timely filed its prehearing statement on August 2, 2019. Dr. Jones did not file a prehearing statement by his deadline for doing so.

I conducted a telephonic prehearing conference with the parties on August 21, 2019. Following the conference, I issued a Prehearing Ruling (''PHR''), in which I directed Dr. Jones to file a prehearing statement and a motion for leave to file his prehearing statement out of time.

On August 26, 2019, Dr. Jones filed his prehearing statement along with a motion for leave to file his prehearing statement out of time. Because the Government did not file an opposition to Respondent's motion for out-of-time filing, on September 10, 2019, I issued an Order Granting Respondent's Motion for Out of Time Prehearing Statement and Notice Concerning Summary Disposition (''Order Concerning Summary Disposition''), which granted Respondent's motion for out-of-time filing as unopposed. My Order Concerning Summary Disposition also established a deadline for the Government to file a motion for summary disposition and for Dr. Jones to respond to the Government's motion for summary disposition.

The Government timely filed its Motion for Summary Disposition on September 13, 2019. Dr. Jones timely filed his Opposition to Government's Motion for Summary Disposition on September 18, 2019 (''Respondent's Opposition''). Accordingly, I base this ruling and Recommended Decision on the Government's Motion for Summary Disposition, Dr. Jones's Opposition, and the Administrative Record before me.

The issue in this case is whether the record as a whole establishes by a preponderance of the evidence that the DEA should revoke the Certificate of Registration of Michael Jones, M.D., No. BJ5665281/XJ5665281, and deny any applications for renewal or modification of such registration, and deny any applications for any other DEA registrations, pursuant to 21 U.S.C. 824(a)(5), because he has been excluded from federal health care programs under 42 U.S.C. 1320a–7(a).

The Facts

I. Stipulations

During the telephonic prehearing conference, the parties agreed to the following stipulations (''Stip.''), which are accepted as facts in this proceeding:

1. Respondent is registered with the DEA as a practitioner-DW/30 in Schedules II through V under DEA Certificate of Registration BJ5665281/XJ5665281 with a registered address of 3405 Saint Claude Ave., New Orleans, LA 70117–6144, and a mailing address of 2433 Bedford Dr., New Orleans, LA 70131–4703. Respondent's registration expires by its terms on December 31, 2021.

2. On or about September 25, 2018, Judgment was entered against Respondent based on Respondent's conviction on one count of ''Conspiracy to Commit Health Care Fraud,'' in violation of 18 U.S.C. 1349, one count of ''Conspiracy to Pay and Receive Illegal Health Care Kickbacks,'' in violation of 18 U.S.C. 371, and seven counts of ''Health Care Fraud,'' in violation of 18 U.S.C. 1347 and 2. *U.S.* v. *Michael Jones,* No. 2:15–cr–00061–SM–JCW (E.D. La. filed Sept. 28, 2018).

3. Based on Respondent's conviction, the U.S. Department of Health and Human Services, Office of Inspector

*A I have made minor, nonsubstantive, grammatical changes to the RD. Where I have made more substantive changes, I have marked the changes with an asterisk, brackets and explanatory footnotes.

General (''HHS/OIG''), by letter dated March 29, 2019, mandatorily excluded Respondent from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of ten years pursuant to 42 U.S.C. 1320a–7(a), effective April 18, 2019.

4. Reinstatement of eligibility to participate in Medicare, Medicaid and all federal health care programs after exclusion by HHS/OIG is not automatic.

5. Respondent is currently excluded from participation in Medicare, Medicaid and all federal health care programs.

6. Respondent stipulates to the admissibility of Government Exhibits 1–4.

I. Government's Position

In its Motion for Summary Disposition, the Government argues that there is no dispute of material fact requiring an adversarial hearing. Gov't Summ. Disp., at 1, 5–6. Specifically, the Government notes that Dr. Jones does not dispute that he is currently excluded from federal health care programs under 42 U.S.C. 1320a–7(a). *Id.* at 5. After quoting the entirety of Dr. Jones's proposed testimony from his Prehearing Statement and noting his single proposed exhibit, the Government argues that based on his Prehearing Statement, Dr. Jones ''does not intend to provide any testimony or documentary evidence as to why his registration should not be revoked.'' *Id.* at 4–5. Continuing, the Government argues that Dr. Jones's Prehearing Statement ''makes no proffer as to why, in the face of his exclusion, he should be allowed to retain his registration.'' *Id.* Consequently, the Government argues that granting summary disposition in the Government's favor is consistent with DEA precedent because Dr. Jones has failed ''to identify any issue of material fact in his Prehearing Statement that would warrant the holding of a hearing or the presentation of testimony.'' *Id.* at 1. In conclusion, the Government requests that Dr. Jones's COR be revoked. *Id.* at 6.

II. Respondent's Position

In his Opposition, Dr. Jones argues that summary disposition is inappropriate because he appealed his conviction to the United States Court of Appeals for the Fifth Circuit (''Fifth Circuit''). Resp't Opposition, at 1. Although the Fifth Circuit has not yet ruled on Dr. Jones's appeal, his Opposition states that he believes his appeal has merit on the ground that the prosecution ''failed to present sufficient evidence at trial to sustain his convictions.'' *Id.* The Opposition further states that Dr. Jones's counsel intends to ''outline the relevant issues in that appeal at his [DEA] hearing.'' *Id.* Respondent's Opposition reiterates the substance of the testimony that is contained in his Prehearing Statement concerning his appeal pending before the Fifth Circuit, but adds for the first time that the DEA proceeding should be ''deferred until after the Fifth Circuit resolves the appeal.'' *Id.*

Analysis

Under DEA precedent, ''it is well-settled that when no question of material fact is involved, a plenary, adversary administrative proceeding involving evidence and cross-examination of witnesses is not obligatory.'' *Michael G. Dolin, M.D.,* 65 FR 5661, 5662 (2000). This precedent is based on the principle that ''Congress did not intend administrative agencies to perform meaningless tasks.'' *Sandra J.S. Tyner, M.D.,* 63 FR 56223, 56223 (1998). '' '[C]ommon sense suggests the futility of hearings where there is no factual dispute of substance.' '' *Richard Jay Blackburn, D.O.,* 82 FR 18669, 18672 (2017) (quoting *Veg-Mix, Inc.* v. *U.S. Dep't of Agric.,* 832 F.2d 601, 607 (D.C. Cir. 1987)). The central inquiry when deciding a motion for summary disposition is whether there is ''a genuine issue for trial.'' *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986).

The ''party moving for summary disposition 'must show, with materials of appropriate evidentiary quality, that every state of facts is excluded save that which entitles [it] to relief.' '' *Bio Diagnostic Int'l,* 78 FR 39327, 39328–29 (2013). The underlying facts are '' 'viewed in the light most favorable to the' '' non-moving party. *Matsushita Elec. Indus. Co., Ltd.* v. *Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (quoting *United States* v. *Diebold, Inc.,* 369 U.S. 654, 655 (1962)). Once the moving party satisfies its burden to show that there is no genuine dispute of material fact, the non-movant is tasked with presenting '' 'competent evidence that could be presented at trial showing that there is a genuine dispute as to a material fact.' '' *William J. O'Brien, III, D.O.,* 82 FR 46527, 46529 (2017) (quoting 10B Charles Allen Wright, *et al., Federal Practice and Procedure Civ.* § 2727.2 (4th ed. April 2017)).

''A fact is '*material*' if it '*might affect* the outcome of the suit under the governing law.' '' *Bazan* v. *Hidalgo Cty.,* 246 F.3d 481, 489 (5th Cir. 2001) (emphasis in original) (quoting *Liberty Lobby, Inc.,* 477 U.S. at 248). To be considered material, a fact must be ''outcome determinative.'' *Int'l Shortstop, Inc.* v. *Rally's, Inc.,* 939 F.2d 1257, 1264 (5th Cir. 1991). In other words, a material fact is a fact that has the potential to affect the outcome of the case. Failure to present material evidence that could impact the outcome of the case is fatal to the non-moving party. *William J. O'Brien, III, D.O.,* 82 FR at 46529. An issue is genuine if the evidence resolving the issue is sufficient to support a ruling in favor of the party opposing summary judgment. *Prof'l Managers, Inc.* v. *Fawer, Brian, Hardy & Zatzkis,* 799 F.2d 218, 222 (5th Cir. 1986). An issue must be ''real and substantial'' to be considered genuine. *Bazan,* 246 F.3d at 489.

The Administrative Record contains ''reliable and probative evidence'' to support the conclusion that there is no genuine issue of material fact requiring an adversarial hearing. *Richard Jay Blackburn, D.O.,* 82 FR at 18672–73. To begin, at the prehearing conference, the Government and Respondent entered into all the relevant factual stipulations necessary to establish a *prima facie* case for sanction under 21 U.S.C. 824(a)(5). Specifically, the Parties stipulated that Dr. Jones was convicted of federal offenses involving health care fraud in the United States District Court for the Eastern District of Louisiana (''District Court'') (Stip. 2); that as a result of his convictions the HHS/OIG mandatorily excluded Dr. Jones from participating in Medicare, Medicaid, and all federal health care programs for ten years beginning on April 18, 2019 (Stip. 3); that reinstatement in federal health care programs is not automatic (Stip. 4); and that Dr. Jones is currently excluded from participating in federal health care programs (Stip. 5). PHR, at 1–2. Lastly, Respondent stipulated to the admissibility of the Government's exhibits (Stip. 6). *Id.* at 2.

The Government attached evidence to its Motion for Summary Disposition corroborating the factual stipulations. Specifically, the Government attached a notarized Certification of Registration History (Exh. 1); a copy of the judgment entered by the District Court against Dr. Jones (Exh. 2); a copy of the HHS/OIG exclusion letter (Exh. 3); and a printout from the HHS/OIG website (Exh. 4).

The notarized Certification of Registration History, dated June 24, 2019, is signed by the Associate Chief of DEA's Registration and Program Support Section. Gov't Summ. Disp., Exh. 1, at 1. The Certification states that Dr. Jones is registered with the DEA as a practitioner-DW/30 to handle controlled substances in Schedules 2–5 under COR No. BJ5665281 and that DEA last approved the renewal of this registration on November 29, 2018. *Id.*

The Certification further states that this registration expires on December 31, 2021, and that it is currently under active pending status. *Id.* The Certification additionally states that this registration number is the only DEA registration associated with Dr. Jones. *Id.*

The Government's next exhibit is the judgment entered by the District Court against Dr. Jones on September 25, 2018. The District Court's judgment form shows that Dr. Jones was found guilty of one count of conspiracy to commit health care fraud (18 U.S.C. 1349); one count of conspiracy to pay and receive illegal health care kickbacks (18 U.S.C. 371); and seven counts of health care fraud (18 U.S.C. 1347). Gov't Summ. Disp., Exh. 2, at 1. The judgment further ordered Dr. Jones to pay $347,525 in restitution to Medicare, and sentenced him to serve three years in prison followed by two years of supervised release. *Id.* at 2–3, 6.

Next, the Government attached a copy of the HHS/OIG exclusion letter, dated March 29, 2019. That letter shows that as a result of Dr. Jones's convictions, HHS excluded him from participating in Medicare, Medicaid, and all federal health care programs for ten years. Gov't Summ. Disp., Exh. 3, at 1. The letter explains that Dr. Jones's ten-year exclusion would become effective twenty days from the date of the letter. *Id.* The letter further explains that Dr. Jones's exclusion is based on his conviction of a program-related crime. *Id.;* 42 U.S.C. 1320a–7(a)(1). In addition, the letter explains that reinstatement in federal health care programs is not automatic. *Id.* at 3. Lastly, the Government attached a printout from the HHS/OIG website, which shows that Dr. Jones has been excluded from federal health care programs since April 18, 2019, for a program-related conviction. Gov't Summ. Disp., Exh. 4, at 1.

The four exhibits attached to the Government's Motion are the same exhibits the Government identified in its prehearing statement. *See* Gov't PHS, at 3 (describing each of the Government's four exhibits intended for use at the hearing). Respondent stipulated to the information that is contained in each of those exhibits (Stips. 2–5) as well as the admissibility of those exhibits if they were offered at trial (Stip. 6). Based on the Government's exhibits and the Parties' factual stipulations to the contents of those exhibits, as well as their admissibility, I find that the Administrative Record contains ''reliable and probative evidence'' that Dr. Jones is currently excluded from Medicare, Medicaid, and all federal health care programs pursuant to a program-related conviction. *Richard Jay Blackburn, D.O.,* 82 FR at 18672–73. The Administrative Record further establishes that Dr. Jones's ten-year exclusion from all federal health care programs is the result of his convictions related to health care fraud. The Administrative Record also shows that Dr. Jones's exclusion began on April 18, 2019. And based on the Parties' factual stipulations, Respondent does not dispute that he was convicted of fraud-related crimes and then excluded by HHS/OIG from all federal health care programs.

To meet its burden for sanction under 21 U.S.C. 824(a)(5), the Government must show that Respondent is excluded from participating in Medicare, Medicaid, and all federal health care programs under one of the four bases for mandatory exclusion in 42 U.S.C. 1320a–7(a). Mandatory exclusion from a federal health care program under 42 U.S.C. 1320a–7(a) serves as an independent basis for revoking a DEA registration. 21 U.S.C. 824(a)(5); *Terese, Inc., d/b/a Peach Orchard Drugs,* 76 FR 46843, 46847 (2011); *Dinorah Drug Store, Inc.,* 61 FR 15972, 15973 (1996).

Once the Government meets its burden, the issue becomes which sanction should DEA impose in light of considerations concerning acceptance of responsibility, mitigation, egregiousness, and deterrence. *Jeffrey Stein, M.D.,* 84 FR 46968, 46972 (2019). To resolve this issue, the DEA considers whether the respondent ''has presented 'sufficient mitigating evidence to assure the Administrator that [he] can be trusted with the responsibility carried by' '' a DEA registration. *Id.* (alteration in original) (quoting *Samuel S. Jackson, D.D.S.,* 72 FR 23848, 23853 (2007)); *see also Kwan Bo Jin, M.D.,* 77 FR 35021, 35023–25 (2012) (concluding the Government ''met its burden of proving its Section 824(a)(5) claim'' and then considering the five public interest factors to determine whether respondent met his burden ''to show that . . . granting him a COR would not be contrary to the public interest.''). The material issues in this case are, therefore, quite simple: Is Dr. Jones excluded under 42 U.S.C. 1320a–7(a), and, if so, does the evidentiary record support the Government's requested sanction?

As discussed above, there is no dispute that Dr. Jones is currently excluded from all federal health care programs under 42 U.S.C. 1320a–7(a)(1). There is no dispute because Dr. Jones does not contest the fact that HHS/OIG excluded him from eligibility to participate in all federal health care programs for ten years beginning on April 18, 2019. Stips. 3, 5. Thus, to defeat the Government's Motion, Dr. Jones must present '' 'competent evidence that could be presented at trial' '' relevant to the issue of which sanction should DEA impose. *William J. O'Brien, III, D.O.,* 82 FR at 46529 (quoting 10B Charles Allen Wright, *et al., Federal Practice and Procedure Civ.* § 2727.2 (4th ed. April 2017)). In other words, to raise an issue of material fact, Dr. Jones would need to present evidence relevant to acceptance of responsibility, mitigation, egregiousness, or deterrence. *Jeffrey Stein, M.D.,* 84 FR at 46972. He has failed to do so.

Instead, Dr. Jones responded to the Government's Motion with the same proposed evidence he raised in his Prehearing Statement. And despite the fact that Dr. Jones was allowed to file a prehearing statement after the original deadline for doing so, and despite my advice to him at the prehearing conference concerning the level of detail that his prehearing statement should contain, Dr. Jones filed a prehearing statement with only a single sentence of proposed testimony. That single sentence previewed that Dr. Jones would testify that he appealed his criminal sentence to the Fifth Circuit and he believes his conviction will be overturned.[1] Resp't PHS, at 3. Dr. Jones's Prehearing Statement noticed only one exhibit: A copy of the certified notice of his appeal to the Fifth Circuit. *Id.* In his Opposition to the Government's Motion, Dr. Jones states that he appealed his conviction to the Fifth Circuit and that he believes his appeal has merit.[2] Resp't Opposition, at 1. Dr. Jones's Opposition further previews that his counsel intends to ''outline'' at the DEA hearing the issues he has appealed to the Fifth Circuit.[3] *Id.*

Dr. Jones's appeal of his conviction has no bearing on the issues relevant to this case. First, the appeal of his conviction does not change the fact that beginning on April 18, 2019, HHS/OIG excluded him from federal health care programs for ten years. Furthermore, Dr. Jones's pending appeal does not change the fact that he is currently excluded

[1] Notwithstanding the irrelevance of this proposed testimony, it is unclear how an appeal of his sentence would affect the underlying conviction.

[2] Again, notwithstanding the irrelevance of this statement, the basis for this belief is unclear.

[3] Again, notwithstanding the irrelevance of his appeal, it is unclear how Respondent's counsel intends to ''outline'' the issues of that appeal at the hearing since he failed to disclose in his prehearing statement, or his Opposition, what issues he intends to ''outline.''

from all federal health care programs for a program-related conviction under 42 U.S.C. 1320a–7(a)(1). Because it is Dr. Jones's mandatory exclusion and not his underlying conviction that forms the basis for sanction in this case, his appeal of the conviction is not a relevant consideration. Second, the appeal does not bear in any way on the issue of whether Dr. Jones can be trusted with handling controlled substances during his ten-year exclusion. In other words, the existence of a pending appeal is not mitigating evidence that is probative of Dr. Jones's ability to responsibly discharge the duties of a DEA registrant and to comply with controlled substance laws. Third, whether Dr. Jones's appeal will be successful and, if so, whether HHS/OIG will reinstate his eligibility to participate in federal health care programs, is pure speculation. Even if his appeal is successful, and his convictions are erased, it is speculative at this time to predict whether and when HHS/OIG will reinstate Dr. Jones's eligibility to participate in federal health care programs. And ''unsupported speculation [is] not sufficient to defeat a motion for summary judgment.'' *Brown* v. *City of Houston,* 337 F.3d 539, 541 (5th Cir. 2003).

Rather than respond to the Government's Motion with probative evidence that bears on the issue of whether he can be trusted to handle controlled substances, Dr. Jones has collaterally attacked the criminal proceedings underlying his mandatory exclusion. A respondent cannot use DEA proceedings to collaterally attack proceedings litigated in another forum. *Kristen Lee Raines, A.P.R.N.,* 81 FR 14890, 14891–92 (2016); *see also Hicham K. Riba, D.D.S.,* 73 FR 75773, 75774 (2008) (same); *Brenton D. Glisson, M.D.,* 72 FR 54296, 54297 (2007) (same). There is a proper forum for Dr. Jones to litigate his criminal convictions, and the DEA is not that forum. In addition, there is a proper forum to litigate his mandatory exclusion, and the procedures for doing so are provided on page 4 of the HHS/OIG exclusion letter in a section titled, ''How to Appeal Your Exclusion.'' Gov't Summ. Disp., Exh. 3, at 4. Dr. Jones may disagree with his conviction and exclusion, but a DEA proceeding is not the proper place to voice that disagreement.

In sum, the Administrative Record contains substantial, undisputed evidence to establish a *prima facie* case for sanction under 21 U.S.C. 824(a)(5). Specifically, the evidence proves that Dr. Jones is currently excluded from Medicare, Medicaid, and all federal health care programs under 42 U.S.C. 1320a–7(a)(1) pursuant to a program-related conviction involving fraudulent activity. Dr. Jones's exclusion from federal health care programs under 42 U.S.C. 1320a–7(a)(1) is an independent basis for sanction under 21 U.S.C. 824(a)(5). Furthermore, the evidence that Dr. Jones has presented in response to the Government's Motion fails to raise a genuine issue of material fact necessitating an adversarial hearing. The only evidence Dr. Jones has presented concerns a pending appeal and pure speculation about the appeal's chance of success. The evidence of Dr. Jones's appeal bears no relevance to the issue of whether Dr. Jones can be trusted with a DEA Certificate of Registration in light of the fact that the Government has satisfied its burden for sanction under 21 U.S.C. 824(a)(5). Because Dr. Jones's pending appeal cannot affect '' 'the outcome of [this case] under the governing law,' '' it is not a material fact, and therefore, it is insufficient to defeat the Government's Motion. *Bazan,* 246 F.3d at 489 (quoting *Liberty Lobby, Inc.,* 477 U.S. at 248).

Accordingly, the Government's Motion for Summary Disposition is *granted,* and the scheduled hearing in this matter is, therefore, *cancelled.*

With respect to Dr. Jones's request in his Opposition to stay these proceedings until the resolution of his appeal, that request is *denied.* Dr. Jones cites no case law to support the proposition that he is entitled to a stay of these proceedings pending his appeal. Furthermore, staying this case pending Dr. Jones's appeal would significantly diverge from well-established DEA precedent. [*See Grider Drug #1 & Grider Drug #2,* 77 FR 44070, 44104 n.97 (2012); *see also Newcare Home Health Servs.,* 72 FR 42126, 42127 (2007).] [*B] Dr. Jones has not pointed to any legal authority, and provided no legal argument, to justify diverging from DEA's consistent precedent against granting stays pending the outcome of other proceedings, *[and as noted herein, the outcome of his appeal does not directly affect this proceeding.]

Sanction

Once the Government makes a *prima facie* case for sanction, the burden shifts to the respondent to demonstrate that despite the proven allegations, maintaining his DEA registration would not be inconsistent with the public interest. *Kwan Bo Jin, M.D.,* 77 FR at 35023. This would require the respondent to credibly accept responsibility for his misconduct or point to evidence mitigating the gravity of his offense. *Id.* at 35026. Here, because the Administrative Record establishes a *prima facie* case for sanction, the next question is ''whether revocation . . . is the appropriate sanction in light of the facts'' and Respondent's evidence. *Samuel Arnold, D.D.S.,* 63 FR at 8688.

Revoking a registration on the ground that the registrant has been mandatorily excluded from federal health care programs is discretionary. *Dinorah Drug Store, Inc.,* 61 FR at 15973. Since revocation is a matter of discretion, the DEA has advised that the public interest factors outlined in 21 U.S.C. 823(f) may be consulted in determining the appropriate sanction, although the ALJ is not obligated to analyze them. *Id.; see, e.g., Johnnie Melvin Turner, M.D.,* 67 FR at 71203–04 (revoking registration based on mandatory exclusion without conducting public interest inquiry). It is not required that the underlying misconduct involved controlled substances, but that can be a relevant consideration.[4] *Dinorah Drug Store, Inc.,* 61 FR at 15974.

[*C] The Administrator has explained that because DEA employs roughly 1,625 individuals to regulate over 1.8 million registrants, the Administration relies heavily on a registrant's honesty and integrity ''to complete its mission of preventing diversion within such a large regulated population.'' *Jeffrey Stein, M.D.,* 84 FR at 46974. Because DEA depends on the integrity of those it entrusts with controlled substance privileges, it takes a close look at a registrant's fraudulent activity. *See Nelson Ramirez-Gonzalez, M.D.,* 58 FR 52787, 52788 (1993) (noting fraudulent activity ''casts doubt upon [a registrant's] integrity''). Although a registrant's fraud may not involve controlled substances, fraudulent activity indicates that a registrant ''place[s] monetary gain above the welfare of his patients, and in so doing,

[*B] Omitted parts of citation for clarity.

[4] DEA has reiterated its well-established precedent in numerous final orders that the underlying conviction that led to mandatory exclusion does not need to involve controlled substances to support sanction. *See, e.g., Jeffrey Stein, M.D.,* 84 FR 46968, 46971 (2019); *Mohammed Asgar, M.D.,* 83 FR 29569, 29571 (2018); *Narciso A. Reyes, M.D.,* 83 FR 61678, 61681 (2018); *Richard Hauser, M.D.,* 83 FR 26308, 26310 (2018); *Orlando Ortega-Ortiz, M.D.,* 70 FR 15122, 15123 (2005); *Juan Pillot-Costas, M.D.,* 69 FR 62084, 62085 (2004); *Daniel Ortiz-Vargas, M.D.,* 69 FR 62095, 62095–96 (2004); *KK Pharmacy,* 64 FR 49507, 49510 (1999); *Melvin N. Seglin, M.D.,* 63 FR 70431, 70433 (1998); *Anibal P. Herrera, M.D.,* 61 FR 65075, 65078 (1996); *Stanley Dubin, D.D.S.,* 61 FR 60727, 60728 (1996); *Richard M. Koenig, M.D.,* 60 FR 65069, 65071 (1995); *George D. Osafo, M.D.,* 58 FR 37508, 37509 (1993); *Nelson Ramirez-Gonzalez, M.D.,* 58 FR 52787, 52788 (1993); *Gilbert L. Franklin, D.D.S.,* 57 FR 3441, 3441 (1992).

[*C] Omitted sentence for clarity.

endanger[s] the public health and safety.'' *George D. Osafo, M.D.,* 58 FR 37508, 37509 (1993).

The Government's evidence does not provide details concerning Dr. Jones's criminal misconduct; however, the District Court's judgment offers sufficient information to find that Dr. Jones committed fraudulent activity related to medical services. Dr. Jones was convicted of seven counts of violating 18 U.S.C. 1347 (''Health care fraud''). Gov't Summ. Disp., Exh. 2, at 1. The elements of this statute require proof that an individual knowingly or willfully executed a scheme ''to defraud any health care benefit program,'' or ''to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program.'' 18 U.S.C. 1347(a). Dr. Jones was further convicted of one count of violating 18 U.S.C. 371 (''Conspiracy to commit offense or to defraud United States''), which subjects persons who conspire ''to commit any offense against the United States, or to defraud the United States,'' to a maximum prison sentence of five years, or to payment of a fine, or both. The District Court's judgment specifies that Dr. Jones's violation of 18 U.S.C. 371 involved conspiracy to pay and receive illegal health care kickbacks. Gov't Summ. Disp., Exh. 2, at 1. The District Court sentenced Dr. Jones to three years' imprisonment, to be served, if practicable, after the term of imprisonment of his co-defendant. *Id.* at 2. The District Court further imposed two years of supervised release after Dr. Jones serves his prison term, and ordered him to pay $347,525 to Medicare in restitution. *Id.* at 3, 6.

Despite the lack of evidence that Dr. Jones's criminal misconduct involved controlled substances, the District Court's judgment shows that Dr. Jones defrauded Medicare of hundreds of thousands of dollars. This type of criminal misconduct raises serious concerns about Dr. Jones's integrity and honesty, especially in his dealings with government agencies, and justifies revocation even if his misconduct did not involve controlled substances. *Anibal P. Herrera, M.D.,* 61 FR at 65078; *Nelson Ramirez-Gonzalez, M.D.,* 58 FR at 52788; *George D. Osafo, M.D.,* 58 FR at 37509; *see also Jeffrey Stein, M.D.,* 84 FR at 46972.

In fact, DEA has previously revoked registrations for misconduct comparable to Respondent's. *See Dan E. Hale, D.O.,* 69 FR 69402, 69406 (2004) (denying application based on material falsification and mandatory exclusion which resulted from fraud convictions); *Johnnie Melvin Turner, M.D.,* 67 FR at 71204 (revocation based on exclusion from Medicare program after federal fraud conviction); *Stanley Dubin, D.D.S.,* 61 FR 60727, 60727 (1996) (revocation for exclusion from federal health care programs after state fraud conviction).

Furthermore, the exclusion letter notes that HHS/OIG deemed Dr. Jones's criminal misconduct to be egregious enough to warrant an exclusion period in excess of the statutory minimum. Gov't Summ. Disp., Exh. 3, at 1–2. The exclusion letter explains that HHS/OIG excluded Dr. Jones for ten years instead of the statutory minimum of five years, because (1) Dr. Jones's fraudulent activity was intended to cause financial loss to a government agency of more than $50,000; (2) he committed the fraudulent activity over a period of six years; and (3) the District Court's sentence included imprisonment. *Id.* at 2.

The DEA ''carefully consider[s] mitigating evidence provided by the respondent'' when deciding the appropriate sanction in a Medicare exclusion case. *Jeffrey Stein, M.D.,* 84 FR at 46970. Dr. Jones, however, has failed to provide any mitigating evidence for the DEA to consider. Dr. Jones's failure to present mitigating evidence is the reason why granting summary disposition in the Government's favor is appropriate. It is also the reason why, in light of the egregiousness of his fraudulent activity, revocation is the appropriate sanction.

In the face of Dr. Jones's exclusion, he has not presented any evidence to convince DEA that it can trust him with the privilege and responsibility to handle controlled substances. Dr. Jones fraudulently obtained hundreds of thousands of dollars from a United States government agency over a period of six years. Based on several aggravating circumstances, HHS/OIG found Dr. Jones's criminal activity to be sufficiently egregious to justify imposing a longer exclusion period than statutorily required. Dr. Jones has not responded with any indication that he intends to accept responsibility at the DEA hearing or that he feels remorse for his misconduct. In fact, Dr. Jones pled not guilty to the criminal charges and his position on appeal is that the prosecution failed to present enough evidence at trial. Gov't Summ. Disp., Exh. 2, at 1; Resp't Opposition, at 1. Pleading not guilty and then attacking the conviction on appeal is inconsistent with a respondent who accepts responsibility and feels remorse for his misconduct. Furthermore, Dr. Jones has not presented any mitigation evidence, to include evidence that he has taken steps to assure DEA that he will not engage in fraudulent activity in the future. In the absence of mitigation evidence demonstrating that DEA can entrust Dr. Jones with a registration, revocation is appropriate.

Recommendation

For these reasons, it is *recommended* that Dr. Jones's DEA Certificate of Registration, Number BJ5665281/XJ5665281, be *revoked,* and that any of Dr. Jones's applications for renewal or modification of such registration, and any application by Dr. Jones for any other DEA registration, be *denied*.[5]

Dated: September 19, 2019.

Charles Wm. Dorman,

U.S. Administrative Law Judge.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Javaid A. Perwaiz, M.D.; Decision and Order

On June 1, 2020, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, Government), issued an Order to Show Cause (hereinafter, OSC) to Javaid A. Perwaiz, M.D. (hereinafter, Registrant) of Chesapeake, Virginia. OSC, at 1. The OSC proposed the revocation of Registrant's Certificate of Registration No. AP1844287. It alleged that Registrant is without ''authority to handle controlled substances in Virginia, the state in which [Registrant is] registered with DEA.'' *Id.* (citing 21 U.S.C. 823(f) and 824(a)(3)).

Specifically, the OSC alleged that according to the records of the Virginia Department of Health Professionals, Registrant's Virginia Medicine & Surgery license expired on March 31, 2020. OSC, at 2. The OSC further alleged that because Registrant's medical license was expired, Registrant no longer held authority to handle controlled substances in Virginia. *Id.*

The OSC notified Registrant of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* (citing 21 CFR

[5] Pursuant to 21 CFR 1316.66, a party may file exceptions to this Recommended Decision ''[w]ithin twenty days after the date upon which a party is served a copy of'' this Recommended Decision. * [No exceptions were timely filed.]

1301.43). The OSC also notified Registrant of the opportunity to submit a corrective action plan. OSC, at 3 (citing 21 U.S.C. 824(c)(2)(C)).

Adequacy of Service

In a Declaration dated August 5, 2020, a Diversion Investigator (hereinafter, DI) assigned to the Norfolk Resident Office of the Washington Field Division stated that she first attempted service of the OSC by forwarding a copy of the OSC to Registrant's legal counsel via email on June 2, 2020. Request for Final Agency Action (hereinafter RFAA), App. 8 (Declaration of DI), at 2. After nine days with no response, the DI called the office of Registrant's legal counsel and left a message with his staff regarding the OSC. *Id.* On June 19, 2020, the DI called the office of Registrant's legal counsel a second time after having still not received a response to the first phone call or the initial email. *Id.* at 3. According to the DI, Registrant's legal counsel returned the second phone call later that day and ''acknowledged receiving a copy of the [OSC]'' and ''confirmed that [Registrant] had received a copy of the [OSC] (although he could not remember the exact date).'' *Id.* Registrant's legal counsel also said that he ''planned on filing a response to the [OSC] on behalf of [Registrant].'' *Id.* The DI concluded that, following the phone call on June 19, 2020, neither she nor her office ''received any other written correspondence, telephonic communication, or any other communication from [Registrant], or any representative on his behalf in response to the [OSC].'' *Id.*

The Government forwarded its RFAA, along with the evidentiary record, to this office on August 6, 2020. In its RFAA, the Government represents that ''despite [Registrant's legal counsel's] assurances to DEA personnel that a response would filed [sic] in response to the [OSC], more than [thirty days] have passed since Registrant received the [OSC]; however, Registrant has not submitted to DEA a request for hearing.'' [1] RFAA, at 2; *see also* RFAA, Apps. 5 and 6. The Government requests that Registrant's Certificate of Registration be revoked based on Registrant's lack of state authority to handle controlled substances. RFAA, at 5 and 6.

Based on the DI's Declaration, the Government's written representations, and my review of the record, I find that the Government accomplished service of the OSC on Registrant on or before June 19, 2020. I also find that more than thirty days have now passed since the Government accomplished service of the OSC. Further, based on the Government's written representations, I find that neither Registrant, nor anyone purporting to represent the Registrant, requested a hearing, submitted a written statement while waiving Registrant's right to a hearing, or submitted a corrective action plan. Accordingly, I find that Registrant has waived the right to a hearing and the right to submit a written statement and corrective action plan. 21 CFR 1301.43(d) and 21 U.S.C. 824(c)(2)(C). I, therefore, issue this Decision and Order based on the record submitted by the Government, which constitutes the entire record before me. 21 CFR 1301.43(e).

Findings of Fact

Registrant's DEA Registration

Registrant is the holder of DEA Certificate of Registration No. AP1844287 at the registered address of 3003 Churchland Boulevard, Chesapeake, VA 23321. RFAA, App. 1. Pursuant to this registration, Registrant is authorized to dispense controlled substances in schedules II through V as a practitioner. *Id.* Registrant's registration expired on March 31, 2021.[2] *Id.*

The Status of Registrant's State License

According to the records of the Virginia Department of Health Professionals, Registrant's Virginia Medicine & Surgery License expired on March 31, 2020. RFAA, App. 3, at 1. Additionally, Registrant's license remained expired as of the date of the OSC. RFAA, App. 7, at 1.

According to Virginia's online records, of which I take official notice, Registrant's license is still expired.[3] *https://dhp.virginia interactive.org/lookup* (last visited date of signature of this Order). Virginia's online records show that Registrant's medical license remains expired and that Registrant is not authorized in Virginia to practice medicine. *Id.*

Accordingly, I find that Registrant is not currently licensed to engage in the practice of medicine in Virginia, the state in which Registrant is registered with the DEA.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the CSA ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27616, 27617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71371–72;

[1] The Government also represents that Registrant has not ''otherwise filed a response with the agency following the issuance of the [OSC].'' RFAA, at 2.

[2] The fact that a Registrant allows his registration to expire during the pendency of an OSC does not impact my jurisdiction or prerogative under the Controlled Substances Act (hereinafter, CSA) to adjudicate the OSC to finality. *Jeffrey D. Olsen, M.D.,* 84 FR 68474 (2019).

[3] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Registrant may dispute my finding by filing a properly supported motion for reconsideration of finding of fact within fifteen calendar days of the date of this Order. Any such motion and response shall be filed and served by email to the other party and to Office of the Administrator, Drug Enforcement Administration at *dea.addo.attorneys@dea.usdoj.gov.*

Sheran Arden Yeates, M.D., 71 FR 39130, 39131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51104, 51105 (1993); *Bobby Watts, M.D.,* 53 FR 11919, 11920 (1988); *Frederick Marsh Blanton,* 43 FR at 27617.

Under the Virginia Drug Control Act, a practitioner ''shall only prescribe, dispense, or administer controlled substances in good faith for medicinal or therapeutic purposes within the course of his professional practice.'' Va. Code 54.1–3408. The Virginia Drug Control Act also defines a ''practitioner,'' as ''a physician . . . licensed, registered, or otherwise permitted to distribute, dispense, prescribe and administer, or conduct research with respect to a controlled substance in the course of professional practice or research in the Commonwealth.'' Va. Code 54.1–3401. Further, under Virginia state law, a ''physician'' is defined as ''a person licensed to practice medicine in the Commonwealth of Virginia or in the jurisdiction where the health care is to be rendered or withheld.'' Va. Code 54.1–2981; *see also:* Va. Code 54.1–2902 (''It shall be unlawful for any person to practice medicine . . . in the Commonwealth without a valid unrevoked license issued by the Board of Medicine.'').

Here, the undisputed evidence in the record is that Registrant currently lacks authority to practice medicine in Virginia. As already discussed, a physician must be a licensed practitioner to dispense a controlled substance in Virginia. Thus, because Registrant lacks authority to practice medicine in Virginia and, therefore, is not authorized to handle controlled substances in Virginia, Registrant is not eligible to maintain a DEA registration. Accordingly, I will order that Registrant's DEA registration be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. AP1844287 issued to Javaid A. Perwaiz. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Javaid A. Perwaiz to renew or modify this registration, as well as any other pending application of Javaid A. Perwaiz, for additional registration in Virginia. This Order is effective May 21, 2021.

D. Christopher Evans,

Acting Administrator.

[FR Doc. 2021–08173 Filed 4–20–21; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–816]

Importer of Controlled Substances Application: Research Triangle Institute

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Notice of application.

SUMMARY: Research Triangle Institute has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before May 21, 2021. Such persons may also file a written request for a hearing on the application on or before May 21, 2021.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing must be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on March 18, 2021, Research Triangle Institute, 3040 East Cornwallis Road, Hermann Building, Room 106, Research Triangle Park, North Carolina 22709–0000, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
3-Fluoro-N-methylcathinone (3–FMC)	1233	I
Cathinone	1235	I
Methcathinone	1237	I
4-Fluoro-N-methylcathinone (4–FMC)	1238	I
Pentedrone (α-methylaminovalerophenone)	1246	I
Mephedrone (4-Methyl-N-methylcathinone)	1248	I
4-Methyl-N-ethylcathinone (4–MEC)	1249	I
Naphyrone	1258	I
N-Ethylamphetamine	1475	I
N,N-Dimethylamphetamine	1480	I
Fenethylline	1503	I
Aminorex	1585	I
4-Methylaminorex (cis isomer)	1590	I
Gamma Hydroxybutyric Acid	2010	I
Methaqualone	2565	I
Mecloqualone	2572	I
JWH–250 (1-Pentyl-3-(2-methoxyphenylacetyl) indole)	6250	I
SR–18 (Also known as RCS–8) (1-Cyclohexylethyl-3-(2-methoxyphenylacetyl) indole)	7008	I
ADB–FUBINACA (N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(4-fluorobenzyl)-1H-indazole-3-carboxamide)	7010	I
5-Fluoro-UR–144 and XLR11 [1-(5-Fluoro-pentyl)1H-indol-3-yl](2,2,3,3-tetramethylcyclopropyl)methanone	7011	I
AB–FUBINACA (N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-(4-fluorobenzyl)-1H-indazole-3-carboxamide)	7012	I
FUB–144 (1-(4-fluorobenzyl)-1H-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone)	7014	I
JWH–019 (1-Hexyl-3-(1-naphthoyl)indole)	7019	I
MDMB–FUBINACA (Methyl 2-(1-(4-fluorobenzyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate)	7020	I

Controlled substance	Drug code	Schedule
FUB–AMB, MMB- FUBINACA, AMB–FUBINACA (2-(1-(4-fluorobenzyl)-1Hindazole-3-carboxamido)-3-methylbutanoate) ..	7021	I
AB–PINACA (N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-pentyl-1H-indazole-3-carboxamide)	7023	I
THJ–2201 ([1-(5-fluoropentyl)-1H-indazol-3-yl](naphthalen-1-yl)methanone)	7024	I
5F–AB–PINACA (N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-(5-fluropentyl)-1H-indazole-3-carboximide)	7025	I
AB–CHMINACA (N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-(cyclohexylmethyl)-1H-indazole-3-carboxamide)	7031	I
MAB–CHMINACA (N-(1-amino-3,3dimethyl-1-oxobutan-2-yl)-1-(cyclohexylmethyl)-1H-indazole-3-carboxamide)	7032	I
5F–AMB (Methyl 2-(1-(5-fluoropentyl)-1H-indazole-3-carboxamido)-3-methylbutanoate)	7033	I
5F–ADB, 5F–MDMB–PINACA (Methyl 2-(1-(5-fluoropentyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate)	7034	I
ADB–PINACA (N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-pentyl-1H-indazole-3-carboxamide)	7035	I
5F–EDMB–PINACA (ethyl 2-(1-(5-fluoropentyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate)	7036	I
5F–MDMB–PICA (methyl 2-(1-(5-fluoropentyl)-1H-indole-3-carboxamido)-3,3-dimethylbutanoate)	7041	I
MDMB–CHMICA, MMB–CHMINACA (Methyl 2-(1-(cyclohexylmethyl)-1H-indole-3-carboxamido)-3,3-dimethylbutanoate) ..	7042	I
MMB–CHMICA, AMB–CHMICA (methyl 2-(1-(cyclohexylmethyl)-1H-indole-3-carboxamido)-3-methylbutanoate)	7044	I
FUB–AKB48, FUB–APINACA, AKB48 N-(4–FLUOROBENZYL) (N-(adamantan-1-yl)-1-(4-fluorobenzyl)-1H-indazole-3-carboximide).	7047	I
APINACA and AKB48 (N-(1-Adamantyl)-1-pentyl-1H-indazole-3-carboxamide)	7048	I
5F–APINACA, 5F–AKB48 (N-(adamantan-1-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide)	7049	I
JWH–081 (1-Pentyl-3-(1-(4-methoxynaphthoyl) indole)	7081	I
5F–CUMYL–PINACA, 5GT–25 (1-(5-fluoropentyl)-N-(2-phenylpropan-2-yl)-1H-indazole-3-carboxamide)	7083	I
5F–CUMYL–P7AICA (1-(5-fluoropentyl)-N-(2-phenylpropan-2-yl)-1H-pyrrolo[2,3-b]pyridine-3-carboxamide)	7085	I
4–CN–CUML–BUTINACA, 4-cyano-CUMYL–BUTINACA, 4–CN–CUMYL BINACA, CUMYL–4CN–BINACA, SGT–78 (1-(4-cyanobutyl)-N-(2-phenylpropan-2-yl)-1H-indazole-3-carboxamide).	7089	I
SR–19 (Also known as RCS–4) (1-Pentyl-3-[(4-methoxy)-benzoyl] indole)	7104	I
JWH–018 (also known as AM678) (1-Pentyl-3-(1-naphthoyl)indole)	7118	I
JWH–122 (1-Pentyl-3-(4-methyl-1-naphthoyl) indole)	7122	I
UR–144 (1-Pentyl-1H-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone	7144	I
JWH–073 (1-Butyl-3-(1-naphthoyl)indole)	7173	I
JWH–200 (1-[2-(4-Morpholinyl)ethyl]-3-(1-naphthoyl)indole)	7200	I
AM2201 (1-(5-Fluoropentyl)-3-(1-naphthoyl) indole)	7201	I
JWH–203 (1-Pentyl-3-(2-chlorophenylacetyl) indole)	7203	I
NM2201, CBL2201 (Naphthalen-1-yl 1-(5-fluoropentyl)-1H-indole-3-carboxylate	7221	I
PB–22 (Quinolin-8-yl 1-pentyl-1H-indole-3-carboxylate)	7222	I
5F–PB–22 (Quinolin-8-yl 1-(5-fluoropentyl)-1H-indole-3-carboxylate)	7225	I
4-Methyl-alpha-ethylaminopentiophenone (4–MEAP)	7245	I
N-Ethylhexedrone	7246	I
Alpha-ethyltryptamine	7249	I
Ibogaine	7260	I
CP–47,497 (5-(1,1-Dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl-phenol)	7297	I
CP–47,497 C8 Homologue (5-(1,1-Dimethyloctyl)-2-[(1R,3S)3-hydroxycyclohexyl-phenol)	7298	I
Lysergic acid diethylamide	7315	I
2C–T–7 (2,5-Dimethoxy-4-(n)-propylthiophenethylamine	7348	I
Marihuana Extract	7350	I
Parahexyl	7374	I
Mescaline	7381	I
2C–T–2 (2-(4-Ethylthio-2,5-dimethoxyphenyl) ethanamine)	7385	I
3,4,5-Trimethoxyamphetamine	7390	I
4-Bromo-2,5-dimethoxyamphetamine	7391	I
4-Bromo-2,5-dimethoxyphenethylamine	7392	I
4-Methyl-2,5-dimethoxyamphetamine	7395	I
2,5-Dimethoxyamphetamine	7396	I
JWH–398 (1-Pentyl-3-(4-chloro-1-naphthoyl) indole)	7398	I
2,5-Dimethoxy-4-ethylamphetamine	7399	I
3,4-Methylenedioxyamphetamine	7400	I
5-Methoxy-3,4-methylenedioxyamphetamine	7401	I
N-Hydroxy-3,4-methylenedioxyamphetamine	7402	I
3,4-Methylenedioxy-N-ethylamphetamine	7404	I
3,4-Methylenedioxymethamphetamine	7405	I
4-Methoxyamphetamine	7411	I
Peyote	7415	I
5-Methoxy-N–N-dimethyltryptamine	7431	I
Alpha-methyltryptamine	7432	I
Bufotenine	7433	I
Diethyltryptamine	7434	I
Dimethyltryptamine	7435	I
Psilocybin	7437	I
Psilocyn	7438	I
5-Methoxy-N,N-diisopropyltryptamine	7439	I
4-Chloro-alpha-pyrrolidinovalerophenone (4-chloro-a-PVP)	7443	I
4-Methyl-alpha-pyrrolidinohexiophenone (MPHP)	7446	I
N-Ethyl-1-phenylcyclohexylamine	7455	I
1-(1-Phenylcyclohexyl)pyrrolidine	7458	I
1-[1-(2-Thienyl)cyclohexyl]piperidine	7470	I
1-[1-(2-Thienyl)cyclohexyl]pyrrolidine	7473	I

Controlled substance	Drug code	Schedule
N-Ethyl-3-piperidyl benzilate	7482	I
N-Methyl-3-piperidyl benzilate	7484	I
N-Benzylpiperazine	7493	I
4-MePPP (4-Methyl-alphapyrrolidinopropiophenone)	7498	I
2C–D (2-(2,5-Dimethoxy-4-methylphenyl) ethanamine)	7508	I
2C–E (2-(2,5-Dimethoxy-4-ethylphenyl) ethanamine)	7509	I
2C–H 2-(2,5-Dimethoxyphenyl) ethanamine)	7517	I
2C–I 2-(4-iodo-2,5-dimethoxyphenyl) ethanamine)	7518	I
2C–C 2-(4-Chloro-2,5-dimethoxyphenyl) ethanamine)	7519	I
2C–N (2-(2,5-Dimethoxy-4-nitro-phenyl) ethanamine)	7521	I
2C–P (2-(2,5-Dimethoxy-4-(n)-propylphenyl) ethanamine)	7524	I
2C–T–4 (2-(4-Isopropylthio)-2,5-dimethoxyphenyl) ethanamine)	7532	I
MDPV (3,4-Methylenedioxypyrovalerone)	7535	I
25B–NBOMe (2-(4-bromo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl) ethanamine)	7536	I
25C–NBOMe (2-(4-chloro-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl) ethanamine)	7537	I
25I–NBOMe (2-(4-iodo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl) ethanamine)	7538	I
Methylone (3,4-Methylenedioxy-N-methylcathinone)	7540	I
Butylone	7541	I
Pentylone	7542	I
N-Ethypentylone, ephylone (1-(1,3-benzodioxol-5-yl)-2-(ethylamino)-pentan-1-one)	7543	I
Alpha-pyrrolidinohexanophenone (a-PHP)	7544	I
alpha-pyrrolidinopentiophenone (α-PVP)	7545	I
alpha-pyrrolidinobutiophenone (α-PBP)	7546	I
Ethylone	7547	I
Alpha-pyrrolidinoheptaphenone (PV8)	7548	I
AM–694 (1-(5-Fluoropentyl)-3-(2-iodobenzoyl) indole)	7694	I
Acetyldihydrocodeine	9051	I
Benzylmorphine	9052	I
Codeine-N-oxide	9053	I
Cyprenorphine	9054	I
Desomorphine	9055	I
Etorphine (except HCl)	9056	I
Codeine methylbromide	9070	I
Brorphine (1-(1-(1-(4-bromophenyl)ethyl)piperidin-4-yl)-1,3-dihydro-2H-benzo[d]imidazol-2-one)	9098	I
Dihydromorphine	9145	I
Difenoxin	9168	I
Heroin	9200	I
Hydromorphinol	9301	I
Methyldesorphine	9302	I
Methyldihydromorphine	9304	I
Morphine methylbromide	9305	I
Morphine methylsulfonate	9306	I
Morphine-N-oxide	9307	I
Myrophine	9308	I
Nicocodeine	9309	I
Nicomorphine	9312	I
Normorphine	9313	I
Pholcodine	9314	I
Thebacon	9315	I
Acetorphine	9319	I
Drotebanol	9335	I
U–47700 (3,4-dichloro-N-[2-(dimethylamino)cyclohexyl]-N-methylbenzamide)	9547	I
AH–7921 (3,4-dichloro-N-[(1-dimethylamino)cyclohexylmethyl]benzamide))	9551	I
MT–45 (1-cyclohexyl-4-(1,2-diphenylethyl)piperazine))	9560	I
Acetylmethadol	9601	I
Allylprodine	9602	I
Alphacetylmethadol except levo-alphacetylmethadol	9603	I
Alphameprodine	9604	I
Alphamethadol	9605	I
Benzethidine	9606	I
Betacetylmethadol	9607	I
Betameprodine	9608	I
Betamethadol	9609	I
Betaprodine	9611	I
Clonitazene	9612	I
Dextromoramide	9613	I
Isotonitazene (N,N-diethyl-2-(2-(4 isopropoxybenzyl)-5-nitro-1H-benzimidazol-1-yl)ethan-1-amine)	9614	I
Diampromide	9615	I
Diethylthiambutene	9616	I
Dimenoxadol	9617	I
Dimepheptanol	9618	I
Dimethylthiambutene	9619	I
Dioxaphetyl butyrate	9621	I

Controlled substance	Drug code	Schedule
Dipipanone	9622	I
Ethylmethylthiambutene	9623	I
Etonitazene	9624	I
Etoxeridine	9625	I
Furethidine	9626	I
Hydroxypethidine	9627	I
Ketobemidone	9628	I
Levomoramide	9629	I
Levophenacylmorphan	9631	I
Morpheridine	9632	I
Noracymethadol	9633	I
Norlevorphanol	9634	I
Normethadone	9635	I
Norpipanone	9636	I
Phenadoxone	9637	I
Phenampromide	9638	I
Phenoperidine	9641	I
Piritramide	9642	I
Proheptazine	9643	I
Properidine	9644	I
Racemoramide	9645	I
Trimeperidine	9646	I
Phenomorphan	9647	I
Propiram	9649	I
1-Methyl-4-phenyl-4-propionoxypiperidine	9661	I
1-(2-Phenylethyl)-4-phenyl-4-acetoxypiperidine	9663	I
Tilidine	9750	I
Acryl fentanyl (N-(1-phenethylpiperidin-4-yl)-N-phenylacrylamide)	9811	I
Para-Fluorofentanyl	9812	I
3-Methylfentanyl	9813	I
Alpha-methylfentanyl	9814	I
Acetyl-alpha-methylfentanyl	9815	I
N-(2-fluorophenyl)-N-(1-phenethylpiperidin-4-yl)propionamide	9816	I
Acetyl Fentanyl (N-(1-phenethylpiperidin-4-yl)-N-phenylacetamide)	9821	I
Butyryl Fentanyl	9822	I
Para-fluorobutyryl fentanyl	9823	I
4-Fluoroisobutyryl fentanyl (N-(4-fluorophenyl)-N-(1-phenethylpiperidin-4-yl)isobutyramide)	9824	I
2-methoxy-N-(1-phenethylpiperidin-4-yl)-N-phenylacetamide	9825	I
Para-chloroisobutyryl fentanyl	9826	I
Isobutyryl fentanyl	9827	I
Beta-hydroxyfentanyl	9830	I
Beta-hydroxy-3-methylfentanyl	9831	I
Alpha-methylthiofentanyl	9832	I
3-Methylthiofentanyl	9833	I
Furanyl fentanyl (N-(1-phenethylpiperidin-4-yl)-N-phenylfuran-2-carboxamide)	9834	I
Thiofentanyl	9835	I
Beta-hydroxythiofentanyl	9836	I
Para-methoxybutyryl fentanyl	9837	I
Ocfentanil	9838	I
Valeryl fentanyl	9840	I
N-(1-phenethylpiperidin-4-yl)-N-phenyltetrahydrofuran-2-carboxamide	9843	I
Crotonyl fentanyl ((E–N-(1-phenethylpiperidin-4-yl)-N-phenylbut-2-enamide)	9844	I
Cyclopropyl Fentanyl	9845	I
Cyclopentyl fentanyl	9847	I
Fentanyl related-compounds as defined in 21 CFR 1308.11(h)	9850	I
Phenmetrazine	1631	II
Methylphenidate	1724	II
Amobarbital	2125	II
Pentobarbital	2270	II
Secobarbital	2315	II
Glutethimide	2550	II
Dronabinol in an oral solution in a drug product approved for marketing by the U.S. Food and Drug Administration	7365	II
Nabilone	7379	II
1-Phenylcyclohexylamine	7460	II
Phencyclidine	7471	II
ANPP (4-Anilino-N-phenethyl-4-piperidine)	8333	II
Norfentanyl (N-phenyl-N-(piperidin-4-yl) propionamide)	8366	II
Phenylacetone	8501	II
1-Piperidinocyclohexanecarbonitrile	8603	II
Alphaprodine	9010	II
Anileridine	9020	II
Coca Leaves	9040	II
Cocaine	9041	II

Controlled substance	Drug code	Schedule
Etorphine HCl	9059	II
Dihydrocodeine	9120	II
Diphenoxylate	9170	II
Ecgonine	9180	II
Ethylmorphine	9190	II
Levomethorphan	9210	II
Levorphanol	9220	II
Isomethadone	9226	II
Meperidine	9230	II
Meperidine intermediate–A	9232	II
Meperidine intermediate–B	9233	II
Meperidine intermediate–C	9234	II
Metazocine	9240	II
Oliceridine (N-[(3-methoxythiophen-2yl)methyl] ({2-[9r)-9-(pyridin-2-yl)-6-oxaspiro [4.5]decan-9-yl]ethyl{time})amine fumarate).	9245	II
Metopon	9260	II
Dextropropoxyphene, bulk (non-dosage forms)	9273	II
Dihydroetorphine	9334	II
Opium tincture	9630	II
Opium, powdered	9639	II
Opium, granulated	9640	II
Noroxymorphone	9668	II
Phenazocine	9715	II
Thiafentanil	9729	II
Piminodine	9730	II
Racemethorphan	9732	II
Racemorphan	9733	II
Alfentanil	9737	II
Remifentanil	9739	II
Sufentanil	9740	II
Carfentanil	9743	II
Tapentadol	9780	II
Bezitramide	9800	II
Moramide-intermediate	9802	II

The company plans to import small quantities of the listed controlled substances for the National Institute on Drug Abuse for research activities. The company plans to import analytical reference standards for distribution to its customers for research and analytical purposes.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

William T. McDermott,

Assistant Administrator.

[FR Doc. 2021–08166 Filed 4–20–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–822]

Importer of Controlled Substances Application: Scottsdale Research Institute

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Scottsdale Research Institute has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTAL INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before May 21, 2021. Such persons may also file a written request for a hearing on the application on or before May 21, 2021.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing must be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on January 28, 2021, Scottsdale Research Institute, 5436 East Tapekim Road, Cave Creek, Arizona 85331, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Marihuana	7360	I
Tetrahydrocannabinols	7370	I
Psilocybin	7437	I
Psilocyn	7438	I

The company plans to import Marijuana (7360) and Tetrahydrocannabinols (7370) as

flowering plants to support analytical purposes, research, and the manufacturing of dosage forms for clinical trials. This notice does not constitute an evaluation or determination of the merits of the company's application.

The company plans to import fungi material from which Psilocybin (7437) and Psilocyn (7438) will be produced for further manufacturing prior to use in research and clinical trials. No other activity for these drug codes is authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

William T. McDermott,

Assistant Administrator.

[FR Doc. 2021–08162 Filed 4–20–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

[CPCLO Order No. 001–2021]

Privacy Act of 1974; Systems of Records

AGENCY: Justice Management Division, United States Department of Justice.

ACTION: Notice of a new system of records.

SUMMARY: Pursuant to the Privacy Act of 1974 and Office of Management and Budget (OMB) Circular No. A–108, notice is hereby given that the Justice Management Division, (JMD), a component within the United States Department of Justice (DOJ or ''the Department''), proposes to develop a new system of records notice titled, ''DOJ Personnel Public Health Emergency Records System,'' JUSTICE/JMD–025. JMD proposes to establish this system of records to protect the Department's workforce and respond to Coronavirus Disease 2019 (COVID–19), a declared public health emergency, and other high-consequence public health threats.

DATES: In accordance with 5 U.S.C. 552a(e)(4) and (11), this notice is effective upon publication, subject to a 30-day period in which to comment on the routine uses, described below. Please submit any comments by May 21, 2021.

ADDRESSES: The public, OMB, and Congress are invited to submit any comments by mail to the United States Department of Justice, Office of Privacy and Civil Liberties, ATTN: Privacy Analyst, Two Constitution Square (2CON), 145 N Street, NE, Suite 8W.300, Washington, DC 20530; by facsimile at 202–307–0693; or by email at *privacy.compliance@usdoj.gov.* To ensure proper handling, please reference the above CPCLO Order No. on your correspondence.

FOR FURTHER INFORMATION CONTACT: Michael H. Allen, Deputy Assistant Attorney General, Policy, Management, and Procurement, 950 Pennsylvania Avenue NW, Washington, DC 20530–0001, (202) 514–3101.

SUPPLEMENTARY INFORMATION: This system of records covers information necessary and relevant to Department activities responding to and mitigating COVID–19 and other high-consequence public health threats, and diseases or illnesses relating to a public health emergency. Such information may include information on Department personnel, including employees, interns, and contractors, who have contracted or may have been exposed to a suspected or confirmed disease or illness that is the subject of a declared public health emergency or who undergo preventative testing for, or receive a vaccination to prevent, a disease or illness that is the subject of a declared public health emergency, in accordance with federal, state, or local public health orders. The information collected may include identifying and contact information of individuals who have been suspected or confirmed to have contracted a disease or illness, or who have been exposed to an individual who had been suspected or confirmed to have contracted a disease or illness, related to a declared public health emergency; individual circumstances and dates of suspected exposure; testing results, symptoms, and treatments; vaccination records; health status information; and other information necessary and relevant to Department activities responding to and mitigating COVID–19 and other high-consequence public health threats and diseases or illnesses relating to a public health emergency. The Department maintains this information to understand the impact of an illness or disease on the Department workforce, and to assist in reducing the spread of the disease or illness among Department personnel. In certain instances, depending on the type of record collected and maintained, records maintained in this system of records may also be covered by Office of Personnel Management/Government-10 Employee Medical File System Records, 75 FR 35,099 (June 21, 2010). However, JUSTICE/JMD–025 covers additional records—specifically records collected in response to COVID–19, a high-consequence public health threat, as well as other declared public health emergencies.

When collecting information on Department employees, there are several employment laws that govern the collection, dissemination, and retention of employee medical information. These employment laws include the Americans with Disability Act (ADA), the Rehabilitation Act of 1973 (Rehab Act), and the Occupational Safety and Health Act of 1970 (OSH Act). Generally, under federal employment laws, medical information pertaining to employees is confidential and may be obtained by an employer only for certain reasons and only at certain points in the employment relationship. In response to a high-consequence public health threat such as COVID–19, or relating to other public health emergencies, an employer may be permitted to collect certain employee medical information that it would not otherwise be permitted to collect, depending upon the circumstances. This system of records will apply if it is determined that the circumstances permit the Department to legally collect the employee medical information at issue.

Further, this system of records notice (SORN) includes a reference to the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. 2000ff to ff-11. Title II of GINA prohibits employment discrimination based on genetic information, including family medical history; restricts the circumstances under which employers may lawfully acquire applicants' and employees' genetic information; and prohibits the disclosure of applicants' and employees' genetic information, with limited exceptions, including those stated in 42 U.S.C. 2000ff–5(b) and 29 CFR 1635.9(b). The Department may request the circumstances of an individual's suspected or actual exposure to a disease or illness, including the source of exposure. Although it is not the intent for the Department to collect family medical information, an individual may indicate that they were exposed to specific family members who have been diagnosed with, or are suspected to have, the disease or illness in question. To the extent this information may be acquired inadvertently, such information will be kept as a ''confidential medical record'' and maintained separately from an employee's general medical files,

pursuant to 42 U.S.C. 2000ff–5(a) and 29 CFR 1635.9(a).

In accordance with 5 U.S.C. 552a(r), the Department has provided a report to OMB and Congress on this new system of records.

Dated: April 16, 2021.

Peter A. Winn,

Acting Chief Privacy and Civil Liberties Officer,United States Department of Justice.

JUSTICE/JMD–025

SYSTEM NAME AND NUMBER:

DOJ Personnel Public Health Emergency Records System, JUSTICE/JMD–025.

SECURITY CLASSIFICATION:

Controlled Unclassified Information.

SYSTEM LOCATION:

Records may be maintained at all locations at which the Department of Justice (DOJ), or contractors on behalf of the Department, operate or at which DOJ operations are supported, including the Robert F. Kennedy Main Justice Department Building, 950 Pennsylvania Avenue NW, Washington, DC 20530–0001.

Additionally, records may be maintained electronically at one or more of the Department's data centers, including, but not limited to, one or more of the Department's Core Enterprise Facilities (CEF), including, but not limited to, the Department's CEF East, Clarksburg, WV 26306, or CEF West, Pocatello, ID 83201. Records within this system of records may be transferred to a Department-authorized cloud service provider within the Continental United States. Access to these electronic records may occur at any location at which the DOJ operates or where DOJ Office of the Chief Information Officer (OCIO) operations are supported. Some or all of the information in the system may be duplicated at other locations where the Department has granted direct access to support DOJ operations, system backup, emergency preparedness, and/or continuity of operations. To determine the location of a particular record maintained in this system of records, contact the system manager, whose contact information is listed in the ''SYSTEM MANAGER(S)'' paragraph, below.

SYSTEM MANAGER(S):

Michael H. Allen, Deputy Assistant Attorney General, Policy, Management and Procurement, 950 Pennsylvania Avenue NW, Washington, DC 20530–0001, (202) 514–3101.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Workforce safety federal requirements, including the Occupational Safety and Health Act of 1970, Executive Order No. 12,196, Occupational safety and health programs for Federal employees, 5 U.S.C. 7902; federal laws related to a specific public health emergency or high-consequence public health threat, including, Executive Order No. 13,994, Ensuring a Data-Driven Response to COVID–19 and Future High-Consequence Public Health Threats, and federal laws that authorize the Attorney General to create and maintain federal records of agency activities, including 5 U.S.C. 301 and 44 U.S.C. 3101.

PURPOSE(S) OF THE SYSTEM:

The purpose of this system is to maintain records necessary and relevant to Department activities responding to and mitigating COVID–19, other high-consequence public health threats, or diseases and illnesses relating to a public health emergency. Such records include those records needed to understand the impact of an illness or disease on the Department workforce, and to assist in protecting the Department's workforce from, and responding to, a declared public health emergency or other high-consequence public health threats. Among other things, DOJ may use the information collected to facilitate the provision of vaccines to DOJ personnel, including employees, interns, and contractors; to inform individuals who may have been in proximity of a person possibly infected with the disease or illness at or on buildings, grounds, and properties that are owned, leased, or used by the Department; or to confirm which personnel have received vaccinations to prevent such disease or illness to spread throughout the Department's workforce.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Department personnel, including employees, interns, and contractors.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records maintained in this system may include:

A. Full name, telephone number, worksite, email address, supervisor's name, address and contact information and/or the contractor's supervisor/contracting officer representative name, address and contact information;

B. Date(s) and circumstances of the individual's suspected or actual exposure to disease or illness including symptoms, as well as locations within the Department workplace where an individual may have contracted or been exposed to the disease or illness;

C. Other individual information directly related to the disease or illness (*e.g.* testing results/information, symptoms, treatments such as vaccines, and source of exposure);

D. Appointment scheduling information, including the date, time and location of a scheduled appointment.

E. Medical screening information, including the individual's name, date of birth, age, category of employment, current medical status, vaccination history, and any relevant medical history.

F. Vaccination records, including the date, type, and dose of vaccine administered to the individual.

RECORD SOURCE CATEGORIES:

Records may be obtained from DOJ personnel and contractors who may provide relevant information on a suspected or confirmed disease or illness, or the prevention of such disease or illness, which is the subject of a declared public health emergency. Information may also be sourced from personnel at medical facilities, or from existing systems of records, including but not limited to OPM/GOVT–10, Employee Medical File System Records, 75 FR 35,099 (June 21, 2010), and modified at 80 FR 74,815 (Nov. 30, 2015).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b), all or a portion of the records or information contained in this system of records may be disclosed as a routine use pursuant to 5 U.S.C. 552a(b)(3) under the circumstances or for the purposes described below, to the extent such disclosures are compatible with the purposes for which the information was collected:

A. To appropriate medical facilities, or federal, state, local, tribal, territorial or foreign government agencies, to the extent permitted by law, for the purpose of protecting the vital interests of individual(s), including to assist the United States Government in responding to or mitigating high-consequence public health threats, or diseases and illnesses relating to a public health emergency.

B. Where a record, either alone or in conjunction with other information, indicates a violation or potential violation of law—criminal, civil, or regulatory in nature—the relevant records may be referred to the appropriate federal, state, local, territorial, tribal, or foreign law

enforcement authority or other appropriate entity charged with the responsibility for investigating or prosecuting such violation or charged with enforcing or implementing such law.

C. In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body, when the Department determines that the records are arguably relevant to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

D. To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the Federal Government, when necessary to accomplish an agency function related to this system of records.

E. To a former employee of the Department for purposes of: responding to an official inquiry by a federal, state, or local government entity or professional licensing authority, in accordance with applicable Department regulations; or facilitating communications with a former employee that may be necessary for personnel-related or other official purposes where the Department requires information and/or consultation assistance from the former employee regarding a matter within that person's former area of responsibility.

F. To Federal, state, local, territorial, tribal, foreign, or international licensing agencies or associations which require information concerning the suitability or eligibility of an individual for a license or permit.

G. To a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

H. To the National Archives and Records Administration for purposes of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

I. To appropriate agencies, entities, and persons when (1) the Department suspects or has confirmed that there has been a breach of the system of records; (2) the Department has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department (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 the Department's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

J. To another Federal agency or Federal entity, when the Department 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.

K. To any agency, organization, or individual for the purpose of performing authorized audit or oversight operations of the Department and meeting related reporting requirements.

L. To such recipients and under such circumstances and procedures as are mandated by Federal statute or treaty.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

All records in this system of records are maintained electronically and in paper and are in compliance with applicable executive orders, statutes, and agency implementing recommendations. Electronic records are stored in databases and/or on hard disks, removable storage devices, or other electronic media.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

The Department will retrieve records by any of the categories of records, including name, location, date of vaccination, or work status.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

To the extent applicable, to ensure compliance with Americans with Disabilities Act (ADA), the Rehabilitation Act, and the Genetic Information Nondiscrimination Act of 2008 (GINA), medical information must be ''maintained on separate forms and in separate medical files and be treated as a confidential medical record.'' 42 U.S.C. 12112(d)(3)(B); 42 U.S.C. sec 2000ff–5(a); 29 CFR 1630.14(b)(1), (c)(1), (d)(4)(i); and 29 CFR 1635.9(a). This means that medical information and documents must be stored separately from other personnel records. As such, the Department must keep medical records for at least one year from creation date. 29 CFR 1602.14. Further, records compiled under this SORN will be maintained in accordance with NARA General Records Schedule (GRS) 2.7, Items 010, 070 or 080, and NARA records retention schedules DAA–GRS2017–0010–0001, DAA–GRS2017–0010–0012, and DAA–GRS2017–0010–0013, to the extent applicable.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The Department safeguards records in this system according to applicable rules and polices, including all applicable DOJ automated systems security and access policies. The Department has imposed strict controls to minimize the risk of compromising the information that is being stored. Users of individual computers can only gain access to the data by a valid user identification and password. Paper records are maintained in a secure, access-controlled room, with access limited to authorized personnel.

RECORD ACCESS PROCEDURES:

All requests for access to records must be in writing and should be addressed to the Justice Management Division, ATTN: FOIA Contact, Department of Justice, Rm. 1111, 950 Pennsylvania Avenue NW, Washington, DC 20530–000, phone: 202–514–3101, email: *JMDFOIA@usdoj.gov.* The envelope and letter should be clearly marked ''Privacy Act Access Request.'' The request must describe the records sought in sufficient detail to enable Department personnel to locate them with a reasonable amount of effort. The request must include a general description of the records sought and must include the requester's full name, current address, and date and place of birth. The request must be signed and either notarized or submitted under penalty of perjury. Some information may be exempt from the access provisions as described in the ''EXEMPTIONS PROMULGATED FOR THE SYSTEM'' paragraph, below. An individual who is the subject of a record in this system of records may access those records that are not exempt from access. A determination whether a record may be accessed will be made at the time a request is received.

Although no specific form is required, you may obtain forms for this purpose from the FOIA/Privacy Act Mail Referral Unit, United States Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530, or on the Department of Justice website at *https://www.justice.gov/oip/oip-request.html.*

More information regarding the Department's procedures for accessing records in accordance with the Privacy Act can be found at 28 CFR part 16 Subpart D, ''Protection of Privacy and Access to Individual Records Under the Privacy Act of 1974.''

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest or amend records maintained in this system of records must direct their requests to the address indicated in the ''RECORD ACCESS PROCEDURES'' paragraph, above. All requests to contest or amend records must be in writing and the envelope and letter should be clearly marked ''Privacy Act Amendment Request.'' All requests must state clearly and concisely what record is being contested, the reasons for contesting it, and the proposed amendment to the record. Some information may be exempt from the amendment provisions as described in the ''EXEMPTIONS PROMULGATED FOR THE SYSTEM'' paragraph, below. An individual who is the subject of a record in this system of records may contest or amend those records that are not exempt. A determination of whether a record is exempt from the amendment provisions will be made after a request is received.

More information regarding the Department's procedures for amending or contesting records in accordance with the Privacy Act can be found at 28 CFR 16.46, ''Requests for Amendment or Correction of Records.''

NOTIFICATION PROCEDURES:

Individuals may be notified if a record in this system of records pertains to them when the individuals request information utilizing the same procedures as those identified in the ''RECORD ACCESS PROCEDURES'' paragraph, above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

None.

[FR Doc. 2021–08273 Filed 4–20–21; 8:45 am]

BILLING CODE 4410–NW–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Submission for OMB Review, Comment Request, Proposed Collection: 2022–2024 National Medal for Museum and Library Service Nomination Form

AGENCY: Institute of Museum and Library Services, National Foundation for 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. This Notice proposes the clearance of the web-based National Medal for Museum and Library Service Nomination Form. 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 **ADDRESSES** section below on or before May 22, 2021.

OMB is particular 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. Once you have found this information collection request, select ''Comment,'' and enter or upload your comment and information. Alternatively, please mail your written comments to Office of Information and Regulatory Affairs, Attn.: OMB Desk Officer for Education, Office of Management and Budget, Room 10235, Washington, DC 20503, or call (202) 395–7316.

FOR FURTHER INFORMATION CONTACT: 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 at 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. Persons who are deaf or hard of hearing (TTY users) can contact IMLS via Federal Relay at 800–877–8339.

SUPPLEMENTARY INFORMATION: The Institute of Museum and Library Services (IMLS) 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. To learn more, visit *www.imls.gov.*

Current Actions: This Notice proposes renewal of the clearance for the web-based form for nominating an organization for the National Medal for Museum and Library Service award for the next three years. The award is the nation's highest honor for institutions that make significant and exceptional contributions to their communities. Since 1994, IMLS has presented the award to institutions that demonstrate extraordinary and innovative approaches to community service. Recipient institutions are honored at an awards ceremony held virtually when necessary and in person in Washington DC when conditions permit. The 60-Day Notice was published in the **Federal Register** on January 8, 2021 (86 FR 1536). One comment was received.

Agency: Institute of Museum and Library Services.

Title of Collection: 2022–2024 National Medal for Museum and Library Service Nomination Form.

OMB Control Number: 3137–0097.

Agency Number: 3137.

Affected Public: Library and Museum applicants.

Total Estimated Number of Annual Responses: 175.

Frequency of Response: Once per year.

Average Hours per Response: 9.

Total Estimated Number of Annual Burden Hours: 1,575.

Total Annual Cost Burden: $47,407.50.

Total Annual Federal Costs: $7,628.25.

Dated: April 16, 2021.

Kim Miller,

Senior Grants Management Specialist, Institute of Museum and Library Services.

[FR Doc. 2021–08234 Filed 4–20–21; 8:45 am]

BILLING CODE 7036–01–P

THE NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Notice of Proposed Information Collection Requests: 2022–2024 IMLS Grants to States Program State Program Reporting System 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. By this notice, IMLS is soliciting comments concerning a plan to continue the IMLS Grants to States Program State Program Reporting System (SPR) electronic data collection which supports both the financial and performance reporting for all grantees. 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 June 20, 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 at 202–653–4636, 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. Persons who are deaf or hard of hearing (TTY users) can contact IMLS at 202–207–7858 via 711 for TTY-Based Telecommunications Relay Service.

FOR FURTHER INFORMATION CONTACT: Teresa DeVoe, Associate Deputy Director—State Programs, Office of Library Services, Institute of Museum and Library Services, 955 L'Enfant Plaza North, SW, Suite 4000, Washington, DC 20024–2135. Ms. DeVoe can be reached by telephone at 202–653–4778, by email at *tdevoe@imls.gov.*

SUPPLEMENTARY INFORMATION: IMLS is particularly interested in public 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 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. To learn more, visit *www.imls.gov.*

II. Current Actions

The Grants to States program is the largest source of Federal funding support for library services in the U.S. Using a population-based formula, more than $160 million is distributed among the State Library Administrative Agencies (SLAAs) every year. SLAAs are official agencies charged by law with the extension and development of library services, and they are located in each of the 50 States of the United States, the District of Columbia, the five Territories, and the three Freely Associated States.

This action is to renew clearance of the forms and instructions for the IMLS State Program Reporting System for the next three years. These forms include SPR Reporting System User Documentation; Grants to States Program Report; Financial Status Report; SPR Phase 3 Reporting; State Legal Officer's Certification of the Authorized Certifying Official; and internet Safety Certification for Applicant Public Libraries, Public Elementary and Secondary School Libraries, and Consortia with Public and/or Public School Libraries.

Agency: Institute of Museum and Library Services.

Title: 2022–2024 IMLS Grants to States Program State Program Reporting System Forms.

OMB Number: 3137–0071.

Frequency: 1 time per year.

Affected Public: State Library Administrative Agencies (SLAAs).

Number of Respondents: 59.

Estimated Average Burden per Response in hours: 47.83.

Estimated Total Annual Burden in hours: 2,821.97.

Total Annualized capital/startup costs: n/a

Total Annual costs: $86,239.40.

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: April 16, 2021.

Kim Miller,

Senior Grants Management Specialist, Institute of Museum and Library Services.

[FR Doc. 2021–08254 Filed 4–20–21; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Application of Emergency Provision Under the Antarctic Conservation Act

AGENCY: National Science Foundation.

ACTION: Notice of application of emergency provision for hazardous waste to be stored at McMurdo Station, Antarctica for more than 15 months due to an emergency, pursuant to 45 CFR 671.17.

SUMMARY: The Office of Polar Programs, National Science Foundation, is giving notice that an emergency relating to considerations of human health and safety caused hazardous waste to be stored at McMurdo Station for more than 15 months. Hazardous waste in the form of batteries, regulated medical waste, laboratory chemical waste, gas cylinders, paints and solvents, petroleum-based compounds and fuel contaminated soils, with an aggregate of

approximately 385,000 lbs. net weight, was, consistent with waste management best practices, segregated, packaged, and stored in a secured location for removal from the station.

SUPPLEMENTARY INFORMATION: The waste was to be removed in February 2021, at the end of the 2021–2021 season. Due to the world-wide pandemic, the United States Antarctic Program severely curtailed its activities on the continent and directed efforts to activities required to ensure the safe and continuous operation of all three USAP stations and activities required to avoid irreversible damage to science or operational infrastructure. In order to minimize the risk of introducing COVID–19 to the Antarctic continent, personnel was reduced to a minimum and the annual ships for resupply and waste removal were cancelled for the season. The removal of the hazardous waste is a priority for removal during the January-February 2022 time period.

FOR FURTHER INFORMATION CONTACT: Dr. Polly A. Penhale, Senior Advisor, Environment at 703–292–7420.

Authority: 45 CFR 671.17.

Erika N. Davis,

Program Specialist, Office of Polar Programs.

[FR Doc. 2021–08186 Filed 4–20–21; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2021–0048]

Role of Artificial Intelligence Tools in U.S. Commercial Nuclear Power Operations

AGENCY: Nuclear Regulatory Commission.

ACTION: Request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is requesting public comment on the current state of commercial nuclear power operations relative to the use of artificial intelligence (AI) and machine learning (ML) tools.

DATES: Submit comments by May 21, 2021. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal Rulemaking website:

• *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2021–0048. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: John C. Lane, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–2476, email: *John.Lane@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2021–0048 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–2021–0048.

• *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, at 301–415–4737, or by email to *pdr.resource@nrc.gov.* The AI/ML general solicitation request for comment is also available in ADAMS under Accession No. ML21085A611.

• *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 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal Rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2021–0048 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Discussion

The NRC is exploring the potential for advanced computational and predictive capabilities involving AI and ML in the various phases of nuclear power generation operational experience and plant management. The NRC is soliciting comments on the state of practice, benefits, and future trends related to the advanced computational tools and techniques in predictive reliability and predictive safety assessments in the commercial nuclear power industry.

III. Specific Request for Comment

The NRC requests comments from the public, the nuclear industry and other stakeholders, as well as other interested individuals and organizations. The focus of this request is to gather information that will provide the NRC staff with a better understanding of current usage and future trends in AI and ML in the commercial nuclear power industry.

IV. Requested Information and Comments

AI and ML are emerging, analytical tools, which, if used properly, show promise in their ability to improve reactor safety, yet offer economic savings. The NRC requests comments on issues listed below in this solicitation to enhance the NRC's understanding of the short- and long-term applications of AI

and ML in nuclear power industry operations and management, as well as potential pitfalls and challenges associated with their application.

1. What is status of the commercial nuclear power industry development or use of AI/ML tools to improve aspects of nuclear plant design, operations or maintenance or decommissioning? What tools are being used or developed? When are the tools currently under development expected to be put into use?

2. What areas of commercial nuclear reactor operation and management will benefit the most, and the least, from the implementation of AI/ML? Possible examples include, but are not limited to, inspection support, incident response, power generation, cybersecurity, predictive maintenance, safety/risk assessment, system and component performance monitoring, operational/maintenance efficiency and shutdown management.

3. What are the potential benefits to commercial nuclear power operations of incorporating AI/ML in terms of (a) design or operational automation, (b) preventive maintenance trending, and (c) improved reactor operations staff productivity?

4. What AI/ML methods are either currently being used or will be in the near future in commercial nuclear plant management and operations? Example of possible AI/ML methods include, but are not limited to, artificial neural networks, decision trees, random forests, support vector machines, clustering algorithms, dimensionality reduction algorithms, data mining and content analytics tools, gaussian processes, Bayesian methods, natural language processing, and image digitization.

5. What are the advantages or disadvantages of a high-level, top-down strategic goal for developing and implementing AI/ML across a wide spectrum of general applications versus an ad-hoc, case-by-case targeted approach?

6. With respect to AI/ML, what phase of technology adoption is the commercial nuclear power industry currently experiencing and why? The current technology adoption model characterizes phases into categories such as: the innovator phase, the early adopter phase, the early majority phase, the late majority phase, and the laggard phase.

7. What challenges are involved in balancing the costs associated with the development and application of AI/ML tools, against plant operational and engineering benefits when integrating AI/ML into operational decision-making and workflow management?

8. What is the general level of AI/ML expertise in the commercial nuclear power industry (*e.g.* expert, well-versed/skilled, or beginner)?

9. How will AI/ML effect the commercial nuclear power industry in terms of efficiency, costs, and competitive positioning in comparison to other power generation sources?

10. Does AI/ML have the potential to improve the efficiency and/or effectiveness of nuclear regulatory oversight or otherwise affect regulatory costs associated with safety oversight? If so, in what ways?

11. AI/ML typically necessitates the creation, transfer and evaluation of very large amounts of data. What concerns, if any, exist regarding data security in relation to proprietary nuclear plant operating experience and design information that may be stored in remote, offsite networks?

Dated: April 15, 2021.

For the Nuclear Regulatory Commission.

Mehdi Reisi Fard,

Chief, Performance and Reliability Branch, Division of Risk Analysis, Office of Nuclear Regulatory Research.

[FR Doc. 2021–08177 Filed 4–20–21; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on the Medical Uses of Isotopes: Meeting Notice

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Notice of Meeting.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) will convene a public teleconference meeting of the Advisory Committee on the Medical Uses of Isotopes (ACMUI) on May 27, 2021, to discuss the NRC staff's assessment of medical related events for fiscal year 2020 and the ACMUI Abnormal Occurrence Subcommittee's draft report on the proposed limited revisions to abnormal occurrence criteria for medical events. The meeting agenda is subject to change. Meeting information, including a copy of the agenda and related documents, will be available on the ACMUI's Meetings and Related Documents web page at *https://www.nrc.gov/reading-rm/doc-collections/acmui/meetings/2021.html.* The agenda and related meeting documents may also be obtained by contacting Ms. Kellee Jamerson using the information below.

DATES: The teleconference meeting will be held on Thursday, May 27, 2021, 1:00 p.m. to 5:00 p.m. Eastern Daylight Time.

Date	Webinar information
May 27, 2021 ...	Link: *https://usnrc.webex.com* Event number: 199 574 5068.

Public Participation: The meeting will be held as a webinar using Cisco WebEx. Any member of the public who wishes to participate in any portion of this meeting should register in advance of the meeting by accessing the provided link above. Upon successful registration, a confirmation email will be generated providing the telephone bridge line and a link to join the webinar on the day of the meeting. Members of the public should also monitor the NRC's Public Meeting Schedule at *https://www.nrc.gov/pmns/mtg* for any meeting updates. If there are any questions regarding the meeting, persons should contact Ms. Jamerson using the information below.

Contact Information: Kellee Jamerson, email: *Kellee.Jamerson@nrc.gov,* telephone: 301–415–7408.

Conduct of the Meeting

The ACMUI Chair, Darlene F. Metter, M.D., will preside over the meeting. Dr. Metter will conduct the meeting in a manner that will facilitate the orderly conduct of business. The following procedures apply to public participation in the meeting:

1. Persons who wish to provide a written statement should submit an electronic copy to Ms. Jamerson at the contact information listed above. All written statements must be received by May 24, 2021, three business days prior to the meeting, and must pertain to the topics on the agenda for the meeting.

2. Questions and comments from members of the public will be permitted during the meeting, at the discretion of the ACMUI Chairman.

3. The draft transcript and meeting summary will be available on ACMUI's website *https://www.nrc.gov/reading-rm/doc-collections/acmui/meetings/2021.html* on or about July 9, 2021.

4. Persons who require special services, such as those for the hearing impaired, should notify Ms. Jamerson of their planned participation.

This meeting will be held in accordance with the Atomic Energy Act of 1954, as amended (primarily Section 161a); the Federal Advisory Committee Act (5 U.S.C. App); and the Commission's regulations in 10 CFR part 7.

Dated at Rockville, Maryland, this 15th day of April 2021.

For the U.S. Nuclear Regulatory Commission.

Russell E. Chazell,

Federal Advisory Committee Management Officer.

[FR Doc. 2021–08172 Filed 4–20–21; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Excepted Service

AGENCY: Office of Personnel Management (OPM).

ACTION: Notice.

SUMMARY: This notice identifies Schedule A, B, and C appointing authorities applicable to a single agency that were established or revoked from February 1, 2021 to February 28, 2021.

FOR FURTHER INFORMATION CONTACT: Julia Alford, Senior Executive Resources Services, Senior Executive Services and Performance Management, Employee Services, 202–606–2246.

SUPPLEMENTARY INFORMATION: In accordance with 5 CFR 213.103, Schedule A, B, and C appointing authorities available for use by all agencies are codified in the Code of Federal Regulations (CFR). Schedule A, B, and C appointing authorities applicable to a single agency are not codified in the CFR, but the Office of Personnel Management (OPM) publishes a notice of agency-specific authorities established or revoked each month in the **Federal Register** at *www.gpo.gov/fdsys/.* OPM also publishes an annual notice of the consolidated listing of all Schedule A, B, and C appointing authorities, current as of June 30, in the **Federal Register**.

Schedule A

No Schedule B Authorities to report during February 2021.

Schedule B

No Schedule B Authorities to report during February 2021.

Schedule C

The following Schedule C appointing authorities were approved during February 2021.

Agency name	Organization name	Position title	Authorization No.	Effective date
DEPARTMENT OF AGRICULTURE	Office of the Assistant Secretary for Congressional Relations.	Legislative Analyst	DA210070	02/01/2021
	Agricultural Marketing Service	Senior Advisor for Fair and Competitive Markets.	DA210086	02/12/2021
	Farm Service Agency	Senior Policy Advisor	DA210079	02/04/2021
	Foreign Agricultural Service	Policy Advisor	DA210089	02/23/2021
	Office of the Assistant Secretary for Administration.	Senior Advisor for Data and Technology.	DA210085	02/12/2021
	Rural Utilities Service	Senior Policy Advisor	DA210080	02/04/2021
DEPARTMENT OF COMMERCE	Immediate Office	Executive Assistant	DC210081	02/05/2021
		Senior Advisor (Upskilling and Broadband).	DC210076	02/10/2021
	Office of Advance, Scheduling and Protocol.	Scheduler	DC210079	02/05/2021
	Office of Policy and Strategic Planning.	Policy Advisor	DC210083	02/05/2021
		Deputy Director, Office of Policy and Strategic Planning.	DC210086	02/10/2021
		Senior Advisor	DC210087	02/25/2021
	Office of the Deputy Secretary	Special Assistant	DC210080	02/05/2021
DEPARTMENT OF DEFENSE	Office of the Assistant Secretary of Defense (Legislative Affairs).	Special Assistant (2)	DD210191	02/12/2021
			DD210193	02/12/2021
	Office of the Assistant to the Secretary of Defense (Public Affairs).	Deputy Press Secretary	DD210204	02/18/2021
		Director of Digital Media	DD210173	02/02/2021
		Research Assistant	DD210199	02/18/2021
		Speechwriter (2)	DD210175	02/02/2021
			DD210205	02/25/2021
	Office of the Secretary of Defense	Deputy Director of Protocol	DD210194	02/12/2021
		Special Assistant (3)	DD210178	02/02/2021
			DD210186	02/12/2021
			DD210200	02/18/2021
	Office of the Under Secretary of Defense (Acquisition and Sustainment).	Special Assistant (4)	DD210170	02/02/2021
			DD210174	02/02/2021
			DD210189	02/12/2021
			DD210192	02/12/2021
	Office of the Under Secretary of Defense (Personnel and Readiness).	Special Assistant	DD210177	02/02/2021
	Office of the Under Secretary of Defense (Policy).	Special Assistant (3)	DD210172	02/02/2021
			DD210180	02/02/2021
			DD210202	02/18/2021
DEPARTMENT OF THE AIR FORCE.	Office of the General Counsel	Attorney Advisor/Special Assistant	DF210007	02/16/2021
	Office of the Secretary	Special Assistant	DF210008	02/16/2021
	Office of the Under Secretary	Special Assistant	DF210009	02/16/2021
DEPARTMENT OF THE ARMY	Office of the General Counsel	Attorney Advisor	DW210009	02/11/2021
	Office Assistant Secretary Army (Civil Works).	Special Assistant	DW210010	02/11/2021

Agency name	Organization name	Position title	Authorization No.	Effective date
	Office of the Secretary	Special Assistant	DW210011	02/11/2021
DEPARTMENT OF THE NAVY	Office of the Secretary of the Navy	Special Assistant	DN210016	02/05/2021
DEPARTMENT OF EDUCATION	Office of Communications and Outreach.	Special Assistant	DB210056	02/11/2021
		Press Secretary	DB210061	02/11/2021
		Senior Director of Digital Strategy	DB210063	02/16/2021
	Office of Elementary and Secondary Education.	Chief of Staff	DB210055	02/04/2021
		Special Assistant	DB210066	02/23/2021
	Office of Legislation and Congressional Affairs.	Chief of Staff	DB210035	02/04/2021
	Office of Planning, Evaluation and Policy Development.	Special Assistant	DB210054	02/04/2021
		Chief of Staff	DB210058	02/19/2021
	Office of Special Education and Rehabilitative Services.	Special Assistant	DB210073	02/18/2021
	Office of the Secretary	Confidential Assistant (3)	DB210052	02/01/2021
			DB210070	02/18/2021
			DB210074	02/26/2021
		Deputy Chief of Staff (2)	DB210060	02/12/2021
			DB210072	02/18/2021
		Deputy White House Liaison	DB210051	02/01/2021
		Director of Advance	DB210071	02/18/2021
	Office of the Under Secretary	Confidential Assistant	DB210059	02/11/2021
ENVIRONMENTAL PROTECTION AGENCY.	Office of Public Affairs	Public Affairs Specialist	EP210084	02/10/2021
		Writer-Editor (Speechwriter)	EP210074	02/26/2021
	Office of Public Engagement and Environmental Education.	Special Assistant	EP210077	02/25/2021
	Office of the Administrator	Advance Specialist	EP210076	02/04/2021
		Deputy Chief of Staff for Operations.	EP210049	02/03/2021
		Deputy White House Liaison	EP210051	02/03/2021
		Director of Scheduling and Advance.	EP210050	02/03/2021
		Special Assistant	EP210024	02/01/2021
		White House Liaison	EP210013	02/01/2021
	Office of the Assistant Administrator for Air and Radiation.	Special Assistant	EP210072	02/04/2021
	Office of the Assistant Administrator for Chemical Safety and Pollution Prevention.	Special Assistant	EP210073	02/04/2021
	Office of the Assistant Administrator for Land and Emergency Management.	Special Assistant	EP210075	02/04/2021
	Office of the Assistant Administrator for Water.	Special Assistant	EP210083	02/04/2021
	Office of the Associate Administrator for Congressional and Intergovernmental Relations.	Deputy Associate Administrator for Intergovernmental Affairs.	EP210014	02/01/2021
	Office of the Associate Administrator for Policy.	Special Assistant	EP210070	02/04/2021
GENERAL SERVICES ADMINISTRATION.	Office of Congressional and Intergovernmental Affairs.	Policy Advisor (2)	GS210028	02/01/2021
			GS210030	02/12/2021
	Office of the Administrator	Senior Advisor	GS210031	02/12/2021
		White House Liaison	GS210032	02/12/2021
DEPARTMENT OF HEALTH AND HUMAN SERVICES.	Indian Health Service	Senior Advisor	DH210073	02/02/2021
	Office for Civil Rights	Senior Advisor	DH210125	02/17/2021
	Office of Global Affairs	Special Assistant	DH210076	02/02/2021
	Office of Intergovernmental and External Affairs.	Confidential Assistant	DH210106	02/12/2021
		Senior Advisor	DH210124	02/17/2021
	Office of Refugee Resettlement/Office of the Director.	Special Assistant	DH210105	02/12/2021
		Chief of Staff	DH210112	02/12/2021
	Office of the Assistant Secretary for Administration.	Special Assistant	DH210097	02/05/2021
	Office of the Assistant Secretary for Health.	Senior Advisor and Director of Scheduling and Advance.	DH210114	02/12/2021
			DH210130	02/17/2021
		Special Advisor		
	Office of the Assistant Secretary for Legislation.	Special Assistant	DH210108	02/12/2021
	Office of the Assistant Secretary for Preparedness and Response.	Special Assistant COVID Response.	DH210121	02/17/2021
	Office of the Assistant Secretary for Public Affairs.	Press Assistant	DH210095	02/05/2021
		Press Secretary (2)	DH210096	02/05/2021
			DH210115	02/12/2021

Agency name	Organization name	Position title	Authorization No.	Effective date
		National Press Secretary (COVID)	DH210116	02/12/2021
	Office of the National Coordinator for Health Information Technology.	Special Assistant	DH210074	02/02/2021
	Office of the Secretary	Deputy Chief of Staff, COVID Response.	DH210075	02/02/2021
		Deputy White House Liaison	DH210100	02/12/2021
		Executive Assistant and Briefing Book Coordinator.	DH210102	02/12/2021
		Senior Advisor	DH210109	02/12/2021
		Special Assistant for Scheduling	DH210099	02/08/2021
		White House Liaison	DH210059	02/02/2021
DEPARTMENT OF HOMELAND SECURITY.	Office for Civil Rights and Civil Liberties.	Advisor	DM210170	02/26/2021
	Office of Legislative Affairs	Director of Legislative Affairs	DM210157	02/17/2021
	Office of Public Affairs	Communications Director	DM210173	02/26/2021
	United States Citizenship and Immigration Services.	Counselor (Special Projects)	DM210172	02/16/2021
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.	Office of Fair Housing and Equal Opportunity.	Special Assistant	DU210049	02/03/2021
DEPARTMENT OF THE INTERIOR	Office of the Assistant Secretary—Fish and Wildlife and Parks.	Special Assistant, Fish and Wildlife and Parks.	DI210098	02/12/2021
	Office of the Assistant Secretary—Land and Minerals Management.	Special Assistant, Land and Minerals Management.	DI210069	02/12/2021
	Office of the Assistant Secretary—Policy, Management and Budget.	Special Assistant, Policy, Management and Budget.	DI210094	02/13/2021
	Bureau of Land Management	Special Assistant, Bureau of Land Management.	DI210091	02/13/2021
	Bureau of Ocean Energy Management.	Advisor, Bureau of Ocean Energy Management.	DI210086	02/12/2021
	Bureau of Reclamation	Special Assistant	DI210093	02/13/2021
	National Park Service	Special Assistant, National Park Service.	DI210092	02/13/2021
	Secretary's Immediate Office	Advance Representative	DI210096	02/13/2021
		Deputy Director of Congressional Affairs—House.	DI210085	02/11/2021
		Deputy Director of Congressional Affairs—Senate.	DI210068	02/11/2021
		Deputy White House Liaison	DI210095	02/13/2021
		Digital Director	DI210036	02/25/2021
		Director of Scheduling and Advance.	DI210104	02/17/2021
		Director, Intergovernmental and External Affairs.	DI210100	02/16/2021
		Press Secretary	DI210066	02/11/2021
		Special Assistant (3)	DI210048	02/26/2021
			DI210097	02/13/2021
			DI210063	02/26/2021
		White House Liaison	DI210065	02/12/2021
	United States Fish and Wildlife Service.	Special Assistant, Fish and Wildlife Service.	DI210070	02/16/2021
DEPARTMENT OF JUSTICE	Office of the Deputy Attorney General.	Special Assistant	DJ210077	02/02/2021
DEPARTMENT OF LABOR	Office of the Secretary	Director of Scheduling and Advance.	DL210071	02/04/2021
		Special Assistant (2)	DL210072	02/04/2021
			DL210073	02/04/2021
	Office of Congressional and Intergovernmental Affairs.	Legislative Officer	DL210054	02/08/2021
NATIONAL ENDOWMENT FOR THE HUMANITIES.	National Endowment for the Humanities.	Chief of Staff	NH210002	02/08/2021
		White House Liaison and Chairman Strategic Scheduler.	NH210003	02/08/2021
		Supervisory Public Affairs Specialist.	NH210004	02/08/2021
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION.	Office of Commissioners	Counsel	SH210003	02/10/2021
OFFICE OF MANAGEMENT AND BUDGET.	Office of the Director	Confidential Assistant	BO210056	02/01/2021
	Office of Communications	Deputy Associate Director for Communications.	BO210022	02/02/2021
OFFICE OF PERSONNEL MANAGEMENT.	Office of the Director	Special Assistant	PM210038	02/16/2021

Agency name	Organization name	Position title	Authorization No.	Effective date
		Press Secretary	PM210040	02/16/2021
		White House Liaison	PM210041	02/23/2021
SMALL BUSINESS ADMINISTRATION.	Office of Communications and Public Liaison.	Deputy Associate Administrator for Communication and Public Liaison.	SB210017	02/08/2021
		Special Advisor	SB210009	02/04/2021
	Office of the Administrator	Confidential Assistant	SB210023	02/18/2021
SOCIAL SECURITY ADMINISTRATION.	Office of the Commissioner	Senior Advisor	SZ210021	02/23/2021
DEPARTMENT OF THE TREASURY.	Secretary of the Treasury	Deputy White House Liaison	DY210064	02/12/2021
DEPARTMENT OF VETERANS AFFAIRS.	Office of the Secretary and Deputy	Special Assistant	DV210035	02/04/2021
	Office of the Assistant Secretary for Congressional and Legislative Affairs.	Special Assistant	DV210034	02/05/2021

The were no Schedule C appointing authorities revoked during February 2021.

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2021–08155 Filed 4–20–21; 8:45 am]

BILLING CODE 6325–39–P

OFFICE OF PERSONNEL MANAGEMENT

Excepted Service

AGENCY: Office of Personnel Management (OPM).

ACTION: Notice.

SUMMARY: This notice identifies Schedule A, B, and C appointing authorities applicable to a single agency that were established or revoked from January 1, 2021 to January 31, 2021.

FOR FURTHER INFORMATION CONTACT: Julia Alford, Senior Executive Resources Services, Senior Executive Services and Performance Management, Employee Services, 202–606–2246.

SUPPLEMENTARY INFORMATION: In accordance with 5 CFR 213.103, Schedule A, B, and C appointing authorities available for use by all agencies are codified in the Code of Federal Regulations (CFR). Schedule A, B, and C appointing authorities applicable to a single agency are not codified in the CFR, but the Office of Personnel Management (OPM) publishes a notice of agency-specific authorities established or revoked each month in the **Federal Register** at *www.gpo.gov/fdsys/*. OPM also publishes an annual notice of the consolidated listing of all Schedule A, B, and C appointing authorities, current as of June 30, in the **Federal Register**.

Schedule A

No Schedule B Authorities to report during January 2021.

Schedule B

No Schedule B Authorities to report during January 2021.

Schedule C

The following Schedule C appointing authorities were approved during January 2021.

Agency name	Organization name	Position title	Authorization No.	Effective date
DEPARTMENT OF AGRICULTURE	Food and Nutrition Service	Senior Advisor	DA210061	01/20/2021
	Office of Communications	Director of Scheduling and Advance.	DA210059	01/20/2021
		Confidential Assistant	DA210060	01/20/2021
		Scheduler	DA210063	01/20/2021
		Deputy Director of Communications.	DA210071	01/29/2021
	Office of the Assistant Secretary for Congressional Relations.	Confidential Assistant (2)	DA210047	01/20/2021
			DA210048	01/20/2021
		Legislative Director	DA210064	01/20/2021
	Office of the Secretary	Senior Advisor	DA210056	01/20/2021
		White House Liaison	DA210041	01/20/2021
		Senior Advisor for COVID	DA210057	01/20/2021
		Deputy White House Liaison	DA210065	01/20/2021
	Office of the Under Secretary for Farm Production and Conservation.	Confidential Assistant	DA210046	01/20/2021
		Senior Advisor	DA210055	01/20/2021
	Office of the Under Secretary for Rural Development.	Senior Advisor	DA210058	01/20/2021
	Rural Business Service	Chief of Staff (2)	DA210062	01/20/2021
			DA210067	01/20/2021
DEPARTMENT OF COMMERCE	Bureau of Industry and Security	Senior Advisor	DC210040	01/20/2021
		Congressional Affairs Specialist	DC210066	01/20/2021
		Chief of Staff	DC210070	01/26/2021
	Bureau of the Census	Chief of Congressional Affairs	DC210061	01/20/2021
	Office of Economic Development Administration.	Director of Public Affairs	DC210045	01/20/2021

Agency name	Organization name	Position title	Authorization No.	Effective date
	National Oceanic and Atmospheric Administration.	Special Assistant	DC210047	01/20/2021
	Office of Legislative and Intergovernmental Affairs.	Confidential Assistant	DC210048	01/20/2021
		Director for Oversight	DC210057	01/26/2021
		Director of Legislative and Intergovernmental Affairs.	DC210067	01/26/2021
	Office of Policy and Strategic Planning.	Policy Advisor	DC210049	01/20/2021
	Office of Public Affairs	Deputy Director of Public Affairs and Director of Digital Strategy and Engagement.	DC210069	01/26/2021
		Deputy Director of Public Affairs and Press Secretary.	DC210051	01/20/2021
		Director of the Office of Public Affairs.	DC210065	01/20/2021
		Press Assistant	DC210050	01/20/2021
	Office of the Deputy Secretary	Advisor	DC200153	01/08/2021
	Office of the Director	Senior Advisor	DC210063	01/20/2021
	Office of the General Counsel	Special Assistant	DC210052	01/20/2021
	Office of the Under Secretary	Special Assistant	DC210046	01/20/2021
		Senior Advisor (2)	DC210058	01/26/2021
			DC210056	01/20/2021
	Office of White House Liaison	Senior Advisor (COVID)	DC210041	01/20/2021
		Senior Advisor (Delivery)	DC210060	01/20/2021
		Deputy White House Liaison	DC210071	01/29/2021
COUNCIL ON ENVIRONMENTAL QUALITY.	Council on Environmental Quality	Scheduler	EQ210001	01/22/2021
		Special Assistant	EQ210002	01/26/2021
DEPARTMENT OF DEFENSE	Office of the Assistant Secretary of Defense (Legislative Affairs).	Special Assistant (2)	DD210132	01/23/2021
			DD210148	01/28/2021
	Office of the Assistant to the Secretary of Defense (Public Affairs).	Chief of Staff	DD210133	01/23/2021
		Speechwriter	DD210159	01/28/2021
	Office of the Secretary of Defense	Advance Officer	DD210158	01/28/2021
		Confidential Assistant	DD210152	01/28/2021
		Protocol Officer	DD210147	01/28/2021
		Special Assistant (2)	DD210112	01/23/2021
			DD210155	01/28/2021
	Office of the Under Secretary of Defense (Policy).	Special Assistant (4)	DD210129	01/23/2021
			DD210116	01/24/2021
			DD210163	01/28/2021
			DD210164	01/28/2021
DEPARTMENT OF THE NAVY	Office of the General Counsel	Attorney-Advisor (General)	DN210011	01/20/2021
	Office of the Under Secretary of the Navy.	Residential Manager and Social Secretary for the Vice President.	DN210012	01/28/2021
DEPARTMENT OF EDUCATION	Office of Civil Rights (2)	Senior Counsel	DB210025	01/20/2021
		Chief of Staff	DB210042	01/22/2021
	Office of Communications and Outreach.	Special Assistant	DB210046	01/29/2021
	Office of Legislation and Congressional Affairs.	Special Assistant	DB210026	01/20/2021
	Office of Planning, Evaluation and Policy Development.	Special Assistant (2)	DB210047	01/29/2021
			DB210049	01/29/2021
	Office of Postsecondary Education	Chief of Staff	DB210027	01/20/2021
		Special Assistant	DB210030	01/20/2021
	Office of the General Counsel	Senior Counsel (3)	DB210034	01/20/2021
			DB210044	01/29/2021
			DB210045	01/30/2021
	Office of the Secretary	Director, White House Liaison	DB210022	01/20/2021
		Senior Advisor	DB210033	01/20/2021
	Office of the Under Secretary	Chief of Staff	DB210041	01/22/2021
DEPARTMENT OF ENERGY	Office of Management	Deputy Director of Operations for Advance.	DE200172	01/14/2021
		Director of External Operations	DE200173	01/14/2021
ENVIRONMENTAL PROTECTION AGENCY.	Office of Public Engagement and Environmental Education.	Senior Advisor	EP210009	01/05/2021
	Office of the Administrator	Senior Assistant	EP210010	01/05/2021
	Office of the Assistant Administrator for Research and Development.	Policy Assistant	EP200077	01/08/2021
	Office of the Associate Administrator for Congressional and Intergovernmental Relations.	Special Advisor for Senate Affairs	EP200082	01/05/2021
		Deputy Associate Administrator for Congressional Affairs.	EP210016	01/30/2021

Agency name	Organization name	Position title	Authorization No.	Effective date
EXPORT-IMPORT BANK	Office of Congressional and Intergovernmental Affairs.	Senior Vice President	EB210004	01/20/2021
	Office of the Chairman	Director of Scheduling	EB210006	01/20/2021
		Executive Secretary	EB210007	01/20/2021
GENERAL SERVICES ADMINISTRATION.	Office of Strategic Communication	Director of Public Engagement	GS210023	01/20/2021
	Office of the Administrator	Senior Advisor (3)	GS210022	01/20/2021
			GS210024	01/20/2021
			GS210026	01/25/2021
DEPARTMENT OF HOMELAND SECURITY.	Office of Public Affairs	Director of Strategic Communications.	DM210073	01/14/2021
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.	Office of Congressional and Intergovernmental Relations.	Deputy Assistant Secretary for Congressional Relations.	DU210030	01/27/2021
		Congressional Relations Specialist	DU210031	01/27/2021
	Office of Field Policy and Management.	Special Policy Advisor	DU210037	01/22/2021
	Office of Housing	Special Assistant	DU210035	01/27/2021
	Office of Policy Development and Research.	Special Advisor	DU210029	01/27/2021
	Office of Public Affairs	Deputy Assistant Secretary for Public Engagement.	DU210041	01/22/2021
		Press Secretary	DU210022	01/27/2021
		Deputy Assistant Secretary for Public Affairs.	DU210028	01/27/2021
	Office of Public and Indian Housing	Special Assistant	DU210040	01/22/2021
	Office of the Administration	Director of Advance	DU210032	01/27/2021
	Office of the Deputy Secretary	Deputy White House Liaison	DU210047	01/27/2021
	Office of the General Counsel	Senior Counsel	DU210024	01/27/2021
	Office of the Secretary	White House Liaison	DU210020	01/27/2021
		Executive Assistant	DU210025	01/27/2021
DEPARTMENT OF JUSTICE	Office of Environment and Natural Resources Division.	Senior Counsel	DJ210024	01/08/2021
DEPARTMENT OF LABOR	Office of Employment and Training Administration.	Chief of Staff	DL210049	01/20/2021
		Senior Policy Advisor for Unemployment Insurance.	DL210060	01/29/2021
	Occupational Safety and Health Administration.	Chief of Staff	DL210044	01/20/2021
	Office of Congressional and Intergovernmental Affairs.	Chief of Staff	DL210033	01/20/2021
		Deputy Director of Intergovernmental Affairs.	DL210017	01/20/2021
		Legislative Assistant	DL210007	01/14/2021
		Senior Counsel	DL210036	01/20/2021
		Senior Legislative Officer	DL210043	01/20/2021
	Office of Federal Contract Compliance Programs.	Chief of Staff	DL210029	01/20/2021
	Office of Public Affairs	Digital Engagement Director	DL210061	01/27/2021
		Director of Digital Strategy	DL210057	01/28/2021
		Press Secretary	DL210042	01/20/2021
	Office of the Assistant Secretary for Administration and Management.	Special Advisor	DL210018	01/20/2021
	Office of the Assistant Secretary for Policy.	Chief of Staff	DL210027	01/20/2021
	Office of the Deputy Secretary	Counselor	DL210059	01/27/2021
	Office of the Secretary	Advisor for Worker Voice Engagement.	DL210063	01/29/2021
		Counselor (2)	DL210039	01/20/2021
			DL210051	01/21/2021
		Deputy White House Liaison	DL210041	01/20/2021
		Executive Assistant	DL210062	01/27/2021
		Policy Advisor	DL210048	01/21/2021
		White House Liaison	DL210016	01/20/2021
	Office of the Solicitor	Senior Counsel	DL210032	01/20/2021
		Senior Advisor	DL210038	01/20/2021
	Office of Workers Compensation Programs.	Chief of Staff	DL210034	01/20/2021
	Office of Veterans Employment and Training Service.	Chief of Staff	DL210058	01/29/2021
	Office of Wage and Hour Division	Chief of Staff	DL210064	01/28/2021
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION.	Office of Legislative and Intergovernmental Affairs.	Special Assistant	NN210020	01/22/2021
NATIONAL CREDIT UNION ADMINISTRATION.	Office of the Board	Special Assistant and Advisor	CU210002	01/05/2021

Agency name	Organization name	Position title	Authorization No.	Effective date
NATIONAL ENDOWMENT FOR THE ARTS.	National Endowment for the Arts ...	Deputy Director of Public Affairs	NA210003	01/08/2021
		Director of Strategic Communications and Public Affairs.	NA210007	01/20/2021
		White House Liaison and Senior Advisor.	NA210009	01/20/2021
		Director of Congressional Affairs ...	NA210010	01/21/2021
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION.	Occupational Safety and Health Review Commission.	Confidential Assistant	SH210002	01/13/2021
OFFICE OF MANAGEMENT AND BUDGET.	Office of Communications	Confidential Assistant	BO210052	01/29/2021
	Office of Education, Income Maintenance and Labor Programs.	Confidential Assistant	BO210020	01/29/2021
	Office of General Counsel	Confidential Assistant	BO210051	01/29/2021
		Associate Deputy General Counsel	BO210058	01/29/2021
	Office of General Government Programs.	Confidential Assistant (2)	BO210018	01/29/2021
			BO210025	01/29/2021
	Office of Legislative Affairs	Deputy (2)	BO210023	01/29/2021
			BO210031	01/29/2021
	Office of Natural Resource Programs.	Confidential Assistant	BO210019	01/29/2021
	Office of Information and Regulatory Affairs.	Confidential Assistant	BO210030	01/29/2021
	Office of the Director	Assistant	BO210014	01/21/2021
		Advisor	BO210046	01/29/2021
	Staff Offices	Associate Director for Communications.	BO210053	01/29/2021
		Confidential Assistant	BO210057	01/29/2021
OFFICE OF NATIONAL DRUG CONTROL POLICY.	Office of Legislative Affairs	Associate Director Office of Legislative Affairs.	QQ210004	01/21/2021
OFFICE OF SCIENCE AND TECHNOLOGY POLICY.	Office of Science and Technology Policy.	Legislative Affairs Director	TS210002	01/22/2021
		Special Assistant	TS210003	01/22/2021
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE.	Office of Congressional Affairs	Assistant United States Trade Representative for Congressional Affairs.	TN210008	01/27/2021
		Director for Congressional Affairs ..	TN210010	01/27/2021
	Office of Intergovernmental Affairs and Public Liaison.	Assistant United States Trade Representative for Public Engagement.	TN210009	01/27/2021
		Assistant United States Trade Representative for Intergovernmental Affairs.	TN210012	01/29/2021
	Office of Public and Media Affairs	Digital Media Director	TN210004	01/26/2021
		Assistant United States Trade Representative for Public and Media Affairs.	TN210013	01/29/2021
UNITED STATES INTERNATIONAL DEVELOPMENT FINANCE CORPORATION.	Overseas Private Investment Corporation.	Deputy Chief of Staff	PQ210002	01/20/2021
		Special Assistant	PQ210006	01/25/2021
SMALL BUSINESS ADMINISTRATION.	Office of Congressional and Legislative Affairs.	Legislative Policy Advisor	SB210006	01/28/2021
	Office of the Administrator	White House Liaison	SB210005	01/28/2021
		Senior Advisor	SB210011	01/28/2021
DEPARTMENT OF TRANSPORTATION.	Office of the Assistant Secretary for Governmental Affairs.	Deputy Assistant Secretary for Congressional Affairs (House).	DT210034	01/20/2021
		Deputy Assistant Secretary for Intergovernmental Affairs.	DT210035	01/20/2021
		Principal Deputy Assistant Secretary for Congressional Affairs (Senate).	DT210009	01/20/2021
		Special Assistant for Governmental Affairs.	DT210042	01/20/2021
	Office of the Assistant Secretary for Transportation Policy.	Special Assistant for Policy	DT210043	01/20/2021
	Office of the Assistant Secretary for Transportation Policy.	Special Assistant for Policy	DT210045	01/20/2021
	Office of the Executive Secretariat	Director, Executive Secretariat	DT210033	01/20/2021
	Federal Highway Administration	Special Assistant	DT210041	01/20/2021
	Office of General Counsel	Special Assistant	DT210037	01/20/2021
	Pipeline and Hazardous Materials Safety Administration.	Special Assistant	DT210040	01/20/2021
	Immediate Office of the Administrator.	Senior Advisor	DT210032	01/20/2021
	Office of Public Affairs	Deputy Director of Public Affairs	DT210057	01/29/2021

Agency name	Organization name	Position title	Authorization No.	Effective date
		Digital Communications Manager ..	DT210059	01/29/2021
	Office of the Secretary	Deputy Chief of Staff for Operations.	DT210036	01/20/2021
		Deputy White House Liaison	DT210060	01/29/2021
		Director of Scheduling and Advance.	DT210044	01/20/2021
		Special Assistant (2)	DT210061	01/29/2021
			DT210056	01/29/2021
		White House Liaison	DT210031	01/20/2021
DEPARTMENT OF THE TREASURY.	Secretary of the Treasury	Director of Scheduling and Advance.	DY210027	01/13/2021
DEPARTMENT OF VETERANS AFFAIRS.	Office of the Assistant Secretary for Public and Intergovernmental Affairs.	Special Assistant	DV210023	01/20/2021
		Press Secretary	DV210024	01/20/2021
	Office of the Secretary and Deputy	Director of Mission Operations	DV210022	01/20/2021
		White House Liaison	DV210028	01/20/2021

The were no Schedule C appointing authorities revoked during January 2021.

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2021–08156 Filed 4–20–21; 8:45 am]

BILLING CODE 6325–39–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2021–84 and CP2021–87]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* April 23, 2021.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

II. Docketed Proceeding(s)

1. Docket No(s).: MC2021–84 and CP2021–87; Filing Title: USPS Request to Add Priority Mail Contract 694 to Competitive Product List and Notice of Filing Materials Under Seal; Filing Acceptance Date: April 15, 2021; Filing Authority: 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; Public Representative: Kenneth R. Moeller; Comments Due: April 23, 2021.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2021–08209 Filed 4–20–21; 8:45 am]

BILLING CODE 7710–FW–P

RAILROAD RETIREMENT BOARD

Agency Forms Submitted for OMB Review, Request for Comments

Summary: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Railroad Retirement Board (RRB) is forwarding an Information Collection Request (ICR) to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB). Our ICR describes the information we seek to collect from the public. Review and approval by OIRA ensures that we impose appropriate paperwork burdens.

The RRB invites comments on the proposed collection of information to determine (1) the practical utility of the

collection; (2) the accuracy of the estimated burden of the collection; (3) ways to enhance the quality, utility, and clarity of the information that is the subject of collection; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology. Comments to the RRB or OIRA must contain the OMB control number of the ICR. For proper consideration of your comments, it is best if the RRB and OIRA receive them within 30 days of the publication date.

Title and purpose of information collection: Student Beneficiary Monitoring; OMB 3220–0123. Under provisions of the Railroad Retirement Act (RRA), there are two types of benefit payments that are based on the status of a child being in full-time elementary or secondary school attendance at age 18–19: (1) A survivor child's annuity benefit under Section 2(d)(1)(iii) (45 U.S.C. 231a) and (2) an increase in the employee retirement annuity under the Special Guaranty computation as prescribed in Section 3(f)(2) (45 U.S.C. 231b) and 20 CFR part 229.

The survivor student annuity is usually paid by direct deposit to a financial institution either into the student's checking or savings account or into a joint bank account with a parent. The requirements for eligibility as a student are prescribed in 20 CFR 216.74, and include students in independent study and home schooling.

To help determine if a child is entitled to student benefits, the RRB requires evidence of full-time school attendance. This evidence is acquired through the RRB's student monitoring program, which utilizes the following forms. Form G–315, Student Questionnaire, obtains certification of a student's full-time school attendance as well as information on the student's marital status, social security benefits, and employment, which are needed to determine entitlement or continued entitlement to benefits under the RRA. Form G–315A, Statement of School Official, is used to obtain, from a school, verification of a student's full-time attendance when the student fails to return a monitoring Form G–315. Form G–315A.1, School Official's Notice of Cessation of Full-Time School Attendance, is used by a school to notify the RRB that a student has ceased full-time school attendance.

Previous Requests for Comments: The RRB has already published the initial 60-day notice (86 FR 8811 on February 9, 2021) required by 44 U.S.C. 3506(c)(2). That request elicited no comments.

Information Collection Request (ICR)

Title: Student Beneficiary Monitoring.

OMB Control Number: 3220–0123.

Form(s) submitted: G–315, G–315a, G–315a.1.

Type of request: Extension without change of a currently approved collection.

Affected public: Individuals or Households.

Abstract: Under the Railroad Retirement Act (RRA), a student benefit is not payable if the student ceases full-time school attendance, marries, works in the railroad industry, has excessive earnings or attains the upper age limit under the RRA. The report obtains information to be used to determine if benefits should cease or be reduced.

Changes proposed: The RRB proposes no changes to the forms in this collection.

The burden estimate for the ICR is as follows:

Form No.	Annual responses	Time (minutes)	Burden (hours)
G–315	860	15	215
G–315a	20	3	1
G–315a.1	20	2	1
Total	900		217

Additional Information or Comments: Copies of the forms and supporting documents can be obtained from Kennisha Tucker at (312) 469–2591 or *Kennisha.Tucker@rrb.gov.* Comments regarding the information collection should be addressed to Brian Foster, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–1275 or *Brian.Foster@rrb.gov.*

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.

Brian Foster,

Clearance Officer.

[FR Doc. 2021–08185 Filed 4–20–21; 8:45 am]

BILLING CODE 7905–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 33–10938; 34–91583; File No. 265–32]

SEC Small Business Capital Formation Advisory Committee

AGENCY: Securities and Exchange Commission.

ACTION: Notice of meeting.

SUMMARY: The Securities and Exchange Commission Small Business Capital Formation Advisory Committee, established pursuant to Section 40 of the Securities Exchange Act of 1934 as added by the SEC Small Business Advocate Act of 2016, is providing notice that it will hold a public meeting by videoconference. The public is invited to submit written statements to the Committee.

DATES: The meeting will be held on Friday, April 30, 2021, from 10:00 a.m. to 2:30 p.m. (ET) and will be open to the public. Written statements should be received on or before April 30, 2021.

ADDRESSES: The meeting will be conducted by remote means (videoconference). Members of the public may attend the meeting by viewing the webcast on the Commission's website at *www.sec.gov.* Written statements may be submitted by any of the following methods:

Electronic Statements

- Use the Commission's internet submission form (*https://www.sec.gov/rules/submitcomments.htm*); or
- Send an email message to *rule-comments@sec.gov.* Please include File Number 265–32 on the subject line; or

Paper Statements

- Send paper statements to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549–1090.

All submissions should refer to File No. 265–32. This file number should be included on the subject line if email is used. To help us process and review your statement more efficiently, please use only one method. The Commission will post all statements on the SEC's website at *www.sec.gov.*

Statements also 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. (ET). All statements received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Jenny Choi, Attorney, Office of the Advocate for Small Business Capital Formation, at (202) 551–5407, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549–3628.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public. Persons needing special accommodations because of a disability should notify the contact person listed in the section above entitled **FOR FURTHER INFORMATION CONTACT**. The agenda for the meeting includes matters relating to rules and regulations affecting small and emerging companies and their investors under the federal securities laws.

Dated: April 16, 2021.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 2021–08253 Filed 4–20–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–125, OMB Control No. 3235–0104]

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Form 3

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget this request for extension of the previously approved collection[s] of information discussed below.

Under Section 16(a) of the Securities Exchange Act of 1934 (''Exchange Act'') (15 U.S.C. 78a *et seq.*), every person who owns more than ten percent of any class of equity security (other than an exempted security) which is requested under Section 12 of the Exchange Act, or who is a director or an officer of the issuer of such security (collectively ''reporting persons'') are required to file statements disclosing their ownership of the issuer's equity securities. Form 3 must be filed within ten days after the event by which the person becomes a reporting person. Approximately 21,968 insiders file Form 3 annually and it takes approximately 0.50 hours to prepare for a total of 10,984 annual burden hours (0.50 hours per response × 21,968 responses).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: April 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–08139 Filed 4–20–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–614, OMB Control No. 3235–0682]

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Rule 13h–1 and Form 13H

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.),* the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the existing collection of information provided for in Rule 13h–1 (17 CFR 240.13h–1) and Form 13H—registration of large traders [1] submitted pursuant to Section 13(h) of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act'').

Rule 13h–1 and Form 13H under Section 13(h) of the Exchange Act established a large trader reporting framework.[2] The framework assists the Commission in identifying and obtaining certain baseline information about traders that conduct a substantial amount of trading activity, as measured by volume or market value, in the U.S. securities markets.

The identification, recordkeeping, and reporting framework provides the Commission with a mechanism to identify large traders and obtain additional information on their trading activity. Specifically, the rule requires large traders to identify themselves to the Commission and file certain interim updates with the Commission on Form 13H. Upon receipt of Form 13H, the Commission issues a unique identification number to the large trader, which the large trader then provides to its registered broker-dealers. Certain registered broker-dealers are required to maintain transaction records for each large trader, and are required to report that information to the Commission upon request.[3] In addition, certain registered broker-dealers are required to adopt procedures to monitor their customers for activity that would trigger the identification requirements of the rule.

The respondents to the collection of information required by Rule 13h-1 and Form 13H are large traders and

[1] Rule 13h–1(a)(1) defines ''large trader'' as any person that directly or indirectly, including through other persons controlled by such person, exercises investment discretion over one or more accounts and effects transactions for the purchase or sale of any NMS security for or on behalf of such accounts, by or through one or more registered broker-dealers, in an aggregate amount equal to or greater than the identifying activity level or voluntarily registers as a large trader by filing electronically with the Commission Form 13H.

[2] *See* Securities Exchange Act Release No. 64976 (July 27, 2011), 76 FR 46959 (August 3, 2011).

[3] The Commission, pursuant to Rule 17a–25 (17 CFR 240.17a–25), currently collects transaction data from registered broker-dealers through the Electronic Blue Sheets (''EBS'') system to support its regulatory and enforcement activities. The large trader framework added two new fields, the time of the trade and the identity of the trader, to the EBS system.

registered broker-dealers. The Commission estimates that the total annual time burden associated with Rule 13h–1 and Form 13H is approximately 185,200 hours per year. This burden is comprised of 23,500 hours for initial filings by large traders on Form 13H, 58,500 hours for updates by large traders, 96,000 hours for broker-dealer reporting, and 7,200 hours for broker-dealer monitoring.

Compliance with Rule 13h–1 is mandatory. The information collection under Rule 13h–1 is considered confidential subject to the limited exceptions provided by the Freedom of Information Act.[4]

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: April 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–08135 Filed 4–20–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–270, OMB Control No. 3235–0292]

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Form F–6

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995(44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Form F–6 (17 CFR 239.36) is a form used by foreign companies to register the offer and sale of American Depositary Receipts (ADRs) under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*). Form F–6 requires disclosure of information regarding the terms of the depository bank, fees charged, and a description of the ADRs. No special information regarding the foreign company is required to be prepared or disclosed, although the foreign company must be one which periodically furnishes information to the Commission. The information is needed to ensure that investors in ADRs have full disclosure of information concerning the deposit agreement and the foreign company. Form F–6 takes approximately 1.35 hour per response to prepare and is filed by 643 respondents annually. We estimate that 25% of the 1.35 hour per response (0.338 hours) is prepared by the filer for a total annual reporting burden of 217 hours (0.338 hours per response x 643 responses). The information provided on Form F–6 is mandatory to best ensure full disclosure of ADRs being issued in the U.S. All information provided to the Commission is available for public review upon request.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: April 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–08142 Filed 4–20–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–609, OMB Control No.3235–0706]

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Form ABS–EE

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Form ABS–EE (17 CFR 249.1401) is filed by asset-backed issuers to provide asset-level information for registered offerings of asset-backed securities at the time of securitization and on an ongoing basis required by Item 1111(h) of Regulation AB (17 CFR 229.1111(h)). The purpose of the information collected on Form ABS–EE is to implement the disclosure requirements of Section 7(c) of the Securities Act of 1933 (15 U.S.C. 77g(c)) to provide information regarding the use of representations and warranties in the asset-backed securities markets. We estimate that approximately 13,374 securitizers will file Form ABS–EE annually at estimated 170,089 burden hours per response. In addition, we estimate that 25% of the 50.87152 hours per response (12.71788 hours) is carried internally by the securitizers for a total annual reporting burden of 170,089 hours (12.71788 hours per response × 13,374 responses).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer,

[4] *See* 5 U.S.C. 552 and 15 U.S.C. 78m(h)(7).

Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: April 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–08141 Filed 4–20–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91577; File No. SR–NASDAQ–2021–022]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Current Pilot Program Related to Nasdaq Equity 11, Rule 11890 to the Close of Business on October 20, 2021

April 15, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 14, 2021, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the current pilot program related to Nasdaq Equity 11, Rule 11890 to the close of business on October 20, 2021.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to extend the current pilot program related to Equity 11, Rule 11890, Clearly Erroneous Transactions, to the close of business on October 20, 2021. The pilot program is currently due to expire on April 20, 2021.

On September 10, 2010, the Commission approved, on a pilot basis, changes to Equity 11, Rule 11890 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[3] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[4] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[5]

These changes were originally scheduled to operate for a pilot period to coincide with the pilot period for the Plan to Address Extraordinary Market Volatility (the ''Limit Up-Limit Down Plan'' or ''LULD Plan'').[6] In April 2019, the Commission approved an amendment to the LULD Plan for it to operate on a permanent, rather than pilot, basis.[7] In light of that change, the Exchange amended Equity 11, Rule 11890 to untie the pilot program's effectiveness from that of the LULD Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019.[8] Subsequently, the Exchange amended Rule 11890 to extend the pilot's effectiveness to the close of business on April 20, 2021.[9]

The Exchange now proposes to amend Equity 11, Rule 11890 to extend the pilot's effectiveness for a further six months until the close of business on October 20, 2021. If the pilot period is not either extended, replaced or approved as permanent, the prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) shall be in effect, and the provisions of paragraphs (g) through (i) shall be null and void.[10] In such an event, the remaining sections of Rule 11890 would continue to apply to all transactions executed on the Exchange. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to Rule 11890.

The Exchange does not propose any additional changes to Equity 11, Rule 11890. Extending the effectiveness of Rule 11890 for an additional six months will provide the Exchange and other self-regulatory organizations additional time to consider whether further amendments to the clearly erroneous execution rules are appropriate.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[11] in general, and Section 6(b)(5) of the Act,[12] in particular, in that it is

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–NASDAQ–2010–076).

[4] *See* Securities Exchange Act Release No. 68819 (February 1, 2013), 78 FR 9438 (February 8, 2013) (SR–NASDAQ–2013–022).

[5] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–NASDAQ–2014–044).

[6] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[7] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (approving Eighteenth Amendment to LULD Plan).

[8] *See* Securities Exchange Act Release No. 85603 (April 11, 2019), 84 FR 16064 (April 17, 2019) (SR–NASDAQ–2019–028).

[9] *See* Securities Exchange Act Release No. 90202 (October 15, 2020), 85 FR 67030 (October 21, 2020) (SR–NASDAQ–2020–070).

[10] *See* notes 3–5, *supra*. The prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) generally provided greater discretion to the Exchange with respect to breaking erroneous trades.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. The Exchange believes that extending the clearly erroneous execution pilot under Equity 11, Rule 11890 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate.

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 proposal would ensure the continued, uninterrupted operation of harmonized clearly erroneous execution rules across the U.S. equities markets while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate. The Exchange understands that the other national securities exchanges and FINRA will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and Rule 19b–4(f)(6) thereunder.[14]

A proposed rule change filed under Rule 19b–4(f)(6) [15] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii) [16] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[17]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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–NASDAQ–2021–022 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–NASDAQ–2021–022. 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–NASDAQ–2021–022 and should be submitted on or before May 12, 2021.

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 240.19b–4(f)(6)(iii).

[17] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–08148 Filed 4–20–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–104, OMB Control No. 3235–0119]

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Rule 12g3–2

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Rule 12g3–2 (17 CFR 240.12g3–2) under the Securities Exchange Act of 1934 (the ''Exchange Act'') provides an exemption from Section 12(g) of the Exchange Act (15 U.S.C. 78l(g)) for foreign private issuers. Rule 12g3–2 is designed to provide investors in foreign securities with information about such securities and the foreign issuer. As a condition to the exemption, a non-Exchange Act reporting foreign private issuer must publish in English specified non-U.S. disclosure documents required by Rule 12g3–2(b) for its most recently completed fiscal year on its internet website or through an electronic information delivery system in its primary trading market. In addition, the rule requires a foreign private issuer similarly to publish electronically specified non-U.S. disclosure documents in English on an ongoing basis for subsequent fiscal years as a condition to maintaining the Rule 12g3–2(b) exemption. We estimate that, that approximately 1,386 respondents claim the exemption. Each respondent publishes an estimated 12 submissions pursuant to Rule 12g3–2 per year for a total of 16,632 responses. We estimate the number of burden hours incurred by foreign private issuers to produce the Rule 12g3–2(b) publications to total 37,206, or approximately 2.237 burden hours per response (2.237 hours per response × 16,632 responses).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: April 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–08144 Filed 4–20–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91581; File No. SR–NASDAQ–2021–009]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change, as Modified by Amendment No. 1, To Amend Equity 4, Rule 4754 Relating to the Limit-Up Limit-Down Closing Cross

April 15, 2021.

On February 11, 2021, The Nasdaq Stock Market LLC (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Equity 4, Rule 4754 relating to the Limit-Up Limit-Down (''LULD'') closing cross. The proposed rule change was published for comment in the **Federal Register** on March 3, 2021.[3] The Commission has not received any comment letters on the proposed rule change. On April 9, 2021, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and superseded the proposed rule change as originally filed.[4]

Section 19(b)(2) of the Act[5] provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is April 17, 2021.

The Commission is extending the 45-day time period for Commission action on the proposed rule change. The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change, as modified by Amendment No. 1. Accordingly, pursuant to Section 19(b)(2) of the Act,[6] the Commission designates June 1, 2021, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change, as modified by Amendment No. 1 (File No. SR–NASDAQ–2021–009).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–08197 Filed 4–20–21; 8:45 am]

BILLING CODE 8011–01–P

[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 91208 (February 25, 2021), 86 FR 12503.

[4] In Amendment No. 1, the Exchange amended the proposal to: (1) Specify the dissemination of certain imbalance information before the LULD closing cross; (2) clarify the process for calculating the LULD closing cross price and the benchmark prices for the LULD closing cross; (3) specify the treatment of imbalance only orders for purposes of the LULD closing cross price selection; (4) provide additional explanation to support the proposal; (5) specify the implementation date for the proposal; and (6) make other clarifying, technical, and conforming changes. Amendment No. 1 is available on the Commission's website at: *https://www.sec.gov/comments/sr-nasdaq-2021-009/srnasdaq2021009-8670132-235426.pdf.*

[5] 15 U.S.C. 78s(b)(2).

[6] *Id.*

[7] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91576; File No. SR–CBOE–2021–022]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Rules Relating to Categories of Registration and Respective Qualification Examinations Required for Trading Permit Holders and Associated Persons That Engage in Trading Activities on the Exchange

April 15, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'' or ''Exchange Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 5, 2021, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (the ''Commission'' or ''SEC'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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 amend its rules relating to categories of registration and respective qualification examinations required for Trading Permit Holders (''TPHs'') and associated persons that engage in trading activities on the Exchange. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange has adopted registration requirements to ensure that associated persons of TPH organizations attain and maintain specified levels of competence and knowledge pertinent to their function. In general, the current rules require that persons engaged in a TPH organization's securities business who are to function as representatives or principals register with the Exchange in the category of registration appropriate to their functions by passing one or more qualification examinations[5] and exempt specified associated persons from the registration requirements.[6] They also prescribe ongoing continuing education requirements for registered persons.[7] The Exchange now proposes to amend, reorganize and enhance its rules regarding registration, qualification examinations and continuing education, as described below.

In 2017, the Commission approved a Financial Industry Regulatory Authority, Inc. (''FINRA'') proposed rule change adopting rules relating to qualification and registration requirements in the consolidated FINRA Rulebook, restructuring the FINRA representative-level qualification examinations, creating a general knowledge examination and specialized knowledge examinations, allowing permissive registration, establishing an exam waiver process for persons working for a financial services affiliate of a member, and amending certain Continuing Education (''CE'') requirements (the ''FINRA Rule Changes'').[8] The FINRA Rule Changes became effective on October 1, 2018. Other exchanges, such as Nasdaq Stock Market LLC (''Nasdaq''), New York Stock Exchange LLC (''NYSE'') and Miami International Securities Exchange, LLC (''MIAX'') subsequently adopted rule changes based on FINRA's Rule Changes (collectively with the FINRA Rule Changes, the ''Registration Rule Changes'').[9]

The Exchange now proposes to amend, reorganize and enhance its own membership, registration and qualification rules in part in response to the Registration Rule Changes, and also in order to conform the Exchange's rules more closely to those of its affiliated exchanges and non-affiliated exchanges in the interest of uniformity and to facilitate compliance with membership, registration and qualification regulatory requirements by members of multiple exchanges. The proposed rule change also includes the proposal to enhance its registration rules by adding a new registration requirement applicable to developers of algorithmic trading systems similar to a requirement adopted by FINRA pursuant to a 2016 FINRA proposed rule change.[10] In

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Cboe Options Rule 3.30(a)(1).

[6] *See* Cboe Options Rule 3.30(a)(2).

[7] *See* Cboe Options Rule 3.33.

[8] *See* Exchange Act Release No. 81098 (July 7, 2017), 82 FR 32419 (July 13, 2017) (Order Approving File No. SR–FINRA–2017–007). *See also* FINRA Regulatory Notice 17–30 (SEC Approves Consolidated FINRA Registration Rules, Restructured Representative-Level Qualification Examinations and Changes to Continuing Education Requirements) (October 2017). FINRA articulated its belief that the proposed rule change would streamline, and bring consistency and uniformity to, its registration rules, which would, in turn, assist FINRA members and their associated persons in complying with the rules and improve regulatory efficiency. FINRA also determined to enhance the overall efficiency of its representative-level examinations program by eliminating redundancy of subject matter content across examinations, retiring several outdated representative-level registrations, and introducing a general knowledge examination that could be taken by all potential representative-level registrants and the general public. FINRA amended certain aspects of its continuing education rule, including by codifying existing guidance regarding the effect of failing to complete the Regulatory Element on a registered person's activities and compensation.

[9] *See, e.g.,* Exchange Act Release No. 84638 (November 20, 2018), 83 FR 60909 (November 27, 2018) (SR–NASDAQ–2018–093). *See also* Exchange Act Release No. 84336 (October 2, 2018), 83 FR 50727 (October 9, 2018) (SR–NYSE–2018–44) and Exchange Act Release No. 87830 (December 20, 2019), 84 FR 72025 (December 30, 2019) (SR–MIAX–2019–50). The Exchange notes the affiliates of these Exchanges have filed similar rule changes.

[10] *See* Exchange Act Release No. 77551 (April 7, 2016), 81 FR 21914 (April 13, 2016) (Order Approving File No. SR–FINRA–2016–007). In its proposed rule change FINRA addressed the increasing significance of algorithmic trading strategies by amending its rules to require registration, as Securities Traders, of associated persons primarily responsible for the design, development or significant modification of algorithmic trading strategies, or who are

connection with these changes, the Exchange proposes to amend Cboe Options Rules 3.30, 3.33, 3.36 and 3.37 and adopt Cboe Options Rules 3.31, 3.32 and 3.34.

Registration Requirements (Proposed Rule 3.30)

Cboe Options Rule 3.30 currently requires that persons engaged, or to be engaged, in the securities business of a TPH who are to function as representatives or principals register with the Exchange in the category of registration appropriate to their functions as specified in Cboe Options Rule 3.30.[11] The Exchange proposes to amend Rules 3.30 and 3.33 and adopt Rules 3.31 and 3.32 to address various elements of registration.

Proposed Rule 3.30 provides that each person engaged in the securities business of a TPH must register with the Exchange as a representative or principal in each category of registration appropriate to his or her functions and responsibilities as specified in proposed Rule 3.31, unless exempt from registration pursuant to proposed Rule 3.32. Proposed Rule 3.30 also provides that such person is not qualified to function in any registered capacity other than that for which the person is registered, unless otherwise stated in the rules.

Minimum Number of Registered Principals (Proposed Rule 3.30.01)

Rule 3.30.07 currently requires that every TPH must register with the Exchange in a heightened capacity each individual acting in any of the following roles: (i) officer; (ii) partner; (iii) director; (iv) supervisor of proprietary trading, market-making or brokerage activities; and/or (v) supervisor of those engaged in proprietary trading, market-making or brokerage activities with respect to those activities. Each TPH must register with the Exchange at least two individuals acting in one or more of the capacities described in (i)–(v) above. The Exchange is able to waive this requirement if a TPH demonstrates conclusively that only one individual acting in one or more of the capacities described in (i) through (v) above should be required to register. In addition, a TPH that conducts proprietary trading only and has 25 or fewer registered persons shall instead be required to have a minimum of one officer or partner who is registered in this capacity. The Exchange is proposing to eliminate Rule 3.30.07 and, in its place, adopt a similar, but new, Rule 3.30.01. The new rule would provide TPHs that limit the scope of their business flexibility in satisfying the two-principal requirement. In particular, proposed Rule 3.30.01 requires that a TPH have a minimum of two General Securities Principals, provided that a TPH that is limited in the scope of its activities may instead have two officers or partners who are registered in a principal category that corresponds to the scope of the TPH's activities. For instance, if a TPH's business is limited to securities trading, the TPH may have two Securities Trader Principals, instead of two General Securities Principals. Additionally, proposed Rule 3.30.01 provides that any TPH with only one associated person is excluded from the two-principal requirement. Proposed Rule 3.30.01 would provide that existing TPHs as well as new applicants may request a waiver of the two-principal requirement, consistent with current Rule 3.30.07. Finally, the Exchange is proposing to retain the existing rule's provision permitting a proprietary trading firm with 25 or fewer registered representatives to have just one registered principal. The Exchange notes that proposed Rule 3.30.01 is substantively the same as FINRA's and other exchanges' corresponding Rules.[12]

Permissive Registrations (Proposed Rule 3.30.02)

Current Rule 3.30(a)(1) prohibits TPHs from maintaining a registration with the Exchange for any person (A) who is no longer active in the TPH's securities business, (B) who is no longer functioning in the registered capacity, or (C) where the sole purpose is to avoid the examination requirement of the rule. A TPH may not make application for the registration of any person where there is no intent to employ such person in the TPH's securities business. However, a TPH may maintain or make application for the registration of a person who performs legal, compliance, internal audit, back-office operations, or similar duties for the TPH or a person engaged in the securities business of a foreign securities affiliate or subsidiary of the TPH. The Exchange is proposing to replace this provision with new Rule 3.30.02. The Exchange is also proposing to expand the scope of permissive registrations and to clarify a TPH's obligations regarding individuals who are maintaining such registrations.

Specifically, proposed Rule 3.30.02 allows any associated person to obtain and maintain any registration permitted by the TPH. For instance, an associated person of a TPH working solely in a clerical or ministerial capacity, such as in an administrative capacity, would be able to obtain and maintain a General Securities Representative registration with the TPH. As another example, an associated person of a TPH who is registered, and functioning solely, as a General Securities Representative would be able to obtain and maintain a General Securities Principal registration with the TPH. Further, proposed Rule 3.30.02 allows an individual engaged in the securities business of a foreign securities affiliate or subsidiary of a TPH to obtain and maintain any registration permitted by the TPH.

The Exchange is proposing to permit the registration of such individuals for several reasons. First, a TPH may foresee a need to move a former representative or principal who has not been registered for two or more years back into a position that would require such person to be registered. Currently, such persons are required to requalify (or obtain a waiver of the applicable qualification examinations) and reapply for registration. Second, the proposed rule change would allow TPHs to develop a depth of associated persons with registrations in the event of unanticipated personnel changes. Third, allowing registration in additional categories encourages greater regulatory understanding.

Individuals maintaining a permissive registration under the proposed rule change would be considered registered persons and subject to all Exchange rules, to the extent relevant to their activities. For instance, an individual working solely in an administrative capacity would be able to maintain a General Securities Representative registration and would be considered a registered person for purposes of rules relating to borrowing from or lending to customers, but the rule would have no practical application to his or her conduct because he or she would not have any customers.

Consistent with the Exchange's supervision rules, TPHs would be required to have adequate supervisory systems and procedures reasonably designed to ensure that individuals with permissive registrations do not act outside the scope of their assigned functions. With respect to an individual who solely maintains a permissive registration, such as an individual working exclusively in an administrative capacity, the individual's day-to-day supervisor may be a

responsible for the day-to-day supervision or direction of such activities.

[11] *See* Cboe Options Rule 3.30.

[12] *See, e.g.,* FINRA Rule 1210.01 (Minimum Number of Registered Principals and Nasdaq Rule 1210.01 (Minimum Number of Registered Principals)).

nonregistered person. TPHs would be required to assign a registered supervisor to this person who would be responsible for periodically contacting such individual's day-to-day supervisor to verify that the individual is not acting outside the scope of his or her assigned functions. If such individual is permissively registered as a representative, the registered supervisor must be registered as a representative or principal. If the individual is permissively registered as a principal, the registered supervisor must be registered as a principal. The Exchange notes that proposed Rule 3.30.02 is substantively similar to FINRA and other exchanges' corresponding rules.[13]

Qualification Examinations and Waivers of Examinations (Proposed Rule 3.30.03)

Current Rule 3.30(a)(1) provides that before a registration can become effective, TPHs must submit the appropriate application for registration, pass a qualification examination appropriate to the category of registration and submit any required registration and examination fees. The Exchange is proposing to incorporate similar language in new Rule 3.30.03.

In addition, as part of the FINRA Rule Changes, FINRA adopted a restructured representative-level qualification examination program whereby representative-level registrants would be required to take a general knowledge examination (the Securities Industry Essentials Exam or ''SIE'') and a specialized knowledge examination appropriate to their job functions at the firm with which they are associating. The Exchange similarly adopted this requirement, which is reflected in current Cboe Options Rules 3.30.08 and 3.37(d).[14] The Exchange therefore also proposes to provide in proposed Rule 3.30.03 that before the registration of a person as a representative can become effective under proposed Rule 3.30, such person must pass the SIE and an appropriate representative-level qualification examination as specified in proposed Rule 3.31. Proposed Rule 3.30.03 also provides that before the registration of a person as a principal can become effective under proposed Rule 3.30, such person must pass an appropriate principal-level qualification examination as specified in proposed Rule 3.31.

Further, proposed Rule 3.30.03 provides that if a registered person's job functions change and he or she needs to become registered in another representative-level category, he or she would not need to pass the SIE again. Rather, the registered person would need to pass only the appropriate representative-level qualification examination. Moreover, proposed Rule 3.30.03 provides that all associated persons, such as associated persons whose functions are solely and exclusively clerical or ministerial, are eligible to take the SIE. Proposed Rule 3.30.03 also provides that individuals who are not associated persons of firms, such as members of the general public, are eligible to take the SIE. The Exchange believes that expanding the pool of individuals who are eligible to take the SIE would enable prospective securities industry professionals to demonstrate to prospective employers a basic level of knowledge prior to submitting a job application. Further, this approach would allow for more flexibility and career mobility within the securities industry. While all associated persons of firms as well as individuals who are not associated persons would be eligible to take the SIE pursuant to the proposed rule, passing the SIE alone would not qualify them for registration with the Exchange. Rather, to be eligible for registration with the Exchange, an individual must pass an applicable representative or principal qualification examination and complete the other requirements of the registration process.

Proposed Rule 3.30.03 also provides that the Exchange may, in exceptional cases and where good cause is shown, waive the applicable qualification examination(s) and accept other standards as evidence of an applicant's qualifications for registration. The rule will also state that advanced age or physical infirmity will not individually of themselves constitute sufficient grounds to waive a qualification examination and that experience in fields ancillary to the securities business may constitute sufficient grounds to waive a qualification examination. The Exchange notes that proposed language relating to waivers is already contained in current Rule 3.30.05.[15] Proposed Rule 3.30.03 will further provide that the Exchange shall only consider waiver requests submitted by a TPH for individuals associated with the TPH who are seeking registration in a representative or principal registration category. Moreover, the Exchange shall consider waivers of the SIE alone or the SIE and the applicable representative and principal examination(s) for such individuals. The Exchange shall not consider a waiver of the SIE for individuals who are not associated persons or for associated persons who are not registering as representatives or principals. The Exchange notes that proposed Rule 3.30.03 is substantively similar to FINRA and other exchanges' rules.[16]

Requirements for Registered Persons Functioning as Principals for a Limited Period (Proposed Rule 3.30.04)

The Exchange next proposes to adopt Rule 3.30.04, which governs the requirements for registered persons who wish to function as a principal for a limited period. Particularly, proposed Rule 3.30.04 provides that a TPH may designate any person currently registered, or who becomes registered, with the TPH as a representative to function as a principal for a limited period, provided that such person has at least 18 months of experience functioning as a registered representative with the five-year period immediately preceding the designation. The proposed rule is intended to ensure that representatives designated to function as principals for the limited period under the proposal have an appropriate level of registered representative experience. The proposed rule clarifies that the requirements of the rule apply to designations to any principal category, including those categories that are not subject to a prerequisite representative-level registration requirement, such as the Financial and Operations Principal registration category.[17]

The proposed rule also clarifies that the individual must fulfill all applicable prerequisite registration, fee and examination requirements before his or her designation as a principal. Further, the proposed rule provides that in no event may such person function as a principal beyond the initial 120 calendar days without having successfully passed an appropriate principal qualification examination. The proposed rule also provides an exception to the experience requirement for principals who are designated by a TPH to function in other principal categories for a limited period. Specifically, the proposed rule states

[13] *See, e.g.,* FINRA Rule 1210.02, NYSE Arca Rule 2.1210.01 and Nasdaq Rule 1210.02.

[14] *See* Exchange Act Release No. 84142 (September 14, 2018), 83 FR 47665 (September 20, 2018) (SR–CBOE–2018–064).

[15] Pursuant to a Regulatory Services Agreement between FINRA and the Exchange, FINRA provides the Exchange certain exam waiver services in responding to exam waiver requests from TPHs.

[16] *See, e.g.,* FINRA Rule 1210.03, NYSE Arca Rule 2.1210.02 and Nasdaq Rule 1210.03.

[17] The Exchange notes that qualifying as a registered representative is a prerequisite to qualifying as a principal except with respect to the following principal-level registrations: (1) Compliance Officer and (2) Financial and Operations Principal.

that a TPH may designate any person currently registered, or who becomes registered, with the TPH as a principal to function in another principal category for 120 calendar days before passing any applicable examinations. The Exchange notes that proposed Rule 3.30.04 is substantively similar to similar FINRA and other exchanges' rules.[18]

Rules of Conduct for Taking Examinations and Confidentiality of Examinations (Proposed Rule 3.30.05)

Proposed Rule 3.30.05 provides that associated persons taking the SIE would be subject to the SIE Rules of Conduct, and associated persons taking a representative or principal examination would be subject to the Rules of Conduct for representative and principal examinations. Pursuant to proposed Rule 3.30.05, a violation of the SIE Rules of Conduct or the Rules of Conduct for representative and principal examinations by an associated person would be deemed to be a violation of Exchange rules requiring just and equitable principles of trade.[19] Moreover, if an associated person is deemed to have violated the SIE Rules of Conduct or the Rules of Conduct for representative and principal examinations, the associated person may forfeit the results of the examination and may be subject to disciplinary action by the Exchange.

Further, the proposed rule states that individuals taking the SIE who are not associated persons must agree to be subject to the SIE Rules of Conduct. Among other things, the SIE Rules of Conduct would require individuals to attest that they are not qualified to engage in the investment banking or securities business based on passing the SIE and would prohibit individuals from cheating on the examination or misrepresenting their qualifications to the public subsequent to passing the SIE. Moreover, non-associated persons may forfeit their SIE results and may be prohibited from retaking the SIE if the Exchange determines that they cheated on the SIE or that they misrepresented their qualifications to the public subsequent to passing the SIE.

The proposed rule further notes that the Exchange considers all qualification examinations content to be highly confidential and that the removal of examination content from an examination center, reproduction, disclosure, receipt from or passing to any person, or use for study purposes of any portion of such qualification examination or any other use that would compromise the effectiveness of the examinations and the use in any manner and at any time of the questions or answers to the examinations is prohibited and would be deemed a violation of Exchange rules requiring just and equitable principles of trade.[20] The Exchange notes that proposed Rule 3.30.05 is substantively similar to similar FINRA and other exchanges' rules.[21]

Waiting Periods for Retaking a Failed Examination (Proposed Rule 3.30.06)

Proposed Rule 3.30.06 provides that any person who fails a qualification examination may retake that examination after 30 calendar days from the date of the person's last attempt to pass that examination. The proposed rule further provides that if a person fails an examination three or more times in succession within a two-year period, he or she would be prohibited from retaking the examination until a period of 180 calendar days from the date of the person's last attempt to pass it. These waiting periods would apply to the SIE and the representative- and principal-level examinations. The Exchange notes that proposed Rule 3.30.06 is substantively similar to FINRA and other exchanges' rules.[22]

All Registered Persons Must Satisfy the Regulatory Element of Continuing Education (Proposed Rule 3.30.07)

Pursuant to current Rule 3.33, the CE requirements applicable to registered persons consist of a Regulatory Element and a Firm Element. The Regulatory Element applies to registered persons and must be completed within prescribed time frames. The Firm Element consists of annual, TPH-developed and administered training programs designed to keep covered registered persons current regarding securities products, services and strategies offered by the TPH. For purposes of the Firm Element, the term ''covered registered persons'' means any registered Securities Trader and any registered person who has direct contact with customers in the conduct of the TPH's securities sales, trading and investment banking activities and to the immediate supervisors of such persons.

The CE requirements are set forth in current Rule 3.33. The Exchange believes that all registered persons, regardless of their activities, should be subject to the Regulatory Element of the CE requirements so that they can keep their knowledge of the securities industry current. Therefore, the Exchange proposes to adopt Rule 3.30.07, to clarify that all registered persons, including those who solely maintain a permissive registration, are required to satisfy the Regulatory Element, as specified in current Rule 3.33. Individuals who have passed the SIE but not a representative- or principal-level examination and do not hold a registered position would not be subject to any CE requirements.

Proposed Rule 3.30.07 also provides that a registered person of a TPH who becomes CE inactive would not be permitted to be registered in another registration category with the TPH or be registered in any registration category with another TPH, until the person has satisfied the Regulatory Element. The Exchange notes that proposed Rule 3.30.07 is substantively similar to FINRA and other exchanges' rules.[23]

Lapse of Registration and Expiration of SIE (Proposed Rule 3.30.08)

Proposed Rule 3.30.08 provides that any person who was last registered as a representative two or more years immediately preceding the date of receipt by the Exchange of a new application for registration as a representative is required to pass a qualification examination for representatives appropriate to the category of registration as specified in proposed Rule 3.31(b). Proposed Rule 3.30.08 also sets forth that a passing result on the SIE would be valid for up to four years. Therefore, under the proposed rule change, an individual who passes the SIE and is an associated person of a TPH at the time would have up to four years from the date he or she passes the SIE to pass a representative-level examination to register as a representative with that TPH, or a subsequent TPH, without having to retake the SIE. In addition, an individual who passes the SIE and is not an associated person at the time would have up to four years from the date he or she passes the SIE to become an associated person of TPH and pass a representative-level examination and register as a representative without having to retake the SIE.

[18] *See, e.g.,* FINRA Rule 1210.04, NYSE Arca Rule 2.1210.03 and Nasdaq Rule 1210.04.

[19] *See, e.g.,* Cboe Options Rule 8.1.

[20] *See, e.g.,* Cboe Options Rule 8.1.

[21] *See, e.g.,* FINRA Rule 1210.05, NYSE Arca Rule 2.1210.04 and Nasdaq Rule 1210.05.

[22] *See, e.g.,* FINRA Rule 1210.06, NYSE Arca Rule 2.1210.05 and Nasdaq Rule 1210.06. FINRA Rule 1210.06 requires individuals taking the SIE who are not associated persons to agree to be subject to the same waiting periods for retaking the SIE. The Exchange is not including this language in proposed Rule 3.30.06, as the Exchange will not apply its registration rules in any event to individuals who are not associated persons of TPHs.

[23] *See, e.g.,* FINRA Rule 1210.07, NYSE Arca Rule 2.1210.06 and Nasdaq Rule 1210.07.

Moreover, an individual holding a representative-level registration who leaves the industry after the effective date of this proposed rule change would have up to four years to re-associate with a TPH and register as a representative without having to retake the SIE. However, the four-year expiration period in the proposed rule change extends only to the SIE, and not the representative- and principal-level registrations. The representative- and principal-level registrations would continue to be subject to a two-year expiration period as is the case today.

Finally, proposed Rule 3.30.08 clarifies that, for purposes of the proposed rule, an application would not be considered to have been received by the Exchange if that application does not result in a registration. The Exchange notes that proposed Rule 3.30.08 is substantively similar to similar FINRA and other exchanges' rules.[24]

Waiver of Examinations for Individuals Working for a Financial Services Industry Affiliate of a TPH (Proposed Rule 3.30.09)

The Exchange is proposing Rule 3.30.09 to provide a new process whereby individuals who would be working for a ''financial services industry affiliate of a TPH'' [25] would terminate their registrations with the TPH and would be granted a waiver of their requalification requirements upon re-registering with an TPH, provided the firm that is requesting the waiver and the individual satisfy the criteria for a Financial Services Affiliate (''FSA'') waiver.[26]

Under the proposed waiver process, the first time a registered person is designated as eligible for a waiver based on the FSA criteria, the TPH with which the individual is registered would notify the Exchange of the FSA designation. The TPH would concurrently file a full Form U5 terminating the individual's registration with the firm, which would also terminate the individual's other self-regulatory organization and state registrations. To be eligible for initial designation as an FSA-eligible person by a TPH, an individual must have been registered for a total of five years within the most recent 10-year period prior to the designation, including for the most recent year with that TPH. An individual would have to satisfy these preconditions only for purposes of his or her initial designation as an FSA-eligible person, and not for any subsequent FSA designation(s). Thereafter, the individual would be eligible for a waiver for up to seven years from the date of initial designation,[27] provided that the other conditions of the waiver, as described below, have been satisfied. Consequently, a TPH other than the TPH that initially designated an individual as an FSA-eligible person may request a waiver for the individual and more than one TPH may request a waiver for the individual during the seven-year period.[28]

An individual designated as an FSA-eligible person would be subject to the Regulatory Element of CE while working for a financial services industry affiliate of a TPH. The individual would be subject to a Regulatory Element program that correlates to his or her most recent registration category, and CE would be based on the same cycle had the individual remained registered. If the individual fails to complete the prescribed Regulatory Element during the 120-day window for taking the session, he or she would lose FSA eligibility (*i.e.,* the individual would have the standard two-year period after termination to re-register without having to retake an examination). The Exchange is making corresponding changes to Rule 3.33, Continuing Education.

Upon registering an FSA-eligible person, a TPH would file a Form U4 and request the appropriate registration(s) for the individual. The TPH would also submit an examination waiver request to the Exchange,[29] similar to the process used today for waiver requests, and it would represent that the individual is eligible for an FSA waiver based on the conditions set forth below. The Exchange would review the waiver request and make a determination of whether to grant the request within 30 calendar days of receiving the request. The Exchange would summarily grant the request if the following conditions are met:

(a) Prior to the individual's initial designation as an FSA-eligible person, the individual was registered for a total of five years within the most recent 10-year period, including for the most recent year with the TPH that initially designated the individual as an FSA-eligible person;

(b) The waiver request is made within seven years of the individual's initial designation as an FSA-eligible person by a TPH;

(c) The initial designation and any subsequent designation(s) were made concurrently with the filing of the individual's related Form U5;

(d) The individual continuously worked for the financial services affiliate(s) of a TPH since the last Form U5 filing;

(e) The individual has complied with the Regulatory Element of CE; and

(f) The individual does not have any pending or adverse regulatory matters, or terminations, that are reportable on the Form U4, and has not otherwise been subject to a statutory disqualification while the individual was designated as an FSA-eligible person with a TPH.

Following the Form U5 filing, an individual could move between the financial services affiliates of a TPH so long as the individual is continuously working for an affiliate. Further, a TPH could submit multiple waiver requests for the individual, provided that the

[24] *See, e.g.,* FINRA Rule 1210.08, NYSE Arca Rule 2.1210.07 and Nasdaq Rule 1210.08.

[25] Proposed Rule 3.30.09 defines a ''financial services industry affiliate of a TPH'' as a legal entity that controls, is controlled by or is under common control with TPH and is regulated by the SEC, CFTC, state securities authorities, federal or state banking authorities, state insurance authorities, or substantially equivalent foreign regulatory authorities.

[26] There is no counterpart to proposed Rule 3.30.09 in the Exchange's existing rules. FINRA Rule 1210.09 was previously adopted as a new waiver process for FINRA registrants, as part of the FINRA Rule Changes. Other Exchanges have since adopted substantively similar Rules. *See, e.g.,* NYSE Arca Rule 2.1210.08 and Nasdaq Rule 1210.09.

[27] Individuals would be eligible for a single, fixed seven-year period from the date of initial designation, and the period would not be tolled or renewed.

[28] The following examples illustrate this point:

Example 1. TPH A designates an individual as an FSA-eligible person by notifying the Exchange and files a Form U5. The individual joins Firm A's financial services affiliate. TPH A does not submit a waiver request for the individual. After working for TPH A's financial services affiliate for three years, the individual directly joins TPH B's financial services affiliate for three years. TPH B then submits a waiver request to register the individual.

Example 2. Same as Example 1, but the individual directly joins TPH B after working for TPH A's financial services affiliate, and TPH B submits a waiver request to register the individual at that point in time.

Example 3. TPH A designates an individual as an FSA-eligible person by notifying the Exchange and files a Form U5. The individual joins TPH A's financial services affiliate for three years. TPH A then submits a waiver request to re-register the individual. After working for TPH A in a registered capacity for six months, TPH A re-designates the individual as an FSA-eligible person by notifying the Exchange and files a Form U5. The individual rejoins TPH A's financial services affiliate for two years, after which the individual directly joins TPH B's financial services affiliate for one year. TPH B then submits a waiver request to register the individual.

Example 4. Same as Example 3, but the individual directly joins TPH B after the second period of working for TPH A's financial services affiliate, and TPH B submits a waiver request to register the individual at that point in time.

[29] The Exchange would consider a waiver of the representative-level qualification examination(s), the principal-level qualification examination(s) and the SIE, as applicable.

waiver requests are made during the course of the seven-year period.[30] An individual who has been designated as an FSA-eligible person by a TPH would not be able to take additional examinations to gain additional registrations while working for a financial services affiliate of a TPH.

Status of Persons Serving in the Armed Forces of the United States (Proposed Rule 3.30.10)

Proposed Rule 3.30.10 provides specific relief to registered persons serving in the Armed Forces of the United States. Among other things, the proposed rule permits a registered person of a TPH who volunteers for or is called into active duty in the Armed Forces of the United States to be registered in an inactive status and remain eligible to receive ongoing transaction-related compensation. The proposed rule also includes specific provisions regarding the deferment of the lapse of registration requirements for formerly registered persons serving in the Armed Forces of the United States. The proposed rule further requires that the TPH with which such person is registered promptly notify the Exchange of such person's return to employment with the TPH. The proposed rule would require a TPH that is a sole proprietor to also similarly notify the Exchange of his or her return to participation in the investment banking or securities business. The proposed rule also provides that the Exchange would defer the lapse of the SIE for formerly registered persons serving in the Armed Forces of the United States.

Impermissible Registrations (Proposed Rule 3.30.11)

Existing Rule 3.30 prohibits a TPH from maintaining a registration with the Exchange for any person who is no longer active in the TPH's investment banking or securities business, who is no longer functioning in the registered capacity, or where the sole purpose is to avoid an examination requirement. The Rule also prohibits a TPH from applying for the registration of a person where the TPH does not intend to employ the person in its investment banking or securities business. These prohibitions do not apply to the current permissive registration categories identified in Rule 3.30.[31]

In light of proposed 3.30.02, Permissive Registrations, discussed above the Exchange is proposing to not carry over this language to new rule 3.30 and instead adopt Rule 3.30.11, which prohibits a TPH from registering or maintaining the registration of a person unless the registration is consistent with the requirements of proposed Rule 3.30. The Exchange notes that proposed Rule 3.30.11 is substantively similar FINRA and other exchanges' rules.[32]

Registration Categories (Proposed Rule 3.31)

The Exchange is proposing to adopt new and revised registration category rules and related definitions in proposed Rule 3.31, Registration Categories.[33]

Definition of Principal (Proposed Rule 3.31(a)(1))

As set forth in proposed Rule 3.31(a)(1), for purposes of these registration rules, the term ''principal'' means any person associated with a TPH, including, but not limited to, sole proprietor, officer, partner, director or other person occupying a similar status or performing similar functions, actively engaged in the management of the TPH's securities business, including supervision, solicitation, conduct of the TPH's business, or the training of persons associated with a TPH for any of these functions. Proposed Rule 3.31(a)(1) also clarifies that a TPH's chief executive officer (''CEO'') and chief financial officer (''CFO'') (or equivalent officers) are considered principals based solely on their status. The proposed rule further clarifies that the term ''principal'' includes any other associated person who is performing functions or carrying out responsibilities that are required to be performed or carried out by a principal under Exchange Rules.

In addition, the proposed Rule provides that the phrase ''actively engaged in the management of the TPH's securities business'' includes the management of, and the implementation of corporate policies related to, such business as well as managerial decision-making authority with respect to the TPH's securities business and management-level responsibilities for supervising any aspect of such business, such as serving as a voting member of the TPH's executive, management or operations committees. The Exchange notes that proposed definition in Rule 3.31(a)(1) is substantively similar to the definition of principal in FINRA and other exchanges' rules.[34]

General Securities Principal (Proposed Rule 3.31(a)(2))

Proposed Rule 3.31(a)(2)(A) states that each principal as defined in paragraph (a)(1) (of Rule 3.31) is required to register with the Exchange as a General Securities Principal, subject to the following exceptions.[35] The proposed rule provides that if a principal's activities include the functions of a Compliance Officer, a Financial and Operations Principal, a Securities Trader Principal, a Securities Trader Compliance Officer, or a Registered Options Principal, then the principal must appropriately register in one or more of these categories.

Proposed Rule 3.31(a)(2)(A) further provides that if a principal's activities are limited solely to the functions of a General Securities Sales Supervisor, then the principal may appropriately register in that category in lieu of registering as a General Securities Principal, provided that if the principal is engaged in options sales activities he or she would be required to register as a General Securities Sales Supervisor or as a Registered Options Principal.

Proposed Rule 3.31(a)(2)(B) requires that an individual registering as a General Securities Principal satisfy the General Securities Representative prerequisite registration and pass the General Securities Principal qualification examination. Proposed Rule 3.31(a)(2)(B) also clarifies that an individual may register as a General Securities Sales Supervisor and pass the General Securities Sales Supervisor Module qualification examination in lieu of passing the General Securities Principal examination.

The Exchange notes that proposed General Securities Principal requirements and qualifications set forth in Rule 3.31(a)(2) are similar to the

[30] For example, if a TPH submits a waiver request for an FSA-eligible person who has been working for a financial services affiliate of the TPH for three years and re-registers the individual, the TPH could subsequently file a Form U5 and re-designate the individual as an FSA-eligible person. Moreover, if the individual works with a financial services affiliate of the TPH for another three years, the TPH could submit a second waiver request and re-register the individual upon returning to the TPH.

[31] Current Rule 3.30 allows for permissive principal registration of individuals who perform legal, compliance, internal audit, back-office operations, or similar duties for the TPH or a person engaged in the investment banking or securities business of a foreign securities affiliate or subsidiary of the TPH.

[32] *See, e.g.,* FINRA Rule 1210.11 and Nasdaq Rule 1210.11.

[33] For ease of reference, the Exchange proposes to adopt as Rule 3.31, Interpretation and Policy .05, a Summary of Qualification Requirements in chart form for each of the Exchange's permitted registration categories discussed below.

[34] *See, e.g.,* FINRA Rule 1220.(a)(1), NYSE Arca Rule 2.1220(a)(1) and Nasdaq Rule 1220(a)(1).The Exchange notes that its definition of Principal does not include ''manager of office of supervisory jurisdiction'' as FINRA, NYSE, and Nasdaq rules do because it is not applicable on the Exchange.

[35] Under the current Rules, the Exchange does not recognize the General Securities Principal.

requirements and qualifications required by FINRA and other exchanges' rules.[36]

Compliance Officer (Proposed Rule 3.31(a)(3))

Current Rule 3.30(c) provides that each TPH that registered as a broker-dealer shall designated a CCO on Schedule A of Form BD and that such individuals are required to register with the Exchange and pass the appropriate heightened qualification examination(s). Current Rule 3.30.08 further provides that any individual that is a CCO (or performs similar functions) for a TPH that engages in in proprietary trading, market-making or effecting transactions on behalf of a broker-dealer is required to register and qualify as a Securities Trader Compliance Officer (CT) and pass the Series 14 examination or pass the General Securities Principal or Securities Trader Principal qualification examination.

Under the new registration rules, the Exchange proposes to adopt Rule 3.31(a)(3) providing that each person designated as a Chief Compliance Officer on Schedule A of Form BD shall be required to register with the Exchange as a General Securities Principal, provided that such person may instead register as a Compliance Officer if his or her duties do not include supervision of trading. All individuals registering as Compliance Officers would be required, prior to or concurrent with such registration, to pass the Compliance Official qualification examination. An individual designated as a Chief Compliance Officer on Schedule A of Form BD of a TPH that is engaged in limited securities business could also be registered in a principal category under Rule 3.31(a) that corresponds to the limited scope of the TPH's business.

The Exchange notes that the proposed Compliance Officer requirements and qualifications set forth in Rule 3.31(a)(3) are similar to the requirements and qualifications required by FINRA's and other exchange's rules.[37]

Securities Trader Compliance Officer (Proposed Rule 3.31(a)(4))

Rule 3.31(a)(4) would provide that an individual designated as a Chief Compliance Officer on Schedule A of Form BD may register and qualify as a Securities Trader Compliance Officer if, with respect to transactions in equity, preferred or convertible debt securities, or options, such person is engaged in proprietary trading or Market Making, the execution of transactions on an agency basis, or the direct supervision of such activities other than a person associated with a TPH whose trading activities are conducted principally on behalf of an investment company that is registered with the SEC pursuant to the Investment Company Act and that controls, is controlled by, or is under common control with a TPH. Each individual registering as a Securities Trader Compliance Officer would be required to first become registered pursuant to paragraph (b)(4) as a Securities Trader, and to pass either (i) the Compliance Official qualification exam or (ii) the General Securities Principal qualification exam. The Exchange notes that the proposed Securities Trader Compliance Officer requirements and qualifications set forth in Rule 3.31(a)(4) are similar to the requirements and qualifications required by other exchanges' rules.[38]

Financial and Operations Principal (Proposed Rule 3.31(a)(5))

Existing Rule 3.30(b) provides that every TPH that is subject to Exchange Act Rule 15c3–1 shall designate a Financial/Operations Principal. It requires each person associated with a TPH who performs such duties to be registered as a Financial/Operations Principal with the Exchange and to pass the Series 27 examination.[39]

It further provides that each Financial/Operations Principal designated by a TPH shall be registered in that capacity with the Exchange as prescribed by the Exchange, and that a Financial/Operations Principal of a TPH may be a full-time employee, a part-time employee or independent contractor of the TPH. The Exchange proposes to delete Exchange 3.30(b) and adopt in its place Exchange Rule 3.31(a)(5). Under the new rule, every TPH of the Exchange that is operating pursuant to the provisions of Rules 15c3–1(a)(1)(ii), (a)(2)(i) or (a)(8) of the Exchange Act, shall designate at least one Financial and Operations Principal who shall be responsible for performing the duties described in proposed Rule 3.31(a)(5)(A)(i)–(vii). In addition, each person associated with a TPH who performs such duties shall be required to register as a Financial and Operations Principal with the Exchange. Proposed Exchange Rule 3.31(a)(5)(C) would require all individuals registering as a Financial and Operations Principal to pass the Financial and Operations Principal qualification examination before such registration may become effective. The Exchange notes that proposed Financial and Operations Principal requirements and qualifications set forth in Rule 3.31(a)(5) are similar to the requirements and qualifications required by other exchanges' rules.[40]

Securities Trader Principal (Proposed Rule 3.31(a)(6))

Existing Rule 3.30.08 provides that an individual associated with a TPH that: (i) Supervises or monitors proprietary trading, market-making and/or brokerage activities for broker-dealers; (ii) supervises or trains those engaged in proprietary trading, market-making and/or effecting transactions on behalf of a broker-dealer, with respect to those activities; and/or (iii) is an officer, partner or director of a TPH or TPH organization is required to register and qualify as a Securities Trader Principal (TP) and satisfy the prerequisite registration and qualification requirements. The Rule further provides that to qualify for registration as a Securities Trader Principal, such person must pass the Series 24 (General Securities Principal) qualification examination or the General Securities

[36] *See, e.g.,* FINRA Rule 1220(a)(2), NYSE Arca Rule 2.1220(a)(2) and Nasdaq Rule 1220(a)(2).

[37] *See, e.g.,* FINRA Rule 1220(a)(3) and NYSE Arca Rule 2.1220(a)(3).

[38] *See, e.g.,* Nasdaq Rule 1220(a)(3)(D) and MIAX Options Rule 1220(b)(2)(iv). FINRA does not recognize the Securities Trader Compliance Officer registration categories that the Exchange proposes to recognize. However, FINRA Rule 1220(a)(3), like proposed Rule 3.31(a)(3), offers an exception pursuant to which a Chief Compliance Officer designated on Schedule A of Form BD may register in a principal category that corresponds to the limited scope of the member's business. Unlike Nasdaq and MIAX, the Exchange proposes to accept the General Securities Principal exam in lieu of the Compliance Official exam. The Exchange notes this is in line with the qualification requirements for the Compliance Officer, as well as the Exchange's current Securities Trader Compliance Officer qualification requirements. *See* Rule 3.30.08(b).

[39] FINRA Rule 1220(a)(4) differs from proposed Rule 3.31(a)(5) in that it includes an Introducing Broker-Dealer, Financial and Operations Principal, and Market-Maker registration requirement. Additionally, proposed Rule 3.31(a)(5) contains a requirement, which the FINRA rule does not, that each person associated with a member who performs the duties of a Financial and Operations Principal must register as such with the Exchange. Additionally, the Exchange is not adopting a Principal Financial Officer or Principal Operations Officer requirement like FINRA Rule 1220(a)(4)(B), as it believes the Financial and Operations Principal requirement is sufficient. Finally, proposed Rule 3.31(a)(5)(B)(v) and (vi) contain minor wording variations from the FINRA rule. Proposed Rule 3.31(a) is substantively similar as Nasdaq Rule 1220(a)(7).

[40] *See, e.g.,* Nasdaq Rule 1220(a)(3)(D) and MIAX Options Rule 1220(b)(2)(iv). FINRA Rule 1220(a)(4) differs from proposed Exchange Rule 3.31(a)(5) in that it includes an Introducing Broker-Dealer Financial and Operations Principal registration requirement. Further, as discussed above, the Exchange does not propose to adopt a Principal Financial Officer or Principal Operations Officer requirement similar to FINRA Rule 1220(a)(4)(B), as it believes the Financial and Operations Principal requirement is sufficient.

Sales Supervisor Registration and General Securities Principal—Sales Supervisor Module Registration (Series 9/10 and Series 23). A Securities Trader Principal must also pass the Securities Trader (Series 57) qualification examination.[41]

In place of Rule 3.30.08, the Exchange proposes to adopt Rule 3.31(a)(6), Securities Trader Principal. Proposed Rule 3.31(a)(6) requires that a principal responsible for supervising the securities trading activities specified in proposed Rule 3.31(b)(3), which provides for registration in the representative-level ''Securities Trader'' category, register as a Securities Trader Principal. The proposed rule requires individuals registering as Securities Trader Principals to be registered as Securities Traders and to pass the General Securities Principal qualification examination. The Exchange notes that proposed Rule 3.31(a)(6) is substantively similar to FINRA and other exchanges' rules governing Securities Trader Principals.[42]

Registered Options Principal (Proposed Rules 3.31(a)(7))

Existing Rule 3.30(d) provides that associated persons of a TPH that conducts a public customer business must also comply with the registration requirements set forth in Chapter 3, which include the Registered Options Principal. Rule 3.36 provides no TPH shall be approved to transact options business with the public until those persons associated with it who are designated as Options Principals have been approved by and registered with the Exchange.[43] Rule 3.36 also provides that persons engaged in the supervision of options sales practices or a person to whom the designated general partner or executive officer (pursuant to Rule 9.2) or another Registered Options Principal delegates the authority to supervise options sales practices shall be designated as Options Principals. Rule 3.36 provides that individuals engaged in the supervision of options sales practices and designated as Options Principals are required to qualify as an Options Principal by passing the Registered Options Principals Examination (Series 4) or the Sales Supervision Examination (Series 9/10). Rule 3.36(c) further provides that individuals who are delegated responsibility pursuant to Rule 9.2 for reviewing the acceptance of discretionary accounts, for approving exceptions to a TPH organization's criteria or standards for uncovered options accounts, and for approval of communications, shall be designated as Options Principals and are required to qualify as an Options Principal by passing the Registered Options Principal Examination (Series 4).

The Exchange is proposing to delete Rule 3.30 and in its place adopt Rule 3.31(a)(7), Registered Options Principal, which would require under its Section (a)(7)(A) that each TPH that is engaged in transactions in options with the public to have at least one Registered Options Principal.[44] In addition, each principal as defined in paragraph (a)(1) of the Rule who is responsible for supervising a TPH's options sales practices with the public would be required to register with the Exchange as a Registered Options Principal, subject to the following exception. If a principal's options activities are limited solely to those activities that may be supervised by a General Securities Sales Supervisor, then such person may register as a General Securities Sales Supervisor pursuant to paragraph (a)(8) of the Rule in lieu of registering as a Registered Options Principal. The proposed rule requires individuals registering as Registered Options Principals to be registered as General Securities Representatives and to pass the Registered Options Principals qualification examination.[45] The Exchange notes that proposed Rule 3.31(a)(7) is substantively similar to FINRA and other exchanges' rules regarding Registered Options Principals.[46]

General Securities Sales Supervisor (Proposed Rule 3.31(a)(8))

Proposed Rule 3.31(a)(8) provides that a principal may register with the Exchange as a General Securities Sales Supervisor if his or her supervisory responsibilities in the investment banking or securities business of a TPH are limited to the securities sales activities of the TPH, including the approval of customer accounts, training of sales and sales supervisory personnel and the maintenance of records of original entry or ledger accounts of the TPH required to be maintained in branch offices by Exchange Act record-keeping rules.

A person registering as a General Securities Sales Supervisor must satisfy the General Securities Representative prerequisite registration and pass the General Securities Sales Supervisor examinations. Moreover, a General Securities Sales Supervisor is precluded from performing any of the following activities: (1) Supervision of market-making commitments; (2) supervision of the custody of firm or customer funds or securities for purposes of Exchange Act Rule 15c3–3; or (3) supervision of overall compliance with financial responsibility rules. The Exchange notes that proposed Rule 3.31(a)(8) is substantively similar to FINRA and other exchanges' rules governing General Securities Sales Supervisors.[47]

Definition of Representative (Proposed Rule 3.31(b)(1))

The Exchange proposes to adopt a definition for the term ''representative'' in proposed Exchange Rule 3.31(b)(1). Currently, the Exchange's rules do not define the term ''representative,'' although Rule 3.37(a) states that persons who perform duties for the TPH that are customarily performed by sales representatives' solicitors, or branch office managers shall be designated as Representatives.[48] Proposed Rule 3.31(b)(1) will define a representative as any person associated with an TPH, including assistant officers other than principals, who is engaged in TPH's investment banking or securities business, such as supervision, solicitation, conduct of business in securities or the training of persons associated with a TPH for any of these functions. The Exchange notes that proposed ''representative'' definition is substantively similar to the definition used by FINRA and other exchange rules.[49]

General Securities Representative (Proposed Rule 3.31(b)(2))

Under current Rule 3.37(d), a person accepting orders from non-TPH customers (unless such customer is a broker-dealer registered with the

[41] *See* Cboe Options Regulatory Circular RG15–180.

[42] *See e.g.,* FINRA Rule 1220(a)(7), NYSE Arca Rule 2.1220(a)(5) and Nasdaq Rule 1220(a)(7).

[43] The Exchange proposes to clarify in Rule 3.36 that the designated Options Principal(s) must also meet the applicable registration requirements in Chapter III.

[44] The Exchange proposes to amend Rule 3.36 to conform all references to ''Options Principal'' with ''Registered Options Principal''.

[45] Current Rule 3.36(b) provides that individuals engaged in the supervision of options sales practices and designated as Options Principals are required to qualify as an Options Principal by passing the Registered Options Principals Qualification Examination (Series 4) or the Sales Supervisor Qualification Examination (Series 9/10), and is proposed to be deleted in view of proposed Rule 3.31(a)(7).

[46] *See, e.g.,* FINRA Rule 1220(a)(8), NYSE Arca Rule 2.1220(a)(7) and Nasdaq Rule 1220(a)(8).

[47] *See, e.g.,* FINRA Rule 1220(a)(10), NYSE Arca Rule 2.1220(a)(6) and Nasdaq Rule 1220(a)(10).

[48] The Exchange proposes to eliminate this language under Rule 3.37(a) in view of the proposed definition under Rule 3.31(b)(1).

[49] *See, e.g.,* FINRA Rule 1220(b)(1), NYSE Arca Rule 2.1220(b)(1) and Nasdaq Rule 1220(b)(1).

Commission) is required to register with the Exchange and to be qualified by passing the General Securities Representatives Examination (Series 7).

Proposed Rule 3.31(b)(2)(A) states that each representative as defined in proposed Rule 3.31(b)(1) is required to register with the Exchange as a General Securities Representative, subject to the following exceptions. The proposed rule provides that if a representative's activities include the function of a Securities Trader, then the representative must appropriately register in that category.

The proposed rule further provides that each person seeking to register as a General Securities Representative shall, prior to or concurrent with such registration, pass the SIE and the General Securities Representative qualification examinations. The Exchange notes that proposed Rule 3.31(b)(2) is substantively similar to FINRA and other exchanges' rules governing General Securities Representatives.[50]

Securities Trader (Proposed Rule 3.31(b)(3))

Pursuant to current Rule 3.30.08, associated persons must pass the qualification examination for Securities Trader (the Series 57 examination) and SIE and register with the Exchange as a Securities Trader if that person is engaged in proprietary trading, market-making and/or effecting transactions on behalf of a broker-dealer.

The Exchange proposes to delete Rule 3.30 and with respect to the Securities Trader requirement, replace it with proposed Rule 3.31(b)(3). Rule 3.31(b)(3) would require each representative as defined in Rule 3.31(b)(1) to register with the Exchange as a Securities Trader if, with respect to transactions in equity, preferred or convertible debt securities, or options, such person is engaged in proprietary trading or Market Making, the execution of transactions on an agency basis, or the direct supervision of such activities other than a person associated with a TPH whose trading activities are conducted principally on behalf of an investment company that is registered with the SEC pursuant to the Investment Company Act and that controls, is controlled by, or is under common control with a TPH. Rule 3.31(b)(3) would continue to require individuals registering as Securities Traders to pass the SIE as well as the Securities Trader qualification exam.

Additionally, proposed Rule 3.31(b)(3)(A) would require each person associated with a TPH who is: (i) Primarily responsible for the design, development or significant modification of an algorithmic trading strategy relating to equity, preferred or convertible debt securities or options; or (ii) responsible for the day-to-day supervision or direction of such activities to register with the Exchange as a Securities Trader.[51]

For purposes of this proposed new registration requirement an ''algorithmic trading strategy'' is an automated system that generates or routes orders (or order-related messages) but does not include an automated system that solely routes orders received in their entirety to a market center. The proposed registration requirement applies to orders and order related messages whether ultimately routed or sent to be routed to an exchange or over the counter. An order router alone would not constitute an algorithmic trading strategy. However, an order router that performs any additional functions would be considered an algorithmic trading strategy. An algorithm that solely generates trading ideas or investment allocations—including an automated investment service that constructs portfolio recommendations—but that is not equipped to automatically generate orders and order-related messages to effectuate such trading ideas into the market— whether independently or via a linked router—would not constitute an algorithmic trading strategy.[52]

The associated persons covered by the expanded registration requirement would be required to pass the requisite qualification examination and be subject to the same continuing education requirements that are applicable to individual Securities Traders. The Exchange believes that potentially problematic conduct stemming from algorithmic trading strategies—such as failure to check for order accuracy, inappropriate levels of messaging traffic, and inadequate risk management controls—could be reduced or prevented, in part, through improved education regarding securities regulations for the specified individuals involved in the algorithm design and development process.

The proposal is intended to ensure the registration of one or more associated persons that possesses knowledge of, and responsibility for, both the design of the intended trading strategy and the technological implementation of the strategy, sufficient to evaluate whether the resulting product is designed to achieve regulatory compliance in addition to business objectives. For example, a lead developer who liaises with a head trader regarding the head trader's desired algorithmic trading strategy and is primarily responsible for the supervision of the development of the algorithm to meet such objectives must be registered under the proposal as the associated person primarily responsible for the development of the algorithmic trading strategy and supervising or directing the team of developers. Individuals under the lead developer's supervision would not be required to register under the proposal if they are not primarily responsible for the development of the algorithmic trading strategy or are not responsible for the day-to-day supervision or direction of others on the team. Under this scenario, the person on the business side that is primarily responsible for the design of the algorithmic trading strategy, as communicated to the lead developer, also would be required to register. In the event of a significant modification to the algorithm, TPHs, likewise, would be required to ensure that the associated person primarily responsible for the significant modification (or the associated person supervising or directing such activity), is registered as a Securities Trader.

A TPH employing an algorithm is responsible for the algorithm's activities whether the algorithm is designed or developed in house or by a third-party. Thus, in all cases, robust supervisory procedures, both before and after deployment of an algorithmic trading strategy, are a key component in protecting against problematic behavior stemming from algorithmic trading. In addition, associated persons responsible for monitoring or reviewing the performance of an algorithmic trading strategy must be registered, and a TPH's trading activity must always be supervised by an appropriately registered person. Therefore, even where a firm purchases an algorithm off-the-shelf and does not significantly modify the algorithm, the associated person responsible for monitoring or reviewing the performance of the algorithm would be required to be registered.

The Exchange notes that proposed Rule 3.31(b)(3) is substantively similar

[50] *See, e.g.,* FINRA Rule 1220(b)(2), NYSE Arca Rule 2.1220(b)(2) and Nasdaq Rule 1220(b)(2).

[51] This new registration requirement was recently added to the FINRA Rulebook. The Exchange, like other Exchanges such as Nasdaq (see Nasdaq Rule 1220(b)(4)(A)) has determined to add a parallel requirement to its own rules, but also to add options and market making to the scope of products and activities, respectively, within the proposed rule's coverage. *See* SR–FINRA–2016–007, 81 FR 21914.

[52] *See id.*

to FINRA and other exchanges' rules governing Securities Traders.[53]

Foreign Registrations (Proposed Rule 3.31.01)

Current Rule 3.30.09 and Rule 3.37(e) provide that any person who is in good standing as a representative with the Financial Conduct Authority in the United Kingdom or with a Canadian stock exchange or securities regulator shall be exempt from the requirement to pass the SIE. The Exchange proposes to relocate the language contained in Rule 3.30.09 (which rule is being deleted) and Rule 3.37(e) to new Rule 3.31 Interpretation and Policy .01 as Rule 3.31 governs the SIE requirements and as the relocation is consistent with the location of the provision in the rules of other exchanges.[54]

Additional Qualification Requirements for Persons Engaged in Security Futures Activities (Proposed Rule 3.31.02)

The Exchange is also proposing to adopt Rule 3.31.02, which provides that each person who is registered with the Exchange as a Registered Options Principal, General Securities Representative, Options Representative, or General Securities Sales Supervisor shall be eligible to engage in security futures activities as a principal provided that such individual completes a Firm Element program as set forth in proposed Rule 3.33 that addresses security futures products before such person engages in security futures activities.[55]

TPHs With One Registered Options Principal (Proposed Rule 3.31.03)

The Exchange proposes to adopt new Rule 3.31 Interpretation and Policy .03 which requires notification to the Exchange by a TPH that has one Registered Options Principal in the event such person is terminated, resigns, becomes incapacitated or is otherwise unable to perform the duties of a Registered Options Principal, and imposes certain restrictions on the TPH's options business in that event.[56]

Scope of General Securities Sales Supervisor Registration Category (Proposed Rule 3.31.04)

Proposed Rule 3.31.04 explains the purpose of the General Securities Sales Supervisor registration category. The General Securities Sales Supervisor category is an alternate category of registration designed to lessen the qualification burdens on principals of general securities firms who supervise sales. Without this category of limited registration, such principals would be required to separately qualify pursuant to the rules of FINRA, the MSRB, and the Cboe options exchanges. While persons may continue to separately qualify with all relevant self-regulatory organizations, the General Securities Sales Supervisor examination permits qualification as a supervisor of sales of all securities through one registration category. Persons registered as General Securities Sales Supervisors may also qualify in any other category of principal registration. Persons who are already qualified in one or more categories of principal General Securities Sales Supervisors may supervise sales activities of all securities by also qualifying as General Securities Sales Supervisors. The proposed rule further provides that any person required to be registered as a principal who supervises sales activities in corporate, municipal and option securities, investment company products, variable contracts, and security futures (subject to the requirements of Rule 3.31.02) may be registered solely as a General Securities Sales Supervisor. In addition to branch office managers, other persons such as regional and national sales managers may also be registered solely as General Securities Sales Supervisors as long as they supervise only sales activities. Proposed Rule 3.31.04 is similar to corresponding FINRA and other exchanges' rules.[57]

Summary of Qualification Requirements (Proposed Rule 3.31.05)

Proposed Rule 3.31.05 provides a table summary of the categories of registration and applicable qualifications and alternative qualifications set forth throughout Rule 3.31.

Associated Persons Exempt From Registration (Proposed Rule 3.32)

Existing Rule 3.30(2) currently provides that the following persons associated with a TPH are not required to register: (a) Individual associated persons whose functions are solely and exclusively clerical or ministerial; (b) individual TPHs and individual associated persons who are not actively engaged in the securities business; (c) individual TPHs and individual associated persons whose functions are related solely and exclusively to the TPH's or TPH organization's need for nominal corporate officers or for capital participation; (d) individual associated persons that are restricted from accessing the Exchange (physically and electronically) and that do not engage in the securities business of the TPH or TPH organization relating to activity that occurs on the Exchange; and (e) individual associated persons whose functions are related solely and exclusively to: (i) Transactions in commodities; (ii) transactions in security futures; and/or (iii) effecting transactions on the floor of another national securities exchange and who are registered as floor members with such exchange.

The Exchange is proposing to adopt Rule 3.30(2) as Rule 3.32 subject to certain changes. Rule 3.30 exempts from registration those associated persons who are not actively engaged in the securities business. It also exempts from registration those associated persons whose functions are related solely and exclusively to a member's need for nominal corporate officers or for capital participation.[58] The Exchange believes that the determination of whether an associated person is required to register must be based on an analysis of the person's activities and functions in the context of the various registration categories. Proposed Rule 3.32 provides an exemption from registration with the Exchange for certain associated persons. Specifically, the proposed rule provides that persons associated with a TPH whose functions are solely and exclusively clerical or ministerial would be exempt from registration.

FINRA Rule 1230 provides an exemption from registration with FINRA to persons associated with a FINRA member whose functions are solely and exclusively clerical or ministerial and persons associated with a FINRA member whose functions are related solely and exclusively to (i) effecting transactions on the floor of a national securities exchange and who are appropriately registered with such exchange; (ii) effecting transactions in municipal securities; (iii) effecting transactions in commodities; or (iv)

[53] *See, e.g.,* FINRA Rule 1220(b)(4), NYSE Arca Rule 2.1220(b)(3) and Nasdaq Rule 1220(b)(4).

[54] *See, e.g.,* FINRA Rule 1220.01, NYSE Arca Rule 2.1220.01 and Nasdaq Rule 1220.01.

[55] Unlike FINRA Rule 1220.02, proposed Exchange Rule 3.31.02 omits references to United Kingdom Securities Representatives and Canada Securities Representatives, which are registration categories the Exchange does not recognize. In any event, the Exchange does not currently offer security futures products for trading.

[56] *See* Proposed Rule 3.31.03. Proposed Rule 3.31.03 is similar to corresponding FINRA Rule 1220.03, NYSE Arca Rule 2.1220.04 and Nasdaq Rule 1220.03.

[57] *See, e.g.,* FINRA Rule 1220.04, NYSE Arca Rule 2.1220.03 and Nasdaq Rule 1220.04.

[58] These exemptions generally apply to associated persons who are corporate officers of a TPH in name only to meet specific corporate legal obligations or who only provide capital for a member but have no other role in a TPH's business.

effecting transactions in security futures, provided that any such person is registered with a registered futures association. TPHs do not solely and exclusively engage in any of the foregoing transactions and therefore the Exchange is not adopting that portion of FINRA Rule 1230. Proposed Rule 3.32 is similar to other exchanges' corresponding rules.[59]

The Exchange proposes to adopt Rule 3.32.01 to clarify that the function of accepting customer orders is not considered a clerical or ministerial function and that associated persons who accept customer orders under any circumstances are required to be appropriately registered. However, the proposed rule provides that an associated person is not accepting a customer order where occasionally, when an appropriately registered person is unavailable, the associated person transcribes the order details and the registered person contacts the customer to confirm the order details before entering the order.

Changes to Continuing Education Requirements (Proposed Rule 3.33)

Existing Rule 3.33 (Continuing Education for Registered Persons), includes a Regulatory Element and a Firm Element. The Regulatory Element applies to registered persons and consists of periodic computer-based training on regulatory, compliance, ethical, supervisory subjects and sales practice standards. The Firm Element consists of at least annual, TPH-developed and administered training programs designed to keep covered registered persons current regarding securities products, services and strategies offered by the TPH.

Regulatory Element

The Exchange proposes to amend Rule 3.33(a) to provide, consistent with proposed Rule 3.30.09, that a waiver-eligible person would be subject to a Regulatory Element program that correlates to his or her most recent registration category, and that the content of the Regulatory Element would be based on the same cycle had the individual remain registered. The proposed rule change is similar to FINRA's and other exchanges' rules.[60]

Further, the Exchange proposes to amend Rule 3.33(a)(1) to provide that any person whose registration has been deemed inactive under the rule may not accept or solicit business or receive any compensation for the purchase or sale of securities. The proposed amendment provides, however, that such person may receive trail or residual commissions resulting from transactions completed before the inactive status, unless the TPH with which the person is associated has a policy prohibiting such trail or residual commissions. The proposed amendment to Rule 3.33(a)(1) also provides that if a waiver-eligible person fails to complete the Regulatory Element during the prescribed time frames, he or she would lose waiver eligibility.[61]

The Exchange proposes to amend Rule 3.33(a)(2) to provide that unless otherwise determined by the Exchange, a registered person other than a person designated as eligible for a waiver pursuant to Rule 3.30.09 will be required to re-take the Regulatory Element and satisfy all of its requirements under certain circumstances.[62]

Lastly, the Exchange proposes to amend Rule 3.33(a)(3) to provide that the Exchange offers Regulatory Elements for Exchange registered persons: the S201 for registered principals and supervisors, the S106 for persons registered only as Investment Company and Variable Contracts Representatives, and the S101 for all other registered persons.[63]

Firm Element

The Exchange proposes to amend Rule 3.33(c)(1) to provide that any registered person or any or any associated person who has direct contact with customers in the conduct of the TPH's or TPH organization's securities sales, trading or investment banking activities, and to the immediate supervisors of such persons, is subject to the Firm Element.[64]

The Exchange believes that training in ethics and professional responsibility should apply to all registered persons. Therefore, proposed Rule 3.33(c)(2)(ii), which provides that the Firm Element training programs must cover applicable regulatory requirements, would also require that a firm's training program cover training in ethics and professional responsibility. The proposed change to the Firm Element section of proposed Rule 3.33 is similar to changes made by other exchanges. [65]

Electronic Filing Rules (Proposed Rule 3.34)

The Exchange is proposing to adopt new Rule 3.34, Electronic Filing Requirements for Uniform Forms, which, among other things, will consolidate various Web CRD Form U4 and U5 electronic filing requirements in a single location and also would impose certain new requirements. More specifically, current Rule 3.30, Interpretations and Polices .01—.03, state that each individual required to register shall electronically file a Uniform Application for Securities Industry Registration (''Form U4'') through the Central Registration Depository system (''Web CRD'') operated by FINRA and to electronically submit to Web CRD any required amendments to Form U4. Further, any TPH or TPH organization that discharges or terminates the employment or retention of an individual required to register must comply with certain termination filing requirements, which include the filing of a Form U5. Form U4 and Form U5 electronic filing requirements applicable to options principals and representatives, as well a Form U5 requirement applicable to members upon termination of employment of any of their registered persons, are found in Exchange Rules 3.36 and 3.37. The Exchange proposes to delete current Exchange Rule 3.30, Interpretations and Polices .01–.03, and the electronic filing requirements of Exchange Rules 3.36 [66] and 3.37 [67], and to replace them with proposed Rule 3.34, Electronic Filing Requirements for Uniform Forms, which will consolidate Form U4 and Form U5 electronic filing requirements into a single rule.

First, proposed Rule 3.34(a) would provide that all forms required to be filed under the Exchange's registration rules shall be filed through an electronic process or such other process as the Exchange may prescribe to Web CRD.

Under Rule 3.34(b), TPHs would be required to designate registered principal(s) or corporate officer(s) who are responsible for supervising a firm's electronic filings. The registered principal(s) or corporate officer(s) who has or have the responsibility to review and approve the forms filed pursuant to the rule would be required to

[59] *See, e.g.,* NYSE Arca Rule 2.1230.

[60] *See, e.g.,* FINRA Rule 1240(a)(1), NYSE ARCA Rules 2.23(d)(1) and 2.24(d)(1), and Nasdaq Rule 1240(a)(1).

[61] *See* FINRA Rule 1240(a)(2), NYSE ARCA Rules 2.23(d)(1) and 2.24(d)(1), and Nasdaq Rule 1240(a)(2).

[62] *Id.*

[63] *See* NYSE Arca Rule 2.23(d)(1)(A).

[64] *See* FINRA Rule 1240(b)(1), NYSE Arca Rule 2.23(d)(2)(A) and Nasdaq Rule 1240(b)(1).

[65] *See* FINRA Rule 1240(b)(2)(B), NYSE Arca Rules 2.23(d)(2)(B)(ii) and 2.24(d)(2)(B) and Nasdaq Rule 1240(b)(2)(B).

[66] *See* current Rule 3.36(a).

[67] *See* current Rule 3.37(a), (b) and (c).

acknowledge, electronically, that he or she is filing this information on behalf of the member and the member's associated persons. Under Rule 3.34.01, the registered principal(s) or corporate officer(s) could delegate filing responsibilities to an associated person (who need not be registered) but could not delegate any of the supervision, review, and approval responsibilities mandated in Rule 3.34(b). The registered principal(s) or corporate officer(s) would be required to take reasonable and appropriate action to ensure that all delegated electronic filing functions were properly executed and supervised.

Under Rule 3.34(c)(1), initial and transfer electronic Form U4 filings and any amendments to the disclosure information on Form U4 must be based on a manually signed Form U4 provided to the TPH or applicant for membership by the person on whose behalf the Form U4 is being filed. As part of the TPH's recordkeeping requirements, it would be required to retain the person's manually signed Form U4 or amendments to the disclosure information on Form U4 in accordance with Rule 17a4(e)(1) under the Act and make them available promptly upon regulatory request. An applicant for membership must also retain every manually signed Form U4 it receives during the application process and make them available promptly upon regulatory request. Rule 3.34(c)(2) and Interpretation and Policy .03 and 04 provide for the electronic filing of Form U4 amendments without the individual's manual signature, subject to certain safeguards and procedures.

Rule 3.34(d) provides that upon filing an electronic Form U4 on behalf of a person applying for registration, a TPH must promptly submit fingerprint information for that person and that the Exchange may make a registration effective pending receipt of the fingerprint information. It further provides that if a TPH fails to submit the fingerprint information within 30 days after filing of an electronic Form U4, the person's registration will be deemed inactive, requiring the person to immediately cease all activities requiring registration or performing any duties and functioning in any capacity requiring registration. Under the rule the Exchange must administratively terminate a registration that is inactive for a period of two years. A person whose registration is administratively terminated could reactivate the registration only by reapplying for registration and meeting the qualification requirements of the applicable provisions of proposed Exchange Rule 3.31. Upon application and a showing of good cause, the Exchange could extend the 30-day period.

Rule 3.34(e) would require initial filings and amendments of Form U5 to be submitted electronically. As part of the TPH's recordkeeping requirements, it would be required to retain such records for a period of not less than three years, the first two years in an easily accessible place, in accordance with Rule 17a–4 under the Act, and to make such records available promptly upon regulatory request.

Finally, proposed Rule 3.34.02 would provide a TPH could enter into an agreement with a third party pursuant to which the third party agrees to file the required forms electronically on behalf of the TPH and the TPH's associated persons. Notwithstanding the existence of such an agreement, the TPH would remain responsible for complying with the requirements of the Rule.

Implementation Date

The Exchange proposes to announce the implementation date of the proposed rule change in an Exchange Notice, to be published no later than thirty (30) days following the operative date. The implementation date will be no later than sixty (60) days following the operative date, with the exception of the new registration requirement for developers of algorithmic trading strategies which would become effective 180 days following the implementation date.[68]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[69] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[70] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[71] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule change will streamline, and bring consistency and uniformity to, the registration rules, which will, in turn, assist TPHs and their associated persons in complying with these rules and improve regulatory efficiency. The proposed rule change will also improve the efficiency of the examination program, without compromising the qualification standards, by eliminating duplicative testing of general securities knowledge on examinations and by removing examinations that currently have limited utility. In addition, the proposed rule change will expand the scope of permissive registrations, which, among other things, will allow TPHs to develop a depth of associated persons with registrations to respond to unanticipated personnel changes and will encourage greater regulatory understanding. Further, the proposed rule change will provide a more streamlined and effective waiver process for individuals working for a financial services industry affiliate of a TPH, and it will require such individuals to maintain specified levels of competence and knowledge while working in areas ancillary to the securities business. The proposed rule change will improve the supervisory structure of firms by imposing an experience requirement for representatives that are designated by firms to function as principals for a 120-day period before having to pass an appropriate principal qualification examination. The proposed rule change will also prohibit unregistered persons from accepting customer orders under any circumstances, which will enhance investor protection.

The extension of the Securities Trader registration requirement to developers of algorithmic trading strategies requires associated persons primarily responsible for the design, development or significant modification of an algorithmic trading strategy or responsible for the day-to-day supervision or direction of such

[68] The Exchange believes it is appropriate to provide TPHs more lead time for implementation of the requirement for developers of algorithmic trading to become Securities Trader, as such requirement may trigger new testing requirements for individuals who otherwise weren't required to register prior to this rule change. The proposed implementation period is also consistent with the amount of time provided for compliance by other exchanges that have adopted the proposed requirement. *See, e.g.,* Exchange Act Release No. 84386 (October 9, 2018), 83 FR 51988 (October 15, 2018) (SR–NASDAQ–2018–078).

[69] 15 U.S.C. 78f(b).

[70] 15 U.S.C. 78f(b)(5).

[71] *Id.*

activities to register and meet a minimum standard of knowledge regarding the securities rules and regulations applicable to the TPH employing the algorithmic trading strategy. This minimum standard of knowledge is identical to the standard of knowledge currently applicable to traditional securities traders. The Exchange believes that improved education of firm personnel may reduce the potential for problematic market conduct and manipulative trading activity.

Finally, the proposed rule change makes organizational changes to the Exchange's registration and qualification rules to align them with registration and qualification rules of other exchanges as discussed above, in order to prevent unnecessary regulatory burdens and to promote efficient administration of the rules. The change also makes minor updates and corrections to the Exchange's rules which improve readability.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule changes which are, in all material respects, based upon and substantially similar to, recent rule changes adopted by FINRA and/or other national securities exchanges, will reduce the regulatory burden placed on market participants engaged in trading activities across different markets. The Exchange believes that the harmonization of these registration requirements across the various markets will reduce burdens on competition by removing impediments to participation in the national market system and promoting competition among participants across the multiple national securities exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

A. Significantly affect the protection of investors or the public interest;

B. impose any significant burden on competition; and

C. become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[72] and Rule 19b–4(f)(6)[73] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2021–022 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2021–022. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2021–022 and should be submitted on or before May 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[74]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–08147 Filed 4–20–21; 8:45 am]

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[72] 15 U.S.C. 78s(b)(3)(A).

[73] 17 CFR 240.19b–4(f)(6).

[74] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91582; File No. SR–FINRA–2021–007]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Time to Announce the Implementation Schedule for FINRA's Corporate Bond New Issue Reference Data Service

April 15, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 13, 2021, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. 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

FINRA is proposing to extend its time to announce the implementation schedule for FINRA's corporate bond

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

new issue reference data service. The proposed rule change would not make any changes to FINRA rules.

The text of the proposed rule change is available on FINRA's website at *http://www.finra.org,* at the principal office of FINRA 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, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On January 15, 2021, the Commission approved a proposed rule change for FINRA to establish a new issue reference data service for corporate bonds.[3] When FINRA submitted that proposed rule change, it noted that it would announce the effective date for the new issue reference data service in a *Regulatory Notice* within 90 days of Commission approval, and that the effective date would be within 270 days of Commission approval.[4] FINRA is now submitting this filing to extend its time to establish and announce the effective date. Once an effective date has been established, FINRA will issue a *Regulatory Notice* to announce an implementation schedule that provides market participants with sufficient time to prepare for implementation.

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so FINRA can implement the proposed rule change immediately.

2. *Statutory Basis*

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[5] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest. The Commission has determined that the corporate bond new issue reference data service is consistent with the Act, including Section 15A(b)(6), and FINRA believes that this proposed rule change will allow for additional time to establish and announce an implementation schedule for the corporate bond new issue reference service on the terms approved by the Commission.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and Rule 19b–4(f)(6) thereunder.[7]

A proposed rule change filed under Rule 19b–4(f)(6)[8] normally does not become operative for 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[9] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. FINRA has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. As discussed above, FINRA initially stated it would announce the effective date for the corporate bond new issue reference data service in a *Regulatory Notice* within 90 days of Commission approval, and that the effective date would be within 270 days of Commission approval.[10] FINRA requests waiver of the 30-day operative delay so that it is immediately clear that FINRA will extend its time to establish and announce the effective date for the corporate bond new issue reference service. For the foregoing reason, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission waives the 30-day operative delay and designates the proposed rule change operative upon filing.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2021–007 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.

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[3] *See* Securities Exchange Act Release No. 90939 (January 15, 2021), 86 FR 6922 (January 25, 2021) (Order Setting Aside Action by Delegated Authority and Approving File No. SR–FINRA–2019–008).

[4] *See* Securities Exchange Act Release No. 85488 (April 2, 2019), 84 FR 13977 (April 8, 2019) (Notice of Filing of File No. SR–FINRA–2019–008).

[5] 15 U.S.C. 78*o*–3(b)(6).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires FINRA to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. FINRA has satisfied this requirement.

[8] 17 CFR 240.19b–4(f)(6).

[9] 17 CFR 240.19b–4(f)(6)(iii).

[10] *See supra* note 4 and accompanying text.

[11] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

All submissions should refer to File Number SR–FINRA–2021–007. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. 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–FINRA–2021–007 and should be submitted on or before May 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–08149 Filed 4–20–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91579; File No. SR–Phlx–2021–23]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Current Pilot Program Related to Phlx Equity 4, Rule 3312 to the Close of Business on October 20, 2021

April 15, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 14, 2021, Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the current pilot program related to Phlx Equity 4, Rule 3312 (Clearly Erroneous Transactions) to the close of business on October 20, 2021.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/phlx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to extend the current pilot program related to Equity 4, Rule 3312, Clearly Erroneous Transactions, to the close of business on October 20, 2021. The pilot program is currently due to expire on April 20, 2021.

On September 10, 2010, the Commission approved, on a pilot basis, changes to Equity 4, Rule 3312 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[3] Following this, on September 30, 2010, the Exchange adopted changes to conform its Rule 3312 to Nasdaq's and BX's rules 11890.[4] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[5] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[6]

These changes were originally scheduled to operate for a pilot period to coincide with the pilot period for the Plan to Address Extraordinary Market Volatility (the ''Limit Up-Limit Down Plan'' or ''LULD Plan'').[7] In April 2019, the Commission approved an amendment to the LULD Plan for it to operate on a permanent, rather than pilot, basis.[8] In light of that change, the Exchange amended Equity 4, Rule 3312 to untie the pilot program's effectiveness from that of the LULD Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019.[9] Subsequently, the Exchange amended Rule 3312 to extend the pilot's

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–NASDAQ–2010–076).

[4] *See* Securities Exchange Act Release No. 63023 (September 30, 2010), 75 FR 61802 (October 6, 2010) (SR–Phlx–2010–125).

[5] *See* Securities Exchange Act Release No. 68820 (February 1, 2013), 78 FR 9436 (February 8, 2013) (SR–Phlx–2013–12).

[6] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–Phlx–2014–27).

[7] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[8] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (approving Eighteenth Amendment to LULD Plan).

[9] *See* Securities Exchange Act Release No. 85632 (April 11, 2019), 84 FR 16057 (April 17, 2019) (SR–Phlx–2019–14).

effectiveness to the close of business on April 20, 2021.[10]

The Exchange now proposes to amend Equity 4, Rule 3312 to extend the pilot's effectiveness for a further six months until the close of business on October 20, 2021. If the pilot period is not either extended, replaced or approved as permanent, the prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) shall be in effect, and the provisions of paragraphs (g) through (i) shall be null and void.[11] In such an event, the remaining sections of Rule 3312 would continue to apply to all transactions executed on the Exchange. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to Rule 3312.

The Exchange does not propose any additional changes to Equity 4, Rule 3312. Extending the effectiveness of Rule 3312 for an additional six months will provide the Exchange and other self-regulatory organizations additional time to consider whether further amendments to the clearly erroneous execution rules are appropriate.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[12] in general, and Section 6(b)(5) of the Act,[13] in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. The Exchange believes that extending the clearly erroneous execution pilot under Equity 4, Rule 3312 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate.

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 proposal would ensure the continued, uninterrupted operation of harmonized clearly erroneous execution rules across the U.S. equities markets while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate. The Exchange understands that the other national securities exchanges and FINRA will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[14] and Rule 19b–4(f)(6) thereunder.[15]

A proposed rule change filed under Rule 19b–4(f)(6)[16] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii)[17] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[18]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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

[10] *See* Securities Exchange Act Release No. 90205 (October 15, 2020), 85 FR 67022 (October 21, 2020) (SR–Phlx–2020–47).

[11] *See* notes 3—6, *supra.* The prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) generally provided greater discretion to the Exchange with respect to breaking erroneous trades.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[16] 17 CFR 240.19b–4(f)(6).

[17] 17 CFR 240.19b–4(f)(6)(iii).

[18] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2021–23 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2021–23. 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–Phlx–2021–23 and should be submitted on or before May 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–08151 Filed 4–20–21; 8:45 am]

BILLING CODE 8011–01–P

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–151, OMB Control No. 3235–0291]

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Rules 17Adb–6 and 17Adb–7

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 17Adb–6 (17 CFR 240.17Adb–6) and Rule 17Adb–7 (17 CFR 240.17Adb–7) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act''). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Rule 17Adb–6 requires every registered transfer agent to make and keep current records about a variety of information, such as: (1) Specific operational data regarding the time taken to perform transfer agent activities (to ensure compliance with the minimum performance standards in Rule 17Adb–2 (17 CFR 240.17Adb–2)); (2) written inquiries and requests by shareholders and broker-dealers and response time thereto; (3) resolutions, contracts, or other supporting documents concerning the appointment or termination of the transfer agent; (4) stop orders or notices of adverse claims to the securities; and (5) all canceled registered securities certificates.

Rule 17Adb–7 requires each registered transfer agent to retain the records specified in Rule 17Adb–6 in an easily accessible place for a period of six months to six years, depending on the type of record or document. Rule 17Adb–7 also specifies the manner in which records may be maintained using electronic, microfilm, and microfiche storage methods.

These recordkeeping requirements are designed to ensure that all registered transfer agents are maintaining the records necessary for them to monitor and keep control over their own performance and for the Commission to adequately examine registered transfer agents on an historical basis for compliance with applicable rules.

The Commission estimates that approximately 359 registered transfer agents will spend a total of 179,500 hours per year complying with Rules 17Adb–6 and 17Adb–7 (500 hours per year per transfer agent).

The retention period under Rule 17Adb–7 for the recordkeeping requirements under Rule 17Adb–6 is six months to six years, depending on the particular record or document. The recordkeeping and retention requirements under Rules 17Adb–6 and 17Adb–7 are mandatory to assist the Commission and other regulatory agencies with monitoring transfer agents and ensuring compliance with the rules. These rules do not involve the collection of confidential information.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street, NE Washington, DC 20549, or send an email to: *PRA_Mailbox@sec.gov.*

Dated: April 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–08145 Filed 4–20–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–613, OMB Control No. 3235–0712]

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange

Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Credit Risk Retention—Regulation RR

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Credit Risk Retention (''Regulation RR'') (17 CFR 246.1 through 246.22) recordkeeping and disclosure requirements implement Section 15G of the Securities Exchange Act of 1934 (15 U.S.C. 78o–11) Section 15G clarifies the scope and application of Section 306(a) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7244(a)). Section 306(a) of the Sarbanes-Oxley Act requires, among other things, an issuer to provide timely notice to its directors and executive officers and to the Commission of the imposition of a blackout period that would trigger a trading prohibition under Section 306(a)(1) of the Sarbanes-Oxley Act. Section 306(a)(1) prohibits any director or executive officer of an issuer of any equity security, from directly or indirectly, purchasing, selling or otherwise acquiring or transferring any equity security of that issuer during the blackout period with respect to such equity security, if the director or executive officer acquired the equity security in connection with his or her service or employment. Approximately 1,647 issuers file using Regulation RR responses and it takes approximately 14.389 hours per response. We estimate that 75% of the 14.389 hours per response (10.792 hours) is prepared by the registrant for a total annual reporting burden of 17,774 hours (10.792 hours per response × 1,647 responses).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: April 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–08137 Filed 4–20–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION[SEC File No. 270–208, OMB Control No. 3235–0213]

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Rule 17g–1

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 350l-3520), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Rule 17g–1 (17 CFR 270.17g–1) under the Investment Company Act of 1940 (the ''Act'') (15 U.S.C. 80a–17(g)) governs the fidelity bonding of officers and employees of registered management investment companies (''funds'') and their advisers. Rule 17g–1 requires, in part, the following:

Independent Directors' Approval

The form and amount of the fidelity bond must be approved by a majority of the fund's independent directors at least once annually, and the amount of any premium paid by the fund for any ''joint insured bond,'' covering multiple funds or certain affiliates, must be approved by a majority of the fund's independent directors.

Terms and Provisions of the Bond

The amount of the bond may not be less than the minimum amounts of coverage set forth in a schedule based on the fund's gross assets. The bond must provide that it shall not be cancelled, terminated, or modified except upon 60-days written notice to the affected party and to the Commission. In the case of a joint insured bond, 60-days written notice must also be given to each fund covered by the bond. A joint insured bond must provide that the fidelity insurance company will provide all funds covered by the bond with a copy of the agreement, a copy of any claim on the bond, and notification of the terms of the settlement of any claim prior to execution of that settlement. Finally, a fund that is insured by a joint bond must enter into an agreement with all other parties insured by the joint bond regarding recovery under the bond.

Filings with the Commission

Upon the execution of a fidelity bond or any amendment thereto, a fund must file with the Commission within 10 days: (i) A copy of the executed bond or any amendment to the bond, (ii) the independent directors' resolution approving the bond, and (iii) a statement as to the period for which premiums have been paid on the bond. In the case of a joint insured bond, a fund must also file: (i) A statement showing the amount the fund would have been required to maintain under the rule if it were insured under a single insured bond; and (ii) the agreement between the fund and all other insured parties regarding recovery under the bond. A fund must also notify the Commission in writing within five days of any claim or settlement on a claim under the fidelity bond.

Notices to Directors

A fund must notify by registered mail each member of its board of directors of: (i) Any cancellation, termination, or modification of the fidelity bond at least 45 days prior to the effective date; and (ii) the filing or settlement of any claim under the fidelity bond when notification is filed with the Commission.

Rule 17g–1's independent directors' annual review requirements, fidelity bond content requirements, joint bond agreement requirement, and the required notices to directors are designed to ensure the safety of fund assets against losses due to the conduct of persons who may obtain access to those assets. These requirements also seek to facilitate oversight of a fund's fidelity bond. The rule's required filings with the Commission are designed to assist the Commission in monitoring funds' compliance with the fidelity bond requirements.

Based on conversations with representatives in the fund industry, the Commission staff estimates that for each of the estimated 2.200 active funds (respondents),[1] the average annual

[1] Based on a review of fund filings for the three-year period from 2018 to 2020, Commission staff

Continued

paperwork burden associated with rule 17g–1's requirements is two hours, one hour each for a compliance attorney and the board of directors as a whole. The time spent by a compliance attorney includes time spent filing reports with the Commission for fidelity losses (if any) as well as paperwork associated with any notices to directors, and managing any updates to the bond and the joint agreement (if one exists). The time spent by the board of directors as a whole includes any time spent initially establishing the bond, as well as time spent on annual updates and approvals. The Commission staff therefore estimates the total ongoing paperwork burden hours per year for all funds required by rule 17g–1 to be 4,400 hours (2,200 funds × 2 hours = 4,400 hours). Commission staff continues to estimate that the filing and reporting requirements of rule 17g–1 do not entail any external cost burdens.

These estimates of average burden hours are made solely for the purposes of the Paperwork Reduction Act. These estimates are not derived from a comprehensive or even a representative survey or study of Commission rules. The collection of information required by Rule 17g–1 is mandatory and will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: April 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–08138 Filed 4–20–21; 8:45 am]

BILLING CODE 8011–01–P

estimates there are approximately 2,200 funds (registered open- and closed-end funds, and business development companies) that must comply with the collections of information under rule 17g–1, and which collectively submit an estimated 2,597 filings on Form 17G annually.

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–563, OMB Control No. 3235–0626]

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Rule 17g–3

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the previously approved collection of information provided for in Rule 17g–3 (17 CFR 240.17g–3) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act'').

Rule 17g–3 contains certain reporting requirements for NRSROs including financial statements and information concerning its financial condition that the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Currently, there are 9 credit rating agencies registered as NRSROs with the Commission. The Commission estimates that the total burden for respondents to comply with Rule 17g–3 is 3,285 hours.

An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

The public may view background documentation for this information collection at the following website: >*www.reginfo.gov*<. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) >*www.reginfo.gov/public/do/PRAMain*< and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: April 16, 2021.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 2021–08227 Filed 4–20–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–524, OMB Control No. 3235–0582]

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street, NE, Washington, DC 20549–2736

Extension:
Form N–PX

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (''Paperwork Reduction Act''), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the previously approved collection of information discussed below.

Rule 30b1–4 (17 CFR 270.30b1–4) under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) requires every registered management investment company, other than a small business investment company registered on Form N–5 (''funds''), to file a report on Form N–PX not later than August 31 of each year. Funds use Form N–PX to file annual reports with the Commission containing their complete proxy voting record for the most recent twelve-month period ended June 30.

The Commission estimates that there are approximately 2,207 funds registered with the Commission, representing approximately 11,890 fund portfolios that are required to file Form N–PX reports. The 11,890 portfolios are comprised of approximately 6,392 portfolios holding equity securities, 2,857 portfolios holding no equity securities, and 1,476 portfolios holding fund securities (*i.e.,* fund of funds).[1] The

[1] The estimate of 2,207 funds is based on the number of management investment companies currently registered with the Commission. The Commission staff estimates that there are approximately 6,392 portfolios that invest primarily in equity securities, 804 ''hybrid'' or bond portfolios that may hold some equity securities, 2,857 bond portfolios that hold no equity securities, and 361 money market fund portfolios, and 1,476 fund of funds, for a total of 11,890 portfolios required to file Form N–PX reports. The staff has based its portfolio estimates on a number of publications. *See* Investment Company Institute, Trends in Mutual Fund Investing (February 2020); Investment

currently approved burden of Form N–PX for portfolios holding equity securities is 7.2 hours per response, the current burden estimate for funds holding no equity securities is 0.17 hours (10 minutes) per response, and the current burden estimate for fund of funds is 1 hour per response. Therefore, the number of aggregate burden hours, when calculated using the current number of portfolios, is approximately 47,984 hours.[2] We continue to believe that these estimates for Form N–PX's current burden are appropriate. Based on the Commission's estimate of 47,984 burden hours and an estimated wage rate of approximately $368 per hour,[3] the total cost to reporting persons of the hour burden for filing Form N–PX is approximately $17.66 million.[4]

The estimated cost burden of Form N–PX is $1,000 in external costs per portfolio holding equity securities that is paid to third-party service providers. External costs for portfolios holding no equity securities have previously been estimated to be zero because portfolios holding no equity securities generally have no proxy votes to report and therefore do not require third-party service providers to assist with proxy voting and preparing reports on Form N–PX. The estimated cost burden of Form N–PX for fund of funds is estimated to be $100 per portfolio because fund of funds generally either have no proxy votes to report; or if proxy votes are reported, they are generally limited in the number of securities and the number of voting matters relative to portfolios holding equity securities. Therefore, the aggregate cost burden, when calculated using the current number of portfolios, is approximately $6.54 million in external costs.[5] We continue to believe that these estimates for Form N–PX's current cost burden are appropriate.

Estimates of average burden hours and costs are made solely for the purposes of the Paperwork Reduction Act and are not derived from a comprehensive or even representative survey or study of the costs of Commission rules and forms. Compliance with the collection of information requirements of Form N–PX is mandatory. Responses to the collection of information will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: >*www.reginfo.gov*<. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) >*www.reginfo.gov/public/do/PRAMain*< and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street, NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: April 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–08143 Filed 4–20–21; 8:45 am]

BILLING CODE 8011–01–P

Company Institute, Closed-End Fund Assets and Net Issuance (Fourth Quarter 2019); Investment Company Institute, ETF Assets and Net Issuance (February 2020).

[2] (6,392 portfolios that hold equity securities × 7.2 hours per year) + (2,857 portfolios holding no equity securities × 0.17 hours per year) + (1,476 portfolios holding fund securities x 1 hour per year) = 47,984 hours.

[3] The hourly wage figure for a compliance attorney is from the Securities Industry and Financial Markets Association's Management & Professional Salaries in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour work-year and inflation and multiplied by5.35 to account for bonuses, firm size, employee benefits and overhead.

[4] 47,984 hours × $368 per hour = $17,658,112.

[5] (6,392 portfolios holding equity securities × $1,000 per year) + (2,857 portfolios holding no equity securities × $0 per year) + (1,476 fund of funds x $100) = $6,539,600

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91575; File No. SR–BX–2021–016]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Current Pilot Program Related to BX Equity 11, Rule 11890 to the Close of Business on October 20, 2021

April 15, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 14, 2021, Nasdaq BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the current pilot program related to BX Equity 11, Rule 11890 (Clearly Erroneous Transactions) to the close of business on October 20, 2021.[3]

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/bx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to extend the current pilot program related to Equity 11, Rule 11890, Clearly Erroneous Transactions, to the close of business on October 20, 2021. The pilot program is currently due to expire on April 20, 2021.

On September 10, 2010, the Commission approved, on a pilot basis, changes to Equity 11, Rule 11890 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[4] In 2013, the Exchange adopted a provision designed to address the

[3] The Exchange recently filed a proposed rule change to relocate the Rule 11000 Series, including Rule 11890, into Equity 11. *See* SR–BX–2021–012 (not yet published). This filing reflects the rule relocation changes in SR–BX–2021–012.

[4] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–BX–2010–040).

operation of the Plan.[5] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[6]

These changes were originally scheduled to operate for a pilot period to coincide with the pilot period for the Plan to Address Extraordinary Market Volatility (the ''Limit Up-Limit Down Plan'' or ''LULD Plan'').[7] In April 2019, the Commission approved an amendment to the LULD Plan for it to operate on a permanent, rather than pilot, basis.[8] In light of that change, the Exchange amended Equity 11, Rule 11890 to untie the pilot program's effectiveness from that of the LULD Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019.[9] Subsequently, the Exchange amended Rule 11890 to extend the pilot's effectiveness to the close of business on April 20, 2021.[10]

The Exchange now proposes to amend Equity 11, Rule 11890 to extend the pilot's effectiveness for a further six months until the close of business on October 20, 2021. If the pilot period is not either extended, replaced or approved as permanent, the prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) shall be in effect, and the provisions of paragraphs (g) through (i) shall be null and void.[11] In such an event, the remaining sections of Rule 11890 would continue to apply to all transactions executed on the Exchange. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to Rule 11890.

The Exchange does not propose any additional changes to Equity 11, Rule 11890. Extending the effectiveness of Rule 11890 for an additional six months will provide the Exchange and other self-regulatory organizations additional time to consider whether further amendments to the clearly erroneous execution rules are appropriate.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[12] in general, and Section 6(b)(5) of the Act,[13] in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. The Exchange believes that extending the clearly erroneous execution pilot under Equity 11, Rule 11890 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate.

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 proposal would ensure the continued, uninterrupted operation of harmonized clearly erroneous execution rules across the U.S. equities markets while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate. The Exchange understands that the other national securities exchanges and FINRA will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[14] and Rule 19b–4(f)(6) thereunder.[15]

A proposed rule change filed under Rule 19b–4(f)(6)[16] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii)[17] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public

[5] *See* Securities Exchange Act Release No. 68818 (February 1, 2013), 78 FR 9100 (February 7, 2013) (SR–BX–2013–010).

[6] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–BX–2014–021).

[7] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[8] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (approving Eighteenth Amendment to LULD Plan).

[9] *See* Securities Exchange Act Release No. 85613 (April 11, 2019), 84 FR 16077 (April 17, 2019) (SR–BX–2019–009).

[10] *See* Securities Exchange Act Release No. 90206 (October 15, 2020), 85 FR 67078 (October 21, 2020) (SR–BX–2020–031).

[11] *See* notes 4–6, *supra*. The prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) generally provided greater discretion to the Exchange with respect to breaking erroneous trades.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[16] 17 CFR 240.19b–4(f)(6).

[17] 17 CFR 240.19b–4(f)(6)(iii).

interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[18]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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–BX–2021–016 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2021–016. 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–BX–2021–016 and should be submitted on or before May 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–08146 Filed 4–20–21; 8:45 am]

BILLING CODE 8011–01–P

[18] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–170, OMB Control No. 3235–0167]

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Form 15

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Form 15 (17 CFR 249.323) is a certification of termination of a class of security under Section 12(g) or notice of suspension of duty to file reports pursuant to Sections 13 and 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). All information is provided to the public for review. We estimate that approximately 1,062 issuers file Form 15 annually and it takes approximately 1.5 hours per response to prepare for a total of 1,593 annual burden hours (1.5 hours per response × 1,062 responses).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: April 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–08140 Filed 4–20–21; 8:45 am]

BILLING CODE 8011–01–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2020–0041]

Privacy Act of 1974; Matching Program

AGENCY: Social Security Administration (SSA).

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces a new matching program with the Bureau of the Fiscal Service (Fiscal Service), Department of the Treasury (Treasury). Under this matching program, Fiscal Service, Treasury will disclose savings security data to SSA. SSA will use the data to determine continued eligibility for Supplemental Security Income (SSI) applicants and recipients, or the correct benefit amount for recipients and deemors who did not report or

incorrectly reported ownership of savings securities.

DATES: The deadline to submit comments on the proposed matching program is May 21, 2021. The matching program will be applicable on June 26, 2021, or once a minimum of 30 days after publication of this notice has elapsed, whichever is later. The matching program will be in effect for a period of 18 months.

ADDRESSES: You may submit comments by any one of three methods—internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA–2020–0041 so that we may associate your comments with the correct regulation.

Caution: You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. *Internet:* We strongly recommend that you submit your comments via the internet. Please visit the Federal eRulemaking portal at *http://www.regulations.gov.* Use the *Search* function to find docket number SSA–2020–0041 and then submit your comments. The system will issue you a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each submission manually. It may take up to a week for your comments to be viewable.

2. *Fax:* Fax comments to (410) 966–0869.

3. *Mail:* Matthew Ramsey, Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, or emailing *Matthew.Ramsey@ssa.gov.* Comments are also available for public viewing on the Federal eRulemaking portal at *http://www.regulations.gov* or in person, during regular business hours, by arranging with the contact person identified below.

FOR FURTHER INFORMATION CONTACT: Interested parties may submit general questions about the matching program to Andrea Huseth, Division Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore MD 21235–6401, at telephone: (410) 966–5855, or send an email to *Andrea.Huseth@ssa.gov.*

SUPPLEMENTARY INFORMATION: None.

Matthew Ramsey,

Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

Participating Agencies: SSA and Fiscal Service, Treasury.

Authority for Conducting the Matching Program: The legal authority for the disclosure under this agreement for SSA to conduct this matching activity is contained in section 1631(e)(1)(B), and (f) of the Social Security Act, (42 U.S.C. 1383(e)(1)(B), and (f)).

Purpose(s): This matching program establishes the conditions under which Fiscal Service, Treasury will disclose savings security data to SSA. SSA will use the data to determine continued eligibility for SSI applicants and recipients, or the correct benefit amount for recipients and deemors who did not report or incorrectly reported ownership of savings securities.

Categories of Individuals: The individuals whose information is involved in this matching program are SSI applicants, recipients, and deemors.

Categories of Records: The finder file SSA provides to Fiscal Service will contain approximately 10 million records of individuals for whom SSA requests data for the administration of the SSI program.

System(s) of Records: The relevant SSA system of records (SOR) is ''Supplemental Security Income Record and Special Veterans Benefits,'' 60–0103. The SOR Notice (SORN) was fully published on January 11, 2006 at 71 FR 1830 and updated on December 10, 2007 at 72 FR 69723; July 3, 2018 (83 FR 31250–31251), and November 1, 2018 (83 FR 54969). The relevant Fiscal Service SOR is Fiscal Service SORN .014 (United States Securities and Access). The SORN was last published on February 27, 2020 at 85 FR 11776.

[FR Doc. 2021–08219 Filed 4–20–21; 8:45 am]

BILLING CODE 4191–02–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36500]

Canadian Pacific Railway Limited; Canadian Pacific Railway Company; Soo Line Railroad Company; Central Maine & Quebec Railway US Inc.; Dakota, Minnesota & Eastern Railroad Corporation; and Delaware & Hudson Railway Company, Inc.—Control—Kansas City Southern; The Kansas City Southern Railway Company; Gateway Eastern Railway Company; and The Texas Mexican Railway Company

AGENCY: Surface Transportation Board.

ACTION: Decision No. 3 in Docket No. FD 36500; notice of receipt of prefiling notification.

SUMMARY: Canadian Pacific Railway Limited (Canadian Pacific), Canadian Pacific Railway Company (CPRC), and their U.S. rail carrier subsidiaries, Soo Line Railroad Company (Soo Line), Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware & Hudson Railway Company, Inc. (collectively, CP) and Kansas City Southern and its U.S. rail carrier subsidiaries, The Kansas City Southern Railway Company (KCSR), Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, KCS) (CP and KCS collectively, Applicants) have notified the Surface Transportation Board (Board) of their intent to file an application seeking authority for the acquisition of control by Canadian Pacific, through its indirect, wholly owned subsidiary Cygnus Merger Sub 2 Corporation (Cygnus Merger Sub 2 Corp.), of Kansas City Southern, and through it, of KCSR and its railroad affiliates, and for the resulting common control by Canadian Pacific of its U.S. railroad subsidiaries, and KCSR and its railroad affiliates. Applicants have indicated that 2019 will be the base year for their impact analysis and that they anticipate filing their application on or shortly after June 28, 2021.

ADDRESSES: Any filing submitted in this proceeding should be filed with the Board via e-filing on the Board's website. In addition, one copy of each filing must be sent (and may be sent by email only, if service by email is acceptable to the recipient) to each of the following: (1) Secretary of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3109, Department of

Justice, Washington, DC 20530; (3) CP's representative, David L. Meyer, Law Office of David L. Meyer, 1105 S Street NW, Washington, DC 20009; (4) KCS's representative, William A. Mullins, Baker & Miller PLLC, Suite 300, 2401 Pennsylvania Avenue, NW, Washington, DC 20037; (5) any other person designated as a Party of Record on the service list; and, as noted below, (6) the administrative law judge assigned in this proceeding.

FOR FURTHER INFORMATION CONTACT: Valerie Quinn at (202) 245–0283. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Applicants state that, on March 21, 2021, Canadian Pacific (along with two of its wholly-owned subsidiaries, Cygnus Merger Sub 1 Corporation and Cygnus Merger Sub 2 Corp.) and Kansas City Southern entered into an Agreement and Plan of Merger (Merger Agreement) under which Canadian Pacific, through its indirect, wholly owned subsidiary, Cygnus Merger Sub 2 Corp., would acquire all of the capital stock of Kansas City Southern. (Notice of Intent 2.) [1] Specifically, Applicants state that, upon receipt of approval by the shareholders of Canadian Pacific and Kansas City Southern and the satisfaction of other customary closing conditions, Cygnus Merger Sub 2 Corp. would merge with and into Kansas City Southern (Merger), with Kansas City Southern surviving. (*Id.*) Upon completion of the Merger, Applicants state that holders of Kansas City Southern's common stock would become entitled to receive a combination of Canadian Pacific common shares and cash in exchange for their common stock, and holders of Kansas City Southern's preferred stock would become entitled to receive cash in exchange for their preferred shares. (*Id.*) According to Applicants, immediately following completion of the Merger, Canadian Pacific would conduct a series of internal transactions that would result in its voting interest in the successor to Kansas City Southern being placed into an independent voting trust (Voting Trust) pending review and approval of the control transaction by the Board.[2] (*Id.*) Applicants state that the internal transactions involve a series of steps designed to address matters relating to tax and corporate law, and all such steps, including the placement of Canadian Pacific's interest in Kansas City Southern into the Voting Trust, would be completed within moments of the completion of the Merger and for practical purposes contemporaneously. (*Id.* at 2–3.) Applicants state that, if and when the Board takes final and favorable action on the application, the Voting Trust would be terminated and Canadian Pacific would assume control of Cygnus Merger Sub 2 Corp. and, through it, of Kansas City Southern and its railroad affiliates. (*Id.* at 3.)

Applicants indicate that they will use 2019 as the base year for the impact analysis in the application and that they anticipate filing their application on or shortly after June 28, 2021. (Notice of Intent 1.)

Major Transaction Status. The Board finds that this is a major transaction under 49 CFR 1180.2(a), as it is a control transaction involving two or more Class I railroads. Canadian Pacific presently controls Soo Line, a Class I railroad, and proposes to acquire common control of KCSR, also a Class I railroad.[3]

Protective Order. By motion filed March 22, 2021, Applicants requested a protective order to protect confidential, highly confidential, and proprietary information to be submitted in connection with the control application. By decision served April 2, 2021 (Decision No. 1), Applicants' motion for a protective order was granted.

Proposed Procedural Schedule. Also on March 22, 2021, Applicants filed a petition to establish a procedural schedule. The Board will solicit comments on the proposed procedural schedule after it resolves the waiver issue discussed above.

Administrative Law Judge. The Board has signed a Memorandum of Understanding with the Federal Mine Safety and Health Review Commission to employ the services of administrative law judges (ALJs) on a case-by-case basis to perform discrete, Board-assigned functions such as adjudicating discovery disputes in cases pending before the Board. The Board hereby assigns and authorizes Administrative Law Judge Thomas McCarthy to entertain and rule upon discovery matters and to resolve initially all disputes concerning discovery in this proceeding. Parties are directed to send copies of all their filings and documents in this proceeding to Judge McCarthy, 1331 Pennsylvania Avenue NW, Washington, DC 20004–1710, and at *ctolbert@fmshrc.gov* and *zbyers@fmshrc.gov*.

It is ordered:

1. This proceeding is assigned to Administrative Law Judge Thomas McCarthy for the handling of all discovery matters and initial resolution of all discovery disputes.

2. In addition to filing pleadings with the Board and serving copies on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, and other parties of record, parties must send a copy of all filings and documents to Judge McCarthy at 1331 Pennsylvania Avenue NW, Washington, DC 20004–1710, and at *ctolbert@fmshrc.gov* and *zbyers@fmshrc.gov.*

3. Judge McCarthy will be added to the service list in this proceeding and a copy of this decision will be served upon him.

4. A copy of this decision will be served on the U.S. Office of Personnel Management (OPM), at Human Resource Solutions, ALJ Program Office, 1900 E Street NW, Suite 2469, Washington, DC 20415–9400 and electronically at *karyn.lusby@opm.gov.* Judge McCarthy shall send a copy of the notice or order that constitutes the final disposition of his assignment of this case to OPM at the above address.

5. This decision is effective on its service date.

Decided: April 15, 2021.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2021–08283 Filed 4–20–21; 8:45 am]

BILLING CODE 4915–01–P

[1] Applicants initially submitted a notice of intent on March 22, 2021. However, on March 23, 2021, Applicants filed an errata and asked the Board to substitute a revised notice of intent for the notice of intent filed on March 22, 2021. As such, March 23, 2021, is deemed the filing date of Applicants' notice of intent to file an application under 49 CFR 1180.4(b).

[2] Canadian Pacific has submitted a proposed Voting Trust Agreement and seeks an informal, non-binding opinion from Board staff, pursuant to 49 CFR 1013.3(a), stating that the Voting Trust Agreement and the arrangements described in the letter accompanying the voting trust submission will effectively insulate Canadian Pacific from any violation of Board policy against unauthorized acquisition of control of a regulated carrier. Because there are differences between the Board's current regulations pertaining to voting trusts in major mergers and the regulations that were in effect before July 11, 2001, resolution of the waiver issue discussed in footnote 3 could also impact the voting trust request.

[3] Under 49 CFR 1180.0(b), the Board ''will waive application of the regulations contained in [49 CFR part 1180, subpart A] for a consolidation involving [KCSR] and another Class I railroad and instead will apply the regulations in this subpart A in effect before July 11, 2001 . . . unless [the Board is] shown why such a waiver should not be allowed.'' Comments on the waiver provision have been filed by several parties, and Applicants have filed replies. The Board will resolve the waiver issue in a subsequent decision.

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice with Respect to List of Countries Denying Fair Market Opportunities for Government-Funded Airport Construction Projects

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: The U.S. Trade Representative has determined not to list any countries as denying fair market opportunities for U.S. products, suppliers, or bidders in foreign government-funded airport construction projects.

FOR FURTHER INFORMATION CONTACT: Kate Psillos, International Procurement Negotiator, *Kathryn.W.Psillos@ustr.eop.gov* or 202–395–9581, or Edward Marcus, Assistant General Counsel, *Edward.D.Marcus@ustr.eop.gov* or 202–395–0448.

SUPPLEMENTARY INFORMATION: Section 533 of the Airport and Airway Improvement Act of 1982, as amended by section 115 of the Airport and Airway Safety and Capacity Expansion Act of 1987, Public Law 100–223 (*codified at* 49 U.S.C. 50104), requires the U.S. Trade Representative to decide whether any foreign country has denied fair market opportunities to U.S. products, suppliers, or bidders in connection with airport construction projects of $500,000 or more that are funded in whole or in part by the government of such country. The Office of the United States Trade Representative has not received any complaints or other information indicating that U.S. products, suppliers, or bidders are being denied fair market opportunities in such airport construction projects. As a consequence, the U.S. Trade Representative has decided not to list any countries as denying fair market opportunities for U.S. products, suppliers, or bidders in foreign government-funded airport construction projects.

Nora Todd,

Chief of Staff, Office of the United States Trade Representative.

[FR Doc. 2021–08194 Filed 4–20–21; 8:45 am]

BILLING CODE 3290–F1–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2021–2068]

Petition for Exemption; Summary of Petition Received; Airlines for America

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before May 11, 2021.

ADDRESSES: Send comments identified by docket number FAA–2020–0429 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 (DOT), 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: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

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: Deana Stedman, AIR–612, Federal Aviation Administration, 2200 South 216th Street, Des Moines, WA 98198, phone and fax 206–231–3187, email *deana.stedman@faa.gov.*

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on April 16, 2021.

Daniel J. Elgas,

Manager, Strategic Policy Management Branch,Policy and Innovation Division, Aircraft Certification Service.

Petition for Exemption

Docket No.: FAA–2020–0429
Petitioner: Airlines for America
Section(s) of 14 CFR Affected: §§ 91.9(a) and (b), 121.153(a), 121.337(b)(9)(iii)

Description of Relief Sought: Airlines for America petitions for a one-year extension of FAA Exemption No. 18561A that is set to terminate on July 10, 2021. That exemption permits relief from 14 CFR 91.9(a) and 121.153(a)(2) and allows member airlines to transport cargo, subject to the FAA's conditions, on passenger seats of transport category airplanes when no revenue passengers are being transported. Due to the ongoing reduction in demand, passenger carriers continue to have the capacity to carry cargo, including critical medical cargo, in cabin. Approval of the petition would allow operators of passenger airplanes to support COVID–19 response efforts by continuing to carry cargo in-cabin, including critical medical cargo.

[FR Doc. 2021–08264 Filed 4–20–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2020–0926]

Agency Information Collection Activities: Requests for Comments; Clearance of Clearance of a Renewed Approval of Information Collection: Notice of Proposed Outdoor Laser Operation(s)

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 **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on January 29, 2021. The collection involves the gathering of information necessary for FAA to ensure proposed outdoor laser operations will not interfere with air traffic operations. The information to be collected will be used by FAA to evaluate proposed outdoor laser operations (*e.g.,* laser light show, display, or device) requiring approval of a Food and Drug Administration (FDA) variance.

DATES: Written comments should be submitted by May 21, 2021.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Brian Konie, Rules and Regulations Group, Office of Policy, by email at: *brian.konie@faa.gov;* phone: 202–267–8783.

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: 2120–0662.

Title: Notice of Proposed Outdoor Laser Operation(s).

Form Numbers: FAA Form 7140–1.

Type of Review: Renewal of an information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on January 29, 2021 (86 FR 7611).

No laser light show, projection system, or device may vary from compliance with 21 CFR 1040.11(c) in design or use without the approval of an application for variance in accordance with 21 CFR 1010.4. Those applying for an FDA variance (using and per FDA Form 3147), must make advance written notification as early as possible to FAA for any projections into open airspace at any time. To notify FAA of a proposed outdoor laser operation, proponents complete and submit FAA Form 7140–1, Notice of Proposed Outdoor Laser Operation(s), to FAA. FAA Form 7140–1 is the approved method for collecting information required to process submissions from proponents intending to project into open airspace.

FAA received one comment from two contributing authors. The comment supported past changes made to the technical aspects of FAA Form 7140–1 and raised multiple points with suggestions to improve, notably: Defining regulatory authority, when to submit a form, combining the form within another document, and clarifying language on the form. FAA appreciates the time taken by the authors to comment, acknowledges the suggestions, and intends to revise FAA Form 7140–1 to improve clarity.

Respondents: Approximately 603 laser operations.

Frequency: One time per laser operation.

Estimated Average Burden per Response: Approximately 240 minutes or 4 hours per form.

Estimated Total Annual Burden: Approximately 2,412 hours.

Issued in Washington, DC, on April 15, 2021.

George Gonzalez,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2021–08136 Filed 4–20–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Opportunity for Public Comment To Dispose of 1.93 Acres of Land at Eastern Slopes Regional Airport, Fryeburg, ME

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Request for Public Comments.

SUMMARY: Notice is being given that the FAA is considering a request from the Town of Fryeburg, ME to dispose of 2.0 Acres of land at Eastern Slopes Regional Airport, Fryeburg ME. The land was the site of the non-directional beacon located 10.2 nautical miles from the airport and was decommissioned and removed from the site. The land is no longer needed for aviation purposes and can be disposed without affecting future aviation needs of the airport. Ninety percent of the revenue generated by the disposal will be returned to the FAA and used for future airport grants.

DATES: Comments must be received on or before May 21, 2021.

ADDRESSES: You may send comments using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov,* and follow the instructions on providing comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W 12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Interested persons may inspect the request and supporting documents by contacting the FAA at the address listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION, CONTACT: Mr. Jorge E. Panteli, Compliance and Land Use Specialist, Federal Aviation Administration New England Region Airports Division, 1200 District Avenue, Burlington, Massachusetts 01803. Telephone: 781–238–7618.

Authority: 49 United States Code 47107(h)(2).

Issued in Burlington, Massachusetts on April 14, 2021.

Julie Seltsam-Wilps,

Deputy Director, ANE–600.

[FR Doc. 2021–07992 Filed 4–20–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2021–2069]

Petition for Exemption; Summary of Petition Received; Airlines for America

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's

awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before May 11, 2021.

ADDRESSES: Send comments identified by docket number FAA–2020–0492 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 (DOT), 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: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

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: Deana Stedman, AIR–612, Federal Aviation Administration, 2200 South 216th Street, Des Moines, WA 98198, phone and fax 206–231–3187, email *deana.stedman@faa.gov.*

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on April 16, 2021.

Daniel J. Elgas,

Manager, Strategic Policy Management Branch, Policy and Innovation Division, Aircraft Certification Service.

Petition For Exemption

Docket No.: FAA–2020–0492.
Petitioner: Airlines for America.
Section(s) of 14 CFR Affected: §§ 91.9(a) and (b), 121.153(a), 121.337(b)(9)(iii).

Description of Relief Sought: Airlines for America petitions for a one-year extension of FAA Exemption No. 18584 that is set to terminate on July 10, 2021. That exemption permits relief from 14 CFR 91.9(a) and 121.153(a)(2) and allows member airlines to transport cargo, subject to the FAA's conditions, on the main deck of transport category airplanes (secured to seats or secured to seat tracks) when no revenue passengers are being transported. Due to the ongoing reduction in demand, passenger carriers continue to have the capacity to carry cargo, including critical medical cargo, in cabin. Approval of the petition would allow operators of passenger airplanes to support COVID–19 response efforts by continuing to carry cargo in-cabin, including critical medical cargo.

[FR Doc. 2021–08263 Filed 4–20–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2020–0027–N–41]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of information collection; request for comment.

SUMMARY: Under the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, this notice announces that FRA is forwarding the Information Collection Request (ICR) abstracted below to the Office of Management and Budget (OMB) for review and comment. The ICR describes the information collection and its expected burden. On December 18, 2020, FRA published a notice providing a 60-day period for public comment on the ICR.

DATES: Interested persons are invited to submit comments on or before May 21, 2021.

ADDRESSES: Written comments and recommendations for the proposed ICR should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find the particular ICR by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Ms. Hodan Wells, Information Collection Clearance Officer, Office of Railroad Safety, Regulatory Analysis Division, Federal Railroad Administration, telephone: (202) 493–0440, email: *Hodan.wells@dot.gov.*

SUPPLEMENTARY INFORMATION: The PRA, 44 U.S.C. 3501–3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. *See* 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. On December 18, 2020, FRA published a 60-day notice in the **Federal Register** soliciting comment on the ICR for which it is now seeking OMB approval. *See* 85 FR 82577. FRA received no comments related to the proposed collection of information.

Before OMB decides whether to approve the proposed collection of information, it must provide 30 days for public comment. Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507(b)–(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983 (Aug. 29, 1995). OMB believes the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983 (Aug. 29, 1995). Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect.

Comments are invited on the following ICR regarding: (1) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the information will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways to minimize the burden of information collection activities on the public, including the use of automated collection techniques

or other forms of information technology.

The summary below describes the ICR that FRA will submit for OMB clearance as the PRA requires:

Title: Occupational Noise Exposure for Railroad Operating Employees.

OMB Control Number: 2130–0571.

Abstract: Title 49 CFR part 227 contains requirements for occupational noise exposure. FRA uses the collection of information to ensure that railroads covered by this rule establish and implement noise monitoring, hearing conservation, and audiometric testing programs to protect their employees against the harmful effects of excessive noise in the workplace. Additionally, railroads must maintain testing and training records on noise and hearing conservation. Further, railroads must make exposure measurement records for specific locations available to regional or national labor representatives upon request.

Type of Request: Extension without change (with changes in estimates) of a currently approved collection.[1]

Affected Public: Businesses (Railroads, railroads equipment manufacturers).

Form(s): N/A.

Respondent Universe: 512 railroads.

Frequency of Submission: On occasion.

Total Estimated Annual Responses: 159,927.

Total Estimated Annual Burden: 3,980 hours.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: $316,871.

Under 44 U.S.C. 3507(a) and 5 CFR 1320.5(b) and 1320.8(b)(3)(vi), FRA informs all interested parties that a respondent is not required to respond to, conduct, or sponsor a collection of information that does not display a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Brett A. Jortland,

Acting Chief Counsel.

[FR Doc. 2021–08181 Filed 4–20–21; 8:45 am]

BILLING CODE 4910–06–P

[1] In this 30-day notice, FRA corrects its previous characterization of this type of request as an ''extension with change (estimates) of a currently approved collection.''

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2021–0037]

Surface Transportation Project Delivery Program; California High-Speed Rail Authority Audit Report

AGENCY: Federal Railroad Administration (FRA), U.S. Department of Transportation (DOT).

ACTION: Notice; request for comment.

SUMMARY: The Surface Transportation Project Delivery Program (STPD Program), often referred to as the ''NEPA Assignment Program,'' allows a State to assume FRA's responsibilities for Federal environmental review, consultation, and compliance under the National Environmental Policy Act (NEPA), and other Federal environmental laws, for railroad projects. When a State assumes these responsibilities, it carries out the assigned environmental review process, in lieu of FRA. The STPD Program requires annual audits for the first four years of the State's lead role in the program to ensure compliance with program requirements. This notice requests comments on FRA's first audit report of the California High-Speed Rail Authority (CHSRA) under the STPD Program.

DATES: Comments must be received on or before May 21, 2021.

ADDRESSES: Comments related to Docket No. FRA–2021–0037 may be submitted by going to *http://www.regulations.gov* and following the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number (docket #). All comments received will be posted without change to *https://www.regulations.gov;* this includes any personal information. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov* and follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: Andréa Martin, Senior Environmental Protection Specialist, Office of Railroad Policy and Development (RPD), telephone: (202) 493–6201, email: *Andrea.Martin@dot.gov;* or Marlys Osterhues, Chief Environment and Project Engineering, RPD, telephone: (202) 493–0413, email: *Marlys.Osterhues@dot.gov.*

SUPPLEMENTARY INFORMATION:

Privacy Act Statement: FRA will post comments it receives without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* In order to facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, inclusion of names is completely optional. Whether commenters identify themselves or not, 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.

Draft Surface Transportation Project Delivery Program Audit of the California High-Speed Rail Authority: December 8–10, 2020

Executive Summary

This report summarizes the results of FRA's first audit of CHSRA's conduct of its environmental review responsibilities under 23 U.S.C. 327, in accordance with the July 23, 2019, memorandum of understanding (section 327 MOU) between CHSRA and FRA.

To carry out its audit responsibilities under the section 327 MOU, FRA formed a team (Audit Team) in April 2020. The Audit Team consisted of NEPA subject matter experts (SMEs) from FRA's environmental and project management divisions and the John A. Volpe National Transportation Systems Center. In addition, FRA designated a Senior Environmental Protection Specialist to serve as a NEPA Assignment Program liaison to CHSRA. The Audit Team reviewed certain NEPA project documentation completed by CHSRA during the first year of the NEPA Assignment Program, and CHSRA's self-assessment of its NEPA Assignment Program. In addition, the Audit Team reviewed documents related to quality assurance and quality control (QA/QC) and conducted interviews with relevant CHSRA staff between December 8 and 10, 2020.

Overall, the Audit Team found that CHSRA is carrying out the responsibilities it has assumed and complies with the provisions of the section 327 MOU.

Background

The STPD Program allows a State to assume FRA's environmental responsibilities for review, consultation, and compliance for railroad projects.

When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities it has assumed, in lieu of FRA. CHSRA published its application under the STPD Program on November 9, 2017, and made it available for public comment for 30 days. After considering public comments, CHSRA submitted its application to FRA on January 31, 2018. The application served as the basis for developing the section 327 MOU identifying the responsibilities and obligations that CHSRA would assume.

FRA published a notice of the draft MOU in the **Federal Register** on May 2, 2018, with a 30-day comment period to solicit the views of the public and Federal agencies. After the close of the comment period, FRA considered comments received and proceeded to execute the MOU with CHSRA. On July 23, 2019, CHSRA assumed FRA's responsibilities under NEPA, and the responsibilities for NEPA-related Federal environmental laws described in the section 327 MOU.

Section 327(g) requires the Secretary of Transportation (Secretary) to conduct annual audits during each of the first four years of State participation. After the fourth year, the Secretary must monitor the State's compliance with section 327 MOU, but no longer conducts audits. The results of each audit must be made available for public comment.

FRA's annual audits are the primary mechanism to (1) oversee the State's compliance with this MOU and applicable Federal laws and policies; (2) determine the State's attainment of the performance measures identified in part 10 of the section 327 MOU; and (3) collect information needed for the Secretary's annual report to Congress pursuant to 23 U.S.C. 327(i). FRA will conduct three more annual audits consistent with 23 U.S.C. 327(g) and part 11 of the section 327 MOU. FRA must present the results of each audit in a report and make the report available for public comment in the **Federal Register**, before finalizing.

Scope and Methodology

Consistent with the section 327 MOU, the Audit Team examined a sample of CHSRA's NEPA project files; CHSRA's self-assessment report; and CHSRA policies, guidance, and manuals relating to NEPA responsibilities. The scope of the project file portion of the audit included a review of six reexaminations for previously approved Final Environmental Impact Statements (EIS) and one Final EIS/Record of Decision (ROD), representing all projects in process or initiated after the section 327 MOU's effective date through June 30, 2020. In conducting the audit, and to determine compliance with the section 327 MOU, the FRA Audit Team focused on objectives related to six NEPA Assignment Program Elements: Program management, documentation and records management, QA/QC, training, performance measurement, and legal sufficiency. Each NEPA Assignment Program Element is described further below.

The Audit Team interviewed 11 CHSRA staff, in one of CHSRA's three regional offices, and at its headquarters office. In addition, the Audit Team interviewed one staff member from the U.S. Environmental Protection Agency. The Audit Team invited CHSRA staff, middle management, counsel, and executive management to participate in the interview process to ensure representation of a diverse range of staff expertise, experience, and program responsibility.

To evaluate CHSRA's performance against its documented procedures, the Audit Team compared the procedures outlined in CHSRA's environmental manuals and policies to the information obtained during staff interviews and project file reviews. The Audit Team documented observations under the six NEPA Assignment Program Elements.

Audit Results

Overall, CHSRA has carried out the environmental responsibilities assumed through the section 327 MOU and the Audit Team found that CHSRA is complying with the section 327 MOU.

Program Management

Consistent with part 4 of the section 327 MOU, CHSRA has developed and implemented the updated Environmental Policies and Procedures Handbook, Environmental Compliance Program Manual, a QA/QC Plan, and the NEPA Assignment Training Course. CHSRA has also conducted the required self-assessment.

CHSRA has incorporated the NEPA Assignment Program into its overall project development process included in CHSRA's environmental manuals and policies. CHSRA has also created a NEPA assignment team in the CHSRA headquarters office to support the new responsibilities under the NEPA Assignment Program. To ensure NEPA Assignment responsibilities are fulfilled, CHSRA staff at the headquarters office review projects for compliance with assigned environmental laws and regulations independently from staff responsible for developing the NEPA and related documentation, as required in part 3 of the section 327 MOU.

CHSRA environmental staff at the three regional offices coordinate their NEPA related project-work with headquarters staff through NEPA Coordinators. Prior to assuming responsibilities under the NEPA Assignment Program, CHSRA regional staff reported to their regional office. However, following its assumption of FRA's NEPA responsibilities, CHSRA hired a NEPA Assignment Manager in the headquarters office who is responsible for overseeing CHSRA's policies, manuals, guidance, and training under the NEPA Assignment Program. CHSRA also has assigned a team of attorneys to advise on the environmental review process. The legal team includes both CHSRA in-house counsel and outside counsel, who advise on issues relate to the assigned responsibilities.

Since the NEPA Assignment Program became effective, CHSRA staff noted that their relationship with resource agencies has not changed, and the overall environmental and consultation process has continued without significant change. FRA's Audit Team's review of project files supports this conclusion.

Documentation and Records Management

Between July 23, 2019, and June 30, 2020, CHSRA made 22 NEPA auditable actions. Employing judgmental sampling, the Audit Team reviewed seven NEPA project files; six were reexaminations of previously approved Final EISs and one was a combined Final EIS/ROD. These projects represented a sampling of CHSRA environmental review efforts in process, or initiated after, the section 327 MOU's effective date through June 30, 2020, covering a range of resource considerations and agency coordination requirements. The Audit Team found that CHSRA maintained a complete final electronic record, including all NEPA-related documentation.

The Audit Team recognized several CHSRA efforts to ensure consistency of project documentation through CHSRA's use of an accessible file database. Interviews with CHSRA staff indicated that the regional staff consistently manage project files, including working files. In addition, CHSRA uses a software program to document public and resource agency comments, allowing CHSRA to track comments, responses, and resolution.

Quality Assurance/Quality Control

Under part 10.2.B of the section 327 MOU, CHSRA has agreed to carry out regular QA/QC activities to ensure the assumed responsibilities are conducted in accordance with applicable law and the section 327 MOU. The Audit Team noted that CHSRA has implemented a QA/QC program where environmental staff in the three regions coordinate with the NEPA assignment team within the headquarters office. The NEPA assignment team is responsible for reviewing all NEPA documentation and technical reports to ensure compliance. CHSRA staff also have access to SMEs for various environmental resources and regulations. During interviews, CHSRA staff noted that the NEPA assignment team acts independently to provide unbiased and objective reviews of work products. The Audit Team also found that regional staff understands how to implement the QA/QC process throughout the environmental review process.

During subsequent audits, the FRA Audit Team will require that CHSRA provide FRA with supporting QA/QC documentation associated with project files. This will allow the Audit Team to confirm QA/QC measures are being fully implemented for the projects under review. The Audit Team also recommends that CHSRA review a judgmental or random sampling of projects between FRA's annual audits to check compliance and identify potential improvements that can be made to the QA/QC process.

Training Program

CHSRA committed to implementing training necessary to meet its environmental obligations under the section 327 MOU. CHSRA developed its NEPA Assignment Training Plan to fulfill the requirements of part 12 of the section 327 MOU. The training covers all topics related to CHSRA's responsibilities under NEPA assignment. Based on interviews and a review of training documentation and records, all CHSRA staff received the training in accordance with the training plan after the MOU was executed.

The FRA Audit Team recommends that CHSRA expand its training plan to include additional training opportunities. This training could include formal or informal training with State and Federal resource agencies, in addition to the regularly scheduled agency coordination meetings.

Performance Measures

In accordance with part 10.1.1 of the section 327 MOU, FRA and CHSRA have established performance measures that CHSRA will seek to attain and that FRA will consider during FRA's audits.

CHSRA is still in the early stages of developing metrics to track attainment of performance measures outlined in the section 327 MOU. However, based on the results of the audit review and interviews, the FRA Audit Team found that CHSRA is implementing the performances measures. CHSRA environmental leadership staff indicated they will continue to implement the performance measures in part 10 of the section 327 MOU.

Legal Sufficiency

CHSRA conducts a legal sufficiency review at various stages of the environmental review process, consistent with existing internal procedures. This review is generally conducted by outside counsel and CHSRA attorneys. CHSRA attorneys are responsible for making the final written determination regarding legal sufficiency of EISs prior to their publication.

Next Steps

FRA provided this draft audit report to CHSRA for a 21-day review and comment period. The FRA Audit Team considered CHSRA comments in developing this draft audit report. This draft audit report is available for public review for a 30-day comment period in accordance with 23 U.S.C. 327(g). No later than 60 days after the close of the comment period, FRA will respond to all comments submitted to finalize this draft audit report pursuant to 23 U.S.C. 327(g)(B). FRA will publish the final audit report in the **Federal Register**.

Issued in Washington, DC, on April 16, 2021.

Jamie P. Rennert,

Director, Office of Infrastructure Investment.

[FR Doc. 2021–08228 Filed 4–20–21; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2020–0027–N–42]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of information collection; request for comment.

SUMMARY: Under the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, this notice announces that FRA is forwarding the Information Collection Request (ICR) abstracted below to the Office of Management and Budget (OMB) for review and comment. The ICR describes the information collection and its expected burden. On December 30, 2020, FRA published a notice providing a 60-day period for public comment on the ICR.

DATES: Interested persons are invited to submit comments on or before May 21, 2021.

ADDRESSES: Written comments and recommendations for the proposed ICR should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find the particular ICR by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Ms. Hodan Wells, Information Collection Clearance Officer, Office of Railroad Safety, Regulatory Analysis Division, Federal Railroad Administration, telephone: (202) 493–0440, email: *Hodan.wells@dot.gov.*

SUPPLEMENTARY INFORMATION: The PRA, 44 U.S.C. 3501–3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. *See* 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. On December 30, 2020, FRA published a 60-day notice in the **Federal Register** soliciting comment on the ICR for which it is now seeking OMB approval. *See* 85 FR 86644. FRA received no comments related to the proposed collection of information.

Before OMB decides whether to approve the proposed collection of information, it must provide 30 days for public comment. Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507(b)–(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983 (Aug. 29, 1995). OMB believes the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983 (Aug. 29, 1995). Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect.

Comments are invited on the following ICR regarding: (1) Whether the information collection activities are

necessary for FRA to properly execute its functions, including whether the information will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology.

The summary below describes the ICR that FRA will submit for OMB clearance as the PRA requires:

Title: Conductor Certification.

OMB Control Number: 2130–0596.

Abstract: FRA's conductor certification regulation (49 CFR part 242) requires railroads to have a formal program for certifying conductors. As part of that program, railroads are required to have a formal process for training prospective conductors and determining that all persons are competent before permitting them to serve as a conductor. FRA intended the regulation to ensure that only those persons who meet minimum Federal safety standards serve as conductors. FRA collects information to ensure that railroads and their employees fully comply with all the requirements of part 242, including a conductor certification/recertification program, fitness requirements, initial and periodic testing, and territorial qualifications.

Type of Request: Extension without change (with changes in estimates) of a currently approved collection.[1]

Affected Public: Businesses.

Form(s): N/A.

Respondent Universe: 765 railroads.

Frequency of Submission: On occasion.

Total Estimated Annual Responses: 222,386.

Total Estimated Annual Burden: 49,761 hours.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: $4,303,437.

Under 44 U.S.C. 3507(a) and 5 CFR 1320.5(b) and 1320.8(b)(3)(vi), FRA informs all interested parties that a respondent is not required to respond to, conduct, or sponsor a collection of information that does not display a currently valid OMB control number.

[1] In this 30-day notice, FRA corrects its previous characterization of this type of request as an ''extension with change (estimates) of a currently approved collection.''

Authority: 44 U.S.C. 3501–3520.

Brett A. Jortland,

Acting Chief Counsel.

[FR Doc. 2021–08180 Filed 4–20–21; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2021–0019; Notice 1]

Notice of Receipt of Petition for Decision That Nonconforming Model Year 2020–2021 GMC Sierra 2500HD Trucks Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, Department of Transportation (DOT).

ACTION: Receipt of petition.

SUMMARY: This document announces the National Highway Traffic Safety Administration (NHTSA) receipt of a petition for a decision that model year (MY) 2020–2021 GMC Sierra 2500HD Trucks (TKs) that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS) with a GVWR range of 6,105–6,950 lbs., are eligible for importation into the United States because they are substantially similar to vehicles that were originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards (the U.S.-certified version of the 2020–2021 GMC Sierra 2500HD TKs) and are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is May 21, 2021.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and may be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard along with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000, (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Robert Mazurowski, Office of Vehicle Safety Compliance, NHTSA (202–366–1012).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same MY as the model of the motor vehicle to be compared,

and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice of each petition that it receives in the **Federal Register** and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

Diversified Vehicle Services Inc. (DVS), (Registered Importer R–98–165), of Indianapolis, Indiana has petitioned NHTSA to decide whether nonconforming 2020–2021 GMC Sierra 2500HD TKs are eligible for importation into the United States. The vehicles which DVS believes are substantially similar are MY 2020–2021 GMC Sierra 2500HD TKs sold in the United States and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner claims that it compared non-U.S. certified MY 2020–2021 GMC Sierra 2500HD TKs to their U.S. certified counterparts and found the vehicles to be substantially similar with respect to compliance with most FMVSS.

DVS submitted information with its petition intended to demonstrate that non-U.S. certified MY 2020–2021 GMC Sierra 2500HD TKs, as originally manufactured, conform to many applicable FMVSS in the same manner as their U.S.-certified counterparts, or are capable of being readily altered to conform to those standards. Specifically, the petitioner claims that the non-U.S. certified MY 2020–2021 GMC Sierra 2500HD TKs, as originally manufactured, conform to: FMVSS Nos.102, *Transmission Shift Position Sequence, Starter Interlock, and Transmission Braking Effect,* 103, *Windshield Defrosting and Defogging Systems,* 104, *Windshield Wiping and Washing Systems,* 106, *Brake Hoses,* 108, *Lamps, Reflective Devices, and Associated Equipment,* 110, *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 kilograms (10,000 pounds) or Less,* 111, *Rear Visibility,* 113, *Hood Latch System,* 114, *Theft Protection,* 116, *Motor Vehicle Brake Fluids,* 118, *Power-Operated Window, Partition, and Roof Panel System,* 119, *New Pneumatic Tires,* 124, *Accelerator Control Systems,* 126, *Electronic Stability Control Systems For Light Vehicles,* 135, *Light Vehicle Brake Systems,* 138, *Tire pressure monitoring systems,* 201, *Occupant Protection in Interior Impact,* 202, *Head Restraints; Mandatory Applicability Begins on September 1, 2009,* 203, *Impact Protection for the Driver from the Steering Control System,* 204, *Steering Control Rearward Displacement,* 205, *Glazing Materials,* 206, *Door Locks and Door Retention Components,* 207, *Seating Systems,* 208, *Occupant Crash Protection,* 209, *Seat Belt Assemblies,* 210, *Seat Belt Assembly Anchorages,* 212, *Windshield Mounting,* 213, *Child Restraint Systems,* 214, *Side Impact Protection,* 216, *Roof Crush Resistance; Applicable Unless a Vehicle is Certified to § 571.216a,* 219, *Windshield Zone Intrusion,* 301, *Fuel System Integrity,* 302, *Flammability of Interior Materials,* 49 CFR part 541, *Theft Prevention,* and, 49 CFR part 565 *VIN Requirements.*

The petitioner also contends that the subject non-U.S. certified vehicles are capable of being readily altered to meet the following FMVSS, in the manner indicated:

FMVSS No. 101, *Controls and Displays:* the instrument cluster will require the addition of the word ''BRAKE''.

The petitioner additionally states a reference and certification label will need to be added to the left front door post area to meet the requirements of 49 CFR part 567.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B), and (b)(1); 49 CFR 593.7; delegation of authority at 49 CFR 1.95 and 501.8.

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2021–08207 Filed 4–20–21; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2021–0018; Notice 1]

Notice of Receipt of Petition for Decision That Nonconforming Model Year 2020–2021 GMC Sierra 1500 Trucks are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, Department of Transportation (DOT).

ACTION: Receipt of petition.

SUMMARY: This document announces the National Highway Traffic Safety Administration (NHTSA) receipt of a petition for a decision that model year (MY) 2020–2021 GMC Sierra Trucks (TKs) that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS) with a GVWR range of 4,520–5,270 lbs, are eligible for importation into the United States because they are substantially similar to vehicles that were originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards (the U.S.-certified version of the 2020–2021 GMC Sierra TKs) and are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is May 21, 2021.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and may be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard along with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and

will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000, (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Robert Mazurowski, Office of Vehicle Safety Compliance, NHTSA (202–366–1012).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same MY as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice of each petition that it receives in the **Federal Register** and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

Diversified Vehicle Services Inc. (DVS), (Registered Importer R–98–165), of Indianapolis, Indiana has petitioned NHTSA to decide whether nonconforming 2020–2021 GMC Sierra TKs are eligible for importation into the United States. The vehicles which DVS believes are substantially similar are MY 2020–2021 GMC Sierra TKs sold in the United States and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner claims that it compared non-U.S. certified MY 2020–2021 GMC Sierra TKs to their U.S. certified counterparts and found the vehicles to be substantially similar with respect to compliance with most FMVSS.

DVS submitted information with its petition intended to demonstrate that non-U.S. certified MY 2020–2021 GMC Sierra TKs, as originally manufactured, conform to many applicable FMVSS in the same manner as their U.S.-certified counterparts, or are capable of being readily altered to conform to those standards. Specifically, the petitioner claims that the non-U.S. certified MY 2020–2021 GMC Sierra TKs, as originally manufactured, conform to: FMVSS Nos.102, *Transmission Shift Position Sequence, Starter Interlock, and Transmission Braking Effect,* 103, *Windshield Defrosting and Defogging Systems,* 104, *Windshield Wiping and Washing Systems,* 106, *Brake Hoses,* 108, *Lamps, Reflective Devices, and Associated Equipment,* 110, *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 kilograms (10,000 pounds) or Less,* 111, *Rear Visibility,* 113, *Hood Latch System,* 114, *Theft Protection,* 116, *Motor Vehicle Brake Fluids,* 118, *Power-Operated Window, Partition, and Roof Panel System,* 119, *New Pneumatic Tires,* 124, *Accelerator Control Systems,* 126, *Electronic Stability Control Systems For Light Vehicles,* 135, *Light Vehicle Brake Systems,* 138, *Tire pressure monitoring systems,* 201, *Occupant Protection in Interior Impact,* 202, *Head Restraints; Mandatory Applicability Begins on September 1, 2009,* 203, *Impact Protection for the Driver from the Steering Control System,* 204, *Steering Control Rearward Displacement,* 205, *Glazing Materials,* 206, *Door Locks and Door Retention Components,* 207, *Seating Systems,* 208, *Occupant Crash Protection,* 209, *Seat Belt Assemblies,* 210, *Seat Belt Assembly Anchorages,* 212, *Windshield Mounting,* 213, *Child Restraint Systems,* 214, *Side Impact Protection,* 216, *Roof Crush Resistance; Applicable Unless a Vehicle is Certified to § 571.216a,* 219, *Windshield Zone Intrusion,* 301, *Fuel System Integrity,* 302, *Flammability of Interior Materials,* 49 CFR part 541, *Theft Prevention,* and, 49 CFR part 565 *VIN Requirements.*

The petitioner also contends that the subject non-U.S. certified vehicles are capable of being readily altered to meet the following FMVSS, in the manner indicated:

FMVSS No. 101, *Controls and Displays:* the instrument cluster will require the addition of the word ''BRAKE''.

The petitioner additionally states a reference and certification label will need to be added to the left front door post area to meet the requirements of 49 CFR part 567.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B), and (b)(1); 49 CFR 593.7; delegation of authority at 49 CFR 1.95 and 501.8.

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2021–08204 Filed 4–20–21; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2021–0020; Notice 1]

Notice of Receipt of Petition for Decision That Nonconforming Model Year 2020–2021 GMC Sierra 3500HD Trucks Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, Department of Transportation (DOT).

ACTION: Receipt of petition.

SUMMARY: This document announces the National Highway Traffic Safety Administration (NHTSA) receipt of a petition for a decision that model year (MY) 2020–2021 GMC Sierra 3500HD Trucks (TKs) that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS) with a GVWR range of 6,231–7,059 lbs, are eligible for importation into the United States because they are substantially similar to vehicles that were originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards (the U.S.-certified version of the 2020–2021 GMC Sierra 3500HD TKs) and are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is May 21, 2021.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and may be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room

W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

• *Hand Delivery:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.

• *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.

• Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard along with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000, (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Robert Mazurowski, Office of Vehicle Safety Compliance, NHTSA (202–366–1012).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same MY as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice of each petition that it receives in the **Federal Register** and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

Diversified Vehicle Services Inc. (DVS), (Registered Importer R–98–165), of Indianapolis, Indiana has petitioned NHTSA to decide whether nonconforming 2020–2021 GMC Sierra 3500HD TKs are eligible for importation into the United States. The vehicles which DVS believes are substantially similar are MY 2020–2021 GMC Sierra 3500HD TKs sold in the United States and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner claims that it compared non-U.S. certified MY 2020–2021 GMC Sierra 3500HD TKs to their U.S. certified counterparts and found the vehicles to be substantially similar with respect to compliance with most FMVSS.

DVS submitted information with its petition intended to demonstrate that non-U.S. certified MY 2020–2021 GMC Sierra 3500HD TKs, as originally manufactured, conform to many applicable FMVSS in the same manner as their U.S.-certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that the non-U.S. certified MY 2020–2021 GMC Sierra 3500HD TKs, as originally manufactured, conform to: FMVSS Nos.102, *Transmission Shift Position Sequence, Starter Interlock, and Transmission Braking Effect,* 103, *Windshield Defrosting and Defogging Systems,* 104, *Windshield Wiping and Washing Systems,* 106, *Brake Hoses,* 108, *Lamps, Reflective Devices, and Associated Equipment,* 110, *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 kilograms (10,000 pounds) or Less,* 111, *Rear Visibility,* 113, *Hood Latch System,* 114, *Theft Protection,* 116, *Motor Vehicle Brake Fluids,* 118, *Power-Operated Window, Partition, and Roof Panel System,* 119, *New Pneumatic Tires,* 124, *Accelerator Control Systems,* 126, *Electronic Stability Control Systems For Light Vehicles,* 135, *Light Vehicle Brake Systems,* 138, *Tire pressure monitoring systems,* 201, *Occupant Protection in Interior Impact,* 202, *Head Restraints; Mandatory Applicability Begins on September 1, 2009,* 203, *Impact Protection for the Driver from the Steering Control System,* 204, *Steering Control Rearward Displacement,* 205, *Glazing Materials,* 206, *Door Locks and Door Retention Components,* 207, *Seating Systems,* 208, *Occupant Crash Protection,* 209, *Seat Belt Assemblies,* 210, *Seat Belt Assembly Anchorages,* 212, *Windshield Mounting,* 213, *Child Restraint Systems,* 214, *Side Impact Protection,* 216, *Roof Crush Resistance; Applicable Unless a Vehicle is Certified to § 571.216a,* 219, *Windshield Zone Intrusion,* 301, *Fuel System Integrity,* 302, *Flammability of Interior Materials,* 49 CFR part 541, *Theft Prevention,* and, 49 CFR part 565 *VIN Requirements.*

The petitioner also contends that the subject non-U.S. certified vehicles are capable of being readily altered to meet the following FMVSS, in the manner indicated:

FMVSS No. 101, *Controls and Displays:* the instrument cluster will require the addition of the word ''BRAKE''.

The petitioner additionally states a reference and certification label will need to be added to the left front door post area to meet the requirements of 49 CFR part 567.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B), and (b)(1); 49 CFR 593.7; delegation of authority at 49 CFR 1.95 and 501.8.

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2021–08206 Filed 4–20–21; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0149]

Agency Information Collection Activity: Application for Conversion

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before June 21, 2021.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov* Please refer to ''OMB Control No. 2900–0149'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 1717 H Street NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0149'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 or the use of other forms of information technology.

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: Application for Conversion, VA Form 29–0152

OMB Control Number: 2900–0149.

Type of Review: Revision of a currently approved collection.

Abstract: This form is used by Veterans to convert to a permanent plan of insurance. The information on the form is required by law, U.S.C. 1904 and 1942.

Affected Public: Individuals and households.

Estimated Annual Burden: 1,125 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: Once.

Estimated Number of Respondents: 4,500.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2021–08160 Filed 4–20–21; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0675]

Agency Information Collection Activity Under OMB Review: (Vendor Information Pages Verification Program)

AGENCY: Center for Verification and Evaluation, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Center for Verification and Evaluation, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: 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. Refer to ''OMB Control No. 2900–0675.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 1717 H Street NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0675'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: Vendor Information Pages Verification Program, VA Form 0877.

OMB Control Number: 2900–0675.

Type of Review: Reinstatement with change of a previously approved collection.

Abstract: Vendor Information Pages Verification Program is used to assist federal agencies in identifying small businesses owned and controlled by veterans and service-connected disabled veterans. The information is necessary to ensure that veteran owned businesses are given the opportunity to participate in Federal contracts and receive contract solicitations information automatically. VA will use the data collected to verify small businesses as veteran-owned or service-disabled veteran-owned. 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 OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at: 86 FR 7920 on February 02, 2021, pages 7920 and 7921.

Affected Public: Business or other for-profit.

Estimated Annual Burden: 10,000 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 20,000.

By direction of the Secretary.

Jeffrey M. Martin,

Assistant Director, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

[FR Doc. 2021–08158 Filed 4–20–21; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0665]

Agency Information Collection Activity: Direct Deposit Enrollment/ Change

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed reinstatement of a previously approved collection, and allow 60 days for public comment in response to this notice. This notice solicits comments on information needed to start or change direct deposit of Government Life Insurance payments.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before June 21, 2021.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0665'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 1717 H Street NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0665'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 or the use of other forms of information technology.

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: Direct Deposit Enrollment/Change, VA Form 29–0309.

OMB Control Number: 2900–0665.

Type of Review: Reinstatement of a previously approved collection.

Abstract: Claimants complete VA Form 29–0309 authorizing VA to initiate direct deposit of insurance benefit at their financial institution.

Affected Public: Individuals and households.

Estimated Annual Burden: 10,000 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 30,000.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2021–08161 Filed 4–20–21; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0262]

Agency Information Collection Activity: Designation of Certifying Official(s)

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before June 21, 2021.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0262'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 1717 H Street NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0262'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 or the use of other forms of information technology.

Authority: 38 U.S.C. 3034(a), 3241, 3323(a), 3492, 3680, and 3684(a). 10 U.S.C. 16136(b), and 16166(b); 38 CFR 21.4203(a), 21.5200(d), 21.5292(e)(2), 21.5810(a), 21.7140(a), 21.7652, and 21.7656.

Title: Designation of Certifying Official(s), VA Form 22–8794.

OMB Control Number: 2900–0262.

Type of Review: Revision of a currently approved collection.

Abstract: VA uses the VA Form 22–8794 to maintain a record of the VA Certifying Official responsible for certifying approved training for Veterans and other eligible beneficiaries.

Affected Public: Individuals and households.

Estimated Annual Burden: 1,105 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 6,631.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2021–08164 Filed 4–20–21; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0492]

Agency Information Collection Activity: VA MATIC Authorization

AGENCY: Veterans Benefits Administration (VBA), Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before June 21, 2021.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0492'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 1717 H Street NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0492'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 or the use of other forms of information technology.

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: VA MATIC Authorization, 29–0532

OMB Control Number: 2900–0492.

Type of Review: Revision of a currently approved collection.

Abstract: Veteran policyholders complete VA Form 29–0532 to authorize deduction of Government Life Insurance premiums from their bank account.

Affected Public: Individuals and households.

Estimated Annual Burden: 1,500 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 3,000.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2021–08163 Filed 4–20–21; 8:45 am]

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FEDERAL REGISTER

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Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Western Distinct Population Segment of the Yellow-Billed Cuckoo; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2013–0011; FF09E21000 FXES11110900000 212]

RIN 1018–BE29

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Western Distinct Population Segment of the Yellow-Billed Cuckoo

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the western distinct population segment of the yellow-billed cuckoo (western yellow-billed cuckoo) (*Coccyzus americanus*) under the Endangered Species Act. In total, approximately 298,845 acres (120,939 hectares) are now being designated as critical habitat in Arizona, California, Colorado, Idaho, New Mexico, Texas, and Utah. This rule extends the Act's protections to critical habitat for this species.

DATES: This rule is effective May 21, 2021.

ADDRESSES: This final rule is available on the internet at *http://www.regulations.gov,* and the Sacramento Fish and Wildlife Office website at *http://www.fws.gov/sacramento.* Comments and materials we received, as well as supporting documentation we used or developed in preparing this rule, are available for public inspection at *http://www.regulations.gov at* Docket No. FWS–R8–ES–2013–0011.

The coordinates or plot points or both from which the maps are generated are included in the decisional record for this critical habitat designation and are available at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2013–0011 and on the Service's website at *http://www.fws.gov/sacramento.*

FOR FURTHER INFORMATION CONTACT: Michael Fris, Field Supervisor, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Room W–2605, Sacramento, California 95825; or by telephone 916–414–6600. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Scope of this rule. The information presented in this final rule pertains only to the western distinct population segment of the yellow-billed cuckoo (western yellow-billed cuckoo) (DPS). Any reference to the ''species'' or to the western yellow-billed cuckoo within this document only applies to the DPS and not to the yellow-billed cuckoo as a whole unless specifically expressed. A complete description of the DPS and area associated with the DPS is contained in the proposed and final listing rules for the western yellow-billed cuckoo published in the **Federal Register** (78 FR 61621, October 3, 2013, and 79 FR 59992, October 3, 2014).

Why we need to publish a rule. Under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.;* hereafter ''Act'' or ''ESA''), any species that is determined to be an endangered or threatened species requires critical habitat to be designated, to the maximum extent prudent and determinable. Designations and revisions of critical habitat can only be completed by issuing a rule.

What this document does. This is a final rule to designate critical habitat for the western yellow-billed cuckoo. This final designation of critical habitat identifies areas that we have determined, based on the best scientific and commercial information available, are essential to the conservation of the species or otherwise essential for its conservation. After exclusions of areas under section 4(b)(2) of the Act, the final critical habitat comprises 63 units and is located in the States of Arizona, California, Colorado, Idaho, New Mexico, Texas, and Utah. The total change in area as a result of exclusions or changes from the revised proposed designation is a reduction of approximately 194,820 acres (ac) (78,840 hectares (ha)). In addition, some of the areas removed did not contain the physical or biological features or meet our criteria for critical habitat for the western yellow-billed cuckoo and were identified based on comments or additional review. The total area excluded is approximately 172,490 ac (69,808 ha).

The basis for our action. Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary) to designate critical habitat concurrent with listing to the maximum extent prudent and determinable. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat. Section 4(b)(2) also authorizes the Secretary to exclude areas from the critical habitat if the benefits of excluding the areas outweigh the benefits of including the areas, unless exclusion would result in extinction of the species.

Peer review and public comment. We sought comments from six independent specialists to ensure that our designation is based on scientifically sound data and analyses. In 2014, we obtained opinions from four knowledgeable individuals with scientific expertise to review our technical assumptions, analysis, and whether or not we had used the best scientific data available. These peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve this final rule. Information we received from peer review is incorporated in this final designation of critical habitat. We also received comments from one of the peer reviewers on our 2020 revised proposed rule. We considered all comments and information received from the peer reviewer, species experts, and the public during the comment period for the 2014 proposed and the 2020 revised proposed designation of critical habitat.

Previous Federal Actions

On October 3, 2013 (78 FR 61621), we published a proposed rule to list the western distinct population segment (DPS) of the yellow-billed cuckoo as threatened. On August 15, 2014 (79 FR 48547), we published a proposed rule to designate critical habitat for the DPS. On October 3, 2014 (79 FR 59992), we published the final listing rule, which added the western yellow-billed cuckoo to the List of Endangered and Threatened Wildlife in title 50 of the Code of Federal Regulations at 50 CFR 17.11(h) as a threatened species. On February 27, 2020 (85 FR 11458), we published a revised proposed critical habitat designation and opened a public

comment period that closed on April 27, 2020. On September 16, 2020 (85 FR 57816), we published a not-warranted 12-month finding on a petition to delist the western yellow-billed cuckoo. Please refer to the proposed and final listing and revised proposed critical habitat rules for the western yellow-billed cuckoo published in the **Federal Register** for a detailed description of previous Federal actions concerning this species.

Summary of Changes From the Revised Proposed Rule

We reviewed the site-specific comments related to critical habitat for the western yellow-billed cuckoo (see Summary of Comments and Recommendations), completed our analysis of areas considered for exclusion under section 4(b)(2) of the Act, reviewed our analysis of the Physical or biological features (PBFs) essential to the long-term conservation of the western yellow-billed cuckoo, reviewed the application of our conservation strategy and criteria for identifying critical habitat across the range of the western yellow-billed cuckoo to refine our designation, and completed the economic analysis of the designation. This final rule incorporates changes to our 2020 revised proposed critical habitat rule based on the comments that we received, and have responded to in this document, and considers efforts to conserve the western yellow-billed cuckoo.

As a result, our final designation of critical habitat reflects the following changes from the February 27, 2020, revised proposed rule (85 FR 11458):

(1) We revised unit areas based on comments received regarding areas that did or did not contain the physical or biological features essential to the conservation of the species.

(2) We revised Federal, Tribal, and private land ownership information regarding Unit 70 (UT–1) based on information received from Duchesne County, Utah.

(3) We excluded approximately 172,490 ac (69,808 ha) from entire or portions of Units as identified in Table 3, Areas Excluded by Critical Habitat Unit.

(4) In the revised proposed rule, we misidentified the acreage of off-site restoration areas identified in the Lower Colorado River Multi-Species Conservation Program Habitat Conservation Plan (LCR MSCP HCP). We now acknowledge this miscalculation and as a result of the HCP providing conservation for the western yellow-billed cuckoo and its habitat, we are excluding from this designation all lands that were identified as proposed critical habitat within the planning area.

(5) The U.S. Forest Service (USFS) suggested that the Tucson Audubon Society (MacFarland and Horst 2015) did not survey Unit 44 (AZ–32, California Gulch). We corrected the unit description with survey information used to determine occupancy for this unit.

(6) We updated the climate change information with new references based on comments.

(7) We corrected a number of errors in unit length, acreage, and descriptions.

(8) We clarified that Rockhouse Demonstration Site on the Salt River inflow to Roosevelt Lake was not included as critical habitat.

(9) In the revised proposed rule, we failed to identify potential exclusions for San Carlos Apache parcels on the lower San Pedro River and Aravaipa Creek and for Eagle Creek on the San Carlos Apache Tribal lands. These Tribal lands have been excluded. We corrected ownership and operation of San Carlos Apache Reservoir and Coolidge Dam.

Supporting Documents

In the revised proposed critical habitat rule, we stated that a draft analysis document under the National Environmental Policy Act (NEPA) for the designation of critical habitat was made available to the public for comment. We have now finalized an environmental assessment with a finding of no significance under NEPA. The document and finding of no significance is available at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2013–0011 and from the Sacramento Fish and Wildlife Office at *http://www.fws.gov/sacramento.* See Required Determinations section below for a discussion of our NEPA obligations for this designation.

We also finalized our information pertaining to our economic analysis after considering public comment on the draft document. The final document (IEc 2020, entire) is available at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2013–0011.

Species Information

The western yellow-billed cuckoo is a migratory bird species, traveling between its wintering grounds in Central and South America and its breeding grounds in North America (Continental United States and Mexico) each spring and fall often using river corridors as travel routes. Habitat conditions through most of the western yellow-billed cuckoo's range are often dynamic and may change condition or location within or between years depending on environmental conditions, vegetation growth, tree regeneration, plant maturity, stream dynamics, and sediment movement and deposition. The species' major food resources (insects) are also similarly variable in abundance and distribution. As a result, the western yellow-billed cuckoo's use of an area is tied to the area's habitat condition and food resources, which as stated, can be variable between and within years. This variability in resources may cause the western yellow-billed cuckoo to move between areas in its wintering or breeding grounds to take advantage of habitat conditions and food availability. For a thorough discussion of the western yellow-billed cuckoo's biology and natural history, including limiting factors and species resource needs, please refer to the proposed and final rules to list this species as threatened published in the **Federal Register** on October 3, 2013 (78 FR 61621), and October 3, 2014 (79 FR 59992), (available at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2013–0104), and the proposed critical habitat rule, which published August 15, 2014 (79 FR 48548) (available at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2013–0011).

Summary of Comments and Recommendations

We requested written comments from the public on the initial proposed (2014) and revised proposed (2020) designation of critical habitat for the western yellow-billed cuckoo during multiple comment periods. The first comment period opened on August 15, 2014, and closed on October 14, 2014 (79 FR 48548). The comment period was reopened from November 12, 2014, to January 12, 2015 (79 FR 67154). On December 2, 2014, we announced a public hearing which was held in Sacramento, California, on December 18, 2014 (79 FR 71373). On February 27, 2020, we opened a comment period on the revised proposed critical habitat (85 FR 11458). The comment period closed on April 27, 2020.

In our 2014 proposed rule designating critical habitat, we contacted appropriate Federal, State, Tribal governments, and local agencies; scientific organizations; and other interested parties, and invited them to comment on the proposed critical habitat designation and 2014 draft economic analysis. We also held a public hearing in December 2014 in Sacramento, California, and received comments from scientific experts,

landowners, and other stakeholders regarding the proposed designation. On February 27, 2020, with the publication of the revised proposed rule (85 FR 11458), we again contacted all interested parties including appropriate Federal and State agencies, Tribal governments, scientific experts and organizations, and other interested parties and invited them to submit written comments on the revised proposal by April 27, 2020. We stated that any comments received as a result of the 2014 proposed rule need not be resubmitted and that they would be addressed in this final rule. Newspaper notices inviting general public comment were published in numerous locations throughout the range of the critical habitat designation for both the original and revised proposed rules.

During the comment period on the 2014 proposed rule, we received nearly 1,200 written comments as well as over 87,000 form letters on the proposed critical habitat designation or the draft economic analysis (IEc 2013, entire). During the comment period on the revised proposed rule, we received an additional 99 comment letters and over 6,000 form letters on the revised proposed critical habitat designation or the draft economic analysis (IEc 2019, entire; IEc 2020, entire). We also received from several parties additional requests for exclusion of areas that were not identified in the revised proposed rule. We reviewed each exclusion request and whether the requester provided information or a reasoned rationale to initiate an analysis or support an exclusion (see Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act: 81 FR 7226; February 11, 2016). All substantive information provided during each comment period has either been incorporated directly into this final determination or addressed in our responses below.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review actions under the Act, we solicited expert opinion on the 2014 proposed critical habitat from six knowledgeable individuals with scientific expertise that includes familiarity with the western yellow-billed cuckoo and its habitat, biological needs, and threats. We received responses from four of the peer reviewers. In 2020, during the public comment period, we received comments from one of the peer reviewers regarding our revised proposed rule. We addressed the 2014 and 2020 peer reviewer comments in this final rule as appropriate.

We reviewed all the comments we received from the peer reviewers for substantive issues and new information regarding the western yellow-billed cuckoo and its habitat use and needs. The peer reviewers generally concurred with the information regarding the western yellow-billed cuckoo and its habitat. In some cases, they provided additional information, clarifications, and suggestions to improve the designation. Our revised designation was developed in part to address some of the concerns and information raised by the 2014 peer reviewers. The reviewers also provided or corrected references we cited in the proposed rule. The additional details and information have been incorporated into this final listing rule as appropriate. Substantive comments we received from peer reviewers as well as Federal, State, Tribal, and local governments, nongovernmental organizations, and the public are outlined below.

Comment 1: One peer reviewer recommended discussion of the role nonnative plant species other than tamarisk (salt cedar) (*Tamarix* spp.) play in supporting western yellow-billed cuckoo. The peer reviewer noted that particularly in western Colorado, Russian olive (*Elaeagnus angustifolia*) forms dense stands dominating the understory of the largest cottonwood galleries along areas identified as critical habitat. The peer reviewer provided information on a confirmed nest on July 21, 2008, in Russian olive in revised proposed Unit 69 (CO–2) along the North Fork of the Gunnison River near the town of Hotchkiss. The peer reviewer commented that the possible effects to western yellow-billed cuckoo and its habitat should be considered during widespread removal of Russian olive and the reviewer recommended rapid replacement with native shrubs.

Our Response: In response to this comment, in the 2020 revised proposed critical habitat, we included discussion of the presence and use of nonnative plant species, including Russian olive, in western yellow-billed cuckoo habitat (85 FR 11458, at pp. 11466, 11469, 11473).

Comment 2: One peer reviewer suggested adding additional areas along the Sacramento River, California, based on future plans for restoration of those sites.

Our Response: We based our designation of areas by selecting occupied breeding habitat for the western yellow-billed cuckoo. Our conservation strategy and criteria for identifying occupied areas is supported by existing information on species' abundance and distribution. In our analysis, we found that existing habitat availability along the Sacramento River is sufficient to support a larger number of breeding birds. As a result, in this final rule, we do not include additional unoccupied areas, especially if those areas have not been restored to contain the habitat features necessary for the species.

Comment 3: One peer reviewer suggested including areas along river segments to allow for natural stream processes such as bank cutting and deposition to occur, especially when hardened banks limit this natural process, thereby limiting the establishment of riparian vegetation.

Our Response: In determining boundaries for the critical habitat along river segments, we evaluated aerial imagery to map those vegetated areas along the river segments that we determined contain the physical or biological features (PBFs) essential to the conservation of the species and which may require special management considerations or protection. In most cases, we included areas along rivers and streams that would allow for natural stream processes such as cutting and deposition that would allow for such meandering of the river to take place.

Federal Agency Comments

Comment 4: USFS stated that the critical habitat designation in Unit 64 CA–2 at Lake Isabella, California, could affect recreation and grazing opportunities on USFS lands. The U.S. Army Corps of Engineers (Corps) also commented that designating areas within the floodplain would disrupt flood control operations and that portions of the unit within the floodplain of Lake Isabella under conservation easement should be removed or excluded.

Our Response: As a result of the Federal agency and other public comments (Kern County and Kern River Watermaster) on the 2014 proposed designation and discussions with the Corps since the publication of the 2020 revised proposed designation, we revised the extent of the critical habitat within Unit 64 at Lake Isabella to avoid those areas typically inundated by the lake or areas within the floodplain. Although the western yellow-billed cuckoo may use these areas during periods of drought or other times when the lake is drawn down, these areas are temporary and extremely variable and may not contain the physical or

biological features on a long-term basis. We also identified and excluded portions of the unit under conservation easement under section 4(b)(2) of the Act. Our rationale for excluding certain portions of the unit is outlined below. See Exclusions, *Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General.*

Comment 5: The Corps requested exclusion of Unit 4 (AZ–2) and the portion of Unit 31 (AZ–29) for operation and maintenance of Alamo Dam and Lake in Arizona.

Our Response: We identified the entire Unit 4 (AZ–2) at Alamo Lake and a portion of Unit 31 (AZ–29) upstream of the lake on Big Sandy River for possible exclusion in our proposed rule and have excluded these areas based on the Arizona Game and Fish Department (AGFD) Alamo Lake State Wildlife Area management plan. We also acknowledge the multi-year process underway among the Corps and partners to develop a long-term operation plan for Alamo Dam and Lake that benefits environmental resources while meeting the dam's maintenance needs (USACE 2020, entire). Although the original authority for the Corps' Alamo Dam and Lake was for flood control, the Water Resources Development Act of 1996 (Pub. L. 104–303) authorized the operation of the dam to provide fish and wildlife benefits both upstream and downstream of the dam as long as these actions do not reduce flood control and recreation benefits. The revised operations are designed to improve the currently degraded riparian western yellow-billed cuckoo and southwestern willow flycatcher habitat (*Empidonax traillii extimus*) by providing the magnitude, timing, and duration of flow that encourages regeneration and maintenance of riparian vegetation (USACE 2020, pp. 14–16). Benefits are expected both upstream and downstream of Alamo Dam (see Exclusions, *Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General*).

Comment 6: The USFS reiterated that overgrazing does not occur on most of the 20 units in the Coronado National Forest that were proposed as critical habitat. The USFS requested removal of the statement regarding overgrazing from the final rule.

Our Response: Our discussion of overgrazing is in reference to the special management and protections that may be required in areas identified as critical habitat. Grazing operations that are properly managed, such as USFS lands under management under the Coronado National Forest Land Management Plan and Allotment Management Plans, may be in compliance with grazing standards but may still result in reduced riparian habitat quality and quantity over time for western yellow-billed cuckoos.

Comment 7: The Department of Energy (DOE) through the Western Area Power Administration (WAPA) and two local private energy companies requested information on how maintaining rights-of-way for electrical power transmission lines would be treated in areas of critical habitat and requested that these areas be excluded from the designation. The commenters stated that the designation would limit maintenance of the rights-of-way and potentially cause increased risk of wildfires, power outages, or injury to human life and property.

Our Response: With respect to rights-of-way maintenance activities in areas of critical habitat, Federal agencies that authorize, carry out, or fund actions that may affect listed species or designated critical habitat are required to consult with us to ensure the action is not likely to jeopardize listed species or destroy or adversely modify designated critical habitat. This consultation requirement under section 7 of the Act is not a prohibition of Federal agency actions; rather, it is a means by which they may proceed in a manner that avoids jeopardy or adverse modification. Even in areas absent designated critical habitat, if the Federal agency action may affect a listed species, consultation is still required to ensure the action is not likely to jeopardize the species. Because the areas designated as critical habitat are occupied and consultation will be required to meet the jeopardy standard, the impact of the critical habitat designation should be minimal and administrative in nature. In some instances, we have worked with entities with on-going maintenance requirements such as in rights-of-way to develop programmatic consultations that help to conserve habitat while still meeting an entity's operational responsibilities, and we are willing to meet with DOE and WAPA to discuss potential programmatic consultation activities. In addition, existing consultation processes also allow for emergency actions for wildfire and other risks to human life and property; critical habitat would not prevent the commenters from fulfilling those obligations. Lastly, we note that actions of private entities for which there is no Federal nexus (*i.e.,* undertaken with no Federal agency involvement) do not trigger any requirement for consultation.

In regard to the commenter's request to exclude their rights-of-way areas from the critical habitat designation, the commenters provided general statements of their desire to be excluded but no information or reasoned rationale as described in our preamble discussion in our policy on exclusions (see Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act: 81 FR 7226; February 11, 2016) (Policy on Exclusions) or as described in our 2020 revised proposed rule (85 FR 11502). For the Service to properly evaluate an exclusion request, the commenter must provide information concerning how their rights-of-way maintenance activities would be limited or curtailed by the designation, and hence the need for exclusion. In addition, as noted above, the requirement to consult with us on Federal actions that may affect designated critical habitat is designed to allow actions to proceed while avoiding destruction or adverse modification of critical habitat.

In the Policy on Exclusions, we outline the procedures we undertake when determining if an area should or should not be excluded. In determining whether or not to exclude an area, the Secretary is given a great deal of discretion for undertaking an exclusion analysis or determining to exclude an area. In our review of their request of exclusion, we determined that the effect of having critical habitat designated in their rights-of-way would be to require consultation with us for those Federal agency actions that may affect such designated critical habitat. In addition, we determined that this consultation requirement would not preclude these rights-of-way maintenance activities from occurring, and subsequently would not result in a potential for increased risk of wildfires, power outages, or injury to human life and property.

Comment 8: The U.S. Bureau of Reclamation (Reclamation) requested that the full pools of Elephant Butte and Caballo Reservoirs be excluded from critical habitat designation based on a precedent set by the Rio Grande silvery minnow (*Hybognathus amarus*) designated critical habitat, a variety of commitments associated with section 7 consultations and their Southwestern Willow Flycatcher and Yellow-billed Cuckoo Management Plan. The full pool of Elephant Butte Reservoir is considered to be River Mile (RM) 62 by Reclamation.

Our Response: The Service commends Reclamation on their decision to allow for the temporary habitat to develop within Elephant Butte and Caballo Reservoirs and other commitments identified in their Southwestern Willow Flycatcher and Yellow-billed Cuckoo

Management Plan. We have reviewed the information presented by Reclamation for Elephant Butte Reservoir and information on the species use and habitat conditions for the western yellow-billed cuckoo and determined that an exclusion for Elephant Butte Reservoir (Unit 37, NM–6B) to RM 54 is appropriate for exclusion.

We also reviewed Reclamation's request for excluding the two areas associated with Caballo Reservoir (Unit 39, NM–8A and NM–8B) and determined that exclusion of these areas is appropriate. See Exclusions (*Federal Lands*) for our description and analysis for excluding Elephant Butte and Caballo Reservoirs under section 4(b)(2) of the Act from the final designation.

Comment 9: Reclamation is concerned that critical habitat could impose unnecessary burdens on water storage and delivery operations in Arizona for Reclamation and its partners. The areas of concern include: Habitat downstream of Horseshoe Dam (Unit 11, AZ–9A); the eastern part of Unit 17 (AZ–15) on the Lower San Pedro and Gila Rivers upstream of Dripping Springs Wash to San Carlos Reservoir on the Gila River because this reach cuts through a narrow canyon, is devoid of vegetation, and surveys have not detected western yellow-billed cuckoos; the 2020 proposed Unit 11 (AZ–9B Horseshoe Dam) extension from the south end of Horseshoe Reservoir to below Horseshoe Dam because the additional area downstream to Sheep Creek is canyon-bound with narrow stringers of trees and does not currently support suitable breeding or foraging habitat and because the lower segment occurs within the Bartlett Reservoir operating space that precludes establishment and persistence of suitable nesting and foraging habitat.

Our Response: Habitat for many species, including the western yellow-billed cuckoo, along rivers, dams, and reservoirs fluctuates over time as habitat transitions due to natural or human-induced succession. At any given time across the range, habitat may be regenerating, growing into suitability, growing out of suitability, desiccated from drought, or killed from scouring floods or fire. These processes are expected to occur over time in critical habitat. We agree that proposed critical habitat should not have been identified in the steeper and narrower portions of Unit 17 (AZ–15) on the Gila River and have removed these areas from the final designation. Although some breeding and foraging habitat exists in this upper reach, it is of lesser quality than habitat farther downstream. We also agree that the southern boundary of the additional Unit 11 (AZ–9B Horseshoe Dam) segment where PBFs are lacking does not constitute critical habitat. The southern terminus of this extension is now the same as the terminus of the critical habitat for the southwestern willow flycatcher. In the revised proposed rule, we identified portions of Unit 11 (AZ–9A and AZ–9B) for consideration to be excluded under the Salt River Project's (SRP's) Horseshoe and Bartlett Reservoir HCP and excluded these areas from the final designation (see *Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act*).

Comment 10: Reclamation requested a correction to our description of how western yellow-billed cuckoo habitat is maintained in Unit 1 (CA/AZ–1) and Unit 2 (CA/AZ–2) as a result of the LCR MSCP. Reclamation points out the inaccuracy of the statement that the hydrologic processes needed to regenerate and maintain breeding habitat occur within these units but depends on river flows and flood timing. The majority of the western yellow-billed cuckoo breeding that occurs on the mainstem of the Lower Colorado River, including habitat at Palo Verde Ecological Preserve, Cibola Valley Conservation Area, Cibola National Wildlife Refuge Unit #1 Conservation Area, and the 'Ahakhav Tribal Preserve, has been created through tree plantings and can be maintained only through active irrigation as the habitat is disconnected from the river channel on the upland side of the levees.

Our Response: We have reviewed the information and have revised the information regarding Unit 1 and Unit 2 in this final rule to clarify that most of the western yellow-billed cuckoos breeding along the Lower Colorado River are breeding in revegetation sites created by the LCR MSCP. Because these units have been excluded (see Exclusions) from the final designation, we removed the Unit 1 and 2 descriptions and provide them in our supporting documentation (Service 2020b, entire).

Comment 11: The U.S. Customs and Border Protection under the Department of Homeland Security (DHS/CBP) requested that the Roosevelt Reservation portion of critical habitat in Units 1, 16, 20, 21, 44, 45, 52, and 61 along the U.S./Mexico border be considered for exclusion under section 4(b)(2) of the Act for national security reasons and for being exempt from environmental regulations (DHS 2020, entire). The Roosevelt Reservation is a 60-ft (18-m) wide strip of land owned by the Federal Government along the United States side of the U.S./Mexico border in California, Arizona, and New Mexico.

Our Response: We have reviewed DHS/CBP's request and have excluded the 60-ft (18-m) area of the Roosevelt Reservation from the final designation. Please see Exclusions (*Exclusions Based on Impacts on National Security and Homeland Security*) for our analysis of the DHS/CBP request for exclusion for border units within the Roosevelt Reservation.

Comment 12: The U.S. International Boundary and Water Commission (IBWC), expressed concern that the designation of critical habitat along the Rio Grande and other areas (Units 1, 2, 37, 39, and 41) would hinder the implementation of the 1906 Convention with Mexico or the requirements to deliver water under the Rio Grande Compact. Therefore they requested exclusion of their lands from these units. IBWC also requested an exclusion of Unit 20 (AZ–18 Santa Cruz River) to ensure its permit requirements and operation of the Nogales International Wastewater Treatment Plant are not impacted.

Our Response: Several of the areas identified by the IBWC have already been excluded entirely or in part from the final designation based on conservation and management of the areas by other entities and thus are not addressed further here. These areas include Unit 1 and 2 along the lower Colorado River, portions of Unit 37 on the Rio Grande, Unit 39 at the Caballo Reservoir, and Unit 41 at Seldon Canyon and Radium Springs (see Exclusions, *Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General*) for a full discussion of our exclusion analyses). We note that IBWC would still need to consult for actions which may affect the species under section 7 of the Act to ensure they do not jeopardize the species. The only area remaining within the designation is a portion of Unit 37 (NM–6B) at Elephant Butte Reservoir.

With respect to the remaining area within Unit 37 (NM–6B), we have no information indicating that designation of these areas as critical habitat would prevent IBWC from implementing the treaty or meeting their water delivery commitments, or would otherwise disrupt water management actions. For example, our economic analysis did not identify water delivery or other water management actions as incurring significant costs as a result of designating these areas, nor did it anticipate that water operations would

be significantly affected. Moreover, the IBWC did not specify whether it was requesting exclusion based upon national-security or homeland-security reasons, nor explain how treaty implementation would fit within these possible exclusions. IBWC did not provide any other information or a reasonably specific justification showing an incremental impact to national security or homeland security from designation, as described in our preamble discussion in our Policy on Exclusions (81 FR at 7231). Nor did the IBWC provide any reasoned explanation of how treaty implementation would be affected by a designation, and thus we have no basis to exclude this area based on treaty commitments. Additionally, our 2020 revised proposed rule designating critical habitat for the western yellow-billed cuckoo requested information on how properties for which exclusions were requested are managed and protected, noting that without this information, we could not weigh the benefits of a potential exclusion in comparison to inclusion (85 FR 11458, 11502 (February 27, 2020)). Having received no information, we have no basis to exclude the requested portions of Unit 37.

In regard to the IBWC's request to exclude areas in Unit 20 due to potential impacts to waste water treatment facilities, we have no information indicating that such impacts are likely. Due to the arid nature of the Southwest and lack of consistent water flows, waste water treatment facilities often assist in maintaining river flows and may benefit riparian habitat (Luthy *et al.* 2015, entire). As a result, we do not anticipate significant changes, if any, for the operation of waste water treatment facilities due to the designation of critical habitat. Moreover, the IBWC again did not provide any supporting information, as described above according to our Policy on Exclusions (81 FR at 7231), or our request for information in the 2020 revised proposed rule designating critical habitat (85 FR at 11502). As a result, we could not initiate a review of information for a potential exclusion and did not exclude areas along the Santa Cruz River from Unit 20.

Comment 13: The IBWC provided two comments regarding the units designated along the U.S./Mexico border. First, they concurred with the DHS/CBP's request for the exclusion of the 60-ft (18-m) Roosevelt Reservation in California, Arizona, and New Mexico, stating they coordinate with DHS/CBP on vegetation clearing within the 60-ft (18-m) Roosevelt Reservation. Second, IBWC recommended an additional exclusion so that the exclusion would extend to 150-ft (46-m) from the U.S./Mexican border for national security and access reasons. IBWC deferred to the National Park Service (NPS) for critical habitat designated along the border in Texas (Unit 72, TX–1).

Our Response: We have excluded the 60-ft (18-m) Roosevelt Reservation from this final designation based on DHS/CBP's request in support of their national-security mission (see *Comment 11* and Exclusions, *Exclusions Based on Impacts on National Security and Homeland Security*). We are not aware of any reason why this 60-ft (18-m) exclusion would be insufficient to provide security and access, or why extending the exclusion out to 150-ft (46-m) along the border with Mexico would be necessary for ensuring security and access. The IBWC provided general statements of their desire to be excluded but no such information or reasoned rationale that the critical habitat designation would impact their activities as described in our preamble discussion in our Policy on Exclusions (81 FR at 7231), or as requested in our 2020 revised proposed rule (85 FR at 11502). Moreover, the IBWC did not provide information showing how designating areas beyond the 60-foot exclusion would harm national-security or homeland-security interests. In the preamble to the Policy on Exclusions, we made clear that a Federal agency's reference to national-security concerns does not in itself require an exclusion. Rather, the Federal agency must ''provide a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat'' (81 FR at 7231). In light of the absence of information on, or reasonably specific justification of, how designating these areas could raise national-security concerns, we do not consider this request to meet the initial burden described in our policy that the agency requesting a national security exclusion must provide a reasonably specific justification (81 FR at 7231). We reiterated this requirement to support a request for exclusion based on national security reasons in our 2020 revised proposed rule designating critical habitat for the western yellow billed cuckoo (85 FR at 11503).

State Comments

Comment 14: The New Mexico Interstate Stream Commission requested that Unit 37 (NM–6A and NM–6B, Middle Rio Grande) be excluded in entirety based on the efforts of the Middle Rio Grande Endangered Species Collaborative Program (Program) and that this Program should be treated similarly to that of the LCR MSCP and others.

Our Response: In our analysis for exclusions for Unit 37, we decided to exclude the entire NM–6A (7,238 ac (2,929 ha)) and portions of NM–6B (11,367 ac (4,600 ha)). Exclusion of Unit 37 (NM–6A) was based on Tribal management and partnerships through the Santa Ana Pueblo, the Santa Domingo Tribe, Cochiti Pueblo, and the San Felipe Pueblo (see Exclusions, *Tribal Lands*). Because the area identified in Unit 37, NM–6B is part of Elephant Butte Reservoir managed by Reclamation, exclusion of portions of that unit were based on management of the area (see *Comment 8* above and Exclusions, *Federal Lands*).

In response to the Commission's request that the two units be excluded in their entirety based on the Middle Rio Grande Endangered Species Collaborative Program (Program), we have determined that the exclusion would not be appropriate for several reasons. Although we commend the Program for investing time, effort, and funding for conservation on the Middle Rio Grande, the habitat conservation efforts to date that have been implemented are focused on instream restoration for the Rio Grande silvery minnow, and conservation efforts for the western yellow-billed cuckoo have been mostly associated with surveying, monitoring, and non-habitat related efforts (MRGESCP 2003, entire). In identifying critical habitat for the western yellow-billed cuckoo, we identified those areas that meet the definition of critical habitat at section 3(5)(A) of the Act. Although management actions for one listed species may overlap other species' habitat or be mutually beneficial to multiple listed species, the physical and biological features in occupied habitat for yellow-billed cuckoo differ from the physical and biological features identified for the Rio Grande silvery minnow. We reviewed the habitat restoration efforts conducted by the Middle Rio Grande Endangered Fish Recovery Program and found that the vast majority of habitat management actions were focused on instream water management and fish habitat and not western yellow-billed cuckoo habitat. Instream habitats do not contain the physical or biological features essential to the conservation of the western yellow-billed cuckoo and therefore are not considered critical habitat. As a result, excluding these areas based on management for listed fish species does not meet our criteria for exclusion.

Comment 15: We received comments from the Arizona Game and Fish Department (AGFD) on the proposed and revised proposed rule. In 2014, the AGFD suggested removing areas from the proposal based on the areas being in poor condition or not supporting breeding western yellow-billed cuckoos. In 2020, the AGFD expressed that the revised proposed rule was inconsistent, did not clearly define essential habitat, incorrectly identified western yellow-billed cuckoos as a habitat generalist, inappropriately included migration and stop-over habitat that inflates areas needed, did not provide a location where separation of rangewide breeding habitat and southwest breeding occurs, and places regulatory burdens on the State. AGFD also stated that the Service defines all habitats where the species breeds, feeds, migrates, and stops over as critical habitat, thus inappropriately imposing Federal regulatory restrictions on all landowners which will require both Federal and State resources to manage. AGFD commented that time would be more appropriately spent on other conservation programs to benefit listed species. AGFD claimed that the revised designation violates 16 U.S.C. 1532 (5)(C), which states that critical habitat ''shall not include the entire geographical area which can be occupied by the threatened or endangered species'' and that the Service has arbitrarily chosen to propose an inappropriate designation of critical habitat, and ignore the true intent of the purpose of critical habitat in the revised proposed rule. The AGFD questioned the validity of designating critical habitat for the western yellow-billed cuckoo, if there is not a specific habitat type that can be determined as critical. The proposed rule described a variety of habitat types (*i.e.,* mesquite bosques, tamarisk stands, xeroriparian areas, cottonwood-willow galleries, desert scrub and grassland drainages, etc.) as important breeding habitat. If these habitats are all important breeding habitats, as described, AGFD stated that the species should be considered a habitat generalist and no critical habitat should be designated (*e.g.,* similar to the bald eagle). If this is not the situation, AGFD stated that the revised proposed rule needs to be rescinded and redrafted to remove habitat that is used intermittently or occasionally for breeding from the designation of critical habitat. AGFD also stated that there are several factual inconsistencies in the proposed rule that require the proposed rule be rescinded. These inconsistencies include: An over-inflation of the importance of tamarisk as breeding habitat; unverified breeding pair information; and arbitrary and unsupported estimation of pairs. The AGFD recommended removing unverified units and excluding certain State lands under conservation management and that the Service should assist the States with funds for monitoring western yellow-billed cuckoo populations and allow partners to explore additional methods to restore habitat to benefit the western yellow-billed cuckoo. The AGFD expressed concern that the economic analysis does not fully capture economic impacts to State agencies. The commenter noted that many State agencies receive Federal funds to conduct projects, including wildlife conservation projects. Because of that potential Federal nexus, the commenter suggested that State agencies could incur incremental impacts. Lastly, the AGFD stated that the Service should finalize its determination on the petition to delist the species prior to finalizing critical habitat.

Our Response: Part of our reasoning for revising our 2014 proposed critical habitat was in response to comments from the AGFD on the description of the physical and biological features needed by the western yellow-billed cuckoo and to remove areas of degraded habitat or not used by the species. As a result of AGFD's and other comments and information received, we removed or reduced a number of areas from the revised proposed designation. We revised the description of the habitat used by the species, including a description of the geographic area where southwest breeding habitat PBFs are found. We are not required to delineate or map a specific boundary line between the identified PBFs as requested by the AGFD.

The Service did not include all habitats where the species breeds, feeds, migrates, and stops over as critical habitat. Our designation of critical habitat focuses on selected areas used for breeding by the western yellow-billed cuckoo, and as a result purposefully does not include all breeding areas used by the species.

We do not consider the western yellow-billed cuckoo to be a habitat generalist. As explained in our revised proposed rule, western yellow-billed cuckoos in ephemeral drainages in the southwestern United States are found in drainages with sparse, patchy, or dense tree cover, high humidity, and increased insect availability. Our description of habitat and inclusion of additional PBFs for the species is due to greater specificity as to the types of habitat used by the western yellow-billed cuckoo and not an abandonment or reclassification of habitat historically described for the species. Ephemeral drainages associated with monsoon events are relatively small and within a specific geographic area in southeastern Arizona.

In response to AGFD's questions regarding our methodology for determining occupancy, we followed the Act's requirement that we determine occupancy based on areas that are occupied at the time of listing. We revised our language within the unit descriptions to more accurately describe occupancy status of the areas. We agree that survey information in Arizona identified by Corman and Magill (2000) cannot provide definitive occupancy or breeding information due to the survey methodology used in the study. We also agree that statewide protocol surveys would provide additional information on western yellow-billed cuckoo distribution and breeding. We used numerous sources to make our determination of occupancy and breeding status for the areas identified as critical habitat; we determined that these sources viewed in combination constitute the best scientific and commercial information available.

Under the Act, we are required to designate critical habitat as long as we find that the designation is prudent and determinable as we did for the western yellow-billed cuckoo. Given that the western yellow-billed cuckoo in Arizona occupies a variety of riparian habitats and its range overlaps with several other listed species, designating critical habitat would potentially provide additional funding through section 6 of the Act and support the State's other conservation programs.

Tamarisk can provide habitat for the western yellow-billed cuckoo, especially in areas where altered river flows have caused the native vegetation to become degraded. We compiled the currently known information for western yellow-billed cuckoo's use of tamarisk and included information in the rule. Western yellow-billed cuckoos breed in tamarisk, especially if mixed with other native habitat.

Regarding economic costs to State agencies, exhibit 3 of the economic analysis presents the unit incremental administrative costs of section 7 consultation used in the economic analysis. The total unit cost presented in that exhibit includes costs to the Service, other Federal agencies, and third parties. State agencies receiving Federal funds to conduct projects would be considered third parties in consultation and thus are represented in the cost estimates produced by the economic analysis. The analysis estimates that the incremental costs

incurred by third parties during the consultation process would range from $510 to $880 per consultation. In addition, the analysis forecasts the likely number of section 7 consultations based on consultations that have occurred since the listing of the western yellow-billed cuckoo in 2014, which have included third parties, such as State agencies. Thus, State agency consultation activity is captured in both the projection of the number of consultations and the unit cost of these consultations.

We completed our status review and published our not warranted 12-month finding in the **Federal Register** on September 16, 2020 (85 FR 57816). We are under a court-ordered deadline to have a final designation submitted to the **Federal Register** by February 5, 2021.

AGFD recommended exclusion of some AGFD properties under HCPs or conservation management. In our evaluation of areas to be excluded from the final designation, we identified the Upper Verde Wildlife Area, the Alamo Lake Wildlife Area, and State lands covered under the LCR MSCP (see Exclusions).

Comment 16: The California Department of Fish and Wildlife (CDFW) provided additional observation information for the Sacramento Valley (Butte Creek) and for areas adjacent to the Owens River in California (Hogback Creek and Baker Creek) and requested additional areas be considered as critical habitat.

Our Response: In determining those areas we consider essential to the conservation of the species as critical habitat, we developed a conservation strategy for the western yellow-billed cuckoo that focuses on core areas where the western yellow-billed cuckoo breeds consistently in relatively high numbers or is breeding in areas which are unique. Although the western yellow-billed cuckoo may be found in additional areas throughout its range, not all areas meet our definition of essential as outlined in our conservation strategy. Of the three sites requested by the CDFW to include, only the Butte Creek site has shown to include sufficient numbers of presumably breeding western yellow-billed cuckoos, with the Hogback and Baker Creek sites showing few individuals with only intermittent use. We did not consider the Butte Creek site to meet our designation criteria because the area is not part of the core breeding area. Another nearby site that has been more consistently occupied (Unit 63, CA–1, Sacramento River) and has already been identified as critical habitat meets our conservation goals for this geographic area.

Comment 17: The California Department of Water Resources (DWR) stated that the designation in Unit 63 (CA–1) along the Sacramento River would cause conflicts with flood management requirements under the Central Valley Flood Protection Act of 2008 (CVFPA). The DWR stated that they have developed the Central Valley Flood Protection Plan (CVFPP) to comply with the CVFPA to improve public safety, environmental stewardship, and long-term economic stability in its management of this critical water resource infrastructure. The DWR requested exclusion of the area based on public safety, economic concerns, and existing management.

Our Response: We fully support the DWR's mission of water resource management and stream flows and emergency actions necessary to protect the public. As described above, both our Policy on Exclusions and our revised proposed rule indicated that entities requesting exclusion must provide a reasoned rationale in support of the exclusion in order for the Service to conduct a full exclusion analysis. Here, DWR provided general statements of their desire to be excluded but did not provide information or a reasoned rationale on the impact of the designation to its activities for us to initiate an analysis or support an exclusion. As a result, we have determined that the designation of critical habitat would not disrupt their activities for flood management or water delivery because the habitat along the Sacramento River is in areas of natural stream conditions without flood control or water delivery structures managed by the DWR.

Comment 18: The California Central Valley Flood Protection Board (CVFPB), along with numerous other local water agencies, expressed concern that flood control infrastructure and facilities were within the critical habitat boundary and that the designation would limit the agencies' ability to operate and maintain as well as improve and alter these flood control facilities. The CVFPB identified flood protection features such as levees, weirs, bypasses, water control gates, bridges, pipelines, conduits, irrigation pumps, buildings, structures, and underground and overhead utilities as being those types of flood control features of particular concern.

Our Response: Critical habitat is defined by the existence of specific physical or biological features for a species that are essential to the conservation of the species and which may require special management considerations or protection. The facilities and features described by the CVFPB do not contain the physical or biological features essential to the conservation of the western yellow-billed cuckoo and thus are not critical habitat. In our description of the physical or biological features, we specifically state that critical habitat does not include humanmade structures (such as buildings, aqueducts, runways, roads, bridges, and other paved or hardened areas as a result of development) and the land on which they are located existing within the legal boundaries of the critical habitat units designated for the species on the effective date of this rule. Due to the scale on which the critical habitat boundaries are developed, some areas within the units' legal boundaries may not contain the physical or biological features and therefore are not considered critical habitat.

Comment 19: Colorado Department of Natural Resources, Colorado Riverfront Commission, Town of Palisade, Delta County Commissioners, Montrose Board of County Commissioners, City of Montrose, Gunnison County, Grand Valley Water Users Association/Orchard Mesa Irrigation District/Ute Water Conservancy District, Associated Governments of Northwest Colorado, and Club 20 asserted that designating critical habitat in Colorado is not appropriate due to being on the fringe of the DPS' range. They stated that areas where western yellow-billed cuckoo are routinely detected are limited and most detections are sporadic, representing single or very small numbers of individuals with limited documentation of recent breeding in western Colorado; therefore, these units will not make a significant contribution towards conservation of the species.

Our Response: Although limited breeding is known to occur in Colorado, western yellow-billed cuckoo consistently use the areas identified in Units 68 and 69 (CO–1 and CO–2). These areas fall into category 3 of our conservation strategy as they are large river systems outside of the Southwest that occur in different ecological settings that are consistently being used as breeding areas, thus contributing to the ecological representation and redundancy of the species. Maintaining breeding areas throughout the range of the species allows year-to-year movements to take advantage of any spatial and temporal changes in habitat resources and food abundance. These areas are occupied and contain the PBFs essential to the conservation of the species and which may require special management.

Comment 20: The Colorado Department of Natural Resources, Mesa County Commissioners, Grand Valley Water Users Association/Orchard Mesa Irrigation District/Ute Water Conservancy District, and Club 20 strongly concur with the proposed exclusion of the Walter Walker State Wildlife Area (SWA), Colorado River Wildlife Management Area, and James M. Robb State Park from critical habitat. They additionally request exclusion of the Leatha Jean Stassen SWA (near the Walter Walker SWA) and Tilman Bishop SWA on eastern edge of Unit 68.

Our Response: Based on our consideration of proposed exclusions and land management information received from Colorado Parks and Wildlife and Colorado Department of Natural Resources, we found that the James M. Robb Colorado River Sate Park (CRSP), and the Leatha Jean Stassen, Walter Walker, and Tilman Bishop SWAs are all managed in ways that promote cottonwood and willow growth while minimizing nonnative plants and noxious weeds, beneficial to western yellow-billed cuckoo. Additionally, the exclusion of these areas is likely to be beneficial in maintaining a working partnership with CPW. As a result of our exclusion/inclusion benefits analysis, the Secretary has determined it appropriate to exclude these areas from the designation. See Exclusions, *Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General.*

Comment 21: Colorado Department of Natural Resources (along with other commenters) stated that rivers in Colorado and Utah are already managed to benefit western yellow-billed cuckoo due to the existing recovery program and designated critical habitat for listed fish (Colorado pikeminnow (*Ptychocheilus Lucius*), razorback sucker (*Xyrauchen texanus*), bonytail (*Gila elegans*), and humpback chub (*Gila cypha*)), such that critical habitat does not need to be designated. Several commenters stated that the Upper Colorado River Endangered Fish Recovery Program and San Juan River Basin Recovery Implementation Program were not cited in the proposed rule as providing protections for western yellow-billed cuckoo and that areas identified as critical habitat for the western yellow-billed cuckoo should be excluded based on implementation of the recovery program.

Our Response: Areas along the San Juan River were not included in the 2020 revised proposed designation and are not included in this final designation. In identifying critical habitat for the western yellow-billed cuckoo, we identified those areas occupied by the species at the time of listing, identified the physical and biological features essential to conservation of the species, and then determined which of these features within identified areas may require special management considerations or protections. Although management actions for one listed species may overlap habitat or be mutually beneficial to multiple listed species, we identified the specific physical and biological features and geographic locations for yellow-billed cuckoo for this designation. The physical and biological features and occupied habitat for yellow-billed cuckoo differ from the physical and biological features identified for the four listed fish. We reviewed the habitat restoration efforts conducted by the Upper Colorado River Endangered Fish Recovery Program and found that the vast majority of habitat management actions were focused on instream water management and fish habitat and not western yellow-billed cuckoo habitat. As a result, excluding these areas based on management for listed fish species does not meet our criteria for exclusion.

Comment 22: Colorado Department of Natural Resources requested further consideration of Colorado conservation efforts that focus on private lands, stating that critical habitat designation may reduce landowner's willingness to work voluntarily to benefit a species. The Department provided a list of conservation projects that have been implemented in partnership by numerous Federal and private entities that have helped to conserve western yellow-billed cuckoo and its habitat.

Our Response: The list of wetland and riparian habitat projects from Partners for Fish and Wildlife, Natural Resources Conservation Service (NRCS) and other local environmental groups and private landowners shows eight projects since the listing of western yellow-billed cuckoo, two of which are in Mesa County, Colorado. Because the programs have been working in partnership and implementing and coordinating such conservation efforts that are partly coordinated by the Service and NRCS, we do not expect private landowner participation in future conservation efforts will be curtailed as a result of designating critical habitat. As shown by the implementation of the various projects, the program has been successful in getting private and non-Federal partners to conserve sensitive species and their habitat.

Comment 23: The Colorado Department of Natural Resources and Club 20 recommend exclusions of critical habitat Unit 37 (NM–6B) because the area has already been analyzed for effects to yellow-billed cuckoo in a 2016 biological opinion for Reclamation operations at Elephant Butte Reservoir, New Mexico. Additionally, an existing management plan (2012) is working effectively. These commenters also recommended exclusion of critical habitat Unit 39 (NM–8A and NM–8B) and that Reclamation extends their 2012 management plan to cover this area.

Our Response: The proposed critical habitat within Unit 37, NM–6B (Elephant Butte Reservoir) will be excluded from critical habitat due to Reclamation's management plan to benefit western yellow-billed cuckoo. Tribal lands within Unit 37 (NM–6A) will also be excluded due to Tribal management for western yellow-billed cuckoo and existing partnerships with the Service. We are also excluding Unit 39 from critical habitat due to existing management. See Exclusions (*Federal Lands* and *Tribal lands*).

Comment 24: The State of Idaho's Office of Species Conservation (OSC) (and other private water users) commented in 2014 and again in 2020. The commenters provided modifications and corrections to the acreages identified in the proposed rule. They stated that protections afforded the western yellow-billed cuckoo as a threatened species and other current on-the-ground measures render the critical habitat designation unnecessary; areas in Idaho are not essential to the conservation of the species; the Service's current information on the status and occupancy of western yellow-billed cuckoo in Idaho is severely lacking; and a recovery plan should be developed before critical habitat is determined. They further stated that they have concerns that the designation would change water management, agricultural, and irrigation activities along the Snake River or its tributaries and that the American Falls Dam and Reservoir's operations and associated transmission lines, humanmade structures and rights-of-way would be affected by the designation. The commenters stated that special management is not necessary as measures are already in place and that it is essential to preserve the 2004 Snake River Agreement.

The OSC stated that the Service should leverage existing collaborative efforts and implement landscape-scale partnerships and incentivize ecologically-based cooperative water management practices to conserve riparian and western yellow-billed cuckoo habitats while providing

balanced management of agricultural irrigation, managed aquifer recharge, municipal uses, and flood control. The OSC commented that if areas are designated, the Service should expand the boundaries of the critical habitat to correspond to Federal lands and only include non-Federal lands with landowner discretion.

Our Response: We have revised the final rule to reflect information provided by the OSC regarding acreages and land ownership. We do not agree with the commenters' assessment that areas in Idaho are not essential to the conservation of the species and should not be designated as critical habitat. We developed a conservation strategy to assist in determining areas essential to the conservation of the species and determined that the areas in Idaho are occupied, contain the PBFs essential to the conservation of the species, meet the goals of the conservation strategy, and follow our criteria for designation. These areas in Idaho fall into category 3 of our conservation strategy as they are large river systems outside of the Southwest that occur in different ecological settings that are consistently being used as breeding areas, thus contributing to the ecological representation and redundancy of the species. Maintaining breeding areas throughout the range of the species allows year-to-year movements to take advantage of any spatial and temporal changes in habitat resources and food abundance. We based our occupancy and use of the areas in Idaho on State natural heritage data and published articles and survey reports including Reynolds and Hinckley (2005, entire) and Idaho Department of Fish and Game (2013–2014, entire), as the best available data that have documented consistent use of the areas designated as critical habitat in Idaho. In the proposed and this final rule we have defined our position and consideration of occupancy (see *Selection Criteria and Methodology Used to Determine Critical Habitat*).

The designation of critical habitat requires Federal agencies to consult with the Service on activities they conduct, permit, or fund. Because the areas being designated are occupied, the Federal agencies managing water storage and delivery infrastructures already must ensure that their operations do not jeopardize western yellow-billed cuckoo due to the threatened status of the species. Our economic analysis did not identify significant additional costs associated with the designation of critical habitat as the measures that may be required would likely be the same as those necessary under the jeopardy analysis other than administrative analysis of any adverse modification review for the agencies' actions.

Collaborative multi-stakeholder cooperative partnerships can be important to long-term conservation of sensitive species and their habitats while still allowing for the interests of stakeholders and needs of the public to continue. However, we are required to designate critical habitat for threatened and endangered species where we find the designation to be both prudent and determinable as is the case with the western yellow-billed cuckoo. In our development of critical habitat, we consider designating those areas with the PBFs essential to the conservation of the species and not based on land ownership, unless limiting the designation to just Federal lands provides for the conservation of the species. In our proposed rule, we solicited the public for information regarding potential exclusion of areas based on management plans or other conservation efforts including partnerships and we engaged with our partners regarding excluding private lands within the units identified in Idaho. We received a request to only include private lands with landowner consent from OSC; however, we received no information from private landowners to exclude their specific lands in Idaho.

We do not agree that specific areas and essential features within critical habitat do not require special management considerations or protection because adequate protections are already in place. In *Center for Biological Diversity* v. *Norton,* 240 F. Supp. 2d 1090 (D. Ariz. 2003), the court held that the Act does not direct us to designate critical habitat only in those areas where ''additional'' special management considerations or protection is needed. If any area provides the physical or biological features essential to the conservation of the species, even if that area is already well managed or protected, that area still qualifies as critical habitat under the statutory definition if special management is needed. The final rule explicitly states that manmade features such as irrigation structures and facilities are excluded from the designated critical habitat. However, rights-of-way are agreements that impose a status on the use of lands rather than describing the condition of the land as human-made structures. As such, rights-of-way are not excluded from designated critical habitat.

Comment 25: The New Mexico Department of Agriculture, Middle Rio Grande Conservancy District, New Mexico Interstate Steam Commission, and the Rio Grande Compact Commission had comments on the revised proposed Unit 37 (NM–6A and NM–6B). They stated that in many cases the designation would not produce any additional benefits for the western yellow-billed cuckoo than already resulting from issuance and implementation of the Service's 2016 biological opinion (Service 2016a, entire) for water operations and river maintenance issued to Reclamation. These entities have also been pursuing other conservation actions in the proposed area through the Middle Rio Grande Endangered Species Collaborative Program. They would like the Service to consider the exclusion of the Elephant Butte Reservoir operating pool from designation as critical habitat. The commenters also requested that the draft NEPA and draft economic analysis developed for the revised proposed designation be made available for review.

Our Response: Partly as a result of the 2014 comments, we revised the previously identified Unit 52 (NM–8) (2014) (Unit 37 (2020)) to remove a segment of the river near Albuquerque, NM, as not constituting critical habitat where there is a significant break in the habitat for the western yellow-billed cuckoo. Though this area has had incidental detections of western yellow-billed cuckoos, breeding activity has not been confirmed by formal surveys since the species was listed. This area was removed from proposed critical habitat, which resulted in splitting the critical habitat into two units (NM–6A and NM–6B). We conducted an exclusion weighing analysis and found that the benefits of exclusion outweigh the benefits of inclusion and excluded the majority of Elephant Butte Reservoir as well as areas within Tribal lands from this final designation (see *Comment 8* and Exclusions, *Tribal Lands* and *Federal Lands*). The draft economic analysis (IEc 2019 and IEc 2020 entire) and draft NEPA analysis (Service 2019d) were posted online at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2013–0011 under supporting documents or on the Sacramento Fish and Wildlife Office's website at *http://www.fws.gov/sacramento.*

Comment 26: In 2014, the New Mexico Interstate Stream Commission and New Mexico Department of Game and Fish (NMDGF) questioned the source of western yellow-billed cuckoo occupancy data for the Gila, San Francisco, Mimbres and San Juan Units. The New Mexico Interstate Stream Commission also requested additional

information as to how State estimates for western New Mexico were established. On the Rio Grande, the Commission also noted discrepancies in 1986 study results by Howe (1986), when compared to the limited survey effort completed by Reclamation from 2006–2010, and stated that the western yellow-billed cuckoo population is larger than estimated. The NMDGF also recommended removing the areas along the San Juan River (2014 Unit 46, NM–1) and Mimbres River (2014 Unit 49, NM–6) (now identified as Unit 34, NM–3A) from the designation due to low frequency of western yellow-billed cuckoo detections.

Our Response: Occupancy data for New Mexico was based on a variety of sources. These include formal surveys conducted by permitted biologists, incidental detection data collected and verified by online data from the Cornell Lab of Ornithology (2020), and information submitted to the Service from the State Heritage Program. State estimates for western New Mexico are based on the observations from the sources above. In this final critical habitat designation, we have updated our estimated numbers for the State, which is a larger population than originally estimated in 2014, after several years of increased survey effort. After reevaluation and prioritizing units of greatest conservation value, we agree that the low frequency of western yellow-billed cuckoo observations on the San Juan River lead us not to consider the area as critical habitat due to our conservation strategy and criteria for determining areas essential to the conservation of the species. The Mimbres River area was also reevaluated and had recent formal or incidental observations of western yellow-billed cuckoos within the area identified in 2014 as well as additional locations outside the unit. As a result, the areas we are designating along the Mimbres River now include the two areas identified in the revised proposed rule (Unit 34, NM–3A and NM–3B).

Comment 27: The New Mexico Department of Agriculture (NMDA) requested that the Service clearly define what criteria it uses to differentiate between ''grazing'' and ''overgrazing.'' NMDA also requests the scientific and peer-reviewed sources of data that has led the Service to conclude that ''overgrazing'' may be a threat to potential critical habitat.

Our Response: As stated in the 2014 final listing rule determining threatened status for the western yellow-billed cuckoo (79 FR 59992, October 3, 2014), well-controlled grazing activity can be compatible within riparian zones and in western yellow-billed cuckoo habitat depending on the measures implemented for the grazing activity. The amount of management depends on the sensitivity of the habitat at any given location and would most likely need to be managed on a site-by-site basis. For example, a grazing regime used on Audubon California's Kern River Preserve in the South Fork Kern River Valley limits grazing to outside the growing season (October to March). This time restriction allows for regeneration of willows and cottonwoods and precludes the tree browsing and high-lining that often accompanies heavy summer (growing season) grazing. Given that ''grazing'' versus ''overgrazing'' may vary on a site-by-site basis, there is no clear definition, but generally, if an area with grazing activity degrades riparian habitat attributes and prevents long-term health and persistence of these systems, it is considered overgrazing.

Comment 28: In 2014, the NMDGF stated that the Service should further describe vague habitat descriptions in the Physical and Biological Features section and within the unit descriptions themselves.

Our Response: In our 2020 revised proposed rule (85 FR 11458, February 27, 2020) and this final rule, we further refined the PBFs for western yellow-billed cuckoo and information regarding habitat within the unit descriptions.

Comment 29: The NMDGF requested that all State lands be excluded based on their State Wildlife Action Plan (Action Plan or SWAP) and the NMDA supports the exclusion of all lands in New Mexico from the final critical habitat designation. The NMDGF identified areas within the Bernardo WMA that do not have the PBFs and should not be considered as critical habitat. The NMDA stated that State lands are often involved in collaborative restoration projects involving funding from Federal agencies. Designating State lands as critical habitat could complicate interagency cooperation and hinder the implementation of restoration projects that would benefit the western yellow-billed cuckoo.

Our Response: We re-evaluated the critical habitat boundary in the Bernardo WMA within Unit 37 (NM–6B) and agree with the State's assessment that a portion of the unit at the southernmost extent of Bernardo WMA does not contain the PBFs for the western yellow-billed cuckoo; therefore, some areas within Bernardo WMA were removed from the designation.

In this final rule, we excluded State lands that have management measures in place to protect habitat for the western yellow-billed cuckoo (see Exclusions, Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General). We value our partnership with New Mexico State agencies and appreciate the conservation efforts associated with the NMDGF State Wildlife Action Plan and coordination with the Service on endangered and threatened wildlife conservation measures and commitments through the consultation process. State Wildlife Action Plans, including the NMDGF State Wildlife Action Plan (NMDGF SWAP 2016, entire), are planning documents that provide a high level overview of the status of species and habitats within each State and are not a plan which specifically implements conservation measures, provides management direction, or ensures specific project or species funding. In some cases, these conservation efforts identified in State Wildlife Action Plans may aid in general riparian health, which in some cases, indirectly benefit western yellow-billed cuckoos. However, the NMDGF and the NMDA did not provide a reasoned explanation that the benefits of exclusion outweigh the benefits of inclusion in support of a request for exclusion. As a result, we did not conduct an exclusion analysis specific to New Mexico State lands. In addition, State agencies receiving Federal funds to conduct projects would be considered third parties in consultation and thus are represented in the cost estimates produced by the economic analysis. The economic analysis found that the incremental economic costs associated with critical habitat to third parties such as States would be minimal.

Tribal Comments

In accordance with our requirements to coordinate with Tribes on a government-to-government basis, we solicited information from and met with members of the Fort Mojave Indian Tribe; Colorado River Indian Reservation; Fort Yuma Indian Reservation; Cocopah Tribe; Yavapai-Apache Nation; Hualapai Indian Tribe; San Carlos Reservation; Navajo Nation; Santa Clara, Ohkay Owingeh and San Ildefonso Pueblos; Cochiti, Santo Domingo, San Felipe, Sandia, Santa Ana and Isleta Pueblos; Shoshone-Bannock, Fort Hall Reservation; the Cachil DeHe Band of Wintun Indians; and the Ute Tribe of the Uinta and Ouray Reservations regarding the designation of critical habitat for the western yellow-billed cuckoo. The comments we received from the Tribes included revisions to Tribal ownership and requests to be excluded from the

designation based on their management and conservation of western yellow-billed cuckoo habitat, that the designation would infringe on Tribal sovereignty and directly interfere with Tribal self-government, and that it would have a disproportionate economic impact on Tribes.

We have reviewed their requests and excluded all the Tribal lands from the final designation under section 4(b)(2) of the Act. See Exclusions (*Tribal Lands*) for those areas we excluded under section 4(b)(2) of the Act from the final designation. Individual Tribal comments requesting exclusion from the final designation under Section 4(b)(2) of the Act are addressed below in the Exclusions (Tribal Lands) section and are not addressed further here.

Comment 30: The Gila River Indian Community (GRIC) and others expressed concern about whether critical habitat would impact water availability and management or prevent future water exchanges for Tribal communities. The GRIC was specifically concerned with the Salt River Reservoir systems identified in the Salt River Project (SRP) and if existing agreements allow for ''storage credits'' to be managed according to water delivery needs and existing water operations. The GRIC also provided comments regarding the economic impact of potential curtailment of water delivery should critical habitat be designated outside Tribal lands.

Our Response: Because all Tribal lands have been excluded from the final critical habitat designation, any conservation activities on Tribal Lands that would be required are based on the listing of the western yellow-billed cuckoo. For critical habitat off Tribal lands, we do not anticipate water operations or water delivery to Tribes to be significantly impacted by the designation of critical habitat. Section 3 of the economic analysis outlines the substantial baseline protections currently afforded the western yellow-billed cuckoo throughout the proposed designation and has determined that the impacts of critical habitat would be minimal. In addition, of the reservoirs within the SRP, we are excluding the areas identified near Roosevelt Lake through SRP's Roosevelt Lake HCP (2002) and areas around and downstream of Horseshoe Reservoir through SRP's Horseshoe and Bartlett Reservoirs HCP (SRP 2008, entire). Horse Mesa Dam, Mormon Flat Dam, and Stewart Mountain Dam are not within cuckoo critical habitat on the Salt River. Other areas within the SRP were not identified as critical habitat. Because the areas identified within the SRP area are no longer critical habitat, we would not expect future water delivery or exchanges to be impacted by the designation. See Exclusions, *Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act* and Exclusions (*Tribal Lands*).

Comment 31: In 2014, the Sandia Pueblo requested the exclusion of critical habitat within their lands based on the mandate established in Secretarial Order 3206, their history of restoration efforts, the Pueblo of Sandia's Bosque Management Plan, and section 4(b)(2) of the Act.

Our *Response:* In 2020, we revised the critical habitat boundary of Unit 37 (NM–6B) near Albuquerque, New Mexico, which included the Sandia Pueblo. Because the area contained a significant break in the type of occupied habitat due to the area being near development and not meeting our criteria for designation, the area that contained Sandia Pueblo lands was not included in the 2020 revised proposed designation. Although this area has had a limited number of detections of western yellow-billed cuckoos, breeding activity has not been confirmed by formal surveys since the species has been listed. This assessment has been further supported by the Sandia Pueblo's historical and multi-year survey effort.

Comment 32: One commenter noted that the Ute Indian Tribe relies on revenues from oil and gas development as the primary source of funding for its governmental services. This commenter stated that, if the listing and critical habitat designation prevent the Tribe from developing its oil and gas resources, the Tribe could lose $2.3 million per well annually.

Our Response: All Ute Indian Tribe lands were excluded from the final designation. The commenter also refers to costs of listing for the yellow-billed cuckoo. Section 4 of the Act prohibits the consideration of economic impacts in decisions about whether to list a species as endangered or threatened. The listing decision made in 2014, was based solely on best scientific and commercial data available on the status of the species, after taking into account efforts by States or foreign nations to protect the species (section 4(b)(1) of the Act). Thus, the economic analysis does not quantify the likely economic effects of our previous decision to list the western yellow-billed cuckoo as a threatened species.

For activities that have a Federal nexus on the Ute Reservation, the consultation history for impacts to the species has been minimal. The economic analysis estimated that the annual rate of expected consultations for the entire Unit 70 would be less than one per year (0.8) (IEc 2020, Exhibit A–2). As result of excluding the Tribal lands, we would expect even fewer consultations for the area.

Public Comments

Comment 33: Several commenters stated the Service should not rely on the PBF of having an adequate prey base to designate critical habitat because the Service does not adequately address how management practices might affect the prey base.

Our Response: In determining critical habitat, we are required to identify the physical or biological features essential to conservation of the species. Prey availability is an important component western yellow-billed cuckoos use to select areas for breeding. However, we did not identify and select areas as critical habitat based on this feature alone; in selecting areas as critical habitat we relied on our conservation strategy which focused on breeding areas with appropriate habitat structure. This PBF is designed to ensure that project proponents consider effects to the prey base in any considerations of how their actions might affect the function of the critical habitat in supporting western yellow-billed cuckoos. As such, we conclude that it is informative and appropriate to include as a PBF in the final designation.

Comment 34: Multiple commenters expressed concern for designating critical habitat in areas where the species has not been recently documented and which we could not be certain were occupied.

Our Response: We based our designation on the best scientific and commercial information available using specific criteria for determining areas to designate as critical habitat. We have determined that all units being designated are occupied by the western yellow-billed cuckoo. In determining occupancy of breeding areas and critical habitat for the western yellow-billed cuckoo, we obtained occurrence information from surveys, reports, State Heritage data, published literature and online information (Cornell Lab of Ornithology). For the 2014 proposed rule, we reviewed information between 1998 and 2014 to determine whether the area was occupied at the time of listing. For the 2020 revised proposed rule, based on new data we received through 2017, we proposed additional units we consider to have been occupied at the time of listing using new data received through the 2017 breeding season. To further support designation of these

units, we used additional occupancy or breeding data up until the 2020 breeding season. See Criteria Used To Identify Critical Habitat for a discussion of the information and criteria we used on determining occupancy.

Comment 35: Multiple commenters requested exclusions for various publicly managed lands. One of these requests was to exclude Black Draw, part of San Bernardino National Wildlife Refuge in Arizona. Private landowners also requested exclusion for their own lands, claiming that they are already managing lands that maintain the species' habitat but did not provide information regarding their management or specific land ownership information.

Our Response: For exclusion of an area from critical habitat designation based on management, we look to our Policy on Exclusions that outlines measures we consider when excluding and areas from critical habitat (81 FR 7226). Black Draw, a part of the San Bernardino National Wildlife Refuge, provides important habitat for the western yellow-billed cuckoo. In order for us to consider and conduct an exclusion analysis, stakeholders should provide information or a reasoned rationale to support their request. Without this information, we did not conduct a weighing analysis to determine whether the benefits of exclusion outweigh the benefits of inclusion. For those Federal, State, Tribal and public lands where we had such information, we conducted an exclusion analysis Please see the Exclusions section for areas we are excluding from the final designation.

Comment 36: Some commenters stated that areas identified as critical habitat did not contain the physical or biological features (PBFs) and therefore are not essential and should not be part of the final designation.

Our Response: In our revised proposed rule, we reevaluated the areas proposed as critical habitat to focus on areas that contain the PBFs and are consistently occupied during the breeding season. We used the best scientific or commercial information available to determine habitat for and use by the western yellow-billed cuckoo. During our process of analyzing the PBFs, care was taken to consider the areas chosen using as consistent an approach as possible, despite the differences in habitat and the timing of when areas are used by the species. In some instances, several areas of habitat if in near proximity to each other were grouped together as a single area. Within the boundaries of critical habitat, areas that do not contain the PBFs are not considered critical habitat, even if they are within the boundary.

Comment 37: One commenter stated that the LCR MSCP maps in the revised proposed rule do not include some important revegetation sites occupied by western yellow-billed cuckoos. The commenter provided the total additional area of the revegetation sites within the LCR MSCP planning area.

Our Response: The proposed rule and revised proposed rule were based on the most current information we had on boundaries of areas for the LCR MSCP and may not have included more recent revegetation sites. As a result of reviewing whether we should exclude the areas being managed under the LCR MSCP, we took into consideration the additional restored sites as part of our benefits of exclusion analysis. We have determined to exclude the entire area being managed under the LCR MSCP. See Exclusions, *Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act.*

Comment 38: One commenter claims the inclusion of critical habitat for the western yellow-billed cuckoo in Unit 19 (AZ–17, Upper Cienega Creek), Unit 24 (AZ–22, Lower Cienega Creek), or Unit 58 (AZ–46, Gardner Canyon) will result in an economic burden for their activities. They also reasons the Service has already analyzed the effects of the Rosemont Project on the western yellow-billed cuckoo habitat in the project area during a section 7 consultation completed in 2016, and that because the habitat is already protected under the jeopardy standard, the area should not be included. The commenter also stated that the critical habitat within and in the vicinity of the Rosemont Project cannot be essential to the conservation of the species. Other commenters expressed concern about the development of Rosemont Copper Mine and that the critical habitat in the area is important for western yellow-billed cuckoos and other species.

Our Response: As we discussed in our draft economic information in our revised proposed rule (IEc 2019, entire; IEc 2020, entire) and our Incremental Effects Memo (Service 2019c, entire), we do not expect significant economic impacts associated with the designation of critical habitat above those associated with listing of the species as threatened, due to the areas being occupied by the species. Our review of the comments and claims raised do not change our position that the incremental economic impacts associated with critical habitat would be limited to administrative costs associated with completing adverse modification analyses for Federal actions (activities, permitting, funding) occurring in critical habitat. In general, conservation measures resulting from the species' listing status under the Act are expected to sufficiently avoid potential destruction or adverse modification of critical habitat.

In 2016, we issued a biological opinion to the USFS for Rosemont Copper's proposed activities (Service 2016b, entire). We subsequently received notification from the USFS that they had suspended all activities under the Rosemont Project Mine Plan of Operations due to litigation and court ruling to halt the project (Dewberry 2019, entire; Helminger 2019). In 2019, we suspended our 2016 biological opinion and its accompanying incidental take statement (Service 2019b, entire). On February 10, 2020, we received an adverse ruling on our biological opinion (Case 4:17-cv-00475–JAS Document 291). The USFS and Corps did not request an appeal of this decision. As a result of these court rulings, Rosemont's claim (James 2020, entire) that impacts to critical habitat have already been analyzed under the jeopardy standard is not correct. In addition, review of critical habitat is not reviewed under the jeopardy standard but rather under the different adverse modification standard. Should Rosemont Copper wish to resume seeking Federal permits for their activities, the Federal agencies would need to consult with the Service and obtain a new biological opinion for incidental take and adverse modification review.

In reviewing areas to designate critical habitat, we used the best scientific and commercial information available to determine those areas that are occupied and contain the physical or biological features essential to the conservation of the species. Western yellow-billed cuckoo use of the area during the breeding season is well documented and the area meets our criteria and conservation strategy for designation.

Comment 39: Permittees and others associated with the Service-approved section 10 Pima County Multi-Species Conservation Plan (MSCP), requested that the critical habitat within the HCPs planning area be designated as critical habitat.

The commenters expressed their confidence in the ability to deliver conservation benefit to the western yellow-billed cuckoo by way of the mitigation, management, and monitoring strategies in the MSCP. However, the commenters did state that large-scale Federal actions outside of Pima County's control could have significant negative impacts on species and lands under their management. The

commenters continued, stating that the designation of critical habitat would require Federal agencies to use an additional standard of review when conducting section 7 consultations with the Service for federally permitted activities (such as mines and transmission lines) not controlled by Pima County. The commenters stated that keeping the area as critical habitat would further serve to benefit the conservation of species and its habitat (Huckelberry 2014, entire). The commenters opined that maintaining the western yellow-billed cuckoo critical habitat on Pima County or Pima County Regional Flood Control District managed lands would not impact their section 10(a)(1)(B) permit or their partners. The commenters therefore requested that critical habitat for the western yellow-billed cuckoo be maintained on County- and District-owned and leased properties and on the Federal lands within Las Cienegas National Conservation Area.

Our Response: In proposing revised critical habitat in 2020 for the western yellow-billed cuckoo, we identified approximately 9,191 ac (3,719 ha) of land within the Pima County MSCP that occurred in numerous proposed units. We are honoring the commenters' requests not to exclude these areas from the final designation.

Comment 40: We received many comments on Unit 16 (AZ–14, Upper San Pedro River), which includes a portion of the San Pedro Riparian National Conservation Area (SPRNCA) managed by the Bureau of Land Management (BLM), ranging from support for inclusion, exclusion, exemption, or removal. One commenter provided support of inclusion in part because it has western yellow-billed cuckoo conservation goals within this unit as part of its Sonoran Desert Multi-species Conservation Plan (Huckelberry 2014, entire). Private individuals and environmental organizations also supported inclusion. Multiple commenters requested exclusion or removal of part or all of this Unit for various reasons, such as the area already having Federal protection, that it was not essential, and not wanting critical habitat on or near their private lands.

Our Response: As noted above, consideration of possible exclusions from critical habitat are in the Service's discretion and generally follow our Policy on Exclusions (81 FR 7226). With respect to Unit 16, we determine that the requesters have not presented information or reasoned rationale that supports a conclusion that the benefits of exclusion outweigh the benefits of inclusion. Breeding western yellow-billed cuckoos have long occupied the area within Unit 16. This area supports the largest population of breeding western yellow-billed cuckoos along and adjacent to a free-flowing river in Arizona and has a high conservation value. Areas such as this were specifically identified as part of our conservation strategy for designating critical habitat. Western yellow-billed cuckoos have been documented as breeding along the cottonwood-willow riparian woodland corridor and in the adjacent mesquite and desert scrub woodland that expands laterally into the broad floodplain. Threats to the physical or biological features in this Unit are ongoing and require constant management to protect from actions that affect the species and its habitat. The Service has engaged in many consultations for proposed actions within and outside of San Pedro Riparian National Conservation Area (SPRNCA) in the San Pedro River Basin that affect cuckoos and habitat within SPRNCA. Designation of critical habitat in this Unit ensures that effects of proposed Federal actions to western yellow-billed cuckoo habitat are considered and fully evaluated for potential impacts. The designation of critical habitat may also help increase agency and private land stewardship through partnerships and curtail unauthorized activities that degrade habitat such as trespass grazing and off-highway vehicle incursions. See *Exclusions Based on Impacts on National Security and Homeland Security* for discussion of Fort Huachuca.

Comment 41: Multiple commenters stated that the geography of the species does not warrant labeling the western yellow-billed cuckoo as a distinct population segment, therefore delisting is warranted, and it is not necessary to designate critical habitat.

Our Response: On September 16, 2020, we published in the **Federal Register** a not warranted 12-month finding on the petition to delist the western yellow-billed cuckoo (85 FR 57816). In that finding, we reaffirmed our previous determination that the western yellow-billed cuckoo constitutes a valid distinct population segment. Thus, we are required to designate critical habitat for all threatened or endangered species as long as we find the designation to be prudent and determinable, as is the case for the western yellow-billed cuckoo. We further note that we are under court order to finalize critical habitat for the western yellow-billed cuckoo critical habitat and do not have the discretion not to do so.

Comment 42: Several commenters stated that the western yellow-billed cuckoo is a habitat generalist or the designation of desert scrub, grasslands, mesquite, mesquite bosques, and cottonwood galleries as ''critical'' is wrong.

Our Response: The western yellow-billed cuckoo uses a variety of riparian and xeroriparian habitat within its range, but they are not habitat generalists. All the vegetation types are habitats with an overstory and understory component that occur in drainages. Based on comments regarding the PBFs in the 2014 proposed rule, we sought to better define the habitat used by the species. Western yellow-billed cuckoo breeding habitat is restricted to riparian woodlands along riparian drainages rangewide and, in the southwestern United States and northwestern Mexico, they also breed in more arid and sometimes narrower or patchier tree-lined drainages. In southeastern Arizona, they breed in tree-lined habitat in ephemeral drainages where humidity is higher than in other parts of the Southwest.

Comment 43: A few commenters stated that the proposed rule does not provide a solid justification for why areas proposed for critical habitat are essential. One commenter also stated there was insufficient justification for why areas were removed from the 2014 proposed critical habitat and why areas previously considered essential were eliminated.

Our Response: Revisions from the 2014 proposal are in part based on comments received and development of our conservation strategy for determining critical habitat. In our revised proposed and this final rule, we describe our rationale on why we consider the areas identified as essential to the conservation of the species. The conservation strategy takes into consideration numerous conservation biology practices and approaches for conserving sensitive species and their habitat. The areas identified contain the PBFs we considered essential to the conservation of the species under section 3(5)(A)(i) of the Act. In the strategy, we focused our designation on breeding areas that showed consistent occupancy and have records of numerous breeding pairs over time. Areas with limited, low, and inconsistent breeding information or degraded habitat were removed as not meeting the definition of critical habitat. For example, some areas on the Verde, Salt, and Gila Rivers that are no longer considered as critical habitat contained some or all of the PBFs, but the habitat is degraded, declining, and disjunct.

There were also no recent records (within the last 5 years) that confirm occupancy throughout the breeding season, although yellow-billed cuckoos migrate through these areas. Some other drainages in Arizona and throughout the range were removed either because: (1) The PBFs no longer occur, (2) our information regarding PBFs was in error, (3) surveys conducted since 2014 have not confirmed occupancy during the breeding season, (4) surveys have not been conducted, or (5) the area had detections but occupancy was otherwise uncertain; these areas were removed from the designation as not meeting the definition of critical habitat.

Comment 44: One commenter stated that the Service failed to inform private landowners that their property is proposed for designation.

Our Response: We made every effort to provide the public notification of our proposed and revised proposed critical habitat, including through direct notification, publications in newspapers, and social media outlets. Due to the large scope of the proposed designation, it was not possible to individually contact each individual landowner within the proposed designation.

Comment 45: Several commenters stated that there is no evidence that critical habitat units were occupied at the time of listing. Commenters disagreed that using data collected over a 20-year span is proof that the area is occupied habitat at the time of listing in 2014. Commenters also disputed that documentation of a few individuals is proof that the species is breeding or that the habitat they occupy is essential. Other commenters held the opposite point of view and found our parameters for occupancy to be too narrow, and recommended that the consideration of occupancy should be expanded temporally and spatially.

Our Response: In development of the proposed rules and this final rule designating critical habitat, we used the best scientific and commercial information available. We have determined based on our analysis of the information available that western yellow-billed cuckoo surveys and occupancy reports conducted in many sites over multiple years indicate continued use. Therefore, it is reasonable to conclude that data collected from 1998 to the present can be used to determine occupancy. We acknowledge the difficulty in identifying every individual occupying or breeding occurrence for an area because of the remote nature of the sites, reclusive nature of the species, the variable nature of resource availability, the extent of the species range, and limited personnel and funding to conduct rangewide protocol surveys. In certain instances we used the best scientific and commercial information to inform our decisions and professional judgment on determining occupancy for an area or including or not including it as critical habitat. In our proposed rule and this final rule, we outline our rationale for determining occupancy and identifying areas as critical habitat. See *Selection Criteria and Methodology Used to Determine Critical Habitat.*

Comment 46: Several commenters were concerned about water depletion (both surface water and groundwater) and its continued threat to western yellow-billed cuckoos into the future. Some were interested in creating more water availability and flow through a balanced approach to water use interests (including municipal, agricultural, recreational, and environmental interests) and implementing more habitat restoration in areas proposed for critical habitat.

Our Response: Water availability and depletion can have a significant impact to western yellow-billed cuckoo and its habitat and were part of our reasoning for listing the DPS as threatened. We expect water depletion to continue due to a variety of causes including actions such as climate change, drought, mining effects, groundwater pumping, and water diversion. We will continue to consult on this issue as it arises as well as work with Federal, State, Tribal, and private landowners on species recovery actions.

Comment 47: Several commenters pointed out potential inconsistencies in application of criteria for designation, in particular where large habitat blocks are absent or where there are gaps greater than 0.25 mi (0.40 km). One commenter is concerned about the gaps in suitable habitat and inclusion of small patches along the Big Sandy River. Another commenter stated that there is no evidence that Pinto Creek contains substantial blocks of riparian habitat.

Our Response: Because of the dynamic aspects of western yellow-billed cuckoo habitat as a result of potential flooding, changing river locations, and land uses, we used the active floodplain to identify where riparian habitat occurs and immediately adjacent suitable woodland habitat to determine the critical habitat boundaries. Blocks of habitat often contain openings that change over time in dynamic riverine systems. Suitable habitat in perennial and intermittent riparian systems consists of a variety of configurations that include small patches of woodland interspersed with openings, large expanses of woodland, narrow woodland, or a combination of different configurations within the same drainage at any given time. Riparian corridors in drainages, especially in the Southwest, can be very narrow or a patchwork of vegetated and nonvegetated areas. Naturally occurring gaps in habitat following flooding and scouring are part of succession in riparian systems. In time, trees will regenerate and fill these openings. Western yellow-billed cuckoos often nest and forage near the edges and openings that are part of the matrix of suitable habitat. We included breaks in habitat to combine one or more areas if we determined that: (1) The gap in vegetation was within minor variances of the 0.25-mi (0.40-km) distance; (2) the habitat on the other side of the gap was a continuation of similar or better suitable habitat and included breeding occupancy as identified above; or (3) the gap in vegetation was determined to be a consequence of natural stream dynamics essential to the continuing function of the hydrologic processes of the occupied areas. By providing breaks in habitat and combining areas, we allow for regeneration of vegetation in these areas, which is often more productive and provides additional food resources for the species and allows for appropriate habitat conditions for use when dispersing to other breeding locations.

Comment 48: Several commenters claimed a need for western yellow-billed cuckoo critical habitat to be protected from livestock grazing.

Our Response: We consider livestock grazing, if conducted and managed appropriately, to be a management tool compatible with western yellow-billed cuckoo and its habitat depending on the location and intensity of the grazing operation. We evaluate effects of grazing on western yellow-billed cuckoos and habitat through section 7 consultation for any proposed project with a Federal nexus. Livestock grazing in riparian areas can be a concern, and the Southwestern Willow Flycatcher Recovery Plan (Service 2002, entire) provides grazing guidance that is also relevant for western yellow-billed cuckoos. We identified overgrazing in riparian (including xeroriparian) habitat as an ongoing threat to western yellow-billed cuckoo habitat that may require special management. Well-managed, low-intensity, appropriately timed grazing in areas with multiple options for water access to livestock can be compatible with western yellow-billed cuckoos in some parts of the range. However, where water is limited and recruitment events are infrequent,

grazing at any level can impact riparian habitat.

Comment 49: Several commenters indicated that the 2020 revised proposed critical habitat rule conflicts with the description of western yellow-billed cuckoo habitat in the 2014 listing rule and 2014 proposed critical habitat rule.

Our Response: Since the publication of the 2014 proposed critical habitat rule, we have learned more about western yellow-billed cuckoos and their habitat use through information identified in published research, survey efforts, and field studies. This new understanding is included as the best available science at the time of publishing the 2020 revised proposed rule. New information includes the species' use of ephemeral drainages with relatively high humidity for breeding, in addition to the known use of riparian woodlands.

Comment 50: Several commenters are concerned about the expansion of identified critical habitat in certain areas of Arizona, such as in the upper reaches of the Big Sandy River and that the additional areas (used as stop-over, dispersal, or breeding habitat) are not needed for critical habitat. They also state that the rule fails to show how many of these areas will require special management. Other commenters expressed concerns that the apparent expansion in Arizona is only due to increased survey effort and that Arizona is disproportionately represented in the 2020 revised proposed critical habitat.

Our Response: The reduction in riparian habitat (including mesquite bosques) in Arizona has been well documented and western yellow-billed cuckoos are no longer found in areas where riparian habitat no longer exists. Yet, remaining habitat within Arizona remains an important stronghold for breeding western yellow-billed cuckoos. As part of the core of the DPS, habitat in Arizona needs to be conserved to enable western yellow-billed cuckoos to produce young that may eventually disperse to other parts of the DPS's range. The Big Sandy River was included because it contains breeding habitat as outlined in our conservation strategy. Although critical habitat areas may be used as migration corridors, dispersal habitat and stop-over sites, that is not why these areas were designated. These areas were identified as critical habitat as they are breeding areas that are used consistently by the western yellow-billed cuckoo and provide for population maintenance and growth as outlined in our conservation strategy. As mentioned in the rule, riparian habitat (including xeroriparian) is used by the western yellow-billed cuckoo; however, not all riparian habitat has been designated. An increase in a species' detection information often occurs as a result of a species being listed as a threatened or endangered species, due to consultation requirements under section 7 as well as recovery actions or State coordination efforts under section 6 of the Act. Additional occupancy information is also sometimes obtained as a result of academic research on a species. Since 2014, we estimate that the number of detections has not increased significantly and this information has not lead to widespread areas being found to be occupied outside those areas known since before listing, which identified the majority of occupancy and population numbers occurring in Arizona and New Mexico. The only areas considered to be ''new'' but most likely occupied at the time of listing are those occurring in the ephemeral habitats in southeastern Arizona associated with monsoonal events.

Comment 51: Several commenters expressed concern about designating critical habitat in areas that contain the nonnative tamarisk and were concerned whether it provided usable habitat and whether critical habitat locations with tamarisk would interfere, delay, or discourage removing tamarisk for long-term restoration efforts. One commenter stated that the nonnative tamarisk plant should not be identified as a physical or biological feature and listed as a riparian plant species used by the western yellow-billed cuckoo, as it will impede removal of the nonnative plant species and delay or discourage future habitat restoration efforts.

Our Response: As stated in our revised proposed rule (see *Tamarisk*), the nonnative tamarisk is often characterized as being poor habitat for wildlife. However, it can be a valuable habitat substitute where the hydrology of a stream or river has been altered to the extent that native woodland or riparian habitat can no longer exist. Western yellow-billed cuckoo use areas containing tamarisk for breeding and foraging, especially when mixed with some native vegetation. In Arizona and New Mexico, it can provide cover, temperature amelioration, food, and nesting habitat. Actions such as clearing vegetation, modifying physical site conditions, altering natural river processes, and disrupting biotic interactions have facilitated tamarisk dispersal to new locales, and created opportunities for its establishment. Because tamarisk is so widespread in existing western yellow-billed cuckoo habitat and used for breeding and foraging, it constitutes habitat for the species, and any Federal actions taken within these areas would most likely be subject to consultation under section 7 due to occupation by the listed species regardless of the area being designated as critical habitat. The value of tamarisk for the western yellow-billed cuckoo depends on geographic and site-specific conditions. Tamarisk can contribute to suitable western yellow-billed cuckoo habitat where mixed with native habitat or adjacent to native habitat, especially in Arizona and New Mexico. Tamarisk is the result of altered hydrology, and removal alone will not create a rebound in native, riparian habitat. However, tamarisk removal combined with native tree replacement may benefit western yellow-billed cuckoos where sufficient water is available and long-term management and funding ensures tree survival. Because all the areas we identified as critical habitat are occupied, the section 7 consultation requirements for protecting the listed species would still apply.

Comment 52: A couple of commenters raised issues pertaining to wildfire. One expressed concerns about how critical habitat could lead to causing an overgrowth of vegetation and potentially leave areas more vulnerable to catastrophic wildfires, while the other acknowledged the need for critical habitat to balance the increased risk of wildfire due to climate change.

Our Response: We acknowledge that wildfire risk exists within all habitat to varying degrees across the range of the DPS. The designation of critical habitat does not mean that management for reduction of wildfire cannot occur. In fact, the identification of critical habitat as an educational tool may focus such wildfire management actions to help conserve the habitat. We will continue to work with Federal, State, and Tribal governments and private landowners within the designation to implement appropriate wildfire management actions within and outside any critical habitat designation.

Comment 53: Several commenters stated that the description of the revised proposed critical habitat conflicts with the breeding and foraging habitat description in the 2014 proposed critical habitat and final listing rule.

Our Response: We have learned more about western yellow-billed cuckoo foraging and breeding habitat since publication of the 2014 proposed critical habitat and final rule for listing. The revised proposed rule and this final rule include revised information on habitat features, foraging behavior, and breeding areas.

Comment 54: Numerous commenters stated they have concerns with western yellow-billed survey information (such as interpretation, biases, and inconsistencies), a lack of comprehensive statewide surveys, and the likely existence of unsurveyed areas where western yellow-billed cuckoo could be found.

Our Response: We recognize the lack of recent statewide survey information and that not all areas within the range of the DPS have been adequately surveyed. However, in development of critical habitat, we are required to use the best scientific and commercial information available to identify those areas essential to the conservation of the species. We used a combination of data collected using the standardized survey protocol (Halterman *et al.* 2016, entire), data from species specific studies, and other credible detection data. Although we cannot always guarantee complete accuracy in the survey information provided to us, as of the 2014 listing, the persons conducting protocol surveys are required to complete Service-approved western yellow-billed cuckoo survey training prior to receiving a permit under section 10 of the Act.

Comment 55: Several commenters expressed that with the new ephemeral Southwest breeding habitat incorporated into critical habitat, there are areas available for western yellow-billed cuckoos that are not subject to threats, and that suitable habitat is now broader and more common, questioning the need for critical habitat.

Our Response: Our characterization of Southwestern breeding habitat is to better define the physical or biological features of habitat throughout the range of the species. Historical descriptions of habitat were largely based on research in the Sacramento Valley, CA, or other areas known to have occupied habitat in large expanses of floodplain areas, which is often different ecologically than habitat in the Southwest as far as vegetation and environmental conditions. These changes were reflected in our description of the PBFs for the species. The changes to the description of habitat, by including a separate description for Southwest breeding habitat, does not mean that additional areas are now available and being used by the species. Southwest breeding habitat is threatened by many of the same activities as the rest of the DPS that has led to the loss of western yellow-billed cuckoos and their habitat.

Comment 56: One commenter claimed that habitat areas within existing power line corridors and rights-of-way that are required to be maintained under existing Federal energy laws and regulations are not essential to the conservation of the species because they currently do not, and in the future cannot, contain the primary constituent elements of essential features; these corridors should be identified and removed from the final critical habitat designation.

Our Response: When determining proposed critical habitat boundaries, we made efforts to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack the PBFs. These types of developments are not typically found adjacent to riparian habitat and, when they do occur, may be missing from or inaccurately represented in existing map sources. As a result, because of the large scope of this designation and the limitations of maps, any such developed lands, such as cement pads that support transmission or power poles or roads left inside critical habitat boundaries, are not considered critical habitat because they lack the necessary physical or biological features. Therefore, a Federal action involving these developed lands would not trigger section 7 consultation with respect to critical habitat or the prohibition of adverse modification, unless the specific action would affect the physical or biological features in adjacent critical habitat. However, Federal actions that may affect the species do require section 7 consultation. If lands surrounding existing powerlines, towers, or rights-of-way are occupied by western yellow-billed cuckoos, Federal activities such as maintenance that may affect the species during the breeding season require section 7 consultation.

Comment 57: One entity claimed that any restriction on mining to maintain critical habitat would have a dramatic impact on mining operations and that any such restrictions are attributable solely to the designation of critical habitat.

Our Response: The areas currently of interest to mining activities located in or near critical habitat boundaries are occupied by the western yellow-billed cuckoo and would be subject to either section 7 or section 10 consultation requirements of the Act due to the species being listed as threatened. As described in our economic analysis (IEc 2019, entire), the majority of regulatory requirements as a result of any critical habitat designation would be administrative in nature and be conducted by the Federal agency that may have approved, permitted, or provided funding for the mining activities.

Comment 58: Many commenters claimed that particular areas should not be designated because they believe that critical habitat will unnecessarily regulate the public, will overload Federal agencies with implementation of the designation, or is not necessary because the areas are already federally owned and therefore protected. Specifically, many landowners with water diversions, cattle ranches, and agricultural property, plus residents in areas dependent on recreation to support local economies throughout the western yellow-billed cuckoo's range, commented that this designation would cause them harm economically, could limit the ability of farmers and ranchers to till productive farmland, could limit use of fertile grazing land, could restrict the utilization of critical water rights, and could delay projects through the regulatory process.

Our Response: We are required to designate critical habitat for listed species if we find that the designation is prudent and determinable as we did for the western yellow-billed cuckoo. The designation of critical habitat applies to actions that are taken, permitted, or funded by Federal agencies. In our economic analysis, we did not find that the designation would cause a significant change in activities or delay or add additional regulatory processes, as the majority of regulation is already in place because the western yellow-billed cuckoo is listed as a threatened species. Agricultural and grazing activities and water operations were not identified as facing significant changes to costs due to the designation.

Comment 59: One commenter claims that the Service reversed course from the proposed rule and now contends that western yellow-billed cuckoo uses nonriparian habitats that occur along dry drainages and adjacent uplands. The commenter questioned the new category of southwestern breeding habitat and stated that, to their knowledge, this use of habitat and habitat description have not been previously recognized or described by ecologists.

Our Response: Southwestern breeding habitat is similar to breeding habitat in Mexico. We identified southwestern breeding habitat to better identify and describe the physical or biological features essential to the conservation of the species and assist us in conducting section 7 consultations for areas within critical habitat. As described in the Critical Habitat section, features such as understory and overstory components with high humidity are considered important for habitat selection for breeding western yellow-billed cuckoos. This is especially true in ephemeral

tree-lined xeroriparian drainages. Western yellow-billed cuckoos have only recently been discovered using this habitat and studies are underway in southeastern Arizona to determine where western yellow-billed cuckoos are and are not occupying habitat during the breeding season. Surveys to date have not found western yellow-billed cuckoos in ephemeral tree-lined xeroriparian drainages where high humidity is lacking.

Comment 60: One commenter asserts that the addition of southwestern breeding habitat significantly increases the number of critical habitat units and total area of critical habitat in Arizona. Many of the Arizona critical habitat units are based on a handful of detections over the past two decades, raising questions about whether the habitat can be considered occupied and whether the areas are essential to the conservation of the species. The commenter states as a result the Service failed to conduct a thorough, systematic review of the data and species' needs in the development of the revised proposed rule.

Our Response: We followed specific occupancy criteria to determine areas of critical habitat and developed a conservation strategy for the designation (see Criteria Used To Identify Critical Habitat, *Conservation Strategy*). Western yellow-billed cuckoos are found in low densities and some units have more occupancy data than others depending on survey efforts. Because western yellow-billed cuckoos are selective in using breeding habitat, have large home ranges, are difficult to detect, and occur in low densities, and surveys have occurred only in limited reaches of available habitat, we expect territory numbers per length of drainage surveyed to be small (one to four individuals or pairs is not uncommon). If the species is found repeatedly in one part of the drainage, and similar habitat occurs upstream and downstream, we assume other individuals may be present. Because most surveys are conducted by one or two surveyors per drainage, only a small length of drainage can be surveyed in any given year, yielding a small number of western yellow-billed cuckoos in a given reach. This contrasts to a focused wide-ranging survey such as on the Rio Grande with many surveyors that find many records along a longer reach.

Comment 61: One commenter stated that many riparian woodlands in areas outside Arizona and New Mexico are known to support western yellow-billed cuckoo and were proposed as critical habitat in 2014. They were concerned that these areas have been dropped from the 2020 revised proposed critical habitat. The commenter suggests that the Service did not provide any rationale for these changes, which appear to contradict efforts for species conservation. The revised proposed rule effectively makes Arizona the central focus for western yellow-billed cuckoo conservation. This counters previous information that the western yellow-billed cuckoo is considered a riparian obligate species and such riparian habitat and perennial streams are limited in Arizona.

Our Response: As described in the revised proposed rule, we developed a conservation strategy to identify areas for critical habitat. Some areas in the 2014 proposed rule were small, isolated, and contained single or very few records of occupancy for the breeding season. As a result of our conservation strategy, we focused the designation on areas where we could confirm large numbers of breeding pairs and consistent breeding activity. For the western yellow-billed cuckoo, this means identifying areas in Arizona and New Mexico. Arrival of the western yellow-billed cuckoo in the western United States occurs from Mexico north through Arizona and New Mexico (Cornell Lab of Ornithology 2020). In addition, new information indicates western yellow-billed cuckoos are breeding in a greater variety of riparian habitat in the Southwest, and as such, this knowledge was used to ensure we protect the breadth of this breeding habitat. Arizona has more currently occupied drainages and breeding locations than other western states and although many surveys have been conducted, only a small proportion of drainages have been surveyed. Therefore, ensuring habitat remains for the species in the core of the population is important for dispersal to other geographic areas with fewer western yellow-billed cuckoos. The core area for this species in the United States is primarily in Arizona and New Mexico in large river systems with riparian habitat, and in xeroriparian habitat influenced by monsoonal conditions. We considered and included new information acquired since listing. We did not include all occupied riparian habitat, but based decisions on representative habitat types and their distribution. In western states outside of Arizona and New Mexico, large river systems used for breeding by western yellow-billed cuckoos provide for additional redundancy and representation.

Comment 62: One commenter stated that the Service's rationale for listing the western yellow-billed cuckoo in 2014 was largely based upon the loss of riparian woodland habitats. The addition of southwestern breeding habitat is not only counter to the Service's well-documented historical ''understanding'' of species ecology but also conflicts with the Service's basis for listing the species. This undermines the legitimacy of the species listing, and as a result, the Service is obliged to conduct a thorough review of the species status.

Our Response: Loss of habitat and breeding location activity for the western yellow-billed cuckoo is well documented. The DPS continues to see population number declines throughout the Western United States with the only remaining strongholds for the species being in Arizona and New Mexico. Our description of habitat and the additional use of habitat in ephemeral drainages does not change our understanding of the status of the species. We completed a status review and determined that the western yellow-billed cuckoo continues to warrant listing as a threatened species (85 FR 57816). Therefore, we continue to be driven by a court-ordered deadline to complete a final designation.

Comment 63: One commenter claims that the revised proposed rule presents contradictory information and suggests that the Service has yet to develop a coherent understanding of this species. The commenter suggests that there are clear gaps in the Service's understanding and explanation of the species' prevalence and its habitat needs. These gaps should be resolved before the Service proceeds with the critical habitat designation. The commenter's preference is for the Service to reevaluate this listing and proposed designation.

Our Response: The information in this final designation is not contradictory. Our rationale for identifying and determining areas as critical habitat, our description of the PBFs essential to the conservation of the species, and our conservation strategy for determining critical habitat are consistent with each other and provide a strong basis for the determination. There are information gaps regarding western yellow-billed cuckoo occupancy and habitat use, and our understanding is continually evolving as we accumulate more information. We have designated critical habitat in accordance with the best scientific and commercial information available, as required by the Act.

Comment 64: Two local government entities in California claim that the designation would have a large impact on agricultural practices and the local economy. One of the two commenters also stated that access to lands would be

restricted, grazing limits imposed, and trout stocking, logging, mining, and recreation would be impacted. The other commenter stated they have drafted the Butte Regional Conservation Plan to conserve western yellow-billed cuckoo and its habitat. Both commenters requested exclusion.

Our Response: For both the 2014 proposed critical habitat and the 2020 revised proposed critical habitat, we completed economic analyses to examine the incremental costs associated with the designation of critical habitat. The economic analyses did not identify significant impacts, and the two local government entities did not provide economic information regarding any of the activities identified. Nor did they provide information or a reasoned rationale supporting their requests for exclusion which is necessary for the Service to engage in an exclusion analysis. Critical habitat does not restrict private landowner access to their property and would need to be considered only if Federal agency funding, or permitting for an activity is needed. Because the areas are considered occupied, the majority of costs are not associated with the designation, but with listing of the species as threatened. In our mapping of critical habitat, we avoided areas associated with agriculture and focused on areas that contained the physical or biological features for the species. In some cases, due to the habitat being fragmented from development or agricultural conversion, we drew the boundary to encompass the various habitat patches. In such instances, some small areas not containing the physical or biological features are within the boundary of the designation. Any such areas would not be considered critical habitat because they do not contain the physical or biological features. The Butte Regional Conservation Plan is still in draft form and has not been approved by the Service or the State under its Natural Community Conservation Planning (NCCP) program.

Comment 65: Several commenters provided their concerns relating to designation of critical habitat at Lake Isabella, California. The issues raised were concerning potential impacts to public safety for disruption of reservoir operations, flooding, and potential wildfire due to vegetation growth as well as increased economic costs for the local economy from loss of recreation and water use.

Our Response: Although we would not expect a designation of critical habitat to impact the commenters' concerns identified above or increase economic cost to the local economy, we have revised our designation of the critical habitat within Unit 64 (CA–2) at Lake Isabella to avoid those areas typically inundated and within the floodplain of the reservoir. These areas are part of the flood control management and operations conducted by the Corps established under separate authorization. In addition, the Corps has already consulted with the Service on its operations of Lake Isabella for both the southwestern willow flycatcher and the western yellow-billed cuckoo. Because these areas have been removed, any activities associated with the operations of Lake Isabella by the Corps would not be impacted by the designation of critical habitat. In addition, two areas where the Corps obtained conservation easements are also being excluded under section 4(b)(2) of the Act (see *Exclusions Based on Other Relevant Impacts*).

Comment 66: Several organizations and groups requested that Unit 63 (CA–1) along the Sacramento River be excluded from the designation for these stated reasons: Increased costs to agriculture, concerns about flood control, National Wildlife Refuge (NWR) lands along the Sacramento River already protect western yellow-billed cuckoo and its habitat, and additional areas are not needed.

Our Response: The commenters provided general statements of their request that Unit 63 be excluded but did not provide information or a reasoned rationale supporting their request for exclusion. In designating critical habitat, we avoided areas that contained developed or agricultural lands based on aerial imagery and land classification. Our economic analysis did not identify that designation of critical habitat would significantly impact agricultural activities above and beyond what may be required because of the species' listed status under the Act. The critical habitat designation occurs along the banks of the main stem of the Sacramento River. The designation of critical habitat would not impact normal water delivery, flood control actions, or stream flows required for emergency operations. In fact, such unregulated flows assist in mimicking natural high flow events, which can benefit sediment deposition and provide new vegetation growth for use by the western yellow-billed cuckoo. In determining the extent of critical habitat within a unit, we based the boundaries on areas where the species has had continuous or nearly continuous records of confirmed or presumed breeding. We delineated critical habitat boundaries to provide connectivity between breeding locations and account for the dynamic nature of habitat conditions and prey availability. As a result, the NWR boundaries would not account for all the areas essential to the conservation of the species, and by limiting them to the NWR boundary, the designation would not meet the needs of the species.

Comment 67: One group said that portions of their land included in Unit 63 (CA–1) along the Sacramento River do not contain the PBFs and therefore are not critical habitat. They also stated that they have worked with the CDFW on habitat actions, and requested that portions of their lands be excluded.

Our Response: We reviewed the areas identified by the commenter and adjusted the boundary of the unit to reflect those areas containing the PBFs. We also reviewed the information regarding the landowner's agreement with CDFW. After review, we find that the landowner's agreement does not meet our criteria for exclusion of plans as outlined in our policy for exclusion (81 FR 7226) because it does not contain sufficient measures to conserve the PBFs of the species' habitat or include measures for adaptive management that would ensure that the conservation measures are effective and can be modified to respond to new information. Therefore, we did not consider the area identified for exclusion.

Comment 68: Numerous environmental organizations and several other local environmental groups stated that the entire proposed critical habitat areas should be designated without any exclusions and that exclusion of areas should not rely on southwestern willow flycatcher management plans or its critical habitat for conservation of the western yellow-billed cuckoo. They also provided information about adding additional areas and expanding proposed areas to be sure to include connectivity and stop over areas as well as migratory routes up to and including entire river corridors.

Our Response: Our designation of critical habitat for the western yellow-billed cuckoo was developed based on a specific conservation strategy to assist in recovery of the species (see Criteria Used To Identify Critical Habitat (*Conservation Strategy*)). Based on our conservation strategy, we have concluded that the areas identified as proposed critical habitat and now being designated are sufficient in meeting our critical habitat designation requirements under the Act. The conservation strategy provides for many of the measures identified by the commenters. While we agree with the commenters that additional areas outside the current designation are important and would

contribute to recovery, the designation of critical habitat is not intended to identify all areas important for a species, but just those considered essential. The Secretary has broad discretion in determining if areas are appropriate for exclusion under section 4(b)(2) of the Act. Our evaluation for determining if an exclusion is appropriate includes a detailed analysis and balancing on whether the benefits of excluding outweigh the benefits of including an area as critical habitat as long as the exclusion does not lead to an extinction of the species. The exclusions we have identified include implementation of HCPs, other management plans, conservation agreements, or conservation easements that protect or implement specific conservation measures for the western yellow-billed cuckoo or its habitat (see Exclusions). As a result, we determine that excluding these areas under section 4(b)(2) of the Act is appropriate.

Comment 69: One commenter claimed that the Service ignored, withheld, hid, or discounted information and as a result did not meet the best scientific or commercial information standard under the Act in making its determination of critical habitat. The commenter further stated that the western yellow-billed cuckoo only rarely uses habitat in the western DPS on a migratory and seasonal basis, which therefore inhibits the Service's ability to delineate habitat that contains the physical and biological features to justify the designation of critical habitat. As a result, the designation of critical habitat for the western yellow-billed cuckoo would be not prudent or determinable. Lastly the commenter stated that existing regulatory mechanisms are sufficient to protect habitat and the designation of critical habitat is not necessary and would contribute to an already heavy regulatory burden for the industry.

Our Response: In development of the proposed, revised, and this final rule designating critical habitat, we used the best scientific and commercial information available. We find the commenter's statements regarding our ignoring, withholding, hiding, or discounting information and not using the best scientific and commercial information available to be baseless. In the final listing rule, proposed critical habitat rule, revised proposal, and this final rule, we describe the habitat, migratory and arrival patterns, nesting behavior, and behaviors of the western yellow-billed cuckoo and its use of habitat in great detail. The available information on the species' life history and habitat use patterns is well documented by the scientific community. As a result, we have sufficient information to determine the areas essential to the conservation of the species as critical habitat. Under the Act, we are required to designate critical habitat for threatened and endangered species. The commenter's statement that the existing regulatory mechanisms are sufficient to protect habitat for the species is confusing one of the factors considering in listing a species under the Act with the designation of critical habitat. The Act requires Federal agencies to use their authorities to conserve endangered and threatened species and to consult with the Service about actions that they carry out, fund, or authorize to ensure that they will not destroy or adversely modify critical habitat. The prohibition against destruction and adverse modification of critical habitat protects such areas in the interest of conservation. In our determination of critical habitat, we took into account the regulatory requirements of listing the western yellow-billed cuckoo as a threatened species and evaluated any incremental impacts and additional regulatory responsibilities of designating critical habitat. We found that any increase in regulatory requirements as a result of critical habitat would most likely be administrative in nature in regard to Federal agency compliance with evaluating any adverse modification aspects of actions they carry out, fund, or authorize.

Comment 70: In 2015, we received a spreadsheet outlining 83,454 identical comments supporting critical habitat and 3,609 nearly identical public comment letters. We also received another spreadsheet containing 6,317 nearly duplicative comments in 2020. The latter commenters were similarly supportive of critical habitat but stated that all habitat should be designated including additional areas smaller than 200 ac (81 ha) due to the decline of the species and its habitat. The 2020 comments supported the inclusion of additional areas not identified in the 2014 proposal, but were disappointed that numerous areas were removed or partially removed (*i.e.,* Eel (CA), Yampa (CO), Conejos (CO), Santa Maria (AZ), and Carson (NV) Rivers) without reason and stated that we should protect additional areas including every stream and river stretch where western yellow-billed cuckoos nest. They state that many of these areas are targeted for development, and so a failure to protect them will eliminate places for western yellow-billed cuckoos to nest. As a result, they stated that the current proposal is insufficient for recovery of the species.

Our Response: In our revised proposed critical habitat, we developed and described our conservation strategy to identify those areas considered to be essential to the conservation of the species. In implementing our strategy, we focused on designating areas where the western yellow-billed cuckoo has shown to have consistent and recent occupation as a breeder. Consequently, areas where sightings or presumed breeding were sparse or inconsistent were not included in the 2020 proposal, as these areas were not considered as part of our conservation strategy for designating critical habitat. Not designating areas as critical habitat does not mean they are unprotected under the Act. The western yellow-billed cuckoo is a threatened species and is protected by the prohibitions in section 9 the Act. Critical habitat is just one of the tools we use for species conservation. Not including areas as critical habitat does not mean the areas outside the critical habitat boundaries are not important or cannot be identified in future recovery planning. We stand by our strategy for designating critical habitat for the western yellow-billed cuckoo as the areas identified contain the PBFs, meet the definition for critical habitat, and support relatively large consistent breeding habitat for the species.

Comment 71: One organization and others stated that they were opposed to limiting the designation and that a full NEPA analysis be conducted. They also state that the Service does not adequately describe economic benefits of designation of critical habitat. They contend that the Service erroneously relies on plans for other species to exclude areas from critical habitat and that if exclusions occur, they should have clear explanations on why the areas are excluded. The commenters stated that the Service should ensure that the designation will not interfere with habitat restoration efforts to remove tamarisk. Lastly the commenters contend that the Service should ensure that no agricultural application of pesticides has the potential to affect western yellow-billed cuckoo or alternatively the Service should expand units that are adjacent to areas with agricultural use so that the application of pesticides does not impact the species or its insect prey. Another commenter stated rotenone was of particular concern.

Our Response: We developed a conservation strategy to determine which areas to consider as critical habitat. This strategy has led us to

appropriately identify the extent and distribution of critical habitat for the western yellow-billed cuckoo (see *Conservation Strategy*). The designation provides for critical habitat in areas that have shown consistent breeding and typically have a large number of breeding birds. The designation provides for habitat in each of the differing landscape level ecosystems where the western yellow-billed cuckoo occurs.

In regard to economic benefits, a primary reason for conducting the economic analysis is to provide information regarding the economic impacts and benefits associated with a critical habitat designation. Executive Order 12866 directs agencies to assess the costs and benefits of any regulatory action. The primary intended benefit of critical habitat is to support the conservation of threatened and endangered species, such as the western yellow-billed cuckoo. However, public perception of limits imposed by the regulation may inadvertently cause changes in future land use, and as a result may provide additional benefits to the species and its habitat. In our economic analysis, data limitations prevented us from quantifying such additional economic benefits. Quantification of these benefits would require primary research and the generation of substantial amounts of new data, which is beyond the scope of our analysis and Executive Order 12866.

Prior to publication of the revised proposed rule, we completed a draft NEPA analysis for the designation of critical habitat and made the document available to the public by request or through the Sacramento Fish and Wildlife Office website. After the public comment period and our determination of the areas to be designated, we finalized an environmental assessment with a finding of no significance under NEPA. In our process for excluding areas from critical habitat, we conduct a balancing analysis describing the benefits of including an area as critical habitat versus the benefits of excluding an area as critical habitat. Our reasoning and logic for coming to our conclusion on whether we are or are not excluding an area is included for each exclusion and follows our Policy for Exclusions (81 FR 7226) (see Exclusions).

As for using other species' management plans as justification to exclude an area, we do this on a case-by-case basis. For us to consider use of other species' management plans, we look to whether habitat needs and use are similar for each species to the point that the management of the other species' habitat will also benefit the western yellow-billed cuckoo. For this designation we have looked at numerous southwestern willow flycatcher management plans and found that in cases where breeding areas overlap, management actions to protect and conserve riparian habitat are generally consistent for both species and that using these plans is appropriate for conservation of the western yellow-billed cuckoo.

Restoration of habitat to eliminate tamarisk could benefit the western yellow-billed cuckoo. However, the restoration of riparian habitat is difficult and requires long-term commitments from stakeholders. Mere removal of tamarisk, despite being a nonnative species, would be strongly discouraged regardless if the area is within critical habitat or not. In Arizona and New Mexico, the western yellow-billed cuckoo uses and breeds in tamarisk-dominated sites, especially if other native vegetation components still exist at the site. The western yellow-billed cuckoo also uses areas dominated by tamarisk for foraging. Actions to remove tamarisk and restore riparian vegetation would also need to go through section 7 consultation or section 10 permitting requirements due to the western yellow-billed cuckoo being listed as a threatened species with critical habitat being evaluated only as to whether Federal actions carried out, funded or permitted would adversely modify such areas as defined by the Act.

The western yellow-billed cuckoo is protected by all the section 9 prohibitions under the Act, which includes actions that harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct. Pesticide use and application for agricultural purposes, including use of rotenone, is already regulated under Federal, State, and County laws, regulations, or permits. Such application takes into account measures to avoid and reduce impacts to wildlife and nontarget areas. Expanding additional area around critical habitat is not the intent of designation under the Act and our implementing regulations. In determining critical habitat, we are to identify those areas essential to the conservation of the species by identifying areas that contain those physical or biological features used by the species. Including additional areas that do not contain any physical or biological features would be contrary to our implementation of the Act.

Comment 72: One commenter was concerned that all of the areas previously identified in 2014 were not being included and that the new areas identified in 2020 are still not sufficient for conservation and recovery of the species. The commenter states that the Service should identify areas as critical habitat for foraging, dispersal, and migration (including unoccupied areas in the species' historical range) and that the 200-ac (81-ha) minimum size filter should be removed. Lastly, the commenter states that the Service should not exclude any areas, especially those that rely on southwestern willow flycatcher management plans.

Our Response: In determining critical habitat for the western yellow-billed cuckoo, we developed a conservation strategy to identify those areas essential to the conservation of the species. We made the changes from 2014 to 2020 to reflect implementation of this strategy (see Criteria Used to Identify Critical Habitat (*Conservation Strategy*)). In delineating the areas, we included breeding habitat that also accounts for western yellow-billed cuckoo needs for foraging, dispersal, and migration. We did not consider unoccupied areas for critical habitat because we determined that occupied areas were sufficient to conserve the species. In response to our 200-ac (81-ha) selection criterion, we used this as a general rule rather than a strict cut-off of considering areas. In our proposed rule, we took into account the importance and distribution of habitat and included several areas in the revised proposed rule that included less than 200 ac (81 ha). These areas have been excluded from the final designation due to management. We have determined that our exclusion of certain areas meets our standards under section 4(b)(2) of the Act in that the benefits of exclusion outweigh the benefits of inclusion as critical habitat and will not lead to extinction of the species (see Exclusions).

Comment 73: Several environmental organizations specifically raised concerns that the areas identified at Elephant Butte Reservoir be expanded to include additional critical habitat. They also suggested justification and changes to the Service's conservation strategy, and that the Service must do a carrying capacity for units before we discount designating unoccupied areas.

Our Response: In our 2020 revised proposed rule, partly in response to comments received in 2014 and 2015, we extended the proposed designation of the Rio Grande from Elephant Butte Reservoir upstream (Unit 37, NM–6B) to better reflect the areas being used as breeding areas by the western yellow-billed cuckoo.

As a result of comments received, we reviewed our conservation strategy and made minor edits and included additional language for its justification

(see Criteria Used to Identify Critical Habitat (*Conservation Strategy*) in this document).

Although we didn't complete a carrying capacity for the designation as suggested by the commenters, based on the information available, some areas have sufficient habitat that is underused by the species. One example of this is habitat along the Sacramento River in California. In our designation of critical habitat, we included a large extent of habitat along the Sacramento River, which, despite losses, has had a large population of breeding western yellow-billed cuckoos. In recent years, this area has been and continues to be the focus of numerous habitat restoration efforts to assist in development of riparian habitat for numerous sensitive and listed species. Although these restoration efforts have made more habitat available, the western yellow-billed cuckoo has not reoccupied these areas; consequently, habitat is not currently considered a limiting factor for the species (Dettling *et al.* 2015, pp. 6–13).

Comment 74: One commenter stated that the critical habitat designation should be expanded to protect more areas to accommodate for species shifts in habitat use due to changing environmental conditions brought about by climate change. The commenter cites one journal article to support its claims regarding climate change (Thomas and Gillingham 2015, entire).

Our Response: The study referenced by the commenter contends that conservation of a species may be assisted by preserving and protecting areas throughout and outside a species' range to make habitat available to address potential changes of habitat conditions resulting from the effects of climate change. The western yellow-billed cuckoo is a wide-ranging species and still occurs throughout its historical range from southwestern Canada down to Mexico during its breeding season. Environmental conditions within this wide north-south range vary greatly, and the effects of climate change identified for this species were found not to be a major concern due to this variability in habitat and the species' ability to seek out appropriate habitat (see Critical Habitat). Based on our conservation strategy for designating critical habitat, the extent and distribution of areas identified in the revised proposed rule and this final rule meet our requirements under the Act to designate areas essential to the conservation of the western yellow-billed cuckoo as critical habitat and will most likely incorporate any variability in environmental conditions due to the effects of climate change.

Comment 75: Numerous commenters stated that the designation of critical habitat would impact water management and disrupt water availability, distribution, and delivery operations in the range of the western yellow-billed cuckoo.

Our Response: The disruption and changes to ''natural'' river and stream processes, which help the development and regeneration of riparian vegetation, have been identified as a threat to the species. However, the majority of streams and water delivery facilities within the range of the western yellow-billed cuckoo are at least partly managed by Federal entities or would have a Federal nexus. As a result, these Federal agencies and other entities that are funded or permitted by the Federal entity have an obligation to conserve endangered or threatened species and their habitat. However, since listing of the western yellow-billed cuckoo, we have not become aware and the commenter did not provide any examples of any major changes to water availability, distribution, and delivery operations in the range of the western yellow-billed cuckoo. Our economic analysis did not identify these water management actions as incurring significant costs. As a result, water management actions are unlikely to be disrupted. To the extent agencies propose to modify their water management actions in a manner that does not appreciably diminish the value of the critical habitat as a whole for the western yellow-billed cuckoo, it is unlikely that these activities would meet the definition of destruction or adverse modification of critical habitat under the Act.

Comment 76: Numerous commenters stated that the western yellow-billed cuckoo has lost nearly 90 percent of its breeding habitat due to human activities and that the species is further threatened by water delivery and water management activities in the West. As a result, the Service should designate additional areas as critical habitat.

Our Response: In our October 3, 2014, final listing rule (79 FR 59992), and in our February 27, 2020, revised proposed designation of critical habitat (85 FR 11458), we discuss habitat loss for the species from various actions as well as the impacts associated with water delivery and management. We consider existing water management operations in place on riverine segments identified as critical habitat, unless modified subsequent to this revised proposed designation, are unlikely to have any discernible effect on the quantity, quality, or value of the PBFs of the area identified as critical habitat. That is, when evaluating the effects on critical habitat, we consider ongoing water management operations at Federal facilities within the areas identified as critical habitat are often not within the agency's discretion to modify and would be part of the baseline in any effects analysis. This is particularly true of areas upstream of reservoirs. The normal operations of filling and draw-down of reservoirs often mimic the flooding and drying events associated with intact riparian woodland habitat and river systems providing habitat for the western yellow-billed cuckoo. Therefore, we do not expect that the continuation of existing water management operations would appreciably diminish the value or quality of the habitat. As a result, we consider the amount and distribution of critical habitat we identified to be appropriate based on the conservation strategy we developed for the designation of critical habitat for the western yellow-billed cuckoo.

Comment 77: One commenter stated that the designation of critical habitat is duplicative regulation in that regulations are already in place to protect riparian habitat and waterways. The Service should not just focus on habitat in the United States, but look to other areas for conservation actions, especially in their wintering grounds in South America.

Our Response: Because the western yellow-billed cuckoo is a threatened species, we are required under the Act to designate critical habitat. According to the Act, critical habitat applies only to areas in the United States and not to areas in other countries as it applies to actions conducted, funded, or permitted by U.S. Federal entities. Although the commenter is correct that conservation actions should be taken to protect and conserve areas in the western yellow-billed cuckoo's wintering grounds, we cannot designate critical habitat in other countries.

Comment 78: One commenter claimed that additional research is needed to determine which areas should be protected and considered critical habitat for the western yellow-billed cuckoo especially in light of future habitat loss from development.

Our Response: We are required to designate critical habitat based on the best scientific and commercial data available. We have extensive information on habitat use by the species and consider our designation to be appropriate based on that information and our conservation strategy. Should new information

become available that requires revision of critical habitat, we have the authority to do so under the Act.

Comment 79: Several commenters stated that the Service relies on unfounded claims regarding habitat loss and is not in compliance with its requirements to use the best science available in making critical habitat determinations. Several other commenters state that the threats from livestock from overgrazing are unfounded based on existing range management practices. They specified that the designation of critical habitat is expected to place a significant economic burden on livestock grazing operations within the States of California, Arizona, and New Mexico. They opposed the proposed rule and requested that overgrazing be removed from the language of the rule. In addition, one commenter states that the maps showing the designation of critical habitat are difficult for landowners to determine critical habitat accurately and should determine habitat boundaries to the nearest inch.

Our Response: The loss of habitat from numerous threats is well documented throughout the range of the western yellow-billed cuckoo. One compendium identifies 480 state-of-knowledge publications about the threats facing and factors contributing to the loss of riparian habitat in the West, including the effects from agriculture, climate change, dam construction, disease, drought, nonnative species, fire, floods, flow regulation, forest harvesting, grazing, groundwater depletion, insects, mining, recreation, roads, water diversions, urbanization, and water quality (Poff *et al.* 2012, entire). We did not include all the references cited in this publication in our proposed rule for critical habitat, as the focus of designating critical habitat is not threat identification or loss but determining areas essential to or for the conservation of a threatened or endangered species.

Our intent of identifying cattle grazing in the 2020 revised proposed rule was not to imply that all cattle grazing activities are detrimental to habitat for the western yellow-billed cuckoo; on the contrary, we mentioned cattle grazing to identify areas where proper grazing operations have been implemented to either coexist or enhance habitat conditions. We have clarified the language regarding livestock grazing in this final rule. Our economic analysis of the incremental impacts of critical habitat did not identify significant costs attributed to the designation of critical habitat for livestock grazing operations throughout the designation.

Our maps in the proposed and this final designation follow certain guidelines to incorporate such maps within the **Federal Register**. Exact maps showing land ownership and details to the scale recommended by the commenter are not feasible to include in the **Federal Register**. We stated in our proposed rule and this document that additional information regarding the critical habitat can be obtained by contacting the Lead Field Offices for the designation.

Comment 80: One group raised several concerns regarding the designation. The commenter claims that the Service does not adequately identify its rationale for determining and justifying whether areas are occupied by the western yellow-billed cuckoo and as a result fails to justify designating unoccupied areas. The commenter states that the Service also needs to further justify its conservation strategy by explaining how it comports with the statutory and regulatory procedures of the Act. They further state that the Service underestimates economic costs by limiting the costs to ''administrative'' costs, and lastly the textual exclusions should be expanded beyond ''manmade structures'' by revising our definition of aqueducts to include ditches, canals, and related structures and include maintenance and vegetation removal in right-of-ways.

Our Response: We consider the areas selected as critical habitat to be occupied based on survey records, State Heritage occurrence data, surveys, published documents, and information received during the public comment periods. In our selection of breeding areas, we used this information and selected those areas that showed recent and consistent occupation as a breeding site or assumed breeding based on timing and behavior. One of our purposes of revising the 2014 proposal was to focus on those areas that documented this information and not to designate areas that have sporadic or low breeding numbers. Because we appropriately document and justify the areas as being occupied, we do not inappropriately negate our obligation to discuss unoccupied critical habitat. See *Selection Criteria and Methodology Used to Determine Critical Habitat* for a discussion of our rationale for determining critical habitat.

In determining critical habitat, as described in our 2020 revised proposed and in this final rule, we developed a conservation strategy to identify those areas essential to the conservation of the western yellow-billed cuckoo as defined under section 3(5)(A)(i) of the Act. Because one or more of the physical or biological features identified for the western yellow-billed cuckoo occur throughout most areas occupied by the DPS, we used the conservation strategy to assist us in determining those areas that are essential to the conservation of the species.

Our economic analysis appropriately considers those incremental effects of the designation of critical habitat and applies costs to the incremental actions and not additional costs for actions in unoccupied habitat. As stated above, because we consider the areas occupied, the majority of costs associated with the designation are incremental to costs to Federal agencies for actions they conduct, fund, or permit that may affect the species. With the addition of critical habitat, Federal agencies will now also analyze whether their actions within the critical habitat boundaries result in adverse modification or destruction of designated critical habitat, and we consider those costs to be administrative in extent.

In regard to expanding our textual exclusion descriptions, our descriptions are adequate and the list of manmade features are merely examples of the types of features that do not constitute critical habitat within the designated areas. The commenter should focus on whether the feature is manmade and hardened such that any physical or biological features would not be present. In response to vegetation clearing from right-of-ways see our response to Comments 7 and 56 above.

Comment 81: One commenter claims that the Service is reversing its longstanding view that western yellow-billed cuckoo habitat comprises riparian woodlands along large streams and that it needs large areas for breeding. This change to the Service's identification of habitat and use by the species greatly increases the habitat available for the western yellow-billed cuckoo. The commenter estimates that over 65 million ac (26 million ha) of habitat are available for use by the species based on the Service's description and on eBird record information (Cornell Lab of Ornithology 2020, entire). The commenter then concludes that the Service needs to reevaluate the species' listing status as threatened because it did not consider this habitat use and availability in its 2014 listing determination.

Our Response: Our identification of habitat follows our requirements to specifically identify the areas containing the physical or biological features (PBFs) essential to the conservation of the species. After publication of the

2014 proposed critical habitat, we received comments that our description of the primary constituent elements (now referred to as PBFs) were not descriptive enough and did not characterize habitat specifically for the western yellow-billed cuckoo. In response to those comments, we revised the description of the PBFs to better describe the habitat used by the species so that Federal action agencies and the public could more easily identify such areas. Except for areas identified as critical habitat associated with monsoon influenced habitat in southern Arizona, we have not significantly changed the areas considered as breeding areas used by the western yellow-billed cuckoo. We have completed our status review of the western yellow-billed cuckoo, which includes an evaluation of the additional habitat used by the species and found that delisting was not warranted (85 FR 57816).

Comment 82: One commenter expressed concern for designating critical habitat in areas where the species has not been recently documented.

Our Response: We used the most current information available to determine occupancy of areas we are designating as critical habitat. The information we used included State natural heritage data, survey information, section 10 permit reports as well as online public occurrence information (Cornell Lab of Ornithology 2020, entire). We solicited for and received additional occupancy information during our public comment periods. A part of our selection criteria was to not identify areas with older or limited detection information so that we could focus the critical habitat designation on areas with relatively large numbers and consistent occupation within the timeframe we chose to determine occupancy (see *Selection Criteria and Methodology Used to Determine Critical Habitat*).

Comment 83: Multiple commenters were in favor of conservation efforts to protect the western yellow-billed cuckoo. However, one commenter expressed concern that critical habitat designation would burden State regulatory agencies and restrict conservation activities on private lands.

Our Response: We are statutorily required to designate critical habitat for a federally listed species if it is determined to be both prudent and determinable. We made a determination that critical habitat was both prudent and determinable in our proposed and revised proposed critical habitat rules (79 FR 48548 and 85 FR 11458, respectively). The designation of critical habitat does not specifically restrict activities on private lands unless those activities require Federal approval or are federally funded. Some third party entities (*e.g.,* State or County governments) may require additional regulatory reviews and other requirements as a result of the area's inclusion as critical habitat, but those additional reviews are not a requirement under the Act. We welcome the implementation of conservation measures that would benefit the western yellow-billed cuckoo and its habitat as long as those activities take into account impacts to the species either through section 7 or section 10 of the Act.

Comment 84: Several local government entities raised concern that designation of critical habitat in Colorado (Units 68 and 69) could have severe economic impacts to areas of significant agricultural production in Colorado that rely on continued operation of irrigation facilities.

Our Response: Our economic analysis did not find that there would be significant economic impacts to agriculture from the designation of critical habitat. This includes impacts to third party entities such as local governments or private landowner activities. The majority of impacts to agricultural stakeholders are associated with listing of the species as threatened under the Act and remain unchanged by this designation.

Comment 85: Several commenters stated that Unit 68 should not be designated as critical habitat because designation could delay and derail restoration activities and construction of the recreational Riverfront Trail, and inhibit management of local riverfront parks.

Our Response: We fully support riparian restoration activities such as tamarisk removal and willow or cottonwood plantings, which benefit the public as well as listed and non-listed native species. The designation of critical habitat in Unit 68 would not prevent further restoration activities along the Colorado riverfront area; rather, it could help support continued restoration actions and potential additional funding. Additionally, since the time of initial proposed critical habitat in 2014 (79 FR 48548), much of the Riverfront Trail and associated development has already been completed. We understand the perception that there could be economic and recreation opportunities affected by the designation. For Federal projects in the area, consultation with the Service is already required because it is within the known range of the species. Designating critical habitat in the area does not change that; it just ensures that Federal projects do not cause adverse modification to western yellow-billed cuckoo habitat. Although there is further development planned for the riverfront area, most of these actions are not in conflict with designation of critical habitat because the areas being developed in the area do not provide the physical and biological features needed for western yellow-billed cuckoo and are not critical habitat by definition.

Comment 86: Several commenters in Colorado requested more public outreach and information regarding the designation and potential economic impacts of critical habitat.

Our Response: For the proposed and revised proposed designation, we noticed and provided public outreach directly and indirectly to city and local entities. In conducting outreach, we strove to engage the public through multiple traditional and social media outlets. The 2020 economic analysis found that most economic impacts from critical habitat designation are due to perceived increases in Federal regulation, especially on property values, rather than actual regulations. To this extent, our Grand Junction Ecological Services Field Office is available to meet to clarify the implications of critical habitat designation.

Comment 87: One group requested elimination of all proposed critical habitat within Delta County, Colorado.

Our Response: We have considered and applied the best scientific and commercial information available regarding the designation of critical habitat for the western yellow-billed cuckoo. Due to the continued occupancy and breeding of western yellow-billed cuckoo in the North Fork of the Gunnison River and alignment of the area with our conservation strategy, we consider the areas identified as critical habitat to be appropriate and essential to the conservation of the species. In regard to the commenter's request to exclude areas from the critical habitat designation, the commenters provided no specific information or reasoned rationale as described in our preamble discussion in our Policy on Exclusions (81 FR 7226) and as requested in our revised proposed rule designating critical habitat for the western yellow-billed cuckoo (85 FR 11502) to support requests for exclusion. For the Service to evaluate an exclusion request, the commenter must provide supporting information concerning how their activities would be limited or curtailed by the designation. Therefore, we did not

exclude any areas in Delta County, Colorado.

Comment 88: A commenter expressed concern that critical habitat would affect 9 outfall locations in natural drainages, 19 open (un-piped) and 3 piped historical outfalls to the Colorado River, as well as municipal drainage facilities. The risk of flooding increases if they are not able to clear drainages.

Our Response: Designation of critical habitat would only affect actions funded or permitted through a Federal nexus. In such circumstance, the Federal agency would need to consult with the Service and conduct an adverse modification analysis if the proposed action would impact designated critical habitat. Federal agencies are already required to consult with the Service if their actions would affect the species.

Comment 89: One group commented that critical habitat should also be designated on the Gunnison River, south of Delta, Colorado; along the Colorado River through McInnis Canyon National Conservation Area to the Utah State line; side drainages as well as main rivers; and areas that could become habitat in the future if managed better. Similarly, another commenter stated that areas on Plateau Creek between Collbran and Plateau Valley, and areas in Hotchkiss and Paonia that require restoration should be included in the designation.

Our Response: Although western yellow-billed cuckoo may migrate through the habitat in areas along the Gunnison River and the Colorado River west of Grand Junction, we focused our critical habitat designation on areas occupied at the time of listing that provide the patch sizes generally preferred by western yellow-billed cuckoo for breeding, and avoided selection of small and isolated riparian areas (85 FR 11464). We identified critical habitat in areas that are currently used for breeding and contain the PBFs essential to the conservation of the species. We have determined that these areas are sufficient and meet our requirements of designating critical habitat for the species and did not look at areas that didn't meet our breeding criteria or needed restoration and were unoccupied such as those identified by the commenters.

Comment 90: Mesa County, Colorado, commented that the economic analysis is not specific to Mesa County and the Grand Valley and is concerned over restricted land use, especially in Palisade where there are many vineyards and orchards.

Our Response: The draft economic analysis describes the estimation of economic impacts from designating critical habitat. The analysis describes the primary cost associated with designating critical habitat from additional analysis in section 7 consultation for effects to critical habitat and adverse modification. The rangewide administrative burden resulting from the designation was found to be not significant and no single area identified as critical habitat was found to have disproportionate cost requiring additional analysis. Orchards and vineyards do not contain the physical or biological features essential to the conservation of the species and are therefore not considered critical habitat, even if those areas are within the critical habitat boundary.

Comment 91: Commenters recommended that critical habitat be designated in southeastern Colorado on the Upper Rio Grande and Conejos Rivers because the San Luis Valley Habitat Conservation Plan seems more protective of southwestern willow flycatcher and yellow-billed cuckoo critical habitat should be designated independent of any other species' critical habitat.

Our Response: We revised critical habitat units for the 2020 revised proposed rule in accordance with the conservation strategy described within the document. In addition to the protections to western yellow-billed cuckoo from the HCP, the previously proposed units did not meet the conditions of our conservation strategy to designate critical habitat, because the number of breeding pairs was low or because breeding was intermittent.

Comment 92: Multiple commenters recommended that the Service designate critical habitat in unoccupied areas to allow expansion of the current occupied range.

Our Response: We have considered and applied the best scientific and commercial information available regarding designation of critical habitat for the western yellow-billed cuckoo. We have determined that we can better conserve the species by focusing on occupied breeding areas that have been and are consistently used by the species. As a result we developed a conservation strategy that identified certain areas throughout the species range. The extent and distribution of these areas along main-stem rivers throughout the species' breeding range and the migratory behavior of the western yellow-billed cuckoo allows these areas to naturally be used as pathways and stop-over habitat. As a result, the designation of unoccupied areas is not necessary or justified.

Comment 93: Two commenters requested that proposed exclusions in Units 68 and 69 be avoided pending verification of appropriate management plans for those areas.

Our Response: In our proposed and this final rule, we did not identify or exclude areas from Unit 69 (CO–2) because no information was provided to support their request for conducting an analysis. We have considered the management plans for Colorado State lands in Unit 68 and find that the benefits of excluding these areas outweigh the benefits of designation of critical habitat in these areas and that the exclusion will not lead to the extinction of the species. As a result, we have excluded certain areas from Unit 68 from the final designation. See Exclusions, *Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General.*

Comment 94: In 2014, one commenter stated that there is not enough information about proposed critical habitat sites in Colorado (previously identified as Units 54 and Units 57–60) to exclude or include them in critical habitat and that the Service did not fully consider a peer-reviewer's recommendations of three additional sites to consider: Collbran/Plateau City (Plateau Creek in Mesa County), sections of the La Plata River (La Plata County, Colorado), and sections of the Piedra River (La Plata County, Colorado), where birds have been detected on private property during the breeding season but suitable habitat is dependent on irrigation ditches for water.

Our Response: We revised critical habitat units for the 2020 revised proposed rule in accordance with the conservation strategy described within the document. We have considered and applied the best available scientific and commercial information regarding habitat for the western yellow-billed cuckoo, including all peer-reviewed and public comments. We reviewed all areas identified by the commenter as to whether they met our goals identified in our conservation strategy and criteria for designation. We have determined that the additional areas identified by the peer reviewer did not meet our designation criteria due to lack of breeding information and suitable habitat requiring additional management.

Comment 95: One organization requested the Service provide details on the ''other'' category of Table 1 (85 FR 11477–11478) for Units 68 and 69 in Colorado.

Our Response: The ''other'' category contains all property owned by counties, cities, private landowners, or

unknown ownership. Table 1 has been updated with new parcel information for Unit 68 with 2,766 total ac (1,119 ha) in the ''other'' category. This includes approximately 500 ac (202 ha) owned by cities, 106 ac (43 ha) owned by Mesa County, approximately 14 ac (6 ha) owned by a nongovernmental organization, 1,302 ac (527 ha) privately owned, and 844 ac (342 ha) with unknown ownership. Unit 69 has not been changed, and ownership is also identified in Table 1. The implications of critical habitat designation on lands in the ''other'' category do not differ amongst each other, as effects to critical habitat would need to be considered only in the case of a Federal nexus.

Comment 96: One commenter stated that the Service should consider the economic benefits of wildlife and bird watching and recreation in riparian habitats.

Our Response: In our economic analysis, data limitations prevented us from quantifying such additional economic benefits. Quantification of these benefits would require primary research and the generation of substantial amounts of new data, which is beyond the scope of our analysis and Executive Order 12866. Although the information regarding economic benefits is important, we cannot determine those benefits at this time.

Comment 97: The group commented on Unit 67 (ID–3) of the revised proposed rule and suggested revisions to the unit description and recommended deleting several threats regarding water delivery and hydrologic functioning identified in Table 2 (Threats to Habitat and Potential Special Management Considerations). The commenter stated that water management actions and existing hydrology are sufficient to support the critical habitat designation on the Henry's Fork River and South Fork of the Snake River. The Henry's Fork Foundation provided information regarding a hydrologic study being conducted by Utah State University through funding from a partnership of several Federal, State, and other stakeholders of existing water management in the Snake River basin to support its request.

Our Response: As a result of comments, we revised the unit description for Unit 67. In the *Application of the ''Adverse Modification'' Standard* section, we address existing water management operations in place on riverine segments identified as critical habitat, unless modified subsequent to this revised designation, and state that these operations are unlikely to have any discernible effect on the quantity, quality, or value of the PBFs of the area identified as critical habitat for the western yellow-billed cuckoo since these areas support western yellow-billed cuckoo habitat and breeding with the existing management in place. That is, when evaluating the effects on critical habitat, we consider ongoing water management operations within the designated units that are not within the agencies' discretion to modify to be part of the baseline of an effects analysis. Reclamation is mandated through the Flood Control Act of 1944 [16 U.S.C. 460d (and various sections of titles 33 and 43 U.S. Code)] to manage water operations on the South Fork and the Henry's Fork of the Snake River. Therefore, the management and flows of the South Fork and the Henrys Fork of the Snake River are not expected to be impacted by the designation of critical habitat. As a result, we have revised the actions that may require special management considerations from Table 2 of this final rule.

Comment 98: Several commenters recommended in 2014 and 2020 that the Service extend Unit 67 (ID–3) to include additional areas upstream of the unit and to add more cottonwood forest lands managed by the BLM and the USFS along the Henry's Fork and South Fork of the Snake River upstream to Palisades Dam. Further, the commenter suggested including the USFS and BLM island complex of habitat in Swan Valley, Idaho, where western yellow-billed cuckoos were detected by Idaho Department of Fish and Game survey crews in 2011. One of the commenters suggested including the Boise River from eastern Boise to the Snake River.

Our Response: We reviewed the information regarding western yellow-billed cuckoo occurrence and habitat upstream of the area described in our 2014 proposed critical habitat and revised Unit 67 (ID–3) as described in our 2020 revised proposed critical habitat designation to include the additional areas as requested.

The Swan Valley locations recommended for inclusion constitute habitat supportive of the western yellow-billed cuckoo; however, they are isolated from other areas of habitat, and the observation record indicates it is only sporadically occupied. The Boise River is considered to be periodically used by western yellow-billed cuckoo as stop-over habitat, but also does not have consistent use associated with breeding individuals of the species. As a result, we did not consider critical habitat in these areas based on our Conservation Strategy and criteria for designating critical habitat.

Comment 99: One group stated that the western yellow-billed cuckoo appear only sporadically in Idaho and do not currently exist there. They state that the species has not suffered from loss of habitat and that the designation of critical habitat will not increase western yellow-billed cuckoo populations. They further state that the Service has not considered the negative impact on the economy and that the designation of critical habitat will be extremely detrimental to private and locally owned property.

Our Response: The current range of the western yellow-billed cuckoo includes portions of or the entire States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Texas, Utah, and Washington as well as into southwestern British Columbia, Canada. However, the breeding range for the species has contracted with a northern extent in southeastern Idaho. Western yellow-billed cuckoos consistently use habitat along the South Fork Snake River, Henry's Fork Snake River, and the mainstem Snake River (Reynolds and Hinckley 2005; IDFG 2013). As identified in our final listing rule, one of the reasons for decline of the breeding range for the species has been habitat loss. We are required to designate critical habitat for threatened and endangered species under the Act. Several benefits of critical habitat are that it requires Federal agencies to consult with the Service to avoid destruction or adverse modification of critical habitat and identifies areas to focus conservation. Increasing populations may or may not be an outcome of a designation of critical habitat, but are not a requirement for designation.

The designation of critical habitat does not authorize the Service to regulate private actions on private lands or to confiscate private property as a result of a critical habitat designation. Designation of critical habitat does not affect land ownership or establish any closures or restrictions on use of or access to the designated areas. Critical habitat designation also does not establish specific land management standards or prescriptions, although Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. We conducted an economic analysis on the revised proposed critical habitat designation. The economic analysis took into consideration the incremental economic impacts above those associated with listing of the species as threatened under the Act. Because the species is listed, private and local land-owners

would still be subject to section 7 (if their actions require Federal funding or permitting) and section 10 under the Act. Our economic analysis did take into consideration ''third party'' requirements that may be implemented by local (State, county, or city entities) as a result of the designation; however, the analysis did not identify these requirements as significant enough to be identified as requiring additional review or require the areas to be excluded under section 4(b)(2) for economic reasons.

Comment 100: One group stated that neither current land management practices nor regulatory processes are in place to account for the decline of habitat through the reduction of understory vegetation from grazing and water management practices. The commenter contends that the Service should recognize that understory vegetation is equally important as overstory vegetation to suitable western yellow-billed cuckoo habitat. The group recommended: (1) Improving management of livestock; (2) listing western yellow-billed cuckoo as endangered; (3) prohibiting pesticide use in critical habitat units or extremely careful management; (4) including designated critical habitat units farther upstream and downstream of the proposed units; (5) including tributaries with the basic habitat needs; (6) working with all willing property owners to restore habitat to be more continuous; and (7) designating unoccupied areas that are strategically located along migratory pathways to the units.

Our Response: In listing the western yellow-billed cuckoo under the Act, we took into consideration land management and regulatory processes that are already in place and that may protect its status, and we determined that the species may become endangered in the foreseeable future as a threatened species without measure to alleviate the species' threats. In our revised proposed rule, we identified both overstory and understory habitat structure and components as physical or biological features for the species. We based our designation on our conservation strategy and developed specific designation criteria to identify those areas essential to the conservation of the species as critical habitat. The extent of the units and whether to identify unoccupied units were part of our analysis in considering which areas meet the definition of essential for the western yellow-billed cuckoo. The amount and extent of the designation and limitation to occupied breeding areas are appropriate and supported by our rationale for determining critical habitat for the species (see Criteria Used To Identify Critical Habitat (*Conservation Strategy*).

Comment 101: One private company commented that while it recognizes that consultation would be required if a transmission line was rebuilt, ongoing operations and maintenance of preexisting lines (rights-of-way areas) should be included in the baseline analysis. The company requested that American Falls Reservoir not be subject to consultation requirements, because the reservoir has been in operation since 1927 and the effects of the action are ongoing.

Our Response: Rights-of-way are agreements that impose a status on the use of lands rather than describing the condition of the land as humanmade structures. Because actions taking place within rights-of-way areas may impact the habitat conditions for the western yellow-billed cuckoo, consultation with the Service may be required. In the *Application of the ''Adverse Modification'' Standard* section, we address that existing water management operations in place on riverine segments identified as critical habitat, unless modified subsequent to this revised designation, are unlikely to have any discernible effect on the quantity, quality, or value of the PBFs of the area identified as critical habitat. That is, when evaluating the effects on critical habitat, the Service considers mandated water management operations within the designated units that are not within the agencies' discretion to modify to be part of the baseline. See also our response to Comments 7 and 56 regarding rights-of-way.

Comment 102: One commenter stated in 2014 that the Service appears to be acting on insufficient knowledge of which areas within Unit 52 (now Unit 37: NM–6A and NM–6B) are occupied by the western yellow-billed cuckoo, and proposes that further studies are necessary to determine which specific sites are appropriate for designation according to the comparative benefits criteria spelled out for determining exclusion under section 4(b)(2) of the Act.

Our Response: Since 2014, formal protocol surveys have been completed in the area of this Unit that is now designated as critical habitat and further support our previous conclusion that the area supports the occupancy of western yellow-billed cuckoos by the criteria specified in the *Selection Criteria and Methodology Used to Determine Critical Habitat* section of the 2020 revised proposed rule (85 FR 11458) and this final designation.

Comment 103: In 2014 and 2020, one commenter requested exclusion of the U-Bar Ranch in New Mexico based on the commenter's Management Plan, which provides conservation to the western yellow-billed cuckoo and its habitat.

Our Response: The Service commends the longstanding monitoring and restoration efforts specifically along the U-Bar Ranch that have been undertaken by the landowner. We have conducted an exclusion analysis and have excluded U-Bar Ranch lands from this final designation. See Exclusions *Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General.*

Comment 104: One commenter expressed its support for efficient Federal water and power projects and would like the Service to further clarify the riparian areas that were included or combined into a single larger critical habitat unit (as described in 85 FR 11465). The commenter also commented that the commenter would like existing and future power lines within western yellow-billed cuckoo critical habitat to be excluded from the final critical habitat designation.

Our Response: As described in our revised proposed rule (85 FR 11465), the areas of habitat that were included or combined into a single larger unit depended on the extent of use of the areas by western yellow-billed cuckoo, the relative amount of habitat gained if the multiple patches were included or combined, the relationship of the area to the overall designation, and the ease or complexity of removing all nonhabitat from the designation. Also western yellow-billed cuckoo habitat in ideal conditions is dynamic and requires areas for regrowth. By including some open areas, we take into consideration this opportunity for natural regrowth of habitat. The suitability of individual patches within a unit may vary over time as far as abundance of occupancy or amount of PBFs present and would need to be evaluated on a case-by-case basis and would adjust over time.

In the event that powerline construction and/or maintenance result in adverse effects to the species and/or critical habitat, consultation with the Service is expected to occur to provide exemptions to the prohibitions of section 9 in the Act. As noted above, our Policy on Exclusions outlines the procedures we follow for considering and conducting exclusions (81 FR 7226). In this case, the commenter provided general statements of its desire for rights-of-way to be excluded but did not provide any additional information or a reasoned rationale that would

support the request for exclusion. In addition, any hardened structures (such as buildings, aqueducts, runways, roads, bridges, and other paved or hardened areas as a result of development) and the land on which they are located is not considered to be critical habitat. Accordingly, the transmission towers are already not part of the designation. However, the rights-of-way associated with the power transmission lines may contain vegetation and habitat containing the physical or biological features essential to the conservation of the western yellow-billed cuckoo. Because no additional information was provided to support the request for exclusion, these areas are not excluded from the designation.

Comment 105: Several commenters stated that there are already conservation plans and strategies as well as habitat protections for other federally listed species overlapping with the revised proposed critical habitat unit(s). In addition, they state that critical habitat is already designated for other species (such as the southwestern willow flycatcher) that fundamentally have the same habitat requirements (PBFs) as the western yellow-billed cuckoo. Therefore, in the view of these commenters, designation of critical habitat for the western yellow-billed cuckoo is redundant and not necessary.

Our Response: As part of the listing process, we are required to designate critical habitat for species listed as threatened or endangered under the Act. Although conservation measures may be implemented for other species and designated critical habitat for multiple species may overlap, each species' critical habitat and conservation requirements can be different. Critical habitat comprises specific areas occupied by that species and contains the physical or biological features that are essential to the conservation of that species. The focus of this designation is to identify and conserve the unique habitat features of the western yellow-billed cuckoo. While additional conservation plans and strategies for other federally listed species may provide benefits to western yellow-billed cuckoo and its habitat, we base our critical habitat designations on what is uniquely necessary for the western yellow-billed cuckoo and its specific habitat requirements. In addition, if the other species protected by any preexisting conservation programs were to be delisted, this could eliminate protections for the western yellow-billed cuckoo and its habitat. In some cases, such as with the western yellow-billed cuckoo and southwestern willow flycatcher, the areas used by the two species are the same and management and conservation of those areas would benefit both species. However, the ecological niche and certain physical or biological features needed by the two species are different such as habitat patch size and nest site selection. In addition, the range of the southwestern willow flycatcher does not include the entire breeding range of the western yellow-billed cuckoo. As a result, if we relied only on critical habitat for the southwestern willow flycatcher to provide protection for the western yellow-billed cuckoo, large areas of the species' breeding range would not be designated.

Comment 106: Several commenters stated that the proposed critical habitat includes unsuitable, unoccupied habitat, and thus should not be included in our final critical habitat designation.

Our Response: We based our designation on the best scientific and commercial information available including information on occupancy and use of areas we are considering as critical habitat. This included gathering, reviewing, and evaluating information from multiple sources including information from State wildlife agencies, State Natural Heritage databases, Cornell Lab of Ornithology (eBird data), researchers, nongovernment organizations, universities, and consultants, as well as information from our files. During our process for proposing and finalizing this designation of critical habitat, we used a systematic approach to assess potential critical habitat throughout the designation that included an analysis of habitat that contained the physical or biological features that are essential to the conservation of the species.

Comment 107: Multiple commenters stated that oil and gas development will be negatively impacted by designating critical habitat. One commenter stated that the economic analysis fails to consider impacts to oil and gas development.

Our Response: Under section 4(b)(2) of the Act, economic and social impacts are considered in the process for designating critical habitat for species listed under the Act. Our economic analysis did not find that oil and gas development would be significantly impacted by the designation of critical habitat. Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) takes into account effects to oil and gas development that could potentially result from designating critical habitat. We do not expect that a critical habitat designation for the western yellow-billed cuckoo would significantly affect energy supplies, distribution, or use, because the areas identified as critical habitat are along riparian corridors in mostly remote areas with little energy supplies, distribution, or infrastructure. In areas where the western yellow-billed cuckoo is present, Federal agencies are required to consult with our agency under section 7 of the ESA on activities they fund, permit, or implement, which may affect the species. Section 7(a)(1) of the ESA charges Federal agencies to aid in the conservation of listed species, and section 7(a)(2) requires the agencies to ensure that their activities are not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitats. In our economic analysis, we identified oil and gas development as an activity and considered the impact of critical habitat on those activities. Because section 7 consultation is already required for Federal projects that could impact western yellow-billed cuckoo, the additional process necessary to avoid the destruction or adverse modification of critical habitat would be a minor additional step in the existing consultation process. Therefore, economic impacts to oil and gas development would be minimal as a result of this critical habitat designation.

Comment 108: A commenter stated that western yellow-billed cuckoo surveys are incomplete and that some areas that should have been included in our proposed critical habitat designation were incorrectly excluded.

Our Response: The Service is required to use the best scientific or commercial information available in determining critical habitat. We accomplish this by gathering, reviewing, and evaluating information from multiple sources prior to designating critical habitat. Information, including surveys, used for the western yellow-billed cuckoo critical habitat analysis was obtained from reports prepared by several entities including the U.S. Geological Survey (USGS), USFS, NPS, BLM, Reclamation, State wildlife agencies, State Natural Heritage databases, Cornell Lab of Ornithology (eBird data), researchers, nongovernmental organizations, universities, and consultants, as well as information from our files. Because we listed the species as threatened in 2014, we used information up to that point in determining occupancy for determining whether the areas considered as critical habitat would fall under section 3(5)(A)(i) as being occupied at the time of listing or section 3(5)(A)(ii) as being occupied after the time of listing. We also reviewed records subsequent to listing (2015–2019) to confirm

occupancy of the areas being designated.

Comment 109: A commenter stated that the Service is considering designating western yellow-billed cuckoo critical habitat in every place where the species occurs, instead of limiting it to just the locations that are necessary for recovery.

Our Response: We are not designating critical habitat in every place where the species occurs. Part of our conservation strategy and criteria for designating critical habitat for the western yellow-billed cuckoo were intended to focus the designation on breeding areas larger than 200 ac (81 ha) in extent. The western yellow-billed cuckoo still occurs in areas throughout its historical range from Texas to south-western British Columbia, Canada. We did not designate critical habitat in Nevada, Oregon, or Washington or in other areas in States where, although there is confirmed breeding, the areas are not part of our conservation strategy.

Comment 110: A commenter stated that alternate survey methods should have been used to identify occupied and suitable habitat for the western yellow-billed cuckoo.

Our Response: We recognize that due to the reclusive nature of the western yellow-billed cuckoo, the remoteness of some areas it occupies, the difficulty in conducting surveys, and inconsistent survey methodology, the majority of the species' range has not been surveyed on a regular basis or may not have comparable survey data to give an absolute determination of population distribution and occupancy. However, despite these survey challenges, key areas throughout the western DPS have been surveyed more consistently and give some indication of persistence and site fidelity. Therefore, we based our analysis of occupancy on detection records starting in 1998 and ending in 2014, when we listed the western yellow-billed cuckoo as a threatened species. The 1998 to 2014 timeframe was chosen because it includes the last statewide western yellow-billed cuckoo surveys in areas where the majority of individuals within the DPS's range occurs and represents the best available information on long-term occupancy. For the 2020 revised proposed rule, we proposed additional units we consider to have been occupied at the time of listing using new data received through the 2017 breeding season. To further support designation of these units, we used additional occupancy or nesting data up until the 2020 breeding season.

Comment 111: A commenter stated that HCPs should not be used to exclude areas from critical habitat designation for the western yellow-billed cuckoo.

Our Response: HCPs are typically required as part of an application for an incidental take permit through section 10 of the Act for actions that would occur on private lands and would impact federally listed species. We conduct internal section 7 consultation on issuance of the incidental take permit under section 10. These plans must include how impacts would be minimized or mitigated to the maximum extent practicable, and therefore provide a level of protection for listed species. In excluding HCPs, we conduct a balancing analysis and compare the benefits of excluding areas verses the benefits of including areas as critical habitat. For exclusions under section 4(b)(2) of the Act, the Secretary has broad discretion on excluding areas from critical habitat. See Exclusions *Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act* for a discussion of the HCPs being excluded and the balancing analysis as well as our rationale for exclusions.

Comment 112: One commenter stated that we should exclude areas that are managed by Federal agencies from critical habitat designation for western yellow-billed cuckoo.

Our Response: Federal agencies are required to conserve endangered and threatened species and utilize their authorities to further the purposes of the Act. Critical habitat is a mechanism under the Act that requires that actions that Federal agencies conduct, permit, or fund not adversely modify the areas identified as critical habitat for an endangered or threatened species. As a result, Federal agencies are in a position to uniquely contribute to sensitive species management and conservation. Wholesale exclusion of Federal lands or areas managed by Federal agencies would remove the intended conservation components intended under the Act. However, under section 4(b)(2) of the Act, the Secretary may exclude Federal lands in certain circumstances from designation if the benefits of exclusion outweigh the benefits of inclusion and exclusion will not lead to the species extinction. As noted above, consideration of possible exclusions from critical habitat are in the Service's discretion, but we have indicated that a proponent should provide information or a reasoned rationale (81 FR 7226) and we specifically solicited such information in our revised proposed designation of critical habitat for the western yellow-billed cuckoo (85 FR at 11502) In this case, the commenter has not provided information to support the requested exclusion. Although we have excluded some Federal lands from the designation, we find that excluding all Federal lands from the designation for the western yellow-billed cuckoo is not appropriate.

Comment 113: Several commenters claim that the Service did not adequately consider economic impacts as a result of designating critical habitat for the western yellow-billed cuckoo, and another commenter stated that agricultural operations will be negatively impacted by designating critical habitat for the western yellow-billed cuckoo.

Our Response: We developed an economic analysis of the incremental effects of designating critical habitat and made the document available, along with our analysis and findings, in connection with publishing our proposed rule and revised proposed rule (see IEc 2019 entire; IEc 2020, entire). Our analysis took into consideration those activities within the critical habitat areas. The commenter did not provide alternative information or data to suggest our economic analysis and review was insufficient but point to costs that may be part of the species' listing and not to those actions solely as a result of the designation of critical habitat.

When we mapped the boundaries for the proposed critical habitat, we avoided identifying agricultural lands within the proposed designation because these lands generally do not provide the physical or biological features that are essential to the conservation of the western yellow-billed cuckoo. In addition, any agricultural lands included within the boundary of the proposed designation would likely not be considered critical habitat because these lands do not contain the physical or biological features necessary for yellow-billed cuckoo habitat. In our evaluation of the economic impacts that may result from the proposed designation of critical habitat for the western yellow-billed cuckoo (IEc 2019, entire; IEc 2020, entire), we identified probable incremental economic impacts associated with agriculture and found that the critical habitat designation for the western yellow-billed cuckoo would not significantly affect agricultural operations.

Comment 114: Multiple commenters requested that the economic analysis follow the Tenth Circuit's requirement to adopt a ''cumulative'' or ''co-extensive'' approach to quantifying impacts.

Our Response: Because the primary purpose of the economic analysis is to facilitate the mandatory consideration of the economic impact of the designation of critical habitat, to inform the discretionary section 4(b)(2) exclusion analysis, and to determine compliance with relevant statutes and Executive orders, the economic analysis should focus on the incremental impact of the designation. The economic analysis of the designation of critical habitat for the western yellow-billed cuckoo follows this approach.

The Service acknowledges that significant debate has occurred regarding whether assessing the impact of critical habitat designations using the incremental approach is appropriate, with several courts issuing divergent opinions. Most recently, the Ninth Circuit concluded that the incremental approach is appropriate (*Home Builders Association of Northern California* v. *United States Fish and Wildlife Service,* 616 F.3d 983 (9th Cir. 2010); *Arizona Cattle Growers* v. *Salazar,* 606 F.3d 1160 (9th Cir. 2010)). Subsequently, on August 28, 2013, the Service revised its approach to conducting impact analyses for designations of critical habitat, specifying that the incremental approach should be used (78 FR 53062).

Comment 115: One commenter stated that the economic analysis for this action should not use the economic analysis for the designation of critical habitat for the southwestern willow flycatcher as the basis for its estimates. The commenter stated that the southwestern willow flycatcher analysis failed to include significant cost elements, including registration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and costs to water management and use.

Our Response: The revised screening analysis for the proposed critical habitat designation does not use the costs projected in the southwestern willow flycatcher economic analysis to inform its estimated costs. Instead, the economic analysis for the western yellow-billed cuckoo relies on the consultation history for the western yellow-billed cuckoo since its listing as a threatened species in 2014, compiled from the Service's Tracking and Integrated Logging System (TAILS) database. Reference to the southwestern willow flycatcher is made simply with regard to identifying existing baseline regulatory protections that overlap the geographic areas proposed for designation in this rulemaking.

Comment 116: Multiple commenters expressed concern that the economic analysis generally understates the direct, indirect, and induced costs; regulatory delays; and other economic effects expected to result from the designation of critical habitat.

Our Response: These comments do not identify specific data sources or assumptions used in the economic analysis that may be inaccurate. The comments also do not provide new information that could be used to revise the economic analysis. Section 3 of the economic analysis outlines the substantial baseline protections currently afforded the western yellow-billed cuckoo throughout the proposed designation. These baseline protections result from the listing of the western yellow-billed cuckoo under the Act and the presence of the species in all proposed critical habitat units, as well as overlap with habitat of other, similar listed species and designated critical habitat. As a result of these protections, the economic analysis concludes that incremental impacts associated with section 7 consultations for the western yellow-billed cuckoo are likely limited to additional administrative effort. The analysis forecasts future section 7 consultation activity based on consultations for the western yellow-billed cuckoo that have occurred since its listing in 2014. Using these historical consultation rates and applying estimated consultation costs presented in Exhibit 3 of the analysis, we expect that the additional administrative costs incurred by critical habitat designation will not exceed $74,000 in a given year.

Comment 117: Multiple commenters objected to the screening approach applied in the economic analysis. In particular, one commenter noted that the proposed critical habitat would span nine geographically diverse States, and requested that the Service consider impacts to each local economy separately rather than grouping these diverse regions into a single analysis.

Our Response: The primary purpose of the economic analysis is to facilitate the mandatory consideration of the economic impact of the designation of critical habitat, to inform the discretionary section 4(b)(2) exclusion analysis, and to determine compliance with relevant statutes and Executive orders. To support these considerations, the economic analysis estimates costs at the level of individual critical habitat units (see Exhibit A–2). The magnitude of anticipated incremental section 7 costs, based on historical consultation data for the western yellow-billed cuckoo following its listing in 2014, is unlikely to exceed $74,000 in a given year. These costs are likely to be small relative to the economies of the communities, and the majority of these costs are borne by the Service and Federal action agencies.

Comment 118: One commenter expressed concern about the assumption used in the economic analysis that incremental effects will be minimal in areas currently protected for the endangered southwestern willow flycatcher. The commenter noted that, if the southwestern willow flycatcher recovers before the western yellow-billed cuckoo, those protections would disappear. For this reason, the commenter requested that the Service not exclude areas from the final designation of critical habitat for the western yellow-billed cuckoo based on the presence of protections for the southwestern willow flycatcher.

Our Response: Section 3 of the economic analysis describes several baseline protections afforded the western yellow-billed cuckoo in support of the conclusion that incremental costs associated with section 7 consultations are likely limited to administrative costs. Of these baseline protections, the primary protection is the concurrent listing of the western yellow-billed cuckoo under the Act. Because all proposed critical habitat units for the western yellow-billed cuckoo are considered occupied by the species, all projects with a Federal nexus will be subject to section 7 requirements regardless of whether critical habitat is designated. In addition, we expect that, except in cases that cannot be predicted at this time, project modifications recommended to avoid adverse modification of western yellow-billed cuckoo habitat will be the same as those needed to avoid jeopardy to the species. As a result, the section 7-related costs of designating critical habitat for the western yellow-billed cuckoo are likely to be limited to additional administrative effort to consider adverse modification in consultation. This conclusion would not change if the protections currently afforded the southwestern willow flycatcher were removed due to recovery of the southwestern willow flycatcher. Although the specific habitat characteristics and ecological niche occupied by the southwestern willow flycatcher and western yellow-billed cuckoo are different, implementing conservation actions in the areas where they co-occur can be managed together. Numerous plans are in place for the southwestern willow flycatcher because of its earlier listing (1995) compared with the listing of the western yellow-billed cuckoo (2014). We have been working with entities with southwestern willow flycatcher management plans to update their plans to specifically

include the western yellow-billed cuckoo. Should the southwestern willow flycatcher be delisted, we are certain that individuals with southwestern willow flycatcher management plans would continue to provide conservation for the western yellow-billed cuckoo and excluding these areas would most likely further incentivize these efforts.

Comment 119: One commenter questioned the per-consultation incremental administrative costs used in the economic analysis. The commenter suggested that the economic analysis determine administrative costs on a project-by-project basis.

Our Response: The economic analysis relies on the best available information on administrative costs. The costs presented in Exhibit 3 of the economic analysis were developed based on data gathered from three Service field offices (including a review of consultation records and interviews with field office staff); telephone interviews with action agency staff (*e.g.,* BLM, USFS, Corps); and telephone interviews with private consultants who perform work in support of permittees. In the case of Service and Federal agency contacts, we determined the typical level of effort required to complete several different types of consultations (*i.e.,* hours or days of time), as well as the typical Government Service (GS) level of the staff member performing this work. In the case of private consultants, we interviewed representatives of consulting firms to determine the typical cost charged to clients for these efforts (*e.g.,* biological survey, preparation of materials to support a Biological Assessment). The model is periodically updated with new information received in the course of data collection efforts supporting economic analyses and public comment on more recent critical habitat rules. In addition, the GS rates are updated annually. The economic analysis relies on this cost model because estimating incremental administrative costs on a project-by-project basis would require the collection of a significant amount of new data that is beyond the scope of the analysis.

Comment 120: One commenter cited a 2003 article by Dr. David Sunding estimating that total economic losses from critical habitat designations could reach $1 million per acre of habitat conserved.

Our Response: This impact estimate comes from a stylized example, using a hypothetical scenario, included in the article to demonstrate the types of costs that might result from critical habitat designations. The example assumes a 1,000-unit housing development is planned and that critical habitat requires land set-asides, reducing the total number of homes that can be built to 900. It uses hypothetical data about the value of those homes and resulting changes in prices to estimate impacts. Aside from the fact that this example is based on stylized information, rather than actual data, the conditions of the example are not relevant to the western yellow-billed cuckoo. As described in the economic analysis, land set-asides required through section 7 consultation or as a result of the implementation of State laws are unlikely to result solely from the designation of critical habitat, given the western yellow-billed cuckoo's status as a listed species and the presence of other listed species and critical habitat designations.

Comment 121: Multiple commenters stated that a regulatory flexibility analysis is required. One commenter expressed particular concern that the proposed designation will affect operations on farms and ranches in the State of New Mexico. The commenter noted that these farms and ranches are typically run by families and are, therefore, small businesses.

Our Response: Under the Regulatory Flexibility Act, Federal agencies are required to evaluate only the potential incremental impacts of a rulemaking on directly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried by the Agency is not likely to adversely modify critical habitat. Therefore, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation; family farms and ranches are not Federal action agencies and thus are not directly regulated by this designation. Under these circumstances, it is the Service's position that only Federal action agencies will be directly regulated by this designation. Therefore, because Federal agencies are not small entities, the Service certifies that the proposed critical habitat rule will not have a significant economic impact on a substantial number of small entities (see Required Determinations).

Comment 122: One commenter stated that the economic analysis misinterprets Executive Order 12866. The commenter noted that under Executive Order 12866, a significant regulatory action is one that may ''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.'' The commenter stated that meeting either of these criteria can deem an action significant. The commenter then requests that, as a result of the magnitude of possible impacts of public perception described in the economic analysis, this rulemaking be considered a significant action.

Our Response: The revised proposed rule and this final designation was identified by the Office of Information and Regulatory Affairs (OIRA) to be a significant regulatory action (see Required Determinations). However, we have determined that the economic costs of designating critical habitat for the western yellow-billed cuckoo are likely to be limited to additional administrative effort to consider adverse modification in consultation, and are unlikely to exceed $74,000 in a given year. In addition, the analysis recognizes that the designation of critical habitat may cause developers or landowners to perceive that private lands will be subject to use restrictions or litigation from third parties, resulting in costs. Data limitations prevent the quantification of the possible incremental reduction in property values. However, data on current land values suggest that even if such costs occur, the rule is unlikely to meet the threshold for an economically significant rule, with regard to costs, under E.O. 12866. In sum, the economic analysis finds that the combined total of section 7 and possible perception-related effects is unlikely to exceed the threshold for an economically significant rulemaking, as specified by E.O. 12866.

Comment 123: One commenter stated that the Service should supply a Statement of Energy Effects due to the potential for critical habitat designation to affect permitting, operations, and maintenance of facilities such as the Hayden Power Plant, the Craig Power Plant, and other electric transmission facilities.

Our Response: Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The U.S. Office of Management and Budget (OMB) has provided guidance for implementing this Executive order that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared to not taking the

regulatory action under consideration. See OMB Memorandum 01–27, Guidance for Implementing E.O. 13211 (July 13, 2001) (M–01–27), *https://www.whitehouse.gov/wp-content/uploads/2017/11/2001-M-01-27-Guidance-for-Implementing-E.O.-13211.pdf*. These outcomes include, for example, reductions in electricity production in excess of 1 billion kilowatt-hours per year or in excess of 500 megawatts of installed capacity, or increases in the cost of energy production or distribution in excess of one percent. The economic analysis finds that the incremental costs of designating critical habitat for the western yellow-billed cuckoo are likely to be limited to additional administrative effort to consider adverse modification in consultation. Although some energy facilities, such as those identified by the commenter, are located within the vicinity of the proposed designation, the proposed critical habitat is predominantly in remote areas with little energy supply infrastructure. The types of incremental administrative costs described in the economic analysis are therefore unlikely to result in the types of outcomes described by OMB in Executive Order 13211.

Comment 124: One commenter stated that the economic analysis does not satisfy the requirements of President Obama's February 2012 memorandum to the Secretary of the Interior (Presidential Memorandum for the Secretary of the Interior—Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens (February 28, 2012)).

Our Response: The President's memorandum primarily provided direction specific to the consideration of economic impacts related to the designation of critical habitat for the northern spotted owl. However, it also directed the Service to take prompt steps to revise its regulations such that the economic analysis would be completed and made available for public comment at the time of publication of the proposed rule to designate critical habitat. The Service issued a final rule revising these regulations, as requested by the President, on August 28, 2013 (78 FR 53058). For the western yellow-billed cuckoo, the incremental effects memorandum and screening analysis (collectively, the ''economic analysis'') were made available for public comment at the time of the proposed critical habitat rule.

Comment 125: Multiple commenters expressed concern that the economic analysis does not sufficiently address the potential benefits of the designation of critical habitat. These commenters stated that the benefits of critical habitat must be weighed against the economic costs of the designation. One commenter estimated that wildlife watchers contribute $24 million per year to the local economy along the San Pedro River in Arizona, and another commenter cited a survey showing that the total economic effect associated with wildlife-watching activities in 2011 was $1.4 billion.

Our Response: Section 5 of the economic analysis explains that the primary intended benefit of critical habitat designation for the western yellow-billed cuckoo is to support the species' long-term conservation. Critical habitat designation may also generate ancillary benefits by protecting the primary constituent elements on which the species depends. As a result, management actions undertaken to conserve the species or its habitat may have coincident, positive social welfare implications, such as increased recreational opportunities in a region or improved property values on nearby parcels.

As described in section 3 of the economic analysis, incremental changes in land management are unlikely to result from the designation of critical habitat. Furthermore, all of the proposed critical habitat is considered to be occupied by the species, thus the listing of the species also serves as encouragement for wildlife watchers to visit these areas. Therefore, in this instance, critical habitat designation is unlikely to incrementally affect the types of ancillary benefits described by the commenters.

Comment 126: Multiple commenters were concerned that the designation may negatively affect residential and commercial development or otherwise create economic uncertainty on private lands. For example, several commenters stated that the economic analysis should consider potential costs associated with the inability of private property owners to use or sell land on which critical habitat is designated. According to one commenter, development projects that receive Federal funding or otherwise have a Federal nexus for consultation could be delayed or cancelled. The commenter is specifically concerned about impacts in five units of non-Federal, private land included in the proposed designation. Other commenters noted the importance of trust land sales and property tax revenue for funding vital services such as public education, urban and wildland firefighting, health services, road maintenance, emergency medical services, and police protection. In particular, one commenter requested that the economic analysis disaggregate costs to taxable lands and non-taxable lands owned by local governments.

Our Response: Section 7 of the Act does not prohibit the use or sale of land designated as critical habitat. If, during section 7 consultation, the Service finds that the proposed action is likely to adversely modify critical habitat, Federal regulation and the Section 7 Consultation Handbook encourage the Service to identify reasonable and prudent alternatives that can be implemented in a manner consistent with the intended purpose of the action and that are economically and technically feasible (see 50 CFR 402.14(h)(3) and p. xxii of the Section 7 Consultation Handbook, respectively).

As described in the economic analysis, the designation of critical habitat may cause developers or landowners to perceive that private lands will be subject to use restrictions or litigation from third parties, resulting in costs. Data limitations prevent the quantification of the possible incremental reduction in property values. However, data on current land values suggest that even if such costs occur, the rule is unlikely to meet the threshold for an economically significant rule, with regard to costs, under E.O. 12866.

Comment 127: One commenter noted that many development activities and extractive uses that occur on private lands require Clean Water Act permits and could therefore be subject to section 7 consultation for the western yellow-billed cuckoo.

Our Response: The Clean Water Act requires the Army Corps of Engineers to issue permits for certain activities, and thus the Corps may serve as a Federal nexus for many activities occurring in western yellow-billed cuckoo critical habitat. The economic analysis considers the likelihood that activities on private lands may require Corps permits in the development of its cost estimates. It uses the actual, historical consultation rate for the western yellow-billed cuckoo since its listing in 2014, which includes consultations on projects permitted by the Corps.

Comment 128: Multiple commenters expressed concern about economic impacts resulting from restrictions on operations at Lake Isabella. According to one commenter, Lake Isabella provides over $38 million annually in economic benefits related to flood risk management, irrigation, hydropower, and recreation. Another commenter provided a supplemental analysis of economic impacts related to storage restrictions at Lake Isabella. This

commenter stated that storage restrictions similar to those temporarily implemented for the benefit of the southwestern willow flycatcher would result in net economic losses of $5.4 million to $14.7 million annually over the next 20 years. Another commenter estimated up to a 50 percent reduction in use of the U.S. Forest Service's nearby recreation sites, including 10 developed recreation sites, 3 marinas, and 7 boat launches, if the spillway height at Lake Isabella is not able to be maintained.

Our Response: The areas associated Lake Isabella and reservoir operations (reservoir area, flood easement areas) were either not designated or floodplain areas removed from the designation (see *Comment 4*). As a result, we do not anticipate requesting modifications to reservoir operations due to the designation of critical habitat for the western yellow-billed cuckoo and provided our analysis that current spillway construction activities would not likely impact the species or require additional conservation. Section 3 of the economic analysis outlines the substantial baseline protections currently afforded the western yellow-billed cuckoo throughout the proposed designation. These baseline protections result from the listing of the western yellow-billed cuckoo under the Act and the presence of the species in all proposed critical habitat units, as well as overlap with habitat of other, similar listed species and designated critical habitat. As a result of these protections, the economic analysis concludes that incremental impacts associated with section 7 consultations for the western yellow-billed cuckoo are likely limited to additional administrative effort.

Comment 129: Multiple commenters expressed concern that the designation could adversely affect flood control activities. Commenters stated that restrictions to farmers' ability to manage levee vegetation and drainage operations may hinder flood control, resulting in economic and public safety impacts. One commenter notes that the Army Corps of Engineers represents a likely nexus for these activities.

Our Response: We do not anticipate that flood control operations or management and maintenance of existing flood control facilities and levees would be significantly impacted by designation of critical habitat. Areas that have flood and erosion control structures such as levees and other hardened features in place would not contain the physical or biological features and have been textually excluded from being considered as critical habitat. In addition, emergency actions to avoid flooding or other uncontrolled circumstances that may cause loss of life or property are allowed according to the emergency consultation procedures identified under section 7 of the Act. Section 3 of the economic analysis outlines the substantial baseline protections currently afforded the western yellow-billed cuckoo throughout the proposed designation. These baseline protections result from the listing of the western yellow-billed cuckoo under the Act and the presence of the species in all proposed critical habitat units, as well as overlap with habitat of other, similar listed species and designated critical habitat. As a result of these protections, the economic analysis concludes that incremental impacts associated with section 7 consultations for the western yellow-billed cuckoo are likely limited to additional administrative effort.

Comment 130: Multiple commenters expressed concern about the potential impacts of the designation of critical habitat on water management and water rights. Commenters noted specific concerns regarding the following impacts and their costs: Reallocation of water rights; restrictions on the use of unadjudicated water; restrictions on river management and reservoir operations; restrictions on river and habitat restoration projects; restrictions on drainage operations; and the implications of such restrictions for local water supply and local economies.

Our Response: As discussed under the *Application of the ''Adverse Modification'' Standard* below, we consider ongoing water management operations that are not within the agency's discretion to modify to be part of the baseline. All areas identified as critical habitat where ongoing water operations exist contain the physical or biological features necessary to provide for the essential habitat needs of the western yellow-billed cuckoo; therefore, we do not anticipate that the continuation of existing water management operations would appreciably diminish the value or quality of the critical habitat where they occur and therefore ongoing water operations would not be significantly modified as a result of the designation. Section 3 of the economic analysis outlines the substantial baseline protections currently afforded the western yellow-billed cuckoo throughout the proposed designation. These baseline protections result from the listing of the western yellow-billed cuckoo under the Act and the presence of the species in all proposed critical habitat units, as well as overlap with habitat of other, similar listed species and designated critical habitat. As a result of these protections, the economic analysis concludes that incremental impacts associated with section 7 consultations for the western yellow-billed cuckoo are likely limited to additional administrative effort.

Comment 131: Multiple commenters expressed concern that the economic analysis did not sufficiently evaluate potential impacts to livestock grazing and agricultural activities. Several commenters requested that the economic analysis explicitly consider impacts to agricultural operations (including water use and use of pesticides), particularly those that receive NRCS cost-share grants for projects such as bank stabilization, irrigation, fencing, grazing management, and weed control. The commenters expressed concern that the designation of critical habitat could lead to a reduction in grazing or agricultural output, or a reduction in the number of NRCS projects undertaken. These impacts could, in turn, affect local ranching communities and farm income.

Our Response: The Service does not anticipate requesting additional modifications for livestock grazing or agricultural operations, or cost-share projects undertaken with agencies such as NRCS, as a result of the designation of critical habitat for the western yellow-billed cuckoo. Section 3 of the economic analysis outlines the substantial baseline protections currently afforded the western yellow-billed cuckoo throughout the proposed designation. These baseline protections result from the listing of the western yellow-billed cuckoo under the Act and the presence of the species in all proposed critical habitat units, as well as overlap with habitat of other, similar listed species and designated critical habitat. As a result of these protections, the economic analysis concludes that incremental impacts associated with section 7 consultations for the western yellow-billed cuckoo are likely limited to additional administrative effort.

However, the Service recognizes the potential for landowners' perceptions of the Act to influence land use decisions, including decisions to participate in Federal programs such as those managed by NRCS. Several factors can influence the magnitude of perception-related effects, including the community's experience with the Act and understanding of the degree to which future section 7 consultations could delay or affect land use activities. Information is not available to predict the impact of the designation of critical habitat on landowners' decisions to pursue cost-share projects with NRCS in

the future. However, incremental effects due to the designation of critical habitat for the western yellow-billed cuckoo are likely to be reduced due to the species being listed.

Comment 132: Multiple commenters expressed concern that the designation of critical habitat for the western yellow-billed cuckoo could affect agricultural operations through restrictions on the use of irrigation facilities or pesticides, particularly those registered under FIFRA.

Our Response: The Service does not anticipate requesting additional modifications for agricultural operations, including irrigation or pesticide use, as a result of the designation of critical habitat for the western yellow-billed cuckoo. Section 3 of the economic analysis outlines the substantial baseline protections currently afforded the western yellow-billed cuckoo throughout the proposed designation. These baseline protections result from the listing of the western yellow-billed cuckoo under the Act and the presence of the species in all proposed critical habitat units, as well as overlap with habitat of other, similar listed species and designated critical habitat. As a result of these protections, the economic analysis concludes that incremental impacts associated with section 7 consultations for the western yellow-billed cuckoo are likely limited to additional administrative effort.

Comment 133: Multiple commenters expressed concern that the designation of critical habitat could negatively affect mining activities, including gravel pit operations and copper mining in Arizona.

Our Response: Because the western yellow-billed cuckoo is listed as threatened and all the units are occupied during the breeding season and habitat would need to be protected during the nonbreeding season, the majority of actions necessary to conserve the species would be required based on the listing of the western yellow-billed cuckoo. As a result of the species being listed, the economic analysis concludes that incremental impacts of critical habitat associated with section 7 consultations for mining operations for the western yellow-billed cuckoo are likely limited to additional administrative effort of determining if adverse modification may occur. Because the commenters were making general statements and not specific to individual mining projects or actions, we are unable to determine what measures mining interests may need to undertake to avoid adverse modification if necessary.

Comment 134: Multiple commenters expressed concern about impacts to recreational activities and facilities, such as parks. In particular, one commenter expressed concern that the designation could limit access to public lands. Other commenters expressed concern that the designation could limit water use, which would affect recreation. Another commenter stated that increased Federal oversight could hinder efforts to properly manage and maintain public safety at local parks. Another commenter expressed concern that the designation could restrict future trail developments.

Our Response: Because the western yellow-billed cuckoo is listed as threatened, all the units are occupied during the breeding season and habitat would need to be protected during the nonbreeding season, the majority of actions necessary to conserve the species would be required based on the listing of the western yellow-billed cuckoo. Exhibit A–1 of the economic analysis, which displays the planned projects assumed by the economic analysis to require formal consultation, includes multiple consultations for recreational activities. Activities at private or municipal recreational facilities, such as town parks, will only require section 7 consultation if those activities have a Federal nexus, such as Federal funding.

For activities that do have a Federal nexus for section 7 consultation, the Service does not anticipate conservation measures above and beyond those needed for conserving the listed western yellow-billed cuckoo. Section 3 of the economic analysis outlines the substantial baseline protections currently afforded the western yellow-billed cuckoo throughout the proposed designation. These baseline protections result from the listing of the western yellow-billed cuckoo under the Act and the presence of the species in all proposed critical habitat units, as well as overlap with habitat of other, similar listed species and designated critical habitat. As a result of these protections, the economic analysis concludes that incremental impacts associated with section 7 consultations for the western yellow-billed cuckoo are likely limited to additional administrative effort.

Comment 135: Multiple commenters expressed concern that the designation of critical habitat could negatively affect transportation activities and road infrastructure. One commenter further noted that road maintenance is necessary to maintain access to public and private lands; as a result, impacts stemming from the designation of critical habitat have the potential to severely limit public access to public lands.

Our Response: Because the western yellow-billed cuckoo is listed as threatened, and all the units are occupied during the breeding season and habitat would need to be protected during the nonbreeding season, the majority of actions necessary to conserve the species would be required based on the listing of the western yellow-billed cuckoo. For activities that do have a Federal nexus for section 7 consultation, the Service does not anticipate conservation measures above and beyond those needed for conserving the listed western yellow-billed cuckoo. Section 3 of the economic analysis outlines the substantial baseline protections currently afforded the western yellow-billed cuckoo throughout the proposed designation. These baseline protections result from the listing of the western yellow-billed cuckoo under the Act and the presence of the species in all proposed critical habitat units, as well as overlap with habitat of other, similar listed species and designated critical habitat. As a result of these protections, the economic analysis concludes that incremental impacts associated with section 7 consultations for the western yellow-billed cuckoo are likely limited to additional administrative effort.

Comment 136: Multiple commenters expressed concern about economic impacts to operations on military installations. In particular, one commenter expressed concern that the designation could result in the closure or restriction of operations on two military installations near Yuma, Arizona. Multiple commenters expressed concern about impacts to Fort Huachuca in Cochise County, Arizona, noting that Fort Huachuca has an approved integrated natural resources management plan (INRMP) that provides conservation benefit to the western yellow-billed cuckoo. Another commenter expressed particular concern that the designation could affect operations on Fort Huachuca's Buffalo Soldier Electronic Testing Range.

Our Response: No military lands or training areas were included in the revised proposed rule or are included in this final designation. In the timeframe between the proposed rule and this final designation, we had discussions with the military installations at Yuma Proving Grounds and Fort Huachuca regarding the designation of critical habitat. Both military installations requested exclusion from the designation based on national security reasons. We reviewed the request of

Yuma Proving Grounds and found that exclusion was not necessary for the area requested by the Yuma Proving Grounds because the actions described by the installation (overflight of critical habitat areas) would not physically impact habitat for the western yellow-billed cuckoo. Although the actions may require section 7 consultation to consider the effects to western yellow-billed cuckoos, they would not require consideration of adverse effects to critical habitat as overflights would have no habitat-based effects. In addition, this area has been excluded based on the LCR MSCP (see Exclusions, *Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act*).

Fort Huachuca also requested exclusion of critical habitat on areas outside the installation's jurisdiction. The Fort suggested that the base's groundwater may be impacted and result in reduced operational capacity in the future. The Fort is aware of our position that groundwater impacts will not occur as a result of the designation of critical habitat and the designation will not impact the Army's military operations. We reviewed their request and determined that the installation did not provide support for such an exclusion (see Exclusions, *Exclusions Based on Impacts on National Security and Homeland Security*).

Comment 137: One commenter expressed concern that the economic analysis does not include costs to reinitiate consultations for several USFS projects and activities in proposed Unit 64 (CA–2) at Lake Isabella, California. These consultations include travel management in the Sequoia National Forest, recreation management at Lake Isabella, and the Hafenfeld Livestock Grazing Permit. In addition, the commenter noted that a new consultation would likely be required for any revisions to the Sequoia National Forest Land Management Plan. A public comment period for the Revised Draft Land Management Plan for the Sequoia National Forest (USFS 2019, entire) closed in September 2019.

Our Response: The Service appreciates the new information provided by the commenter. As described in our revised proposed rule, we did not identify areas associated with operations and management of Lake Isabella as critical habitat. In addition, we excluded two additional areas that provide conservation for the western yellow-billed cuckoo (see Exclusions, *Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General*). Because these areas are not designated as critical habitat, there are no economic costs of re-initiation for critical habitat. For the remaining areas, section 3 of the economic analysis forecasts future section 7 consultation activity associated with the proposed designation based on the historical consultation activity resulting from the listing of the western yellow-billed cuckoo in 2014. Exhibit A–2 presents the resulting expected annual consultation rates by unit. Importantly, the analysis concludes that the incremental costs resulting from the designation of critical habitat are likely to be limited to administrative costs of addressing critical habitat in consultation, and are unlikely to exceed the threshold for an economically significant rulemaking. To our knowledge, the USFS has yet to complete its land management plan.

Comment 138: Multiple commenters expressed concern that the designation of critical habitat could negatively affect habitat restoration projects, including management programs designed to restore riparian corridors that have been overtaken by tamarisk. One commenter cites as an example an ongoing project delayed by the presence of critical habitat for another listed species in the Upper San Pedro River watershed.

Our Response: Because the western yellow-billed cuckoo is listed as threatened, all the units are occupied during the breeding season, and habitat would need to be protected during the nonbreeding season, the majority of actions necessary to conserve the species would be required based on the listing of the western yellow-billed cuckoo. For activities that do have a Federal nexus for section 7 consultation, the Service does not anticipate conservation measures above and beyond those needed for conserving the listed western yellow-billed cuckoo. Section 3 of the economic analysis outlines the substantial baseline protections currently afforded the western yellow-billed cuckoo throughout the proposed designation. These baseline protections result from the listing of the western yellow-billed cuckoo under the Act and the presence of the species in all proposed critical habitat units, as well as overlap with habitat of other, similar listed species and designated critical habitat. As a result of these protections, the economic analysis concludes that incremental impacts associated with section 7 consultations for the western yellow-billed cuckoo are likely limited to additional administrative effort.

In addition, because all proposed critical habitat units for the western yellow-billed cuckoo are considered occupied by the species, all projects with a Federal nexus will be required to consult with the Service under section 7 of the Act regardless of whether critical habitat is designated. As a result, the designation of critical habitat for the western yellow-billed cuckoo is unlikely to result in incremental delays to projects.

Comment 139: Several commenters expressed concern that baseline protections for the western yellow-billed cuckoo, including several existing HCPs and the presence of southwestern willow flycatcher critical habitat, do not provide sufficient protection to the western yellow-billed cuckoo and its habitat. In particular, one commenter disagreed with the assumption used in the economic analysis that impacts have already occurred due to the listing of the western yellow-billed cuckoo or the presence of other listed species. The commenter stated that, if this assumption were true, the designation of critical habitat for the western yellow-billed cuckoo would not be warranted. In addition, one commenter stated that environmental reviews for livestock grazing on Federal allotments have been reduced since the proposed rule was published, weakening baseline protection.

Our Response: Guidelines issued by OMB for the economic analysis of regulations direct Federal agencies to measure the costs and benefits of a regulatory action against a baseline (*i.e.,* costs and benefits that are ''incremental'' to the baseline). OMB defines the baseline as the ''best assessment of the way the world would look absent the proposed action.'' In the case of critical habitat designation for the western yellow-billed cuckoo, the baseline includes the listing of the species, as well as protections already afforded its habitat as a result of the presence of other listed species, such as the southwestern willow flycatcher and the least Bell's vireo. Because all proposed critical habitat units for the western yellow-billed cuckoo are considered occupied by the species, all projects with a Federal nexus will be subject to section 7 requirements regardless of whether critical habitat is designated. In addition, the Service anticipates that, except in cases that cannot be predicted at this time, project modifications recommended to avoid adverse modification of western yellow-billed cuckoo habitat will likely be the same as those needed to avoid jeopardy to the species. As a result, the economic analysis finds that the section 7-related costs of designating critical habitat for the western yellow-billed cuckoo are likely to be limited to additional

administrative effort to consider adverse modification in consultation.

Comment 140: Multiple commenters noted that many existing HCPs offer baseline protection to the species. One commenter expressed concern that the designation of critical habitat could impose substantial economic burden on landowners participating in such HCPs. In addition, the commenter expressed concern that the designation of critical habitat could create a disincentive for landowners to develop new HCPs and thus negatively affect regional conservation.

Our Response: HCPs, particularly those developed at a regional scale, are valuable tools for conservation. The designation of critical habitat for the western yellow-billed cuckoo may, in some cases, require re-initiation of past consultations, including consultations on HCPs. However, as described in section 3 of the economic analysis, incremental costs associated with section 7 consultations will likely be limited to additional administrative costs following the designation of critical habitat. Incremental impacts to HCP participants beyond third-party administrative costs of consultation are not expected, and we have excluded certain HCP areas from the final designation (see Exclusions, *Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act*).

Comment 141: Multiple commenters expressed concern about potential impacts to utility operations. One commenter expressed concern that the designation of critical habitat within transmission and distribution corridors could hinder maintenance and operation activities. Such activities are required by the Federal Energy Regulatory Commission (FERC) to maintain equipment integrity, mitigate potential public safety hazards, and comply with vegetation management standards. Multiple commenters noted that non-compliance can result in penalties up to $1,000,000 per incident per day. Another commenter noted that impacts to grid reliability represent a significant public health and safety, as well as economic, concern.

Our Response: Because the western yellow-billed cuckoo is listed as threatened, all the units are occupied during the breeding season and habitat would need to be protected during the nonbreeding season, the majority of actions necessary to conserve the species would be required based on the listing of the western yellow-billed cuckoo. For activities that do have a Federal nexus for section 7 consultation, the Service does not anticipate conservation measures above and beyond those needed for conserving the listed western yellow-billed cuckoo. Section 3 of the economic analysis outlines the substantial baseline protections currently afforded the western yellow-billed cuckoo throughout the proposed designation. These baseline protections result from the listing of the western yellow-billed cuckoo under the Act and the presence of the species in all proposed critical habitat units, as well as overlap with habitat of other, similar listed species and designated critical habitat. As a result of these protections, the economic analysis concludes that incremental impacts associated with section 7 consultations for the western yellow-billed cuckoo are likely limited to additional administrative effort.

Comment 142: Several commenters were in favor of conservation efforts to protect the western yellow-billed cuckoo, yet they expressed concern that critical habitat designation would burden State regulatory agencies and restrict ranching, farming, or other activities on private lands. Other commenters were concerned about the level of oversight the Service has in designating critical habitat on privately owned land.

Our Response: We are required to designate critical habitat for a federally listed species if it is determined to be both prudent and determinable, as is the case for the western yellow-billed cuckoo. We further note that we are currently under court order to finalize critical habitat for the western yellow-billed cuckoo.

In regard to State and private landowner burden, critical habitat designations do not constitute or create a regulatory burden by themselves, in terms of regulations on private landowners carrying out private activities, but in certain areas they might trigger additional State regulatory reviews and other requirements. Our economic analysis did not find that there would be significant impacts for third party entities (*e.g.,* States private actions). When a third party action requires Federal approval, permit, or is federally funded, the critical habitat designation might impose a Federal regulatory burden for private landowners, but consultation effort concerning the critical habitat or species would be the responsibility of the Federal entity involved, not the private landowner; absent Federal approval, permits, or funding, the designation should not affect farming, ranching, or other activities on private lands.

Comment 143: Multiple commenters stated they have determined that the economic analysis is flawed in its approach and needs to be re-done in order to consider the unanalyzed economic impacts to the city of Sierra Vista, AZ, due to COVID–19. Other commenters stated the Service failed to analyze the economic impact on private landowners and the State of Arizona. Other commenters, including private landowners, stated that the Service should consider the economic benefits of birdwatching and recreational activities in riparian areas, and supported the enhanced property value of areas with more conservation focus. Other commenters expressed concerns that the economic analysis of the proposed critical habitat designation has not yet been released for public review and comment, which is required before proposed critical habitat can be finalized.

Our Response: For both the 2014 proposed critical habitat and the 2020 revised proposed critical habitat, we completed economic analyses to examine the incremental costs associated with the designation of critical habitat. The economic analyses did not identify significant impacts, and the two local government entities did not provide economic information regarding any of the activities identified. These analyses were available to the public as part of the docket for each publication in the **Federal Register**. Critical habitat does not restrict private landowner access to their property and would only need to be considered if Federal agency funding or permitting for an activity is needed. Because the areas are considered occupied, the majority of costs are not associated with the designation, but with listing of the species as threatened. If Federal funding is involved, the agency providing the funding is the party responsible for meeting obligations of consulting on projects on private lands. We have considered and applied the best available scientific and commercial information in determining the economic impacts associated with designating critical habitat. Section 5 of the economic analysis explains that the primary intended benefit of critical habitat designation for the western yellow-billed cuckoo is to support the species' long-term conservation. Critical habitat designation may also generate ancillary benefits by protecting the primary constituent elements on which the species depends. As a result, management actions undertaken to conserve the species or its habitat may have coincident, positive social welfare implications, such as increased recreational opportunities in a region or

improved property values on nearby parcels.

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features that occur in specific occupied areas, we focus on the specific features that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will consider unoccupied areas to be essential only where a critical habitat designation limited to geographical areas occupied by the species would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species (50 CFR 424.12(b)(2)).

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will

continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, HCPs, or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection. The regulations at 50 CFR 424.02 define ''physical or biological features essential to the conservation of the species'' as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkaline soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the species, the Service may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

We derive the specific physical or biological features required for the western yellow-billed cuckoo from studies of this species' habitat, ecology, and life history as described below. Additional information can be found in the proposed and final listing rules published in the **Federal Register** on October 3, 2013 (78 FR 61621), and October 3, 2014 (79 FR 59992), respectively. The physical or biological features identified here focus primarily on breeding habitat and secondarily on foraging habitat because most of the habitat relationship research data derive from studies of these activities. Much less is known about migration, stop-over, or dispersal habitat within the breeding range; however, for these purposes, western yellow-billed cuckoos use a variety of habitats that may or may not be used for breeding. As a result, we do not think that habitat for these purposes is limiting, and we have not specifically identified areas for these purposes in our designation. As stated above, the species' use of an area for breeding purposes depends on food availability and habitat conditions. If those conditions are not adequate (*i.e.,* prey not present, environmental conditions not favorable), the species may still use the area for the other purposes identified above. Although the wintering and nesting habitat for the western yellow-billed cuckoo that occurs outside of the United States was not considered for critical habitat designation, some information on breeding, migration, and wintering habitat outside the United States is provided. We have determined that the following physical or biological features are essential to the conservation of the western yellow-billed cuckoo.

Space for Individual and Population Growth and for Normal Behavior

General breeding (nesting) habitat conditions. The western yellow-billed cuckoo occurs and breeds during the breeding season (generally June through September—May breeding does occur but is less common) in a subset of its historical range in the western United States. The western yellow-billed cuckoo primarily uses nesting sites in riparian habitat where conditions are typically cooler and more humid than in the surrounding environment (Gaines and Laymon 1984, p. 75; Laymon 1998, pp. 11–12; Corman and Magill 2000, p. 16). In the Southwest, the western yellow-billed cuckoo also nests in more arid-adapted habitat in drainages where conditions are also cooler and more humid than the surrounding environment (Griffin 2015, entire; MacFarland and Horst 2015, entire; MacFarland and Horst 2017, entire; Corson 2018, entire; Drost *et al.* 2020, entire). Riparian habitat characteristics, such as dominant tree species, size and shape of habitat patches, tree canopy structure, tree age, vegetation height, and vegetation density, are important parameters of western yellow-billed cuckoo breeding habitat.

Older studies were geographically limited in their scope but nevertheless established a suite of habitat characteristics that became the archetype for western yellow-billed cuckoo breeding habitat. However, habitat conditions across the DPS range vary considerably, and more recent investigations that included other areas within the western yellow-billed cuckoo's breeding range found that large areas of riparian woodland vegetation are not the only areas used by the species for nesting. We describe both the rangewide and southwestern breeding habitat below with particular emphasis on describing the southwestern habitat, because it is less well known as providing habitat for the western yellow-billed cuckoo.

Rangewide breeding habitat. Rangewide breeding habitat across the DPS exists primarily in riparian areas along low-gradient streams, with patches of cottonwood (*Populus* spp.) and willow (*Salix* spp.) riparian vegetation with an overstory and understory component. Patches of trees interspersed with openings often aggregate into large expanses of habitat. The vegetation is often characterized as

riparian woodlands. More specifically, rangewide breeding habitat is characterized as having broad floodplains and open riverine valleys that provide wide floodplain conditions. The general habitat characteristics are areas that are often greater than 325 feet (ft) (100 meter (m)) wide but may be narrow in parts of the floodplain, contain low-gradient rivers and streams (surface slope usually less than 3 percent), are part of floodplains created where rivers and streams enter upstream portions of reservoirs or other water impoundments, or are in areas associated with irrigated upland terraces adjacent to water courses or riparian floodplains. The habitat is usually dominated by willow or cottonwood, but sometimes by other riparian species. The habitat has above-average canopy closure (greater than 70 percent), and a cooler, more humid environment than the surrounding riparian and upland habitats. The plant species most often associated with rangewide breeding habitat are identified above (see *General Breeding (nesting) Habitat Conditions*), and each may be dominant depending on location. These areas contain the moist conditions that support riparian plant communities made up of overstory and understory components that provide breeding sites, shelter, cover, and food resources for the western yellow-billed cuckoo. However, all foraging needs may not be provided within areas of critical habitat. Western yellow-billed cuckoo use rangewide breeding habitat as described above throughout the DPS, including where it occurs in the Southwest and the states of Sonora and Sinaloa, Mexico.

In addition to cottonwood and willow, riparian vegetation may include tree species other than cottonwood and willow, including but not limited to boxelder (*Acer negundo*); ash (*Fraxinus* spp.); walnut (*Juglans* spp.); and sycamore (*Platanus* spp.) (Gaines 1974, pp. 7–9; Gaines and Laymon 1984, pp. 59–66; Groschupf 1987 pp. 5, 8–11, 16–18; Laymon and Halterman 1989, pp. 274–275; Corman and Magill 2000, pp. 5, 10, 11, 15, 16; Dettling and Howell 2011a, pp. 27–28). In California, the species is typically found in riparian woodland areas along low-gradient streams with patches of cottonwood (*Populus* spp.) and willow (*Salix* spp.) riparian vegetation with an overstory and understory component of other tree species, including but not limited to boxelder (*Acer negundo*); Oregon ash (*Fraxinus latifolia*); California black walnut (*Juglans californica*); California sycamore (*Platanus racemosa*); Fremont cottonwood (*Populus fremontii*); and valley oak (*Quercus lobata*) (Gaines 1974, pp. 7–9; Gaines and Laymon 1984, pp. 59–66; Laymon and Halterman 1989, pp. 274–275; Dettling and Howell 2011a, pp. 27–28).

Western yellow-billed cuckoos have also been found nesting in orchards adjacent to riparian habitat during the breeding season (Laymon 1980, pp. 6–8; Laymon 1998, p. 5). Five pairs of western yellow-billed cuckoos were found nesting along the Sacramento River in a poorly groomed English walnut orchard that provided numerous densely foliaged horizontal branches on which western yellow-billed cuckoos built their nests (Laymon 1980, pp. 6–8). These western yellow-billed cuckoos that nested in the orchard did not forage there, but flew across the river to forage in riparian habitat. Kingsley (1985, pp. 245–249; 1989, p. 142) described western yellow-billed cuckoos as being abundant in the pecan groves in Green Valley and Sahuarita, Arizona, with an estimated density of one nesting pair per 10 ac (4 ha). We consider these agricultural nesting sites to be the exception rather than the preferred nesting habitat for the species due to the paucity of reports identifying such nesting. In mapping the boundaries of the critical habitat, we avoided identifying agricultural lands within the designation. Any agricultural lands inadvertently within the boundary of the designation would not be considered critical habitat because those areas do not contain the physical or biological features.

Southwestern breeding habitat. In parts of the Southwestern United States and the states of Sonora and Sinaloa, Mexico, western yellow-billed cuckoo breeding habitat is more variable than in the rest of its range. Southwestern breeding habitat, found primarily in Arizona and New Mexico, occurs within or along perennial, intermittent, and ephemeral drainages in montane canyons, foothills, bajadas, desert floodplains, and arroyos. Breeding habitat may include woody side drainages, terraces, and hillsides immediately adjacent to the main drainage bottom below 6,000 ft elevation (1,829 m). In areas where water is especially limited, but is nonetheless productive in terms of food and cover for western yellow-billed cuckoos, breeding habitat often consists of narrow, patchy, and/or sparsely vegetated drainages surrounded by arid-adapted vegetation. Due to more arid conditions, southwestern breeding habitat contains a greater proportion of xeroriparian and nonriparian tree species than elsewhere in the DPS. Riparian and xeroriparian trees in these ecosystems may even be more sparsely distributed and less prevalent than nonriparian trees.

Southwestern breeding habitat may be less than 325 ft (100 m) wide due to narrow canyons or limited water availability that do not allow for development of wide reaches of habitat. Southwestern breeding habitat is often but not always 200 ac (81 ha) or more in size, and may consist of a series of smaller tree and large shrub patches separated by openings. Occurring in both low- and high-gradient drainages, slope does not appear to be a factor in whether or not western yellow-billed cuckoos select these areas for nesting. Canopy closure is variable, and where trees are sparsely scattered, it may be dense only at the nest tree or small grove including the nest tree. The North American Monsoon brings high humidity and rainfall to some of these habitats especially in the ephemeral drainages in southeastern Arizona where winters are mild and warm, wet summers are associated with the monsoon and other tropical weather events (Wallace *et al.* 2013, entire; Erfani and Mitchell 2014, pp. 13096–13097). The more arid ephemeral drainages may not flow during summer monsoonal storms, but provide moisture for plant growth and insect production.

Riparian and xeroriparian drainages in southwestern breeding habitat bisect other habitats and often contain a mix of habitats including but not limited to Madrean evergreen woodland (Madrean encinal and Madrean pinyon-juniper), desert grassland (including semi-desert grassland), or desert scrub (including mesquite (*Prosopis,* spp.) upland and semi-desert scrub) (NatureServe 2016, entire; Drost *et al.* 2020, entire). To simplify, we refer to these habitats as riparian, xeroriparian (including mesquite bosque), Madrean evergreen woodland, desert grassland, and desert scrub. More than one vegetation type within and immediately adjacent to the drainage may contribute toward nesting habitat. For example, mesquite, with deeper roots that can reach the water table, often flanks the upland perimeter of more water-dependent cottonwood-willow riparian habitat. In addition to the riparian trees found across the species' range, the vegetation making up the breeding habitat of the western yellow-billed cuckoo in some areas, especially in the more arid Southwest, includes some other native and nonnative xeroriparian and non-riparian trees and large shrubs, such as, but not limited to: Mesquite, hackberry (*Celtis reticulata* and *C. ehrenbergiana*), soapberry (*Sapindus saponaria*), oak (*Quercus* spp.), acacia (*Acacia* spp.,

Senegalia greggi), mimosa (*Mimosa* spp.), greythorn (*Ziziphus obtusifolia*), desert willow (*Chilopsis linearis*), juniper (*Juniperus* spp.), pine (*Pinus* spp.), alder (*Alnus rhombifolia* and *A. oblongifolia*), wolfberry (*Lycium* spp.), Russian olive (*Elaeagnus angustifolia*), and tamarisk (*Tamarix* spp.) (Groschupf 1987 pp. 5, 8–11, 16–18; Corman and Magill 2000, pp. 10, 15, 16; Corson 2018, pp. 5, 6–20; Sferra *et al.* 2019, p. 3). Of these species, the nonriparian trees and large shrubs include oak, juniper, acacia, greythorn, mimosa, and mesquite (upland) (NatureServe 2013, pp. 11–18, 42–113, 132–140). Drainage bottoms in these habitats consist of riparian, xeroriparian and nonriparian trees and may be dominated by cottonwood, willow, mesquite, hackberry, ash, sycamore, walnut, or oak (Sogge *et al.* 2008, pp. 148–149; Johnson *et al.* 2012, pp. 20–21; WestLand Resources, Inc. 2019, entire; Villarreal *et al.* 2014, p. 58; Griffin 2015, pp. 17–25; MacFarland and Horst 2015, pp. iiii, 2, 5–7; Corson 2018, entire; Sferra *et al.* 2019, p.3; Drost *et al.* 2020, entire).

Occupied habitat within a single drainage may include both rangewide breeding habitat and southwestern breeding habitat, transitioning from large stands of gallery riparian forest to mesquite woodland, or narrow or patchy stands of riparian or xeroriparian habitat. These perennial and intermittent drainages include but are not limited to parts of the Gila River, upper Verde River, Blue River, Eagle Creek, Tonto Creek, San Francisco River, Aravaipa Creek, San Pedro River, lower Cienega Creek, Mimbres River, and the Rio Grande (Corman and Magill 2000, pp. 37–48; Sogge *et al.* 2008, pp. 148–149; Johnson *et al.* 2012, pp. 20–21; Arizona Game and Fish Department (AGFD) 2018, entire; Cornell Lab of Ornithology 2020 (eBird data)).

In more intermittent and ephemeral drainages that bisect Madrean evergreen woodlands, desert scrub, and desert grasslands in montane canyons, foothills, bajadas, and desert floodplains of southeastern Arizona, riparian and xeroriparian trees and large shrubs may be present, but are often sparsely distributed or in a narrow band along the drainage bottom. The hillsides immediately adjacent to the tree-lined drainages range from dense woodlands to sparsely treed savannahs with a variety of grasses, contributing toward foraging and breeding habitat for the western yellow-billed cuckoo. Tree and large shrub species such as mesquite, hackberry, acacia, mimosa, and greythorn are present in desert scrub and desert grassland habitats (NatureServe 2013, pp. 88, 134). Madrean evergreen woodland habitat contains oak, mesquite, juniper, acacia, and hackberry (Brown 1994, pp. 59–62) in southeastern Arizona and southwestern New Mexico's mountain ranges, and resembles habitat found in the Sierra Madre Occidental of Mexico. In southeastern Arizona, occupied southwestern breeding habitat that contains a more arid mix of species is found in drainages in the Santa Catalina Mountains, Rincon Mountains, Santa Rita Mountains, Patagonia Mountains, Huachuca Mountains, Pajarito/Atascosa Mountains, Whetstone Mountains, Dragoon Mountains, and Buenos Aires National Wildlife Refuge, among others (Corman and Magill 2000, pp. 37–48; American Birding Association 2014, entire; Griffin 2015, pp. 17–25; MacFarland and Horst 2015, pp. i–iii, 2, 5–7, 9–12; Tucson Audubon Society 2015, p. 44; Arizona Game and Fish Department 2018, entire; Dillon *et al.* 2018, pp. 31–33; White *et al.* 2018, pp. 26–27; Rorabaugh 2019, *in litt,* entire; Sferra *et al.* 2019, pp. 3–6, 9–11; Corson 2018, entire; Westland Resources, Inc. 2019, entire; Cornell Lab of Ornithology 2020 (eBird data; Drost *et al.* 2020, entire). In Sonora and Sinaloa, Mexico, western yellow-billed cuckoos also breed in similar riparian habitat bisecting mesquite-dominated woodlands, and semi-desert and desert scrub and grassland habitats (Russell and Monson 1998, p. 131).

Remnant mesquite bosques, historically extensive throughout the Southwest along major rivers, still occupy some wide floodplains of the lower Colorado River, Gila, Salt, San Pedro, Santa Cruz, and Rio Grande Rivers in Arizona and New Mexico. In Sonora, Mexico, mesquite bosques where western yellow-billed cuckoos have nested have also been greatly reduced (Russell and Monson 1988, p. 131). For example, Arizona's upper San Pedro River contains extensive reaches of mesquite bosque breeding habitat adjacent to the cottonwood and willow dominated breeding habitat in a broad floodplain.

Arid conditions and water management in the Southwest often influence stream flows into and downstream of reservoirs, limiting riparian vegetation regeneration, growth, and survival. In Arizona and New Mexico, narrow or patchy riparian breeding habitat can be found adjacent to heavily managed floodplains (such as areas within Caballo Reservoir and the Lower Rio Grande for example (White *et al.* 2018, pp. 26–27)). Hydrologically perennial systems become intermittent or ephemeral due to reservoir management or water delivery requirements. For example, water abundance at Caballo Reservoir and downstream on the Lower Rio Grande varies from year-to-year, and timing of release may not occur prior to or throughout the western yellow-billed cuckoo breeding season. As a result, riparian (including xeroriparian) habitat may persist only as narrow bands or scattered patches along the bankline or as small in-channel islands, or sections of undisturbed native willows within the reservoir. Habitat within these areas may be as small as approximately 30 ac (12 ha) and is typically composed of either willow, tamarisk, or a mix of the two (White *et al.* 2018, pp. 26–27). Adjacent habitat may include mowed nonnative vegetation typically less than 1 ft (0.3 m) tall or higher terraces within the floodplain with mesquite or other drought-tolerant vegetation.

In a study on the Coronado National Forest, Arizona, Madrean evergreen woodland drainages used by western yellow-billed cuckoos were dominated by oak trees, often with mesquite trees flanking the riparian strip (MacFarland and Horst 2015, pp. 1, 7). The drainages often merge into the surrounding vegetation of juniper. In the wettest reaches of the drainages, the oaks are interspersed with Arizona sycamore, hackberry, willows, occasionally cottonwoods, and a few other infrequently occurring species such as Arizona ash and Arizona walnut (MacFarland and Horst 2015, p. 1). Total canopy cover in occupied habitat was about 52 percent, with oaks as the predominant overstory species recorded (overall average 35 percent), followed by mesquite (20 percent), and juniper (16 percent). The most frequent riparian overstory species were sycamore (3 percent) followed by hackberry (5 percent) and willow (2 percent). The average height of the most prevalent overstory tree species at each point recorded was 20 ft (6.1 m). Habitat occupied during the breeding season (which we also refer to as territories even though western yellow-billed cuckoos may not defend habitat (Hughes 2015, p. 3)) tended to have a higher percentage of mesquites in the community composition, while unoccupied survey points had a higher percentage of junipers (MacFarland and Horst 2015, pp. 9–10). Western yellow-billed cuckoo detections ranged in elevation from 3,564 to 5,480 ft (1,086 to 1,670 m) (MacFarland and Horst 2015, p. 10).

Few western yellow-billed cuckoo detection records in southwestern New Mexico exist between 1998 and 2014 in Madrean evergreen woodland and

mesquite woodlands (including other thorn trees and shrubs) habitat similar to southeastern Arizona (Cornell Lab of Ornithology 2020 (eBird data)). Much of the southwestern New Mexico habitat is privately owned and is not visited as frequently by birders as is southeastern Arizona. No protocol surveys have been conducted in these areas. Based on the best available survey information, we have not identified confirmed breeding or breeding occupancy in Madrean evergreen woodland and mesquite woodlands in New Mexico. Therefore, no critical habitat is designated in similar southwestern habitat in southwestern New Mexico.

Tamarisk. Within Southwestern breeding habitat, tamarisk, also known as salt cedar, is a common nonnative shrubby tree found occurring along or within stream courses in western yellow-billed cuckoo riparian habitat. Tamarisk, as a component of wildlife habitat, is often characterized as being poor habitat for many species of wildlife, but it can be a valuable substitute where the hydrology has been altered to the extent that native woodland habitat can no longer exist (Hunter *et al.* 1988, 113–123; Service 2002, pp. K–11–K–14; Sogge *et al.* 2008, pp. 148–152; Shafroth *et al.* 2010, entire). The spread of tamarisk and the loss of native riparian vegetation is primarily a result of land and water management actions. Tamarisk does not invade and out-compete native vegetation in the Southwest (Service 2002, p. H–11). Rather, human actions have facilitated tamarisk dispersal to new locales, and created opportunities for its establishment by clearing vegetation, modifying physical site conditions, altering natural river processes, and disrupting biotic interactions (Service 2002, p. H–11). Because the presence and relative dominance of tamarisk is greatly influenced by hydrologic regime and depth to groundwater, native riparian vegetation in tamarisk-dominated systems is unlikely to reestablish unless the hydrologic regime is restored (Stromberg *et al.* 2007, pp. 381–391).

Western yellow-billed cuckoos will sometimes build their nests and forage in tamarisk, but there is usually a native vegetation component within the occupied habitat (Gaines and Laymon 1984, p. 72; Johnson *et al.* 2008, pp. 203–204). Surveys conducted in the late 1990s in Arizona in historically occupied western yellow-billed cuckoo riparian habitat found 85 percent of all western yellow-billed cuckoo detections in habitat dominated by cottonwood with a strong willow and mesquite understory, 11.5 percent within mixed native and tamarisk habitats, 3.5 percent within mixed native and Russian olive habitats, and only 5 percent within tamarisk-dominated habitats (Johnson *et al.* 2008, pp. 203–204; Johnson *et al.* 2010, pp. 204–205). Even in the tamarisk-dominated habitat, cottonwoods were still present at all but two of these sites.

Although tamarisk monocultures generally lack the structural diversity of native riparian habitat, western yellow-billed cuckoos may use these areas for foraging, dispersal, and breeding, especially if the tamarisk-dominated sites retain some native trees. Tamarisk contributes cover, nesting substrate, temperature amelioration, increased humidity, and insect production where native habitat regeneration and survivability has been compromised by altered hydrology (*e.g.,* reduced flow or groundwater availability) and hydrologic processes (*e.g.,* flooding and sediment deposition). In parts of the western yellow-billed cuckoo's range, some tamarisk-dominated sites are used for nesting and foraging including parts of the Bill Williams, Verde, Gila, Salt, and Rio Grande Rivers (Groschupf 1987, pp. 9, 15; Corman and Magill 2000, pp. 11, 14–16, Halterman 2001, pp. 11, 15; Leenhouts *et al.* 2006, p. 15; Sogge *et al.* 2008, p. 148; Sechrist *et al.* 2009, p. 55; Dockens and Ashbeck 2011a, pp. 1, B–26; Dockens and Ashbeck 2011b, pp. 8, D–2; Jarnevich *et al.* 2011, p. 170; McNeil *et al.* 2013b, p. I–1; Jakle 2014, entire; Orr *et al.* 2014, p. 25; SRP 2014, entire; Service 2014b, p. 63; Arizona-Sonora Desert Museum 2016, entire; Dillon *et al.* 2018 pp. 31–33; White *et al.* 2018 pp. 26–27; and Parametrix, Incorporated (Inc.) and Southern Sierra Research Station 2019, p. 5–1).

Past restoration efforts favored nonnative tamarisk removal without regard for its habitat suitability for the western yellow-billed cuckoo. In areas where tamarisk is a major component (or part of the understory), its removal may not be appropriate or recommended because western yellow-billed cuckoo habitat selection may be based on overstory/understory structure or annual variation in environmental factors and not on specific vegetation types (Halterman 2001, pp. 11, 15; Sechrist *et al.* 2009, p. 53). Halterman (2001, pp. 11, 15) found western yellow-billed cuckoos nesting in monoculture stands of tamarisk in 2001 for the first time in the 6-year study, indicating that use of tamarisk for nesting may change over time. In some areas, if tamarisk is removed, the remaining habitat may be rendered unsuitable because it is more exposed, hotter, and drier.

Another issue in regard to tamarisk is the introduction of biocontrol agents to remove tamarisk. In 2001, the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) released various species of the nonnative tamarisk leaf beetle (*Diorhabda* sp.) in an effort to control tamarisk invasion (APHIS 2005, p. 4–5). Since 2001, the tamarisk leaf beetle has expanded rapidly and its distribution now encompasses much of the western United States (RiversEdge West, 2019, entire). This expansion of tamarisk defoliation will lead to habitat degradation and may render areas unsuitable for occupancy by the western yellow-billed cuckoo (Sogge *et al.* 2008, p. 150). Defoliation during the breeding season also exposes eggs and nestlings to heat exposure and predation from decreased cover, as was documented in 2008 in St. George, Utah, with the exposure-caused failure of an active southwestern willow flycatcher nest (Paxton *et al.* 2011, p. 257). In defoliated areas of the Rio Grande, canopy cover was still within the natural range of variation; however, the canopy cover was composed of dead leaves as opposed to live leaves, which changed the microclimate (Dillon and Ahlers 2018, pp. 26–27). Ultimately, the sampled areas with the most tamarisk and subsequent defoliation activity reflected the areas with the highest temperature extremes (Dillon and Ahlers 2018, pp. 26–27).

Some tamarisk removal and native tree replacement projects are under way to offset the arrival of tamarisk leaf beetles and subsequent defoliation (Service 2016b, pp. 4–15). If these projects are unsuccessful in sustaining native woodland habitat of at least the same habitat value as habitat that was removed, the end result will be a net loss of habitat. Another nonnative species identified as a biocontrol agent, the tamarisk weevil (*Coniatus* sp.). has also been found in the wild in Arizona, California, Nevada, and Utah (Eckberg and Foster 2011, p. 51; Eichhorst *et al.* 2017, entire). The impact of the tamarisk weevil has not been well studied and currently has not been shown to significantly impact tamarisk-dominated habitats used by the western yellow-billed cuckoo.

Breeding (nesting) habitat and home range size. In rangewide western yellow-billed cuckoo habitat, the habitat used for breeding and nesting by the species varies in size and shape. The available information indicates that the species requires large tracts of habitat for breeding and foraging during the nesting season (home range). The larger the extent of habitat, the more likely it

will provide suitable habitat for the western yellow-billed cuckoos and be occupied by nesting pairs (Laymon and Halterman 1989, pp. 274–275). Rangewide breeding habitat can be relatively dense contiguous stands or irregularly shaped mosaics of dense vegetation with more sparse or open areas.

Along the Colorado River in California and Arizona, western yellow-billed cuckoos tend to favor larger riparian habitat sites for nesting (Laymon and Halterman 1989, p. 275): Sites less than 37 ac (15 ha) are considered unsuitable nesting habitat; sites between 37 ac (15 ha) and 50 ac (20 ha) in size were rarely used as nest sites; and habitat patches or aggregates of patches from 50 to 100 ac (20 to 40 ha) in size were considered marginal habitat (Laymon and Halterman 1989, p. 275). Vegetation data collected in more recent years along the lower Colorado River at 834 plots from 2006 through 2012 indicated the median size of occupied sites (92 ac (37 ha)) was almost three times as large as unoccupied sites (32 ac (13 ha)) (McNeil *et al.* 2013b, p. 94). Habitat areas between 100 ac (40 ha) and 200 ac (81 ha), although considered suitable, are not consistently used by the species in California. The optimal size of habitat patches (aggregates of trees that may be interspersed with openings, sparse understory or canopy, or open floodplains) for the western yellow-billed cuckoo is generally greater than 200 ac (81 ha) in extent and these patches should have dense canopy closure and high foliage volume of willows and cottonwoods in at least a portion of the overall habitat patch (Laymon and Halterman 1989, pp. 274–275) to provide adequate space for nesting and foraging.

In rangewide riparian breeding habitat and mixed riparian habitat in California, Arizona, and New Mexico, the home ranges used by the western yellow-billed cuckoo during the breeding season varied greatly (Laymon and Halterman 1987, pp. 31–32; Halterman 2009, p. 93; Sechrist *et al.* 2009, p. 55; McNeil *et al.* 2010, p. 75; McNeil *et al.* 2011, p. 37; McNeil *et al.* 2012, p. 69; McNeil *et al.* 2013a, pp. 49–52; McNeil *et al.* 2013b, pp. 133–134). Home range estimates for western yellow-billed cuckoos using telemetered birds on the lower Colorado River are considerably smaller (20 ha) than those reported from other areas such as the San Pedro River (38.6 ha) (Halterman 2009, p. 93) and the Rio Grande (56.3 ha) (Sechrist *et al.* 2009, p. 55) and may indicate differences in habitat area, quality, or prey densities (McNeil *et al.* 2013b, p. 137). On the Rio Grande in New Mexico, Sechrist *et al.* (2009, p. 55) estimated a large variation in home range size, ranging from 12 to 697 ac (5 to 282 ha). On the upper San Pedro River in Arizona, Halterman (2009, pp. 67, 93) also estimated a large variation in home range size, ranging from 2.5 to 556 ac (1 to 225 ha). In the intermountain west (Idaho, Utah, Colorado), the western yellow-billed cuckoo breeds in similar habitats as described above but that are more scattered and in lower density (Parrish *et al.* 1999, p. 197; Taylor 2000, pp. 252–253; Idaho Department of Fish and Game 2005, entire; Wiggins 2005, p. 15). These measures suggest that the amount of habitat required to support nesting western yellow-billed cuckoos even in rangewide riparian breeding habitat is variable.

Home range size is unknown in southwestern breeding habitat, including in more xeroriparian woodland, desert scrub and desert grassland drainages with a tree component, and in Madrean evergreen woodland drainages. Whether the area is considered marginal, suitable, or optimal depends on numerous factors and is variable across the species' range. Breeding habitat in more arid regions of the Southwest may be made up of a series of adjacent or nearly adjacent habitat patches, less than 200 ac (81 ha) each, which combined make up suitable breeding habitat for the species. Often interspersed with large openings, these habitat patches include narrow stands of trees, small groves of trees, or sparsely scattered trees. For example, in the Agua Fria River in central Arizona, occupied habitat consists not only of mature cottonwood and willow gallery forest (multi-aged and multi-height forest) found in rangewide breeding habitat, but also smaller patches of young willows that are limited to narrow riparian corridors with mesquite on the adjacent terrace, characteristic of southwestern breeding habitat (Prager and Wise 2015, p. 13). In the bajadas, foothills, and mountain drainages of southeastern Arizona, scattered overstory trees, small patches of trees, or narrow stands of trees contain suitable breeding habitat (MacFarland and Horst 2015, entire, Corson 2018, pp. 5, 6–20; Sferra *et al.* 2019, entire).

Although large expanses of habitat are better than small patches for the species, small habitat patches should be evaluated when managing for the western yellow-billed cuckoo. The optimal minimum breeding habitat patch size of 200 ac (81 ha) may not be applicable for much of the Southwest, where breeding habitat may be narrower and patchier and areas of less than 40 ac (16 ha) may be used for breeding (Sechrist *et al.* 2009, p. 55; White *et al.* 2018, pp. 14–37). These smaller sites support fewer western yellow-billed cuckoos, but collectively they may be important for achieving recovery.

Western yellow-billed cuckoos appear to stage (gather) in southern Arizona or northern Mexico pre- and post-breeding, suggesting that this region is important to the DPS (McNeil *et al.* 2015, pp. 249, 251). Some individuals also roam widely (several hundred miles), apparently assessing food resources prior to selecting a nest site (Sechrist *et al.* 2012, pp. 2–11). A plausible explanation for prolonged presence in southern Arizona and northwestern Mexico pre- and post-breeding may be that western yellow-billed cuckoos are taking advantage of increased insect production in the monsoonal area. Identifying and maintaining habitat across the species' range is important to allow the species to take advantage of variable environmental conditions for successful breeding opportunities.

Foraging area. Western yellow-billed cuckoos select a nesting site based on optimizing the near-term foraging potential of the neighborhood (Wallace *et al.* 2013, p. 2102). Given that western yellow-billed cuckoos are larger birds with a short hatch-to-fledge time, the adults must have access to abundant food sources to successfully rear their offspring. High-quality foraging habitat in rangewide breeding habitat often contains a mixture of overstory and understory vegetation (typically cottonwoods and willows) that provides for diversity and abundance of prey. However, tree habitat does not always have both an overstory and understory. Western yellow-billed cuckoos generally forage within the tree canopy, and the higher the foliage volume the more likely western yellow-billed cuckoos are to use a site for foraging (Laymon and Halterman 1985, pp. 10–12). Foraging areas can be less dense with lower levels of canopy cover and often have a high proportion of cottonwoods in the canopy. Foraging areas can also include riparian habitat with a high abundance of tamarisk (White *et al.* 2020, pp. 51–54).

The foraging distance and size of foraging habitat required by western yellow-billed cuckoo varies on prey availability and other environmental conditions and may vary annually and from site to site. A foraging area during the breeding season may overlap with other western yellow-billed cuckoo foraging areas if multiple nest sites are within a single area. Hughes (2015, p. 3) suggests that adjacent nesting western yellow-billed cuckoos use time spacing (*i.e.,* no overlap in egg dates) to partition

resources, allowing many nesting pairs to share localized short-term abundance of food. In a study in rangewide breeding habitat in the Sacramento Valley, California, the mean size of foraging areas for 4 pairs of western yellow-billed cuckoos was approximately 48 ac (19 ha) (range 27 to 70 ac (11 to 28 ha)) of which about 25 ac (10 ha) was considered usable habitat for foraging (Laymon 1980, p. 20; Hughes 1999, p. 7).

In the southwestern United States and northern Mexico, western yellow-billed cuckoo foraging habitat is usually more arid than adjacent occupied nesting habitat. Western yellow-billed cuckoos not only forage within woodland breeding habitat, but they also forage in almost any adjacent habitat. Desert vegetation in intermittent and ephemeral drainages or adjacent upland areas may require direct precipitation to flourish (Wallace *et al.* 2013, p. 2102). Other desert areas with spring-fed habitat may provide similar habitat conditions. Both are important features of western yellow-billed cuckoo foraging habitat in the arid Southwest. In Arizona and New Mexico, adjacent foraging habitat other than in riparian and xeroriparian or Madrean evergreen woodland habitat includes several types of semi-desert scrub, desert scrub, chaparral, semi-desert grassland, and desert grassland (Brown and Lowe 1982, entire; Brown 1994, entire; Brown *et al.* 2007, pp. 4–5; NatureServe 2016, entire; Drost *et al.* 2020, entire). In New Mexico along the Rio Grande, 29 percent of all estimated territories in the period 2009–2014 were located in understory vegetation (considered less than 6 m (15 ft) in height) that lacked a canopy component (considered less than 25 percent cover), but included a New Mexico olive (*Forestiera neomexicana*) component (Hamilton 2014, p. 3–84). Of these understory areas, roughly half were dominated by exotic species (primarily tamarisk) (Carstensen *et al.* 2015, pp. 57–61). Western yellow-billed cuckoos in New Mexico have also been observed foraging in adjacent habitat up to 0.5 mi (0.8 km) away from nest sites (Sechrist *et al.* 2009, p. 49). In the intermountain west (Idaho, Utah, Colorado), the western yellow-billed cuckoo breeds in similar habitats as described above but that are more scattered and in lower density (Parrish *et al.* 1999, p. 197; Taylor 2000, pp. 252–253; Idaho Fish and Game 2005, entire; Wiggins 2005, p. 15).

Movement corridors and connectivity of habitat. The western yellow-billed cuckoo is a neotropical migratory species that travels between North, Central, and South America each spring and fall (Sechrist *et al.* 2012, p. 5; McNeil *et al.* 2015, p. 244; Parametrix, Inc. and Southern Sierra Research Station 2019, pp. 97–108). As such, it needs movement corridors of linking habitats and stop-over sites along migration routes and between breeding areas (Faaborg *et al.* 2010, pp. 398–414; Allen and Singh 2016, p. 9). During movements between nesting attempts, western yellow-billed cuckoos have been found at riparian sites with small groves or strips of trees, sometimes less than 10 ac (4 ha) in extent (Laymon and Halterman 1989, p. 274). The habitat features at stop-over and foraging sites are typically similar to the features at breeding sites, but may be smaller in size, may be narrower in width, and may lack understory vegetation. Western yellow-billed cuckoos may be using nonbreeding areas as staging areas or taking advantage of local foraging resources (Sechrist *et al.* 2012, pp. 7–9; McNeil *et al.* 2015, pp. 250–252). As a result, western yellow-billed cuckoos use nonbreeding or intermittently used breeding areas as staging areas, movement corridors, connectivity between habitats, or foraging sites (taking advantage of local foraging resources). However, because these nonbreeding habitat areas are not limiting, we have not specifically identified them as critical habitat.

Summary of Space for Individual and Population Growth and for Normal Behavior

Therefore, based on the information above, for the majority of habitat within the species' range (rangewide breeding habitat), we identify rivers and streams of lower gradient and more open valleys with a broad floodplain, containing riparian woodland habitat with an overstory and understory vegetation component made up of various plant species (most often dominated by willow or cottonwood) to be physical or biological features essential to the conservation of the western yellow-billed cuckoo. In more arid regions of the southwestern United States (southwestern breeding habitat), we also identify reaches of more arid riparian and xeroriparian habitat (including mesquite bosques), desert scrub and desert grassland drainages with a tree component, and Madrean evergreen woodland drainages in low- to high-gradient drainages to be a physical or biological feature essential to the conservation of this species. These habitat types provide space for breeding, nesting, and foraging for the western yellow-billed cuckoo. These habitat features also provide for migratory or stop-over habitat and movement corridors for the western yellow-billed cuckoo.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Food. Western yellow-billed cuckoos eat large insects but also prey on small vertebrates such as frogs (*e.g., Hyla* spp.; *Pseudacris* spp.; *Rana* spp.) and lizards (*e.g., Lacertilia* sp.) (Hughes 1999, p. 8). The diet of the western yellow-billed cuckoo on the South Fork Kern River in California showed the majority of the prey to be the big poplar sphinx moth larvae (*Pachysphinx occidentalis*) (45 percent), tree frogs (24 percent), katydids (22 percent), and grasshoppers (Order *Othoptera*) (9 percent) (Laymon and Halterman 1985, pp. 10–12; Laymon *et al.* 1997, p. 7). Minor prey at that site and other sites includes beetles (Order *Coleoptera* sp.), dragonflies (Order *Odonata*), praying mantis (Order *Mantidae*), flies (Order *Diptera*), spiders (Order *Araneae*), butterflies (Order *Lepidoptera*), caddis flies (Order *Trichoptera*), crickets (Family *Gryllidae*), and cicadas (Family Cicadidae) (Laymon *et al.* 1997, p. 7; Hughes 1999, pp. 7–8). In Arizona, cicadas are an important food source (Halterman 2009, p. 112). Western yellow-billed cuckoos on the Buenos Aires National Wildlife Refuge in Arizona were observed eating tent caterpillars, caterpillars of unidentified species, katydids, and lizards (Griffin 2015, pp. 19–20). At upper Empire Gulch in southeastern Arizona, a western yellow-billed cuckoo was photographed in a tree in gallery riparian forest with a leopard frog (*Rana* spp.) in its bill on July 21, 2014 (Barclay 2014, entire; Leake 2014, entire). In the intermountain west (Idaho, Utah, Colorado), the western yellow-billed cuckoo feeds on similar insect species (Parrish *et al.* 1999, p. 197; Idaho Fish and Game 2005, p. 2; Wiggins 2005, p. 18).

Western yellow-billed cuckoos depend on an abundance of large, nutritious insect and vertebrate prey to survive and raise young. In portions of the southwestern United States, high densities of prey species may be seasonally found, often for brief periods of time, during the vegetation growing season. The arrival and nesting of western yellow-billed cuckoos typically coincides with the availability of prey, which is later than in the eastern United States (Hughes 2020, entire). Desiccated riparian sites produce fewer suitable insects than moist sites. In areas that typically receive rains during the summer monsoon, an increase in humidity, soil moisture, and surface

water flow are important triggers for insect reproduction and western yellow-billed cuckoo nesting (Wallace *et al.* 2013, p. 2102). Western yellow-billed cuckoos select a nesting site based on optimizing the near-term foraging potential of the habitat (Wallace *et al.* 2013, p. 2102). Given that western yellow-billed cuckoos are large birds with a short hatch-to-fledge time, the adults must have access to abundant food sources to successfully rear their offspring (Laymon 1980, p. 27). The variability of monsoon precipitation across a region may result in areas with favorable conditions for western yellow-billed cuckoo nesting in one year and less favorable in a different year. In years of high insect abundance, western yellow-billed cuckoos lay larger clutches (three to five eggs rather than two), a larger percentage of eggs produce fledged young, and they breed multiple times (two to three nesting attempts rather than one) (Laymon *et al.* 1997, pp. 5–7).

Therefore, we identify the presence of abundant, large insect fauna (*e.g.,* cicadas, caterpillars, katydids, grasshoppers, crickets, large beetles, dragonflies, and moth larvae) and small vertebrates (frogs and lizards) during nesting season of the western yellow-billed cuckoo to be a physical or biological feature essential to the conservation of the species.

Water and humidity. Rangewide breeding habitat for western yellow-billed cuckoo is largely associated with perennial rivers and streams that support the expanse of vegetation characteristics needed by breeding western yellow-billed cuckoos. Throughout the western yellow-billed cuckoo's range, winter precipitation (as rain or snow) provides water flow to the larger streams and rivers in the late spring and summer. In southwestern breeding habitat, western yellow-billed cuckoos also breed in ephemeral and intermittent drainages, some of which are associated with monsoonal precipitation events. Hydrologic conditions at western yellow-billed cuckoo breeding sites can vary between years. At some locations during low rainfall years, water flow may be reduced or absent, or soils may not become saturated at appropriate times. During high rainfall years, streamflow may be extensive and the riparian vegetation can be inundated and soil saturated for extended periods of time.

The North American Monsoon (monsoon) is a large-scale weather pattern that causes high humidity and a series of thunderstorms during the summer in northwestern Mexico and the southwestern United States (Erfani and Mitchell 2014, pp. 13,096–13,097; National Weather Service 2019, p. 4). It supplies about 60–80 percent of the annual precipitation for northwestern Mexico, 45 percent for New Mexico, and 35 percent for Arizona (Erfani and Mitchell 2014, p. 13,096). The monsoon typically arrives in early to mid-July in Arizona and New Mexico, where much of the rainfall occurs in the mountains (Erfani and Mitchell 2014, pp. 13,096–13,097; National Weather Service 2019, p. 2). The southwestern United States, at the northern edge of the monsoon's range, receives less and more variable rainfall than northwestern Mexico (National Weather Service 2019, p. 2).

Humid conditions created by the North American Monsoon (Erfani and Mitchell 2014, pp. 13,096–13,097; National Weather Service 2019, p. 2) and related surface and subsurface moisture appear to be important for the western yellow-billed cuckoo. The moisture provides a ''green-up'' (sudden germination or growth of vegetation) that attracts prey and improves habitat conditions. The species is restricted to nesting in moist riparian habitat or in drainages that bisect semi-desert, desert grasslands, desert scrub, and Madrean evergreen woodland in portions of the western United States and northern Mexico because of humidity requirements for successful hatching and rearing of young (Hamilton and Hamilton 1965, p. 427; Gaines and Laymon 1984, pp. 75–76; Rosenberg *et al.* 1991, pp. 203–204; Corman and Magill 2000, pp. 37–48; American Birding Association 2014, entire; Arizona Game and Fish Department 2018, entire; Westland Resources, Inc. 2019, entire; Cornell Lab of Ornithology 2020, (eBird data)).

Western yellow-billed cuckoos have evolved larger eggs and thicker eggshells, which help them cope with potential higher egg water loss in the hotter, drier conditions of the Southwest (Hamilton and Hamilton 1965, pp. 426–430; Ar *et al.* 1974, pp. 153–158; Rahn and Ar 1974, pp. 147–152). Nest sites have lower temperatures and higher humidity compared to areas along the riparian forest edge or outside the forest (Launer *et al.* 1990, pp. 6–7, 23). Recent research on the lower Colorado River has confirmed that western yellow-billed cuckoo nest sites had significantly higher daytime relative humidity (6–13 percent higher) and significantly lower daytime temperatures (2–4 degrees Fahrenheit (1–2 degrees Celsius) lower) than average forested sites (McNeil *et al.* 2011, pp. 92–101; McNeil *et al.* 2012, pp. 75–83).

Seasonal precipitation results in vegetative regeneration in the intermittent and ephemeral drainages and adjacent desert scrub, desert grassland, and Madrean evergreen woodlands of the southwestern United States. High summer monsoonal humidity and rain lead to summer flow events in drainages and increased vegetative growth and associated insect production during the breeding season. The North American Monsoon promotes growth of shallow-rooted understory vegetation in mesquite-dominated woodlands, Madrean evergreen woodlands, desert scrub drainages, desert grassland drainages, and adjacent desert and grassland vegetation (Brown 1994, pp. 59–62; Wallace *et al.* 2013, p. 2102). The hydrologic processes in Madrean evergreen woodlands, semi-desert and desert scrub drainages, and semi-desert and desert grassland drainages of southeastern Arizona are different than the rest of the range of the western yellow-billed cuckoo. These bajada and upland habitats on gently rolling hillsides are interspersed with intermittent or ephemeral drainages. Humidity brought on by the summer monsoon may be an especially important trigger for breeding western yellow-billed cuckoos in this otherwise dry landscape.

Nesting continues through August and frequently into September in southeastern Arizona, likely in response to the increased food resources associated with the seasonal summer rains (Corman and Wise-Gervais 2005, p. 202). For example, the big poplar sphinx moth is an earth pupator (larvae burrow in the ground, and pupae emerge under certain environmental conditions) (Oehlke 2017, p. 5). The sphinx moth has a receptor that detects the water content of air to sense changes in humidity and when conditions are favorable for feeding and breeding (McFarland 1973, pp. 199–208; von Arx *et al.* 2012, p. 9471). In riparian woodland habitat soil, moisture and humidity cue the sphinx moths to emerge. In Arizona, summer monsoonal precipitation mimics typical riparian woodland soil moisture conditions, which cue the sphinx moth to emerge from the soil. Although sphinx moths are just one of the foods eaten by western yellow-billed cuckoos, we use these moths to illustrate that the unique monsoonal conditions in southeastern Arizona contributing toward food production are an important factor in western yellow-billed cuckoo presence in southeastern Arizona.

A large proportion of the remaining occupied habitat persists in hydrologically altered systems in the

Southwest where the timing, magnitude, and frequency of natural flow have changed (Service 2002, pp. J1–J34). Hydrologically altered systems, with less dynamic riverine process than unaltered systems, can support suitable western yellow-billed cuckoo habitat if suitable woodland vegetation as described above is present. As discussed above and in the October 3, 2014, **Federal Register** listing the western yellow-billed cuckoo (79 FR 59992), human actions have cleared vegetation, modified physical site conditions, altered natural river processes, and disrupted biotic interactions along much of the western yellow-billed cuckoo habitat in the West (Service 2002, p. H–11). In the intermountain West (Idaho, Utah, Colorado), similar losses and degradation of habitat have occurred (Parrish *et al.* 1999, pp. 200–201; Idaho Fish and Game 2005, p. 3; Wiggins 2005, pp. 22–27). Habitat conditions are greatly influenced by hydrologic regime and depth to groundwater, and native riparian vegetation in altered systems is unlikely to reestablish unless the hydrologic regime is restored (Stromberg *et al.* 2007, pp. 381–391). However, these altered systems, which often cannot support the native plant species and structural diversity of unaltered systems, can support more adapted nonnative tree species like tamarisk or Russian olive. Western yellow-billed cuckoos occupy nonnative habitat interspersed with native habitat on the Colorado, Bill Williams, Verde, Gila, Santa Cruz, San Pedro, and Rio Grande Rivers (Corman and Magill 2000, pp. 15–16, 37–48; Sonoran Institute 2008, pp. 30–34; Dockens and Ashbeck 2011a, p. 6; Dockens and Ashbeck 2011b, p. 10; McNeil *et al.* 2013b, p. I–1; Arizona Game and Fish Department 2018, entire; Parametrix, Inc. and Southern Sierra Research Station 2019, p. 5–1).

Subsurface hydrologic conditions are equally important to surface water conditions in determining riparian vegetation patterns. Depth to groundwater plays an important part in the distribution of riparian vegetation and western yellow-billed cuckoo habitat. Riparian forest trees need access to shallow groundwater to grow to the appropriate size and density to provide habitat for nesting, foraging, and migrating western yellow-billed cuckoos. Goodding's willows and Fremont cottonwoods do not regenerate successfully if the groundwater levels fall below 6 ft (2 m) from the surface (Shafroth *et al.* 2000, pp. 66–75). Goodding's willows cannot survive if groundwater levels drop below 10 ft (3 m), and Fremont cottonwoods cannot survive if groundwater drops below 16 ft (5 m) (Stromberg and Tiller 1996, p. 123). Abundant and healthy riparian vegetation decreases and habitat becomes stressed and less productive when groundwater levels are lowered (Stromberg and Tiller 1996, pp. 123–127).

Therefore, based on the information above, we identify seasonally or perennially flowing rivers, streams, and drainages; elevated subsurface groundwater tables; vegetative cover that provides important microhabitat conditions for successful breeding and prey (high humidity and cooler temperatures); seasonal precipitation (winter and summer) in the Southwest; and high summer humidity as physical and biological features essential to the conservation of the western yellow-billed cuckoo.

Conditions for germination and regeneration of vegetation. The abundance and distribution of fine sediment deposited on floodplains during flood events is critical for the development, abundance, distribution, maintenance, and germination of riparian tree species. This sediment deposition must be accompanied by sufficient surface moisture for seed germination and sufficient groundwater levels for survival of seedlings and saplings (Stromberg 2001, pp. 27–28). The lack of stream flow processes, which deposit such sediments and clear out woody debris, may lead riparian forested areas to senesce (age and become less productive) and to become degraded and not able to support the varied vegetative structure required for western yellow-billed cuckoo nesting and foraging.

In unmanaged hydrologic systems (natural riverine systems), associated with rangewide breeding habitat, this variability of water flow results in removal of stream banks and deposition of soil and sediments. These sediments provide areas for vegetation (especially cottonwood and willow) to colonize and provide diverse habitat for the western yellow-billed cuckoo. In managed hydrologic systems (systems controlled by dams), stream flow is often muted and does not provide the magnitude of these removal and deposition events except during flood events depending on stream-bank composition (Fremier *et al.* 2014, pp. 4–6). However, if these systems are specifically managed to mimic more natural conditions, some removal and deposition can occur. The range and variation of stream flow frequency, magnitude, duration, and timing that will establish and maintain western yellow-billed cuckoo habitat can occur in both managed and unmanaged flow conditions depending on the interaction of the water feature and its floodplain or the physical characteristics of the landscape.

However, successional vegetation change that produces suitable habitat consisting of varied vegetative structure can also occur in managed river and reservoir systems (and in human-altered river systems) when managed to mimic natural stream flows, but sometimes with different vegetation species composition, at different timing, frequency, and magnitude than natural riverine systems. For example, varying amounts of western yellow-billed cuckoo habitat are available from month-to-month and year-to-year as a result of dam operations. During dry years, when lake levels may be low, vegetation can be established and mature into habitat for the western yellow-billed cuckoo. In wet years, this vegetation can be flooded for extended periods of time and be stressed or killed. This is particularly true of areas upstream of reservoirs like Lake Isabella in California, Roosevelt and Horseshoe Reservoirs in Arizona, and Elephant Butte Reservoir in New Mexico, all of which have relatively large western yellow-billed cuckoo populations. The filling and draw-down of reservoirs often mimics the flooding and drying events associated with intact riparian woodland habitat and river systems providing habitat for the western yellow-billed cuckoo.

In southern Arizona and New Mexico, where water is less available and releases do not mimic the natural hydrograph, riparian habitat is often narrower, patchier, sparser, and composed of more xeroriparian and nonriparian trees and large shrubs than in a free- flowing river. Habitat regeneration opportunities occur less frequently than in natural systems or managed systems that mimic the natural hydrograph. Prolonged drying and flooding from reservoir management can also affect food resources and habitat suitability for western yellow-billed cuckoos. For example, food availability is affected when prolonged inundation reduces survivability of ground-dwelling insects such as sphinx moth pupa or katydid eggs (Peterson *et al.* 2008, pp. 7–9). Likewise, prolonged drying reduces the vegetation available for prey insects to consume, so less insect biomass is available for western yellow-billed cuckoos.

In the southwestern United States, the North American Monsoon season, which peaks in July and August when western yellow-billed cuckoos are breeding, provides about 45 percent and

35 percent of the annual precipitation for New Mexico and Arizona, respectively (Erfani and Mitchell 2014, p. 13096). The increased humidity and rains promote rapid and dense herbaceous growth (forbs, grasses, and vines) in occupied habitat in riparian (including xeroriparian) drainages intersecting desert scrub and desert grassland, and Madrean evergreen woodlands. In southeastern Arizona, Madrean evergreen woodland habitat receives half of the annual precipitation during the growing season from May through August (Brown 1994, pp. 60, 62).

Therefore, based on the information above, we identify flowing perennial rivers and streams and deposited fine sediments as physical and biological features essential to the conservation of the western yellow-billed cuckoo. These conditions may occur in either natural or regulated human-altered riverine systems. We also identify intermittent and ephemeral drainages and immediately adjacent upland habitat (which receive moisture as a result of summer monsoon events and other seasonal precipitation) that promote seed germination and regeneration as essential physical or biological features of western yellow-billed cuckoo habitat.

Cover or shelter. Rangewide breeding habitat and the more arid southwestern breeding habitat provide the western yellow-billed cuckoo with cover and shelter while foraging and nesting. Placing nests in dense vegetation provides cover from predators that would search for adult western yellow-billed cuckoos, their eggs, nestlings, and fledged young. For example, northern harriers (*Circus cyaneus*) prey on western yellow-billed cuckoo nestlings in open riparian vegetation at restoration sites in California. Dense vegetation in the habitat patch makes it difficult for northern harriers to prey on species like the western yellow-billed cuckoo (Laymon 1998, pp. 12–14). As noted above, shelter provided by the vegetation also contributes toward providing nesting sites, temperature amelioration, and increased humidity, all of which assist in benefiting the life history of western yellow-billed cuckoo.

Therefore, we identify riparian trees, including but not limited to willow, cottonwood, alder, walnut, sycamore, boxelder, and ash that provide cover and shelter for nesting, foraging, and dispersing western yellow-billed cuckoos as physical or biological features essential to the conservation of the western yellow-billed cuckoo. In southwestern breeding habitat in more arid riparian drainages, in addition to the riparian species above, we identify oak, mesquite, hackberry, acacia, juniper, greythorn, mimosa, soapberry, desert willow, Russian olive, and tamarisk that provide cover and shelter for nesting, foraging, and dispersing western yellow-billed cuckoos as physical or biological features essential to the conservation of the western yellow-billed cuckoo.

Sites for breeding, reproduction, or rearing (or development) of offspring.

Young habitat. The presence of young trees appears to be a component of breeding habitat in at least some sites. In studies of riparian forests throughout California and along the California-Arizona border along the lower Colorado River, researchers found that the western yellow-billed cuckoo is not restricted to old-growth willows and cottonwood habitat, but occurs in habitat with younger trees and saplings 9–32 ft (3–30 m) or less (Gaines and Laymon 1984, pp. 73–75; Anderson and Laymon 1989, entire; Laymon and Halterman 1989, entire; Raulston 2020, p. 4). Along the lower Colorado River in restored sites at the Palo Verde Ecological Reserve, the number of western yellow-billed cuckoo territories increased annually until the fourth year after planting and then began declining and moving into more recently planted areas (Raulston 2020, p. 20). Between 2008 and 2012, researchers found that small tree stem density associated with young trees and total canopy closure at revegetation sites positively associated with western yellow-billed cuckoo nest placement and that native large tree stem density showed only a weak positive association with nest placement (McNeil *et al.* 2013b, ES–2, Raulston 2020, p. 5). Area (site size) was also a predictor of site occupancy to a lesser degree; the median size of occupied sites (37.2 ha) was almost three times as large as unoccupied sites (12.8 ha).

Western yellow-billed cuckoo nests have been documented in Fremont cottonwood, Goodding's black willow (*Salix gooddingii*), red willow (*Salix laevigata*), coyote willow (*Salix exigua*), yew-leaf willow (*Salix taxifolia*), Arizona sycamore, mesquite, tamarisk, hackberry, boxelder, soapberry, Arizona walnut, acacia, ash, alder, seep willow (*Baccharis salicifolia*), English walnut (*Juglans regia*), oak, and juniper (Laymon 1980, pp. 6–8; Laymon 1998, p. 7; Hughes 1999, p. 13; Corman and Magill 2000, p. 16; Halterman 2001, p. 11; Halterman 2002, p. 12; Halterman 2003, p. 11; Halterman 2004, p. 13; Corman and Wise-Gervais 2005, p. 202; Halterman 2005, p. 10; Halterman 2007, p. 5; Holmes *et al.* 2008, p. 21; McNeil *et al.* 2013b, pp. I–1–I–3; Tucson Audubon Society 2015, p. 44; Groschupf 2015, entire; MacFarland and Horst 2015, pp. 9–12; Sferra *et al.* 2019, p. 3).

In one study of a compilation of nests, nest site characteristics in rangewide riparian woodland breeding habitat have been compiled from 217 western yellow-billed cuckoo nests from primarily rangewide breeding habitat on the Sacramento and South Fork Kern Rivers in California, and the Bill Williams and San Pedro Rivers in Arizona. Western yellow-billed cuckoos generally nest in thickets dominated by willow trees along floodplains greater than 200 ac (81 ha) in extent and greater than 325 ft (100 m) in width. Nests are placed on well-foliaged branches closer to the tip of the branch than the trunk of the tree (Hughes 1999, p. 13). Nests are built from 4 ft to 73 ft (1 m to 22 m) above the ground (average 22 ft (7 m)). Nests at the San Pedro River averaged higher (29 ft (9 m)) than either the Bill Williams River (21 ft (6 m)) or the South Fork Kern River (16 ft (5 m)). Nest trees ranged from 10 ft (3 m) to 98 ft (30 m) in height and averaged 35 ft (11 m). In older stands, heavily foliaged branches that are suitable for nesting often grow out into small forest openings or over sloughs or streams, making for ideal nest sites. In younger stands, nests are more often placed in vertical forks or tree crotches. Most nest sites in the study were in rangewide riparian breeding habitat and were placed in willows (72 percent of 217 nests), in generally willow-dominated sites. Nests were also documented in other riparian tree species, including Fremont cottonwood (13 percent), mesquite (7 percent), tamarisk (4 percent), netleaf hackberry (*Celtis laevigata* var. *reticulata*) (2 percent), English walnut (*Juglans regia*) (1 percent), boxelder (less than 1 percent), and soapberry (*Sapindus saponaria*) (less than 1 percent) (Laymon 1980, p. 8; Laymon 1998, p. 7; Hughes 1999, p. 13; Corman and Magill 2000, p. 16; Halterman 2001, p. 11; Halterman 2002, p. 12; Halterman 2003, p. 11; Halterman 2004, p. 13; Corman and Wise-Gervais 2005, p. 202; Halterman 2005, p. 10; Halterman 2007, p. 5; Holmes *et al.* 2008, p. 21).

Canopy cover directly above the nest is generally dense (average cover is 89 percent) and is denser at the South Fork Kern River (93 percent) and Bill Williams River (94 percent) than at the San Pedro River (82 percent). Canopy closure in a plot around the nest averages 71 percent and was higher at the Bill Williams River (80 percent) than at the South Fork Kern River (74 percent) or San Pedro River (64 percent) (Laymon *et al.* 1997, pp. 22–23; Halterman 2001, pp. 28–29; Halterman

2002, p. 25; Halterman 2003, p. 27; Halterman 2004, p. 42; Halterman 2005, p. 32; Halterman 2006, p. 34). In the intermountain West (Idaho, Utah, Colorado), the western yellow-billed cuckoo breeds in similar habitats as described above, but they are more scattered and in lower density (Parrish *et al.* 1999, pp. 196–197; Taylor 2000, pp. 252–253; Idaho Fish and Game 2005, entire; Wiggins 2005, p. 15). Optimal breeding habitat in rangewide riparian breeding habitat contains willow-dominated groves with dense canopy closure and well-foliaged branches for nest building with nearby foraging areas consisting of a mixture of cottonwoods and willows with a high volume of healthy foliage.

In a study on a lower Colorado River revegetation site, where cottonwood, willow, and mesquite were planted yellow-billed cuckoos nested in cottonwoods (n = 95, 57.5 percent), Goodding's willows (n = 49, 29.7 percent), honey mesquite (*Prosopis glandulosa*) (n = 13, 7.9 percent), tamarisk (n = 5, 3.0 percent), coyote willow (n = 2, 1.2 percent), and seep willow (n = 1, 0.7 percent) (Parametrix, Inc. and Southern Sierra Research Station 2019, Table 24 p. 89). Trees or shrubs used as nest substrates ranged in height from 2.5 m (8.2 ft) to 25.0 m (82 ft) (mean = 12.3 m (40.4 ft)). Nest heights ranged from 1 m (3.3 ft) to 20 m (66 ft) (mean = 7.6 m (24.8 ft)) (Parametrix, Inc. and Southern Sierra Research Station 2019, pp. ES–3, 88). Tamarisk was not planted and is uncommon within the revegetation sites.

Some historical records document western yellow-billed cuckoo presence during the breeding season in extensive mesquite bosques on the Santa Cruz River and in the semi-desert grasslands and desert scrub xeroriparian drainages of Canelo Hills; and in the Madrean evergreen woodlands mountain drainages of the Atascosa, Pajarito, Santa Rita, Patagonia, Huachuca, and Chiricahua Mountains of Southeastern Arizona (Groschupf (1987, pp. 11, 14, 16; Corman and Magill 2000, pp. 26–29, 37). In Arizona in the late 1990s, western yellow-billed cuckoos were documented in Sycamore Canyon and Pena Blanca Canyon in the Atascosa Mountains, Canelo Hills, and in the desert scrub and grassland xeroriparian drainages in the Altar Valley on Buenos Aires National Wildlife Refuge (Corman and Magill 2000, pp. 38, 40–44, 48, 51). The first oak nest documented in a Madrean evergreen woodland drainage was found in the lower Santa Rita Mountains in 2014 (Tucson Audubon Society 2015, p. 44).

In a 2018–2019 study to confirm western yellow-billed cuckoo breeding (copulation, active nests, or fledged young), breeding was documented at 39 out of 51 occupied sites in ephemeral xeroriparian drainages in Madrean evergreen woodland, desert and semi-desert scrub, and semi-desert grassland habitats in southeastern Arizona. These 51 occupied drainages were in the lower Santa Catalina Mountains, lower Santa Rita Mountains, Patagonia Mountains, lower Atascosa Mountains, Altar Valley, Baboquivari Mountains, Canelo Hills, and Huachuca Mountains (Drost *et al.* 2020, pp. 11–13. Multiple nests were found at some sites, including Las Guijas Wash and Canoa Wash in the Altar Valley, and Box Canyon and Florida Canyon in the Santa Rita Mountains. Trees where nests were placed varied in size and amount of cover, ranging from small to large trees and from well-concealed nests to partially exposed nests (Service 2020c, entire). Most nests were located along the drainage bottoms (See section on southwestern breeding (nesting) habitat).

Therefore, we identify rangewide riparian woodland generally containing willow and cottonwood, usually within floodplains greater than 200 ac (81 ha) in extent and greater than 325 ft (100 m) in width, with one or more densely foliaged nesting areas, to be a physical or biological feature essential to the conservation of the species. In some areas, we also identify southwestern breeding habitat (drainages with riparian, xeroriparian, and nonriparian tree and large shrub habitat intersecting desert scrub, desert grassland, and Madrean evergreen woodland, and Madrean pinyon-juniper woodland) that may be less than the 200-ac (81-ha) area, 325-ft (100-m) width with one or more nesting and foraging sites to be a physical or biological feature essential to the conservation of the species.

Effects of climate change. The available information on the effects of climate change has led us to predict that there will be altered environmental conditions across the western United States (the breeding range of the western yellow-billed cuckoo) (Hoerling *et al.* 2013, pp. 3–15). In the southwestern United States, northern Mexico, California, Intermountain West, and Pacific Northwest, climate change information is generally leading us to predict an overall warmer, drier climate, with periodic episodic precipitation events that, depending on site conditions, are expected to have adverse effects on habitat of the western yellow-billed cuckoo (Enquist *et al.* 2008, pp. 1–32; Gardali *et al.* 2012, pp. 8–10; Munson *et al.* 2012, pp. 1,083–1,095; Friggens and Finch 2015, entire; Smith and Finch 2016, entire). In rivers that depend on snowmelt, these changes are expected to result in more winter flooding and reduced summer stream flows (Dominguez *et al.* 2012, pp. 1–7). The amount of surface and groundwater available to regenerate and sustain riparian forests is expected to decline overall with persistent drought, favor the spread of tamarisk and other nonnative vegetation, and increase fire frequency (Westerling *et al.* 2006, pp. 942–943; McCarthy 2012, pp. 23–25; Smith and Finch 2016, p. 128). Precipitation events under most climate change scenarios within the range of the DPS will decrease in frequency and increase in severity (Dominguez *et al.* 2012, pp. 4–7; Melillo *et al.* 2014, pp. 70–81). Impacts to riparian habitat from climate change will exacerbate impacts from water drawdown from human use, impoundments, channelization, and alteration of river flows across the western United States and Mexico, and from conversion of habitat from native to mostly nonnative vegetation (Glenn and Nagler 2005, p. 439; Bradley *et al.* 2009, pp. 1514–1519; IPCC 2014, pp. 4–11; Friggens and Finch 2015, pp. 120–131).

Changing climate is expected to place added stress on the species and its habitat. This change may reduce available nesting sites and patch size and affect prey abundance as a result of lower humidity in riparian areas from reduced moisture retention, through periods of prolonged desiccation, and through increased likelihood of scouring flood events (Melillo *et al.* 2014, p. 75). A recent study found western yellow-billed cuckoo habitat suitability to be significantly reduced with hotter maximum July temperatures and increased distance to water along the Rio Grande, with 65–98 percent of their suitable habitat in New Mexico expected to be lost by 2090 (Friggens and Finch 2015, p. 11). Droughts may impact areas in Arizona that are influenced by monsoons (Wallace *et al.* 2013, pp. 2094–2107). Analyses of stream gauge data in the southwestern United States indicate that earlier and diminished stream discharge is expected in Arizona, Colorado, New Mexico, and Utah, which will likely reduce survival and reproduction rates of cottonwood, willow, box elder, and sycamore tree species (Smith and Finch 2016, pp. 120–131). Habitat suitability models further predict that changes in climate will increase habitat fragmentation and decrease breeding habitat patch size along the Rio Grande

in New Mexico (Friggens and Finch 2015, pp. 1–22). In addition, evidence shows that climate change may disrupt the synchrony of nesting western yellow-billed cuckoos and their food supply, causing further population decline and curtailment of its occupied range (Durst 2004, pp. 40–41; Scott *et al.* 2004, p. 70; Visser and Both 2005, pp. 2561–2569). For a more thorough discussion of climate change and the impacts it has on habitat for the western yellow-billed cuckoo, see the final rule to list the species as threatened published in the **Federal Register** on October 3, 2014 (79 FR 59992 at 60023).

Summary of Physical or Biological Features Essential for the Western Yellow-billed Cuckoo

According to 50 CFR 424.12(b)(1)(ii), we identify physical and biological features essential to the conservation of the species at an appropriate level of specificity using the best available scientific data. This analysis will vary between species and may include consideration of the appropriate quality, quantity, and spatial and temporal arrangements of such features in the context of the life history, status, and conservation needs of the species.

Given the wide variety and extent of foraging habitat outside the breeding habitat, and the large geographic areas in which western yellow-billed cuckoos search for food, we are not designating foraging habitat as critical habitat. Based on our current knowledge of the habitat characteristics required to sustain the species' life-history processes including breeding and dispersing, we have determined that the specific physical or biological features essential to the conservation of the western yellow-billed cuckoo consist of the following three components:

Physical or Biological Feature 1—Rangewide breeding habitat. Riparian woodlands across the DPS; Southwestern breeding habitat, primarily in Arizona and New Mexico: Drainages with varying combinations of riparian, xeroriparian, and/or nonriparian trees and large shrubs. This physical or biological feature includes breeding habitat found throughout the DPS range as well as additional breeding habitat characteristics unique to the Southwest.

a. *Rangewide breeding habitat (including areas in the Southwest).* Rangewide breeding habitat is composed of riparian woodlands within floodplains or in upland areas or terraces often greater than 325 ft (100 m) in width and 200 ac (81 ha) or more in extent with an overstory and understory vegetation component in contiguous or nearly contiguous patches adjacent to intermittent or perennial watercourses. The slope of the watercourses is generally less than 3 percent but may be greater in some instances. Nesting sites within the habitat have an above-average canopy closure (greater than 70 percent), and have a cooler, more humid environment than the surrounding riparian and upland habitats. Rangewide breeding habitat is composed of varying combinations of riparian species including the following nest trees: Cottonwood, willow, ash, sycamore, boxelder, alder, and walnut.

b. *Southwestern breeding habitat.* Southwestern breeding habitat, found primarily in Arizona and New Mexico, is more variable than rangewide breeding habitat. Southwestern breeding habitat occurs within or along perennial, intermittent, and ephemeral drainages in montane canyons, foothills, desert floodplains, and arroyos. It may include woody side drainages, terraces, and hillsides immediately adjacent to the main drainage bottom. Drainages intersect a variety of habitat types including, but not limited to, desert scrub, desert grassland, and Madrean evergreen woodlands (presence of oak). Southwestern breeding habitat is composed of varying combinations of riparian, xeroriparian, and/or nonriparian tree and large shrub species including, but not limited to, the following nest trees: Cottonwood, willow, mesquite, ash, hackberry, sycamore, walnut, desert willow, soapberry, tamarisk, Russian olive, juniper, acacia, and/or oak. In perennial and intermittent drainages, Southwestern riparian breeding habitat is often narrower, patchier, and/or sparser than rangewide riparian breeding habitat and may contain a greater proportion of xeroriparian trees and large shrub species. Although some cottonwood and willow may be present in Southwestern riparian habitat, xeroriparian species may be more prevalent. Mesquite woodland may be present within the riparian floodplain, flanking the outer edges of wetter riparian habitat, or scattered on the adjacent hillsides. The more arid the drainage, the greater the likelihood that it will be dominated by xeroriparian and nonriparian nest tree species. Arid ephemeral drainages in southeastern Arizona receive summer humidity and rainfall from the North American Monsoon (PBF 3), with a pronounced green-up of grasses and forbs. These arid ephemeral drainages often contain xeroriparian species like hackberry or nonriparian species associated with the adjacent habitat type like oak, mesquite, acacia, mimosa, greythorn, and juniper. In southeastern Arizona mountains, breeding habitat is typically below pine woodlands (~6,000 ft (1,829 m)).

Physical or Biological Feature 2—Adequate prey base. Presence of prey base consisting of large insect fauna (for example, cicadas, caterpillars, katydids, grasshoppers, large beetles, dragonflies, moth larvae, spiders), lizards, and frogs for adults and young in breeding areas during the nesting season and in post-breeding dispersal areas.

Physical or Biological Feature 3—Hydrologic processes. The movement of water and sediment in natural or altered systems that maintains and regenerates breeding habitat. This physical or biological feature includes hydrologic processes found in rangewide breeding habitat as well as additional hydrologic processes unique to the Southwest in southwestern breeding habitat:

a. Rangewide breeding habitat hydrologic processes (including the Southwest): Hydrologic processes (either natural or managed) in river and reservoir systems that encourage sediment movement and deposits and promote riparian tree seedling germination and plant growth, maintenance, health, and vigor (*e.g.,* lower-gradient streams and broad floodplains, elevated subsurface groundwater table, and perennial rivers and streams). In some areas where habitat is being restored, such as on terraced slopes above the floodplain, this may include managed irrigated systems that may not naturally flood due to their elevation above the floodplain.

b. Southwestern breeding habitat hydrologic processes: In southwestern breeding habitat, elevated summer humidity and runoff resulting from seasonal water management practices or weather patterns and precipitation (typically from North American Monsoon or other tropical weather events) provide suitable conditions for prey species production and vegetation regeneration and growth. Elevated humidity is especially important in southeastern Arizona, where western yellow-billed cuckoos breed in intermittent and ephemeral drainages.

Because the western yellow-billed cuckoo exists in noncontiguous areas across a wide geographical and elevational range and its habitat is subject to dynamic events, the areas described below (see Final Critical Habitat Designation) are essential to the conservation of the western yellow-billed cuckoo because they provide opportunities for breeding, allow for connectivity between habitat, assist in dispersal, provide redundancy to

protect against catastrophic loss, and provide representation of the varying habitat types used for breeding, thereby helping to sustain the species. The physical or biological features essential to the conservation of the western yellow-billed cuckoo are present in the areas designated, but the specific quality of habitat for nesting, migration, and foraging will vary in condition and location over time due to plant succession and the dynamic environment in which they exist. As a result, the areas that are designated may not contain at any one time all of the physical and biological features that have been identified for the western yellow-billed cuckoo.

Based on use of the areas for breeding, we conclude that all of the areas identified contain all or most of the physical or biological features, but in some cases, these features are less prevalent, or their presence is variable over time due to the changing nature of habitat from hydrologic processes. As stated above, all critical habitat units are considered to have been occupied at the time of listing.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection. Here we describe the type of special management considerations or protection that may be required for the physical or biological features identified for the western yellow-billed cuckoo above. The specific critical habitat units and subunits where these management considerations or protection may be required are identified in Table 2 below.

A detailed discussion of activities influencing the western yellow-billed cuckoo and its habitat can be found in the final listing rule (79 FR 59992, October 3, 2014). The above-described physical or biological features (PBFs) may require special management considerations or protection to reduce the following threats or potential threats: Disruption of hydrologic processes that are necessary to maintain a healthy riparian system; unauthorized or uncontrolled grazing; loss of habitat from development activities and extractive uses (sand, gravel, or mineral extraction); degradation of habitat as a result of expansion of nonnative vegetation; destruction of habitat by uncontrolled wildfire; reduction of prey insect abundance by the unauthorized or improper application of pesticides; removal of habitat by biocontrol insects; and habitat loss and degradation from invasive nonnative pest insects. More specific activities that may need special management are identified in Table 2, below.

Special management considerations or protection are required within critical habitat areas to address these threats. Management activities that could ameliorate these threats include (but are not limited to) the following: Monitoring and regulating stream flows below reservoirs to mimic natural flooding and other hydrologic processes to help maintain habitat; establishing permanent conservation easements or land acquisition to protect the species and its habitat; minimizing habitat disturbance, fragmentation, and destruction through use of best management practices; and providing appropriate buffers around western yellow-billed cuckoo habitat.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are not currently designating any areas outside the geographical area occupied by the species because the western yellow-billed cuckoo is found throughout its historical range, nor are we designating all areas within the geographical area occupied by the species. Additional areas besides those identified as critical habitat may be important for recovery for the western yellow-billed cuckoo, but these areas were not identified as critical habitat; however, they may be part of future recovery planning efforts for the species.

To determine and select appropriate occupied areas that contain the physical or biological features essential to the conservation of the species, we developed a conservation strategy for identifying critical habitat for the species. The goal of our conservation strategy for the western yellow-billed cuckoo is to assist in recovery of the species to the point where the protections of the Act are no longer necessary. Other actions in addition to designating critical habitat may be necessary to achieve recovery of the species including development of additional management actions aimed at conserving, enhancing, and protecting the western yellow-billed cuckoo and its habitat. These actions would be further identified in a Recovery Plan for the species. The role of critical habitat in achieving this conservation goal is to identify the specific areas within the western yellow-billed cuckoo's range that provide essential physical and biological features, without which areas the DPS's rangewide resiliency, redundancy, and representation could not be achieved. This, in turn, requires an understanding of the fundamental parameters of the species' biology and ecology based on well-accepted conservation-biology and ecological principles for conserving species and their habitats, such as those described by Carroll *et al.* (1996, pp. 1–12); Meffe and Carroll (1997, pp. 347–383); Shaffer and Stein (2000, pp. 301–321); NRCS (2004 entire); Tear *et al.* (2005, pp. 835–849) and Wolf *et al.* (2015, pp. 200–207); and more general riparian and avian conservation management prescriptions such as those described in Service 1985; Gardner *et al.* 1999; Wyoming Partners in Flight 2002; Rich *et al.* 2004; Riparian Habitat Joint Venture (RHJV) 2004; Shuford and Gardali 2008; and Griggs 2009.

Conservation Strategy

In developing our conservation strategy for determining what areas to include as critical habitat for the western yellow-billed cuckoo, we focused on the western yellow-billed cuckoo's breeding habitat. Breeding habitat includes areas for nesting and foraging and also provides for dispersal habitat when breeding or food resources may not be optimal. Breeding habitat is widely spread across the species' range and typically provides the physical and biological features essential to the conservation of the species without which rangewide resiliency, redundancy, and representation of the species could not be achieved. As explained further below, this focus led to the inclusion of breeding habitat within three general habitat settings as part of the conservation strategy. The three general settings include: (1) Large river systems (mainstem rivers and their tributaries) in the southern and central portions of New Mexico, Arizona, and along the California border with Arizona (generally referred to as the Southwest); (2) locations within southern Arizona not associated with major river systems or their tributaries; and (3) large river systems outside the Southwest (as identified in (1) above) that occur in

different ecological settings that are being consistently used as breeding areas by western yellow-billed cuckoo (such as areas in parts of California, Utah, Idaho, or Colorado).

As discussed above, the western yellow-billed cuckoo is a migratory species that travels long distances to take advantage of localized food resource outbreaks or habitat availability. Maintaining breeding areas (which include nesting habitat, foraging habitat, and dispersal habitat) throughout the range of the western yellow-billed cuckoo allows for within-year and year-to-year movements to take advantage of any spatial and temporal changes in habitat resources and food abundance. We consider this necessary to conserve the species because of the dynamic nature of habitat used by the species. Identifying habitat across the species' range, but primarily in the Southwest where the core of the population breeds: (a) Helps maintain a robust, well-distributed population and enhances survival and productivity of the western yellow-billed cuckoo as a whole; (b) facilitates interchange of individuals between units; (c) promotes recolonization of any sites within the current range of the species that may experience declines or local extirpations due to low productivity or temporary habitat loss or changes in resource availability from the core population areas; and (d) allows for use of areas not being used as breeding in a given year as habitat for movement and dispersal.

The western yellow-billed cuckoo breeding coincides with moist and humid conditions that support abundant prey resources occurring in the temperate zones of the western United States and northern Mexico during the late spring and summer. Breeding areas of the western yellow-billed cuckoo occur primarily in riparian woodlands along perennial rivers or intermittent or ephemeral drainages containing vegetative structure, canopy cover, and appropriate environmental conditions. These areas provide suitable nesting habitat and adjacent foraging habitat with adequate food resources on a consistent basis to successfully produce and fledge young.

In general, the north-south migratory pathway of the western yellow-billed cuckoo funnels through northern Mexico into the American Southwest, with a significant portion of returning birds establishing breeding territories along large river systems (mainstem rivers and their tributaries) in the southern and central portions of New Mexico, Arizona, and along the California border with Arizona. A significant proportion of breeding western yellow-billed cuckoos also occurs in large river systems in northwestern Mexico, primarily in Sonora and Sinaloa, with smaller numbers in Chihuahua and Western Durango, and the tip of Baja California. While returning western yellow-billed cuckoos also establish breeding territories throughout portions of the western States north of Arizona and New Mexico, these large southwestern and Mexican river systems (including but not limited to the Lower Colorado, Salt, Virgin, San Pedro, Gila, Verde, and Rio Grande Rivers) serve as core breeding habitats for the western yellow-billed cuckoo as it returns from wintering grounds in South America. These core areas together provide a consistent, robust supply of resources necessary for the maintenance and expansion of western yellow-billed cuckoos into other habitats across the range. We consider the large river systems (mainstem rivers and their tributaries) in the southern and central portions of New Mexico, Arizona, and along the California border with Arizona to be core areas for conservation of the western yellow-billed cuckoo, and they constitute the first part of our conservation strategy in determining its critical habitat. The core mainstem rivers and streams along with their major tributaries and adjacent habitats contain the physical or biological features essential for the conservation of the western yellow-billed cuckoo.

However, these managed large river systems may not provide sufficient breeding habitat for the western yellow-billed cuckoo in all years (for example, in low flow years the amount of breeding habitat along rivers is diminished), and unregulated smaller tributaries supported or influenced by monsoonal weather patterns may assist in supporting breeding western yellow-billed cuckoos during low flow or drought conditions. Thus, the second part of our conservation strategy includes areas within southern Arizona not associated with major river systems or their tributaries as identified above. In southern Arizona, western yellow-billed cuckoo also use drier habitats for breeding sites in the desert, foothill, and mountain ephemeral drainages of southern Arizona and northwestern Mexico (including but not limited to desert grasslands and scrub, and Madrean evergreen woodland drainages). These areas receive moisture from the seasonal North American Monsoon weather systems and other summer tropical storm events. During the breeding season, these habitats experience a ''flush'' of vegetation and concurrent insect population eruptions, especially in the drainages receiving relatively more moisture than uplands.

A portion of the DPS uses these wet-seasonal or monsoonal habitats in southern Arizona and Mexico for breeding habitat. Use of these types of sites by the western yellow-billed cuckoo provides additional resiliency to the species due to the different weather patterns and hydrological regimes that produce the habitat conditions suitable for breeding. The availability of these additional resilient sites in southern Arizona and northwestern Mexico other than the large southwestern and Mexican river systems described above increases the overall redundancy for the species. Therefore, the southwestern monsoon-driven drainages with sufficient resources for western yellow-billed cuckoo foraging and successful breeding are essential for the overall resiliency and redundancy of the DPS and are therefore essential to allow for conservation of the western yellow-billed cuckoo across its range.

Finally, while large riverine riparian systems in the core area of the American Southwest are fundamentally important for their ability to contribute to the resiliency of the western yellow-billed cuckoo due to the abundance of birds in these areas, similar systems throughout the western yellow-billed cuckoo range are also likely important contributors to local resiliency and maintaining distribution of the western yellow-billed cuckoo across its range. These large river systems outside the Southwest that are being consistently used as breeding areas by western yellow-billed cuckoo have been identified as the third part of our conservation strategy for determining critical habitat. These areas are located in habitats identified as being within different ecological settings, eco-types, or physio-geographic provinces and provide for additional redundancy and representation for the western yellow-billed cuckoo across its breeding range. The physical and biological features of large river systems in differing habitats with sufficient resources for western yellow-billed cuckoo foraging and successful breeding are likely important for contributing to the western yellow-billed cuckoo's overall resiliency, redundancy, and representation, and are therefore essential for conservation of the western yellow-billed cuckoo across its range. Habitats and environmental settings in the arid Southwest differ significantly from those in central California or higher elevation areas of Utah, Idaho, or Colorado. By identifying known breeding habitat of appropriate size throughout the species' range, we

provide habitat where yellow-billed cuckoos are most likely to thrive and potentially increase in numbers.

Selection Criteria and Methodology Used To Determine Critical Habitat

As discussed above, to assist in determining which areas to identify as critical habitat for the western yellow-billed cuckoo, we focused our selection on areas known to have breeding or suspected breeding. The western yellow-billed cuckoo is a migratory bird and travels long distances between its wintering grounds in Central and South America to its breeding grounds in Mexico and the Continental United States. As a result, the western yellow-billed cuckoo continues to be found in areas throughout its historical range in the west, including areas which it may pass through or stopover during its travels. Some of the areas it travels through or stops over at, may include parks, golf courses, or other areas not containing the physical or biological features essential to the conservation of the species. Other areas, such as historically occupied breeding areas also contain the physical or biological features for the species but are not occupied for breeding. Currently known or suspected breeding areas were selected as critical habitat because they contain the physical and biological features essential to the conservation of the species necessary for western yellow-billed cuckoos to produce offspring, have ample foraging habitat, vegetative structure, environmental conditions, and prey. By selecting breeding areas as critical habitat across the western yellow-billed cuckoo's range, we will assist in conserving the ability of the species to continue to occupy these areas. Moreover, the breeding habitat is most likely to be essential to the conservation of the species because of the importance of breeding for survival and recovery of the species.

For the 2014 proposed rule, we reviewed information between 1998 and 2014 to determine whether the area was occupied at the time of listing. For the 2020 revised proposed rule, we proposed additional units we consider to have been occupied at the time of listing using new data received through the 2017 breeding season. To further support designation of these units, we used additional occupancy or nesting data up until the 2020 breeding season.

We considered an area to be a breeding area if it was occupied by the western yellow-billed cuckoo in one of the following two ways:

- If western yellow-billed cuckoos were present in the area on one or more days between June 1 and September 30 (considered to be the primary breeding period) in at least two years between 1998 and 2014 (or later as described above); or
- If western yellow-billed cuckoos were confirmed to be a pair and nesting was observed (or there was evidence of nesting behavior) in at least one year between 1998 and 2014, regardless of the time of year. Thus, if the mated pair and evidence of nesting behavior was discovered prior to June 1, the area was considered to be a breeding area. Evidence of nesting behavior other than presence of an active nest includes copulation, food carries (bird does not eat food) to the same area, stick carries (nest building), multiple incidents of alarm calls, fledgling (unable to fly) with adult, distraction display (dropped wing), or pair exchanging multiple ''kowlp'' or alarm calls (not coos) within 100 m (328 ft) of one another (Service and Reclamation 2019).

In addition to these fundamental criteria established for breeding areas across the DPS range, we identified additional criteria for areas in the Southwest (Arizona and New Mexico). This was to take into account the migratory nature of the species moving up from Mexico through the Southwest, either to or from other breeding areas. The additional criteria is as follows:

- Areas in the Southwest were not considered to be breeding areas if the area contains only two western yellow-billed cuckoo records from different years, one of which was in September and no pairs were detected. Although western yellow-billed cuckoos are still breeding in September in Arizona, a September detection may or may not signify breeding due to birds migrating south or moving between breeding areas in Mexico.

As described above, to delineate the units of critical habitat, we first looked to those areas being used during the breeding season. We defined what we considered breeding areas as those areas that contained seasonal occurrences of the western yellow-billed cuckoo between 1998 and 2014, during the timeframe in which breeding typically occurs for the species in the United States (June–September). In limited instances, this timeframe was expanded into May if the information available confirmed breeding activity during this earlier timeframe. These breeding season occurrences (location points where western yellow-billed cuckoos were detected or breeding activity was confirmed) were then plotted on maps along with information on vegetation cover, topography, and aerial imagery. We then delineated habitat around that location, as well as riparian habitat (including xeroriparian and associated nonriparian habitat in the Southwestern drainages) upstream and downstream from the occurrence location.

We used survey data and reports prepared by the USGS, USFS, NPS, BLM, Reclamation, the Salt River Project, State wildlife agencies, State natural diversity data bases, Cornell Lab of Ornithology (eBird data), researchers, nongovernment organizations, universities, and consultants, as well as available information in our files, to determine the location of areas used for breeding within the geographical area occupied by the western yellow-billed cuckoo at the time of listing. As stated above, since 2014, we have become aware of additional areas occupied by the species with evidence of breeding. We still consider these areas to have been occupied by the species at the time of listing, based on habitat conditions and occupancy of nearby areas.

Because of the dynamic aspects of western yellow-billed cuckoo habitat as a result of potential flooding, changing river locations, and land uses, we used the active floodplain to identify where riparian habitat occurs. When delineating the critical habitat boundary, we included the surrounding contiguous suitable woodland habitat (including along the stream course and in immediate uplands for breeding, feeding, and sheltering) upstream and downstream until we identified a major break in the vegetation. In many drainages, we included these 0.25 miles (mi) (0.62 kilometers (km)) or more breaks in habitat to combine one or more areas if we determined that: (1) The gap in vegetation was within minor variances of this distance; (2) the habitat on the other side of the gap was a continuation of similar or better suitable habitat and included breeding occupancy as identified above; or (3) the gap in vegetation was determined to be a consequence of natural stream dynamics essential to the continuing function of the hydrologic processes of the occupied areas.

By including breaks in habitat and combining areas, we allow for regeneration of vegetation in these areas, which is often more productive and provides additional food resources for the species and allows for appropriate habitat conditions for use when dispersing to other breeding locations. Blocks of suitable habitat often contain openings that can change over time in dynamic riverine systems. Naturally occurring gaps in habitat following flooding and scouring are part of succession in riparian systems. In time, trees will regenerate and fill these

openings. Suitable habitat consists of a variety of configurations that include small patches of woodland interspersed with openings, large expanses of woodland, narrow woodland, or a combination of different configurations within the same drainage at any given time. Western yellow-billed cuckoos often nest and forage near the edges and openings that are part of the matrix of suitable habitat. Upland woodland habitat immediately adjacent to river, stream, or drainages may be composed of more xeroriparian or nonriparian trees.

In California, western yellow-billed cuckoos forage mainly within the riparian woodland habitat or directly adjacent uplands when breeding (Laymon 1980, pp. 6–8; Hughes 2015, p. 12). In New Mexico, foraging activity has been observed in riparian habitat, immediately adjacent tree-covered habitat (including salt cedar) and a variety of upland habitats including desert scrub (Sechrist *et al.* 2009, pp. 24–50). However, based on foraging behavior in other habitats in the West, we expect the foraging distance to remain relatively close to the nesting habitat. In addition, riparian corridors along streams, especially in highly developed areas, can in some instances be very narrow, highly degraded, and be characterized as a patchwork of vegetated and nonvegetated areas.

Whether these habitat areas were included or combined into a single larger unit depended on the extent of use of the areas by western yellow-billed cuckoo, the relative amount of habitat gained if the multiple patches were included or combined, the relationship of the area to the overall designation, and the ease or complexity of removing all nonhabitat from the designation. In addition, by combining these areas, they then better meet an appropriate scale of analysis, given the data as is described in our regulations for determining critical habitat (50 CFR 424.12(b)(1)). For example, if a break in habitat occurred between an area with high occupancy with sufficient habitat and an area with low occupancy, the adjacent area may not have been included. Alternatively, if two smaller areas with relatively low occupancy were adjacent to each other, those areas most likely would have been combined to form a single, larger, more manageable area.

To distinguish between the western yellow-billed cuckoo more typical breeding habitat in riparian areas throughout the range from breeding habitat recently found in more arid areas of the Southwest, we use the terms ''rangewide breeding habitat'' and ''southwestern breeding habitat,'' respectively (see Space for Individual and Population Growth and for Normal Behavior below). In rangewide breeding habitat, we generally selected low-gradient streams containing the physical and biological features that were greater than 200 ac (81 ha)) in size. In considering the extent of each area, in some cases we included the entire streambed as well as the presently vegetated areas. Streams, especially those with intermittent flows, migrate within the streambed depending on flows and other natural fluvial processes. The vegetated areas within the streambed may also move to coincide with the stream movement. As a result, the whole area may not be contiguously vegetated. In these low-gradient rangewide riparian breeding habitats (*i.e.,* cottonwood, willow), areas that currently contain less than 200 ac (81 ha) of riparian habitat outside the Southwest were not selected. However, in some areas of the Southwest, the physical or biological features for areas used as breeding habitat vary from other locations in the range of the western yellow-billed cuckoo. These areas occur in Arizona and New Mexico and are associated with summer monsoonal moisture and are smaller, narrower habitat areas that may extend into upland areas (areas dominated by mesquite and oak) with higher gradient. Selection of these areas depended on the amount of use of the area by the species, the relative proximity to other selected areas, the ecosystem uniqueness, or value to distribution of the area on the landscape. As a result, these habitat sites were selected on a case-by-case basis to provide for the variability of habitat use by the species in these areas.

We have not included critical habitat units within Oregon or Washington because the species has been extirpated as a breeder from those States since at least the 1940s (Littlefield 1988, p. 2; Washington Department of Fish and Wildlife 2013, pp. 200–201), and recent observations of the species, although promising, have not coincided for the most part with suitable breeding habitat and appear to be dispersing but not breeding birds. We also did not include occupied areas within Montana, Nevada, and Wyoming. The reasons for not including critical habitat in these States is that sufficient areas already have been identified within this designation, and these areas do not meet our conservation strategy for designating critical habitat. The conservation strategy focuses on areas with confirmed breeding. No confirmed breeding has been identified in Montana or Wyoming. In Nevada, the only known areas where the western yellow-billed cuckoo has confirmed breeding is in the southern part of the State near the borders of California and Arizona. These habitats are essentially the same as those identified in the Southwest in Arizona and New Mexico, but do not significantly contribute to population numbers for the western yellow-billed cuckoo.

Sources of data reviewed or cited for this species in the development of critical habitat include peer-reviewed articles, information maintained by universities and State agencies, existing State management plans, species-specific reports, habitat information sources, climate change studies, incidental detections, and numerous survey efforts conducted throughout the species' range, including but not limited to the more recent information below: Corman and Magill 2000; Dockens and Ashbeck 2011a, 2011b; SRP 2011a, 2011b; Beason 2012; Dettling and Seavy 2012; Gardali *et al.* 2012; Johnson *et al.* 2012; McCarthy 2012; McNeil *et al.* 2012; Sechrist *et al.* 2012; Greco 2013; IPCC 2013; Johnson *et al.* 2013; McNeil *et al.* 2013b; Pederson *et al.* 2013; Rohwer and Wood 2013; Scribano 2013; Sechrist *et al.* 2013; Stromberg *et al.* 2013; Wallace *et al.* 2013; American Birding Association 2014; Ault *et al.* 2014; Garfin *et al.* 2014; IPCC 2014; Melillo *et al.* 2014; Orr *et al.* 2014; Stanek 2014; Villarreal *et al.* 2014; Dettling *et al.* 2015; Griffin 2015; Hughes 2015; MacFarland and Horst 2015, 2017; Van Dooremolen 2015; WestLand Resources, Inc. 2015 a,b,c,d,e; Arizona Game and Fish Department 2018; Corson 2018; Parametrix, Inc., and Southern Sierra Research Station 2019; RiversEdge West 2019; Sferra *et al.* 2019; WestLand Resources, Inc. 2019; Cornell Lab of Ornithology 2020 (eBird data); and Drost *et al.* 2020.

The amount and distribution of critical habitat that we are designating will give the western yellow-billed cuckoo the opportunity to potentially: (1) Maintain its existing distribution; (2) move between areas depending on food, resource, and habitat availability; (3) increase the size of the population to a level where it can withstand potentially negative genetic or demographic impacts; and (4) maintain its ability to withstand local- or unit-level environmental fluctuations or catastrophes.

When determining critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures or lands used as

parks or for agriculture, because such lands lack physical or biological features necessary for the western yellow-billed cuckoo. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We are designating as critical habitat areas that we have determined are occupied at the time of listing and are considered to still be occupied and that contain one or more of the physical or biological features that are essential to support life-history processes of the species. This variability is due to environmental conditions and the dynamic nature of the habitat used by the western yellow-billed cuckoo (see Species Information).

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document under Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–R8–ES–2013–0011 and on our website at *http://www.fws.gov/sacramento.*

Final Critical Habitat Designation

We are designating 63 units as critical habitat for the western yellow-billed cuckoo. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the western yellow-billed cuckoo. The areas we are designating as critical habitat are located in Arizona, California, Colorado, Idaho, New Mexico, Texas, and Utah and are described below. Table 1 shows the critical habitat units and the approximate area of each unit. Land areas identified as ''Other'' include county, city, unclassified, or unknown land ownerships.

TABLE 1—CRITICAL HABITAT UNITS FOR THE WESTERN YELLOW-BILLED CUCKOO

[Area estimates reflect all land within critical habitat unit boundaries]

Unit name	Unit	Federal		State		Tribal		Other		Total	
		AC	HA	AC	HA	AC	HA	AC	HA	AC	HA
CA–AZ 1 Colorado River 1	1	*Excluded under section 4(b)(2) of the Act*								0	0
CA–AZ 2 Colorado River 2	2	*Excluded under section 4(b)(2) of the Act*								0	0
AZ 1 Bill Williams River	3	*Excluded under section 4(b)(2) of the Act*								0	0
AZ 2 Alamo Lake	4	*Excluded under section 4(b)(2) of the Act*								0	0
AZ 3 Hassayampa River	5	12	5	.....	.....	.....	.....	896	363	908	367
AZ 4 Agua Fria River	6	1,802	729	235	95	.....	.....	1,300	526	3,336	1,350
AZ 5 Upper Verde Creek	7	2,367	958	546	221	.....	.....	2,275	921	5,188	2,100
AZ 6 Oak Creek	8	596	241	160	65	.....	.....	1,475	597	2,231	903
AZ 7 Beaver Creek	9	1,335	540	.....	.....	.....	.....	747	302	2,081	842
AZ 8 Lower Verde/West Clear Ck	10	638	258	30	12	.....	.....	1,466	593	2,134	864
AZ 9A Horseshoe Dam	11	2,667	1,079	.....	.....	.....	.....	.....	.....	2,667	1,079
AZ 9B Horseshoe Dam	11	694	281	.....	.....	.....	.....	88	55	782	316
AZ 10 Tonto Creek	12	2,045	828	.....	.....	.....	.....	1,135	459	3,181	1,287
AZ 11 Pinal Creek	13	*Excluded under section 4(b)(2) of the Act*								0	0
AZ 12 Bonita Creek	14	828	335	.....	.....	.....	.....	101	41	928	375
AZ 13 San Francisco River	15	1,192	482	.....	.....	.....	.....	135	55	1,327	537
AZ 14 Upper San Pedro River	16	17,957	7,267	1,903	770	.....	.....	11,199	4,532	31,059	12,569
AZ 15 Lower San Pedro/Gila River	17	2,695	1,091	2,280	922	.....	.....	17,421	7,050	22,397	9,064
AZ 16 Sonoita Creek	18	.....	.....	926	375	.....	.....	1,563	633	2,488	1,007
AZ 17 Upper Cienega Creek	19	4,630	1,874	574	232	.....	.....	.....	.....	5,204	2,106
AZ 18 Santa Cruz River	20	505	204	4	2	.....	.....	9,029	3,654	9,538	3,860
AZ 19 Black Draw	21	891	360	134	54	.....	.....	570	231	1,595	646
AZ 20 Gila River 1	22	778	315	215	87	.....	.....	9,547	3,863	10,540	4,266
AZ 21 Salt River	23	502	203	.....	.....	.....	.....	79	32	581	235
AZ 22 Lower Cienega Creek	24	.....	.....	759	307	.....	.....	1,601	648	2,360	955

TABLE 1—CRITICAL HABITAT UNITS FOR THE WESTERN YELLOW-BILLED CUCKOO—Continued

[Area estimates reflect all land within critical habitat unit boundaries]

Unit name	Unit	Federal		State		Tribal		Other		Total	
		AC	HA	AC	HA	AC	HA	AC	HA	AC	HA
AZ 23 Blue River	25	1,025	415	.....	.....	.....	.....	.....	.....	1,025	415
AZ 24 Pinto Creek South	26	368	149	.....	.....	.....	.....	5	2	373	151
AZ 25 Aravaipa Creek	27	622	252	116	47	.....	.....	2,199	890	2,937	1,189
AZ 26 Gila River 2	28	1,895	767	204	83	.....	.....	3,736	1,512	5,836	2,362
AZ 27 Pinto Creek North	29	415	168	.....	.....	.....	.....	12	5	427	173
AZ 28 Mineral Creek	30	1	<1	198	80	.....	.....	180	73	380	154
AZ 29 Big Sandy River	31	1,291	522	.....	.....	.....	.....	2,945	1,192	4,236	1,714
NM 1 San Francisco River	32	738	299	10	4	.....	.....	1,291	522	2,039	825
NM 2 Gila River	33	974	394	194	78	.....	.....	1,867	756	3,036	1,228
NM 3A Mimbres River	34	.....	.....	.....	.....	.....	.....	260	105	260	105
NM 3B Mimbres River	34	.....	.....	.....	.....	.....	.....	284	115	284	115
NM 4 Upper Rio Grande 1	35	.....	.....	.....	.....	.....	.....	518	210	518	210
NM 5 Upper Rio Grande 2	36	*Excluded under section 4(b)(2) of the Act*								0	0
NM 6A Middle Rio Grande	37	*Excluded under section 4(b)(2) of the Act*								0	0
NM 6B Middle Rio Grande	37	8,651	3,501	13,064	5,287	.....	.....	24,879	10,068	46,595	18,856
NM 7 Upper Gila River	38	1,086	439	188	76	.....	.....	3,453	1,397	4,727	1,913
NM 8A Caballo Delta North	39	*Excluded under section 4(b)(2) of the Act*								0	0
NM 8B Caballo Delta South	39	*Excluded under section 4(b)(2) of the Act*								0	0
NM 9 Animas	40	*Excluded under section 4(b)(2) of the Act*								0	0
NM 10 Selden Cyn/Radium Springs	41	*Excluded under section 4(b)(2) of the Act*								0	0
AZ 30 Arivaca Wash/San Luis	42	4,662	1,887	89	36	.....	.....	1,014	410	5,765	2,333
AZ 31 Florida Wash	43	449	182	255	103	.....	.....	43	17	747	302
AZ 32 California Gulch	44	376	152	.....	.....	.....	.....	181	73	558	226
AZ 33 Sycamore Canyon	45	601	243	.....	.....	.....	.....	.....	.....	601	243
AZ 34 Madera Canyon	46	1,419	574	.....	.....	.....	.....	313	127	1,732	701
AZ 35 Montosa Canyon	47	496	201	.....	.....	.....	.....	3	1	499	202
AZ 36 Patagonia Mountains	48	1,059	429	8	3	.....	.....	845	342	1,912	774
AZ 37 Canelo Hills	49	1,381	559	1	<1	.....	.....	1,440	583	2,822	1,142
AZ 38 Arivaca Lake	50	567	229	417	169	.....	.....	381	154	1,365	553
AZ 39 Peppersauce Canyon	51	317	128	.....	.....	.....	.....	32	13	349	141
AZ 40 Pena Blanca Canyon	52	483	195	.....	.....	.....	.....	.....	.....	483	195
AZ 41 Box Canyon	53	317	128	184	74	.....	.....	34	14	536	217
AZ 42 Rock Corral Canyon	54	190	77	25	10	.....	.....	.....	.....	214	87
AZ 43 Lyle Canyon	55	716	290	.....	.....	.....	.....	577	234	1,293	523
AZ 44 Parker Canyon Lake	56	1,424	576	.....	.....	.....	.....	75	30	1,499	607
AZ 45 Barrel Canyon	57	755	306	.....	.....	.....	.....	164	66	920	372
AZ 46 Gardner Canyon	58	4,320	1,748	290	117	.....	.....	471	191	5,081	2,056
AZ 47 Brown Canyon	59	726	294	228	92	.....	.....	159	64	1,113	451
AZ 48 Sycamore Canyon/Patagonia	60	604	245	.....	.....	.....	.....	.....	.....	604	245
AZ 49 Washington Gulch	61	361	146	.....	.....	.....	.....	222	90	585	237

TABLE 1—CRITICAL HABITAT UNITS FOR THE WESTERN YELLOW-BILLED CUCKOO—Continued

[Area estimates reflect all land within critical habitat unit boundaries]

Unit name	Unit	Federal		State		Tribal		Other		Total	
		AC	HA	AC	HA	AC	HA	AC	HA	AC	HA
AZ 50 Paymaster Spring/Mowry	62	390	158	.....	.....	.....	.....	512	207	903	365
CA 1 Sacramento River	63	2,123	859	485	196	.....	.....	31,593	12,785	34,201	13,841
CA 2 South Fork Kern River	64	85	34	419	170	.....	.....	1,875	756	2,379	963
ID 1 Snake River 1	65	2,863	1,158	1,209	489	.....	.....	1,551	628	5,623	2,276
ID 2 Snake River 2	66	5,862	2,372	1,940	785	.....	.....	3,641	1,473	11,442	4,630
ID 3 Henry's Fork/Teton Rivers	67	756	306	511	207	.....	.....	3,374	1,365	4,641	1,878
CO 1 Colorado River	68	196	79	174	70	.....	.....	2,766	1,119	3,137	1,269
CO 2 North Fork Gunnison	69	115	47	.....	.....	.....	.....	2,211	895	2,326	941
UT 1 Green River 1	70	4,700	1,902	4,162	1,684	.....	.....	4,411	1,785	13,273	5,371
UT 2 Green River 2	71	40	16	632	256	.....	.....	462	187	1,135	459
TX 1 Terlingue Creek/Rio Grande	72	7,792	3,153	.....	.....	.....	.....	121	49	7,913	3,202
Totals	.....	105,345	42,630	32,769	13,259	0	0	160,726	65,040	298,845	120,939

Note: Area sizes may not sum due to rounding. "Other" refers to local, county, unknown, or unclassified ownership.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for western yellow-billed cuckoo, below. We also provide information on special management considerations or protection that may be required for the physical or biological features essential to the conservation of the species within each of those units. The special management considerations include actions to address the main threats to western yellow-billed cuckoo habitat and are grouped into three categories: (1) Threats from alteration of hydrology; (2) threats from floodplain encroachment; and (3) other identified threats. These threats and special management considerations are summarized in Table 2. See end of table for definition of codes.

TABLE 2—THREATS TO HABITAT AND POTENTIAL SPECIAL MANAGEMENT CONSIDERATIONS FOR CRITICAL HABITAT UNITS DESIGNATED FOR THE WESTERN YELLOW-BILLED CUCKOO

Unit	Name of unit	Threats from alteration of hydrology	Threats from floodplain encroachment	Other threats	Special mgt.
1	CA/AZ–1 Colorado River 1	A, B, C	E, F, G, H, I, J	K, L, M, N, P	R, S, T.
2	CA/AZ–2 Colorado River 2	A, B, C	E, F, G, H, I, J	K, L, M, N, P	R, S, T.
3	AZ–1 Bill Williams River	A, B, C		K, M, N, P	R, T.
4	AZ–2 Alamo Lake	B, C, D	F	K, M, N, P, Q	R, S, T.
5	AZ–3 Hassayampa River	B, C	E, F, G, H, I, J	K, L, M, N, P	R, S, T.
6	AZ–4 Agua Fria River	A, B, C	F, G, I	K, L, M, N, P	R, S, T.
7	AZ–5 Upper Verde River	B, C	F, G, I	K, M, N, P	R, S, T.
8	AZ–6 Oak Creek	B, C	F, G, I	K, M, N, P, Q	R, S, T.
9	AZ–7 Beaver Creek	B, C	F, G, I	K, M, N, P	R, S, T.
10	AZ–8 Lower Verde R./West Clear Creek.	A, B, C	F, G, I	K, M, N, P	R, S, T.
11	AZ–9A Horseshoe Dam	A, B, C, D	I	K, M, N, P, Q	R, S, T.
11	AZ–9B Horseshoe Dam	A, B, C, D	I	K, M, N, P, Q	R, S, T.
12	AZ–10 Tonto Creek	B, C, D	F, G, I	K, M, N, P, Q	R, S, T.
13	AZ–11 Pinal Creek	B, C	F, G, I, J	K, L, M, N, P	R, S, T.
14	AZ–12 Bonita Creek	B, C	F, I	K, M, N, P, Q	R, S, T.
15	AZ–13 San Francisco River	B, C	F, I	K, M, N, P	R, S, T.
16	AZ–14 Upper San Pedro River	B, C	E, F, G, I	K, L, M, N, P, Q	R, S, T.
17	AZ–15 Lower San Pedro and Gila Rivers.	A, B, C	E, F, G, H, I	K, L, M, N, P	R, S, T.
18	AZ–16 Sonoita Creek	B, C, D	F, G, I	K, M, N, P, Q	R, S, T.
19	AZ–17 Upper Cienega Creek	B, C	F, G, I	K, M, N, O, P, Q	R, S, T.
20	AZ–18 Santa Cruz River	B, C	E, F, G, H, I	K, L, M, N, P	R, S, T.
21	AZ–19 Black Draw	B, C	F	K, M, N, P	R, S, T.
22	AZ–20 Gila River 1	A, B, C	E, F, G, H	K, L, M, N, P	R, S, T.
23	AZ–21 Salt River	A, B, C, D	F, G, I	K, M, N, P	R, S, T.
24	AZ–22 Lower Cienega Creek	B, C	E, F, G, I, J	K, L, M, N, O, P	R, S, T.
25	AZ–23 Blue River	A, B, C	G, I, J	K, M, N, P	R, S, T.
26	AZ–24 Pinto Creek South	A, B, C	F, G, I, J	K, N, P	R, S, T.
27	AZ–25 Aravaipa Creek	B, C	E, F, I, J	K, M, N, P	R, S, T.
28	AZ–26 Gila River 2	A, B, C	F, G, I, J	K, N, P	R, S, T.

TABLE 2—THREATS TO HABITAT AND POTENTIAL SPECIAL MANAGEMENT CONSIDERATIONS FOR CRITICAL HABITAT UNITS DESIGNATED FOR THE WESTERN YELLOW-BILLED CUCKOO—Continued

Unit	Name of unit	Threats from alteration of hydrology	Threats from floodplain encroachment	Other threats	Special mgt.
29	AZ–27 Pinto Creek North	B, C	F, I, J	K, N, P	R, S, T.
30	AZ–28 Mineral Creek	B, C	E, F	K, O, P, Q	R, S, T.
31	AZ–29 Big Sandy River	B, C	E, F, G, I,	K, L, N, P, Q	R, S, T.
32	NM–1 San Francisco River	B, C	E, F, G, H, I	K, L, M, N	R, S, T.
33	NM–2 Gila River	B, C	E, F, G, I, J	K, L, M, N	R, S, T.
34	NM–3A Mimbres River	B, C	F, I	K, M, N	R, S, T.
34	NM–3B Mimbres River	B, C	F, I	K, M, N	R, S, T.
35	NM–4 Upper Rio Grande 1	A, B, C	E, F, G, H, I	K, L, M, N	R, S, T.
36	NM–5 Upper Rio Grande 2	A, B, C	E, F, G, H, I, J	K, L, M, N	R, S, T.
37	NM–6A Middle Rio Grande	A, B, C, D	E, F, G, H, I, J	K, L, M, N	R, S, T.
37	NM–6B Middle Rio Grande	A, B, C, D	E, F, G, H, I, J	K, L, M, N	R, S, T.
38	NM–7 Upper Gila River	B, C	E, F, G, I, J	K, L, M, N	R, S, T.
39	NM–8A Caballo Delta North	A, B, C, D	E, F, G, I	K, L, M, N, O, P, Q	R, S, T.
39	NM–8B Caballo Delta South	A, B, C, D	E, F, G, I	K, L, M, N, O, P, Q	R, S, T.
40	NM–9 Animas	B, C	F	O, P	T.
41	NM–10 Selden Canyon and Radium Springs.	A, B, C	E, F, G, H, I	L, M, N, O, P, Q	R, S, T.
42	AZ–30 Arivaca Wash and San Luis Wash.	B, C	F, I	K, M, N, P	R, S, T.
43	AZ–31 Florida Wash	B, C	E, F, G, I, J	K, M, N, P	R, S, T.
44	AZ–32 California Gulch	B, C	F, G, I	K, M, N, O, P, Q	R, S, T.
45	AZ–33 Sycamore Canyon	A, B, C	F, G, I	K, M, N, O, P, Q	R, S, T.
46	AZ–34 Madera Canyon	B, C	F, G, I	K, M, N, O, P, Q	R, S, T.
47	AZ–35 Montosa Canyon	B, C	F, I	K, M, N, O, P, Q	R, S, T.
48	AZ–36 Patagonia Mountains	B, C	F, G, I	K, M, N, O, P, Q	R, S, T.
49	AZ–37 Canelo Hills	B, C	F, G, I	K, M, N, O, P, Q	R, S, T.
50	AZ–38 Arivaca Lake	A, B, C	F, G, I, J	K, M, N, O, P, Q	R, S, T.
51	AZ–39 Peppersauce Canyon	B, C	F, G, I	K, M, N, O, P, Q	R, S, T.
52	AZ–40 Pena Blanca Canyon	B, C	F, I	K, M, N, O, P, Q	R, S, T.
53	AZ–41 Box Canyon	B, C	F, G, I	K, M, N, O, P, Q	R, S, T.
54	AZ–42 Rock Corral Canyon	B, C	F, I	K, M, N, O, P, Q	R, S, T.
55	AZ–43 Lyle Canyon	B, C	F, I	K, M, N, O, P, Q	R, S, T.
56	AZ–44 Parker Canyon Lake	A, B, C	F, G, I	K, M, N, O, P, Q	R, S, T.
57	AZ–45 Barrel Canyon	A, B, C	F, G, I	K, M, N, O, P, Q	R, S, T.
58	AZ–46 Gardner Canyon	B, C	I	K, M, N, O, P, Q	R, S, T.
59	AZ–47 Brown Canyon	B, C	F, I	K, O, P, Q	R, S, T.
60	AZ–48 Sycamore Canyon	B, C	F, I	K, M, N, O, P, Q	R, S, T.
61	AZ–49 Washington Gulch	B, C	F, I	K, M, N, O, P, Q	R, S, T.
62	AZ–50 Paymaster Spring	B, C	F, I	K, M, N, O, P, Q	R, S, T.
63	CA–1 Sacramento River	A, B, C	E, F, G, H, I, J	K, L, M, N	R, S, T.
64	CA–2 South Fork Kern River	A, B, C, D	E, F, G, H, I	K, L, M, N	R, S, T.
65	ID–1 Snake River 1	A, B, C, D	E, F, G, H, I	K, L, M, N	R, S, T.
66	ID–2 Snake River 2	A, B, C	E, F, G, H, I	K, L, M, N	R, S, T.
67	ID–3 Henry's Fork and Teton Rivers.	A, B, C	E, F, G, H, I	K, L, M, N	R, S, T.
68	CO–1 Colorado River	A, B, C	E, F, G, H, I, J	K, L, M, N	R, S, T.
69	CO–2 North Fork Gunnison R.	B, C	E, F, G, H, I, J	K, L, M, N	R, S, T.
70	UT–1 Green River 1	A, B, C	E, F, G, H, I, J	K, L, M, N	R, S, T.
71	UT–2 Green River 2	A, B, C	E, F, G, H, I, J	K, L, M, N	R, S, T.
72	TX–2 Terlingua Creek and Rio Grande.	A, B, C		K, M, N	R, S, T.

Definition of Codes
Threats from alteration of hydrology:
(A) Change in hydrology from upstream dams;
(B) surface water diversions;
(C) groundwater extraction; and
(D) fluctuating reservoir levels.
Threats from floodplain encroachment:
(E) Agricultural activities;
(F) other development (residential, commercial, etc.);
(G) bank stabilization;
(H) levee construction and maintenance;
(I) road and bridge construction and maintenance; and
(J) gravel mining.
Other threats:
(K) Overgrazing (grazing activities that reduce quality and quantity of breeding habitat);
(L) pesticide drift;
(M) woodcutting;
(N) recreational activities (unauthorized off-highway-vehicle use);
(O) on- or offsite mining (other than gravel mining);
(P) impacts from human-caused wildfires;

(Q) disturbance from human foot traffic, vehicular traffic, and associated noise.
Special management considerations:
(R) Manage hydrology to mimic natural flows and floodplain/drainage processes;
(S) prevent encroachment into floodplain/drainage; and
(T) control expansion of nonnative vegetation where control benefits native vegetation (the positive and negative impacts of nonnative vegetation removal should be carefully evaluated if such vegetation is a component of existing habitat (*i.e.,* tamarisk) in areas of altered hydrology).

It should be noted that the effects of climate change may influence streamflow, groundwater, wildfire, nonnative vegetation and other aspects of western yellow-billed cuckoo habitat within the proposed critical habitat. Because climate change is not a single threat but a condition that influences other impacts to habitat, we did not identify climate change as a single threat component.

Unit Descriptions

Below we present brief descriptions of the units, their extent, and why the physical or biological features may require special management or protection. For readers interested in the underlying information and data supporting these unit descriptions, including units being excluded (*e.g.,* cited literature, permit reports, and other survey efforts), these will be included in the supporting materials posted on *http://www.regulations.gov* at Docket No. FWS–R8–ES–2013–0011.

Unit 1: CA/AZ–1 Colorado River 1; Imperial, Riverside, and San Bernardino Counties, California, and Yuma and La Paz Counties, Arizona.

Critical habitat Unit CA/AZ–1 was proposed as containing 82,138 ac (33,240 ha) including a 150-mi (242-km) stretch of the Colorado River in Arizona and California. We have excluded the entire unit from the final designation (see Exclusions). A description and map of this unit is maintained in supporting information for this designation (Service 2020b, entire).

Unit 2: CA/AZ–2 Colorado River 2; San Bernardino County, California and Mohave County, Arizona.

Critical habitat unit CA/AZ–2 is 23,589 ac (9,546 ha) in extent. It is a 23-mi (37-km)-long continuous segment of the Colorado River between the Interstate 40 Bridge, including Topock Marsh in San Bernardino County, California, and upstream to the Arizona-Nevada border in Mohave County, Arizona. We have excluded the entire unit from the final critical habitat designation (see Exclusions). A description and map of this unit is maintained in supporting information for this designation (Service 2020b, entire).

Unit 3: AZ–1 Bill Williams; Mohave and La Paz Counties, Arizona.

Critical habitat unit AZ–1 is 3,389 ac (1,371 ha) in extent and is a continuous segment of the Bill Williams River, a tributary to the Colorado River, from the upstream end of Lake Havasu upstream to Castaneda Wash in Mohave and La Paz Counties, Arizona. We have excluded the entire unit from the final critical habitat designation (see Exclusions). A description and map of this unit is maintained in supporting information for this designation (Service 2020b, entire).

Unit 4: AZ–2 Alamo Lake; Mohave and La Paz Counties, Arizona.

Critical habitat unit AZ–2 totals 2,793 ac (1,130 ha) in extent and is a continuous stream made up of a 6-mi (10-km)-long continuous segment of the Santa Maria River and a 3-mi (5-km)-long continuous segment of the Big Sandy River that feeds into the Santa Maria River above Alamo Lake State Park in Mohave and La Paz Counties, Arizona. We have excluded the entire Unit from the final critical habitat designation (see Exclusions). A description of this unit is maintained in supporting information for this designation (Service 2020b, entire).

Unit 5: AZ–3 Hassayampa River; Maricopa County, Arizona.

Critical habitat unit AZ–3 is 908 ac (367 ha) in extent and is an approximately 7-mi (11-km)-long continuous segment of the Hassayampa River in the vicinity of Wickenburg in Maricopa County, Arizona. Approximately 12 ac (5 ha) is in Federal ownership, and 896 ac (363 ha) is in other ownership. This unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos occupy and nest at this site annually during the breeding season (Corman and Magill 2000, pp. 42–43; Kondrat-Smith 2015–2016, entire; Cornell Lab of Ornithology 2020 (eBird data); Service 2020c). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

Much of the private land in this revised proposed unit is within The Nature Conservancy's (TNC) and Maricopa County Parks and Recreation Department's Hassayampa River Preserve, which is occupied by yellow-billed cuckoos during the breeding season. Preserve management requires management of cottonwood and willow habitat to control nonnative species and maintenance of fencing to prevent trespass livestock from damaging habitat (Maricopa County Parks and Recreation Department 2018, pp. 8, 10). Western yellow-billed cuckoos occupy and nest at this site during the breeding season annually Habitat is gallery woodland with cottonwood, willow, and mesquite (Kondrat-Smith 2015, entire). Very little tamarisk is present in much of the site because the river scours out frequently, preventing tamarisk from becoming established.

Unit 6: AZ–4, Agua Fria River; Yavapai County, Arizona.

Critical habitat unit AZ–4 is 3,336 ac (1,350 ha) in extent and is made up of a continuous segment of the Agua Fria River (called Ash Creek above the confluence with Sycamore Creek), which is joined by the Sycamore Creek tributary. Other portions of tributaries that are part of this unit include Silver Creek, Indian Creek, and Little Ash Creek. Together they form a continuous unit located approximately 2.5 mi (4.0 km) east of Cordes Lakes in Yavapai County, Arizona. Approximately 1,802 ac (729 ha) is in Federal ownership; 235 ac (95 ha) is in State ownership; and 1,300 ac (526 ha) is in other ownership. This unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos occupy and nest at this site annually during the breeding season (Corman and Magill 2000, pp. 37, 40, 47; Prager and Wise 2013, 2014, 2015, 2016, 2017, 2018, 2019, entire). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. BLM management to reduce off-road vehicle and grazing pressure has resulted in gradual improvement to riparian habitat on its Agua Fria National Monument (Prager and Wise 2019, pp. 2–4). Periodic floods on the Agua Fria River scour brushy understory and encourage recruitment of cottonwood and willows. Other species include sycamore, ash, walnut, mesquite, acacia, juniper,

tamarisk, and adjacent mesquite bosque. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides migration stop-over habitat for western yellow-billed cuckoos moving farther north. Altered hydrology has caused the introduction and spread of nonnative tamarisk, resulting in reduced quality of riparian habitat. Although tamarisk is not as desirable as native habitat, it may contribute toward habitat suitability in areas where the native tree density can no longer be sustained.

Unit 7: AZ–5, Upper Verde River; Yavapai County, Arizona.

Critical habitat unit AZ–5 is 5,188 ac (2,100 ha) in extent. We have excluded approximately 272 ac (110 ha) of State land associated with the AGFD's Upper Verde River Wildlife Area and 191 ac (77 ha) of Yavapai-Apache tribal land from this unit (see Exclusions). This unit extends from approximately 0.6 mi (0.9 km) east of State Route 89 to I–17 in Yavapai County. Short reaches of Granite Creek, Peck's Lake and Tavasci Marsh, and Sycamore Creek are also included in this unit. Approximately 2,367 ac (958 ha) is in Federal ownership; 546 ac (221 ha) is in State ownership; and 2,275 ac (921 ha) is in other ownership. This unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos occupy and nest at numerous locations throughout this unit (Holmes *et al.* 2008, pp. 13, 16, 18–20; Johnson and Rakestraw 2016, pp. 6–7; AGFD 2017, entire; AGFD 2019, entire; Jacobs Engineering 2019, pp. 2–9; Prescott National Forest, 2019, entire; SRP 2019c, entire; Cornell Lab of Ornithology 2020 (eBird data); National Audubon Society 2020f; Service 2020c, entire). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. This site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

Habitat is primarily cottonwood and willow gallery riparian forest, and may contain other species such as ash, sycamore, mesquite, boxelder, walnut, juniper, alder, desert willow, hackberry, tamarisk, and Russian olive, often with adjacent mesquite woodland (Agyagos 2016, entire, Prescott National Forest 2019, entire). The Upper Verde State Wildlife and Tuzigoot and IBAs lie within this unit (National Audubon Society 2016b, entire; 2020a, entire; Arizona Important Bird Areas (IBA) 2020c, entire).

Unit 8: AZ–6 Oak Creek; Yavapai and Coconino Counties, Arizona.

Critical habitat unit AZ–6 is 2,231 ac (903 ha) and is a continuous segment of Oak Creek from the State Highway 179 Bridge within the City of Sedona in Coconino County, Arizona, downstream to the confluence with the Verde River in Yavapai County, Arizona. Approximately 596 ac (241 ha), is in Federal ownership; 160 ac (65 ha) is in State ownership; and 1,475 ac (597 ha) is in other ownership. This unit is considered to have been occupied at the time of listing and is occupied by western yellow-billed cuckoos during the breeding season (Corman and Magill 2000, p. 42; Holmes *et al.* 2008, pp. 13, 16, 18–20; Agyagos 2016, entire, AGFD 2018, entire; Cornell Lab of Ornithology 2020 (eBird data); Service 2020c). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

This unit contains the Lower Oak Creek Important Bird Area (IBA), where western yellow-billed cuckoos are identified as a breeding bird (National Audubon Society 2016a, entire). Vegetation is a mix of riparian gallery of cottonwood, willow, sycamore, and mesquite and hackberry woodland (National Audubon Society 2016a, entire). The reach from Cornville to the confluence with the Verde River contains the best broad-valley floodplain and mesquite bosque habitat on Oak Creek (Agyagos 2016, entire). The Oak Creek confluence with the Verde River consists of an approximately 98-ft (30-m)-wide riparian area, with mesquite habitat adjacent to the riparian vegetation (Johnson and Rakestraw 2016, p. 6). Sycamore and boxelder are the dominant trees at the confluence, with scattered cottonwood and some willow and tamarisk trees.

Unit 9: AZ–7 Beaver Creek; Yavapai County, Arizona.

Critical habitat unit AZ–7 is 2,081 ac (842 ha) in extent and is a 23-mi (37-km)-long continuous segment of Beaver Creek from the confluence with the Verde River near Camp Verde upstream to above the Town of Rimrock in Yavapai County, Arizona. We have excluded approximately 1 ac (<1 ha) of land from this unit (see Exclusions). Approximately 1,335 ac (540 ha) is Federal land; and 746 ac (302 ha) is in other ownership. The unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoo occupy and nest in this unit during the breeding season (Corman and Magill 2000, pp. 11, 37–41; Holmes *et al.* 2008, pp. 13, 16, 18–20; Cornell Lab of Ornithology 2020 (eBird data); Service 2020c, entire). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. In a larger study of the Verde River watershed that included 13 survey locations within the Beaver Creek critical habitat complex, Holmes *et al.* (2008, pp. 13, 16, 27) found yellow-billed cuckoos occupy sites that contain relatively large areas of deciduous riparian habitat, at least 100 m (328 ft) wide, with dominant tree species comprising mainly of cottonwood, willow, alder, and sycamore and with adjacent patches of mesquite greater than 12 ac (5 ha) in size. Habitat at occupied survey locations within this unit is native (Holmes *et al.* 2008, p. 23). The site also provides migratory stop-over habitat for western yellow-billed cuckoos moving farther north.

Unit 10: AZ–8 Lower Verde River and West Clear Creek; Yavapai County, Arizona.

Unit AZ–8 is 2,134 ac (864 ha) in extent and is a 17-mi (27-km) long continuous segment of the Verde River extending from the I–17 Verde River Bridges downstream to Beasley Flat, Prescott National Forest, and includes 5 mi (8 km) of the West Clear Creek tributary. We have excluded approximately 44 ac (18 ha) of Yavapai-Apache Nation land from this unit (see

Exclusions). After exclusion, approximately 638 ac (258 ha) is in Federal ownership; 30 ac (12 ha) is in State ownership; and 1,466 ac (593 ha) is in other ownership. Mitigation conservation property along the Verde River that supports nesting western yellow-billed cuckoos was not considered for exclusion. The unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos occupy and breed in this unit during the breeding season (Corman and Magill 2000, pp. 38, 45–46, 48; Holmes *et al.* 2008, pp. 13, 16, 27; Prescott National Forest 2019, entire; AGFD 2018, entire; SRP 2019c, entire; Cornell Lab of Ornithology 2020 (eBird); Service 2020c). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. This unit is part of the Lower Verde River IBA (Arizona IBA 2020b, entire; National Audubon Society 2020a, entire). The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. This unit also provides a movement corridor as well as migratory stop-over habitat for western yellow-billed cuckoos.

A number of NGO organizations, including Friends of Verde River Greenway and The Nature Conservancy, are working on efforts to restore and maintain an appropriate level of base flows in the Verde River to sustain ecological functions (Arizona IBA 2020b, entire). Dominant vegetation is cottonwood and willow with lesser amounts of sycamore, ash, and tamarisk (Prescott National Forest 2019, entire). Mesquite bosque flanks parts of the riparian forest. Altered hydrology has caused the introduction and spread of nonnative tamarisk, resulting in reduced quality of riparian habitat. Although tamarisk is not as desirable as native habitat, it may contribute toward habitat suitability in areas where the native tree density can no longer be sustained.

Unit 11: AZ–9A and AZ–9B Horseshoe Dam; Gila, Maricopa, and Yavapai Counties, Arizona.

Critical habitat in these two subunits is 3,449 ac (1,395 ha) (AZ–9A 2,667 ac (1,079 ha)); (AZ–9B 782 ac (316 ha)) in extent and is a continuous segment of the Verde River immediately upstream of Horseshoe Dam and a continuous segment of the Verde River immediately downstream of Horseshoe Dam in Yavapai County, Arizona. We have excluded approximately 387 ac (161 ha) from (AZ–9A 76 ac (31 ha) and AZ–9B 311 ac (130 ha)) of land from the Units AZ–9AB (see Exclusions). All lands are in Federal ownership. The unit is considered to have been occupied at the time of listing, and the western yellow-billed cuckoo breeds at this site annually (Corman and Magill 2000, pp. 37, 41; SRP 2011a, pp. 18, 19; Dockens and Ashbeck 2011a, 2015, entire; AGFD 2018, entire; SRP 2017a, pp. A1–G2; Cornell Lab of Ornithology 2020 (eBird data); Service 2020c). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3, occur within this unit but depend on river flows and flood timing. This unit also provides a movement corridor as well as migratory stop-over habitat for western yellow-billed cuckoos.

This unit includes part of the Salt and Verde Riparian Ecosystem IBA, with western yellow-billed cuckoos identified as a breeding bird (National Audubon Society 2016b, entire). Riparian cottonwood-willow galleries and mixed riparian stands of native and tamarisk habitat exist both above and below Horseshoe Dam, although some of these stands occur as narrow strands along the Verde River (SRP 2008, p. 61). Habitat consists of contiguous to patchy cottonwood, willow, tamarisk, and mesquite (SRP 2011a, p. 18). Altered hydrology has caused the introduction and spread of nonnative tamarisk. Although tamarisk is not as desirable as native habitat, it contributes toward habitat suitability in areas where the native tree density can no longer be sustained.

Unit 12: AZ–10 Tonto Creek; Gila County, Arizona.

Critical habitat unit AZ–10 is 3,181 ac (1,287 ha) in extent and is made up of a continuous segment of Tonto Creek ending at the 2,151-ft (656-m) elevation line, which represents the lakebed at Theodore Roosevelt Lake in Gila County, Arizona. We have excluded approximately 489 ac (198 ha) of land from this unit (see Exclusions). Approximately 2,045 ac (828 ha) is in Federal ownership, and 1,135 ac (459 ha) is in other ownership. The unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos occupy and nest in this unit during the breeding season (Corman and Magill 2000, pp. 37, 40, 41, 51; Johnson *et al.* 2004, 2005, 2006, 2007, entire; SRP 2005, p. 5; Archaeological Consulting Services, Ltd. 2016, entire; 2017, pp. 2–10; 2018, p. 3; 2019, entire; SRP 2017b, p. 28; AGFD 2018, entire; Cornell Lab of Ornithology 2020 (eBird data); Service 2020c, entire). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. Dominant riparian habitat in this unit is cottonwood, willow, and tamarisk. Mesquite bosque is adjacent to the riparian habitat in some areas of Tonto Creek (Archaeological Consulting Services, Ltd 2018, entire). The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos moving farther north. Altered hydrology has caused the introduction and spread of nonnative tamarisk resulting in reduced quality of riparian habitat. Although tamarisk is not as desirable as native habitat, it may contribute toward habitat suitability in areas where the native tree density can no longer be sustained. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo.

Unit 13: AZ–11 Pinal Creek; Gila County, Arizona.

Critical habitat unit AZ–11 is 419 ac (169 ha) and is a 3-mi (5-km)-long continuous segment of Pinal Creek, approximately 4-mi (6-km) upstream of the confluence with the Salt River north of the Town of Globe in Gila County, Arizona. We have excluded the entire unit from the final designation (see Exclusions). A description and map of this unit is maintained in supporting information for this designation (Service 2020b, entire).

Unit 14: AZ–12 Bonita Creek; Graham County, Arizona.

Critical habitat unit AZ–12 is 928 ac (375 ha) in extent and is an 11-mi (17-km)-long continuous segment of Bonita Creek, a tributary of the Gila River, and an 8-mi (13-km)-long continuous segment of the Gila River extending upstream and downstream of the confluence with Bonita Creek, located northeast of the Town of Safford in Graham County, Arizona. Approximately 828 ac (335 ha) is in Federal ownership, and 101 ac (41 ha) is in other ownership. The BLM's Gila

Box Riparian National Conservation Area, established by Congress to conserve, protect, and enhance the riparian values of the area, includes Bonita Creek. The unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoo occupy and nest in the unit during the breeding season (Corman and Magill 2000, p. 49; AGFD 2018, entire; Reclamation 2019, entire; Cornell Lab of Ornithology 2020 (eBird)). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides a movement corridor between larger habitat patches. Habitat consists of mesquite bosque and riparian habitat dominated by cottonwood and willow (AGFD 2018, entire). Altered hydrology has caused the introduction and spread of nonnative tamarisk resulting in reduced quality of riparian habitat. Although tamarisk is not as desirable as native habitat, it may contribute toward habitat suitability in areas where the native tree density can no longer be sustained.

Unit 15: AZ–13 San Francisco River; Greenlee County, Arizona.

Critical habitat unit AZ–13 is 1,327 ac (537 ha) in extent and is a 4-mi (6-km)-long continuous segment of the San Francisco River that includes a continuous segment of a tributary called Dix Creek located approximately 6 mi (9.6 km) west of the border with New Mexico in Greenlee County, Arizona. Approximately 1,192 ac (482 ha) is in Federal ownership, and 135 ac (55 ha) is in other ownership. The unit is considered to have been occupied at the time of listing, and is used by the western yellow-billed cuckoo during the breeding season (AGFD 2018, entire; Corman and Magill 2000, pp. 38–39, 44; Cornell Lab of Ornithology 2020, (eBird data)); Reclamation 2020b, p. 6.2.2). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides a movement corridor between larger habitat patches. This unit is part of the Blue and San Francisco Rivers IBA. Riparian habitat is dominated by cottonwood, willow, alder, and sycamore. Mesquite, walnut, oak, and juniper may also be present (Corman and Magill 2000, pp. 15–16; National Audubon Society 2020c; entire).

Unit 16: AZ–14 Upper San Pedro River; Cochise County, Arizona.

Critical habitat Unit AZ–14 is 31,059 ac (12,569 ha) in extent and is an 84-mi (135-km)-long segment of the Upper San Pedro River from the border with Mexico north to nearly the community of Redington in Cochise County, Arizona. We have excluded the 60-ft (18-m) Roosevelt Reservation from this unit (see Exclusions). Approximately 17,957 ac (7,267 ha) is in Federal ownership; 1,903 ac (770 ha) is in State ownership; and 11,199 ac (4,532 ha) is in other ownership. The unit is considered to have been occupied at the time of listing. The upper San Pedro River is known as supporting one of the largest nesting populations of western yellow-billed cuckoo s along a free-flowing river during the breeding season. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. This unit also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

This unit not only includes gallery riparian habitat dominated by cottonwood and willow, but also a large adjacent mesquite bosque, where western yellow-billed cuckoos also nest and forage (Corman and Magill 2000, pp. 11, 39–40, 44, 50; Cascabel Conservation Association 2014, entire; EEC 2002, pp. ES–1, 6, 10, 11; Halterman 2002, pp. 10, 22; Halterman 2003, pp. 9, 23; Halterman 2004, pp. 9, 33–34; Halterman 2005, pp. 8, 22–23; Halterman 2006, pp. 26–27, 31; Halterman 2007, pp. 5, 11; Halterman 2009, p. 23; Swanson 2014, entire; AGFD 2018, entire; Cornell Lab of Ornithology 2020 (eBird data); Service 2020c, entire). Western yellow-billed cuckoos have been found nesting in mesquite bosque as far away as 0.3 mi (0.5 km) from the adjacent upper San Pedro River (Halterman 2006, p. 31). Other species include walnut, soapberry, ash, Mexican elder, acacia, and mimosa (EEC 2002, p. 14).

Much of this mesquite habitat is composed of large mature trees. Western yellow-billed cuckoos were documented during 2014 surveys on the Babocomari River portion of this unit in habitat that is not as dense as on the San Pedro River, including narrow habitat with low stature and scattered riparian and mesquite trees (Swanson 2014, entire). Altered hydrology has caused the introduction and spread of nonnative tamarisk resulting in reduced quality of riparian habitat. Although tamarisk is not as desirable as native habitat, it contributes toward habitat suitability in areas where the native tree density can no longer be sustained.

Most of this unit lies within the San Pedro Riparian National Conservation Area and the San Pedro Riparian National Conservation Area IBA (National Audubon Society 2016c, entire). The IBA supports 100 species of breeding birds, and 250 species of migrant and wintering birds (National Audubon Society 2016c, entire). The 40 mi (64 km) of the upper San Pedro River was designated by Congress as a Riparian National Conservation Area in 1988. The primary purpose for the special designation is to protect and enhance the desert riparian ecosystem, a rare remnant of what was once an extensive network of similar riparian systems throughout the American Southwest. Part of this unit is within the Lower San Pedro River IBA (National Audubon Society 2016h, entire). The conservation property, Three Links Farm consisting of 2,156 ac (873 ha), was purchased by TNC to protect the San Pedro River and its riparian habitat. Reclamation holds a conservation easement on part of the property. Western yellow-billed cuckoos nest in the cottonwood and willow dominated gallery forest and mesquite bosque. The Cascabel Conservation Association (2014, entire), a non-profit corporation of local landowners near the community of Cascabel dedicated to the collaborative stewardship of the Middle San Pedro River watershed, provided western yellow-billed cuckoo data collected during the breeding season in support of designation of critical habitat. The Friends of the San Pedro River, a non-profit organization dedicated to the conservation and restoration of the river through advocacy, education, and interpretation supports designation of critical habitat.

Unit 17: AZ–15 Lower San Pedro and Gila Rivers; Pima, Pinal and Gila Counties, Arizona.

Critical habitat unit AZ–15 is 22,397 ac (9,064 ha) in extent and is a 119-mi (192-km)-long segment of the Lower San Pedro River from just north of the community of Redington in Pima County downstream for approximately 49 mi (78 km) to its confluence with the Gila River. The Gila River segment continues downstream for approximately 39 mi (63 km) to the area of the Ashurst-Hayden Dam. A segment of the unit continues upstream to Porphyry Gulch in Pinal County, Arizona. In the revised proposed rule, we identified approximately 729 ac (295 ha) of San Carlos Apache parcel land in this unit for exclusion. After publication, we identified an additional 185 ac (75 ha) along the Lower San Pedro River between Aravaipa Creek and the Gila River confluence, totaling approximately 914 ac (370 ha) of San Carlos Apache lands. However, due to revisions of the area considered as critical habitat between the revised proposed rule and this final designation, the area upstream of Prophyry Gulch on the Gila River was removed. As a result, the total area of Tribal lands we are excluding in Unit 17 is approximately 445 ac (184 ha). (see Exclusions, *Tribal Lands*). The San Carlos Apache parcels along the lower San Pedro River between Aravaipa Creek and the Gila River confluence are within a riparian corridor occupied by western yellow-billed cuckoos (Service 2013, pp. 349, 387). These small parcels are likely within the home range of foraging and breeding western yellow-billed cuckoos. Approximately 2,695 ac (1,091 ha) is in Federal ownership; 2,280 ac (922 ha) is in State ownership; and 17,421 ac (7,050 ha) is in other ownership. The unit is considered to have been occupied at the time of listing. This unit is an important breeding area for western yellow-billed cuckoos and is consistently occupied by a number of pairs during the breeding season (Corman and Magill 2000, pp. 38–40, 42–44, 49–50; SRP 2005, pp. 7–24; SRP 2011b, pp. 22–37; SRP 2015, p. 29; Andreson 2016b, entire; AGFD 2018, entire; Murray and Gicklhorn 2018, pp. 14–15; National Audubon Society 2016h, entire; Reclamation 2019 entire; SRP 2019b, pp. 29–31; Service 2020c, entire). We removed a portion of critical habitat that was previously identified in the revised proposed rule because habitat upstream of Porphyry Gulch on the Gila River is narrower and patchier than the rest of the unit. In part of the removed reach, the Gila River flows through a narrow canyon with limited space for habitat to develop. Several mitigation conservation properties along the San Pedro River that support nesting western yellow-billed cuckoos were not considered for exclusion. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides a movement corridor and migratory stop-over location for western yellow-billed cuckoos moving farther north. Altered hydrology has caused the introduction and spread of nonnative tamarisk resulting in reduced quality of riparian habitat. Although tamarisk is not as desirable as native habitat, it may contribute toward habitat suitability in areas where the native tree density can no longer be sustained. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo.

The entire lower San Pedro reach is included in the Lower San Pedro River IBA (National Audubon Society 2016h, entire) and consists of cottonwood and Goodding's willow gallery forest riparian habitat is interspersed with old growth honey mesquite (*Prosopis juliflora*) woodland bosques. Other species include hackberry, ash, coyote willow, greythorn, and buttonbush (Murray and Gicklhorn 2018, p. 14). Surrounding habitat is desert scrub. The largest intact mesquite bosque community remaining in Arizona is the 14-mi (23-km) reach of the San Pedro River beginning south of San Manuel and ending north of Mammoth. Many conservation properties occur in this unit, most of which were purchased as mitigation for projects that impacted riparian resources. They include Pima County's Bingham Cienega in Pima County; SRP's San Pedro River Preserve, Spirit Hollow, Adobe Preserve, Stillinger Preserve; Resolution Copper's 7B Ranch, BHP-Biliton property; AGFD's Lower San Pedro River Wildlife Area, and Reclamation's Cook's Lake/Cienega Seep. BLM property exists along the San Pedro River as well. Conservation partnerships among these landowners to protect habitat include the Lower San Pedro Watershed Alliance (2014, entire), Lower San Pedro Watershed Collaborative, and Lower San Pedro Working Group (SRP 2019b, p. 37).

Unit 18: AZ–16 Sonoita Creek; Santa Cruz County, Arizona.

Critical habitat Unit AZ–16 is 2,488 ac (1,007 ha) in extent and is a 16-mi (26-km)-long segment of Sonoita Creek from the Town of Patagonia downstream to a point on the creek approximately 4 mi (6 km) east of the Town of Rio Rico in Santa Cruz County, Arizona. Approximately 926 ac (375 ha) is in State ownership, and 1,563 ac (633 ha) is in other ownership. This unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos nest throughout this unit during the breeding season (Corman and Magill 2000, pp. 38–40, 45, 51; Kingsley and Gaiennie 2005, entire; Tucson Audubon Society 2012, entire; AGFD 2018, entire; Cornell Lab of Ornithology 2020 (eBird data); Service 2020c, entire). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. This site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

The perennial flow in Sonoita Creek supports a diverse gallery cottonwood and Goodding's willow forest that includes walnut, mesquite, ash, hackberry, and various willow species in this rare southeastern Arizona ecosystem (National Audubon Society 2016d, entire). This unit includes Patagonia State Park, Sonoita Creek State Natural Area, Patagonia-Sonoita Creek TNC Preserve, and the Tucson Audubon Society's Paton Center for Hummingbirds. The Patagonia-Sonoita Creek TNC Preserve IBA lies within this unit, under conservation stewardship by state parks, TNC, and Tucson Audubon Society (National Audubon Society 2016d, entire).

Unit 19: AZ–17, Upper Cienega Creek; Pima County, Arizona.

Critical habitat Unit AZ–17 is 5,204 ac (2,106 ha) in extent and is an 11-mi (18-km)-long segment of Cienega Creek. Approximately 4,630 ac (1,874 ha) is in Federal ownership, and 574 ac (232 ha) is in State ownership. This unit is considered to have been occupied at the time of listing, and is used by the western yellow-billed cuckoo during the breeding season (Corman and Magill 2000, pp. 38–39, 40, 44, 48; BLM 2010, 2003, entire; AGFD 2018, entire; Cornell Lab of Ornithology 2020 (eBird data); Service 2020c, entire). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the

habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. This unit also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This unit connects Gardner Canyon (AZ–46) with upper Cienega Creek. BLM's Las Cienegas National Conservation Area, also designated as the Las Cienegas NCA IBA, includes cienegas (marshlands) and cottonwood and willow riparian forests, and mesquite bosques bisecting sacaton (*Sporobolus* sp.) grasslands and semi-desert grasslands (National Audubon Society 2020d, entire).

Unit 20: AZ–18 Santa Cruz River; Santa Cruz County, Arizona.

Critical habitat Unit AZ–18 is 9,538 ac (3,860 ha) in extent and is a 27-mi (43-km)-long segment of the Santa Cruz River from the U.S./Mexico border north to the vicinity of the Town of Tubac in Santa Cruz County, Arizona. We have excluded the 60-ft (18-m) Roosevelt Reservation from this unit (see Exclusions). Approximately 505 ac (204 ha) is in Federal ownership; 4 ac (2 ha) is in State ownership; and 9,029 ac (3,654 ha) is in other ownership. This unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos occupy and nest in numerous locations along the Santa Cruz River and tributaries during the breeding season, including a concentration of nesting yellow-billed cuckoos within the Tumacacori area (Corman and Magill 2000, pp. 14, 39, 40, 50; Powell 2000, entire; Krebbs and Moss 2009, entire; Baril et al. 2019, p. 85; National Audubon Society 2016e, entire; Cornell Lab of Ornithology 2020 (eBird data); Service 2020c, entire). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. Some portions of the unit are considered disturbed and may not contain all the physical or biological features essential to the conservation of the species, but due to our mapping constraints, some of these areas were left within the boundaries of the unit. These disturbed areas not containing the physical or biological features would not be considered critical habitat. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

This unit is within the Upper Santa Cruz IBA, with western yellow-billed cuckoos identified as a breeding species (National Audubon Society 2016e, entire). The Upper Santa Cruz River IBA is a linear riparian corridor from Tumacacori National Historical Park downstream (northward) through the Tucson Audubon Society-held conservation easement (National Audubon Society 2016e, entire). This reach of river has the highest groundwater levels and perennial river flow, primarily treated wastewater, but with some groundwater seep augmentation. The IBA boundaries are defined by the cottonwood and willow riparian vegetation, including the mesquite bosques that border the broadleaf gallery forest and elderberry thickets (Powell 2000, p. 5). The IBA also includes all the National Historical Park and Tucson Audubon Society-held conservation easement lands.

Unit 21: AZ–19 Black Draw; Cochise County, Arizona.

Critical habitat Unit AZ–27 is 1,595 ac (646 ha) in extent. Approximately 891 ac (360 ha) is in Federal ownership; 134 ac (54 ha) is in State ownership; and 570 ac (231 ha) is in other ownership. We have excluded the 60-ft (18-m) Roosevelt Reservation from this unit (see Exclusions). This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season (Corman and Magill 2000, pp. 39, 50; Radke 2014, pp. 57–58, 112; Cajero 2016, entire; Radke 2017, pp. 41–42; AGFD 2018, entire; Cajero 2018, entire; Radke 2019, pp. 26, 84, 88; Radke 2020, pp. 40–41; Service 2020c, entire). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. Habitat is primarily cottonwood, Goodding's willow, and some mesquite (Cajero 2016, entire).

Unit 22: AZ–20, Gila River 1; Graham County, Arizona.

Critical habitat Unit AZ–20 is 10,540 ac (4,266 ha) in extent and is a 76-mi (123-km) long continuous segment of the Gila River in Graham County, Arizona. This segment extends along the Gila River from east of Safford downstream to the confluence with the San Carlos Reservoir. We have excluded approximately 10,184 ac (4,121 ha) of land from this unit (see Exclusions). Several mitigation conservation properties along the Gila River that support nesting western yellow-billed cuckoos were not considered for exclusion. Approximately 778 ac (315 ha) is in Federal ownership; 215 ac (87 ha) is in State ownership; and 9,547 ac (3,863 ha) is in other ownership. This unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos nest in this unit during the breeding season (Corman and Magill 2000, p. 39; Dockens and Ashbeck 2014, pp. 6–7; SRP 2015; p. 28; Johnson 2016, entire; AGFD 2018, entire; SRP 2019a, pp. 33–62; Service 2020c, entire). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. Part of this unit is within the BLM's Gila Box Riparian National Conservation Area, established by Congress to conserve, protect, and enhance the riparian values of the area, Mitigation conservation properties along the Gila River that support nesting western yellow-billed cuckoos were not considered for exclusion at the request of the landowners. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. Altered hydrology has caused the introduction and spread of nonnative tamarisk resulting in reduced quality of riparian habitat. Although tamarisk is not as desirable as native habitat, it may contribute toward habitat suitability in areas where the native tree density can no longer be sustained. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

Suitable habitat varies from multi-storied cottonwood and Goodding's willow dominated habitat with large patches of coyote willow along the stream edges to mixed tamarisk/native habitat with fewer cottonwood and willows (SRP 2019a, p. 62). Western yellow-billed cuckoo presence and density varies, depending on habitat

quality. Patches of unsuitable tamarisk dominated habitat are interspersed within this unit.

Unit 23: AZ–21 Salt River; Gila County, Arizona.

Critical habitat unit AZ–21 is 581 ac (235 ha) in extent and is a 5-mi (8-km)-long continuous segment of the Salt River ending at the 2,151-ft (656-m) elevation line, which represents the lakebed at Theodore Roosevelt Lake in Gila County, Arizona. We have excluded approximately 2,009 ac (813 ha) of land from this unit (see Exclusions). Approximately 502 ac (203 ha) of this unit is Federal ownership, and 79 ac (32 ha) is in other ownership. This unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos occupy and nest in this unit during the breeding season (Corman and Magill 2000, p. 38, 50; Johnson *et al.* 2004, 2005, 2006, 2007, entire; SRP 2005, p. 5; SRP 2017b, p. 28; AGFD 2018, entire; Cornell Lab of Ornithology 2020 (eBird data)). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. Habitat consists of primarily of tamarisk, mesquite, and willow. The site also provides a movement corridor between larger habitat patches. Altered hydrology has caused the introduction and spread of nonnative tamarisk resulting in reduced quality of riparian habitat. Although tamarisk is not as desirable as native habitat, it may contribute toward habitat suitability in areas where the native tree density can no longer be sustained. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo.

Unit 24: AZ–22 Lower Cienega Creek, Pima County, Arizona.

Critical habitat unit AZ–22 is 2,360 ac (955 ha) in extent and is an 11-mi (18-km)-long continuous segment of Cienega Creek about 15 mi (24 km) southeast of Tucson in Pima County, Arizona. Approximately 759 ac (307 ha) are State lands and 1,601 ac (648 ha) is in other ownership. This unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos occupy and nest in Pima County's Cienega Creek Natural Preserve regularly during the breeding season (Corman and Magill 2000, p. 48; Powell 2013, entire; Murray and Gicklhorn 2018, pp. 11–13; AGFD 2018, entire; National Audubon Society 2013a, entire; Cornell Lab of Ornithology 2020 (eBird data)). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides a movement corridor between larger habitat patches. Habitat consists of cottonwood, Goodding's willow, ash, hackberry, and mesquite in reaches of perennial water. Tamarisk is widely scattered and relatively rare (Powell 2013, p. 12). Altered hydrology has caused the introduction and spread of nonnative tamarisk resulting in reduced quality of riparian habitat. Although tamarisk is not as desirable as native habitat, it may contribute toward habitat suitability in areas where the native tree density can no longer be sustained.

Unit 25: AZ–23 Blue River, Greenlee County, Arizona.

Critical habitat unit AZ–23 is 1,025 ac (415 ha) in extent and is an 8-mi (13-km)-long continuous segment of the Blue River in Greenlee County, Arizona. The entire unit is in Federal ownership located on the Apache Sitgreaves National Forest managed by the USFS. This unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos occupy this site (AGFD 2018, entire; Corman and Magill 2000, pp. 14, 38–39, 44; Reclamation 2020b, p. 6.1.2). This unit is part of the Blue and San Francisco Rivers IBA (National Audubon Society 2020c, entire). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. Riparian habitat is dominated by cottonwood, willow, alder, and sycamore. Walnut, mesquite, oak and juniper may also be present.

Unit 26: AZ–24 Pinto Creek South, Gila and Pinal Counties, Arizona.

Critical habitat unit AZ–24 is 373 ac (151 ha) in extent and is a 4-mi (6-km)-long continuous segment of Pinto Creek in Gila and Pinal Counties, Arizona. Approximately 368 ac (149 ha) is in Federal ownership, and 5 ac (2 ha) is in other ownership. This unit is considered to have been occupied at the time of listing (Corman and Magill 2000, pp. 38, 42, AGFD 2018, entire; WestLand Resources, Inc. 2019, entire; Cornell Lab of Ornithology 2020 (eBird data); Service 2020c, entire). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. Altered hydrology has caused the introduction and spread of nonnative tamarisk resulting in reduced quality of riparian habitat. Although tamarisk is not as desirable as native habitat, it may contribute toward habitat suitability in areas where the native tree density can no longer be sustained. Habitat is mostly native broadleaf plants, with an overstory of cottonwood, Goodding's willow, and sycamore and an understory of ash and cottonwood (WestLand Resources, Inc. 2019, entire).

Unit 27: AZ–25 Aravaipa Creek; Pinal and Graham Counties, Arizona.

Critical habitat Unit AZ–25 is 2,937 ac (1,189 ha) in extent and is a 28-mi (46-km)-long continuous segment of Aravaipa Creek extending from the confluence of Aravaipa Creek and the San Pedro River in Pinal and Graham Counties, Arizona. In addition, this unit includes approximately 3-mi (4-km) of the Turkey Creek tributary on the eastern end of the Unit. We have excluded approximately 392 ac (159 ha) of San Carlos Apache tribal land from this unit (see Exclusions). Approximately 622 ac (252 ha) is in Federal ownership; 116 ac (47 ha) is in State ownership; and 2,199 ac (890 ha) is in other ownership. This unit includes BLM's Aravaipa Canyon Wilderness Area and TNC's Aravaipa Canyon Preserve. This unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos occupy and nest in this unit during the breeding season within this unit (Corman and Magill 2000, pp. 41–43; AGFD 2018, entire; Cornell Lab of Ornithology 2020 (eBird data)). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. Habitat is

mixed broadleaf riparian forest composed of cottonwood, willow, walnut, alder, and sycamore trees (TNC 2020, entire). The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

Patches and stringers of cottonwood-willow riparian forest and adjacent mesquite bosque exist throughout Aravaipa Canyon. This drainage experiences scouring flood flows that can result in shifting suitable habitat within the floodplain. Including the entire Aravaipa Canyon ensures that if suitable habitat shifts, it will remain within critical habitat. Connecting this unit to the San Pedro River units (AZ–14 and AZ–15) by including the confluence with the San Pedro River strengthens the conservation value of both units by linking breeding, migration, and dispersal corridors. Altered hydrology caused the introduction and spread of nonnative tamarisk resulting in reduced quality of riparian habitat. Although tamarisk is not as desirable as native habitat, it contributes toward habitat suitability in areas where the native tree density can no longer be sustained.

Unit 28: AZ–26, Gila River 2; Graham and Greenlee Counties, Arizona.

Critical habitat Unit AZ–26 is 5,836 ac (2,362 ha) in extent and is a continuous segment of the Gila River and continuous segment of Eagle Creek in Graham and Greenlee Counties, Arizona. Eagle Creek, a tributary to the Gila River, straddles the eastern boundary of San Carlos Apache Reservation and meanders in and out of private, State, tribal, and Federal lands. Also included in this unit is a small portion of the San Francisco River at the confluence with the Gila River in Graham and Greenlee Counties, Arizona. We have excluded approximately 2,753 ac (1,114 ha) of land from this unit (see Exclusions). Approximately 1,895 ac (767 ha) is in Federal ownership; 204 ac (83 ha) is in State ownership; and 3,736 ac (1,512 ha) is in other ownership. Part of this unit is within the BLM's Gila Box Riparian National Conservation Area, established by Congress to conserve, protect, and enhance the riparian values of the area. This unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos occupy and nest in this unit in several locations on the Gila River and Eagle Creek during the breeding season (WestLand Resources, Inc. 2015e, entire; Andreson 2016a, entire; Johnson 2016, entire; AGFD 2018, entire; Cornell Lab of Ornithology 2020 (eBird data); Service 2020c, entire). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

Riparian habitat in overstory and understory along one survey reach in Eagle Creek is primarily cottonwood and sycamore (Westland Resources, Inc. 2019, entire). Lower Eagle Creek includes cottonwood, willow, ash, and mesquite bosque habitat where western yellow-billed cuckoos have been documented during the breeding season. Although narrow and patchy in some reaches of the eastern part of this unit on the Gila River, habitat is primarily cottonwood and willow, with less tamarisk than farther downstream (Johnson 2016, entire). Altered hydrology has caused the introduction and spread of nonnative tamarisk resulting in reduced quality of riparian habitat. Although tamarisk is not as desirable as native habitat, it may contribute toward habitat suitability in areas where the native tree density can no longer be sustained.

Unit 29: AZ–27 Pinto Creek North; Gila County, Arizona.

Critical habitat unit AZ–27 is 427 ac (173 ha) in extent and is a 6-mi (10-km)-long continuous segment of Pinto Creek, located approximately 7 mi (11 km) upstream of Roosevelt Lake in Gila County, Arizona. Approximately 415 ac (168 ha) is in Federal ownership, and 12 ac (5 ha) is in other ownership. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season AGFD 2018, entire; Cornell Lab of Ornithology 2020 (eBird data); Service 2020, entire). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides migration stop-over habitat. Altered hydrology has caused the introduction and spread of nonnative tamarisk resulting in reduced quality of riparian habitat. Although tamarisk is not as desirable as native habitat, it may contribute toward habitat suitability in areas where the native tree density can no longer be sustained. Habitat has declined in recent years due to drought and water withdrawal. Habitat consists of Goodding's willow, cottonwood, ash, alder, sycamore, hackberry and some tamarisk. Large mesquite trees are adjacent to the riparian habitat (Service 2020c, entire).

Unit 30: AZ–28 Mineral Creek; Pinal and Gila Counties, Arizona.

Critical habitat Unit AZ–28 is 380 ac (154 ha) in extent and is a 7-mi (11-km)-long continuous segment of Mineral Creek in Pinal and Gila Counties, Arizona. Approximately 1 ac (<1 ha) is in Federal ownership; 198 ac (80 ha) is in State ownership; and 180 ac (73 ha) is in other ownership. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season (WestLand Resources, Inc. 2019, entire). The southern end of Mineral Creek, which is not included in the proposal, empties into a reservoir owned by American Smelting And Refining Company (ASARCO). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. Mineral Creek provides suitable habitat for western yellow-billed cuckoos along most of the surveyed reach, consisting mostly of ash, with willow, cottonwood, and sycamore (Westland Resources, Inc. 2019, entire).

Unit 31: AZ–29 Big Sandy River; Mohave County, Arizona.

Critical habitat within Unit AZ–29 totals approximately 4,236 ac (1,714 ha) in extent. We have excluded approximately 500 ac (202 ha) of land from this unit (see Exclusions (Alamo

Lake Wildlife Area)). We also removed additional areas from this unit due to either not containing the PBFs or not meeting our criteria for designation. Approximately 1,291 ac (522 ha) is in Federal ownership and 2,945 ac (1,192 ha) is in other ownership. Based on survey data, descriptions of habitat, and lack of information, we have removed parts of this unit from critical habitat designation. Areas removed were more arid and or in narrow canyons than the remaining portion of the unit. This unit is considered to have been occupied at the time of listing and western yellow-billed cuckoos occupy this site during the breeding season (Magill *et al.* 2005, p. 8; Dockens *et al.* 2006, p. 7; O'Donnell *et al.* 2016, pp. 1, 6, 21). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. Following heavy streamflow, the amount of regenerating habitat that develops along the Big Sandy River at the inflow to Alamo Lake is influenced by the length of time and the amount of water that is backed up behind the dam. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

The Big Sandy River has flows that are spatially and temporally intermittent. However, in the vicinity of US 93, the river is perennial and supports a dense riparian woodland of tamarisk, cottonwood, and Goodding's willow, bordered and interspersed with mesquite (Magill *et al.* 2005, pp. 1, 5). Within the floodplain, seep willow, arrowweed (*Pluchea sericea*), and screw-bean mesquite (*Prosopis pubescens*) are also common. Adjacent upland habitat in the area is Arizona Upland Subdivision of Sonoran Desertscrub dominated by foothills paloverde (*Circidium floridium*), mixed cacti, and creosote bush (*Larrea tridentata*) (Magill *et al.* 2005, p. 5). Western yellow-billed cuckoos were found in cottonwood, willow, or the adjacent mesquite (Magill *et al.* 2005, p. 8; Dockens *et al.* 2006, p. 7). Altered hydrology has caused the introduction and spread of nonnative tamarisk resulting in reduced quality of riparian habitat. Although tamarisk is not as desirable as native habitat, it may contribute toward habitat suitability in areas where the native tree density can no longer be sustained.

Unit 32: NM–1 San Francisco River; Catron County, New Mexico.

Critical habitat unit NM–1 is 2,039 ac (825 ha) in extent and is a 10-mi (16-km)-long continuous segment of the San Francisco River near the Town of Glenwood in Catron County, New Mexico. This segment includes 1.2 mi (2 km) portion of Whitewater Creek from the confluence of the San Francisco River near the Town of Glenwood. Approximately 738 ac (299 ha) is in Federal ownership; 10 ac (4 ha) is in State ownership; and 1,291 ac (522 ha) is in other ownership. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides migratory stop-over habitat for western yellow-billed cuckoos moving farther north. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. Altered hydrology has caused the introduction and spread of nonnative tamarisk resulting in reduced quality of riparian habitat. Although tamarisk is not as desirable as native habitat, it may contribute toward habitat suitability in areas where the native tree density can no longer be sustained.

Unit 33: NM–2 Gila River; Grant County, New Mexico.

Critical habitat unit NM–2 is 3,036 ac (1,228 ha) in extent and is a 24-mi (37-km)-long continuous segment of the Gila River from 10 mi (16 km) downstream from the town of Cliff to 10 mi (16 km) upstream of the town of Gila in Grant County, New Mexico. We have excluded approximately 1,142 ac (381 ha) of land from this unit (see Exclusions). Approximately 974 ac (394 ha) is in Federal ownership; 194 ac (78 ha) is in State ownership; and 1,867 ac (756 ha) is in other ownership. This unit is considered to have been occupied at the time of listing and is consistently used by a large number of western yellow-billed cuckoos during the breeding season and is an important breeding location for the species. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides migratory stop-over habitat for western yellow-billed cuckoos moving farther north. Altered hydrology has caused the introduction and spread of nonnative tamarisk resulting in reduced quality of riparian habitat. Although tamarisk is not as desirable as native habitat, it may contribute toward habitat suitability in areas where the native tree density can no longer be sustained. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo.

Unit 34: NM–3A and NM–3B Mimbres River; Grant County, New Mexico.

Critical habitat Unit NM–3 is 544 ac (220 ha) in extent (NM–3A 260 ac (105 ha); NM–3B 284 ac (115 ha)). The unit is made up of two segments totaling approximately 7.4 mi (11.9 km) of the Mimbres River north of the town of Mimbres in Grant County, New Mexico. The entire proposed Unit NM–3 is privately owned. This unit is considered to have been occupied at the time of listing and id used by western yellow-billed cuckoo during the breeding season. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The two areas provide the habitat components in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. Habitat is composed of mainly cottonwood, Goodding's willow and boxelder.

Unit 35: NM–4 Upper Rio Grande 1; Rio Arriba County, New Mexico.

Critical habitat unit NM–4 is 518 ac (210 ha) in extent and is a 10-mi (16-km)-long continuous segment of the upper Rio Grande from Ohkay Owingeh to near Alcalde in Rio Arriba County, New Mexico. We have excluded approximately 1,312 ac (513 ha) of land from this unit (see Exclusions). The entire area is in private ownership. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed

cuckoo during the breeding season. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides a movement corridor for western yellow-billed cuckoos moving farther north. Altered hydrology has caused the introduction and spread of nonnative tamarisk resulting in reduced quality of riparian habitat. Although tamarisk is not as desirable as native habitat, it may contribute toward habitat suitability in areas where the native tree density can no longer be sustained. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo.

Unit 36: NM–5 Upper Rio Grande 2; Santa Fe and Rio Arriba Counties, New Mexico.

Critical habitat unit NM–5 was proposed as 1,173 ac (475 ha) in extent and comprised of a 6-mi (10-km)-long continuous segment of the Upper Rio Grande starting from the Highway 502 Bridge at the south end of the San Ildefonso Pueblo upstream to a point on the river in Rio Arriba County, New Mexico. We have excluded the entire unit from the final designation (see Exclusions). A description and map of this unit is maintained in supporting information for this designation (Service 2020b, entire).

Unit 37: NM–6A and NM–6B Middle Rio Grande; Sierra, Socorro, Valencia, Bernalillo, and Sandoval Counties, New Mexico.

Critical habitat Unit NM–6 is made up of two areas: NM–6A and NM–6B. NM–6A has been entirely excluded from the final designation (see Exclusions). A description and map of Unit NM–6A is maintained in supporting information for this designation (Service 2020b, entire). NM–6B contains 46,595 ac (18,856 ha) along the Rio Grande upstream of Elephant Butte Reservoir in Socorro and Valencia Counties, New Mexico. Within Unit 37 NM–6B approximately 8,651 ac (3,501 ha) is in Federal ownership; 13,064 ac (5,287 ha) is in State ownership; and 24,879 ac (10,068 ha) is in other ownership. This unit is considered to have been occupied at the time of listing and is consistently occupied by the largest number of western yellow-billed cuckoos during the breeding season north of Mexico. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides a movement corridor for western yellow-billed cuckoos. Altered hydrology has resulted in the establishment of tamarisk. Tamarisk is being used by western yellow-billed cuckoos during the breeding season in this unit and may provide important understory habitat (Sechrist *et al.* 2009, p. 55).

Unit 38: NM–7, Upper Gila River; Hidalgo and Grant Counties, New Mexico.

Critical habitat Unit NM–7 is 4,727 ac (1,913 ha) in size and extends in a 30-mi (48-km)-long continuous segment of the Gila River from the Arizona-New Mexico border 5 mi (8 km) downstream from Virden in Hidalgo County upstream to 8 mi (13 km) upstream from Red Rock in Grant County, New Mexico. Approximately 1,086 ac (439 ha) is in Federal ownership; 188 ac (76 ha) is in State ownership; and 3,453 ac (1,397 ha) is in other ownership. The unit is considered to have been occupied at the time of listing. This site is consistently occupied by numerous pairs of western yellow-billed cuckoos during the breeding season. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The unit also provides connecting habitat between the Upper and Lower Gila River and a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo.

Unit 39: NM–8A Caballo Delta North and NM–8B Caballo Delta South; Sierra County, New Mexico.

Critical habitat unit NM–8 is made up of two areas (NM–8A 190 ac (77 ha) and NM–8B 155 ac (63 ha)) within the delta area of Caballo Reservoir east of the town of Caballo, within Sierra County, New Mexico. We have excluded the entire Unit 39 (NM–8A and NM–8B) from the final designation (see Exclusions). A description and map of this unit is maintained in supporting information for this designation (Service 2020b, entire).

Unit 40: NM–9 Animas; Sierra County, New Mexico.

Critical habitat unit NM–9 is 608 ac (246 ha) in extent and is located on a 6-mi (10-km)-long continuous segment of Las Animas Creek west of the town of Caballo, within Sierra County, New Mexico. We have excluded the entire unit from the final designation (see Exclusions). A description and map of this unit is maintained in supporting information for this designation (Service 2020b, entire).

Unit 41: NM–10 Selden Canyon and Radium Springs; Doña Ana County, New Mexico.

Critical habitat unit NM–10 is 237 ac (96 ha) in extent and is a 12.5-mi (20-km)-long continuous segment of river in Doña Ana County, New Mexico. It is located on a continuous segment of habitat northwest of the town of Radium Springs, within Doña Ana County, New Mexico. We have excluded the entire unit from the final designation (see Exclusions). A description and map of this unit is maintained in supporting information for this designation (Service 2020b, entire).

Unit 42: AZ–30 Arivaca Wash and San Luis Wash; Pima County, Arizona.

Critical habitat unit AZ–30 is 5,765 ac (2,333 ha) in extent and is made up of two washes that join to form a 17-mi (27-km)-long continuous segment that comprises 9 mi (15 km) of Arivaca Wash and 8 mi (13 km) of San Luis Wash. The unit is located about 10 mi (16 km) north of the border of Mexico near the Town of Arivaca in Pima County, Arizona. Approximately 4,662 ac (1,887 ha) is in Federal ownership; 89 ac (36 ha) is in State ownership; and 1,014 ac (410 ha) is in other ownership. Most of this unit is located on the Buenos Aries National Wildlife Refuge. The unit is considered to have been occupied at the time of listing. This unit is consistently occupied by numerous nesting western yellow-billed cuckoos during the breeding season (Corman and Magill 2000, pp. 39, 42–43, 47; Griffin 2015, entire; AGFD 2018, entire; Cornell Lab of Ornithology (2020, entire). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy.

The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). The western yellow-billed cuckoo breeding population on the refuge occurs not only within this unit, but in the Brown Canyon unit and in other drainages not included as critical habitat. Ephemeral, intermittent, and perennial riparian drainages intersect grassland, mesquite woodlands, Madrean evergreen woodland, and scrub habitat across the refuge (Griffin 2015, pp. 1, 28; Corson 2018, entire). The site also provides a movement corridor between larger habitat patches. Within this unit, habitat consists of cienega marsh, cattail-bulrush pond, cottonwood and willow riparian forest mixed with ash and hackberry, upland mesquite woodland, bottomland mesquite-herbaceous woodland mesquite-hackberry woodland, native grassland, and disturbed herbaceous areas (Griffin 2015, pp. 10–13).Walnut, Mexican elderberry, desert willow, and mesquite occur as small trees in the understory in some areas. Small seeps and springs are also present in this complex.

Unit 43: AZ–31 Florida Wash; Pima and Santa Cruz Counties, Arizona.

Critical habitat Unit AZ–31 is 747 ac (302 ha) in extent and is a 6-mi (10-km)-long continuous segment of Florida Wash and tributaries in Pima and Santa Cruz Counties, Arizona. Approximately 449 ac (182 ha) is in Federal ownership; 255 ac (103 ha) is in State ownership; and 43 ac (17 ha) is in other ownership. This unit is considered to have been occupied at the time of listing and occupy and nest in this unit during the breeding season (MacFarland and Horst 2015, pp. 101–102, 185–186; MacFarland and Horst 2017, pp. 57–58; AGFD 2018, entire; Cornell Lab of Ornithology 2020 (eBird data)); Drost *et al.* 2020, pp. 13, 33, 35). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

This unit is within the Santa Rita Mountains IBA (National Audubon Society 2016f, entire), one of the sky islands of southeastern Arizona with transitional elevational gradients of forest, oak woodland, grassland, and riparian habitat. Vegetation in occupied habitat is primarily oak, hackberry, and mesquite, with some acacia, sycamore, ocotillo (*Fouquieria splendens*), and juniper along with various other midstory and understory plant species (MacFarland and Horst 2015, pp. 124, 129, 134; Service 2020c, entire).

Unit 44: AZ–32 California Gulch; Santa Cruz County, Arizona.

Critical habitat Unit AZ–32 is 558 ac (226 ha) in extent and is a 7-mi (11-km)-long continuous segment along California Gulch in Santa Cruz County, Arizona. Approximately 376 ac (152 ha) is in Federal ownership, and 181 ac (73 ha) is in other ownership. We have excluded the 60-ft (18-m) Roosevelt Reservation from this unit (see Exclusions). The unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos occupy and nest in this drainage regularly during the breeding season (Sferra *et al.* 2019, pp. 5, 6, 9; Cornell Lab of Ornithology 2020 (eBird data)). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This unit is within the Atascosa Mountains IBA in one of the sky islands (Arizona IBA 2020a; entire). The habitat is Sonoran desert scrub, Madrean evergreen woodland, semi-desert grassland, and low-elevation riparian.

Unit 45: AZ–33 Sycamore Canyon; Santa Cruz County, Arizona.

Critical habitat Unit AZ–33 is 601 ac (243 ha) in extent and is an 8-mi (11-km)-long continuous segment along Sycamore Canyon in Santa Cruz County, Arizona. The entire unit is in Federal ownership. We have excluded the 60-ft (18-m) Roosevelt Reservation from this unit (see Exclusions). The unit is considered to have been occupied at the time of listing and western yellow-billed cuckoos occupy and nest in this unit during the breeding season (Corman and Magill 2000, p. 51; MacFarland and Horst 2015, pp. 5, 25–26; AGFD 2018, entire; Sferra *et al.* 2019, pp. 5, 9; Cornell Lab of Ornithology 2020 (eBird data)). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). Occupied habitat includes riparian and Madrean evergreen woodland vegetation including oak, mesquite, ash, and juniper (MacFarland and Horst 2015, p. 124). This unit is contained within the Atascosa Mountains IBA, with western yellow-billed cuckoos identified as one of the breeding birds (Arizona IBA 2020a, entire).

Unit 46: AZ–34 Madera Canyon; Pima and Santa Cruz Counties, Arizona.

Critical habitat Unit AZ–34 is 1,732 ac (701 ha) in extent and is a 7-mi (11-km)-long continuous segment of Madera Canyon in Pima and Santa Cruz Counties, Arizona. Approximately 1,419 ac (574 ha) is in Federal ownership, and 313 ac (127 ha) is in other ownership. The unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos occupy and nest in this unit during the breeding season (MacFarland and Horst 2015, pp. 99–100; AGFD 2018, entire; Cornell Lab of Ornithology 2020 (eBird data); Drost *et al.* 2020, pp. 33, 36). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. The drainage includes riparian, desert scrub, and Madrean evergreen woodland

vegetation. This unit is within the Santa Rita Mountains IBA (National Audubon Society 2016f, entire), one of the sky islands in southeastern Arizona. Overstory vegetation consists of mesquite, oak, juniper, cottonwood, hackberry, and sycamore with some walnut and ash (MacFarland and Horst 2015, pp. 124–125; Service 2020c, entire).

Unit 47: AZ–35 Montosa Canyon; Santa Cruz County, Arizona.

Critical habitat Unit AZ–35 is 499 ac (202 ha) in extent and is a 4-mi (6-km)-long continuous segment of Montosa Canyon in Santa Cruz County, Arizona. Approximately 496 ac (201 ha) is in Federal ownership, and 3 ac (1 ha) is in other ownership. The unit is considered to have been occupied at the time of listing and western yellow-billed cuckoos occupy and nest in this unit during the breeding season (MacFarland and Horst 2015, pp. 103–104; Cornell Lab of Ornithology 2020 (eBird data); Service 2020c, entire). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This drainage includes riparian, desert scrub, and Madrean evergreen woodland vegetation. This canyon contains dense vegetation along the creek that flows through the bottom of the canyon, and the sloping vegetated canyon walls provide additional foraging opportunities (MacFarland and Horst 2015, p. 103). This unit is within the Santa Rita Mountains IBA (National Audubon Society 2016f, entire), one of the sky islands in southeastern Arizona. Occupied overstory habitat consists of oak, mesquite, hackberry, sycamore (MacFarland and Horst 2015, p. 124).

Unit 48: AZ–36 Patagonia Mountains, Santa Cruz County, Arizona.

Critical habitat Unit AZ–36 is 1,912 ac (774 ha) in extent and is an 11-mi (17-km)-long segment made up of several drainages in the Patagonia Mountains in Santa Cruz County, Arizona. Approximately 1,059 ac (429 ha) is in Federal ownership; 8 ac (3 ha) is in State ownership; and 845 ac (342 ha) is in other ownership. Western yellow-billed cuckoos occupy and nest in the drainages within this unit along 2.2 mi (3.5 km) of Harshaw Creek, along 2.1 mi (3.3 km) of Corral Canyon, and along 1.4 mi (2.2 km) of Hermosa Canyon (AGFD 2018, entire; WestLand Resources, Inc. 2019, entire; Cornell Lab of Ornithology 2020 (eBird data); Drost *et al.* 2020, pp. 31, 35). This unit was considered occupied at the time of listing and western yellow-billed cuckoos occupy Harshaw Creek and an unnamed tributary, Hermosa Creek, Goldbaum Creek, Corral Canyon and two unnamed tributaries, and Willow Springs Canyon (WestLand Resources, Inc. 2019, entire). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). The site also provides a movement corridor migratory stop-over habitat for western yellow-billed cuckoos.

The Patagonia Mountains IBA is within one of southern Arizona's sky islands and is composed of Madrean evergreen woodland habitat dominated by oak-juniper, oak-pine, and pine oak communities surrounded by grasslands and desert (National Audubon Society 2016g, entire). The many canyons and drainages that cut through these mountains support riparian and xeroriparian vegetation. The extent of the oak-juniper community type habitat, with sycamores in drainages, is continuous throughout this range. Occupied habitat includes varying amounts of sycamore, cottonwood, mesquite, oak, juniper, pine, walnut, desert willow, walnut, mimosa, and skunkbush (*Rhus* spp.) (WestLand Resources, Inc. 2019, entire).

Unit 49: AZ–37 Canelo Hills, Santa Cruz County

Critical habitat Unit AZ–37 is 2,822 ac (1,142 ha) in extent and is an 11.5-mi (18.5-km)-long drainage within Santa Cruz County, Arizona. Approximately 1,381 ac (559 ha) is in Federal ownership; 1 ac (< 1 ha) is in State ownership; and 1,440 ac (583 ha) is in other ownership. Occupied habitat includes O'Donnell and Turkey creeks and Canelo Hills Cienega. This unit is considered to be occupied at the time of listing and western yellow-billed cuckoos occupy and nest in the trees bordering creeks and cienega wetlands during the breeding season (Corman and Magill 2000, p. 43; AGFD 2018, entire; Cornell Lab of Ornithology 2020 (eBird data); Drost *et al.* 2020, pp. 31, 34; National Audubon Society 2020b, entire; Service 2020c, entire). The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. Part of this unit overlaps with the Appleton-Whittell Research Ranch of the National Audubon Society IBA (National Audubon Society 2020b, entire). Stringers of trees along the drainages in this primarily oak savanna include oak with some cottonwood, mesquite, and desert willow (National Audubon Society 2020b, entire).

Unit 50: AZ–38 Arivaca Lake, Pima and Santa Cruz Counties, Arizona.

Critical habitat Unit AZ–38 is 1,365 ac (553 ha) in extent and is a 9-mi (14-km)-long continuous segment of stream near Arivaca Lake in Pima and Santa Cruz Counties, Arizona. Approximately 567 ac (229 ha) is in Federal ownership; 417 ac (169 ha) is in State ownership; and 381 ac (154 ha) is in other ownership. The unit is considered to have been occupied at the time of listing and western yellow-billed cuckoos occupy this site regularly during the breeding season (Corman and Magill 2000, pp. 42–43; MacFarland and Horst 2015, pp. 17–18; AGFD 2018, entire; Cornell Lab of Ornithology 2020 (eBird data); Drost *et al.* 2020, pp. 30, 34). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This unit is part of the Arivaca Cienega and Creek IBA

(National Audubon Society 2013a, entire). Habitat includes mesquite, willow, cottonwood, ash, and hackberry (MacFarland and Horst 2015, p. 121).

Unit 51: AZ–39 Peppersauce Canyon, Pinal County, Arizona.

Critical habitat Unit AZ–39 is 349 ac (141 ha) in extent and is a 4-mi (6-km)-long continuous segment of stream within Peppersauce Canyon in Pinal County, Arizona. Approximately 317 ac (128 ha) is in Federal ownership, and 32 ac (13 ha) is in other ownership. The unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoo occupy and breed in the Madrean evergreen woodland drainage in the Santa Catalina Mountains on the Coronado National Forest (MacFarland and Horst 2015, pp. 53–54; MacFarland and Horst 2017, pp. 47–50; MacFarland and Horst 2019, pp. 30–31; Cornell Lab of Ornithology 2020 (eBird data); Drost *et al.* 2020, pp. 32, 35). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy.

The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). This unit is within the Tucson Mountains Sky Islands and Sonoran Uplands IBA (National Audubon Society 2020e, entire). The drainage includes riparian and Madrean evergreen woodland vegetation in occupied habitat consisting of oak, sycamore, hackberry, juniper, cottonwood, mesquite, walnut, and ocotillo (MacFarland and Horst 2015, p. 122; MacFarland and Horst 2016, p. 59).

Unit 52: AZ–40 Pena Blanca Canyon, Santa Cruz County, Arizona.

Critical habitat Unit AZ–40 is 483 ac (195 ha) in extent and is a 7-mi (11-km)-long continuous segment of stream within Pena Blanca Canyon in Santa Cruz County, Arizona. The entire unit is in Federal ownership. We have excluded the 60-ft (18-m) Roosevelt Reservation from this unit (see Exclusions). Pena Blanca Lake is also included in this unit. The unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos occupy and nest in this unit regularly during the breeding season (Helentjaris 2014, entire; MacFarland and Horst 2015, pp. 19–22; AGFD 2018, entire; Cornell Lab of Ornithology 2020 (eBird data)). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). Pena Blanca Canyon and Lake, in Coronado National Forest, are part of the Atascosa Highlands IBA (Arizona IBA 2020a, entire). The occupied drainage includes riparian and Madrean evergreen woodland vegetation consisting primarily of oak and willow, with small amounts of juniper, mesquite, and ash (MacFarland and Horst 2015, p. 121).

Unit 53: AZ–41 Box Canyon, Pima County, Arizona.

Critical habitat Unit AZ–41 is 536 ac (217 ha) in extent and is a 7-mi (11-km)-long continuous segment of stream within Box Canyon in Pima County, Arizona. Approximately 317 ac (128 ha) is in Federal ownership; 184 ac (74 ha) is in State ownership; and 34 ac (14 ha) is in other ownership. The unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos are occupying and nesting in this unit regularly during the breeding season (Sebesta 2014, entire; MacFarland and Horst 2015, entire; MacFarland and Horst 2017, pp. 53–56; Cornell Lab of Ornithology 2020 (eBird data); Drost *et al.* 2020, pp. 13, 15, 31, 33, 35, 36). This unit is within the Santa Rita Mountains IBA (National Audubon Society 2016f, entire) (see description under Unit 43; AZ–31 Florida Wash). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This drainage includes riparian, desert scrub, and Madrean evergreen woodland vegetation in occupied habitat consisting primarily of mesquite, ash, ocotillo, willow, oak, sycamore, cottonwood, walnut, desert willow, hackberry, and juniper (MacFarland and Horst 2015, pp. 124, 129; Service 2020c, entire).

Unit 54: AZ–42 Rock Corral Canyon, Santa Cruz County, Arizona.

Critical habitat Unit AZ–42 is 214 ac (87 ha) in extent and is a 3-mi (5-km)-long continuous segment of stream within Rock Corral Canyon in Santa Cruz County, Arizona. Approximately 190 ac (77 ha) is in Federal ownership, and 25 ac (10 ha) is in State ownership. The unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos occupy and nest in this unit during the breeding season (MacFarland and Horst 2015, pp. 5, 23–24; Cornell Lab of Ornithology 2020 (eBird data); Drost *et al.* 2020, pp. 30, 34). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This unit is part of the Atascosa Highlands IBA (Arizona IBA 2020a, entire). This drainage includes riparian, desert scrub, and Madrean evergreen woodland vegetation in occupied habitat composed primarily of mesquite, with some oak and cottonwood (MacFarland and Horst 2015, p. 121).

Unit 55: AZ–43 Lyle Canyon, Santa Cruz and Cochise Counties, Arizona.

Critical habitat Unit AZ–43 is 1,293 ac (523 ha) in extent and is a 7.5-mi (12-km)-long continuous segment of stream within Lyle Canyon in Santa Cruz and Cochise Counties, Arizona. Approximately 716 ac (290 ha) is in Federal ownership and 577 ac (234 ha) is in other ownership. The site is considered occupied at the time of listing. Western yellow-billed cuckoo occupy Madrean evergreen woodland drainages during the breeding season in Korn and Lyle Canyons (MacFarland and Horst 2015, pp. 33–36; Drost *et al.* 2020, p. 31; Service 2020c, entire).

This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The unit provides

the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). The site also provides a movement corridor and migratory stop-over location. Part of this unit is within Huachuca Mountains IBA (National Audubon Society 2013b, entire). Occupied overstory habitat in Korn Canyon is dominated by oak and juniper, with some sycamore and ash (MacFarland and Horst 2015, pp. 121–122). Occupied overstory habitat in Lyle Canyon is dominated by oak and juniper, with some sycamore, pinion pine, and walnut in some areas and dominated by oak in other areas with cottonwood, mesquite, and desert willow (MacFarland and Horst 2015, p. 122; National Audubon Society 2013b, entire).

Unit 56: AZ–44 Parker Canyon Lake, Santa Cruz and Cochise Counties, Arizona.

Critical habitat Unit AZ–44 is 1,499 ac (607 ha) in extent and is a 10.5-mi (16-km)-long continuous segment of stream near Parker Canyon Lake in Santa Cruz and Cochise Counties, Arizona. Approximately 1,424 ac (576 ha) is in Federal ownership, and 75 ac (30 ha) is in other ownership. The unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoo occupy and nest in Madrean evergreen woodland drainages during the breeding season in Collins and Merrit Canyons (MacFarland and Horst 2015, pp. 27–30, 37–38; Cornell Lab of Ornithology 2020 (eBird data); Drost *et al.* 2020, pp. 31, 34). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. Part of this unit is within the Huachuca Mountains IBA (National Audubon Society 2013b, entire). Dominant overstory vegetation in occupied habitat in Collins and Merritt canyons consists of juniper and oak, with ash, pine, cottonwood, and walnut (MacFarland and Horst 2015, pp. 121–122). Merritt Canyon, north of Parker Canyon Lake, is a shallow and wide drainage with large trees and flowing water (MacFarland and Horst 2015, p. 37).

Unit 57: AZ–45 Barrel Canyon, Pima County, Arizona.

Critical habitat Unit AZ–45 is 920 ac (372 ha) in extent and is a 5-mi (8-km)-long continuous segment of stream within Barrel Canyon in Pima County, Arizona. Approximately 755 ac (306 ha) is in Federal ownership (Coronado National Forest) and 164 ac (66 ha) is in other ownership. The unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoo occupy the Madrean evergreen woodland drainages during the breeding season (Westland Resources, Inc. 2019, entire). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This unit is part of the Santa Rita Mountains IBA (National Audubon Society 2016f, entire). Vegetation in occupied habitat is oak, mesquite, and desert willow, with an occasional sycamore, walnut, Goodding's willow, and juniper.

Unit 58: AZ–46 Gardner Canyon; Pima and Santa Cruz Counties, Arizona.

Critical habitat Unit AZ–46 is 5,801 ac (2,056 ha) in extent and is a 14-mi (23-km)-long continuous segment of stream within Gardner Canyon in Pima and Santa Cruz Counties, Arizona. Approximately 4,320 ac (1,748 ha) is in Federal ownership; 290 ac (117 ha) is in State ownership; and 471 ac (191 ha) is in other ownership. This unit includes suitable habitat within BLM's Las Cienegas National Conservation Area (NCA) that connects Coronado National Forest's Gardner Canyon with BLM's upper Cienega Creek (BLM 2003, entire). The unit is considered to have been occupied at the time of listing. Western yellow-billed cuckoos occupy and nest in Gardner Canyon during the breeding season. Cornell Lab of Ornithology 2020 (eBird data); Drost e*t al.* 2020; pp. 15, 33, 35, 36; Service 2020c, entire). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This unit is part of the Santa Rita Mountains IBA and Las Cienegas NCA IBA (National Audubon Society 2016f, entire; 2020d, entire). Habitat in Gardner Canyon is Madrean evergreen woodland with oak, desert willow, mesquite, and juniper.

Unit 59: AZ–47 Brown Canyon; Pima County, Arizona.

Critical habitat Unit AZ–47 is 1,113 ac (451 ha) in extent and is an 8-mi (13-km)-long continuous segment of stream within Brown Canyon in Pima County, Arizona. Approximately 726 ac (294 ha) is in Federal ownership; 228 ac (92 ha) is in State ownership; and 159 ac (64 ha) is in other ownership. This site is considered to have been occupied at the time of listing. The upper portion of Brown Canyon and Wash, part of Buenos Aires National Wildlife Refuge, is regularly occupied by nesting western yellow-billed cuckoos during the breeding season (Flatland 2011, entire; American Birding Association 2012, entire; Pima County 2016, p. A–78; Corson 2018, pp. 11–12; Drost *et al.* 2020, pp. 30, 31, 34). Western yellow-billed cuckoos are nesting in many drainages in the Altar Valley, including several drainages within the San Bernardino National Wildlife Refuge that are not being designated as critical habitat (Service 2020c, entire). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. Brown Canyon includes a broad mix of dominant plant species that change with elevation and topography, including Madrean evergreen woodland, desert scrub, and

desert grassland. At lower elevations, vegetation is predominantly Sonoran Desert uplands; at higher elevations, vegetation is predominantly oak woodlands (Powell and Steidl 2015, p. 68). Vegetation includes a mix of mesquite, oaks, hackberry, sycamore, walnut, acacia, mimosa, and juniper in the drainage with mimosa and grass or mesquite and grass dominated hillsides (Powell and Steidl 2015, pp. 67, 69; Corson 2018, p. 6).

Unit 60: AZ–48 Sycamore Canyon, Patagonia Mountains; Santa Cruz County, Arizona.

Critical habitat Unit AZ–48 is 604 ac (245 ha) in extent and is a 5-mi (8-km)-long continuous segment of stream within Sycamore Canyon in Santa Cruz County, Arizona. The unit is entirely within Federal lands within the Coronado National Forest and is considered to have been occupied at the time of listing. Sycamore Canyon is a well-vegetated riparian corridor in Madrean evergreen woodland in the Patagonia Mountains and is occupied by western yellow-billed cuckoos during the breeding season (MacFarland and Horst 2015, pp. 91, 92; Cornell Lab of Ornithology 2020 (eBird data)). This unit lies within the Patagonia Mountains IBA (National Audubon Society 2016g, entire). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. Dominant overstory vegetation where western yellow-billed cuckoos have been found during surveys was primarily oak, ash, cottonwood, and mesquite, and dominant midstory vegetation was mesquite, *Baccharis* sp., ash, *Mimosa* sp., grape, and skunkbush (*Rhus trilobata*) (MacFarland and Horst 2015, pp. 91, 124, 129).

Unit 61: AZ–49 Washington Gulch; Santa Cruz County, Arizona.

Critical habitat Unit AZ–49 is 585 ac (237 ha) in extent and is a 5-mi (8-km)-long continuous segment of stream within Washington Gulch in Santa Cruz County, Arizona. We have excluded the 60-ft (18-m) Roosevelt Reservation from this unit (see Exclusions). Approximately 361 ac (146 ha) is in Federal ownership, and 222 ac (90 ha) is in other ownership. The unit is considered to have been occupied at the time of listing. Washington Gulch is a riparian corridor in Madrean evergreen woodland in the Patagonia Mountains in the Coronado National Forest and is occupied by western yellow-billed cuckoos during the breeding season (MacFarland and Horst 2015, pp. 91–94; Cornell Lab of Ornithology 2020 (eBird data)). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This drainage contains an overstory of large oak trees with some juniper and a midstory of manzanita and juniper (MacFarland and Horst 2015; pp. 93, 124, 129). This unit lies within the Patagonia Mountains IBA.

Unit 62: AZ–50 Paymaster Spring and Mowrey Wash; Santa Cruz County, Arizona.

Critical habitat Unit AZ–50 is 903 ac (365 ha) in extent and is made up of segments of stream within Paymaster Spring and Mowrey Wash totaling 5.5 mi (8.8 km) in Santa Cruz County, Arizona. Approximately 390 ac (158 ha) is in Federal ownership, and 512 ac (207 ha) is in other ownership. The unit is considered to have been occupied at the time of listing. Paymaster Creek is a riparian corridor in Madrean evergreen woodland in the Patagonia Mountains in the Coronado National Forest and is occupied by western yellow-billed cuckoos during the breeding season (MacFarland and Horst 2015, p. 89; Cornell Lab of Ornithology 2020 (eBird data); Service 2020c, entire). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occurs within this unit (monsoonal events). The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This drainage includes riparian and Madrean evergreen woodland vegetation including oak, walnut, juniper, and some pine as the most dominant tree species where western yellow-billed cuckoos were detected during surveys (MacFarland and Horst 2015, p. 123; WestLand Resources, Inc. 2019, entire). This unit lies within the Patagonia Mountains IBA.

Unit 63: CA–1 Sacramento River; Colusa, Glenn, Butte, and Tehama Counties, California.

Critical habitat unit CA–1 is 34,201 ac (13,841 ha) in extent and is a 69-mi (111-km)-long continuous segment of the Sacramento River starting 5 mi (8 km) southeast of the city of Red Bluff in Tehama County, California, to the downstream boundary of the Colusa-Sacramento River State Recreation Area next to the town of Colusa in Colusa County, California. Approximately 2,123 ac (859 ha) is in Federal ownership; 485 ac (196 ha) is in State ownership; and 31,593 ac (12,785 ha) is in other ownership. The unit is considered to have been occupied at the time of listing. This site has been a significant nesting area (nearly 100 nesting pairs in early 1970s) for the western yellow-billed cuckoo in the past but has been in decline (Dettling and Howell 2011a, pp. 30–35; Dettling and Howell 2011b, entire; Dettling *et al.* 2015, p. 2). This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. Survey efforts in the early 1970s detected approximately 3 western yellow-billed cuckoo detections per day (60–96 nesting pairs). In the late 1980s this number dropped to less than 1.5 per day (35 nesting pairs) and in 2012 the survey efforts identified 1 to less than 1 sighting per day (28 nesting pairs) (Dettling *et al.* 2015, pp. 11–13). It is an important area to maintain for occupancy to promote species recovery.

Unit 64: CA–2 South Fork Kern River Valley; Kern County, California.

Critical habitat Unit CA–2 is 2,379 ac (963 ha) in extent and is a 13-mi (21-km)-long continuous segment of the

South Fork Kern River from west of the settlement of Canebrake downstream to near Lake Isabella in Kern County, California. We have excluded approximately 261 ac (108 ha) of land from this unit (see Exclusions). Approximately 85 ac (34 ha) is Federal land, 419 ac (170 ha) is State land; and 1,875 ac (756 ha) is in other ownership. The unit is considered to have been occupied at the time of listing. This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides a stop-over area or movement corridor between western yellow-billed cuckoos breeding on the Colorado River and the Sacramento River. Much of the privately owned land is owned and managed by Audubon California as the Kern River Preserve. Numbers of breeding western yellow-billed cuckoos have been relatively consistent at this site. The habitat at this site is improving based on reduction of cattle grazing and habitat restoration activities.

Unit 65: ID–1 Snake River 1; Bannock and Bingham Counties, Idaho.

Critical habitat unit ID–1 is 5,632 ac (2,276 ha) in extent and is a continuous segment of the Snake River from near the upstream end of the American Falls Reservoir in Bannock County upstream to a point on the Snake River approximately 2 mi (3 km) west of the Town of Blackfoot in Bingham County, Idaho. We have excluded approximately 4,023 ac (1,633 ha) of land from this unit (see Exclusions). Approximately 2,863 ac (1,158 ha) is in Federal ownership; 1,209 ac (489 ha) is in State ownership; and 1,551 ac (628 ha) is in other ownership. The unit is considered to have been occupied at the time of listing and is consistently occupied by western yellow-billed cuckoos during the breeding season. This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The unit is at the northern limit of the species' current breeding range.

Unit 66: ID–2 Snake River 2; Bonneville, Madison, and Jefferson Counties, Idaho.

Critical habitat unit ID–2 is 11,442 ac (4,630 ha) in extent and is a 40-mi (64-km)-long continuous segment of the Snake River from the bridge crossing on the Snake River 2 mi (3 km) east of the Town of Roberts in Madison County through Jefferson County and upstream to the vicinity of the mouth of Table Rock Canyon in Bonneville County, Idaho. Approximately 5,862 ac (2,372 ha) is in Federal ownership; 1,940 ac (785 ha) is in State ownership; and 3,641 ac (1,473 ha) is in other ownership. Portions of this unit are within lands designated as the Snake River ACEC by BLM, and the Land and Water Conservation Fund (LWCF) program has purchased 32 properties in fee title and set aside approximately 42 conservation easements (22,400 ac (9,065 ha)) within the ACEC. The western yellow-billed cuckoo has been identified as a species of concern in the ACEC. The unit is considered to have been occupied at the time of listing and is consistently occupied by western yellow-billed cuckoos during the breeding season. This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. State and County road crossings account for less than 1 percent of total ownership of this proposed unit. The unit is at the northern limit of the species' current breeding range.

Unit 67: ID–3 Henry's Fork and Teton Rivers; Madison and Fremont Counties, Idaho.

Critical habitat Unit ID–3 is 4,641 ac (1,878 ha) in extent and is a 15-mi (24-km)-long continuous segment of the Henry's Fork of the Snake River in Madison County from approximately 16 km (10 mi) upstream of the confluence with the Snake River to a point on the river approximately 1.6 km (1 mi) downstream of the town of St. Anthony in Fremont County, Idaho. Approximately 756 ac (306 ha) is in Federal ownership; 511 ac (207 ha) is in State ownership; and 3,374 ac (1,365 ha) is in other ownership. This unit is occupied by western yellow-billed cuckoos during the breeding season and represents the northern limit of the species' currently known breeding range. This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy. The unit contains all the physical or biological features essential to the conservation of the species and was occupied at the time of listing and is still considered occupied. Inclusion of this unit contributes to the proposed critical habitat designation representing the full breeding range of the DPS. New comments by the American Bird Conservancy during the previous comment period, along with survey and habitat information previously submitted by the BLM and Idaho Department of Fish and Game, show western yellow-billed cuckoos in the expanded area. In response to the comments and new information received, we are amending the previously proposed boundaries of this unit to incorporate additional habitat upstream to approximately 1.6 km (1 mi) downstream of the town of St. Anthony, Fremont County, Idaho. Portions of this unit were removed based on our reevaluation of the habitat.

Unit 68: CO–1 Colorado River; Mesa County, Colorado.

Critical habitat unit CO–1 is 3,137 ac (1,269 ha) in extent and is a 25-mi (40-km)-long continuous segment of the Colorado River in the vicinity of Grand Junction in Mesa County, Colorado. We have excluded approximately 866 ac (351 ha) of land from this unit (see Exclusions). Approximately 196 ac (79 ha) is in Federal ownership; 174 ac (70 ha) is in State ownership; and 2,766 ac (1,119 ha) is in other ownership. The unit is considered to have been occupied at the time of listing and occurs within the unit in the breeding season. This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides a migration stop-over habitat for western

yellow-billed cuckoos moving farther north. The Colorado River Wildlife Management Area managed by the U.S. Fish and Wildlife Service holds conservation easements on several private parcels in this unit.

Unit 69: CO–2 North Fork Gunnison River; Delta County, Colorado.

Critical habitat unit CO–2 is 2,326 ac (941 ha) in extent and is a 16-mi (26-km)-long continuous segment of the North Fork of the Gunnison River between Hotchkiss and Paeonia in Delta County, Colorado. Approximately 115 ac (47 ha) is in Federal ownership, and 2,211 ac (895 ha) is in other ownership. This unit is considered to have been occupied at the time of listing and is consistently used by western yellow-billed cuckoos during the breeding season. This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides migratory stop-over habitat for western yellow-billed cuckoos moving farther north.

Unit 70: UT–1 Green River 1; Uintah and Duchesne Counties, Utah.

Critical habitat unit UT–1 is 13,273 ac (5,371 ha) in extent and is made up of segments of the Green River and Duchesne Rivers in the vicinity of Ouray in Uintah County, Utah. We have excluded approximately 15,017 ac (6,077 ha) of land from this unit (see Exclusions). Approximately 4,700 ac (1,902 ha) is in Federal ownership; 4,162 ac (1,684 ha) is in State ownership; and 4,411 ac (1,785 ha) is in other ownership. The unit is considered to have been occupied at the time of listing and has been consistently used by western yellow-billed cuckoos during the breeding season. This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides a movement corridor for western yellow-billed cuckoos moving farther north. This unit includes areas of riparian vegetation that area suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian vegetation that are suitable as foraging habitat. Recent surveys in this area revealed multiple western yellow-billed cuckoo detections.

Unit 71: UT–2 Green River 2; Emery and Grand Counties, Utah.

Critical habitat Unit UT–2 is 1,135 ac (459 ha) in extent and is an 8-mi (13-km)-long continuous segment of the Green River north of the town of Green River in Emery and Grand Counties, Utah. Approximately 40 ac (16 ha) is in Federal ownership; 632 ac (256 ha) is in State ownership; and 462 ac (187 ha) is in other ownership. The unit is considered to have been occupied at the time of listing. Recent surveys have shown that this unit has a number of western yellow-billed cuckoos during the breeding season (Utah Division of Wildlife Resources (UDWR) 2012, entire; UDWR 2013, entire; UDWR 2014, entire). This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides migratory stop-over habitat for western yellow-billed cuckoos. This unit includes areas of riparian vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian vegetation that are suitable as foraging habitat.

Unit 72: TX–1 Terlingua Creek and Rio Grande; Brewster County, Texas.

Critical habitat unit TX–1 is 7,913 ac (3,202 ha) in extent and is a 45-mi (72-km)-long continuous segment from lower Terlingua Creek to the Rio Grande in Brewster County, Texas. Approximately 7,792 ac (3,153 ha) is in Federal ownership in Big Bend National Park, and 121 ac (49 ha) is in other ownership. Because this unit is along the border between United States and Mexico, we delineated the southern edge of the unit to coincide with the National Park boundary. The unit is considered to have been occupied at the time of listing and has been consistently occupied by western yellow-billed cuckoos during the breeding season. This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy. The unit provides the habitat component provided in PBF 1 and the prey component in PBF 2. Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in PBF 3 occur within this unit but depend on river flows and flood timing. The site also provides a north-south movement corridor for western yellow-billed cuckoos breeding farther north. Although tamarisk, a nonnative species that may reduce the habitat's value, is a major component of this unit, the area still provides habitat for the species and considered essential. This unit includes areas of riparian vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian vegetation that are suitable as foraging habitat.

In our review of all units along the U.S./Mexico border, we also reviewed Unit 72 (TX–1 Terlingue Creek/Rio Grande). Unit 72 occurs along the border mostly in Big Bend National Park and includes Santa Elena Canyon and several other heavily used public use areas along the National Park's southern boundary in Brewster County, Texas. The NPS manages the land and natural resources at Big Bend National Park, and western yellow-billed cuckoo have been observed on a regular basis at Cottonwood Campground at Santa Elena Canyon and the area provides significant value as breeding habitat for the species. Flow of the Rio Grande within this unit is persistent which supports relatively intact riparian vegetation along this section of the river. Designation of critical habitat here highlights the conservation needs of the western yellow-billed cuckoo and Rio Grande riparian communities to the general public and Federal partners. Because management of natural resource and sensitive species are conducted by the NPS within this unit, Texas does not include the Roosevelt Reservation, and any border activities would need to be coordinated with NPS, we did not consider the exclusion of areas within Unit 72.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund,

authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. The western yellow-billed cuckoo occupies habitat during the breeding season (generally between May-September); consequently, Federal actions conducted during the breeding season must ensure that the actions do not jeopardize the western yellow-billed cuckoo. Additionally, Federal activities occurring within or outside those areas during the non-breeding season (October-April) must also ensure that the actions do not jeopardize the species by focusing on impacts to habitat.

We published a final rule revising the definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the Corps under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinitiate consultation on previously reviewed actions to address certain circumstances and where the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that result in a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of the western yellow-billed cuckoo. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of these species or that preclude or significantly delay development of such features. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate section 7(a)(2) of the Act by destroying or adversely modifying such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the western yellow-billed cuckoo. These activities include, but are not limited to:

(1) Actions that would remove, thin, or destroy riparian western yellow-billed cuckoo habitat, without implementation of an effective riparian restoration plan that would result in the development of riparian vegetation of equal or better quality in abundance and extent. Such activities could include, but are not limited to, removing, thinning, or destroying riparian vegetation by mechanical (including controlled fire), chemical, or biological (poorly managed biocontrol agents) means. These activities could reduce the amount or extent of riparian habitat needed by western yellow-billed cuckoos for sheltering, feeding, breeding, and dispersing.

(2) Actions that would appreciably diminish habitat value or quality through direct or indirect effects. These activities could permanently eliminate available riparian habitat and food availability or degrade the general suitability, quality, structure, abundance, longevity, and vigor of riparian vegetation. Such activities could include, but are not limited to: Spraying of pesticides that would reduce insect prey populations within or adjacent to riparian habitat; introduction of nonnative plants, animals, or insects; habitat degradation from recreational activities; and activities such as water diversions or impoundments that would result in diminished or altered riverflow regimes, groundwater extraction activities, dam construction and operation activities, or any other activity that negatively changes the frequency, magnitude, duration, timing, or abundance of surface flow. These activities have the potential to reduce or fragment the quality or amount or extent of riparian habitat needed by western yellow-billed

cuckoos for sheltering, feeding, breeding, and dispersing.

As we understand the ongoing existing water management operations, they are not of the magnitude that would cause destruction or adverse modification of critical habitat. If discretion exists to modify these plans and if reinitiation of consultation on these plans becomes necessary, according to our regulations at 50 CFR 402.16, we would evaluate the effects according to the modification. If reinitiation of consultation becomes necessary, the environmental baseline, as defined in 50 CFR 402.02, would include the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. To the extent agencies propose to modify their actions in a manner that does not appreciably diminish the value of the critical habitat as a whole for the western yellow-billed cuckoo, it is unlikely that these activities would meet the definition of destruction or adverse modification of critical habitat under the Act.

(3) Actions that would permanently destroy or alter western yellow-billed cuckoo habitat. Such activities could include, but are not limited to, discharge of fill material, draining, ditching, tiling, pond construction, and stream channelization (due to roads, construction of bridges, impoundments, discharge pipes, stormwater detention basins, dikes, levees, and other things). These activities could permanently eliminate available riparian habitat and food availability or degrade the general suitability, quality, structure, abundance, longevity, and vigor of riparian vegetation and microhabitat components necessary for nesting, migrating, food, cover, and shelter.

(4) Actions that would result in alteration of western yellow-billed cuckoo habitat from management of livestock or ungulates (for example, horses, burros). Such activities could include, but are not limited to, unrestricted ungulate access and use of riparian vegetation; excessive ungulate use of riparian vegetation during the nongrowing season (for example, leaf drop to bud break); overuse of riparian habitat and upland vegetation due to insufficient herbaceous vegetation available to ungulates; and improper herding, water development, or other livestock management actions. These activities could reduce the volume and composition of riparian vegetation, prevent regeneration of riparian plant species, physically disturb nests, alter floodplain dynamics, alter watershed and soil characteristics, alter stream morphology, and facilitate the growth of flammable nonnative plant species.

(5) Actions in relation to the Federal highway system, which could include, but are not limited to, new road construction and right-of-way designation. These activities could eliminate or reduce riparian habitat along river crossings necessary for reproduction, sheltering, or growth of the western yellow-billed cuckoo.

(6) Actions that would involve funding and/or implementation of activities associated with cleaning up Superfund sites, erosion control activities, flood control activities, communication towers, solar arrays, and border walls or fences. These activities could eliminate or reduce habitat for the western yellow-billed cuckoo.

(7) Actions that would affect waters of the United States under section 404 of the Clean Water Act. Such activities could include, but are not limited to, placement of fill into wetlands. These activities could eliminate or reduce the habitat necessary for the reproduction, feeding, or growth of the western yellow-billed cuckoo.

Finally, we note that for any of the seven categories of actions outlined above, we and the relevant Federal agency may find that the agency's anticipated actions affecting critical habitat may be appropriate to consider programmatically in section 7 consultation. Programmatic consultations can be an efficient method for streamlining the consultation process, addressing an agency's multiple similar, frequently occurring, or routine actions expected to be implemented in a given geographic area. Programmatic section 7 consultation can also be conducted for an agency's proposed program, plan, policy, or regulation that provides a framework for future proposed actions. We are committed to responding to any agency's request for a programmatic consultation, when appropriate and subject to the approval of the Director, as a means to streamline the regulatory process and avoid time-consuming and inefficient multiple individual consultations.

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that the Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. There are no Department of Defense (DoD) lands with a completed INRMP within the final critical habitat designation.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

When identifying the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive due to the requirement that protection from destruction of adverse modification as a result of actions with a Federal nexus avoid destruction or adverse modification of the habitat; the educational benefits of increasing public awareness and educational benefits of the presence of western yellow-billed cuckoo; the recovery benefits of mapping the location of habitat that is essential habitat for recovery of the listed species, and importance of habitat protection; and any additional benefits that may result from a designation due to State or Federal laws that may apply to critical habitat, including protection from destruction or adverse modification of critical habitat.

When identifying the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation or in the continuation, strengthening, or encouragement of partnerships. Additionally, continued implementation of an ongoing management plan or implementation of a new management plan that would not be implemented if critical habitat were designated that provides conservation that is equal to or more than the conservation that a critical habitat designation provides would reduce the benefits of including that specific area in the critical habitat designation.

We evaluate the existence of a conservation plan when considering the benefits of inclusion and exclusion. We consider a variety of factors, including but not limited to, whether the plan is finalized; how it provides for the conservation of the essential physical or biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; whether the public participated in the development of the conservation plan; the degree of agency review and required determinations, including compliance with the National Environmental Policy Act (NEPA; 42 U.S.C. 4231 *et seq.*), that were completed; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information. See our February 11, 2016, Policy on Exclusions for a complete discussion of our exclusion process (81 FR 7226).

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction of the species. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. In order to consider economic impacts, we prepared an incremental effects memorandum (IEM) and screening analysis which, together with our narrative and interpretation of effects we consider our draft economic analysis of the critical habitat designation and related factors (IEc 2020, entire). We made the analysis, dated February 5, 2020, available for public review from February 27, 2020, through April 27, 2020. The DEA addressed probable economic impacts of critical habitat designation for the western yellow-billed cuckoo. Following the close of the comment period, we reviewed and evaluated all information submitted during the comment period that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Additional information relevant to the probable incremental economic impacts of critical habitat designation for the western yellow-billed cuckoo is summarized below and available in the screening analysis for the western yellow-billed cuckoo (IEc 2020, entire), available at *http://www.regulations.gov.*

In our screening memo, which was based on our 2013 and 2019 review of potential economic impacts and comments received on our analysis established that the primary expected impact from the critical habitat designation would be the additional analysis to consider adverse modification of critical habitat (and not just jeopardy). While additional analysis for critical habitat in a consultation will require time and resources by both the Federal action agency and the Service, in most circumstances, these additional analyses would be predominantly administrative in nature and would not incur significant costs. Our screening analysis also includes discussion of other incremental impacts that may be triggered by this action that in turn may result in costs or benefits—such as, additional permitting requirements or changes in public perception. However, those impacts are uncertain, and some of the data necessary for a full assessment of those costs and benefits are lacking. We recognize that changes in land value are possible. But because the magnitude and timing are uncertain, the best assessment of these possible impacts is to conduct a bounding analysis of the total possible land value costs and benefits of developable land within the critical habitat designation.

The critical habitat designation for the western yellow-billed cuckoo includes 63 units in 7 western States: Arizona, California, Colorado, Idaho, New Mexico, Texas, and Utah. A total of 298,845 ac (120,939 ha) is being designated after excluding or removing 194,820 ac (78,840 ha). Approximately 35 percent of the proposed total acreage is Federal land, 11 percent is State land, and 54 percent is privately owned or owned by local government entities. No Tribal lands are being designated. All critical habitat units are considered to be occupied.

The entities most likely to incur incremental costs are parties to section 7 consultations, including Federal action agencies and, in some cases, third parties, most frequently State agencies or municipalities. Activities we expect would be subject to consultations that may involve private entities as third parties are residential and commercial development that may occur on Tribal or private lands. However, all Tribal lands have been excluded and based on coordination efforts State and local agencies, the cost to private entities within these sectors is expected to be relatively minor (administrative costs of less than $5,200 per formal consultation effort) and, therefore, would not be significant.

The probable incremental economic impacts of the western yellow-billed cuckoo critical habitat designation are expected to be limited to additional administrative effort, as well as minor costs of conservation efforts resulting from a small number of future section 7 consultations. This low level of impacts is anticipated because, given that the critical habitat is occupied by the species, actions that may adversely modify the critical habitat would also likely jeopardize the continued existence of the species; as a result, other than administrative costs, incremental economic impacts of critical habitat designation over and above impacts from consulting for jeopardy are unlikely. At approximately $5,200 or less per formal consultation, in order to reach the threshold of $100 million of incremental administrative impacts in a single year, Federal agencies would need to undertake more than 20,000 formal consultations in a single year. In our 2020 economic screening memo, we identified 16 formal consultations initiated for the western yellow-billed cuckoo since listing. The resulting incremental economic burden is estimated to be less than $74,000 in a given year (IEc 2019, entire). This estimate calculated the administrative cost (staff time) the Federal agency would need to expend on its analysis of adverse modification of critical habitat for each consultation. As discussed above, we recognize that changes in land value are possible. Because the magnitude and timing are uncertain, we conducted a bounding analysis of the per-acre land values for undeveloped properties within the

designation that may be subject to development pressure in the foreseeable future. Public perception of the effect of critical habitat may diminish land values by some percent of these total values. Data limitations prevent us from estimating the size of this percent reduction. However, any diminishment in property value cannot exceed the total value of the property. The bounding analysis indicates that approximately 287 acres of developable land are located within census tracts overlapping the proposed designation with population densities greater than 1,000 people per square mile. If public perception causes the value of critical habitat acres to be diminished, these acres are those most likely to be affected. Due to existing data limitations regarding the probability that such effects will occur, and the likely degree to which property values will be incrementally affected by this designation (above and beyond potential perceptional effects resulting from the presence of the cuckoo and the flycatcher, as well as flycatcher critical habitat), we are unable to estimate the magnitude of perception-related costs resulting from this designation. However, the cost cannot exceed the total value of affected properties. Our bounding analysis estimates the total value of developable land within the proposed critical habitat to be $20.3 million. Therefore, we have concluded that the future probable incremental economic impacts based on the value of developable land in the vicinity of the proposed designation, the combined total of section 7 and other possible costs and benefits are unlikely to exceed $100 million in any single year, and impacts to any specific geographic area or sector as a result of this critical habitat designation are also unlikely.

Exclusions

Exclusions Based on Economic Impacts

The Service considered the economic impacts of the critical habitat designation as described above. Based on this information, the Secretary has determined not to exercise his discretion to exclude any areas from this designation of critical habitat for the western yellow-billed cuckoo based on economic impacts.

Exclusions Based on Impacts on National Security and Homeland Security

Section 4(a)(3)(B)(i) of the Act may not cover all DoD lands or areas that pose potential national-security concerns (*e.g.,* a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of ''critical habitat.'' Nevertheless, when designating critical habitat under section 4(b)(2), the Service must consider impacts on national security, including homeland security, on lands or areas not covered by section 4(a)(3)(B)(i). Accordingly, the Policy on Exclusions makes clear that we will always consider for exclusion from the designation areas for which DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns (see Policy on Exclusions (81 FR 7226)).

We cannot, however, automatically exclude requested areas. First, when we adopted the policy on exclusion, we explained that, when DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, it must provide a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat. That justification could include demonstration of probable impacts, or a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a reasonably specific justification, we will contact the agency to recommend that it provide a specific justification or clarification of its concerns relative to the probable incremental impact that could result from the designation.

Second, even if the agency provides a reasonably specific justification, the result is not that we automatically exclude the area, but rather that we undertake an exclusion analysis to determine whether or not to exclude the area. In undertaking that exclusion analysis, we will defer to the expert judgment and give great weight to national-security and homeland-security concerns of DoD, DHS, or another Federal agency as outlined in our policy (81 FR 7226).

Department of Army—Yuma Proving Grounds and Department of Air Force—Luke Air Force Base

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the DoD where a national-security impact might exist. We received comments from the Department of the Army and Department of the Air Force requesting exclusion of areas used by the Army and Air Force for training operations based on national security or other military operations. The comments were from the Yuma Proving Grounds (Department of the Army 2014a, entire) and the Luke Air Force Base (Department of the Air Force 2014, entire) concerning airspace above critical habitat; however, the actions described by the two installations (overflight of critical habitat areas) do not directly or indirectly affect the physical or biological features of critical habitat for the western yellow-billed cuckoo; thus, they would not require consideration of adverse modification of the critical habitat. Consequently, national security activities carried out by the Army operations at Fort Yuma or operations by Luke Air Force Base will not be disrupted as a result of designation of critical habitat. Therefore, we are including these areas in our critical habitat designation.

Department of Army—Fort Huachuca

We also received comments from the U.S. Army installation at Fort Huachuca requesting that areas outside the installation in Unit 16 (AZ–14) that includes the San Pedro Riparian National Conservation Area (SPRNCA) be excluded from the final designation (U.S. Department of the Army 2014b, entire). Unit 16 is managed by the BLM and composed of Federal, State, and private lands and not owned by the DoD or part of the lands managed under the Fort Huachuca's INRMP or used for training. The Army's rationale for the requested exclusion was that any additional restrictions to ground water pumping and water usage could affect their ability to increase staffing when needed or carry out missions critical to national security. The Army also stated that designation of lands within the SPRNCA would increase its regulatory burden and disrupt its operations related to national security but provided no specific examples or information supporting or explaining these claims either through its comments or during our meetings with them after the revised proposed rule was issued. The Army pointed to its continued land stewardship actions and its commitment to protecting natural resources on the base.

As stated above, the lands within Unit 16 (AZ–14) are primarily owned and managed by BLM. Declining base flow and habitat loss in the San Pedro River due anthropogenic factors, drought, and climate change has long been a concern

to landowners and communities in and near this unit. In addition, the November 2013 Fort Huachuca Revised Biological Assessment (BA) on its operations, titled Programmatic Biological Assessment for Ongoing and Future Military Operations and Activities at Fort Huachuca, Arizona, (U.S. Department of the Army 2013, p. 5–28), states that ''Fort-attributable groundwater use is unlikely to affect the yellow-billed cuckoo (proposed for listing at the time) or its habitat where the species is known to occur in the SPRNCA, Babocomari Cienega, or the lower San Pedro River. . . .'' The Fort subsequently states that a modeled decline in baseflow to the lower Babocomari River downstream could exist by 2030 (U.S. Department of the Army 2013, p. 5–28). The BA concludes there will be no adverse effect on western yellow-billed cuckoo or its habitat from Fort Huachuca's operational actions or ground water pumping. Within the Service's subsequent 2014 biological and conference opinion under section 7 of the Act, we issued a conference report concluding that Fort Huachuca's operational activities and groundwater pumping as related to the SPRNCA, Babocomari Cienega, the lower San Pedro River, or the lower Babocomari River were not likely to adversely affect western yellow-billed cuckoo (NLAA) (Service 2014c, pp. 300–306).

However, although the Fort's water conservation measures are intended to avoid, minimize, and/or offset the effects of water use to the Upper San Pedro River Unit, they also do not constitute a western yellow-billed cuckoo conservation plan or prevent water use or habitat loss by other entities affecting this unit. The Fort's water conservation actions are not sufficient to protect the San Pedro River critical habitat from ongoing and future actions that threaten to reduce flow and western yellow-billed cuckoo suitable habitat in this large unit. The Fort does not manage or control lands covered by this unit and ground water use is only one component of western yellow-billed cuckoo PBFs. The Service has engaged in several Section 7 consultations on proposed actions that may affect western yellow-billed cuckoo habitat but for which the Fort has no management authority including herbicide treatment, fire management, grazing, exotic plant control, mesquite (breeding habitat) removal, recreation, off-road vehicle use, development, and other proposed actions that may result in loss of water or suitable habitat. We will continue to engage in future consultations that may affect habitat in this active unit. Given that the Fort's groundwater use has been determined to not adversely affect western yellow-billed cuckoos or their habitat, it is unlikely that there would be future restrictions on the Fort's groundwater use resulting from the designation of critical habitat and accordingly, we are not considering the area for exclusion from this final rule due to national security. Designating critical habitat may actually help retain base flow and western yellow-billed cuckoo habitat, through section 7 consultation with other entities affecting this unit.

Unit 1 (CA–AZ 1), Unit 44 (AZ–32), Unit 45 (AZ–33), Unit 52 (AZ–40), Unit 20 (AZ–18), Unit 61 (AZ–49), Unit 16 (AZ–14), and Unit 21 (AZ–19)—U.S. Customs and Border Protection (CBP)/ Department of Homeland Security (DHS)—U.S./Mexico Border Lands

We received a request from the U.S. Customs and Border Protection (CBP) under the Department of Homeland Security (DHS) that the Roosevelt Reservation portion of critical habitat along the U.S./Mexico border be considered for exclusion under section 4(b)(2) of the Act for national security reasons.

The Roosevelt Reservation is a 60-ft (18 m) wide strip of land owned by the Federal Government along the United States side of the U.S./Mexico border in California, Arizona, and New Mexico (DHS 2020, entire). No critical habitat was proposed along the border in New Mexico, while the border area in Texas is not part of the Roosevelt Reservation (Proclamation 758 1907, entire). DHS and CBP requested an exclusion for portions of the Roosevelt Reservation located in Yuma, Pima, Santa Cruz, and Cochise counties in Arizona. Their exclusion request identified Unit 1 (CA–AZ 1), Unit 44 (AZ–32), Unit 45 (AZ–33), Unit 52 (AZ–40), Unit 20 (AZ–18), Unit 61 (AZ–49), Unit 16 (AZ–14), and Unit 21 (AZ–19). The area being excluded totals 113 ac (46 km). All the units are considered to have been occupied at the time of listing and are currently occupied. Unit 1 (CA–AZ 1) has been excluded due to management from the LCR MSCP (see Exclusions *Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act*). Each of these units extend for miles north of the border beyond the 60-ft (18 m) wide Roosevelt Reservation (see Unit Descriptions). The following analysis addresses only the 60-ft (18-m) wide Roosevelt Reservation along the border and not additional portions of the units.

The U.S. Border Patrol (USBP), a law enforcement component of CBP, uses the Roosevelt Reservation for border security operations. The mission of the CBP is ''To safeguard America's borders thereby protecting the public from dangerous people and materials while enhancing the Nation's global economic competitiveness by enabling legitimate trade and travel.'' The Roosevelt Reservation contains border security related infrastructure consisting of border barrier, lighting, a patrol road, and cleared vegetation of the 60-ft (18-m) wide reservation. USBP conducts routine patrols and law enforcement activities between the land ports of entries such as intervention of drug smuggling, human trafficking, and tracking of illegal immigrant foot traffic. Border enforcement activities can occur along the road bordering the barrier (within the 60-ft (18-m) Roosevelt Reservation) and outside of the Roosevelt Reservation, as needed for enforcement. The Roosevelt Reservation has historically been used for border enforcement actions in Arizona for decades and includes an existing patrol road in most areas. New border barrier is being constructed in portions of the Roosevelt Reservation in Arizona where there has historically not been barrier. These new areas of border barrier include the clearing of vegetation within the 60-ft (18-m) wide Roosevelt Reservation, construction of a patrol road paralleling the barrier, lighting, and detection technology. A significant amount of water, which often flows through these drainages important to the western yellow-billed cuckoo, is being extracted from local sources along the border to mix with cement in border wall construction. Upon completion of construction, these areas of new barrier along with existing areas of barrier will be used for border enforcement actions by USBP for the foreseeable future. DHS states that they will continue to maintain and clear vegetation within the Roosevelt Reservation to ensure a safe operating environment for agents patrolling and enforcing border laws on the border. These border-security activities are not compatible with riparian habitat. As a result, since designating the 60-ft (18-m) wide Roosevelt Reservation as critical habitat for the western yellow-billed cuckoo would interfere with on-going border security operations, DHS states that the 60-ft (18-m) wide Roosevelt Reservation should be excluded because of national security reasons.

DHS and CBP currently have the authority to conduct work within the 60-ft (18-m) Roosevelt Reservation to

secure the border under existing waivers of environmental laws, including the ESA. These waivers cover the construction and maintenance of discrete border infrastructure projects, as issued by the Secretary of the Interior. Congress directed DHS to achieve and maintain operational control of the U.S. Mexico border (Secure Fence Act of 2006, Pub. L. 109–367, section 2, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1701 note)). Congress further provided DHS with a number of authorities to carry out DHS's border security mission (85 FR 9794, February 20, 2020). One of these authorities, under section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, as amended, authorized DHS to waive laws where necessary to ensure the expeditious construction of border infrastructure in areas of high illegal entry (IIRIRA 2019). Per section 102 of IIRIRA, the Secretary of Homeland Security has waived certain laws, regulations, and other legal requirements in order to ensure the expeditious construction of barriers and roads and achieve operational control of the border. As such, review of specific federally funded projects through the section 7 consultation process under the Endangered Species Act is not required, although DHS coordinates with the Service concerning actions along the 60-ft (18-m) Roosevelt Reservation, where applicable.

Currently, CBP is authorized to access the project area; remove vegetation; extract and use water; and create, maintain, and use roads, barrier fence, drainage, and lighting, as well as conduct operations involved with homeland security. Actions pertaining to the current building, maintenance, and operation of the border infrastructure are considered to have negative effects to western yellow-billed cuckoo individuals and habitat, based on the western yellow-billed cuckoo's behaviors and biological needs. Some of the actions CBP takes within the Roosevelt Reservation may also affect western yellow-billed cuckoos immediately outside the Roosevelt Reservation, and include actions such as but not limited to: Drainage design, gate placement and operations, and lighting footprint.

Benefits of Inclusion—U.S./Mexico Border Lands

An important benefit of including lands in a critical habitat designation is that the designation can serve to educate landowners and the public regarding the potential conservation value of an area, and it may help focus management and conservation efforts on areas of high value for certain species. Any information about the western yellow-billed cuckoo that reaches a wide audience, including parties engaged in conservation activities, is valuable and would continue to encourage collaboration between DHS, CBP, and USBP and the Service.

The border area is important because it spans riparian areas and associated drainages that run north-south between Mexico and the U.S. These corridors are migratory routes of not only western yellow-billed cuckoos, but also many other migratory birds. Including the Roosevelt Reservation provides opportunities for education and public awareness concerning migratory birds' needs, particularly those of the western yellow-billed cuckoo and potentially encourages future restoration and minimization of adverse effects in areas designated. This may lead to retaining existing trees, allowing for successional development of future riparian habitat, and provide for naturally functioning drainages to maintain or restore the environmental qualities of the sites. Retaining hydrological processes that allow for drainages to fully function naturally will sustain riparian habitat upstream and downstream of the Roosevelt Reservation. Inclusion of these border areas delineates geographically important habitat for this species that may otherwise remain unknown by agencies and organizations working along the border.

In addition, inclusion of western yellow-billed cuckoo habitat within the critical habitat designation would be consistent with other designations of critical habitat for other listed species along the border without exclusions. The border includes designated critical habitat for the jaguar (*Panthera onca*), Yaqui chub (*Gila purpurea*), beautiful shiner (*Cyprinella formosa*), Yaqui catfish (*Ictalurus pricei*), Sonoyta mud turtle (*Kinosternon sonoriense longifemorale*) and Sonora chub (*Gila ditaenia*).

However, because of the waiver discussed above, which waives ESA requirements, the benefits of including this area within the designation are relatively low, given that section 7 consultations are unlikely to occur.

Benefits of Exclusion—U.S./Mexico Border Lands

The benefits of excluding the 60-ft (18-m) Roosevelt Reservation area are significant. CBP has been tasked with enforcing national security along border areas of the United States. The Roosevelt Reservation and infrastructure within the area is a key component in assisting CBP to conduct its normal operations and fulfilling their national security mission along the southern border of the United States. CBP has identified the following activities and infrastructure occurring within the Roosevelt Reservation: Barrier fencing, lighting systems, enforcement zones, patrol roads, cleared vegetation, vehicular patrol operations, ongoing border barrier construction and maintenance, and illegal immigrant foot traffic and trespass. The designation of the Roosevelt Reservation may reduce CBP's availability of unencumbered space to support its operations. By excluding the 60-ft (18-m) Roosevelt Reservation the CBP would be able to fulfill its mission of securing the border and conduct necessary border patrol operations as well as construct any necessary border security infrastructure.

Excluding the Roosevelt Reservation from western yellow-billed cuckoo critical habitat will enable CBP to continue actions without a need to consult on the possible effects of adverse modification to critical habitat. CBP states that excluding critical habitat will also reduce the chances that they will need to obtain additional waivers that they might not otherwise need for border infrastructure projects.

By excluding the Roosevelt Reservation, we will maintain our working relationship with the DHS/CBP. The Department of the Interior (DOI), Department of Agriculture (USDA), and DHS entered into a Memorandum of Understanding (MOU) in 2006 (DHS–DOI–USDA 2006, entire). The MOU is intended to provide consistent goals, principles, and guidance related to DHS, DOI, and USDA working together in fulfilling their mandated responsibilities. The MOU sets goals for communication, cooperation, and resolving conflicts while allowing for border security operations such as: Law enforcement operations; tactical infrastructure installation; utilization of roads; and minimization and/or prevention of significant impact on or impairment of natural and cultural resources, including those protected under the Act.

Excluding the Roosevelt Reservation from the designation of critical habitat so that CBP border activities can continue could also have several positive effects to western yellow-billed cuckoos. For example, border infrastructure and patrolling could help prevent unauthorized trespass and resource destruction to areas adjacent to the border that may impact western yellow-billed cuckoo habitat.

Benefits of Exclusion Outweigh Benefits of Inclusion—U.S./Mexico Border Lands

The benefits of including lands in a critical habitat designation include educating landowners, agencies, tribes, and the public regarding the potential conservation value of an area, as well as potentially helping to focus conservation efforts on areas of high value for certain species and maintaining consistency with other areas being designated for other listed species within the Roosevelt Reservation. Because DHS and CBP have obtained a waiver of ESA requirements, the benefits of including the area as critical habitat is minimized. Because the Roosevelt Reservation only extends 60 ft (18 m) along the border, the amount of area associated with the exclusion is small and the overwhelming majority of critical habitat that is being designated adjacent to the Roosevelt Reservation remains in the final designation, allowing for the educational benefits to remain. As a result, the educational benefits are small.

The benefits of exclusion of the Roosevelt Reservation are significant. We base this on several reasons. Firstly, the exclusion will allow DHS to conduct its mission of securing the border unimpaired from the designation of critical habitat for the western yellow-billed cuckoo. Secondly, the exclusion will further our partnership with DHS and allow for coordination of both the Service's and DHS's responsibilities. We view this as a significant benefit of exclusion. Thirdly, exclusion would allow for CBP to continue conducting border infrastructure and patrolling thereby helping to prevent unauthorized trespass and resource destruction to areas adjacent to the Roosevelt Reservation that may affect western yellow-billed cuckoo habitat. We reviewed and evaluated the benefits of inclusion and benefits of exclusion for the 60-ft (18-m) Roosevelt Reservation for the DHS to conduct its national security operations and have determined that the benefits of excluding outweigh the benefits of including the areas.

Exclusion Will Not Result in Extinction of the Species—U.S./Mexico Border Lands

Because of the 2006 MOU, CBP has a track record of communicating with the Service and of remaining committed to seeking solutions to reduce harm along the border to listed species and their habitat, including the western yellow-billed cuckoo. In addition, if the operation waivers are discontinued, DHS and CBP would be required to consult with the Service under section 7 of the Act. These consultations would need to consider the effects on the species and its habitat, and could be more numerous, complex, or costly if the areas are included within the critical habitat designation. We have determined that exclusion of the 60-ft (18-m) Roosevelt Reservation lands from the critical habitat designation will not result in the extinction of the western yellow-billed cuckoo. Accordingly, we have determined that areas totaling 12 ac (5 ha) within the (60-ft (18-m)) Roosevelt Reservation in Unit 44 (AZ–32) (0.6 ac (0.24 ha)), Unit 45 (AZ–33) (0.26 ac (0.1 ha)), Unit 52 (AZ–40) (0.67 ac (0.27 ha)), Unit 20 (AZ–18) (4 ac (2 ha)), Unit 61 (AZ–49) (1 ac (0.4 ha)), Unit 16 (AZ–14) (0.6 ac (0.24 ha)), and Unit 21 (AZ–19) (4 ac (2 ha)), are excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species.

Consideration of Other Relevant Impacts

When identifying the benefits of inclusion for an area, we consider other relevant impacts, such as the additional regulatory benefits that the area would receive due to the protection from destruction or adverse modification as a result of actions with a Federal nexus, the educational benefits of mapping essential habitat for recovery of the listed species, and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat. The western yellow-billed cuckoo migrates and is present in the U.S. mainly during its breeding season (generally May through September). Regardless of the time of year, proposed actions with a Federal nexus that may remove or reduce the quality or quantity of critical habitat must undergo Section 7 consultation for an adverse modification analysis. Similarly, the listing of the western yellow-billed cuckoo as a threatened species ensures that, regardless of the time of year, consultation under the jeopardy standard in either section 7 or section 10 of the Act would also be required in areas where members of the species are known to occur. When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation, or in the continuation, strengthening, or encouragement of partnerships.

In the case of western yellow-billed cuckoo, the benefits of critical habitat include public awareness of the presence of western yellow-billed cuckoo and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for western yellow-billed cuckoo due to protection from destruction or adverse modification of critical habitat. Additionally, continued implementation of an ongoing management plan that provides equal to or more conservation than a critical habitat designation would reduce the benefits of including that specific area in the critical habitat designation.

We evaluate the existence of a conservation plan when considering the benefits of inclusion. We consider a variety of factors, including, but not limited to, the degree to which the record of the plan supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan, agreement, or partnership; how it provides for the conservation of the essential physical or biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information (see Policy on Exclusions (81 FR 7226 at 7247)).

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction of the species. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

Exclusions Based on Other Relevant Impacts

Based on the information provided by entities seeking exclusion, any additional public comments we received, and the best scientific data available, we evaluated whether certain lands in the critical habitat were appropriate for exclusion from this final designation under section 4(b)(2) of the Act. If our analysis indicated that the benefits of excluding lands from the final designation outweighed the benefits of designating those lands as critical habitat, then we identified those areas for the Secretary to exercise his

discretion to exclude those lands from the final designation, unless exclusion would result in extinction.

In considering whether to exclude areas under section 4(b)(2) of the Act, we consider a number of factors including whether there are permitted conservation plans covering the species in the area such as HCPs, safe harbor agreements (SHAs), or candidate conservation agreements with assurances (CCAAs); whether there are other conservation agreements and partnerships that would be encouraged by designation of, or exclusion from, critical habitat; whether there are tribal conservation plans and partnerships or whether inclusion or exclusion of specific areas could affect the government-to-government relationship of the United States with tribal entities; and whether there are social impacts that might occur because of the designation.

In the paragraphs below, we provide a detailed balancing analysis of the areas being excluded under section 4(b)(2) of the Act. Table 3 below provides approximate areas (ac, ha) of lands that meet the definition of critical habitat but that we are excluding from this final critical habitat rule under section 4(B)(2) of the Act.

TABLE 3—AREAS EXCLUDED BY CRITICAL HABITAT UNIT FOR THE WESTERN YELLOW-BILLED CUCKOO

Unit	Unit name	Proposed critical habitat, (ac (ha))	Area excluded (ac (ha))	Final critical habitat (ac (ha))
1 CA/AZ–1	Colorado River 1	82,138 (33,240)	82,138 (33,240)	0
2 CA/AZ–2	Colorado River 2	23,589 (9,546)	23,589 (9,546)	0
3 AZ–1	Bill Williams River	3,389 (1,371)	3,389 (1,371)	0
4 AZ–2	Alamo Lake	2,793 (1,130)	2,793 (1,130)	0
7 AZ–5	Upper Verde River	6,047 (2,447)	673 (272)	5,188 (2,100)
9 AZ–7	Beaver Creek	2,082 (842)	1 (<1)	2,081 (842)
10 AZ–8	L. Verde R./West Clear Ck	2,178 (882)	44 (18)	2,134 (864)
11 AZ–9A	Horseshoe Dam	2,743 (1,110)	76 (31)	2,667 (1,079)
11 AZ–9B	Horseshoe Dam	1,231 (489)	321 (130)	782 (316)
12 AZ–10	Tonto Creek	3,669 (1,485)	489 (198)	3,181 (1,287)
13 AZ–11	Pinal Creek	419 (169)	380 (154)	0
16 AZ–14	Upper San Pedro River	31,060 (12,569)	0.6 (0.24)	31,059 (12,569)
17 AZ–15	Lower San Pedro/Gila R	23,400 (9,470)	445 (184)	22,397 (9,064)
20 AZ–18	Santa Cruz River	9,543 (3,862)	4 (2)	9,538 (3,860)
21 AZ–19	Black Draw	1,599 (647)	4 (2)	1,595 (646)
22 AZ–20	Gila River 1	20,724 (8,392)	10,184 (4,121)	10,540 (4,266)
23 AZ–21	Salt River	2,590 (1,048)	2,009 (813)	581 (235)
27 AZ–25	Aravaipa Creek	3,329 (1,347)	392 (159)	2,937 (1,189)
28 AZ–26	Gila River 2	8,588 (3,195)	1,467 (594)	5,836 (2,362)
31 AZ–29	Big Sandy	20,179 (8,166)	500 (202)	15,231 (6,164)
33 NM–2	Gila River	4,177 (1,690)	1,142 (462)	3,036 (1,228)
35 NM–4	Upper Rio Grande 1	1,830 (741)	1,312 (531)	518 (210)
36 NM–5	Upper Rio Grande 2	1,173 (475)	1,173 (475)	0
37 NM–6A	Middle Rio Grande	7,238 (2,929)	7,238 (2,929)	0
37 NM–6B	Middle Rio Grande	61,343 (24,825)	11,367 (4,600)	46,595 (18,856)
39 NM–8A	Caballo Delta North	190 (77)	190 (76)	0
39 NM–8B	Caballo Delta South	155 (63)	155 (63)	0
40 NM–9	Animas	608 (246)	608 (246)	0
41 NM–10	Selden Cyn./Radium Sprs	237 (96)	237 (96)	0
44 AZ–32	California Gulch	558 (226)	0.6 (0.24)	558 (226)
45 AZ–33	Sycamore Canyon	601 (243)	0.26 (0.10)	601 (243)
52 AZ–40	Pena Blanca Canyon	484 (196)	0.67 (0.27)	483 (195)
61 AZ–49	Washington Gulch	587 (237)	1 (0.4)	585 (237)
64 CA–2	South Fork Kern R. Valley	2,640 (1,068)	261 (106)	2,379 (963)
65 ID–1	Snake River 1	9,655 (3,907)	4,023 (1,628)	5,623 (2,276)
68 CO–1	Colorado River	4,002 (1,620)	866 (350)	3,137 (1,269)
70 UT–1	Green River 1	28,381 (11,486)	15,017 (6,077)	13,273 (5,371)
Total			172,490 (69,808)	

Note: Areas may not add due to rounding.

Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General

We sometimes exclude specific areas from critical habitat designations based in part on the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships. A conservation plan or agreement describes actions that are designed to provide for the conservation needs of a species and its habitat, and may include actions to reduce or mitigate negative effects on the species caused by activities on or adjacent to the area covered by the plan. Conservation plans or agreements can be developed by private entities with no Service involvement, or in partnership with the Service.

We evaluate a variety of factors to determine how the benefits of any exclusion and the benefits of inclusion are affected by the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships when we undertake a discretionary section 4(b)(2) exclusion analysis. A non-exhaustive list of factors that we will consider for non-permitted plans or agreements is shown below. These factors are not required elements of plans or agreements, and some elements may not apply to a particular plan or agreement.

(i) The degree to which the plan or agreement provides for the conservation of the species or the essential physical

or biological features (if present) for the species.

(ii) Whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan or agreement will be implemented.

(iii) The demonstrated implementation and success of the chosen conservation measures.

(iv) The degree to which the record of the plan supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan, agreement, or partnership.

(v) The extent of public participation in the development of the conservation plan.

(vi) The degree to which there has been agency review and required determinations (*e.g.,* State regulatory requirements), as necessary and appropriate.

(vii) Whether National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) compliance was required.

(viii) Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.

Unit 4 (AZ–2) and Portions of Unit 31 (AZ–29)—Alamo Lake Wildlife Area Management Plan

In the revised proposed rule, we identified approximately 2,793 ac (1,130 ha)) as critical habitat in Alamo Lake Unit 4 (AZ–2) and 500 ac (202 ha) in a portion of the Big Sandy River Unit 31 (AZ–29). Approximately 1,840 ac (745 ha) is in Federal ownership, and 953 ac (386 ha) is in other unclassified ownership but most likely Arizona State Park lands. The vast majority of the critical habitat is within the Alamo Lake State Wildlife Area, which is made up of Corps and State Park Lands. Small upland areas adjacent to the wildlife area belong to BLM. The critical habitat area is a continuous 6-mi (10-km)-long segment of the Santa Maria River and a 3-mi (5-km)-long continuous segment of the Big Sandy River that feeds into the Santa Maria River above Alamo Lake State Park in Mohave and La Paz Counties, Arizona. We are excluding the entire Alamo Lake area (Alamo Lake (Unit 4, AZ–2: 2,793 ac (1,130 ha)) and portions of the Big Sandy River (Unit 31, AZ–29: 500 ac (202 ha) within the Alamo Lake State Wildlife Area from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act. The BLM lands adjacent to the wildlife area were removed from the designation due to their small size and being made up of upland habitat not containing the PBFs.

The Alamo Lake Wildlife Area (AWA) was created under provisions of the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), Public Land Order 492 (PLO 492), and the General Plan agreement between the Secretary of the Army, Secretary of the Interior, and Director of Arizona Game and Fish, signed January 19, 1968 (Arizona Game and Fish Department–Arizona State Parks (AGFD–ASP) 1997). A lease agreement between the Arizona Game and Fish Department Commission and the Corps was signed in 1970, establishing the AWA for fish and wildlife conservation and management purposes (AGFD–ASP 1997). The present lease area encompasses approximately 22,586 ac (9,140 ha).

Public input was solicited and addressed in development of the AWA Management Plan and the NEPA review process (AGFD–ASP 1997). The corresponding AWA Property Operational Management Plan addressing the operations of the property, together with the budget, is updated as needed to reflect the changes in operational management (AGFD 2012).

We identified western yellow-billed cuckoo critical habitat along the Big Sandy, Santa Maria, and Bill Williams Rivers, which are part of Alamo Lake. The AWA Management Plan describes the unique riparian, wetland, and aquatic aspects of the area for a variety of species, specifically targeting the southwestern willow flycatcher for management and including the western yellow-billed cuckoo as a species of wildlife concern. Two of the specific resources are directed toward the habitat needs of the southwestern willow flycatcher and the western yellow-billed cuckoo: (1) Maintain and enhance aquatic and riparian habitats to benefit wildlife; and (2) restore, manage, and enhance habitats for wildlife of special concern. Large Fremont cottonwood and Goodding's willow forests, mesquite bosque, and small areas of wetland currently exist along the Big Sandy, Santa Maria, and upper Bill Williams Rivers. Increasing and improving these habitats will benefit riparian- and wetland-dependent species (AGFD 2012, pp. 4–6). The objective for maintaining and enhancing riparian habitat includes (a) Maintaining a reservoir level sufficient to ensure suitable soil moisture conditions in the mixed riparian forest, and (b) managing feral burros (*Equus asinus*), elk (*Cervus canadensis*), and eliminating trespass cattle to ensure that browsing does not harm existing habitat or impair recruitment of replacement vegetation. Livestock grazing is excluded from the riparian areas on the upper end of Alamo Lake and the lower portions of the Santa Maria and Big Sandy Rivers. Feral burro management objectives are to monitor and limit use of riparian vegetation such that annual bark stripping of live trees does not exceed 3 percent in any of the key monitoring areas (AGFD 2012, p. 10). Fencing may be needed to exclude unauthorized livestock and feral burros, exclude elk, control off-highway-vehicle access, and better manage authorized livestock (AGFD 2012, pp. 10–12).

Although the original authority for Corps' Alamo Dam and Lake was for flood control, the Water Resources Development Act of 1996 (Pub. L. 104–303) authorized the operation of the dam to provide fish and wildlife benefits both upstream and downstream of the dam as long as these actions do not reduce flood control and recreation benefits. A multi-year process is underway to develop a long-term operation plan that benefits environmental needs while meeting the dam's maintenance needs (USACE 2020, entire). Environmental needs include management to encourage regeneration and maintenance of riparian vegetation. Revised management is to benefit southwestern willow flycatchers and western yellow-billed cuckoos (USACE 2020, pp. 14–16).

Benefits of Inclusion—AWA Management Plan

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved. It is possible that in the future, Federal funding or permitting could occur on this AGFD property in conjunction with Corps lands, triggering consultation obligations for species' presence and critical habitat impacts. Recent section 7 consultations with the Corps have addressed western yellow-billed cuckoos and their habitat along, downstream, and in inflows to Alamo Lake and we anticipate we will be

receiving another request for consultation regarding a change in operations at Alamo Dam.

Because the leased property is owned by the Corps, we anticipate future Federal actions that may impact western yellow-billed cuckoos would be proposed by and coordinated with Corps. Ongoing planning among Federal, State, and nongovernment organizations on long-term management of Alamo Lake to benefit riparian habitat and the subsequent section 7 consultation on proposed actions to western yellow-billed cuckoos is likely to result in improving habitat to support the species even if critical habitat is not designated. It is possible that the designation of critical habitat may also provide a benefit by identifying the geographic area where the western yellow-billed cuckoo occurs, raising the level of awareness for managers for both Federal and non-Federal entities. However, because the species has been considered for listing since 2001 and listed since 2014, areas where the species occurs (including Alamo Lake) are well known and land managers understand the value and responsibilities of maintaining habitat for a listed migratory species.

Another important benefit of including lands in a critical habitat designation is that it can serve to inform and educate landowners, agencies, tribes, and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high value for certain species. Any information about the western yellow-billed cuckoo that reaches a wide audience, including parties engaged in conservation, birding, hunting, livestock grazing, recreation, and sportfishing activities, is valuable. The designation of critical habitat may also affect the implementation of Federal laws, such as the Clean Water Act. These laws analyze the potential for projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws; however, the listing of these species, and consultations that have already occurred already provide this benefit. In addition, a multi-year process underway among the Service, Reclamation, the Corps, AGFD, Arizona State Parks, TNC, USGS, and BLM to develop a long-term operation plan along the Bill Williams River (USACE 2020, entire), provides for additional informational and educational benefits. Therefore, in this case we view the regulatory benefit as being largely redundant with the benefit the species receives from listing under the Act, such that designating critical habitat may only result in minimal additional benefits.

Benefits of Exclusion—AWA Management Plan

A considerable benefit from excluding AWA from western yellow-billed cuckoo critical habitat is the maintenance and strengthening of ongoing conservation partnerships. We identified this area for possible exclusion based on the existence of a management plan. AGFD's management of AWA achieves greater protection than would be achieved through designation of critical habitat alone. The AWA management plan directs resources to maintain and enhance riparian habitat and restore, manage, and enhance habitat for wildlife of special concern including the western yellow-billed cuckoo. To maintain and enhance riparian habitat, AGFD commits to ensuring the reservoir level maintains proper soil moisture conditions and controls livestock and off-highway vehicle trespass.

Although recreation and wildlife resources at Alamo Lake are managed by the AGFD under agreement with the Corps, the conservation space of Alamo Lake and Alamo Dam is owned and the dam operated by the Corps. Alamo Dam is operated primarily for flood control (as compared to water storage and delivery for other reservoirs) and typically remains at low levels, permitting occupancy of western yellow-billed cuckoo and southwestern willow flycatcher habitat. The Corps has consulted with the Service on dam operations and the potential effects to these species. In addition, we expect that ongoing conservation efforts in this area will continue with or without critical habitat designation, limiting the benefits of including the area. Consequently, after reviewing the best available information, we have determined that the benefits of excluding these Federal lands as critical habitat is substantial.

Our collaborative relationship with AGFD makes a difference in our partnership with the numerous stakeholders involved with southwestern willow flycatcher and western yellow-billed cuckoo management and recovery and influences our ability to form partnerships with others. A multi-agency team is currently engaged in long-term management planning to benefit riparian habitat downstream and upstream of Alamo Lake (USACE 2020, entire). Our partners will continue to work on western yellow-billed cuckoo management and recovery without the designation of critical habitat. Ongoing public education by AGFD and other entities will continue without designation of critical habitat. The outreach highlights the value of the AWA for riparian habitat and riparian-dependent birds like the yellow-billed cuckoo. The AWA is one of TNC's Sustainable Rivers Project and is included on the national online Wildlife Viewing Areas (Watchable Wildlife, Inc. 2020). AGFD devotes a web page to AWA on its own wildlife viewing website (AGFD 2020), emphasizing protection, restoration, management and enhancement of wildlife habitat and associated wildlife populations. AGFD's stated management philosophy includes allowing for nonconflicting wildlife-associated recreation and other agency and public uses.

Because so many important areas with western yellow-billed cuckoo habitat occur on non-Federal lands, collaborative relationships with non-Federal landowners are important in recovering the species. The western yellow-billed cuckoo and its habitat are expected to benefit substantially from voluntary landowner management actions that implement appropriate and effective conservation strategies. In addition, we have determined that by providing regulatory relief by excluding State managed areas from critical habitat, we can provide incentives to other non-Federal landowners for additional conservation. Where consistent with the discretion provided by the Act, it is beneficial to implement policies that provide positive incentives to non-Federal landowners to voluntarily conserve natural resources and that remove or reduce disincentives to conservation (Wilcove *et al.* 1996, entire; Bean 2002, pp. 1–7). Thus, it is important for the western yellow-billed cuckoo recovery to build on continued conservation activities such as these with a proven partner, and to provide positive incentives for other non-Federal landowners who might be considering implementing voluntary conservation activities, but who have concerns about incurring incidental regulatory or economic impacts.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Alamo Lake Wildlife Area

We have determined that the benefits of exclusion of AWA, with the implementation of AGFD's management plan, outweighs the benefits of inclusion because the AGFD is currently managing AWA western yellow-billed cuckoo and southwestern willow flycatcher breeding sites successfully

and is committed to maintaining and enhancing aquatic and riparian habitats to benefit wildlife and to restore, manage, and enhance habitat for wildlife of special concern. Per the AWA management plan, AGFD has committed to managing burros to limit riparian vegetation damage to no greater than 3 percent and fencing to exclude unauthorized livestock, burros, elk, and off-highway vehicles (AGFD 2012, pp. 10–12). These actions serve to manage and protect habitat needed for western yellow-billed cuckoo above those conservation measures which may be required if the area was designated as critical habitat. In making this finding, we have weighed the benefits of exclusion against the benefits of including these lands as critical habitat.

Past, present, and future coordination with AGFD has provided and will continue to provide sufficient education regarding western yellow-billed cuckoo habitat conservation needs on these lands, such that there would be minimal additional educational benefit from designation of critical habitat. The incremental conservation and benefit of designating critical habitat on part of AWA would largely be redundant with the combined benefits of the existing management. Therefore, the incremental conservation and regulatory benefits of designating critical habitat AWA are minimal.

The benefits of designating critical habitat for the western yellow-billed cuckoo along AWA are relatively low in comparison to the benefits of exclusion. The mentioned long-term land management commitments in the AWA Management Plan, public education and awareness of the riparian value of the AWA, and continuation of a conservation partnership will help foster the maintenance and development of western yellow-billed cuckoo habitat. The AWA management plan outlines actions and commits to tasks that will enhance not only the western yellow-billed cuckoo and its habitat, but other riparian species and the overall health of the riparian ecosystem.

Exclusion of these lands from critical habitat will help preserve and strengthen the conservation partnership we have developed with AGFD and the Corps, as well as foster future partnerships and development of management plans. We anticipate that greater western yellow-billed cuckoo conservation can be achieved through these management actions and relationships than through what are likely to be rare consultations as to impacts of Federal projects on designated critical habitat.

We are committed to working with AGFD to further the conservation of the western yellow-billed cuckoo and other endangered and threatened species. As evident from ongoing management to protect habitat, AGFD will continue to implement its management plans and play an active role to protect western yellow-billed cuckoos and their habitat. Therefore, in consideration of the relevant impact to our partnership with and the ongoing conservation management practices of AGFD, we determined that the significant benefits of exclusion outweigh the benefits of inclusion in the critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—Alamo Lake State Wildlife Area

We find that the exclusion of these lands will not lead to the extinction of the western yellow-billed cuckoo because long-term AGFD land management commitments will ensure the long-term persistence and protection of western yellow-billed cuckoo habitat at Alamo Lake and surrounding inflows. As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Planning among Federal and State agencies, including AGFD, is underway to develop and implement a strategy to manage Alamo Dam releases to benefit western yellow-billed cuckoo riparian habitat upstream as well as downstream. We are engaged in this planning phase and anticipate section 7 consultation on changed operations of Alamo Dam to benefit riparian habitat. Collectively, these elements provide assurances that the western yellow-billed cuckoo will not go extinct as a result of excluding these riparian habitats from the critical habitat designation. After weighing the benefits of including western yellow-billed cuckoo critical habitat against the benefit of exclusion, we have concluded that the benefits of excluding the AWA with long-term AGFD management commitments outweigh those that would result from designating this area as critical habitat. We have therefore excluded the entire Alamo Lake area (Unit 4, AZ–2: 2,793 ac (1,130 ha)) and portions of the Big Sandy River (Unit 31, AZ–29: 500 ac (202 ha)) within the AWA from this final critical habitat designation pursuant to section 4(b)(2) of the Act.

Unit 7 (AZ–5) Upper Verde River—Upper Verde River Wildlife Area

We identified 6,047 ac (2,447 ha) within Unit 7 as critical habitat. The Upper Verde River Wildlife Area (UVRWA), owned and managed by the Arizona Game and Fish Department (AGFD), is located approximately 8 mi (12 km) north of Chino Valley in Yavapai County, Arizona. The property consists of four parcels located along the upper Verde River and lower Granite Creek. The AGFD also manages State Trust lands located adjacent to two of the deeded parcels. The primary management emphasis for the UVRWA property is to manage, maintain, and enhance riparian habitat and maintain native fish diversity while the secondary management emphases are environmental education and compatible wildlife oriented recreation (AGFD 2019, entire). The site is identified as an Important Bird Area (IBA) by the National Audubon Society, and a monitoring program in partnership with Prescott Audubon and Audubon Arizona is ongoing (National Audubon Society 2020f, entire). The UVRWA property has four noncontiguous parcels of private land, which collectively include approximately 3 mi (5 km) of the upper Verde River, draining easterly from the confluence with Granite Creek to the Prescott National Forest boundary 3.5 mi (5.6 km) downstream. Riparian vegetation is dominated by Arizona ash, boxelder, Arizona walnut, and netleaf hackberry (AGFD 2019, pp. 6–7). Some tamarisk is interspersed with native tree species. Lower Granite Creek supports a well-developed narrowleaf cottonwood (*Populus acuminata*) riparian forest.

We received comments from the AGFD requesting an exclusion for 464 ac (188 ha) of AGFD land and 18 ac (7 ha) of State Trust lands from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act. The analyses associated with this request appear below.

Benefits of Inclusion—Upper Verde River Wildlife Area

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the

regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved. It is possible that in the future, Federal funding or permitting could occur on these State-owned and managed parcels for which a critical habitat designation may require consultation to analyze the impacts of the project on western yellow-billed cuckoo habitat. For example, a Corps permit was required for the Salt River Project (SRP) to construct the Upper Verde River Monitoring Flume project to monitor Verde River discharge. The flume was constructed on the Campbell Ranch property, one of the aforementioned parcels within the UVRWA. The Biological Opinion (BO) on the SRP flume project (Service 2003) was transmitted to the Corps prior to the listing of the western yellow-billed cuckoo as a threatened species, the flume remains operational and thus constitutes a federally authorized or permitted activity for which consultation in the future may be required.

Another important benefit of including lands in a critical habitat designation is that it can serve to educate landowners, agencies, tribes, and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high value for certain species. Any information about the western yellow-billed cuckoo that reaches a wide audience, including parties engaged in conservation activities, is valuable. The designation of critical habitat may also affect the implementation of Federal laws, such as the Clean Water Act. These laws analyze the potential for projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

AGFD, Prescott Audubon, and Audubon Arizona have surveyed, and continue to survey the UVRWA, and western yellow-billed cuckoos have been detected on the property (National Audubon Society 2020f, entire). The stated management emphases of the UVRWA—riparian habitat, native fish diversity, environmental education, and compatible wildlife oriented recreation—are wholly consistent with maintaining, enhancing, and potentially expanding habitat suitable for western yellow-billed cuckoos. The Corps, which implements the Clean Water Act, is already aware of riparian habitat on the UVRWA and the area being used by the western yellow-billed cuckoo, as evidenced by the BO described above. There is no demonstrable need for the educational aspect of critical habitat designation, and the site's current management does not require any additional conservation focus. Therefore, the incremental benefits of a western yellow-billed cuckoo designation within the UVRWA would be minimal.

Benefits of Exclusion—Upper Verde River Wildlife Area

A considerable benefit from excluding AGFD-owned and managed lands in the UVRWA as western yellow-billed cuckoo critical habitat is the maintenance and strengthening of ongoing conservation partnerships with AGFD, Prescott Audubon, and Audubon Arizona through designation as the Upper Verde River State Wildlife Area Important Bird Area (National Audubon Society 2020f, entire). Although not all sites AGFD manages qualify for exclusion, the AGFD has demonstrated a partnership with the Service by becoming a conservation partner in conducting surveys and developing and implementing management plans (Hofer 2015a, entire; Hofer 2015b, entire; Service 2019a, pp. 11–14, 16–17).

The success of AGFD's management of the UVRWA is demonstrated by the consistent detection of western yellow-billed cuckoos and other obligate riparian birds (National Audubon Society 2020f, entire). We expect to continue work and partner with the AGFD on activities to benefit the western yellow-billed cuckoo based on our existing working relationship and coordination activities with the State. Exclusion of this area from the designation will maintain and strengthen the partnership between the Service and AGFD. Our collaborative relationship with AGFD supports our partnership with the numerous stakeholders involved with western yellow-billed cuckoo management and recovery and influences our ability to form partnerships with others. Concerns over perceived added regulation potentially imposed by critical habitat could harm this collaborative relationship.

Because so many important areas with western yellow-billed cuckoo habitat occur on State lands, collaborative relationships with the States will be essential in order to recover the species. The western yellow-billed cuckoo and its habitat are expected to benefit substantially from management actions that implement appropriate and effective conservation strategies. In addition, we have determined that by providing regulatory relief by excluding State managed areas from critical habitat, we can provide incentives to other non-Federal landowners for additional conservation. Where consistent with the discretion provided by the Act, it is necessary to implement policies that provide positive incentives to private landowners to voluntarily conserve natural resources and that remove or reduce disincentives to conservation (Wilcove *et al.* 1996, entire; Bean 2002, pp. 1–7). Thus, western yellow-billed cuckoo recovery will build on continued conservation activities such as these with a proven partner, and will provide positive incentives for other private landowners who might be considering implementing voluntary conservation activities, but who have concerns about incurring incidental regulatory or economic impacts.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Upper Verde River Wildlife Area

We have determined that the benefits of exclusion of 464 ac (188 ha) of AGFD land and 18 ac (7 ha) of State Trust lands on the Upper Verde River within the AGFD UVRWA, considering the management of the property, outweigh the benefits of inclusion because current management efforts maintain the physical or biological features necessary to develop, maintain, recycle, and protect essential habitat essential for western yellow-billed cuckoo conservation. These actions serve to manage and protect habitat needed for western yellow-billed cuckoo above those conservation measures which may be required if the area was designated as critical habitat. In making this finding, we have weighed the benefits of exclusion against the benefits of including these lands as critical habitat.

Past, present, and future coordination with AGFD has provided and will continue to provide sufficient education regarding western yellow-billed cuckoo habitat conservation needs on the UVRWA, such that there would be minimal additional educational benefit from designation of critical habitat. The incremental conservation and benefit of designated critical habitat on AGFD-owned lands in the UVRWA would largely be redundant with the combined benefits of the existing management. Therefore, the incremental conservation and regulatory benefits of designating critical habitat on AGFD lands along the Upper Verde River are minimal.

The benefits of designating critical habitat for the western yellow-billed cuckoo within the UVRWA are

relatively low in comparison to the benefits of exclusion. The management of the UVRWA and continuation of a conservation partnership will continue to help foster the maintenance and development of western yellow-billed cuckoo habitat. We anticipate that greater western yellow-billed cuckoo conservation can be achieved through these management actions and relationships than through designation of critical habitat, because actions with a Federal nexus are likely to be rare.

On the other hand, the benefits of excluding AGFD-owned lands within the UVRWA along the Upper Verde River are considerable. The UVRWA already exhibits riparian vegetation occupied by western yellow-billed cuckoos and AGFD's management of the property is focused on maintaining that riparian habitat. Exclusion of these lands from critical habitat will help preserve and strengthen the conservation partnership we have developed with AGFD, reinforce those we are building with other entities, and foster future partnerships and development of management plans whereas inclusion will negatively impact our relationships with AGFD. We are committed to working with AGFD to further western yellow-billed cuckoo conservation and other endangered and threatened species. AGFD will continue to implement their UVRWA management plan and play an active role to protect western yellow-billed cuckoos and their habitat. Therefore, in consideration of the relevant impact to our partnership with AGFD, and the ongoing conservation management practices of AGFD, we determined that the significant benefits of exclusion outweigh the benefits of inclusion in the critical habitat designation. We have therefore excluded these lands from this final critical habitat designation pursuant to section 4(b)(2) of the Act.

Exclusion Will Not Result in Extinction of the Species—Upper Verde River Wildlife Area

We also find that the exclusion of these lands will not lead to the extinction of the western yellow-billed cuckoo, nor hinder its recovery based on AGFD's track record of management of the UVRWA will ensure the long-term persistence and protection of western yellow-billed cuckoo habitat on the Upper Verde River. AGFD has shown a long-term commitment to maintaining and enhancing areas within its jurisdiction to benefit the western yellow-billed cuckoo and we expect such commitment to continue in the future. As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. While future section 7 consultations along the Upper Verde River are likely to be infrequent, the routine implementation of the UVRWA management plan provide assurances that the western yellow-billed cuckoo will not go extinct as a result of excluding these lands from the critical habitat designation. Accordingly, we have determined that 673 ac (272 ha) of the Upper Verde River Wildlife Area and other State lands are excluded under subsection 4(b)(2) of the Act because the benefits of excluding these lands from critical habitat for the western yellow-billed cuckoo outweigh the benefits of their inclusion, and the exclusion of these lands from the designation will not result in the extinction of the species.

Unit 13 (AZ–11) Pinal Creek—Freeport McMoRan Management Plan

We have identified approximately 380 ac (154 ha) as critical habitat in Pinal Creek for exclusion, owned by the private company, Freeport-McMoRan Incorporated (FMC). FMC has ownership and management responsibility for a portion of Pinal Creek in Gila County, Arizona. FMC has been managing the area since 1998, and actively implementing conservation measures for improving the riparian habitat for the southwestern willow flycatcher and developed a management plan in 2012 (FMC 2012, entire). Conservation actions being implemented on FMC lands include control of exotic riparian plant species, improved cattle management, fencing, monitoring, and limiting access to the site in order to foster the development of native riparian habitat. From 1999 to 2007, the water and land management actions implemented resulted in an 88 percent increase in total riparian vegetation volume within the area (FMC 2012, p. 11). In 2015, FMC revised its 2012 southwestern willow flycatcher management plan for the proposed segment of Pinal Creek to include the western yellow-billed cuckoo (FMC 2015, entire). This revised plan, effective on designation of final critical habitat with no termination date, commits FMC to continue implementing the land management actions initiated through a Corps permit that have resulted in the improved abundance, distribution, and quality of riparian habitat for nesting southwestern willow flycatchers and western yellow-billed cuckoos.

Benefits of Inclusion—Freeport McMoRan Management Plan

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat.

It is possible that in the future, Federal funding or permitting could occur on this privately owned and managed segment of Pinal Creek where a critical habitat designation may benefit western yellow-billed cuckoo habitat. For example, a Corps permit was needed to implement FMC's remediation program within Pinal Creek. This permit and associated section 7 consultation resulted in surveys being conducted for the southwestern willow flycatcher. The area was previously thought not to contain nesting occurrences of the species. The results of the surveys confirmed nesting and breeding occurrences of the southwestern willow flycatcher and its habitat. The implementation of the habitat management conditions included in the Corps permit have been a significant contributing factor in causing both species to become established.

However, now that both species are known to occur along Pinal Creek, the benefits of a critical habitat designation are reduced to the possible incremental benefit of critical habitat because the designation would no longer be the sole catalyst for initiating section 7 consultation. Also, because this stream segment is privately owned and is primarily being managed for environmental remediation and habitat improvement, we do not anticipate future Federal actions to impact the current remediation action or habitat improvements associated with the Corps permit and continued management actions. Because of the lack of past section 7 consultations within this Pinal Creek segment of privately owned land, the reduced likelihood of future Federal actions altering the current environment clean-up and management of this stream segment, the presence of southwestern willow flycatcher and western yellow-billed cuckoo territories, and the

commitment to continue implementing land management actions that maintain southwestern willow flycatcher and western yellow-billed cuckoo habitat, the benefits of a critical habitat designation on this lower segment of Pinal Creek are minimized.

Another important benefit of including lands in a critical habitat designation is that it can serve to educate landowners, agencies, tribes, and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high value for certain species. Any information about the western yellow-billed cuckoo that reaches a wide audience, including parties engaged in conservation activities, is valuable. The designation of critical habitat may also affect the implementation of Federal laws, such as the Clean Water Act. These laws analyze the potential for projects to significantly affect the environment. Critical habitat may signal the presence of important sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

At FMC properties in both Arizona and New Mexico, FMC has helped fund western yellow-billed cuckoo studies and cooperated with conducting status surveys. Although the implementation of the Clean Water Act was a catalyst in focusing conservation efforts along Pinal Creek, FMC's existing conservation awareness and continued implementation of conservation actions have greatly improved the physical and biological features for both western yellow-billed cuckoo and southwestern willow flycatcher.

FMC's long-term commitment to environmental clean-up and land management actions that helped create habitat to support southwestern willow flycatcher and western yellow-billed cuckoo territories will continue based on Southwestern willow flycatcher 2012 and 2015 Management Plans and discussions with FMC to incorporate western yellow-billed cuckoos into the efforts. Therefore, the incremental benefits of a western yellow-billed cuckoo critical habitat designation along Pinal Creek would be minimal.

Benefits of Exclusion—Freeport McMoRan Management Plan

A considerable benefit from excluding FMC-owned Pinal Creek lands as western yellow-billed cuckoo critical habitat is the maintenance and strengthening of ongoing conservation partnerships. FMC has demonstrated a partnership with the Service by becoming a conservation partner in the development and implementation of the Southwestern Willow Flycatcher Recovery Plan, and by solidifying their conservation actions in management plans submitted to us for the southwestern willow flycatcher along the upper Gila River at the U-Bar Ranch in New Mexico (see below) and for the spikedace and loach minnow (2007 and 2011). They have also have demonstrated a willingness to conserve southwestern willow flycatcher and western yellow-billed cuckoo habitat at Pinal Creek and to partner with us by exploring the initial stages of a habitat conservation plan.

The success of FMC's management is demonstrated in the development of riparian areas that provide habitat for nesting southwestern willow flycatchers and western yellow-billed cuckoos. FMC's remedial actions from operation of the Lower Pinal Creek Treatment Plant involve output of water into Pinal Creek, which helps the habitat remain potentially wetter than it would be without treated water from the plant. Additional evidence of the partnership between FMC and the Service is shown by FMC's commitment to provide for adaptive management, such that if future western yellow-billed cuckoo surveys and habitat monitoring detect significant positive or negative changes in the numbers of nesting western yellow-billed cuckoos or in key habitat parameters, they will confer with the Service regarding the impacts of such changes and will adopt alternative conservation measures to promote cuckoo habitat. Exclusion of this area from the designation will maintain and strengthen the partnership between the Service and FMC.

Our collaborative relationship with FMC makes a difference in our partnership with the numerous stakeholders involved with western yellow-billed cuckoo management and recovery and influences our ability to form partnerships with others. Concerns over perceived added regulation potentially imposed by critical habitat could harm this collaborative relationship.

Because so many important areas with western yellow-billed cuckoo habitat occur on private lands, collaborative relationships with private landowners will be essential in order to recover the western yellow-billed cuckoo. The western yellow-billed cuckoo and its habitat are expected to benefit substantially from voluntary landowner management actions that implement appropriate and effective conservation strategies. Where consistent with the discretion provided by the Act, it is beneficial to implement policies that provide positive incentives to private landowners to voluntarily conserve natural resources and that remove or reduce disincentives to conservation (Wilcove *et al.* 1996, entire; Bean 2002, pp. 1–7). Thus, it is essential for the western yellow-billed cuckoo recovery to build on continued conservation activities such as these with a proven partner, and to provide positive incentives for other private landowners who might be considering implementing voluntary conservation activities, but who have concerns about incurring incidental regulatory or economic impacts.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Pinal Creek

We have determined that the benefits of exclusion of Pinal Creek on private lands managed by FMC, with the implementation of their management plan, outweigh the benefits of inclusion because current management efforts maintain the physical or biological features necessary to develop, maintain, recycle, and protect essential habitat essential for western yellow-billed cuckoo conservation. These actions serve to manage and protect habitat needed for western yellow-billed cuckoo above those conservation measures which may be required if the area was designated as critical habitat. In making this finding, we have weighed the benefits of exclusion against the benefits of including these lands as critical habitat.

Past, present, and future coordination with FMC has provided and will continue to provide sufficient education regarding western yellow-billed cuckoo habitat conservation needs on these lands, such that there would be minimal additional educational benefit from designation of critical habitat. The incremental conservation and benefit of designated critical habitat on FMC-owned lands would largely be redundant with the combined benefits of the existing management. Therefore, the incremental conservation and regulatory benefits of designating critical habitat on FMC lands along Pinal Creek are minimal.

The benefits of designating critical habitat for the western yellow-billed cuckoo along Pinal Creek are relatively low in comparison to the benefits of exclusion. The operation of the Lower Pinal Creek Treatment Plant remedial activities, long-term land management commitments, and continuation of a conservation partnership will continue to help foster the maintenance and development of western yellow-billed cuckoo habitat. We anticipate that greater western yellow-billed cuckoo conservation can be achieved through

these management actions and relationships than through consultation regarding impacts to designated critical habitat on a project-by-project basis on private land where such consultations are expected to be rare.

On the other hand, the benefits of excluding FMC-owned lands along Pinal Creek from critical habitat are considerable. FMC's management plan establishes a framework for cooperation and coordination with the Service in connection with resource management activities based on adaptive management principles. Most importantly, the management plan indicates a continuing commitment to ongoing management that has resulted in nesting cuckoo habitat. Exclusion of these lands from critical habitat will help preserve and strengthen the conservation partnership we have developed with FMC, reinforce those we are building with other entities, and foster future partnerships and development of management plans whereas inclusion will negatively impact our relationships with FMC and other existing or future partners. We are committed to working with FMC to further western yellow-billed cuckoo conservation and other endangered and threatened species. FMC has agreed to continue to implement their management plans and play an active role to protect western yellow-billed cuckoos and their habitat. Therefore, in consideration of the relevant impact to our partnership with FMC, and the ongoing conservation management practices of FMC, we determined that the significant benefits of exclusion outweigh the benefits of inclusion in the critical habitat designation.

After weighing the benefits of including as western yellow-billed cuckoo critical habitat against the benefit of exclusion, we have concluded that the benefits of excluding the approximate 5.8 km (3.6 mi) of Pinal Creek with long-term FMC management commitments outweigh those that would result from designating this area as critical habitat.

Exclusion Will Not Result in Extinction of the Species—Freeport McMoRan Management Plan

We find that the exclusion of these lands will not lead to the extinction of the western yellow-billed cuckoo, nor hinder its recovery because long-term FMC water and land management commitments will ensure the long-term persistence and protection of cuckoo habitat at Pinal Creek. As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. While future section 7 consultations along this Pinal Creek are likely to be rare, the jeopardy standard of section 7 of the Act and routine implementation of conservation measures through the section 7 process due to the occurrence of western yellow-billed cuckoos on this property provide assurances that the western yellow-billed cuckoo will not go extinct as a result of excluding these lands from the critical habitat designation. As a result, we are excluding 380 ac (154 ha) of land from the final designation along Pinal Creek.

Unit 28 (AZ–26)—Freeport McMoRan Eagle Creek Management Plan

We have identified approximately 1,257 ac (509 ha) of critical habitat in Eagle Creek owned by Freeport-McMoRan Incorporated (FMC), a private mining company, for exclusion. FMC has ownership and management responsibility for a portion of Eagle Creek in Greenlee County, Arizona. FMC, the Service, BLM, and USFS have coordinated on a 2020 Draft Eagle Creek Management Plan for managing western yellow-billed cuckoos to reduce livestock damage to Eagle Creek by providing grazing lands in the upland areas. The desired result is the improvement of the abundance, distribution, and quality of riparian breeding habitat for western yellow-billed cuckoos in perpetuity (FMC 2020, pp. 74–85). Eagle Creek and tributaries within Bee Canyon in Greenlee County flow through private lands belonging to FFMC. Eagle Creek meanders in and out of Graham County along the eastern boundary of the San Carlos Apache Reservation.

Groundwater withdrawal in Eagle Creek, primarily for water supply for a large open-pit copper mine at Morenci, Arizona, dries portions of the stream (Sublette *et al.* 1990, p. 19; Propst *et al.* 1986, p. 7). Mining is the largest industrial water user in southeastern Arizona. The Morenci mine on Eagle Creek is North America's largest producer of copper, covering approximately 60,000 ac (24,281 ha). Water for the mine is imported from the Black River, diverted from Eagle Creek as surface flows, or withdrawn from the Upper Eagle Creek Well Field (Arizona Department of Water Resources 2009, p. 62).

Benefits of Inclusion—Freeport McMoRan Eagle Creek Management Plan

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat.

A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved. We have a few records of section 7 consultations addressing western yellow-billed cuckoos and their habitat along Eagle Creek. However, because much of this stream segment is privately owned, we do not anticipate future Federal actions to impact western yellow-billed cuckoos. The designation of critical habitat would provide a benefit by identifying the geographic area important for western yellow-billed cuckoos. However, because the species has been considered for listing since 2001 and listed since 2014, areas where the species occurs are well known and land managers understand the value of maintaining habitat for the species.

Another important benefit of including lands in a critical habitat designation is that it can serve to educate landowners, agencies, tribes, and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high value for certain species. Any information about the western yellow-billed cuckoo that reaches a wide audience, including parties engaged in conservation, livestock grazing, mining, and sportfishing activities, is valuable. The designation of critical habitat may also affect the implementation of Federal laws, such as the Clean Water Act. These laws analyze the potential for projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws; however, the listing of this species and consultations that have already occurred will provide this benefit. Therefore, in this case we view the regulatory benefit to be largely as redundant with the benefit the species receives from listing under the Act and

may only result in minimal additional benefits.

Eagle Creek and Bee Canyon are in isolated areas; however, there are ranchers in the area, and the area is used for sportfishing by the general public (77 FR 10868; February 23, 2012). Designation of critical habitat could inform those who either live locally or use the area for recreation about listed species and their habitat needs. FMC has indicated that this area is heavily used by employees of the Morenci Mine, and public outreach as a result of a designation would be used to educate users.

Overall, the benefits of designating western yellow-billed cuckoo critical habitat along Eagle Creek and Bee Canyon are minimal. FMC, BLM, USFS, and grazing permittees are aware of the occurrence of western yellow-billed cuckoos along Eagle Creek and these partners will continue to be engaged with the Draft Eagle Creek Western Yellow-billed Cuckoo Management Plan at this time and in implementation when finalized at time of final designation. Thus, the educational and regulatory benefits of a critical habitat designation are minimized.

Benefits of Exclusion—Freeport McMoRan Eagle Creek Management Plan

A considerable benefit from excluding this part of Eagle Creek and Bee Canyon as western yellow-billed cuckoo critical habitat is the maintenance and strengthening of ongoing conservation partnerships. In 2005, FMC prepared and submitted a plan to the Service for the management of the U-Bar Ranch, which supported exclusion of the FMC's land from the 2006 southwestern willow flycatcher critical habitat designation. The following year, FMC prepared and submitted management plans for the spikedace and loach minnow in Eagle Creek and in the upper Gila River, in the Gila/Cliff Valley. In 2012, FMC submitted a management plan for southwestern willow flycatchers and in 2015 for western yellow-billed cuckoos on their reach of Pinal Creek, where both species are breeding in riparian habitat (FMC 2012, entire; FMC 2015, entire). In part from their knowledge and success with Pinal Creek, FMC has committed to management to improve Eagle Creek and Bee Canyon riparian habitat, by fencing out livestock and providing the infrastructure for upland water delivery for displaced livestock (FMC 2020, pp. 74–85), These actions arose during coordination efforts with BLM, FMC, and the Service while exploring conservation options for western yellow-billed cuckoo in this stretch of Eagle Creek. Additional evidence of the partnership between FMC and the Service is shown by FMC's commitment in the 2015 Pinal Creek Management Plan and the 2020 Draft Eagle Creek Management Plan (FMC 2020, pp. 74–85) to provide for adaptive management, such that if future western yellow-billed cuckoo surveys and habitat monitoring detect significant negative changes in the numbers of western yellow-billed cuckoos or in key habitat parameters, they will confer with the Service regarding the impacts of such changes and will adopt alternative conservation measures to promote western yellow-billed cuckoo habitat.

Our collaborative relationship with FMC makes a difference in our partnership with the numerous stakeholders involved with southwestern willow flycatcher and western yellow-billed cuckoo management and recovery and influences our ability to form partnerships with others.

Because so many important areas with western yellow-billed cuckoo habitat occur on private lands, collaborative relationships with private landowners are important in recovering the species. The western yellow-billed cuckoo and its habitat are expected to benefit substantially from voluntary landowner management actions that implement appropriate and effective conservation strategies. Where consistent with the discretion provided by the Act, it is beneficial to implement policies that provide positive incentives to private landowners to voluntarily conserve natural resources and that remove or reduce disincentives to conservation (Wilcove *et al.* 1996, entire; Bean 2002, pp. 1–7). Thus, it is important for the western yellow-billed cuckoo recovery to build on continued conservation activities such as these with a proven partner, and to provide positive incentives for other private landowners who might be considering implementing voluntary conservation activities, but who have concerns about incurring incidental regulatory or economic impacts.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Freeport McMoRan Eagle Creek Management Plan

We have determined that the benefits of exclusion of Eagle Creek and Bee Canyon, with the implementation of the FMC management plan (FMC 2020, pp. 74–85), outweigh the benefits of inclusion, and will not result in extinction of the western yellow-billed cuckoo because the FMC is currently managing Pinal Creek and U-Bar western yellow-billed cuckoo and southwestern willow flycatcher breeding sites successfully and is committing to funding, fencing out livestock from Eagle Creek and Bee Canyon, developing livestock waters in the uplands that do not compromise upland springs, monitoring vegetation and western yellow-billed cuckoos, preparing annual reports, and conducting adaptive management to ensure the fencing and watering project conserves habitat in Eagle Creek and Bee Canyon. These actions serve to manage and protect habitat needed for western yellow-billed cuckoo above those conservation measures which may be required if the area was designated as critical habitat. In making this finding, we have weighed the benefits of exclusion against the benefits of including these lands as critical habitat.

Past, present, and future coordination with FMC has provided and will continue to provide sufficient education regarding western yellow-billed cuckoo habitat conservation needs on these lands, such that there would be minimal additional educational benefit from designation of critical habitat beyond those achieved from listing the species under the Act, and FMC's continued work in conserving these species.

The incremental conservation and regulatory benefit of designating critical habitat on part of Eagle Creek and Bee Canyon would largely be redundant with the combined benefits of the existing management. Therefore, the incremental conservation and regulatory benefits of designating critical habitat along Eagle Creek and Bee Canyon are minimal.

The benefits of designating critical habitat for the western yellow-billed cuckoo along Eagle Creek and Bee Canyon are relatively low in comparison to the benefits of exclusion. The mentioned long-term land management commitments, along with the Draft Eagle Creek Management Plan, and continuation of a conservation partnership will help foster the maintenance and development of western yellow-billed cuckoo habitat. The fencing and water development for upland livestock will be designed to keep livestock from using Eagle Creek and Bee Canyon, thereby reducing the effects from grazing and trampling riparian vegetation, while allowing for regeneration to improve habitat. FMC's management plan outlines actions and commits to tasks that will enhance not only the western yellow-billed cuckoo, but other riparian species and the overall health of the creek ecosystem in areas where cattle are fenced out.

Exclusion of these lands from critical habitat will help preserve and strengthen the conservation partnership we have developed with FMC, assist BLM, USFS, and the grazing lessee in managing livestock to prevent it from entering the Gila Box area, as well as foster future partnerships and development of management plans.

Although a critical habitat designation would require Federal actions to consult on adverse modification, because of the infrequency of section 7 consultations within Eagle Creek, the reduced likelihood of future Federal actions, and the landowners commitment to continue implementing land management actions that maintain western yellow-billed cuckoo habitat, the benefits of a critical habitat designation on Eagle Creek are minimized. We anticipate that greater western yellow-billed cuckoo conservation can be achieved through these management actions and relationships than through implementation of critical habitat designation on a project-by-project basis on private land where the occurrence of implementation of critical habitat designation due to Federal funding or permitting is expected to be rare.

We are committed to working with FMC to further western yellow-billed cuckoo conservation and other endangered and threatened species. As evident from ongoing conversations and adaptive management actions, FMC will continue to implement its management plans and play an active role to protect western yellow-billed cuckoos and their habitat. Therefore, in consideration of the relevant impact to our partnership with FMC and the ongoing conservation management practices of FMC, we determined that the significant benefits of exclusion outweigh the benefits of inclusion in the critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—Freeport McMoRan Eagle Creek Management Plan

We find that the exclusion of these lands will not lead to the extinction of the western yellow-billed cuckoo, nor hinder its recovery because long-term FMC water and land management commitments will ensure the long-term persistence and protection of western yellow-billed cuckoo habitat at Eagle Creek and Bee Canyon. As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Collectively, these elements provide assurances that the western yellow-billed cuckoo will not go extinct as a result of excluding these riparian habitats from the critical habitat designation. After weighing the benefits of including western yellow-billed cuckoo critical habitat against the benefit of exclusion, we have concluded that the benefits of excluding the Eagle Creek and Bee Canyon with long-term FMC management commitments outweigh those that would result from designating this area as critical habitat. We have therefore excluded approximately 1,257 ac (509 ha) of land from this final critical habitat designation pursuant to section 4(b)(2) of the Act.

Unit 64 (CA–2) South Fork Kern River Valley—Sprague Ranch

We identified approximately 40 ac (16 ha) of private land for exclusion from critical habitat based on management and conservation easements for the Sprague Ranch. The Sprague Ranch, included in Unit 64 (CA–2, South Fork Kern River Valley), warrants exclusion from the final designation of critical habitat under section 4(b)(2) of the Act because we have determined that the benefits of excluding Sprague Ranch from western yellow-billed cuckoo critical habitat designation will outweigh the benefits of including it in the final designation based on the long-term protections afforded for southwestern willow flycatcher habitat. The following represents our rationale for excluding the Sprague Ranch from the final designated critical habitat for the western yellow-billed cuckoo.

The Sprague Ranch is an approximately 4,380-ac (1,772-ha) parcel of private land which is managed and conservation easements purchased in a public-private partnership by the Audubon Society, CDFW, and the Corps in 2005. The funding used to purchase the easement and manage the Sprague Ranch was provided by the Corps as a result of biological opinions issued by the Service for the long-term operation of Lake Isabella Dam and Reservoir (Service 1996, 2005b) specifically to provide habitat for and conservation of the southwestern willow flycatcher.

The Sprague Ranch is located immediately north and adjacent to the Kern River Preserve (KRP), which is owned and operated by Audubon, and shares a common border with the KRP of over 3 mi (5 km). Together these co-managed lands provide opportunities for western yellow-billed cuckoo breeding, feeding, and sheltering. The western yellow-billed cuckoo occurs throughout portions of the Sprague Ranch. The Sprague Ranch contains existing riparian forest that can support and maintain nesting territories and migrating and dispersing western yellow-billed cuckoos.

The Sprague Ranch is managed pursuant to a conservation plan dated January 25, 2005. This plan was prepared in partnership with the Service, CDFW, and Audubon to provide consistent management of lands acquired in Unit 64 in compliance with the biological opinions issued by the Service. The Audubon Society is the lead entity for management of the Kern River Preserve, an area adjacent to the Sprague Ranch. Management actions required for the Sprague Ranch include: Demographic surveys, cowbird trapping, nonnative vegetation removal, livestock exclusion, hydrologic improvement, planting of native vegetation, noxious weed control activities, flood irrigating low-lying areas, upgrading of fencing, upgrading irrigation systems, monitoring, and reporting. These measures will assist in improvement, management, and conservation of western yellow-billed cuckoo habitat in perpetuity and meet our criteria for exclusion.

Benefits of Inclusion—Sprague Ranch

As discussed above under Effects of Critical Habitat Designation Section 7 Consultation, Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved. The South Fork Kern River Valley is occupied by western yellow-billed cuckoos during the breeding season and the area and its habitat are well known to be important to the western yellow-billed cuckoo and therefore, if a Federal action or permitting occurs, there is a catalyst for evaluation under section 7 of the Act (mostly due to listing the species as threatened). Through section 7 consultation, some minimal benefit could occur from a critical habitat designation at the Sprague Ranch. The Sprague Ranch may have additional conservation value above sustaining

existing populations because it is being managed to not only maintain existing habitat, but also to improve, protect, and possibly expand upon the amount of nesting habitat that would provide for growth of existing populations. Expansion of existing populations in these areas would contribute to recovery of the western yellow-billed cuckoo. The implementation of future management actions to improve western yellow-billed cuckoo habitat on Sprague Ranch is unlikely to require section 7 consultation between the Corps (the likely Federal action agency) and the Service, because all habitat improvement and management actions are not likely to result in adverse effects to the western yellow-billed cuckoo or its habitat. As a result, any rare Federal action that may result in formal consultation will likely result in only discretionary conservation recommendations (*i.e.,* adverse modification threshold is not likely to be reached). Therefore, there is an extremely low probability of mandatory elements (*i.e.,* reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated western yellow-billed cuckoo critical habitat, and as a result, the benefits of inclusion are minimized.

Another important benefit of including lands in a critical habitat designation is that the designation can serve to educate landowners, agencies, tribes, and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high conservation value for certain species. Any information about the western yellow-billed cuckoo that reaches a wide audience, including parties engaged in conservation activities, is valuable. The designation of critical habitat may also affect the implementation of Federal laws, such as the Clean Water Act. These laws analyze the potential for projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

There would be little additional educational and informational benefit gained from including this portion of the Sprague Ranch within the designation because the Sprague Ranch was purchased specifically for habitat conservation and is well known as an important area for western yellow-billed cuckoo management and recovery. Also, managing agencies such as the Corps, CDFW, and Audubon Society are implementing a long-term management plan that addresses western yellow-billed cuckoo habitat; therefore the educational benefits educational benefits arising from critical habitat designation are likely to be minimal.

Benefits of Exclusion—Sprague Ranch

A considerable benefit from excluding Sprague Ranch from western yellow-billed cuckoo critical habitat is the maintenance and strengthening of ongoing conservation partnerships. Based on past and current efforts to conserve habitat within the South Fork of the Kern River including the Sprague Ranch, we have determined that the conservation benefits that would be realized by foregoing designation of critical habitat for the western yellow-billed cuckoo would be significant by encouraging future conservation cooperation from non-Federal landowners in the area. Actions specifically identified on the Sprague Ranch as part of the Audubon Kern River Preserve for conservation includes protection and maintenance of riparian and upland habitat for breeding feeding and sheltering, active nonnative species management, livestock exclusion, exotic vegetation control, native tree planting, and species monitoring and reporting. These actions will be implemented through the long-term management plan developed by the Corps, CDFW and the Audubon Society, who are all committed to working toward species recovery. The Audubon Society is taking the lead in management of the Kern River Preserve, and its management of this area could be constrained and complicated by a checker boarded critical habitat designation that would apply to certain lands under Audubon management but not all. Accordingly, exclusion would benefit our collaboration with Audubon in support of species recovery.

The western yellow-billed cuckoo occurs on both public and private lands throughout the Unit, but the Sprague Ranch is somewhat unique in that it is a partnership between the Corps, CDFW, Audubon, and the Service. The management of Sprague Ranch is conducted in accordance with the terms and conditions of a biological opinion, which requires actions for the conservation of western yellow-billed cuckoo habitats. These actions would still occur regardless of whether critical habitat is designated, but the managing entity (Audubon) may be discouraged from implementing voluntary beneficial actions because of the additional requirements of the designation.

Proactive conservation efforts and partnerships with private or non-Federal entities are necessary to prevent the extinction and promote the recovery of the western yellow-billed cuckoo in the Unit. Therefore, western yellow-billed cuckoo habitat located within properties covered by management plans or conservation strategies that protect or enhance its habitat will benefit substantially from voluntary landowner management actions.

We contend that where consistent with the discretion provided by the Act, it is beneficial to implement policies that provide positive incentives to private landowners to voluntarily conserve natural resources and that remove or reduce disincentives to conservation (Wilcove *et al.* 1996, entire; Bean 2002, pp. 1–7). Thus, it is essential for the recovery of the western yellow-billed cuckoo to build on continued conservation activities such as these with proven partners, and to provide positive incentives for other private landowners who might be considering implementing voluntary conservation activities but have concerns about incurring incidental regulatory or economic impacts.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Sprague Ranch

Based on the above considerations, we have determined that the benefits of excluding the Sprague Ranch from critical habitat in the Unit 64 outweigh the benefits of including it as critical habitat for the western yellow-billed cuckoo.

The Sprague Ranch was purchased specifically to manage habitats for the western yellow-billed cuckoo and is jointly managed by the Corps, CDFW, and Audubon in accordance with the terms and conditions of the biological opinions. The strategy of the managing partnership is to implement management and habitat improvement measures to achieve western yellow-billed cuckoo conservation goals. There are few additional educational or regulatory benefits of including these lands as critical habitat. The South Fork Kern River as part of the Audubon Society's Kern River Preserve is well known by the public and managing agencies for its value and importance to the western yellow-billed cuckoo. Likewise, there will be little additional Federal regulatory benefit to the species because (a) there is a low likelihood that the Sprague Ranch will be negatively affected to any significant degree by Federal activities that were not consulted on in the existing biological opinions pursuant to section 7 consultation requirements, and (b) the Sprague Ranch is being managed in accordance with the terms and conditions of the biological opinions. Based on ongoing management

activities, there would likely be no additional requirements pursuant to a consultation that addresses critical habitat. Because this piece of land was purchased and is being managed specifically for western yellow-billed cuckoo habitat, a designation of critical habitat would not provide a significant amount of additional benefit.

The conservation measures for the western yellow-billed cuckoo that are occurring or will be used in the future on the Sprague Ranch (*i.e.,* demographic surveys, cowbird trapping, nonnative vegetation removal, livestock exclusion, hydrologic improvement, planting of native vegetation, monitoring, and reporting) provide as many, and likely more, overall benefits than would be achieved through implementing section 7 consultations on a project-by-project basis under a critical habitat designation.

Therefore, we find that the exclusion of critical habitat on the Sprague Ranch would most likely have a net positive conservation effect on the recovery and conservation of the western yellow-billed cuckoo when compared to the positive conservation effects of a critical habitat designation. As described above, the overall benefits to the western yellow-billed cuckoo of a critical habitat designation for this property are relatively few. In contrast, this exclusion will enhance our existing partnership with the Corps, CDFW, and Audubon, and it will set a positive example and could provide positive incentives to other non-Federal landowners who may be considering implementing voluntary conservation activities on their lands. We conclude there is a higher likelihood of beneficial conservation activities occurring in this area for the western yellow-billed cuckoo without designated critical habitat than there would be with designated critical habitat on the Sprague Ranch.

Exclusion Will Not Result in Extinction of the Species—Sprague Ranch

We find that the exclusion of these lands will not lead to the extinction of the western yellow-billed cuckoo, nor hinder its recovery because long-term land management commitments will ensure the long-term persistence and protection of western yellow-billed cuckoo habitat on the Sprague Ranch. Exclusion of these lands will not result in the extinction of the species because there is a long-term commitment by proven land management partners to manage this property specifically for the western yellow-billed cuckoo. In addition, as discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will further protect the species against extinction. Additionally, the western yellow-billed cuckoo occurs on lands adjacent to the Sprague Ranch that are also protected and managed either explicitly for the species, or indirectly through more general objectives to protect natural habitat values. Accordingly, we have determined that 40 ac (16 ha) of the Sprague Ranch are excluded under subsection 4(b)(2) of the Act because the benefits of excluding these lands from critical habitat for the western yellow-billed cuckoo outweigh the benefits of their inclusion, and the exclusion of these lands from the designation will not result in the extinction of the species.

Unit 64 (CA–2) South Fork Kern River Valley—Hafenfeld Ranch

Hafenfeld Ranch is approximately 247 ac (100 ha) in size and lies on and adjacent to the South Fork Kern River. Within the larger ranch are two perpetual conservation easements that were placed for the purposes of riparian and wetland vegetation protection and western yellow-billed cuckoo conservation. The landowner granted these easements willingly and in partnership with Department of Agriculture-Natural Resource Conservation Service (NRCS), the Service, Corps, and California Rangeland Trust (CRT). Approximately 127 ac (51 ha) of the Hafenfeld Ranch was proposed for designation of western yellow-billed cuckoo critical habitat within Unit 64 (CA–2, South Fork Kern River Valley).

The Hafenfeld Ranch is part of a continuous corridor of western yellow-billed cuckoo habitat along the South Fork Kern River that connects the east and west segments of the Kern River Preserve. The dominant vegetation in the Kern Management Unit is willow and cottonwood (*Populus fremontii*). Other plant communities of the Kern Management Unit include open water, wet meadow, and riparian uplands. Portions of the Hafenfeld Ranch are seasonally flooded, forming a mosaic of wetland communities throughout the area. The remainder of the property consists of wet meadow and riparian upland habitats, consistent with the character of habitat along the South Fork Kern River. Western yellow-billed cuckoos have been recorded throughout the South Fork Kern River and the Hafenfeld Ranch.

The first conservation easement of approximately 38 ha (93 ac) was recorded in 1996, between the landowner and the NRCS under authority of the Wetland Reserve Program. The purpose of the easement is to ''. . . restore, protect, manage, maintain, and enhance the functional values of wetlands and other lands, and for the conservation of natural values including fish and wildlife habitat, water quality improvement, flood water retention, groundwater recharge, open space, aesthetic values, and environmental education. It is the intent of NRCS to give the Landowner the opportunity to participate in restoration and management activities in the easement area.''

The second conservation easement of approximately 57 ha (140 ac) was recorded in 2007, between the landowner and CRT as a result of biological opinions for the long-term operation of Lake Isabella Dam and Reservoir (Service 1996, 2005b) specifically to provide habitat and conservation for the western yellow-billed cuckoo. The purposes of the easement includes: (1) Protection of the riparian area; (2) continuation of flows into the riparian area; and (3) protection of riparian habitat. An endowment to implement these purposes was granted by the Corps to the National Fish and Wildlife Foundation to be used by CRT.

The Hafenfeld conservation easements are managed pursuant to a conservation plan dated January 25, 2005. This plan was prepared in partnership with the Service, National Fish and Wildlife Foundation (NFWF), CDFW, Wildlife Conservation Board (WCB), the Packard Foundation, and Audubon to provide consistent management of lands acquired in Unit 64. Management activities under the plan that will protect, maintain, and improve western yellow-billed cuckoo habitat include: (1) Limiting public access to the site, (2) managing grazing, (3) protection of the site from development or encroachment, (4) maintenance of the site as permanent open space that has been left predominantly in its natural vegetative state, and (5) the spreading of flood waters which promotes the moisture regime and wetland and riparian vegetation determined to be essential for western yellow-billed cuckoo conservation. Other prohibitions of the easements which would benefit western yellow-billed cuckoo conservation include: (1) Haying, mowing or seed harvesting; (2) altering the grassland, woodland, wildlife habitat, or other

natural features; (3) dumping refuse, wastes, sewage, or other debris; (4) harvesting wood products; (5) draining, dredging, channeling, filling, leveling, pumping, diking, or impounding water features or altering the existing surface water drainage or flows naturally occurring within the easement area; and (6) building or placing structures on the easement. Funding for the implementation of the conservation plan is assured by an endowment held by NFWF and through commitments by NRCS, CRT, and the Hafenfeld Ranch under provisions of the Conservation Easement.

Benefits of Inclusion—Hafenfeld Ranch

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved. The South Fork Kern River is occupied by western yellow-billed cuckoos; therefore, if a Federal action or permitting occurs, there is a nexus for evaluation under section 7 of the Act due to the species being listed as threatened. Through section 7 consultation, some minimal benefit could occur from a western yellow-billed cuckoo critical habitat designation at the Hafenfeld Ranch. The Hafenfeld Ranch may have additional conservation value above sustaining existing western yellow-billed cuckoo populations because it is being managed to not only maintain existing habitat, but also to improve, protect, and possibly expand upon the amount of nesting habitat that would provide for growth of existing populations. Expansion of existing populations in these areas would be an element of recovering the western yellow-billed cuckoo. However, because these lands are privately owned and not under Federal management, the occurrence of Federal actions that would generate evaluation under section 7 are expected to be limited. Additionally, the established conservation easements' goals to restore, protect, and manage the functional values for the conservation of fish and wildlife habitat are intended to protect riparian vegetation and the western yellow-billed cuckoo. As a result, it is not likely that Federal actions or the easement holder would allow actions that would diminish or reduce the capability of the habitat to support existing populations. As a result, any rare Federal action that may result in formal consultation will likely result in only discretionary conservation recommendations and an adverse modification threshold is not likely to be reached. Therefore, there is an extremely low probability of mandatory elements (*i.e.,* reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated western yellow-billed cuckoo critical habitat, and as a result, the benefits of inclusion are minimized.

Another important benefit of including lands in a critical habitat designation is that the designation can serve to educate landowners, agencies, tribes, and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high conservation value for certain species. Any information about the western yellow-billed cuckoo that reaches a wide audience, including parties engaged in conservation activities, is valuable. The designation of critical habitat may also affect the implementation of Federal laws, such as the Clean Water Act. These laws analyze the potential for projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process.

There would be little educational and informational benefit gained from including this portion of the South Fork Kern River within the designation because the Hafenfeld Ranch-established conservation easements that addressed the western yellow-billed cuckoo and its habitat, and therefore it is well known as an important area for western yellow-billed cuckoo management and recovery. Also, managing agencies such as the Corps, NRCS, Service, CRT, and CDFW were involved with establishing these easements and development of a long-term management plan that addresses western yellow-billed cuckoo habitat; therefore the educational benefits or additional support for implementing other environment regulations from a critical habitat designation are not expected to be realized in this area.

Benefits of Exclusion—Hafenfeld Ranch

Conservation benefits which are and would be realized by foregoing designation of critical habitat for the western yellow-billed cuckoo at the Hafenfeld Ranch include: (1) Continuance and strengthening of our effective working relationship with the Hafenfeld Ranch and the Corps, CRT, and CDFW to promote voluntary, proactive conservation of the western yellow-billed cuckoo and its habitat as opposed to reactive regulation; (2) allowance for continued meaningful collaboration and cooperation in working toward species recovery, including conservation benefits that might not otherwise occur; and (3) encouragement of additional conservation easements and other conservation and management plan development in the future on the Hafenfeld Ranch and other lands for the western yellow-billed cuckoo and other federally listed and sensitive species.

The western yellow-billed cuckoo occurs on public and private lands throughout Unit 64. Proactive voluntary conservation efforts by private or non-Federal entities are necessary to prevent declines and promote the recovery of the western yellow-billed cuckoo in Unit 64.

Therefore, western yellow-billed cuckoo habitat located within private properties, like the Hafenfeld Ranch, covered by management plans or conservation strategies that protect or enhance its habitat will benefit substantially from voluntary landowner management actions. Where consistent with the discretion provided by the Act, it is beneficial to implement policies that provide positive incentives to private landowners to voluntarily conserve natural resources and that remove or reduce disincentives to conservation (Wilcove *et al.* 1996, entire; Bean 2002, pp. 1–7). Thus, it is essential for the recovery of the western yellow-billed cuckoo to build on continued conservation activities such as these with proven partners, like the Hafenfeld Ranch, and to provide positive incentives for other private landowners who might be considering implementing voluntary conservation activities but have concerns about incurring incidental regulatory or economic impacts.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Hafenfeld Ranch

Based on the above considerations, we have determined that the benefits of excluding the Hafenfeld Ranch from critical habitat in Unit 64 outweigh the benefits of including it as critical habitat for the western yellow-billed cuckoo. The Hafenfeld Ranch is currently operating under a conservation plan to implement conservation measures and achieve important conservation goals

through the conservation measures described above, as well as land and water management efforts such as willow planting and management of surface flows to achieve the optimal flooding regime for the enhancement of important riparian and wetland habitat for the western yellow-billed cuckoo.

The additional regulatory and educational benefits of including these lands as critical habitat are relatively few. Based on past and current conservation actions and continued stewardship of their lands by the landowner, we anticipate that the conservation strategies will continue to be implemented in the future, and that the funding for these activities will be apportioned in accordance with the existing management plan.

Past, present, and future coordination with the landowner has provided and will continue to provide sufficient education regarding western yellow-billed cuckoo habitat conservation needs on these lands, such that there would be minimal additional educational benefit from designation of critical habitat. Likewise, there will be little additional Federal regulatory benefit to the species because (a) there is a low likelihood that the Hafenfeld Parcel will be negatively affected to any significant degree by Federal activities requiring section 7 consultation, and (b) based on ongoing management activities, there would likely be no additional requirements pursuant to a consultation that addresses critical habitat. Excluding these privately owned lands with conservation strategies from critical habitat may, by way of example, provide positive social, legal, and economic incentives to other non-Federal landowners who own lands that could contribute to listed species recovery if voluntary conservation measures on these lands are implemented.

The conservation measures for the western yellow-billed cuckoo on the Hafenfeld Ranch that include the activities described above that include land and water management actions to enhance important riparian and wetland habitat provide as much, and likely more comprehensive benefits as would be achieved through implementing section 7 consultation on a project-by-project basis under a critical habitat designation. This is because the land managers are already implementing actions that improve and maintain western yellow-billed cuckoo habitat. The actions already being implemented by the landowner serve to manage and protect habitat needed for western yellow-billed cuckoo above those conservation measures which may be required if the area was designated as critical habitat. In making this finding, we have weighed the benefits of exclusion against the benefits of including these lands as critical habitat.

Therefore, we find that the exclusion of critical habitat on the Hafenfeld Parcel would most likely have a net positive conservation effect on the recovery and conservation of the western yellow-billed cuckoo when compared to designating the area as critical habitat. As described above, the overall benefits to the western yellow-billed cuckoo from a critical habitat designation on the Hafenfeld Ranch are relatively low.

Exclusion Will Not Result in Extinction of the Species—Hafenfeld Ranch

Exclusion of these lands will not result in the extinction of the subspecies because the western yellow-billed cuckoo occupies the Hafenfeld Ranch and the area is being managed for western yellow-billed cuckoo conservation. The management on Hafenfeld Ranch is a long-term conservation commitment by the landowner to benefit habitat for the western yellow-billed cuckoo. As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Accordingly, we have determined that 127 ac (51 ha) of the Hafenfeld Ranch lands are excluded under subsection 4(b)(2) of the Act because the benefits of excluding these lands from critical habitat for the western yellow-billed cuckoo outweigh the benefits of their inclusion, and the exclusion of these lands from the designation will not result in the extinction of the species.

Unit 68 (CO–1) Colorado River—State of Colorado Parks and Wildlife

In the revised proposed rule, we indicated that 417 ac (169 ha) of state-owned lands in Unit 68 (CO–1) along the Colorado River were being considered for exclusion because State of Colorado Parks and Wildlife (CPW) manages them to benefit wildlife, including the western yellow-billed cuckoo. Based on CPW comments and parcel information provided by CPW, we adjusted the acreage considered for exclusion to 866 ac (351 ha). The areas we consider below for exclusion are the multi-parcel James M. Robb Colorado River State Park (273 ac (110 ha)), the Leatha Jean Stassen State Wildlife Area (24 ac (10 ha)), the Tilman Bishop State Wildlife Area (107 ac (43 ha)), and the Walter Walker State Wildlife Area (462 ac (187 ha)).

There are four parcels of the James M. Robb Colorado River State Park (CRSP) within critical habitat Unit 68. The Corn Lake section, 6 ac (2 ha), the Connected Lakes section, 162 ac (66 ha), the Pear Park section 105 ac (42 ha), and the 34 Road section that is 0.26 ac (0.1 ha). The management of the Colorado State Parks is outlined in Colorado Parks & Wildlife Strategic Plan (CPW 2005, entire). The primary goals of the CRSP are to preserve native communities, reduce noxious weeds, maintain desirable shade trees in picnic areas, use a native revegetation management prescription, augment nesting structures for wildlife, improve aquatic resources, implement a comprehensive natural resources monitoring program, and develop and maintain sustainable trails. Western yellow-billed cuckoo detections have been documented at the Connected Lakes Section in 2002 and at the Corn Lake section in 1998 (Beason 2012, p 14). Colorado State Parks manages all parcels under a 2002 stewardship plan that prescribes a stewardship prescription for cottonwood and willow management and noxious weeds management (Colorado State Parks 2002, entire).

The Leatha Jean Stassen, Tilman Bishop, and Walter Walker State Wildlife Areas (SWAs) are all protected in perpetuity (owned in fee by CPW) and managed under terms stipulated by the Federal Aid in Wildlife Restoration Act of 1937 (Pittman-Robertson) and Federal Aid in Sport Fish Restoration Act of 1950 (Dingell-Johnson), which prohibit the diversion of CPW assets or any funds generated from license sales to non-wildlife programs or practices. There are no official management plans for the SWAs, yet all management actions (through annual work plans) are directed to benefit wildlife and native habitat.

The primary management objective for the Leatha Jean Stassen SWA is to provide quality wildlife habitat. Key activities in pursuit of this objective include removal of purple loosestrife (*Lythrum salicaria*) and other herbaceous weeds as well as increasing law enforcement presence and trash removal to reduce disturbance from public use. CPW's annual work plans also include treating Russian olive, tamarisk, and noxious weeds to minimize regrowth. There are no seasonal closures for this parcel.

The Walter Walker SWA is adjacent to the Leatha Jean Stassen SWA on the

west end of Unit 68. The primary management objectives for the Walker SWA are to restore natural riparian vegetation and to enhance values for rare and sensitive species, non-game wildlife, and waterfowl. The annual management activities that support the objectives include removal of tamarisk and other nonnative woody riparian plants and conduct plantings of cottonwood and willow. Understory vegetation management is limited to those activities that enhance or maintain wildlife values on the property. There is no livestock grazing on the property. Mechanical removal of tamarisk and other nonnative woody riparian plants has occurred on the property and will be monitored and repeated as necessary. Control of understory weeds is also a regular occurrence.

The Tilman Bishop SWA is on the eastern end of critical habitat Unit 68. The primary management objectives for the Tilman Bishop SWA are to restore natural riparian vegetation and to enhance habitat values for rare and sensitive species, non-game wildlife, and waterfowl. Key activities in pursuit of these objectives include removal of tamarisk and other nonnative woody riparian plants and conduct plantings of cottonwood and willow. Otherwise, the management efforts are focused on developing additional and enhancing existing riparian vegetation on the property. Actions that implemented annually in this SWA that benefit western yellow-billed cuckoo include treating nonnative plants such as Russian olive and tamarisk, a public access closure period from March 15 through July 15, and mapping of noxious weeds.

Benefits of Inclusion—State of Colorado Parks and Wildlife Lands

The benefits of including lands in critical habitat can be regulatory and educational, which can aid in promoting recovery of the species. As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved.

The most likely Federal nexus for these lands would be associated with Federal funding through Partners for Fish and Wildlife, the Service, or NRCS for habitat restoration projects, or permitting from the Corps if work involves placing fill in riparian or wetland areas. Potential outcomes of section 7 consultations (mostly due to the species being listed as threatened) would be conservation recommendations to avoid disturbance during breeding and nonbreeding periods, avoid degradation or destruction of cottonwood stands and their understory, and avoid spraying pesticides that could reduce insect prey bases for western yellow-billed cuckoo. However, most of these recommendations have been identified and implemented in CPW's management direction to benefit wildlife and their habitat in the CRSP and SWAs, in the absence of critical habitat designation. Therefore, conservation recommendations resulting from any section 7 consultation with respect to critical habitat would most likely be redundant with the conservation actions already in place under current management. Thus, few additional regulatory benefits would be derived from including the CRSP and SWAs in critical habitat Unit 68 for western yellow-billed cuckoo.

Another important benefit of including lands in a critical habitat designation is that it can serve to educate landowners, agencies, tribes, and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high value for certain species. Any information about the western yellow-billed cuckoo that reaches a wide audience, including parties engaged in conservation, birding, hunting, livestock grazing, recreation, and sportfishing activities, is valuable. The designation of critical habitat may also affect the implementation of Federal laws, such as the Clean Water Act. These laws analyze the potential for projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Designation of critical habitat could inform those who either live locally or use the area for recreation about listed species and their habitat needs. However, we believe there is little, if any, educational benefit attributable to critical habitat beyond those achieved from listing the species under the Act. Therefore in this case, we view the regulatory benefit to be largely redundant with the benefit the species will receives from listing under the Act and may only result in minimal additional benefits.

Benefits of Exclusion—State of Colorado Parks and Wildlife Lands

We have determined that the benefits of exclusion of CPW lands outweighs the benefits of inclusion because the CPW is currently managing and is committed to maintaining and enhancing aquatic and riparian habitats to benefit wildlife and to restore, manage, and enhance habitat. The designation of SWA and State Park with prescriptions for cottonwood and willow management that promotes a healthy cottonwood overstory with grass and shrub understory components, sustainable public access, and control of noxious weeds demonstrate CPW's commitment to prudent stewardship of their land and water resources for the benefit of wildlife, including western yellow-billed cuckoo. Due to the legal mandates (Pittman-Robertson and Dingell-Johnson) to manage the SWAs for the benefit of wildlife and the 2002 Stewardship Plan for the CRSP, we conclude that it is unlikely that any proposed actions would adversely affect or adversely modify critical habitat for the western yellow-billed cuckoo. Rather, we can reasonably expect these parcels to be protected from future development and adaptively managed into the future to avoid and minimize threats to the natural habitat included cottonwood galleries and willow understories. Therefore, excluding these areas from critical habitat could benefit the existing partnership with CPW.

Due to the consistent management of the CRSP and SWAs for the benefit of wildlife, including cottonwood and willow management and direction that would not change greatly through section 7 consultation, it is unlikely that designating these areas as critical habitat would appreciably increase recommended conservation measures. In response to the proposed designation of critical habitat, CPW said that designation of critical habitat should also consider the existing conservation programs available to private landowners and that the designation of critical habitat on private lands may discourage landowners from pursuing voluntary conservation actions. By excluding these areas we can foster more cooperation from adjacent private landowners.

Benefits of Exclusion Outweigh the Benefits of Inclusion—State of Colorado Parks and Wildlife Lands

We have determined that the benefits of excluding the CRSP, Walter Walker SWA, Tilman Bishop SWA, and Leatha Jean Stassen SWA as critical habitat for western yellow-billed cuckoo, outweigh the benefits of including them as critical habitat. This conclusion is based on the following factors: (1) The CRSP has a complete stewardship plan that provides guidance and direction for annual activities and land management that promote and preserve native riparian vegetation. Due to designation as a State Park, it is likely that the conservation management strategies and actions will continue to be implemented for the foreseeable future. In addition to the goals and objectives set out in the stewardship plan for the CRSP, there is also a specific cottonwood and willow stewardship prescription that guides management actions to reduce nonnative invasive plants and restore natural hydrology and regeneration processes within the riparian ecosystem. Although the SWAs do not have completed management plans, the annual work plans, cottonwood and willow prescription, and wildlife management mandate under the Pittman-Robertson and Dingell-Johnson Acts indicate sufficient management protections for the physical and biological features needed for western yellow-billed cuckoo; and (2) Excluding these areas from critical habitat will help maintain and improve our partnership with CPW. CPW commented that the designation of critical habitat in Unit 68 as proposed (85 FR 11458) would likely have a negative impact on ongoing and future voluntary conservation efforts by CPW and adjacent private landowners. Designating these areas over the objections of CPW could create a disincentive to future partnering with the Service to achieve conservation goals, who desire to avoid possible Federal regulation under the Act. Given our desire for cooperative partnerships and the wildlife habitat protections enacted by the State of Colorado on these areas, there is a reasonable expectation that the conservation management strategies and actions will continue to be implemented into the future.

Although a critical habitat designation would require actions with a Federal nexus to consult on adverse modification, activities conducted by CPW may not have a Federal nexus and CPW's management already benefits wildlife and their habitat in the CRSP and SWAs, in the absence of critical habitat designation. Therefore, conservation recommendations resulting from any section 7 consultation with respect to critical habitat would most likely be redundant with the conservation actions already in place under current management and few additional regulatory benefits would be derived from including the CRSP and SWAs in critical habitat for the western yellow-billed cuckoo.

Lastly, these areas are well known as important areas for the western yellow-billed cuckoo and past, present, and future coordination with CPW has provided and will continue to provide sufficient educational benefits regarding conservation of western yellow-billed cuckoo habitat on these lands, such that there would be minimal additional educational benefit from designation of critical habitat beyond those achieved from listing the species under the Act, and CPW's continued work in conserving the species.

Exclusion Will Not Result in Extinction of the Species

We have determined that the exclusion of the CRSP and SWAs lands from Unit 68 will not result in the extinction of the western yellow-billed cuckoo. CPW's mandate to manage SWAs for the benefit of wildlife and stewardship plan for the CRSP ensure continued management actions that benefit western yellow-billed cuckoo and their habitat. As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. It is likely that most actions requiring section 7 consultation on these lands would be for actions that have a net conservation benefit to improving riparian habitat and reducing threats such as nonnative invasive plants. Accordingly, we have determined that 866 ac (351 ha) of Colorado Parks and Wildlife lands are excluded under subsection 4(b)(2) of the Act because the benefits of excluding these lands from critical habitat for the western yellow-billed cuckoo outweigh the benefits of their inclusion, and the exclusion of these lands from the designation will not result in the extinction of the species.

Unit 33 (NM–2) Gila River—U-Bar Ranch

We identified approximately 1,142 ac (462 ha) in Unit 33 for exclusion from the final critical habitat based on habitat management by U-Bar Ranch. The U-Bar Ranch (Ranch) near Cliff, in Grant County, New Mexico, in the Upper Gila Management Area is owned by Pacific Western Land Company (PWLC), a subsidiary of the FMC. Through their efforts and their long-time lessee, FMC has demonstrated a commitment to management practices on the Ranch that have conserved and benefited the western yellow-billed cuckoo population in that area over the past decade. In addition, FMC had privately funded scientific research at and in the vicinity of the Ranch in order to develop data that have contributed to the understanding of habitat selection, distribution, prey base, and threats to the southwestern willow flycatcher. The riparian habitat also has a large number of nesting western yellow-billed cuckoos.

PWLC and the U-Bar Ranch have supported collecting annual breeding bird population data for over 20 years, where western yellow-billed cuckoo detections have displayed a significant increase since 1997. The Ranch began formally surveying for western yellow-billed cuckoos on an annual basis beginning in 2014, where results of these surveys and the past breeding bird studies indicate that the western yellow-billed cuckoo is a common summer resident.

The Ranch implements a management plan (FMC 2012, entire) on its pastures within the Gila Valley that are north of the Highway 180 West Bridge and south of the boundary of the Gila National Forest. Eight pastures that incorporate approximately 3,390 ac (1,372 ha) are managed with a plan that is adapted annually for operation of livestock and farming enterprises. The management consists of a multifaceted and highly flexible rest-rotation system using both native forage and irrigated fields. The Ranch's numerous pastures allow a relatively dynamic rotation system that is modified based upon current conditions. Grazing use of river bottom pastures is monitored by daily visual inspections. Use of these pastures is limited to ensure that forage utilization levels are moderate and over-use does not occur. In addition, the riparian areas are monitored regularly, and riparian vegetation is allowed to propagate along the river as well as in irrigation ditches.

Some specific management practices, varying in different pastures, which relate to the western yellow-billed

cuckoo and its habitat are: (1) Grazing is limited to November through April to avoid negative impacts during migration and nesting season; (2) animal units are adjusted to protect and maintain the riparian vegetation needed by the western yellow-billed cuckoo; (3) restoration efforts follow flood events that destroy habitat; and (4) herbicide and pesticides are only used in rare circumstances and are not used near occupied territories during breeding season. These long practiced flexible and adaptive management practices have resulted in the expansion, protection, and successful continuance of a large southwestern willow flycatcher population, which has ultimately also provided benefit to the western yellow-billed cuckoo.

As an example of long standing successful restoration practices, in 1995, active restoration followed the flooding destruction of the Bennett Farm fields in the 162 ha (400 ac) River Pasture. The Bennett Restoration Project is a series of artificially created, flooded marshy areas located between irrigated and dry-land pastures and the river. The Bennett Restoration Project is a mosaic of vegetation in successional stages with dense patches and lines of willows and cottonwoods occurring in manmade oxbows. The site now consistently supports western yellow-billed cuckoos. The 2016 surveys recorded up to 7 detections of western yellow-billed cuckoos at the Bennett site.

Benefits of Inclusion—U-Bar Ranch

As discussed above under Effects of Critical Habitat Designation Section 7 Consultation, Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved. As this is private property and consultation will be rare, critical habitat is not anticipated to have much effect due to lack of Federal actions. Given the anticipated lack of section 7 consultation, the dependence on private conservation actions is more important.

Another important benefit of including lands in a critical habitat designation is that it can serve to educate landowners, agencies, tribes, and the public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the western yellow-billed cuckoo and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable. However, the U-Bar Ranch is already working with the Service to address the conservation and recovery of the species. For these reasons, designation of critical habitat would have few, if any, additional benefits beyond those that will result from continued consultation for the presence of the species.

Benefits of Exclusion—U-Bar Ranch

Significant benefits would be realized by excluding the Ranch that include: (1) The continuance and strengthening of our effective cooperative relationship with the Ranch to promote the conservation of the western yellow-billed cuckoo and its habitat; (2) the allowance for continued meaningful collaboration and cooperation in surveys and research as we work towards recovery of the species; and (3) the provision of conservation benefits to the Gila River ecosystem and the western yellow-billed cuckoo and its habitat that might not otherwise occur. As mentioned above, the Ranch is an important land manager in the Upper Gila River area. The surveys, conservation, restoration and management information submitted to the Service by the Ranch document that meaningful collaborative and cooperative work for the western yellow-billed cuckoo and its habitat will continue on their land. The Ranch has committed to several ongoing or future management, restoration, enhancement, and survey activities. The results of these activities promote long term protection and conserve the western yellow-billed cuckoo and its habitat on the Ranch.

Because so many important areas with western yellow-billed cuckoo habitat occur on private lands, collaborative relationships with private landowners are important in recovering the species. The western yellow-billed cuckoo and its habitat are expected to benefit substantially from voluntary landowner management actions that implement appropriate and effective conservation strategies. Where consistent with the discretion provided by the Act, it is beneficial to implement policies that provide positive incentives to private landowners to voluntarily conserve natural resources and that remove or reduce disincentives to conservation (Wilcove *et al.* 1996, entire; Bean 2002, pp. 1–7). Thus, it is important for the western yellow-billed cuckoo recovery to build on continued conservation activities such as these with a proven partner, and to provide positive incentives for other private landowners who might be considering implementing voluntary conservation activities, but who have concerns about incurring incidental regulatory or economic impacts.

The benefits of excluding this area from critical habitat will encourage the continued conservation, land management, and coordination with the Service. If this area is designated as critical habitat, we may jeopardize future conservation, research, and information sharing for the recovery of the western yellow-billed cuckoo.

Benefits of Exclusion Outweigh the Benefits of Inclusion—U-Bar Ranch

We have determined that the benefits of exclusion of U-Bar Ranch, with the implementation of their management plan, outweighs the benefits of inclusion, because the Ranch is currently managing western yellow-billed cuckoo and southwestern willow flycatcher breeding sites successfully and is committed to maintaining and enhancing habitats to benefit wildlife. The benefits of including the Ranch in critical habitat are few, and are limited to educational benefits since these lands are privately owned and thus one trigger for section 7 consultation for adverse modification is lacking. The benefits of excluding this area from designation as critical habitat for the western yellow-billed cuckoo are significant, and include encouraging the continuation of adaptive management measures such as monitoring, surveys, research, enhancement, and restoration activities that the Ranch currently implements and plans for the future. The exclusion of this area will likely also provide additional benefits to the species by encouraging and maintaining a cooperative working relationship with the Ranch.

Through their and their long-time lessee's efforts, FMC has demonstrated a commitment to management practices on the Ranch that have conserved and benefited the western yellow-billed cuckoo population in that area over the past decade. In addition, FMC had privately funded scientific research at and in the vicinity of the Ranch in order to develop data that has contributed to the understanding of habitat selection and distribution of the western yellow-billed cuckoo. Considering the past and

ongoing efforts of management and research to benefit the western yellow-billed cuckoo, done in coordination and cooperation with the Service, we find the benefits of excluding areas of the U-Bar Ranch outweigh the benefits of including it in critical habitat.

Exclusion Will Not Result in Extinction of the Species—U-Bar Ranch

We have determined that exclusion of areas of the Ranch will not result in extinction of the species, nor hinder its recovery because FMC management will ensure the long-term persistence and protection of western yellow-billed cuckoo habitat at the Ranch and because the Ranch is committed to greater conservation measures on their land than would be available through the designation of critical habitat. In addition, as discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Accordingly, we have determined that approximately 1,142 ac (462 ha) of land within Unit 33: NM–2 Gila River owned by the U-Bar Ranch are excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species.

Unit 40 (NM–9) Animas—Ladder Ranch, NM

In the revised proposed rule we identified the entire 608 ac (246 ha) of private land for exclusion in Unit 40 (NM–9) along Las Animas Creek owned by the Turner Ranch Properties. The Ladder Ranch (Ranch) is located near Truth or Consequences in Sierra County, New Mexico. The Nature Conservancy is a Conservation Guardian of the Turner Conservation Trust (which includes the Ladder Ranch). The Turner Conservation Trust has a goal of demonstrating how private lands can be innovatively managed to allow conservation and commerce to co-exist to sustain the natural diversity of the landscape. The Ranch has committed to management, protections of habitat, water availability, and survey activities according to the Trust Agreement with the Nature Conservancy and has demonstrated a commitment to conservation of the western yellow-billed cuckoo by completing formal presence/absence surveys for the species in 2016 and the management techniques described below. From the 2016 baseline study as well as from incidental observations, the riparian habitat provides refuge to western yellow-billed cuckoos suspected of nesting on the property.

The Ranch is managed as a working landscape, supporting bison ranching, commercial and recreational hunting, ecotourism, conservation and restoration projects, and scientific research. While these activities have been ongoing, listed or sensitive species such as the western yellow-billed cuckoo, the Chiricahua leopard frog (*Rana chiricahuensis*), Rio Grande chub (*Gila Pandora*), Rio Grande sucker (*Catostomus plebeius*) and black-tailed prairie dogs (*Cynomys ludovicianus arizonensis*) have all coexisted on the property. Examples of conservation pertaining to these sensitive species include pumping water to support Chiricahua leopard frog habitat and captive breeding/rearing of the species. Monitoring Rio Grande chub and Rio Grande sucker habitat, surveying the species, and translocating when appropriate are also examples of conservation. In order to protect sensitive species such as the western yellow-billed cuckoo and others located on the Ranch, the Ranch has constructed fencing and monitored browsing activity and provided supplemental feed and water when necessary to move bison away from sensitive areas and protect habitats. Considering the past and ongoing efforts of management and research to benefit the western yellow-billed cuckoo as well as other listed or sensitive species within the Ranch, we find the benefits of excluding the Ranch outweigh the benefits of including it in critical habitat.

Benefits of Inclusion—Ladder Ranch

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved. Since the western yellow-billed cuckoo was listed in 2014, there has been one formal consultation that overlapped with the property and was associated with the Copper Flat Mine and one informal consultation that resulted in concurrence of a ''not likely to adversely affect'' determination. Since the area is on private property, we expect that future consultations will also be rare and that critical habitat is not anticipated to have much effect due to lack of Federal actions. Given the anticipated lack of section 7 consultation, the dependence on private conservation actions is more important.

Another possible benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the western yellow-billed cuckoo and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable. However, the Ranch is already working with the Service and The Nature Conservancy to address the conservation and recovery of the species.

Based on this history of conservation and management practices, we have determined that designation of critical habitat would have few, if any, additional benefits beyond those that would result from the species being listed as threatened.

Benefits of Exclusion—Ladder Ranch

We have determined that significant benefits would be realized by excluding the Ranch that include: (1) The continuance and strengthening of our cooperative relationship with the Ranch to promote the conservation of the western yellow-billed cuckoo and its habitat; (2) the allowance for continued meaningful collaboration and cooperation in surveys and research as we work towards recovery of the species; and (3) the provision of conservation benefits to the Las Animas Creek ecosystem and the western yellow-billed cuckoo and its habitat that might not otherwise occur. The Ranch is an important land manager in the Las Animas Creek, a tributary to the Rio Grande. The surveys, conservation, restoration and management information submitted by the Ranch document that meaningful collaborative and cooperative work for the western yellow-billed cuckoo and other listed or sensitive species and their habitat will continue on their land. Through their Trust Agreement with The Nature Conservancy, the Ranch has committed to future management, protections of

habitat and water availability, and survey activities. We have determined that the results of these activities promote long term protection and conserve the western yellow-billed cuckoo and its habitat on the Ranch. The benefits of excluding this area from critical habitat will encourage the continued conservation, land management, and coordination with the Service by granting the Ranch's request for exclusion and acknowledging their history of conservation for the species.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Ladder Ranch

We have determined that the benefits of exclusion of Ladder Ranch, with the implementation of actions for conservation of western yellow-billed cuckoo habitat, outweighs the benefits of inclusion. The benefits of including the Ranch in critical habitat are low, and are limited to educational benefits since these lands are privately owned and the trigger for section 7 consultation for adverse modification of habitat due to critical habitat is lacking. Past, present, and future coordination with the landowner has provided and will continue to provide sufficient educational benefits regarding western yellow-billed cuckoo habitat and conservation needs on these lands, such that there would be minimal additional educational benefit from designation of critical habitat. The benefits of excluding this area from designation as critical habitat for the western yellow-billed cuckoo are significant, and include encouraging the continuation of adaptive management measures such as monitoring, surveys, research, enhancement, and habitat protection that the Ranch currently implements and plans for the future. The exclusion of this area will likely also provide additional benefits to the species by encouraging and maintaining a cooperative working relationship with the Ranch. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area.

Exclusion Will Not Result in Extinction of the Species—Ladder Ranch

We have determined that exclusion of areas of the Ranch will not result in extinction of the species, nor hinder its recovery because management by The Nature Conservancy and Turner Ranch Properties will ensure the long-term persistence and protection of western yellow-billed cuckoo habitat at the Ranch, and because the Ranch is committed to greater conservation measures on their land than would be available through the designation of critical habitat. In addition, as discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Accordingly, we have determined approximately 608 ac (246 ha) of land within Unit 40 (NM–9) Animas owned by Turner Ranch Properties should be excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species.

Unit 41 (NM–10) Selden Canyon and Radium Springs

In New Mexico, along the lower Rio Grande south of Caballo Reservoir, the Elephant Butte Irrigation District (EBID) and the El Paso County Water Improvement District No. 1 (EPWD) manages the water from the Rio Grande in Elephant Butte Reservoir for agricultural use, and the International Boundary and Water Commission (IBWC) (a Federal Agency) is responsible for maintaining levees and channel irrigation facilities, and floodway management. The entire approximately 237 ac (96 ha) of Selden Canyon and Radium Springs Unit 41 has been identified for exclusion from critical habitat. Together, the EBID, EPWD, and IBWC have planned and implemented a large-scale riparian habitat improvement project along the lower Rio Grande from Percha Dam to American Dam (termed the lower Rio Grande Elephant Butte Irrigation District Canalization and Conservation Project).

The lower Rio Grande south of Caballo Reservoir is managed by the IBWC, whose mission is to provide bi-national solutions to issues that arise during the application of United States—Mexico treaties regarding boundary demarcation, national ownership of waters, sanitation, water quality, and flood control in the border region. Water deliveries to downstream water users for irrigation and other purposes are managed by EBID which operates, maintains, and owns the irrigation distribution system. This irrigation distribution system was constructed by Reclamation and includes canals, laterals, drains, waste-ways, and maintenance roads on both riverbanks, and structures. State statutes provide for the equitable distribution of water from the Elephant Butte Reservoir to all of its water users and generally govern how EBID operates and manages the water it provides to its users.

Prior to the listing of the western yellow-billed cuckoo, IBWC's management of the lower Rio Grande emphasized canalization to facilitate efficient water deliveries and flood control. As a result, the channel narrowed and degraded, with limited areas for overbank flooding to support expansive native riparian communities. The vast majority of floodplains, which would have formerly supported native riparian vegetation, including some western yellow-billed cuckoo habitat, are now subject to substantial human impacts by agriculture, urbanization, recreation, vegetation encroachment and management, grazing, fire, and other stressors. IBWC has worked for ten years to develop habitat restoration areas under a 2009 Record of Decision. From 2009 to 2019, IBWC planted approximately 123,000 trees and shrubs on more than 500 ac (202 ha) of restoration sites, with about 100 ac (40 ha) targeting the creation of native canopy woodland habitat that will eventually be beneficial to the western yellow-billed cuckoo and developed a River Management Plan in 2014 (IBWC 2014, entire). Additionally, the practice of mowing willow trees has been ceased, which has already added to the distribution and abundance of riparian vegetation. Plus, western yellow-billed cuckoo surveys have and will continue to occur, as will vegetation monitoring.

In 2016, IBWC updated their River Management Plan to incorporate the western yellow-billed cuckoo (IBWC 2016, entire) and includes conservation measures such as avoidance areas around western yellow-billed cuckoo observations, formal surveys to be completed on an annual basis, and restoration features to target western yellow-billed cuckoo habitat suitability. Measures to protect the western yellow-billed cuckoo as well as habitat restoration sites targeting potential cuckoo habitat are included in the updated River Management Plan. The goal is to provide western yellow-billed cuckoo habitat in the lower Rio Grande, while still delivering water, as required by IBWC and EBID. The concerted effort by multiple agencies and groups to improve habitat in this reach of the Rio Grande has already provided habitat benefits to the southwestern willow flycatcher and are expected to provide benefit to the western yellow-billed cuckoo as well. EBID and EPWD have voluntarily worked with NFWF to develop a water transaction program that will allow IBWC and other partners to purchase or lease water that can be used to flood riparian habitat similar to

an agricultural crop. The participation by EBID is crucial to the continued habitat improvement of this river reach for the benefit of the western yellow-billed cuckoo. The number of estimated western yellow-billed cuckoo territories detected annually in this unit from 2014 to 2019 ranged from 2 to 7 (Reclamation 2019, p. 46).

Benefits of Inclusion—Canalization and Conservation Project, NM

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved.

There may be some benefits from the designation of critical habitat along the lower Rio Grande, primarily because it would require Federal agencies to perform additional review of their project implementation. While this area was not previously designated as western yellow-billed cuckoo critical habitat, the IBWC has already undergone section 7 consultation due to the occurrence of southwestern willow flycatchers and western yellow-billed cuckoos along the lower Rio Grande. With the implementation of the western yellow-billed cuckoo conservation actions included in the Canalization and Conservation Project, which are expected to avoid the species in construction activities and result in more breeding habitat and territories, we provided concurrence to IBWC's determination that their actions would not likely to adversely affect the western yellow-billed cuckoo (Service 2017, pp. 1–2). Any future Federal projects implemented by other agencies with responsibilities along the lower Rio Grande, such as Federal Highway Administration, or from the BLM on surrounding lands, would require evaluation under section 7 of the Act. However, because western yellow-billed cuckoos occur along the lower Rio Grande during the breeding season, exhibit a certain amount of site fidelity and their habitat is protected due to the long-term and extensive western yellow-billed cuckoo habitat conservation benefits resulting from the EBID's Canalization and Conservation Project, the incremental benefits of designating critical habitat at Selden Canyon and Radium Springs are minimized.

Another important benefit of including lands in a critical habitat designation is that the designation can serve to educate landowners, agencies, tribes, and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high conservation value for certain species. Any information about the western yellow-billed cuckoo that reaches a wide audience, including parties engaged in conservation activities, is valuable. The designation of critical habitat may also inform implementation of other Federal laws, such as NEPA or the Clean Water Act. These laws analyze the potential for projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

We have determined that there would be little, if any educational and informational benefit gained from including the lower Rio Grande within the designation because this area is well known as an important area for western yellow-billed cuckoo management and recovery. For example, Federal agencies and stakeholders integral to water and land management along the lower Rio Grande are involved in conducting western yellow-billed cuckoo surveys, initiated section 7 consultation, and have planned and are implementing western yellow-billed cuckoo conservation actions. Consequently, we have determined that the informational benefits and support for implementing other environment regulations have already occurred through past actions even in the absence of critical habitat.

Benefits of Exclusion—Canalization and Conservation Project, NM

The benefits of excluding the lower Rio Grande at Selden Canyon and Radium Springs from designated critical habitat include: (1) Continued and strengthened effective working relationships with IBWC, EBID, Audubon, and other stakeholders and partners; (2) meaningful collaboration toward western yellow-billed cuckoo recovery, including; (3) the development of a water transaction program that provides irrigation water to restoration sites that might not otherwise occur and that are expected to provide benefit to western yellow-billed cuckoos. EBID and constituents are concerned of the impacts of a critical habitat designation on their abilities to manage their water rights, as stated in their comments on the revised proposed rule (see Summary of Comments and Recommendations). Through fostering a cooperative working relationship with EBID, IBWC and others conducting surveys and habitat monitoring, and undertaking habitat restoration and enhancement projects are realizing western yellow-billed cuckoo conservation benefits. Without EBID's support in carrying out these restoration efforts and implementing the water transaction program, significant conservation benefits to the western yellow-billed cuckoo could be lost. For these reasons, we have determined that fostering our working relationship with EBID and their constituents is important to maintain western yellow-billed cuckoo conservation benefits.

Proactive voluntary conservation efforts have and will continue to be important to achieve western yellow-billed cuckoo recovery. As the water manager for the lower Rio Grande, EBID's willingness to participate and coordinate the water transaction program is crucial to creating successful western yellow-billed cuckoo restoration sites. Their agreement to work with IBWC, NFWF, and others demonstrates that meaningful, collaborative, and cooperative work for the western yellow-billed cuckoo and its habitat will continue within their jurisdiction. Therefore, we have determined that the results of these voluntary restoration activities will promote long-term protection and conserve the western yellow-billed cuckoo and its habitat within the lower Rio Grande. The benefits of excluding this area from critical habitat will encourage the continued cooperation and development of the water transaction program which will allow IBWC to provide water to the habitat restoration sites.

Excluding the lower Rio Grande from the critical habitat designation that are within the jurisdiction of IBWC will provide significant benefits to the western yellow-billed cuckoo through sustaining and enhancing the working relationship between the Service, IBWC, EBID, and other stakeholders. The willingness of IBWC and EBID to work with the Service on innovative ways to manage and develop western yellow-billed cuckoo habitat will reinforce our partnership that is important in order to achieve western yellow-billed cuckoo recovery. We can often achieve greater conservation through voluntary actions than through implementing a critical habitat regulation on a project-by-project basis.

By excluding the Rio Grande south of Caballo Dam in New Mexico from critical habitat designation, we are also encouraging new partnerships with other landowners and jurisdictions to protect the western yellow-billed cuckoo and other listed or sensitive species. We consider this voluntary partnership in conservation vital to our understanding of the status of species on non-Federal lands and necessary for us to implement recovery actions such as habitat protection and restoration, and beneficial management actions for species.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Canalization and Conservation Project, NM

We have reviewed and evaluated the lower Rio Grande at Selden Canyon and Radium Springs, and have concluded that the benefits of exclusion under section 4(b)(2) of the Act outweigh the benefits of including these areas as western yellow-billed cuckoo critical habitat. The incremental regulatory benefits of including these lands within the critical habitat designation are minimized because the regulatory, educational, and ancillary benefits that would result from critical habitat designation are similar to the benefits already afforded through the IBWC 2016 River Management Plan and protections associated with the listing of the western yellow-billed cuckoo. In addition, the 2017 Biological Assessment associated with IBWC's Long-Term River Management of the Rio Grande Canalization Project (IBWC 2017, entire) commits to not removing any nesting habitat for western yellow-billed cuckoos or otherwise causing displacement of the species. The implementation of IBWC collaborative conservation project provides for significant conservation, management, improvement, and protection of habitat for western yellow-billed cuckoo conservation.

The Service has created close partnerships through the development of IBWC's restoration plan, which incorporates protections and management objectives for the western yellow-billed cuckoo and the habitat upon which it depends for breeding, sheltering, and foraging activities. The conservation strategy identified in IBWC's 2016 River Management Plan, along with our close coordination with IBWC, EBID and other partners, addresses the identified threats to western yellow-billed cuckoos and its habitat. These actions serve to manage and protect habitat needed for western yellow-billed cuckoo above those conservation measures which may be required if the area was designated as critical habitat.

Exclusion of these lands from critical habitat will help preserve the partnerships we have developed with local jurisdictions and project proponents through the development and ongoing implementation of their conservation plan. These partnerships are focused on western yellow-billed cuckoo conservation and securing conservation benefits that will lead to recovery. Because we now have a consistent western yellow-billed cuckoo population along the lower Rio Grande, we are relying on the conservation efforts of the many stakeholders to create, manage, and maintain western yellow-billed cuckoo habitat. We expect that the results of implementing these western yellow-billed cuckoo conservation actions will generate benefits beyond those that could be achieved from project-by-project evaluation through a critical habitat designation. The conservation gains to the western yellow-billed cuckoo identified south of Caballo Dam are more beneficial than designation of critical habitat because of the development of the water transaction program. Our partnership, along with the 2017 biological opinion for IBWC's canalization project and restoration sites [which includes the 2016 River Management Plan (updated to incorporate the western yellow-billed cuckoo in 2018) and the water transaction program], ensure implementation of the protections and management actions identified within their plan. Therefore, the relative benefits of excluding critical habitat on these lands are substantial and outweigh the benefits of including the area as critical habitat.

We have determined that the additional regulatory benefits of designating occupied areas as western yellow-billed cuckoo critical habitat, such as protection afforded through the section 7(a)(2) consultation process, are minimal. Furthermore, the conservation objectives identified by the IBWC Plan, in conjunction with our partnership with the EBID and others will provide a greater benefit to the species than critical habitat designation. We also conclude that the educational and ancillary benefits of designating critical habitat for the western yellow-billed cuckoo at Selden Canyon and Radium Springs would be negligible because of the partnership established between the Service and IBWC, and the management objectives identified in the biological assessment and biological opinion. Therefore, in consideration of the relevant impact to current and future partnerships, as summarized in the Benefits of Exclusion section above, we determined the significant benefits of exclusion outweigh the benefits of critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—Canalization and Conservation Project, NM

We determine that the exclusion of the lower Rio Grande at Selden Canyon and Radium Springs from the designation of critical habitat for the western yellow-billed cuckoo will not result in extinction of the species because current conservation efforts under IBWC's River Management Plan adequately protect the geographical areas containing the physical or biological features essential to western yellow-billed cuckoo conservation. As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. In our Biological Opinion, the Service provided concurrence that implementation of the IBWC Canalization and Conservation Project and associated restoration plans was not likely to adversely affect the species (Service 2017, pp. 1–2), and is likely to benefit the species. Therefore, based on the benefits described above, we have determined that this exclusion would not result in the extinction of the western yellow-billed cuckoo, and are excluding the entire 237 ac (96 ha) of the lower Rio Grande at Selden Canyon and Radium Springs from this final critical habitat designation.

Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act

HCPs for incidental take permits under section 10(a)(1)(B) of the Act provide for partnerships with non-Federal entities to minimize and mitigate impacts to listed species and their habitat. In some cases, HCP permittees agree to do more for the conservation of the species and their habitats on private lands than designation of critical habitat would provide alone. We place great value on the partnerships that are developed during the preparation and implementation of HCPs.

CCAAs and SHAs are voluntary agreements designed to conserve candidate and listed species, respectively, on non-Federal lands. In

exchange for actions that contribute to the conservation of species on non-Federal lands, participating property owners are covered by an ''enhancement of survival'' permit under section 10(a)(1)(A) of the Act, which authorizes incidental take of the covered species that may result from implementation of conservation actions, specific land uses, and, in the case of SHAs, the option to return to a baseline condition under the agreements. The Service also provides enrollees assurances that we will not impose further land-, water-, or resource-use restrictions, or require additional commitments of land, water, or finances, beyond those agreed to in the agreements.

When we undertake a discretionary section 4(b)(2) exclusion analysis, we will always consider areas covered by an approved CCAA/SHA/HCP, and generally exclude such areas from a designation of critical habitat if three conditions are met:

(1) The permittee is properly implementing the CCAA/SHA/HCP and is expected to continue to do so for the term of the agreement. A CCAA/SHA/HCP is properly implemented if the permittee is, and has been, fully implementing the commitments and provisions in the CCAA/SHA/HCP, implementing agreement, and permit.

(2) The species for which critical habitat is being designated is a covered species in the CCAA/SHA/HCP, or very similar in its habitat requirements to a covered species. The recognition that the Services extend to such an agreement depends on the degree to which the conservation measures undertaken in the CCAA/SHA/HCP would also protect the habitat features of the similar species.

(3) The CCAA/SHA/HCP specifically addresses the habitat of the species for which critical habitat is being designated and meets the conservation needs of the species in the planning area.

We have determined that the plans, HCPs, or Agreements identified in Table 3, fulfill the above criteria, and we are excluding the non-Federal lands covered by these plans that provide for the conservation of western yellow-billed cuckoo.

Unit 1 (CA/AZ–1) Colorado River 1 and Unit 2 (CA/AZ–2) Colorado River 2 and Unit 3 (AZ–1) Bill Williams River—Lower Colorado River Multi-Species Conservation Program (LCR MSCP)

The Lower Colorado River Multi-Species Conservation Program HCP (2004, entire) was developed for areas along the lower Colorado River along the borders of Arizona, California, and Nevada from Lake Mead to Mexico, in the Counties of La Paz, Mohave, and Yuma in Arizona; Imperial, Riverside, and San Bernardino Counties in California; and Clark County in Nevada. In 1995, U.S. Department of the Interior agencies; water, power, and wildlife resources agencies from Arizona, California, and Nevada; Native American tribes; environmental interests; and recreational interests agreed to form a partnership to develop and implement a long-term endangered species compliance and management program for the historical floodplain of the lower Colorado River. The goal was to facilitate the development of an ecosystem-based HCP and coordination with the various LCR MSCP Federal partners. Reclamation has taken lead for coordinating activities under the LCR MSCP.

A Steering Committee provides oversight to Reclamation's LCR MSCP Program Manager, operating under a Funding and Management Agreement that was prepared among Federal, State, local, and tribal party participants (LCR MSCP 2007, p. 1–3). The potentially affected parties and other interested parties established a public process for developing the required documents and plans. Various public agencies and other non-governmental groups have participated in developing the various components of the LCR MSCP. The LCR MSCP primarily covers activities associated with water storage, delivery, diversion, and hydroelectric production. The record of decision was signed by the Secretary of the Interior on April 2, 2005. An important catalyst of the effort was a 1997 jeopardy biological opinion for the southwestern willow flycatcher issued to Reclamation for lower Colorado River operations (Service 2005a, entire). The Federal agencies involved in the LCR MSCP include Reclamation, Bureau of Indian Affairs (BIA), NPS, BLM, WAPA, and the Service. Native American Tribes involved in the LCR MSCP and owning lands within the planning area include the Colorado River Indians Tribes, Fort Mohave Tribe, Cocopah Tribe, Chemehuevi Tribe, and Fort Yuma (Quechan) Tribe.

The LCR MSCP planning area primarily surrounds proposed western yellow-billed cuckoo critical habitat along the lower Colorado River from Lake Mead to the southerly international border. Portions of the Colorado River, Lake Mead, Virgin River, and Muddy River in Arizona, Utah, and Nevada are included where they surround Lake Mead (including the conservation space of Lake Mead, which extends up the Colorado River to Separation Canyon). Also, a portion of the Bill Williams River at the Colorado River confluence at Lake Havasu occurs within the LCR MSCP planning area. The LCR MSCP permittees will create and maintain 4,050 ac (1,639 ha) of western yellow-billed cuckoo habitat, reduce the risk of loss of created habitat to wildfire, replace created habitat affected by wildfire, and avoid and minimize operational and management impacts to western yellow-billed cuckoos over the 50-year life of the permit (2005 to 2055) (Lower Colorado River Multi-Species Conservation Program 2004, pp. 5–30–5–36, Table 5–10, 5–58–5–60). Additional research, management, monitoring, and protection of western yellow-billed cuckoos will occur. In addition to western yellow-billed cuckoo habitat creation and subsequent management, the LCR MSCP provides funds to ensure existing western yellow-billed cuckoo habitat is maintained. Western yellow-billed cuckoo management associated with the LCR MSCP is conducted in conjunction and coordinated with management occurring on the National Wildlife Refuges (Bill Williams, Havasu, Cibola, and Imperial) and Tribal lands (Colorado River Indians Tribes, Fort Mohave Tribe, Cocopah Tribe, Chemehuevi Tribe, and Fort Yuma (Quechan) Tribe) along the LCR and within the LCR MSCP planning area.

On the lower Colorado River and Bill Williams River, we identified 77,726 ac (31,468 ha) of proposed critical habitat for exclusion within the LCR MSCP planning area and off-site conservation areas of La Paz, Mohave, and Yuma Counties in Arizona; and Imperial, Riverside, and San Bernardino Counties in California. Western yellow-billed cuckoo management within the proposed Units in the LCR MSCP planning area is occurring on National Wildlife Refuges (Bill Williams, Havasu, Cibola, and Imperial) and Tribal lands (Colorado River Indian Tribes, Fort Yuma (Quechan) Tribe, Cocopah Tribe, and Fort Mojave Tribe). During the breeding season the area is considered to have been occupied at the time of listing and is currently occupied.

Reclamation has provided protection and benefits to this species since 2005 and conducts annual monitoring of the species. Reclamation requested excluding habitat within the entire 914,200 ac (369,964 ha) LCR MSCP planning area and off-site conservation areas (LCR MSCP implementation area) from critical habitat under the rationale that conservation measures described in the LCR MSCP Habitat Conservation Plan provide protection and benefits to the yellow-billed cuckoo and its habitat

(LCRMSCP 2004, pp. 1–506; Reclamation 2020a, p. 2). Because the entire 914,200 ac (369,964 ha) implementation area was not proposed as critical habitat, we are only analyzing exclusion of the areas proposed as critical habitat.

Conservation and development of western yellow-billed cuckoo and southwestern willow flycatcher habitat is a priority for all the Federal, State, Tribal, and private land managers within the LCR MSCP planning area. In particular, the Bill Williams River, Havasu, Cibola, and Imperial NWRs and Fort Mohave, Colorado River Indian Tribe, and Quechan Tribes are implementing conservation strategies to manage and enhance riparian resources along the Colorado River. Reclamation, in its lead role as Program Manager for the LCR MSCP, requested exclusion for areas proposed as critical habitat within the LCR MSCP boundary. Information regarding their specific activities and management on their lands is identified in our supporting information (Service 2020b, entire).

Benefits of Inclusion—Lower Colorado River Multi-Species Conservation Plan (LCR MSCP)

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved. The areas within the LCR MSCP planning area are occupied by western yellow-billed cuckoos and have undergone section 7 consultation. There may be some minor benefits from the designation of critical habitat along the length of the LCR for land management actions because of the additional review required by Federal actions; most likely those occurring on Service NWRs, BLM, and NPS land. The western yellow-billed cuckoo and southwestern willow flycatcher are well known as a listed species using the LCR for migration and for nesting. Because these Federal agencies manage open space for public use and wildlife, the types of actions evaluated would mostly be associated with recreation, hunting, habitat management, and public access, and possibly some land resource use.

The benefits of western yellow-billed cuckoo critical habitat designation on lands managed by Federal partners within the LCR MSCP planning area are limited. Reclamation manages lower Colorado River water storage, river regulation, and channel maintenance such that the river stays within its incised channel and can no longer flow onto the adjacent floodplain. As a result, Reclamation has no discretion to change these water management actions to allow a better functioning stream to improve the riparian forest. Improving the duration, magnitude, and timing of river flow would generate overbank flooding, create and recycle riparian habitat, and, therefore, improve the quality and abundance of western yellow-billed cuckoo habitat. Because of the lack of flooding and the prevention of overbank flows, the floodplain can no longer support the pre-dam riparian forest.

While land managers (BLM, NPS, Service NWRs and Tribes) along the LCR floodplain do conduct discretionary actions on their lands, the success of their conservation actions and impacts of other actions to restore pre-dam riparian forests are limited by the impacts of water management. Overall, the riparian forest and western yellow-billed cuckoo habitat managed by these land management agencies are not expected to be harmed further by site-specific land management actions because the quality of vegetation has already been degraded. To the extent that remaining patches of riparian habitat and western yellow-billed cuckoo habitat continue to exist, they are of great value for western yellow-billed cuckoo conservation. As a result, past section 7 consultations on land management agency actions within the proposed critical habitat along the LCR show that land management agencies conserve existing riparian vegetation and explore innovative strategies outside of the restrictions on water management to improve vegetation quality that could be used by western yellow-billed cuckoos. Because the regulated stream flow has caused habitat degradation and existing water management operations prevent any change in water management that can improve the riparian forest, land management agencies are unable to impact these river flow conditions, nor are they able to impact river flow conditions through non-discretionary mandatory reasonable and prudent measures or alternatives resulting from any possible future section 7 consultation. Therefore, there are limited benefits to designating critical habitat on lands managed by Federal and Tribal partners within the LCR MSCP implementation.

We also have determined that few additional benefits would be derived from including the five tribal areas within the LCR MSCP planning area as western yellow-billed cuckoo critical habitat, beyond what will be achieved through the implementation of their management plans. No different than our description above, we expect that the degraded environmental baseline caused by water storage, river regulation, and channel maintenance would cause similar evaluations and conclusions in section 7 consultations on tribal lands within the LCR MSCP planning area. Additionally, because these tribes are also implementing their Flycatcher Management Plans or Flycatcher and Cuckoo Management Plans that preserve existing habitat, similarly within the limitations caused by regulation of the Colorado River, there are likely few regulatory benefits to be gained from a designation of western yellow-billed cuckoo critical habitat.

Another important benefit of including lands in a critical habitat designation is that the designation can serve to educate landowners, agencies, tribes, and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high conservation value for certain species. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Some educational and conservation benefit from reinforcing other environmental laws and regulations may also be gained from including the LCR MSCP planning area within the western yellow-billed cuckoo critical habitat designation. However, this conservation benefit can also be accomplished through ongoing education being conducted by the LCR MSCP. As long as the educational benefit is ongoing, the support of other laws and regulations is minimized. Ongoing outreach that educates local communities about the LCR MSCP program activities conducted to benefit species along the river including conservation-themed community events, professional conferences, Project Water Education for Teachers (Wet) workshops, school programs, youth conservation corps coordination, volunteer opportunities, and outdoor expos (LCR MSCP 2020, pp. 303–304). The annual Colorado River Terrestrial and Riparian meeting and Las Vegas

Science and Technology Festival are two events funded by the MSCP. Although this is a well-known southwestern willow flycatcher and western yellow-billed cuckoo management area, we continue to learn about these species' biology and potential impacts from proposed projects may emerge at any time. Educating individuals, agencies, and organizations with existing or updated western yellow-billed cuckoo biology is an ongoing process. Through the development and implementation of the LCR MSCP, the 2014 and 2020 western yellow-billed cuckoo critical habitat proposals, ongoing studies, the development of land management plans, and the creation of specific tribal management plans, the value of the LCR and riparian habitat for the western yellow-billed cuckoo is well established. Some educational benefits have already occurred through past actions even though the LCR MSCP planning area is not currently designated as critical habitat. The importance of the LCR MSCP implementation area for western yellow-billed cuckoo conservation to meet conservation goals established for the LCR is well understood by managing agencies, Native American tribes, private industry, and public, State, and local governments. The LCR MSCP provides new information gained from its studies to all parties through reports, meetings, coordination, and outreach. Management recommendations developed from these studies include avoiding disturbance activities in occupied habitat through the end of September to allow late-breeders to raise young and the need to develop and implement management actions that ensure long-term suitability of created habitat.

Benefits of Exclusion—Lower Colorado River Multi-Species Conservation Plan (LCR MSCP)

The benefits of excluding the LCR MSCP management areas from the designation are considerable, and include the conservation measures described above (land acquisition, management, and habitat development) and those associated with implementing conservation through enhancing and developing partnerships.

A small benefit of excluding the LCR from critical habitat includes some reduction in administrative costs associated with engaging in the critical habitat portion of section 7 consultations due the area being occupied and the species being listed as threatened. Administrative costs include time spent in meetings, preparing letters and biological assessments, and in the case of formal consultations, the development of the critical habitat component of a biological opinion. However we anticipate that the costs to perform the additional critical habitat and associated adverse modification analysis would not be significant.

The exclusion of the LCR from critical habitat as a result of the LCR MSCP can help facilitate other cooperative conservation activities with other similarly situated dam operators or landowners. Continued cooperative relations with the States and a myriad of stakeholders is expected to influence other future partners and lead to greater conservation than would be achieved through multiple site-by-site, project-by-project efforts, and associated section 7 consultations. With the current degraded condition of the environmental baseline and limitations associated with changes to dam operations, the LCR MSCP conservation measures commit the program to create and manage at least 5,940 ac (2,404 ha) of cottonwood-willow and 1,320 ac (534 ha) of honey mesquite land cover types to provide habitat for 14 species including the western yellow-billed cuckoo (Reclamation 2020a, p. 7). A mosaic of these habitat types in patches of at least 25 ac (10 ha) and totaling at least 4,050 ac (1,639 ha) is required to be created and managed for western yellow-billed cuckoos (LCR MSCP 2004, entire). Between 2005 and 2019, the LCR MSCP has created 4,117 ac (1,666 ha) of cottonwood-willow and 1,800 ac (728 ha) of mesquite habitat (LCR MSCP 2020, pp. 14, 15, 94; Reclamation 2020a, p. 7) in critical habitat Units 1, 2, and 3.

The benefits of excluding lands within the LCR MSCP plan area from critical habitat designation include recognizing the value of conservation benefits associated with these HCP actions; encouraging actions that benefit multiple species; encouraging local participation in development of new HCPs; and facilitating the cooperative activities provided by the Service to landowners, communities, and counties in return for their voluntary adoption of the HCP.

The LCR MSCP will help generate important status and trend information for western yellow-billed cuckoo recovery. In addition to specific western yellow-billed cuckoo conservation actions, the development and implementation of this HCP provides regular monitoring of western yellow-billed cuckoo habitat, distribution, and abundance over the 50-year permit. Most of the western yellow-billed cuckoos successfully breeding along the LCR since 2005 have been in habitat created and managed by the LCR in five created conservation areas: Beal Lake Conservation Area on Havasu NWR, Cibola NWR Unit #1 Conservation Area, Cibola Valley Conservation Area, Palo Verde Ecological Reserve on California Department of Fish and Wildlife land, and Yuma East Wetlands on city of Yuma, Quechan Indian Tribe lands, and Arizona Game and Fish Department lands (LCR MSCP 2020, pp. 162–163, 179–249; Reclamation 2020a, pp. 7–8). Although nesting was not confirmed in other sites, western yellow-billed cuckoos were detected at Planet Ranch on the Bill Williams River, Laguna Division Conservation Area near Yuma, and Hunters Hole at the southern end of the Limitrophe (Parametrix, Inc. and Southern Sierra Research Station 2019, entire). They have also been documented nesting in other habitat areas between southern Nevada and the Southern International Border with Mexico.

Failure to exclude the LCR MSCP planning area could be a disincentive for other entities contemplating partnerships as it would be perceived as a way for the Service to impose additional regulatory burdens once conservation strategies have already been agreed to through our permitting process. Private entities are motivated to work with the Service collaboratively to develop voluntary HCPs because of the regulatory certainty provided by an incidental take permit under section 10(a)(1)(B) of the Act with the No Surprises Assurances. This collaboration often provides greater conservation benefits than could be achieved through strictly regulatory approaches, such as critical habitat designation. The conservation benefits resulting from this collaborative approach are built upon a foundation of mutual trust and understanding. It has taken considerable time and effort to establish this foundation of mutual trust and understanding, which is one reason it often takes several years to develop a successful HCP. Excluding this area from critical habitat would help promote and honor that trust by providing greater certainty for permittees that once appropriate conservation measures have been agreed to and consulted on for listed and sensitive species additional consultation will not be necessary.

HCP permittees and stakeholders submitted comments that they view critical habitat designation along the LCR as unwarranted and an unwelcome intrusion to river operations, and an erosion of the regulatory certainty that

is provided by their incidental take permit and the No Surprises assurances. Additionally, the LCR MSCP partners and stakeholders sent comments of support for exclusion of all the LCR MSCP partners within the planning area, specifically Service NWRs because they were not initially identified as locations we were considering for exclusion. Having applicants understand the Service's commitment will encourage continued partnerships with these permittees that could result in additional conservation plans or additional lands enrolled in HCPs.

Our collaborative relationships with the LCR MSCP permittees clearly make a difference in our partnership with the numerous stakeholders involved and influence our ability to form partnerships with others. Concerns over perceived added regulation potentially imposed by critical habitat harms this collaborative relationship by leading to distrust. Our experience has demonstrated that successful completion of one HCP has resulted in the development of other conservation efforts and HCPs with other landowners. Partners associated with the LCR MSCP also established HCPs with the Service in central Arizona.

There are additional considerable benefits from excluding the areas owned by or held in trust for the five tribes along the LCR including the advancement of our partnership with the tribes and for the tribes to develop and implement tribal conservation and natural resource management plans for their lands and resources, which includes the western yellow-billed cuckoo. Benefits associated with excluding tribes and other landowners and managers also include: (1) The maintenance of effective working relationships to promote the conservation of the western yellow-billed cuckoo and its habitat; (2) the allowance for continued meaningful collaboration and cooperation; (3) the provision of conservation benefits to riparian ecosystems and the western yellow-billed cuckoo and its habitat that might not otherwise occur; and (4) the reduction or elimination of administrative and/or project modification costs as analyzed in the economic analysis.

During the development of the 2014 and 2020 western yellow-billed cuckoo critical habitat proposals, we sought and received input from tribes. We provided technical assistance to tribes requesting assistance to develop measures to conserve the western yellow-billed cuckoo and its habitat on their lands. These measures are contained within the management and conservation plans that we have in our supporting record for this decision (see discussion above). These proactive actions were conducted in accordance with Secretarial Order 3206, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'' (June 5, 1997); the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2); and Secretarial Order 3317, ''Department of Interior Policy on Consultation with Indian Tribes'' (December 1, 2011). We have determined that these tribes should be the governmental entities to manage and promote western yellow-billed cuckoo conservation on their lands. During our communication with these tribes, we recognized and endorsed their fundamental right to provide for tribal resource management activities, including those relating to riparian ecosystems.

The benefits of excluding this HCP from critical habitat designation include relieving Federal agencies, State agencies, landowners, tribes, communities, and counties of any additional regulatory burden for water management actions that might be imposed by critical habitat. The LCR MSCP took many years to develop and, upon completion, became a river long conservation plan that is consistent with the western yellow-billed cuckoo recovery objectives within the planning area. This HCP provides western yellow-billed cuckoo conservation benefits and commitments toward habitat development and management, and western yellow-billed cuckoo surveys and studies that could not be achieved through project-by-project section 7 consultations. Imposing an additional regulatory review after the HCP is completed, solely as a result of the designation of critical habitat, may undermine conservation efforts and partnerships in many areas. In fact, it could result in the loss of species' benefits if future participants abandon the voluntary HCP process. Designation of critical habitat along the LCR could be viewed as a disincentive to those entities currently developing HCPs or contemplating them in the future. We find the section 7 consultation process for a designation of critical habitat, above and beyond that which is already required for the species, is unlikely to result in additional protections for the western yellow-billed cuckoo on lands within the LCR MSCP planning and implementation area (which includes NPS, Service, BLM, tribal lands, and non-Federal lands).

Benefits of Exclusion Outweigh the Benefits of Inclusion—Lower Colorado River Multi-Species Conservation Plan (LCR MSCP)

We have determined that the benefits of excluding the LCR MSCP planning area along the LCR within the States of Arizona and California from the designation of western yellow-billed cuckoo critical habitat on all Federal, State, Tribal, and non-Federal lands outweigh the benefits of inclusion. In our determination, we considered and found that the HCP meets our criteria for exclusion for HCPs (see *Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act*). Implementation of western yellow-billed cuckoo conservation included within the LCR MSCP planning area, combined with the conservation efforts of other land managers, has already created and will continue to create and manage habitat that benefits breeding western yellow-billed cuckoo and other riparian dependent species.

Under section 7 of the Act, critical habitat designation will provide little additional benefit to the western yellow-billed cuckoo within the boundaries of the LCR MSCP. The catalyst for the LCR MSCP was largely a result of the jeopardy biological opinion (Service 1997, entire) for the southwestern willow flycatcher to Reclamation for its LCR operations (Service 2005a, entire). The Law of the River, which protects the regulation and delivery of Colorado River water to the western United States, prevents altering the regulation of the Colorado River for the benefit of a more naturally functioning system, which can create and recycle southwestern willow flycatcher and western yellow-billed cuckoo habitat. As a result, the development of the LCR MSCP and its Implementing Agreement are designed to ensure southwestern willow flycatcher and western yellow-billed cuckoo conservation within the planning area and includes management measures to protect, restore, enhance, manage, research, and monitor western yellow-billed cuckoo habitat (along the Colorado River and at mitigation sites). The adequacy of LCR MSCP conservation measures to protect the then candidate western yellow-billed cuckoo and its habitat have undergone evaluation under a section 7 consultation conference opinion under the Act, reaching a non-jeopardy conclusion. Therefore, the benefit of including the LCR MSCP planning area to require section 7 consultation for critical habitat is minimized.

The commitment by the LCR MSCP partners to western yellow-billed cuckoo conservation throughout the planning area is considerable and we have determined that the LCR MSCP has met the conditions to be excluded from critical habitat as identified above (see *Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act*). The LCR MSCP partners commit through implementation of their permit to developing, managing, and protecting 4,050 ac (1,639 ha) of western yellow-billed cuckoo nesting habitat and has already created 4,117 ac (1,666 ha) of cottonwood-willow and 1,800 ac (728 ha) of mesquite habitat within the boundaries of their planning area (LCR MSCP 2020, pp. 5, 94; Reclamation 2020a, p. 7). Additional habitat to be created is in the planning stage. As described above, much of these habitats are expected to occur within irrigated agricultural fields adjacent to river. The culmination of these efforts is expected to maintain, develop and improve migration, dispersal, sheltering, and foraging habitat; develop metapopulation stability; and protect against catastrophic losses.

Additional riparian habitat along the river that can be used by western yellow-billed cuckoos, mostly as migratory habitat and also as nesting habitat, occurring across thousands of acres (hectares), will collectively be restored, planted, managed, and maintained on NWRs (Cibola, Imperial, and Bill Williams River), Federal lands (NPS and BLM), and tribal lands (Colorado River Indians Tribes, Fort Mohave Tribe, Cocopah Tribe, Chemehuevi Tribe, and Fort Yuma (Quechan) Tribe) along the LCR within the area covered by the LCR MSCP.

This HCP involved public participation through public notices and comment periods associated with the NEPA process prior to being approved. Additionally, this HCP is one of the largest HCPs in the country, with an extensive list of stakeholders and permittees from California, Arizona, and Nevada that took about a decade to complete. Therefore, managing agencies, States, counties, cities, and other stakeholders are aware of the importance of the LCR for the western yellow-billed cuckoo. For these reasons, although we have determined that designation of critical habitat along the LCR MSCP planning area would provide some additional educational benefit, much of this is already occurring through the LCR MSCP.

Covered activities under the LCR MSCP are not the only possible impacts to western yellow-billed cuckoo habitat along the LCR. There are continued projects developed, carried out, funded, and permitted by Federal agencies such as Reclamation and BLM that are not covered by the LCR MSCP. Fire management, habitat restoration, recreation, and other activities have the ability to adversely affect the western yellow-billed cuckoo and critical habitat. Minor changes in habitat restoration, fire management, and recreation could occur as result of a critical habitat designation in the form of additional discretionary conservation recommendations to reduce impacts to critical habitat. Therefore, if the LCR was designated as critical habitat, there may be some benefit through consultation under the adverse modification standard for actions not covered by the LCR MSCP. But, as explained above, the habitat along the LCR is so degraded that it is unlikely that a section 7 consultation under an adverse modification standard would result in mandatory elements (*i.e.,* reasonable and prudent alternatives) within the LCR MSCP planning area.

Excluding the LCR within the LCR MSCP planning area would eliminate some small additional administrative effort and cost during the consultation process pursuant to section 7 of the Act. Excluding the LCR MSCP planning area would continue to help foster development of future HCPs and strengthen our relationship with Arizona, California, and Nevada permittees and stakeholders, eliminating regulatory uncertainty associated with permittees and stakeholders. Excluding the LCR MSCP planning area eliminates any possible risk to water storage, delivery, diversion and hydroelectric production to Arizona, California, and Nevada, and therefore significant potential economic costs due to a critical habitat designation. We have therefore concluded that the benefits to the western yellow-billed cuckoo and its habitat as result of the improvement, maintenance, and management activities attributed to the LCR MSCP, and those additional efforts conducted by NWRs, Tribes, and other land managers, outweigh those that would result from the addition of a critical habitat designation. We have therefore excluded these lands from the final critical habitat designation pursuant to section 4(b)(2) of the Act.

Exclusion Will Not Result in Extinction of the Species—Lower Colorado River Multi-Species Conservation Plan (LCR MSCP)

We have determined that exclusion of the Colorado River within the LCR MSCP planning area will not result in extinction of the western yellow-billed cuckoo. As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Second, the amount of suitable habitat being created as result of implementing the LCR MSCP, combined with management by other land managers, is expected to be able to provide substantial western yellow-billed cuckoo breeding habitat. The Implementation Agreement establishes a 50-year commitment to accomplish these tasks. Overall, we expect greater western yellow-billed cuckoo conservation through these commitments than through project-by-project evaluation implemented through a critical habitat designation. Accordingly, we have determined that the LCR MSCP area should be excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species and we are excluding the entire Unit 1: CA/AZ–1 (82,138 ac (33,240 ha)), Unit 2: CA/AZ–2 (23,589 ac (9,546 ha)) and Unit 3: AZ–1 (3,389 ac (1,371 ha)) that occur in the LCR MSCP planning area along the Colorado River and Bill Williams River from the final critical habitat designation.

Unit 11 (AZ–9A and AZ–9B) Horseshoe Dam—Salt River Project Horseshoe Bartlett HCP

We identified 3,974 ac (1,608 ha) within Unit 11 as proposed critical habitat in and adjacent to the water storage area of Horseshoe Reservoir and approximately 4 mi (6 km) downstream from the final designation. The Horseshoe Reservoir and Bartlett Dam are part of the Salt River Project (SRP) constructed by Reclamation. The SRP was part of a Federal action started in 1917 to construct irrigation facilities along the Salt and Verde River in Maricopa and Gila Counties, Arizona. Lands surrounding the reservoir and stream are managed by the Tonto National Forest. Horseshoe Reservoir facilities were completed in 1945 and management and operation of the facilities was turned over to two entities: Salt River Project Agricultural Improvement and Power District (a political subdivision of the State of Arizona) and the Salt River Valley Water Users' Association (a private

corporation). The umbrella name for these two entities is also referred to as the Salt River Project (SRP), and these two entities have the authority to care for, operate, and maintain all project facilities including Horseshoe and Bartlett Dams. In 2002, the listed southwestern willow flycatcher was discovered nesting in trees on the Horseshoe lakebed and downstream of Horseshoe Dam along the Verde River (SRP 2008, p. 6). As a result, SRP began discussions with the Service about developing a HCP, with the southwestern willow flycatcher being a primary focus of the HCP. Because the habitat managed for southwestern willow flycatchers is also used by nesting and foraging western yellow-billed cuckoo, separate habitat mitigation requirements for the western yellow-billed cuckoo were not identified in the HCP. Because SRP operates Horseshoe and Bartlett Dams on Federal lands within Tonto National Forest, the Service issued an incidental take permit to SRP under section 10(a)(1)(B) of the Act in 2008.

The HCP is being properly implemented and identifies the southwestern willow flycatcher and the western yellow-billed cuckoo as covered species, and impacts to nesting habitat and breeding attempts from raising and lowering of the water stored behind Horseshoe Dam are covered activities for the duration of the permit, thereby meeting criteria 1 and 2 above for consideration for exclusion (see *Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act*). The biological goals of the HCP will be achieved with the following measures: (1) Managing water levels in Horseshoe Lake to the extent practicable to support tall dense vegetation at the upper end of the lake for southwestern willow flycatcher and western yellow-billed cuckoos; and (2) acquiring and managing southwestern willow flycatcher and western yellow-billed cuckoo habitat along rivers in central Arizona to provide a diversity of geographic locations with habitat like Horseshoe Lake (SRP 2008, pp. ES–4, 9). These measures meet criteria 3 above for exclusion under *Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act.*

Optimum operation of Horseshoe and Bartlett is predicted to periodically result in the unavailability, modification, or loss of up to 200 ac (81 ha) of occupied southwestern willow flycatcher and western yellow-billed cuckoo habitat on average. If circumstances change, adaptive management will be implemented to address impacts on up to 200 ac (81 ha) of additional occupied southwestern willow flycatcher and western yellow-billed cuckoo habitat at Horseshoe Lake (SRP 2008, p. ES–5). On-site and off-site minimization and mitigation measures are identical for both species (SRP 2008, p. 169). Under the Horseshoe and Bartlett Dam HCP, SRP owns and manages the Gila River mitigation properties near Fort Thomas in Unit 22 (AZ–20; Gila River 1). We identified these properties as critical habitat, but because SRP supports including them as critical habitat, we did not consider them for exclusion (SRP 2014, entire). SRP established an irrevocable trust to fund this HCP in January 2011, with approximately $6.0M to support the estimated $300,000 on average annual expenditures over the life of the permit and in perpetuity costs for some of the mitigation obligations (SRP 2019a, p. 25).

The action area, as described in the Horseshoe Bartlett HCP, prepared for SRP by ERO Resources Corporation (SRP 2008, entire), extends farther from the location of these dams to areas where the impacts of water storage and delivery may occur because of the impacts to other species caused by water regulation. Specific southwestern willow flycatcher-related impacts were only identified within the high water mark of the Horseshoe Lake conservation space between 2,026 ft (618 m) in elevation and Horseshoe Dam. The area within Horseshoe Lake is Federal land managed by the USFS and Reclamation, and SRP maintain interest in water management of the lake. A tri-party agreement between SRP, USFS, and Reclamation establishes a framework to maintain these water storage areas for their intended purpose. The Tonto National Forest continues to manage this area for recreation and other public land uses (SRP 2008, p. 16).

Periodic changes in the level of the lake water of the Horseshoe Lake conservation space due to dam operations and water storage can result in the establishment and maintenance of nesting western yellow-billed cuckoo habitat. This is because western yellow-billed cuckoos nest or otherwise use vegetation that grows in the dry lakebed within the conservation space. Rising water levels or excessive drying can cause temporary losses and unavailability of this nesting habitat. The amount and timing of water stored in Horseshoe Lake can vary widely from year-to-year because of the relatively small amount of water storage space in Horseshoe Lake, the erratic nature of precipitation and run-off, and the arid nature of the Sonoran Desert.

It is estimated that between 60 to 450 ac (24 to 182 ha) of western yellow-billed cuckoo nesting habitat will occur annually within the high water mark of Horseshoe Lake over the 50-year permit period of this HCP (SRP 2008, p. 120). The annual average of western yellow-billed cuckoo habitat estimated to occur within the lake is 260 ac (105 ha) (SRP 2008, p. 120). In total, the upper limit of occupied western yellow-billed cuckoo habitat addressed by the HCP is 400 ac (162 ha) (SRP 2008, pp. 134–135).

The 50-year Horseshoe Bartlett HCP conservation strategy focuses primarily on the protection and management of southwestern willow flycatcher and western yellow-billed cuckoo habitat within the Horseshoe Lake conservation space through modified dam operations; acquisition and management of habitat outside of Horseshoe Lake; and the implementation of measures to conserve Verde River water. SRP will modify dam operations to make western yellow-billed cuckoo habitat available earlier in the nesting season and to maintain riparian vegetation at higher elevations within the conservation space whenever possible. SRP acquired a 150 ac (61 ha) and a 55 ac (22 ha) parcel along the upper Gila River near Fort Thomas (SRP 2019a, p. 14). SRP's water supply protection program will focus on special projects to specifically benefit mitigation habitat such as ground water testing and modeling in the vicinity of mitigation lands, development and support of instream flow water rights, and research on the relationship between hydrology, habitat, and covered species under the HCP.

Ongoing maintenance on mitigation properties include year-round perimeter fence patrolling and repair; and removing nonnative plants, kochia (*Kochia scoparia*) and Russian thistle (*Salsola tragus*); pruning salt cedar limbs from fence lines and roads; and, patrolling and management of trespass cattle (SRP 2019a, pp. 15–16). SRP is engaged in substantial and ongoing watershed management efforts to maintain and improve stream flows, which benefit all main-stem species. These watershed protection efforts include 25 different actions in 2018 (SRP 2019a, pp. 16–24). SRP is actively protecting in-stream flow through administrative and legal efforts, public outreach and education, funding research and monitoring, and protection of future water supplies for mitigation lands.

The issuance of the Horseshoe Bartlett HCP permit was based upon the persistence of varying degrees of occupied nesting southwestern willow

flycatcher habitat within the Horseshoe Lake conservation space (under full operation of Horseshoe and Bartlett Dams) that, along with other areas could reach breeding and habitat-related goals established in the 2002 Southwestern Willow Flycatcher Recovery Plan. Although a recovery plan has not been developed for western yellow-billed cuckoo, the persistence of habitat within the Horseshoe Lake conservation space and other areas upstream and downstream on the Verde River have benefited breeding western yellow-billed cuckoos.

Benefits of Inclusion—Horseshoe and Bartlett Dams HCP

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved.

The Horseshoe Lake area is occupied by western yellow-billed cuckoos and, although western yellow-billed cuckoos were not listed at the time the section 7 consultation for southwestern willow flycatchers was conducted, effects to western yellow-billed cuckoos were evaluated as part of the HCP permitting process. There may be some minor benefits by the designation of critical habitat within Horseshoe Lake, primarily because of the additional review required by USFS management of the area. Not only does the USFS manage recreation, access, land use, and wildfire suppression and management activities, USFS also ensures that there is no cattle grazing, or road and camping developments; recreation activities at the lake are mostly focused on fishing. These USFS management actions have resulted in conservation of western yellow-billed cuckoo habitat since the listing of the southwestern willow flycatcher in 1995 within the conservation space of Horseshoe Lake. Additionally, because the purpose of the conservation space of Horseshoe Lake is to store water, it prevents significant land and water altering actions, such as the development of permanent structures within this open space area. As a result, because of the conservation associated with implementing the HCP, western yellow-billed cuckoo breeding areas occurring within the Horseshoe Lake conservation space, and supporting USFS management, we have determined that these incremental benefits of a critical habitat designation are minimized. Formal consultations will likely result in only discretionary conservation recommendations due to existing appropriate management; therefore we have determined that there is a low probability of mandatory elements (*i.e.,* reasonable and prudent alternatives) arising from formal section 7 consultations evaluating western yellow-billed cuckoo critical habitat at Horseshoe Lake.

Another important benefit of including lands in a critical habitat designation is that the designation can serve to educate landowners, agencies, tribes, and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high conservation value for certain species. Any information about the western yellow-billed cuckoo that reaches a wide audience, including parties engaged in conservation activities, is valuable. The designation of critical habitat may also affect the implementation of Federal laws, such as the Clean Water Act. These laws analyze the potential for projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

We have determined that there would be little additional educational and informational benefit gained from including Horseshoe Lake within the designation, because this area is well known as an important area for western yellow-billed cuckoo management and recovery. For example, the Horseshoe Bartlett HCP was developed over multiple years and was completed in 2008; and the Horseshoe Lake area was proposed as southwestern willow flycatcher critical habitat in 2004 and excluded in 2005, and proposed as western yellow-billed cuckoo habitat in 2014 and 2020. Additionally, since the early 2000s, Horseshoe Lake southwestern willow flycatchers and western yellow-billed cuckoos have been discussed by management agencies while meeting to discuss management issues occurring in the area for two species (western yellow-billed cuckoos as a candidate species). Consequently, we have determined that the informational benefits have already occurred through past actions even though this area is not designated as critical habitat. The importance of Horseshoe Lake for conservation of the western yellow-billed cuckoo, its importance to the Verde River, and to the population of western yellow-billed cuckoos in the State of Arizona has already been realized by managing agencies, including the public, State and local governments, and Federal agencies.

Benefits of Exclusion—Horseshoe and Bartlett Dams HCP

The benefits of excluding the area within the high-water mark (below an elevation of 2,026 ft (618 m) of Horseshoe Lake from being designated as critical habitat are considerable, and include the conservation measures described above and those associated with implementing conservation through enhancing and developing partnerships.

The Horseshoe Bartlett HCP has and will continue to help generate important status and trend information and conservation toward western yellow-billed cuckoo recovery. SRP will continue to modify dam operations to make western yellow-billed cuckoo habitat available earlier in the nesting season, manage 200 ac (81 ac) of habitat for the western yellow-billed cuckoo, and implement water protection programs on the Verde River. In addition to those specific western yellow-billed cuckoo conservation actions, the development and implementation of this HCP provides regular monitoring of western yellow-billed cuckoo habitat, distribution, and abundance over the 50-year permit at Horseshoe Lake. SRP is currently implementing innovative monitoring of riparian habitat abundance and western yellow-billed cuckoo habitat suitability through satellite image-based models (Hatten and Paradzick 2003, entire; SRP 2012a, pp. 13–14).

Because of the importance of the Horseshoe Lake conservation space for water storage, there is no expectation that any considerable development or changes to the landscape would result in reducing the overall water storage space, and therefore the overall ability to develop riparian vegetation. Horseshoe Dam operates in a way that continues moves water out of the reservoir downstream to Bartlett Lake and canals in order to continuously create water storage conservation space, and therefore area for western yellow-billed cuckoo habitat to be maintained. Constant lake levels, which are not the operational condition at Horseshoe Lake for water storage, will not create or maintain abundant western yellow-billed cuckoo habitat. On the contrary,

dynamic lake levels that mimic the function of flooding on river systems are essential for creating habitat conditions needed by nesting western yellow-billed cuckoos within Horseshoe Lake.

Not excluding the areas within Horseshoe Bartlett HCP could be a disincentive for other entities contemplating partnerships, as it would be perceived as a way for the Service to impose additional regulatory burdens once conservation strategies have already been agreed to. Private entities are motivated to work with the Service collaboratively to develop voluntary HCPs because of the regulatory certainty provided by an incidental take permit under section 10(a)(1)(B) of the Act with the ''No Surprises'' assurances. This collaboration often provides greater conservation benefits than could be achieved through strictly regulatory approaches, such as critical habitat designation. The conservation benefits resulting from this collaborative approach are built upon a foundation of mutual trust and understanding. It takes considerable time and effort to establish this foundation of mutual trust and understanding. Excluding this area from critical habitat would help promote and honor that trust by providing greater certainty for permittees that once appropriate conservation measures have been agreed to and consulted on for the western yellow-billed cuckoo that additional consultation will not be necessary. Working together with SRP and Reclamation, USFS management has continued to foster the maintenance and development of western yellow-billed cuckoo habitat through land management actions that protect habitat and reduce habitat stressors. The majority of USFS standards and guidelines in the Tonto National Forest's Land Management Resource Plan would benefit the western yellow-billed cuckoo.

Through the development of the Horseshoe Bartlett HCP, we have generated additional partnerships with SRP and its stakeholders by developing collaborative conservation strategies for the western yellow-billed cuckoo and the habitat upon which it depends for breeding, sheltering, foraging, migrating, and dispersing. The strategies within the HCP seek to achieve conservation goals for the western yellow-billed cuckoo and its habitat, and thus can be of greater conservation benefit than the designation of critical habitat, which does not require specific actions. Continued cooperative relations with SRP and its stakeholders is expected to influence other future partners and lead to greater conservation than would be achieved through multiple site-by-site, project-by-project, section 7 consultations. For example, soon after completing the Roosevelt HCP, we partnered with SRP and its stakeholders to develop the Horseshoe and Bartlett Dam HCP where the western yellow-billed cuckoo conservation was a key component. The benefits of excluding lands within the Horseshoe and Bartlett Dam HCP area from critical habitat designation include recognizing the value of conservation benefits associated with HCP actions; encouraging actions that benefit multiple species; encouraging local participation in development of new HCPs; and facilitating the cooperative activities provided by the Service to landowners, communities, and counties in return for their voluntary adoption of the HCP. Concerns over perceived added regulation potentially imposed by critical habitat could harm this collaborative relationship.

Another benefit of excluding Horseshoe Bartlett HCP area from critical habitat includes a small reduction in administrative costs for Federal agencies associated with engaging in activities within the critical habitat portion of section 7 consultations. Administrative costs include time spent in meetings, preparing letters and biological assessments, and in the case of formal consultations, the development of the critical habitat component of a biological opinion. However, because the western yellow-billed cuckoo occurs at Horseshoe Lake during the breeding season, consultations evaluating jeopardy to the western yellow-billed cuckoo would be expected to occur regardless of a critical habitat designation, and those costs to perform the additional analysis are not expected to be significant.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Horseshoe Bartlett Dams HCP

We have determined that the benefits of exclusion of the conservation space of Horseshoe Bartlett HCP below 2,026 ft (618 m) of Horseshoe Lake from the designation of western yellow-billed cuckoo critical habitat on Federal lands surrounding the lake managed by the USFS, as identified in the Horseshoe Bartlett HCP, outweigh the benefits of inclusion as critical habitat. In our determination, we considered and found that the HCP meets our criteria for exclusion for HCPs (see *Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act*) and whether the current dam operations, management, and conservation efforts protect, maintain and conserve western yellow-billed cuckoo habitat.

The benefits of designating critical habitat for the western yellow-billed cuckoo at Horseshoe Lake are relatively low in comparison to the benefits of exclusion. We find that including Horseshoe Lake would result in very minimal, if any additional benefits to the western yellow-billed cuckoo, because Horseshoe Dam operations will continue to foster the maintenance, development, and necessary recycling of habitat for the western yellow-billed cuckoo in the long-term due to the dynamic nature of water storage and delivery. USFS management fosters the presence of western yellow-billed cuckoo habitat, and there is virtually no risk of changes to the landscape within the Horseshoe Lake conservation space, based on the track record of successful habitat maintenance for western yellow-billed cuckoos and southwestern willow flycatchers.

The benefits of excluding Horseshoe Lake from inclusion as critical habitat are considerable and varied. Excluding Horseshoe Lake will strengthen our partnership with Horseshoe Bartlett HCP permittees and stakeholders and potentially help foster development of future HCPs. Excluding Horseshoe Lake also eliminates regulatory uncertainty associated with the permittees HCP and the operation of Horseshoe and Bartlett Dams for water storage and flood control. The conservation measures being implemented by the Horseshoe and Bartlett Dam HCP are considerable and include acquisition and management of western yellow-billed cuckoo habitat, modifications of Horseshoe Dam operations to facilitate the persistence of western yellow-billed cuckoo habitat, and long-term monitoring of western yellow-billed cuckoo habitat and territories. These conservation measures will result in greater western yellow-billed cuckoo conservation benefits than what could be accomplished from a project-by-project evaluation through the incremental benefits of a critical habitat designation. Excluding Horseshoe Lake will also eliminate some additional administrative effort and cost during the consultation process pursuant to section 7 of the Act.

After weighing the benefits of including Horseshoe Lake as western yellow-billed cuckoo critical habitat against the benefit of exclusion, we have concluded that the benefits of excluding the conservation space of Horseshoe Lake below an elevation 2,026 ft. (618 m), underneath the coverage of the Horseshoe Bartlett HCP and with the support of USFS management, outweigh

those that would result from designating this area as critical habitat.

As mentioned below in our evaluation of SRP's Roosevelt HCP, SRP requested that their western yellow-billed cuckoo mitigation property along the upper Gila River purchased as part of the measures to implement the Horseshoe Bartlett Dams HCP be designated as critical habitat. The mitigation property is not located within the Horseshoe lakebed, and may benefit from section 7 consultation. Therefore, based upon the comments received from SRP and the likely benefit of future section 7 consultation, we have honored the landowners request not to exclude the mitigation properties acquired by SRP along the Gila River from the final designation as critical habitat for the western yellow-billed cuckoo.

Exclusion Will Not Result in Extinction of the Species—Horseshoe and Bartlett Dams HCP

We find that the exclusion of the conservation space of Horseshoe Lake will not lead to the extinction of the western yellow-billed cuckoo, nor hinder its recovery because Horseshoe and Bartlett Dam operations combined with the preservation of open space within the lake and USFS land management will ensure the long-term persistence and protection of western yellow-billed cuckoo habitat at Horseshoe Lake. In addition, as discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. We determined in our intra-Service section 7 biological opinion for the issuance of the Horseshoe and Bartlett Dams HCP permit that operations would not result in jeopardy. We also determined that while Horseshoe Dam operations will cause incidental take of western yellow-billed cuckoos and cause fluctuations in habitat abundance and quality, reservoir operations will also create a dynamic environment that fosters the long-term persistence of habitat. It was estimated that during the life of the permit, the annual average of southwestern willow flycatcher and western yellow-billed cuckoo habitat estimated to occur within the lake is 260 ac (105 ha) (SRP 2008, p. 120). In total, the upper limit of occupied western yellow-billed cuckoo habitat at Horseshoe and Bartlett addressed by the HCP is 400 ac (162 ha), but could vary annually (SRP 2008, pp. 134–135).

Accordingly, we have determined that the critical habitat within the Salt River Project Horseshoe Bartlett HCP planning area should be excluded from the final designation because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species. Therefore, we are excluding approximately 397 ac (161 ha) of critical habitat from Unit 11: AZ–9A (76 ac (31 ha)) and AZ–9B (321 ac (130 ha) from the final critical habitat designation.

Unit 12 (AZ–10) Tonto Creek and Unit 23 (AZ–21) Salt River—Salt River Project Roosevelt Lake HCP

In the revised proposed rule we identified 3,155 ac (1,277 ha) for exclusion from Unit 12 (AZ–10, Tonto Creek) and 2,469 ac (1,000 ha) from Unit 23 (AZ–21, Salt River) from the final designation based on the Salt River Project (SRP) Roosevelt Dam HCP. SRP obtained a permit under section 10(a)(1)(B) of the Act in 2003, for the Roosevelt Dam HCP for the operation of Roosevelt Dam in Gila and Maricopa Counties, Arizona. Roosevelt Dam was constructed by Reclamation and turned over to SRP for operation and management. The permit authorizes incidental take of the federally listed southwestern willow flycatcher caused by the raising and lowering of the water stored by Roosevelt Dam for a period of 50 years. The then-candidate yellow-billed cuckoo was also covered by the HCP in anticipation of Federal listing. Critical habitat for this unit is a 12-mi (19-km)-long continuous segment of Tonto Creek ending at the 2,151-foot elevation line, which represents the lakebed of Theodore Roosevelt Lake. The extent of the full conservation storage pool at Roosevelt Lake extends to the 2,151-ft (656 m) high elevation line and represents the area covered by the Roosevelt Dam HCP. The land within the Roosevelt Lake perimeter is Federal land owned and managed by the USFS (Tonto National Forest).

The Roosevelt Lake western yellow-billed cuckoo population fluctuates depending on the habitat conditions at the lake edge and inflows. During lower water years, flat gradient floodplains expose broad areas where riparian vegetation can grow at both the Salt River and Tonto Creek inflows. The areas at each end of the lake are estimated to be able to establish as much as 1,250 ac (506 ha) of habitat for the western yellow-billed cuckoo below the high water mark. The cycles of germination, growth, maintenance, and loss of western yellow-billed cuckoo habitat within the perimeter of Roosevelt Lake are dependent on how and when the lake recedes due to the amount of water in-flow, and subsequent storage capacity and delivery needs caused by Roosevelt Dam operations. The process of western yellow-billed cuckoo habitat inundation and drying through raising and lowering of lake levels can be more exaggerated than the dynamic flooding that occurs on free-flowing streams, yet those dynamic processes within the lake's high water mark mimic those that occur on a river and are important to develop and maintain western yellow-billed cuckoos and their habitat. Even in high-water years, some high quality riparian habitat would persist at Roosevelt Lake providing western yellow-billed cuckoo nesting opportunities.

The Roosevelt Dam HCP conservation strategy for western yellow-billed cuckoo focuses primarily on: (1) The acquisition and management of western yellow-billed cuckoo habitat outside of Roosevelt Lake; (2) the protection of existing habitat within the Roosevelt Lake conservation space; and (3) the creation of riparian habitat adjacent to Roosevelt Lake. Western yellow-billed cuckoo habitat is to be created and maintained at Roosevelt Lake (outside of the impacts of water storage) at the adjacent Rock House Demonstration Area. Also, because the USFS has management authority over dry land within the lakebed, SRP would fund a USFS Forest Protection Officer to patrol and improve protection of western yellow-billed cuckoo habitat in the Roosevelt lakebed from adverse activities such as fire ignition from human neglect, improper vehicle use, and other unauthorized actions that could harm habitat. These measures fulfill the criteria for consideration of exclusion of areas covered by the Roosevelt Dam HCP (see *Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act*).

Because the mitigation measures for the already federally listed southwestern willow flycatcher were intended to support the then-candidate western yellow-billed cuckoos as well, suitable habitat that fulfilled the needs of both species were included in the selection of mitigation sites in the HCP (SRP 2002, p. 132). As part of implementing the HCP, western yellow-billed cuckoo properties have been acquired along the lower San Pedro and Gila River (Middle Gila/San Pedro Management Unit) and along the Verde River (SRP 2012b, pp. 17–20). SRP has acquired 1,842 ac (745 ha) of riparian habitat and additional buffer lands and

water rights. They have also developed 20 ac (8 ha) of western yellow-billed cuckoo habitat at Rockhouse Demonstration Site (not proposed as critical habitat) and funded the USFS employee to help on-the-ground management for Roosevelt Lake and western yellow-billed cuckoo (SRP 2012b, pp. 13–20). SRP has collected and evaluated information on occupied habitats and population status of western yellow-billed cuckoos at Roosevelt Lake and mitigation properties.

In response to the 2014 proposed and the 2020 revised proposed critical habitat rule, SRP requested that Roosevelt Lake, including the Tonto and Salt rivers inflows be excluded from final critical habitat designation, but that mitigation properties be designated as critical habitat.

Benefits of Inclusion—Roosevelt Lake HCP

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved.

The Roosevelt Lake area is known to be occupied by western yellow-billed cuckoos and has undergone section 7 consultation under the jeopardy standard related to the Roosevelt Lake HCP and USFS actions. There may be some minor benefits from the designation of critical habitat within Roosevelt Lake, primarily because it would require the Service and USFS to perform additional review of USFS management within the exposed portion of the lake bottom through a critical habitat consultation under section 7 of the Act. These USFS management actions are typically limited to recreation management and resource use because the Salt River Project operates conservation space of Roosevelt Lake to store water. USFS has appropriately managed recreation, access, land use, and wildfire in a manner that has conserved both southwestern willow flycatcher and western yellow-billed cuckoo habitat since the permit was issued, as demonstrated by the continued persistence of both species in habitat surrounding Roosevelt Lake. For these reasons and because formal consultations will likely result in only discretionary conservation recommendations due to existing appropriate management, we have determined that there is a low probability of mandatory elements (*i.e.,* reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated critical habitat for the western yellow-billed cuckoo at Roosevelt Lake.

We have evaluated Roosevelt Lake Dam operations through implementation of the Roosevelt HCP, and considered impacts to western yellow-billed cuckoos and their habitat. The conservation strategies in the Roosevelt HCP included considerable habitat acquisition to account for habitat affected, with commitments for management and monitoring. We concluded that Roosevelt Dam operations, while causing incidental take of western yellow-billed cuckoos periodically, will support the development of additional habitat over time. Because of the non-jeopardy analysis completed in our section 7 consultation, the continued function of Roosevelt Lake to establish western yellow-billed cuckoo habitat for recovery, and the comprehensive conservation strategies implemented in the HCP, we have determined that there is a low probability of mandatory elements (*i.e.,* reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of Roosevelt Dam operations on designated western yellow-billed cuckoo critical habitat at Roosevelt Lake.

Another important benefit of designation is that it can serve to educate landowners, agencies, tribes, and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high conservation value for certain species. Any information about the western yellow-billed cuckoo that reaches a wide audience, including parties engaged in conservation activities, is valuable. The designation of critical habitat may also inform implementation of some Federal laws such as the Clean Water Act. These laws analyze the potential for projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

We have determined that there would be little educational and informational benefit gained from including Roosevelt Lake within the designation because this area is well known as an important area for southwestern willow flycatcher and western yellow-billed cuckoo management and recovery. For example, extensive southwestern willow flycatcher research has occurred at Roosevelt Lake through much of the late 1990s and early 2000s by USGS, Reclamation, and AGFD; the Roosevelt Dam HCP was developed in 2003; periodic news articles were published on the development of the Roosevelt Dam HCP; and the Roosevelt Lake area was proposed as southwestern willow flycatcher critical habitat in 2004 and excluded in 2005 and as western yellow-billed cuckoo critical habitat in 2014. Additionally, since the mid-1990s, SRP, USFS, Reclamation, AGFD, and the Service have met annually to discuss the status and ongoing management of the southwestern willow flycatcher and western yellow-billed cuckoo in the Roosevelt Lake area. Consequently, informational benefits informing the public and partners about the value of Roosevelt Lake for both listed bird species will continue into the future.

Benefits of Exclusion—Roosevelt Lake HCP

The benefits of excluding the area within the high-water mark of Roosevelt Dam from being designated as critical habitat are considerable, and include the conservation measures described above (land acquisition, management, and habitat development) and those associated with implementing conservation through enhancing and developing partnerships.

The implementation of the Roosevelt HCP has and will continue to help generate important status and trend information, acquire additional mitigation lands, and help on-the-ground management of Roosevelt Lake western yellow-billed cuckoos and their habitat (SRP 2012b, pp. 15–16). In addition to these specific western yellow-billed cuckoo conservation actions, the development and implementation of this HCP provides regular monitoring of western yellow-billed cuckoo habitat, distribution, and abundance over the 50-year permit.

Because of the importance of the Roosevelt Lake conservation space for water storage, there is no expectation that any considerable development or changes to the landscape would result in reducing the overall water storage space, and therefore the overall ability to develop riparian vegetation.

Roosevelt Dam operates in a way that continues to move water out of the reservoir to downstream lakes and canals in order to continuously create water storage conservation space at Roosevelt Lake, and therefore area for riparian vegetation and western yellow-billed cuckoo habitat to grow. The dynamic lake levels, similar to river systems, are important for the creation and maintenance of abundant western yellow-billed cuckoo habitat at this location.

Roosevelt Dam operations, implemented through the HCP permit continue to sustain local populations of western yellow-billed cuckoo by sustaining suitable habitat for the species. Western yellow-billed cuckoo populations have persisted within the high water mark at Roosevelt Lake throughout increases and decreases in water storage as well as along streams adjacent to Roosevelt Lake (Salt River, Tonto Creek, Pinal Creek, and Cherry Creek). The expanding and contracting western yellow-billed cuckoo habitat within the lake combined with dynamic habitat along adjacent streams support the overall western yellow-billed cuckoo population within the Roosevelt Lake area.

Failure to exclude Roosevelt Lake could be a disincentive for other entities contemplating partnerships, as it would be perceived as a way for the Service to impose additional regulatory burdens once conservation strategies have already been agreed to through our permitting process. Private entities are motivated to work with the Service collaboratively to develop voluntary HCPs because of the regulatory certainty provided by an incidental take permit under section 10(a)(1)(B) of the Act with the ''No Surprises'' assurances. This collaboration often provides greater conservation benefits than could be achieved through strictly regulatory approaches, such as critical habitat designation. The conservation benefits resulting from this collaborative approach are built upon a foundation of mutual trust and understanding. Excluding this area from critical habitat will help promote and honor that trust by providing greater certainty for permittees that once appropriate conservation measures have been agreed to and consulted on for the western yellow-billed cuckoo that additional consultation will not be necessary. SRP has proven to be a valuable and responsible partner to the Service in leading, innovating, and implementing large- and small- scale conservation efforts in Arizona.

Through the development of the Roosevelt Dam HCP, we have generated additional partnerships with SRP and its stakeholders by developing collaborative conservation strategies for the western yellow-billed cuckoo and the habitat upon which it depends for breeding, sheltering, foraging, migrating, and dispersing. The strategies within the Roosevelt HCP seek to achieve conservation goals for the western yellow-billed cuckoo and its habitat, and will achieve greater conservation benefit than the designation of critical habitat and multiple site-by-site, project-by-project, section 7 consultations, which is unlikely to require specific actions. Continued cooperative relations with SRP and its stakeholders are expected to influence other future partners. The benefits of excluding lands within the Roosevelt Lake HCP area from critical habitat designation include recognizing the value of conservation benefits associated with HCP actions; encouraging actions that benefit multiple species; encouraging local participation in development of new HCPs; and facilitating the cooperative activities provided by the Service to landowners, communities, and counties in return for their voluntary adoption of the HCP. Concerns over perceived added regulation potentially imposed by critical habitat could harm this collaborative relationship.

Another benefit of excluding Roosevelt Lake from critical habitat includes a small reduction in administrative costs associated with engaging in the critical habitat portion of section 7 consultations. Administrative costs include time spent in meetings, preparing letters and biological assessments, and in the case of formal consultations, the development of the critical habitat component of a biological opinion.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Roosevelt Lake HCP

We have determined that the benefits of exclusion of the conservation space of Roosevelt Lake below 2,151 ft (655 m) in elevation from the designation of western yellow-billed cuckoo critical habitat on Federal land managed by the USFS, as identified in the Roosevelt Dam HCP, outweigh the benefits of inclusion because current dam operations and management, and implementation of conservation actions maintain, protect, and conserve western yellow-billed cuckoo habitat. In our determination, we considered and found that the HCP meets our criteria for exclusion for HCPs (see *Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act*). As a result, we weighed the benefits of including these lands as critical habitat with an operative HCP and management by the USFS, and the same situation without critical habitat.

The benefits of designating critical habitat for the western yellow-billed cuckoo at Roosevelt Lake are relatively low in comparison to the benefits of exclusion. We find that including Roosevelt Lake as critical habitat would result in very minimal, if any, additional benefits to the western yellow-billed cuckoo. Roosevelt Dam operations will continue to foster the maintenance, development, and necessary recycling of habitat for the western yellow-billed cuckoo in the long term due to the dynamic nature of water storage and delivery. USFS management of lands surrounding the lake ensures the maintenance and development of western yellow-billed cuckoo habitat per the HCP. As a result, we anticipate that formal section 7 consultations conducted on critical habitat would only likely result in discretionary conservation recommendations.

The benefits of excluding Roosevelt Lake from inclusion as critical habitat are considerable. Excluding Roosevelt Lake would continue to help foster development of future HCPs and strengthen our partnership with Roosevelt HCP permittees and stakeholders. Excluding Roosevelt Lake also eliminates regulatory uncertainty associated with the permittees' HCP and the operation of Roosevelt Dam for water storage and flood control. The conservation benefits of implementing the Roosevelt HCP are considerable and include significant acquisition and management of western yellow-billed cuckoo habitat, creation of western yellow-billed cuckoo habitat adjacent to Roosevelt Lake, on-the-ground protection of western yellow-billed cuckoo habitat, and long-term monitoring of western yellow-billed cuckoo habitat and territories. These conservation measures are substantial and will result in greater western yellow-billed cuckoo conservation benefits than what could be accomplished from a project-by-project evaluation through the incremental benefits of a critical habitat designation. Also, excluding Roosevelt Lake will eliminate some additional, but minimal, administrative effort and cost during the consultation process pursuant to section 7 of the Act.

After weighing the benefits of including Roosevelt Lake as western yellow-billed cuckoo critical habitat against the benefit of exclusion, we have concluded that the benefits of excluding

the conservation space of Roosevelt Lake below an elevation 2,151 ft (655 m), underneath the coverage of the Roosevelt HCP and with the support of USFS management, outweigh those that would result from designating this area as critical habitat.

As mentioned above, during development of the western yellow-billed cuckoo critical habitat designation, SRP requested that all of their western yellow-billed cuckoo mitigation properties purchased before the publication of our final critical habitat designation, be designated as critical habitat. The mitigation properties are not located within the Roosevelt lakebed, and may benefit from section 7 consultation on their management. Therefore, based upon the comments received from SRP and the likely benefit of future section 7 consultation, the mitigation properties acquired by SRP along the San Pedro, Gila, and Verde Rivers are included in this final designation as western yellow-billed cuckoo critical habitat.

Exclusion Will Not Result in Extinction of the Species—Roosevelt Lake HCP

We find that the exclusion of the conservation space of Roosevelt Lake will not lead to the extinction of the western yellow-billed cuckoo, nor hinder its recovery because Roosevelt Dam operations combined with the preservation of open space within the lake and USFS land management under the HCP will ensure the long-term persistence and protection of western yellow-billed cuckoo habitat at Roosevelt Lake. In addition, as discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. We determined in our intra-Service section 7 biological opinion for the issuance of the Roosevelt HCP permit that, while Roosevelt Dam operations will cause incidental take due to operations that cause fluctuations in habitat abundance and quality, reservoir operations also create a dynamic environment that fosters the long-term persistence of habitat. It was estimated that during the life of the permit, an average amount of habitat to support 6 western yellow-billed cuckoo territories would be present throughout the life of the 50-year permit and even in a worst case flood event with maximum water storage, 22 territories could persist. USFS management has continued to foster the maintenance and development of western yellow-billed cuckoo habitat through land management actions that reduce threats to the species habitat. We have therefore excluded approximately 489 ac (198 ha) from Unit 12 (AZ–10, Tonto Creek) and 2,009 ac (813 ha) from Unit 23 (AZ–21, Salt River) from the final critical habitat designation.

Tribal Lands

Several Executive Orders, Secretarial Orders, and policies concern working with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control tribal lands, emphasize the importance of developing partnerships with tribal governments, and direct the Service to consult with Tribes on a government-to-government basis.

A joint Secretarial Order that applies to both the Service and the National Marine Fisheries Service (NMFS), Secretarial Order 3206, *American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997) (S.O. 3206), is the most comprehensive of the various guidance documents related to tribal relationships and Act implementation, and it provides the most detail directly relevant to the designation of critical habitat. In addition to the general direction discussed above, S.O. 3206 explicitly recognizes the right of Tribes to participate fully in the listing process, including designation of critical habitat. The Order also states: ''Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.'' In light of this instruction, when we undertake a discretionary section 4(b)(2) exclusion analysis, we will always consider exclusions of tribal lands under section 4(b)(2) of the Act prior to finalizing a designation of critical habitat, and will give great weight to tribal concerns in analyzing the benefits of exclusion.

However, S.O. 3206 does not preclude us from designating tribal lands or waters as critical habitat, nor does it state that tribal lands or waters cannot meet the Act's definition of ''critical habitat.'' We are directed by the Act to identify areas that meet the definition of ''critical habitat'' (*i.e.,* areas occupied at the time of listing that contain the essential physical or biological features that may require special management or protection and unoccupied areas that are essential to the conservation of a species), without regard to landownership. While S.O. 3206 provides important direction, it expressly states that it does not modify the Secretaries' statutory authority.

Unit 7 (AZ–5) Upper Verde River; Unit 9 (AZ–7) Beaver Creek; and Unit 10 (AZ–8) Lower Verde River and West Clear Creek—Yavapai-Apache Nation

We identified 534 ac (216 ha) of critical habitat that occurs on Yavapai-Apache Nation lands within portions of the Verde River, Beaver Creek, and West Clear Creek (Unit 7: AZ–5, Upper Verde River; Unit 9: AZ–7, Beaver Creek; and Unit 10: AZ–8, Lower Verde River and West Clear Creek). The Yavapai-Apache Nation completed a Southwestern Willow Flycatcher Management Plan in 2005, and updated their plan in 2012 (Yavapai-Apache Nation 2012, entire). The plan was originally developed for the southwestern willow flycatcher but has been revised to include western yellow-billed cuckoo.

Prior to the incursion of non-Indians into their territory, the Yavapai-Apache Nation notes that their people lived and prospered for many centuries along the Verde River and its tributaries without depleting the river system or harming its riparian habitat and the many plant and animal species it supports (Montgomery & Interpreter, PLC 2020, p. 2). Today, the Yavapai-Apache Nation Reservation is only a small portion of lands considered as historical Yavapai-Apache Nation lands and currently totals a little over 1,800 ac (728 ha) in Arizona. The Verde River and its tributaries serve as a primary source of the Nation's water supply and is integral in the preservation of the Nation's values. The Nation has implemented strong conservation measures on the Reservation to preserve the Verde River for the benefit of all species and to protect the practices of the Nation. The Yavapai-Apache Nation is aware of the threats facing the Verde River and adjacent lands and their impacts on the riparian habitat and food availability as well as its suitability for western yellow-billed cuckoo nesting, migrating, food, cover, and shelter (Montgomery & Interpreter, PLC 2020, p. 2).

The Nation continues to preserve those portions of the Verde River, Beaver Creek, and West Clear Creek under its jurisdiction along with the plants and animals associated with the river. On June 15, 2006, the Nation enacted Tribal Resolution No. 46–2006 formally designating a ''Riparian

Conservation Corridor'' extending from the center of the River outward for 300 lateral ft (91 lateral m) on either side of the bank full stage of the Verde River (Yavapai-Apache Nation 2006, entire; Montgomery & Interpreter, 2020 PLC, pp. 5–6). This resolution essentially codified in Tribal law certain land use restrictions and management goals for the Verde River that had long been in place on the Reservation. Within the Riparian Conservation Corridor, those activities that are harmful to the health of the riparian area are discouraged or prohibited outright in order to protect the corridor's natural habitat and the animal and plant species that live, breed, rest, and forage within the corridor, including the western yellow-billed cuckoo.

The Nation has taken steps to protect western yellow-billed cuckoo habitat along the Verde River, Beaver Creek, and West Clear Creek through zoning, implementing tribal ordinances and code requirements.

The purpose of the Nation's Flycatcher Management Plan as updated to include western yellow-billed cuckoo is to promote the physical and biological features that will maintain southwestern willow flycatcher and western yellow-billed cuckoo habitat. The strategy of the plan is not to allow any net loss or permanent impacts to western yellow-billed cuckoo habitat by implementing measures from the Service's Southwestern Willow Flycatcher Recovery Plan. Recreation and access to riparian areas will be managed to ensure no net loss of habitat. Fire within riparian areas will be suppressed and vegetation managed by reducing fire risks. The Nation will cooperate with the Service to monitor and survey habitat for breeding and migrating western yellow-billed cuckoos, conduct research, and manage habitat.

Since 2005, the Yavapai-Apache Nation has concluded that through implementation of their plan, there has been no net loss of western yellow-billed cuckoo habitat. Since 2005, no cattle grazing has occurred within the Verde River corridor. If any future grazing is permitted, it will be conducted appropriately with fences, and in a manner to protect western yellow-billed cuckoo habitat quality. The Nation has also installed measurement devices to evaluate the depth of the Verde River groundwater in order to address river flows necessary to maintain or improve the riparian habitat quality (Montgomery & Interpreter 2020 PLC pp. 7–8). Also, no new access roads or recreation sites have been created. Similarly, any new housing areas have been directed to avoid construction within the river corridor.

The Yavapai-Apache Nation has conducted continued education, information gathering, and partnering and emphasized the importance of protecting the Verde River within tribal youth education programs. The Yavapai-Apache Nation has also continued to strengthen its partnership with the Service by meeting and coordinating efforts on the Service's goals for conservation on the Verde River. The Nation has committed to cooperatively discussing and examining future projects with the Service that could impact the western yellow-billed cuckoo or its habitat.

Benefits of Inclusion—Yavapai-Apache Nation Tribal Lands

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved.

We have conducted informal consultations with agencies implementing actions on tribal lands, provided tribes technical assistance on project implementation, and the Corps has coordinated with tribes and pueblos on projects within the area. However, overall since listing of the southwestern willow flycatcher as endangered in 1995 and the western yellow-billed cuckoo in 2014 as threatened, formal section 7 consultations have been rare on tribal lands. Because of how tribes and pueblos have chosen to manage and conserve their lands and the lack of past section 7 consultation history, we do not anticipate a noticeable increase in section 7 consultations in the future, nor that such consultations would significantly change the current management of western yellow-billed cuckoos or its habitat. Therefore, the effect of a critical habitat designation on these lands is minimized.

Were we to designate critical habitat on these tribal lands, our section 7 consultation history indicates that there may be some, but few, regulatory benefits to the western yellow-billed cuckoo. As described above, even with southwestern willow flycatchers and western yellow-billed cuckoos occurring on these tribal lands, the frequency of formal section 7 consultations has been rare. Projects initiated by Federal agencies in the past were associated with maintenance of rights-of-way or water management such as those initiated by Federal Highway Administration or Reclamation. When we review projects addressing the western yellow-billed cuckoo pursuant to section 7 of the Act in Arizona, we commonly examine conservation measures associated with the project for consistency with strategies described within the Southwestern Willow Flycatcher Recovery Plan due to the two species overlapping and using similar habitat. Where there is consistency with managing habitat and implementing conservation measures recommended in the recovery plan, it would be unlikely that a consultation would result in a determination of adverse modification of critical habitat. Therefore, when the threshold for adverse modification is not reached, only additional conservation recommendations could result out of a section 7 consultation, but such measures would be discretionary on the part of the Federal agency.

Another important benefit of including lands in a critical habitat designation is that the designation can serve to inform and educate landowners and the public regarding the potential conservation value of an area, and it may help focus management efforts on areas of high value for certain species. Any information about the western yellow-billed cuckoo that reaches a wide audience, including parties engaged in conservation activities, is valuable. However, the southwestern willow flycatcher has been listed since 1995, and western yellow-billed cuckoo has been a candidate species since 2001. As a result the Yavapai-Apache Nation has been and is currently working with the Service to conserve southwestern willow flycatcher and western yellow-billed cuckoo habitat, participate in working groups, and exchange management information. These regulatory developments already ensure that the Yavapai-Apache Nation and others are fully aware of the importance of listed riparian bird habitat and conservation. Given that these regulatory actions have already informed the public about the value of these areas and helped to focus potential conservation actions, the educational benefits from designating critical habitat would be small.

Another possible benefit of the designation of critical habitat is that it may also affect the implementation of Federal laws, such as the Clean Water Act. These laws require analysis of the potential for proposed projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Finally, there is the possible benefit that additional funding could be generated for habitat improvement by an area being designated as critical habitat. Some funding sources may rank a project higher if the area is designated as critical habitat. Tribes or pueblos often seek additional sources of funding in order to conduct wildlife-related conservation activities. Therefore, having an area designated as critical habitat could improve the chances of receiving funding for southwestern willow flycatcher and western yellow-billed cuckoo habitat-related projects. However, areas where nesting, migrating, dispersing, or foraging western yellow-billed cuckoos occur, as is the case here, may also provide benefits when projects are evaluated for receipt of funding.

Therefore, because of the development and implementation of a management plan, habitat conservation, rare initiation of formal section 7 consultations, the occurrence of breeding and migrant western yellow-billed cuckoos on tribal lands, and overall coordination with tribes on western yellow-billed cuckoo related issues, it is expected that there may be some, but limited, benefits from including these tribal lands in a western yellow-billed cuckoo critical habitat designation. The principal benefit of any designated critical habitat is that activities in and affecting such habitat require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid destruction or adverse modification of critical habitat.

Benefits of Exclusion—Yavapai-Apache Nation Tribal Lands

The benefits of excluding the Yavapai-Apache Nation lands from designated critical habitat include: (1) Our deference to the Tribe to develop and implement conservation and natural resource management plans for their lands and resources, which includes benefits to the western yellow-billed cuckoo and its habitat that might not otherwise occur; (2) the continuance and strengthening of our effective working relationships with the Tribe to promote the conservation of the western yellow-billed cuckoo and its habitat; and (3) the maintenance of effective partnerships with the Tribe and working in collaboration and cooperation to promote additional conservation of the western yellow-billed cuckoo and their habitat.

During the development of the western yellow-billed cuckoo critical habitat proposal (and coordination for other critical habitat proposals) and other efforts such as implementing measures identified in the Southwestern Willow Flycatcher Recovery Plan (applicable to western yellow-billed cuckoos in central Arizona), we have met and communicated with the Yavapai-Apache Nation to discuss how they might be affected by the regulations associated with listing and designating critical habitat for the western yellow-billed cuckoo. As such, we have established a beneficial relationship to support western yellow-billed cuckoo conservation. As part of our relationship, we have provided technical assistance to the Yavapai-Apache Nation to develop measures to conserve the western yellow-billed cuckoo and their habitat on their lands. These measures are contained within the management plan developed by the Yavapai-Apache Nation. We have determined that the Yavapai-Apache Nation should be the governmental entity to manage and promote western yellow-billed cuckoo conservation on their lands. During our coordination efforts with the Yavapai-Apache Nation, we recognized and endorsed their fundamental right to provide for tribal resource management activities, including those relating to riparian habitat.

As stated above, the Yavapai-Apache Nation has developed and implemented a management plan specific to western yellow-billed cuckoo and its habitat. The Yavapai-Apache Nation has expressed that their lands, and specifically riparian habitat, are connected to their cultural and religious beliefs, and as a result they have a strong commitment and reverence toward its stewardship and conservation and have common goals with the Service on species and habitat conservation. The management plan identifies actions to maintain, improve, and preserve riparian habitat. The Yavapai-Apache Nation has also implemented a review processes for activities occurring in riparian zones and restricted or limited certain actions that would impact resources from occurring or implement conservation measures to minimize, or eliminate adverse impacts. Overall, the commitments toward management of western yellow-billed cuckoo habitat by the Yavapai-Apache Nation likely accomplish greater conservation than would be available through the implementation of a designation of critical habitat on a project-by-project basis.

The designation of critical habitat on Yavapai-Apache Nation lands would be expected to have an adverse impact on our working relationship with the Nation. The designation of critical habitat would be viewed as an intrusion and impact their sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws. These impacts include, but are not limited to: (1) Interfering with the sovereign and constitutional rights of the Nation to protect and control its own resources on the Reservation; (2) undermining the positive and effective government-to-government relationship between the Nation and the Service—a relationship that serves to protect federally listed species and their habitat; and (3) hampering or confusing the Nation's own long-standing protections for the Verde River and its habitat. The perceived restrictions of a critical habitat designation could have a damaging effect on coordination efforts, possibly preventing actions that might maintain, improve, or restore habitat for the western yellow-billed cuckoo and other species. For these reasons, we have determined that our working relationships with the Nation would be better maintained if we excluded their lands from the designation of western yellow-billed cuckoo critical habitat. We view this as a substantial benefit since we have developed a cooperative working relationship with the Yavapai-Apache Nation for the mutual benefit of the western yellow-billed cuckoo and other endangered and threatened species.

In addition, we anticipate future management plans to include additional conservation efforts for other listed species and their habitats may be hampered if critical habitat is designated on tribal lands being managed for sensitive species conservation. We have determined that many other tribes and pueblos are willing to work cooperatively with us and others to benefit other listed and sensitive species, but only if they view the relationship as mutually beneficial. Consequently, the development of future voluntarily management actions for other listed species may be compromised if these tribal lands are designated as critical habitat for the western yellow-billed cuckoo. Thus, a benefit of excluding these lands would be future conservation efforts that

would benefit other listed or sensitive species.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Yavapai-Apache Nation Tribal Lands

The benefits of including Yavapai-Apache Nation tribal lands in the critical habitat designation are limited to the incremental benefits gained through the regulatory requirement to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat, agency and educational awareness, potential additional grant funding, and the implementation of other law and regulations. However, due to the rarity of Federal actions resulting in formal section 7 consultations, the benefits of a critical habitat designation are minimized. In addition, the benefits of consultation are further minimized because any conservation measures which may have resulted from consultation are already provided through other mechanisms, such as (1) the conservation benefits to the western yellow-billed cuckoo and their habitat from implementation of the Yavapai-Apache Nation management plans; and (2) the maintenance of effective collaboration and cooperation to promote the conservation of the southwestern willow flycatcher and western yellow-billed cuckoo and their habitat.

Because the Yavapai-Apache Nation has developed a specific management plan, has been involved with the critical habitat designation process, and is aware of the value of their lands for western yellow-billed cuckoo conservation, the educational benefits of a western yellow-billed cuckoo critical habitat designation are also minimized.

By allowing the Yavapai-Apache Nation to implement its own resource conservation programs it gives the Nation the opportunity to manage their natural resources to benefit riparian habitat for the western yellow-billed cuckoo, without the perception of Federal Government intrusion. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of these areas will likely also provide additional benefits to the western yellow-billed cuckoo and other listed species that would not otherwise be available without the Service's maintaining a cooperative working relationships with the Yavapai-Apache Nation. The actions taken by the Nation to manage and protect habitat needed for western yellow-billed cuckoo are above those conservation measures which may be required if the area was designated as critical habitat. As a result, we have determined that the benefits of excluding these tribal lands from critical habitat designation outweigh the benefits of including these areas.

Exclusion Will Not Result in Extinction—Yavapai-Apache Nation Tribal Lands

We have determined that exclusion of the Yavapai-Apache Nation tribal lands from the critical habitat designation will not result in the extinction of the western yellow-billed cuckoo. We base this determination on several points. Firstly, as discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Secondly, the Yavapai-Apache Nation has a long term record of conserving species and habitat and is committed to protecting and managing southwestern willow flycatcher and western yellow-billed cuckoo habitat according to their cultural history, management plans, and natural resource management objectives. We have determined that this commitment accomplishes greater conservation than would be available through the implementation of a designation of critical habitat on a project-by-project basis. With the implementation of these conservation measures, based upon strategies developed in the management plan, we have concluded that this exclusion from critical habitat will not result in the extinction of the western yellow-billed cuckoo. Accordingly, we have determined that the benefits of excluding the Yavapai-Apache Nation tribal lands outweighs the benefits of their inclusion, and the exclusion of these lands from the designation will not result in the extinction of the species. As a result, we are excluding Yavapai-Apache Nation tribal lands within Unit 7 (AZ–5) Upper Verde River (191 ac (77 ha)); Unit 9 (AZ–7) Beaver Creek (3 ac (1 ha)); and Unit 10 (AZ–8) Lower Verde River and West Clear Creek (43 ac (17 ha)) from this final designation.

Unit 22 (AZ–20) Gila River 1; Unit 27 (AZ–25) Aravaipa Creek; Unit 28 (AZ–26) Gila River 2; and Unit 17 (AZ–15) Lower San Pedro and Gila Rivers—San Carlos Apache and Gila River Indian Community

We identified approximately 12,533 ac (5,646 ha) for the western yellow-billed cuckoo as critical habitat on San Carlos Apache Tribe lands within Pinal, Gila, and Graham Counties, Arizona in Unit 22 (10,183 ac (4,121 ha)), Unit 28 (1,436 ac (581 ha)), and Unit 17 (729 ac (295 ha)). As a results of comments and coordinating with the Tribe, we received additional land ownership information that identified additional lands owned by the San Carlos Apache. The revised proposed designation should have identified an additional 185 ac (75 ha) along the Lower San Pedro River between Aravaipa Creek and the Gila River confluence in Unit 17 totaling 914 ac (370 ha). However, due additional revisions of the area considered as critical habitat between the revised proposed rule and this final designation, we removed areas upstream of Prophyry Gulch on the Gila River from Unit 17. Therefore, the total area of Tribal lands we are excluding in Unit 17 is approximately 445 ac (184 ha).

The San Carlos Reservoir and surrounding land up to elevation 2,535 ft (773 m)) is Federal land owned by the Bureau of Indian Affairs (BIA), which owns and operates the reservoir and Coolidge Dam site. The facilities are operated for storage and delivery of irrigation water as part of the Central Arizona Water Project. The dam and reservoir are surrounded by San Carlos Apache tribal lands. In our revised proposed rule, we misidentified the BIA lands as San Carlos Apache tribal lands. This ownership issue has been corrected in this final rule.

Unit 22 (Gila River 1) and Unit 28 (Gila River 2) are located upstream of San Carlos Reservoir on the Gila River where it enter the reservoir and near where Eagle Creek enters the river respectively. Unit 17 (Lower San Pedro and Gila River) is located downstream of San Carlos Reservoir. Unit 27 (Aravaipa Creek) flows into the lower San Pedro River. When at full capacity the San Carlos Reservoir contains 867,400 ac-ft (1.07 cubic km) of water, making it one of the largest lakes in Arizona. However, due to water demand and the seasonal, flashy nature of river flows into the reservoir result in the lake rarely fills and its water levels fluctuate dramatically (LCR MSCP 2004, p. 12). Total dry-up of the reservoir has been recorded over 21 times with two of those times occurring in the last five

years (LCR MSCP 2004, p. 12; Reclamation 2020b, p. 2). Chronic drought since 1999 had also severely reduced inflows and reduced stored water available to downstream irrigators (LCR MSCP 2004, p. 13). Despite these extreme water fluctuations, normal water management operations, similar to what occurs at other reservoirs managed for irrigation and other water use, can periodically store and release large amounts of water that can mimic riverine flood flows within the lakebed, spreading water over a large area and stimulating the growth of vegetation such as willow and cottonwood, and helping to create and maintain western yellow-billed cuckoo habitat. Coolidge Dam and San Carlos Reservoir operation plays a role in the overall development, persistence, and recycling of western yellow-billed cuckoo habitat (Service 2004, pp. 14–19). The San Carlos Apache Water Rights Settlement Act of 1992, allows the San Carlos Apache Tribe to exchange its Central Arizona Project water allocation for irrigation water releases from San Carlos Reservoir, and grants the Tribe permission to store exchanged water in the reservoir to maintain a permanent pool for fish, wildlife, and recreation (LCR MSCP 2004, p. 5). Although critical habitat is not being designated on the Gila River Indian Community (GRIC) lands, this Tribe is entitled to its allocation of water per existing agreements and exchanges and therefore has an interest in San Carlos management.

The San Carlos Apache Recreation and Wildlife Department conduct surveys for western yellow-billed cuckoo, but population size and territory information are the proprietary information of the San Carlos Apache Tribe. An unknown number of western yellow-billed cuckoos occur upstream of the San Carlos Reservoir on the Gila River and on Eagle Creek within tribal boundaries although the habitat appears to be suitable. Western yellow-billed cuckoos occur downstream and upstream of the San Carlos Apache Reservation on the Gila River. Recent surveys in 2016 and 2019 confirm presence of a breeding western yellow-billed cuckoos on the Gila River and in Eagle Creek (Andreson 2016b, entire; WestLand Resources, Inc. 2019, entire; and Cornell Lab of Ornithology 2020 (eBird data)). The San Carlos Apache parcels along lower Aravaipa Creek and the lower San Pedro River between Aravaipa Creek and the Gila River confluence are within a riparian corridor occupied by western yellow-billed cuckoos (Service 2013, pp. 349, 387). These small parcels are likely within the home range of foraging and breeding western yellow-billed cuckoos.

The San Carlos Apache Tribe Recreation and Wildlife Department (SCATRWD) administers recreational use permits for nontribal members on San Carlos Apache tribal lands including the San Carlos lake bottom (SCATRWD 2009, entire). The SCATRWD has identified specific numbered areas or units of their land where their various rules and regulations apply. The SCATRWD administers fishing licenses for San Carlos Reservoir, but does not include Federal land within the conservation space of San Carlos Reservoir. Other than a store and marina located closer toward Coolidge Dam and adjacent to the reservoir, no paved roads, developed camping areas, or other designed recreation centers ae located within the San Carlos Reservoir conservation space.

Benefits of Inclusion—San Carlos Apache Tribe

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the costs or outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved.

The Gila River, Eagle Creek, and San Carlos Apache parcels are known to be occupied by western yellow-billed cuckoos, and therefore, if a Federal action or permitting occurs, there is a nexus for evaluation under section 7 of the Act. In addition, any water delivery or operational activities associated with Coolidge Dam by the BIA or Reclamation would also be subject to section 7 consultation for both the listing and critical habitat. For example, in 2003, Reclamation initiated consultation under section 7 of the Act, on a proposed water exchange between the San Carlos Apache Tribe and the Central Arizona Project. We completed a biological opinion (Service 2004, entire). The only consultation on Eagle Creek (near Unit 28 (Gila River 2)) involved an upstream fish barrier and a BLM grazing plan. However, our recent records show that no other formal consultation on western yellow-billed cuckoos has occurred for actions associated with San Carlos Reservoir or water operations. As described above, even with western yellow-billed cuckoos occurring throughout this portion of the Gila River, the frequency of formal section 7 consultations for western yellow-billed cuckoo has been rare. We do not anticipate a noticeable increase in section 7 consultations in the future, nor any significant change to the current management of western yellow-billed cuckoos or its habitat resulting from consultations.

Another important benefit of including lands in a critical habitat designation is that it can serve to educate landowners, agencies, tribes, and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high value for certain species. Any information about the western yellow-billed cuckoo that reaches a wide audience, including parties engaged in conservation activities, is valuable.

However, the southwestern willow flycatcher has been listed since 1995, and western yellow-billed cuckoo has been a candidate species since 2001. These regulatory developments already ensured that the San Carlos Apache Tribe, GRIC, Reclamation, BIA, State of Arizona and others are fully aware of the importance of San Carlos Reservoir to listed riparian bird habitat and conservation due to their involvement in the water transfer consultations. The GRIC is made up of members of both the Akimel O'odham (Pima) and the Pee-Posh (Maricopa) tribes. The Akimel O'otham name for the yellow-billed cuckoo is Kathgam. The Pee-Posh general term for birds is 'chiyer. The GRIC and the San Carlos Apache Tribe have a long standing record for conserving habitat for sensitive species. Given that these regulatory actions have already informed the public about the value of these areas and helped to focus potential conservation actions, the educational benefits from designating critical habitat would be small.

Another possible benefit of the designation of critical habitat is that it may also affect the implementation of Federal laws, such as the Clean Water Act. These laws require analysis of the potential for proposed projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Benefits of Exclusion—San Carlos Apache Tribe

The benefits of excluding the Gila River Indian Community and the San Carlos Apache Tribe lands from designated critical habitat include: (1) Our deference to the Tribe to develop and implement conservation and natural resource management plans for their lands and resources, which includes benefits to the western yellow-billed cuckoo and its habitat that might not otherwise occur; (2) the continuance and strengthening of our effective working relationships with the Tribe to promote the conservation of the western yellow-billed cuckoo and its habitat; and (3) the maintenance of effective partnerships with the Tribe and working in collaboration and cooperation to promote additional conservation of the western yellow-billed cuckoo and their habitat.

The San Carlos Reservoir was acquired by BIA for the purpose of water storage for the Gila River Indian Community and the San Carlos Apache Tribe. Additionally, San Carlos Reservoir has become an important part of the San Carlos Apache Tribe society because it generates income through its recreational value, and nearby stores, lodging, and gaming facilities, thereby becoming a significant trust asset to both Gila River Indian Community and the San Carlos Apache Tribe. During the development of the southwestern willow flycatcher and western yellow-billed cuckoo critical habitat designations and recovery implementation, we have met and communicated with the GRIC and San Carlos Apache Tribe to discuss how they might be affected and measures they make take as a result of these actions. As a result, the San Carlos Apache Tribe submitted a Flycatcher Management Plan that is compatible with western yellow-billed cuckoo management (San Carlos Apache Tribe 2005, entire). During our communication with these tribes, we recognized and endorsed their fundamental right to provide for tribal resource management activities, including those relating to riparian habitat. The designation of critical habitat would be expected to have an adverse impact on the working relationship for conservation that we have developed with the GRIC and the San Carlos Apache Tribe. During our discussions and in the comments we received from the Tribes on the proposed designation of critical habitat, we were informed that critical habitat would be viewed as an intrusion on their sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws, and in the case of GRIC, a potential impact to their federally mandated water deliveries. The perceived future restrictions (whether realized or not) of a critical habitat designation could have a damaging effect to coordination efforts, possibly preventing actions that might maintain, improve, or restore habitat for the western yellow-billed cuckoo and other listed species. For these reasons, we have determined that our working relationships with these the GRIC and San Carlos Apache Tribe would be better maintained if the critical habitat areas identified on tribal lands on the Gila River, Eagle Creek, lower San Pedro River and Federal lands within the San Carlos Reservoir owned by BIA and managed by the San Carlos Apache Tribe are excluded from the final designation. We view this as a substantial benefit since we have developed a cooperative working relationship with these tribes for the mutual benefit of western yellow-billed cuckoo conservation and other endangered and threatened species.

Benefits of Exclusion Outweigh the Benefits of Inclusion—San Carlos Apache Tribe

The benefits of designating the areas identified as critical habitat within the Gila River, Eagle Creek, and Federal lands at San Carlos Reservoir on the San Carlos Apache Reservation; and the San Carlos Apache parcels on lower San Pedro River and Aravaipa Creek are limited to the incremental benefits gained through the regulatory requirement to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat, as well as agency and educational awareness, and implementation of other laws and regulations. However, we have determined that these benefits are minimized because the species is listed as threatened and there is a lack of Federal actions occurring within the tribal lands and conservation space of San Carlos Reservoir; the operation of Coolidge Dam that supports western yellow-billed cuckoo habitat it influences; and the limited discretion BIA may have with Coolidge Dam operations. Because of this overall awareness by tribal, Federal, and State entities, we have determined that there is little educational benefit or support for other environmental laws and regulations attributable to western yellow-billed cuckoo critical habitat beyond those achieved from listing the species under the Act.

The benefits of excluding these areas from designation as critical habitat also include the importance of our partnerships and working relationships with the San Carlos Apache and Gila River Indian Community, as well as our responsibility to afford reasonable protection of Native American trust assets. While San Carlos Reservoir is Federal land, the water resources it supports are essential components to both the San Carlos Apache Tribe and Gila River Indian Community. These tribes play an important partnership role in managing their lands for western yellow-billed cuckoo recovery. Without their cooperation, land management, and ability to share information, achieving western yellow-billed cuckoo conservation would be difficult on Tribal lands. Our conservation partnership with tribes also includes the advancement and support of our Federal Indian Trust obligations and the maintenance of effective collaboration and cooperation to promote the conservation of the western yellow-billed cuckoo and its habitat. In conclusion, we find that the benefits of excluding the Gila River, Eagle Creek, and San Carlos Reservoir Lakebed on San Carlos Apache Reservation; and San Carlos Apache parcels on lower San Pedro River and Aravaipa Creek from the final critical habitat designation outweigh the benefits of including these areas.

Exclusion Will Not Result in Extinction of the Species—San Carlos Apache Tribe

We have determined that exclusion of critical habitat from the areas identified on the Gila River, Eagle Creek, and San Carlos Reservoir Lakebed on San Carlos Apache Reservation and San Carlos Apache parcels on lower San Pedro River and Aravaipa Creek will not result in the extinction of the western yellow-billed cuckoo. We base this determination on several points. Firstly, as discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction.

Secondly, the San Carlos Apache are committed to protecting and managing for the western yellow-billed cuckoo and its habitat. We have determined that this commitment accomplishes greater conservation than would be available through the implementation of a designation of critical habitat on a project-by-project basis. We have determined that excluding these lands

will not result in the extinction of the western yellow-billed cuckoo and that these lands should be excluded under subsection 4(b)(2) of the Act because the benefits of exclusion from critical habitat for the western yellow-billed cuckoo outweigh the benefits of their inclusion. As a result, approximately 12,074 ac (4,886 ha) of San Carlos Apache Tribal Lands in Unit 22 (AZ–20) (10,183 ac (4,121 ha)); Unit 28 (AZ–26) (1,436 ac (581 ha)); and Unit 17 (AZ–15) (455 ac (184 ha)) on the Gila River, Eagle Creek, and San Carlos Reservoir Lakebed on San Carlos Apache Reservation, and San Carlos Apache parcels on lower San Pedro River and Aravaipa Creek are excluded from the final critical habitat designation.

Unit 65 (ID–1) Snake River 1—Shoshone-Bannock Tribal Land Management

The Shoshone-Bannock tribal lands on the Fort Hall Reservation are located in Bingham, Bannock, Caribou, and Power Counties in Idaho, and approximately 2,527 ac (1,023 ha) of western yellow billed cuckoo critical habitat with Unit 65 has been identified on their lands. Riparian cottonwood forest occurs on approximately 1 percent of the Fort Hall Reservation and is primarily found along the Snake River in (the area known as) the Fort Hall bottoms. The Shoshone-Bannock Tribes have a demonstrated track record of maintaining these lands for natural resources through implementation of their Woodland Management Plan (WMP) and draft Integrated Resource Management Plan (IRMP).

The WMP was finalized in 2008 and identifies management guidance for specific forest types to maintain long-term sustainability of woodlands on the Fort Hall Reservation. The plan identifies actions that contribute to the conservation of cottonwood forest habitat important to western yellow billed-cuckoos including reducing the risk of wildfire, increasing cottonwood regeneration, decreasing the spread of nonnative plants, and maintaining and improving riparian conditions. Specific habitat improvements undertaken as the result of the WMP include fencing riparian areas to exclude them from livestock grazing and completing noxious and invasive weed treatments.

Additionally, the Shoshone-Bannock Tribes are implementing the draft IRMP which promotes an integrated review process for project planning and implementation across the tribe's resource departments. Although still in draft form, the IRMP has been used regularly with a great deal of success in delivering conservation as part of project reviews. The review process contains special consideration for any project occurring within the habitat for any special status or listed species and appropriate mitigation of potential impacts is developed by the Shoshone-Bannock Tribes' Fish and Wildlife Department. Significant changes in riparian cottonwood habitat conditions on the Fort Hall Reservation have not occurred over the past decade and existing habitat conditions are not expected to change, except for those positive projected habitat programs the Shoshone-Bannock Tribes are undertaking, in the near or long term.

Benefits of Inclusion—Tribal Lands on Fort Hall Reservation

Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved.

Our section 7 consultation history within the Shoshone-Bannock Tribes show that since listing in 2014, no formal consultations have occurred for actions conducted on tribal lands. We have conducted an informal consultation with Reclamation implementing actions which affect tribal lands; however, overall, since listing in 2014, section 7 consultations have been rare on tribal lands. Because of how the Shoshone-Bannock Tribes have chosen to manage and conserve their lands and the lack of past section 7 consultation history, we do not anticipate that the Shoshone-Bannock Tribes' actions would change considerably, generate a noticeable increase in section 7 consultations, and that the consultations would significantly change the current management of western yellow-billed cuckoos or their habitat.

Another important benefit of including lands in a critical habitat designation is that the designation can serve to educate landowners and the public regarding the potential conservation value of an area, and it may help focus management efforts on areas of high value for certain species. Any information about the western yellow-billed cuckoo that reaches a wide audience, including parties engaged in conservation activities, is valuable. The Shoshone-Bannock Tribes are currently working to survey western yellow-billed cuckoo habitat, participate in working groups, and exchange management information. Because the Shoshone-Bannock Tribes have developed the WMP and are aware of the value of their lands for western yellow-billed cuckoo conservation, the educational benefits of a western yellow-billed cuckoo critical habitat designation are minimized.

Another possible benefit of the designation of critical habitat is that it may inform implementation of Federal laws such as the Clean Water Act (33 U.S.C. 1251–1376). These laws require analysis of the potential for proposed projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Finally, there is the possible benefit that additional funding could be generated for habitat improvement by an area being designated as critical habitat. Some funding sources may rank a project higher if the area is designated as critical habitat. The Shoshone-Bannock Tribes have coordinated for additional sources of funding in order to conduct wildlife-related conservation activities. Therefore, having an area designated as critical habitat could improve the chances of receiving funding for western yellow-billed cuckoo habitat-related projects. However, areas where nesting, migrating, dispersing, or foraging western yellow-billed cuckoos occur, as is the case here, may also provide benefits when projects are evaluated for receipt of funding.

Therefore, because of the implementation of the WMP and IRMP conservation, rare initiation of formal section 7 consultations, the occurrence of western yellow-billed cuckoo on the Fort Hall Reservation, and overall coordination with the Shoshone-Bannock Tribes on western yellow-billed cuckoo-related issues, it is expected that there may be some, but limited, benefits from including Fort Hall Reservation tribal lands in a western yellow-billed cuckoo critical habitat designation. The principal benefit of any designated critical habitat is that activities in and affecting such habitat require consultation under section 7 of the Act for adverse modification. Such consultation would still be required due to the species being listed as threatened regardless of the

designation due to the area being occupied by the species. However, with the Shoshone-Bannock Tribes implementing measures that conserve western yellow-billed cuckoo habitat combined with the rarity of Federal actions resulting in formal section 7 consultations, the benefits of a critical habitat designation are minimized.

Benefits of Exclusion—Tribal Lands on Fort Hall Reservation

The benefits of excluding Shoshone-Bannock tribal lands on the Fort Hall Reservation from designated critical habitat include: (1) Our deference to the Tribe to develop and implement conservation and natural resource management plans for their lands and resources, which includes benefits to the western yellow-billed cuckoo and its habitat that might not otherwise occur; (2) the continuance and strengthening of our effective working relationships with the Tribe to promote the conservation of the western yellow-billed cuckoo and its habitat; and (3) the maintenance of effective partnerships with the Tribe and working in collaboration and cooperation to promote additional conservation of the western yellow-billed cuckoo and their habitat.

During the development of the western yellow-billed cuckoo critical habitat proposal and in exercise of our trust responsibility to the Tribes, we have met and communicated with the Shoshone-Bannock Tribes to discuss how they might be affected by the regulations associated with western yellow-billed cuckoo management, recovery actions, and the designation of critical habitat. As such, we established relationships specific to western yellow-billed cuckoo conservation. As part of our relationship, we have provided technical assistance to the Shoshone-Bannock Tribes to conserve the western yellow billed cuckoo and its habitat on their lands. The Shoshone-Bannock Tribes included measures within the WMP and IRMP that we have in our supporting record for this decision. We have determined that the Shoshone-Bannock Tribes should be the governmental entities to manage and promote western yellow-billed cuckoo conservation on their lands. During our communication with the Shoshone-Bannock Tribes, we recognized and endorsed their fundamental right to provide for tribal resource management activities, including those relating to riparian habitat.

The Shoshone-Bannock Tribes' WMP and IRMP address western yellow-billed cuckoo habitat. The proposed critical habitat segment we identified on lands managed by the Shoshone-Bannock Tribes are where western yellow-billed cuckoo have been recorded. The Shoshone-Bannock Tribes have expressed that their lands, and specifically riparian habitat, are connected to their cultural and religious beliefs, and as a result they have a strong commitment and reverence toward its stewardship and conservation. The WMP and IRMP identify actions that contribute to the conservation of cottonwood forest habitat important to western yellow billed-cuckoo including; reducing the risk of wildfire, increasing cottonwood regeneration, decreasing the spread of nonnative plants, and maintaining and improving riparian conditions. Specific habitat improvements undertaken as the result of the WMP include fencing riparian areas to exclude them from livestock grazing and completing noxious and invasive weed treatments. Through the IRMP the Shoshone-Bannock Tribes also have project-by-project review processes in place that allow evaluation and implementation of conservation measures to minimize, or eliminate adverse impacts. The Shoshone-Bannock Tribes have natural resource departments, which have experienced biologists, conduct western yellow-billed cuckoo surveys, and maintain databases on the quality of habitat throughout tribal lands and the status and occurrence of western yellow-billed cuckoo. Having this information available to the Shoshone-Bannock Tribes creates effective conservation through any project review process. The implementation of their WMP and IRMP has been coordinated and approved through appropriate tribal processes, such as tribal councils. Overall, these commitments toward management of riparian habitat likely accomplish greater conservation than would be available through the implementation of a designation of critical habitat on a project-by-project basis.

The designation of critical habitat on the Shoshone-Bannock Tribes lands would be expected to have an adverse impact on our working relationship with the Shoshone-Bannock Tribes. The perceived restrictions of a critical habitat designation could have a damaging effect on coordination efforts, possibly preventing actions that might maintain, improve, or restore habitat for the western yellow-billed cuckoo and other species. For these reasons, we have determined that our working relationships with the Shoshone-Bannock Tribes would be better maintained if we excluded their lands from the designation of western yellow-billed cuckoo critical habitat. We view this as a substantial benefit since we have developed a cooperative working relationship with the Shoshone-Bannock Tribes for the mutual benefit of western yellow-billed cuckoo conservation and other endangered and threatened species.

We indicated in the proposed rule that our final decision regarding the exclusions of tribal lands under 4(b)(2) of the Act would consider tribal management and the recognition of their capability to appropriately manage their own resources, and the government-to-government relationship of the United States with tribal entities (85 FR 11458; February 27, 2020 p. 11512). We also acknowledged our responsibilities to work directly with tribes in developing programs for healthy ecosystems, that tribal lands are not subject to the same controls as Federal public lands, our need to remain sensitive to Indian culture, and to make information available to tribes (85 FR 11458; February 27, 2020 p. 11504).

We coordinated and communicated with the Shoshone-Bannock Tribes throughout the proposal of western yellow-billed cuckoo critical habitat by providing them information on implementation of section 4(b)(2) of the Act; guidance and review; related documents, and public hearings; and our interest in consulting with them on a government-to-government basis at their request. We also followed up our correspondence with telephone calls and electronic mail to assist with any questions. During the comment period, we received input from the Shoshone-Bannock Tribes expressing the view that designating western yellow-billed cuckoo critical habitat on tribal land would adversely affect the Service's working relationship with all tribes. We conclude that our working relationships with these tribes on a government-to-government basis have been extremely beneficial in implementing natural resource programs of mutual interest, and that these productive relationships would be compromised by critical habitat designation of these tribal lands.

We have determined that the Shoshone-Bannock Tribes are willing to work cooperatively with us and others to benefit listed species, but only if they view the relationship as mutually beneficial. Consequently, the development of future voluntarily management actions for other listed species may be compromised if these tribal lands are designated as critical habitat for the western yellow-billed cuckoo. Thus, a benefit of excluding these lands would be future

conservation efforts that would benefit other listed species.

Benefits of Exclusion Outweigh Benefits of Inclusion—Tribal Lands on Fort Hall Reservation

The benefits of including the Shoshone-Bannock Tribes lands in the critical habitat designation are limited to the incremental benefits gained through the regulatory requirement to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat, agency and educational awareness, potential additional grant funding, and the implementation of other laws and regulations. However, due to the rarity of Federal actions resulting in formal section 7 consultations, the benefits of a critical habitat designation are minimized. In addition, the benefits of consultation are further minimized because any conservation measures which may have resulted from consultation are already provided through other mechanisms, such as (1) the conservation benefits to the western yellow-billed cuckoo and their habitat from implementation of the Reservation's WMP and IRMP; and (2) the maintenance of effective collaboration and cooperation to promote the conservation of the western yellow-billed cuckoo and its habitat.

Because the Shoshone-Bannock Tribes have developed specific management plans, has been involved with the critical habitat designation process, and is aware of the value of their lands for western yellow-billed cuckoo conservation, the educational benefits of a western yellow-billed cuckoo critical habitat designation are also minimized.

The benefits of excluding these areas from being designated as western yellow-billed cuckoo critical habitat are more significant and include encouraging the continued implementation of Shoshone-Bannock Tribes management and conservation measures such as monitoring, survey, habitat management and protection, and fire-risk reduction activities that are planned for the future or are currently being implemented. These programs will allow the Shoshone-Bannock Tribes to manage their natural resources to benefit riparian habitat for the western yellow-billed cuckoo, without the perception of Federal Government intrusion. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of these areas will likely also provide additional benefits to the western yellow-billed cuckoo and other listed species that would not otherwise be available without the Service's maintaining a cooperative working relationship with the Shoshone-Bannock Tribes. The actions taken by the Shoshone-Bannock Tribes to manage and protect habitat needed for western yellow-billed cuckoo are above those conservation measures which may be required if the area was designated as critical habitat. In conclusion, we find that the benefits of excluding the Fort Hall Reservation lands (Shoshone-Bannock Tribes) in Idaho, from critical habitat designation outweigh the benefits of including these areas.

Exclusion Will Not Result in Extinction—Tribal Lands on Fort Hall Reservation

We have determined that exclusion of the Shoshone-Bannock Tribal lands from the final critical habitat designation will not result in the extinction of the western yellow-billed cuckoo. We base this determination on several points. Firstly, as discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Secondly, the Shoshone-Bannock Tribes have committed to protecting and managing western yellow-billed cuckoo habitat according to their WMP and IRMP. We have determined that this commitment accomplishes greater conservation than would be available through the implementation of a designation of critical habitat on a project-by-project basis. With the implementation of these plans, we have concluded that this exclusion from critical habitat will not result in the extinction of the western yellow-billed cuckoo. Accordingly, we have determined that 2,527 ac (1,023 ha) of the Fort Hall Reservation tribal lands are excluded under subsection 4(b)(2) of the Act because the benefits of excluding these lands from critical habitat for the western yellow-billed cuckoo outweigh the benefits of their inclusion, and the exclusion of these lands from the designation will not result in the extinction of the species.

Unit 35 (NM–4) Upper Rio Grande 1—Ohkay Owingeh, NM

Ohkay Owingeh is located just north of Espanola in Rio Arriba County New Mexico, and adjoins the lands of Santa Clara Pueblo. The Pueblo includes the southern or downstream end of the Velarde reach of the Rio Grande, and comprises the largest contiguous area of generally intact bosque, as well as the largest riparian area under the control of a single landowner, within the Velarde reach. On Ohkay Owingeh, we are excluding 1,313 ac (531 ha) of critical habitat.

Dating back to 1993, upon observing the presence of the southwestern willow flycatcher, the Pueblo began restoring the bosque habitat and associated wetlands specifically for the southwestern willow flycatcher. Habitat within the Pueblo had been much degraded relative to historical conditions for two main reasons: (1) River channelization that has caused floodplain desiccation, cessation of overbank flooding, and disruption of geomorphological processes; and (2) intensive invasion by nonnative trees, primarily Russian olives. The increasing frequency and severity of fires in the Rio Grande bosque, accompanied by changes in vegetation and the water regime, underscores the urgency of the restoration needs.

Ohkay Owingeh immediately began restoration/conservation projects to benefit the southwestern willow flycatcher in 1994, with restoration/conservation occurring over approximately 4 ac (1.6 ha) of Ohkay Owingeh lands. Since 1999, the Pueblo has initiated or completed a variety of restoration/conservation projects, including further wetland creation and expansion, southwestern willow flycatcher habitat enhancement with vegetation and open water, and removal of non-native vegetation with replacement of native vegetation. These projects are funded through various programs of the Environmental Protection Agency, Wildland Urban Interface/Collaborative Forest Restoration Program, Middle Rio Grande Endangered Species Act Collaborative Program, Service Partners for Fish and Wildlife Program, and the State of New Mexico; they affect 744 riparian ac (301 riparian ha) on the Pueblo with direct and indirect benefits to the southwestern willow flycatcher. The project implementations include conservation, monitoring, and management for the southwestern willow flycatcher into the future. These efforts contribute to the long term goals of recovery for the southwestern willow flycatcher. In addition to the habitat work, the Pueblo supports southwestern willow flycatcher surveys and nest monitoring on the Pueblo lands. Though past work has targeted southwestern willow flycatchers, restoration efforts also provide benefit to the western yellow-billed cuckoos. It is because of

their historical response to meet the needs of listed species as provided in the example above, that the Service concludes that Ohkay Owingeh will ensure conservation benefits to the western yellow-billed cuckoo on their lands. Ohkay Owingeh commented that the western yellow-billed cuckoo will be incorporated into their Riparian and Bosque Habitat Restoration Management Plan, as was done for other listed species such as the New Mexico meadow jumping mouse (*Zapus hudsonius luteus*).

Benefits of Inclusion—Ohkay Owingeh

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved.

Since 1993, the section 7 consultations involving Ohkay Owingeh for the southwestern willow flycatcher, New Mexico meadow jumping mouse, or western yellow-billed cuckoo have all been informal (with the exception of one formal consultation). Effects to the southwestern willow flycatcher, New Mexico meadow jumping mouse, and/or western yellow-billed cuckoo from these projects have been insignificant and discountable because conservation measures have focused on restoration and management for the species and its habitat.

Another possible benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the western yellow-billed cuckoo and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable. However, the Pueblo is already working with the Service to address the habitat needs of the species. For these reasons, then, we have determined that designation of critical habitat would have few, if any, additional benefits beyond those that will result from continued consultation for the presence of the species.

Another possible benefit of the designation of critical habitat is that it may also affect the implementation of Federal laws, such as the Clean Water Act. These laws require analysis of the potential for proposed projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Benefits of Exclusion—Ohkay Owingeh

The benefits of excluding the Pueblo from designated critical habitat are significant. We have determined that the significant benefits that would be realized by foregoing the designation of critical habitat on this area include: (1) Our deference to the Pueblo to develop and implement conservation and natural resource management plans for their lands and resources, which includes benefits to the western yellow-billed cuckoo and its habitat that might not otherwise occur; (2) the continuance and strengthening of our effective working relationships with the Pueblo to promote the conservation of the western yellow-billed cuckoo and its habitat; and (3) the maintenance of effective partnerships with the Pueblo and working in collaboration and cooperation to promote additional conservation of the western yellow-billed cuckoo and their habitat.

We have determined that Ohkay Owingeh should be the governmental entity to manage and promote the conservation of the western yellow-billed cuckoo on their land as indicated in Secretarial Order 3206; the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951); Executive Order 13175; and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2).

We find that other conservation benefits are provided to the Upper Rio Grande Unit and the western yellow-billed cuckoo and its habitat by excluding the Pueblo from the designation. For example, as part of maintaining a cooperative working relationship with the Pueblo, conservation benefits, including listed species' surveys, nest and/or habitat monitoring, and/or habitat restoration and enhancement have been possible. Ohkay Owingeh submitted comments on October 14, 2014, indicated that critical habitat would be viewed as an intrusion on their sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws. To this end, we found that the Pueblo would prefer to work with us on a Government-to-Government basis. For these reasons, we have determined that our working relationship with the Pueblo would be maintained if they are excluded from the designation of critical habitat for the western yellow-billed cuckoo. We view this as a substantial benefit.

Proactive voluntary conservation efforts have and will continue to promote the recovery of the western yellow-billed cuckoo. As mentioned above, the Pueblo is an important land manager in the Upper Rio Grande Unit. The consultation history, surveys, and conservation, restoration and management information historically submitted by the Pueblo documents that meaningful collaborative and cooperative work for listed species and their habitat will continue within their lands. These commitments demonstrate the willingness of the Pueblo to work cooperatively with us toward conservation efforts that will benefit the western yellow-billed cuckoo. The Pueblo has committed to several ongoing or future management, restoration, enhancement, and survey activities that may not occur with critical habitat designation. Therefore, we have determined that the results of these activities will promote long-term protection and conserve the western yellow-billed cuckoo and its habitat within the Pueblo lands. The benefits of excluding this area from critical habitat will encourage the continued cooperation and development of data-sharing and management plans. If this area is designated as critical habitat, we have determined that it is unlikely that sharing of information would occur.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Ohkay Owingeh

The long-term goal of riparian management on Ohkay Owingeh is to make significant additions of wetland areas for listed species, as well as implement innovative restoration techniques, decrease fire hazards by restoring native vegetation, share information with other restoration practitioners, use restoration projects in the education of the tribal community and surrounding community, and provide a working and training environment for the people of the Pueblo.

Based on their traditional beliefs and ties to the bosque area, the Pueblo continues to protect, conserve, and restore the riparian species and their habitat. As is demonstrated through their projects, the Pueblo has invested a

significant amount of ongoing time and effort to address the needs and recovery of the southwestern willow flycatcher. In addition, based on the long term goals of restoring additional wetland and native habitat, the Pueblo has shown that it is managing its resources to meet its traditional and cultural needs, while addressing the needs of listed species.

Because the Pueblo has a lengthy history of managing and restoring habitat for sensitive species, has been involved with the critical habitat designation process, and is aware of the value of their lands for western yellow-billed cuckoo conservation, the educational benefits of a western yellow-billed cuckoo critical habitat designation are also minimized.

In summary, the benefits of including the Pueblo in critical habitat are low, and are limited to insignificant educational benefits. The benefits of excluding these areas from designation as critical habitat for the western yellow-billed cuckoo are significant, and include encouraging the continued development and implementation of special management measures such as monitoring, surveys, enhancement, and restoration activities that the Pueblo plans for the future or is currently implementing. These activities and projects will allow the Pueblo to manage their natural resources to benefit the Upper Rio Grande Unit and the western yellow-billed cuckoo, without the perception of Federal Government intrusion. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of this area will likely also provide additional benefits to the species that would not otherwise be available to encourage and maintain cooperative working relationships. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area.

Exclusion Will Not Result in Extinction of the Species—Ohkay Owingeh

We have determined that exclusion of the Pueblo land will not result in extinction of the species. Firstly, as discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Secondly, the Pueblo is committed to protecting and managing Pueblo lands and species found on those lands according to their tribal and cultural management plans and natural resource management objectives, which provide conservation benefits for the western yellow-billed cuckoo and its habitat. In short, the Pueblo is committed to greater conservation measures on their land than would be available through the designation of critical habitat. Accordingly, we have determined that the 1,313 ac (531 ha) of Ohkay Owingeh lands be excluded from the final critical habitat under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species.

Unit 36 (NM–5) Upper Rio Grande 2—Santa Clara Pueblo, NM

On Santa Clara Pueblo, we proposed 141 ac (57 ac) of critical habitat within this unit in Rio Arriba County, New Mexico. The entire area is considered occupied at the time of listing. The Pueblo has joined with San Ildefonso Pueblo and Ohkay Owingeh to work with the Corps to complete large scale environmental restoration and floodplain management on their lands. As a result, Santa Clara Pueblo is already restoring all habitat proposed as critical habitat for western yellow-billed cuckoos with the exception of 4 ac (1.6 ha) which are agricultural lands. We have a productive working relationship with Santa Clara Pueblo and coordinated with them during the critical habitat designation process.

Benefits of Inclusion—Santa Clara Pueblo

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved.

Another possible benefit is that the designation of critical habitat can serve to educate the landowner and public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the western yellow-billed cuckoo and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable.

Another possible benefit of the designation of critical habitat is that it may also affect the implementation of Federal laws, such as the Clean Water Act. These laws require analysis of the potential for proposed projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Finally, there is the possible benefit that additional funding could be generated for habitat improvement by an area being designated as critical habitat. Some funding sources may rank a project higher if the area is designated as critical habitat. Tribes or Pueblos often seek additional sources of funding in order to conduct wildlife-related conservation activities. Therefore, having an area designated as critical habitat could improve the chances of receiving funding for western yellow-billed cuckoo habitat-related projects.

Benefits of Exclusion—Santa Clara Pueblo

The benefits of excluding the Pueblo from designated critical habitat are significant. The proposed critical habitat designation included areas of riparian woodland, or bosque, within the Pueblo boundaries. We have determined that the significant benefits that would be realized by foregoing the designation of critical habitat on this area include: (1) Our deference to the Pueblo to develop and implement conservation and natural resource management plans for their lands and resources, which includes benefits to the western yellow-billed cuckoo and its habitat that might not otherwise occur; (2) the continuance and strengthening of our effective working relationships with the Pueblo to promote the conservation of the western yellow-billed cuckoo and its habitat; and (3) the maintenance of effective partnerships with the Pueblo and working in collaboration and cooperation to promote additional conservation of the western yellow-billed cuckoo and their habitat.

We have determined that Santa Clara Pueblo should be the governmental entity to manage and promote the conservation of the western yellow-billed cuckoo on their land as indicated in Secretarial Order 3206; Executive Order 13175; and the relevant provision

of the Departmental Manual of the Department of the Interior (512 DM 2).

We find that other conservation benefits are provided to the Upper Rio Grande Unit and the western yellow-billed cuckoo and its habitat by excluding the Pueblo from the designation. For example, the objective of Santa Clara Pueblo's management of their land is to protect, conserve, and promote the well-being of listed species and their associated habitats within the Pueblo's boundaries. As part of maintaining a cooperative working relationship with the Pueblo, conservation benefits, including listed species' surveys, nest and/or habitat monitoring, and/or habitat restoration and enhancement have been possible. In comments submitted by Santa Clara Pueblo on October 13, 2014, we were informed that critical habitat would be viewed as unnecessary and offensive to impose extra regulatory burdens upon us when they are voluntarily and proactively managing their lands to provide benefit to the western yellow-billed cuckoo. The Pueblo would prefer to work with us on a Government-to-Government basis. For these reasons, we have determined that our working relationship with the Pueblo would be maintained if they are excluded from the designation of critical habitat for the western yellow-billed cuckoo. We view this as a substantial benefit.

Proactive voluntary conservation efforts have and will continue to promote the recovery of the western yellow-billed cuckoo. As mentioned above, the Pueblo is an important land manager in the Upper Rio Grande Unit. The consultation conservation, restoration and management information historically submitted by the Pueblo documents that meaningful collaborative and cooperative work for listed species and their habitat will continue within their lands. These commitments demonstrate the willingness of the Pueblo to work cooperatively with us toward conservation efforts that will benefit the western yellow-billed cuckoo. The Pueblo has committed to several ongoing or future management, restoration, enhancement, and survey activities that may not occur with critical habitat designation. Therefore, we have determined that the results of these activities will promote long-term protection and conserve the western yellow-billed cuckoo and its habitat within the Pueblo lands. The benefits of excluding this area from critical habitat will encourage the continued cooperation and development of data-sharing and management plans. If this area is designated as critical habitat, we have determined that it is unlikely that sharing of information would occur.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Santa Clara Pueblo

The benefits of including Pueblo in the critical habitat designation are limited to the incremental benefits gained through the regulatory requirement to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat, agency and educational awareness, potential additional grant funding, and the implementation of other law and regulations. However, due to the rarity of Federal actions resulting in formal section 7 consultations, the benefits of a critical habitat designation are minimized. In addition, the Pueblo will continue to protect its bosque habitat and does not intend to develop the areas used by western yellow-billed cuckoo as critical habitat. Moreover, as part of their history, the Santa Clara Pueblo has conducted a variety of voluntary measures, restoration projects, and management actions to conserve riparian vegetation, including protecting riparian habitat from fire, maintaining native vegetation, and preventing habitat fragmentation. The Pueblo is already working with the Service to address the habitat needs of the species. This working relationship will be better maintained if Santa Clara Pueblo was excluded from the designation. We view this as a substantial benefit since we have developed a cooperative working relationship for the mutual benefit of endangered and threatened species, including the western yellow-billed cuckoo. Because the Pueblo has implemented habitat conservation and restoration efforts, and is aware of the value of their lands for western yellow-billed cuckoo conservation, the educational benefits of a western yellow-billed cuckoo critical habitat designation are also minimized. For these reasons, we have determined that designation of critical habitat would have few, if any, additional benefits beyond those that will result from the presence of the species.

In summary, the benefits of including the Pueblo in critical habitat are low, and are limited to insignificant educational benefits. The benefits of excluding these areas from designation as critical habitat for the western yellow-billed cuckoo are significant, and include encouraging the continued development and implementation of special management measures such as monitoring, surveys, enhancement, and restoration activities that the Pueblo plans for the future or is currently implementing. These activities and projects will allow the Pueblo to manage their natural resources to benefit the Upper Rio Grande Unit and the western yellow-billed cuckoo, without the perception of Federal Government intrusion. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of this area will likely also provide additional benefits to the species that would not otherwise be available to encourage and maintain cooperative working relationships. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area.

Exclusion Will Not Result in Extinction of the Species—Santa Clara Pueblo

We have determined that exclusion of the Pueblo land will not result in extinction of the species. Firstly, as discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Secondly, the Pueblo is committed to protecting and managing Pueblo lands and species found on those lands according to their tribal and cultural management plans and natural resource management objectives, which provide conservation benefits for the western yellow-billed cuckoo and its habitat. In short, the Pueblo is committed to greater conservation measures on their land than would be available through the designation of critical habitat. Accordingly, we have determined that the 141 ac (57 ha) of Santa Clara Pueblo lands are excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species.

Unit 36 (NM–5) Upper Rio Grande 2—San Ildefonso Pueblo, NM

San Ildefonso Pueblo, is located in Rio Arriba County New Mexico, and adjoins the lands of Santa Clara Pueblo. On San Ildefonso Pueblo, we proposed 1,032 ac (418 ha) of critical habitat.

In 2011, an addendum to the Pueblo's 2005 Integrated Resource Management Plan (IRMP) was revised and adopted to provide for long term management of the Tribe's natural resources, including the southwestern willow flycatcher's habitat. The addendum to the Pueblo's IRMP specifically addresses measures to

protect southwestern willow flycatcher habitat based on the Southwestern Willow Flycatcher Recovery Plan (Service 2002, entire). While funding specific for IRMP implementation has not been fully secured unless surplus funds are available, the Pueblo has committed to the IRMPs implementation and the Addendum is now part of the Pueblo policy in this area. The Pueblo de San Ildefonso worked with the Corps to protect the southwestern willow flycatcher's habitat on tribal lands under agreements in place to serve that purpose. Though the western yellow-billed cuckoo has not been included in the IRMP, many management practices aid in the conservation of the western yellow-billed cuckoo. These include, but are not limited to, restoring adequate water-related elements to improve and expand the quality, quantity, and distribution of riparian habitat; retaining riparian vegetation in the floodplain and minimizing clearing of vegetation; and, managing livestock grazing and improving fences to prevent damage to riparian areas and increase riparian habitat quality and quantity. We expect the Pueblo to continue such conservation activity for the western yellow-billed cuckoo based on the Pueblo's commitment to natural resource protection and enhancement even if the southwestern willow flycatcher is delisted.

Benefits of Inclusion—San Ildefonso Pueblo

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved. Since listing, one consultation and conference for western yellow-billed cuckoo occurred in 2016. The consultation and conference was with Reclamation, who made a ''no effect'' determination on the western yellow-billed cuckoo and its proposed critical habitat in the Pojoaque Basin Regional Water System and Associated Connected Actions Biological Assessment and consultation number 02ENNM00–2016–I–0398.

Another possible benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the western yellow-billed cuckoo and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable.

Another possible benefit of the designation of critical habitat is that it may also affect the implementation of Federal laws, such as the Clean Water Act. These laws require analysis of the potential for proposed projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Finally, there is the possible benefit that additional funding could be generated for habitat improvement by an area being designated as critical habitat. Some funding sources may rank a project higher if the area is designated as critical habitat. Tribes or Pueblos often seek additional sources of funding in order to conduct wildlife-related conservation activities. Therefore, having an area designated as critical habitat could improve the chances of receiving funding for western yellow-billed cuckoo habitat-related projects.

Benefits of Exclusion—San Ildefonso Pueblo

The benefits of excluding the Pueblo from designated critical habitat are significant. We have determined that the significant benefits that would be realized by foregoing the designation of critical habitat on this area include: (1) Our deference to the Pueblo to develop and implement conservation and natural resource management plans for their lands and resources, which includes benefits to the western yellow-billed cuckoo and its habitat that might not otherwise occur; (2) the continuance and strengthening of our effective working relationships with the Pueblo to promote the conservation of the western yellow-billed cuckoo and its habitat; and (3) the maintenance of effective partnerships with the Pueblo and working in collaboration and cooperation to promote additional conservation of the western yellow-billed cuckoo and their habitat.

Educational benefits will be provided to the Pueblo lands if they are excluded from the designation, because their past and ongoing restoration projects, with management goals, provide for conservation benefits above any that would be provided by designating critical habitat. For example, the educational aspects are similar for this area if they are not included in the designation because the Pueblo will continue to work cooperatively toward the conservation of the riparian ecosystem, and we have determined that based on their history of conservation, that this will also benefit the western yellow-billed cuckoo.

The exclusion from critical habitat will further support and maintain our cooperative working relationship with the Pueblo, and provide conservation benefits, including implementing habitat restoration and enhancements above those which have already been implemented. During past discussions with the Pueblo, we were informed that critical habitat would be viewed as an intrusion on their sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws. For these reasons, we have determined that our working relationship with the Pueblo would be maintained if they are excluded from the designation of critical habitat for the western yellow-billed cuckoo. We view this as a substantial benefit.

Protection of river and riparian habitat resources remains an important component of the Pueblo's culture and traditions. The Pueblo will continue to protect riparian habitat on tribal land through its existing programs and agreements.

The long-term goal of riparian management on San Ildefonso Pueblo is to make significant additions of wetland areas for breeding southwestern willow flycatchers, as well as implement innovative restoration techniques, decrease fire hazards by restoring native vegetation, share information with other restoration practitioners, use restoration projects in the education of the tribal community and surrounding community, and provide a working and training environment for the people of the Pueblo. These efforts will also provide benefit to the western yellow-billed cuckoo.

Based on their traditional beliefs and ties to the bosque area, the Pueblo continues to protect, conserve, and restore the riparian species and their habitat. The Pueblo has invested ongoing time and effort to address the needs and recovery of the southwestern willow flycatcher and we have determined that, based on this history, that the Pueblo will also invest time and effort in conservation for the western

yellow-billed cuckoo. In addition, based on the long term goals of restoring additional wetland and native habitat, the Pueblo has shown that it is managing its resources to meet its traditional and cultural needs, while addressing the needs of federally listed species.

Proactive voluntary conservation efforts have and will continue to promote the recovery of the western yellow-billed cuckoo. As mentioned above, the Pueblo is an important land manager in the Upper Rio Grande Unit. The commitments in the IRMP demonstrate the willingness of the Pueblo to work cooperatively with us toward conservation efforts that will benefit listed species. The Pueblo has committed to several ongoing or future management, restoration, enhancement, activities that may not occur with critical habitat designation. Therefore, we have determined that the results of these activities will promote long-term protection and conserve the western yellow-billed cuckoo and its habitat within the Pueblo lands. The benefits of excluding this area from critical habitat will encourage the continued cooperation and development of data-sharing and management plans.

Benefits of Exclusion Outweigh the Benefits of Inclusion—San Ildefonso Pueblo

The benefits of including the Pueblo in the critical habitat designation are limited to the incremental benefits gained through the regulatory requirement to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat, agency and educational awareness, potential additional grant funding, and the implementation of other law and regulations. The benefits of including the Pueblo in critical habitat are low, and are limited to minor educational benefits. However, due to the rarity of Federal actions resulting in formal section 7 consultations, the benefits of a critical habitat designation are minimized. The benefits of consultation are further minimized because any conservation measures which may have resulted from consultation are already provided through other mechanisms, such as (1) the conservation benefits to the western yellow-billed cuckoo and their habitat from implementation of the Pueblo's management plans; and (2) the maintenance of effective collaboration and cooperation to promote the conservation of the southwestern willow flycatcher and western yellow-billed cuckoo and their habitat. Because the Pueblo has developed a specific management plan, has been involved with the critical habitat designation process, and is aware of the value of their lands for western yellow-billed cuckoo conservation, the educational benefits of a western yellow-billed cuckoo critical habitat designation are also minimized.

The benefits of excluding these areas from designation as critical habitat for the western yellow-billed cuckoo are significant, and include encouraging the continued development and implementation of special management measures such as enhancement, and restoration activities that the Pueblo plans for the future or is currently implementing. These activities and projects will allow the Pueblo to manage their natural resources to benefit the Upper Rio Grande Unit and the western yellow-billed cuckoo, without the perception of Federal Government intrusion. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of this area will likely also provide additional benefits to the species that would not otherwise be available to encourage and maintain cooperative working relationships. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area.

Exclusion Will Not Result in Extinction of the Species—San Ildefonso Pueblo

We have determined that exclusion of the Pueblo land from the designation of critical habitat will not result in extinction of the western yellow-billed cuckoo. We base this determination on several points. Firstly, as discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Secondly, the Pueblo is committed to protecting and managing Pueblo lands and species found on those lands according to their tribal and cultural management plans and natural resource management objectives, which provide conservation benefits for the species and its habitat. In short, the Pueblo is committed to greater conservation measures on their land than would be available through the designation of critical habitat. Accordingly, we have determined that the 1,032 ac (418 ha) of San Ildefonso lands be excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species.

Unit 37: NM–6A) Middle Rio Grande—Santa Ana Pueblo, NM

On Santa Ana Pueblo, we proposed 862 ac (349 ha) of critical habitat within Sandoval County, New Mexico. The entire area is excluded from the final designation.

The Pueblo is an important land manager in the Middle Rio Grande. The Pueblo of Santa Ana has developed and maintained a long standing history of habitat projects and conservation that includes the southwestern willow flycatcher, Rio Grande silvery minnow, and the western yellow-billed cuckoo. The objective of their management program is to protect, conserve, and promote the resources associated with the southwestern willow flycatcher, silvery minnow, and western yellow-billed cuckoo within the Pueblo's boundaries. Over the last 26 years, an estimated 3 formal consultations have occurred and all have been associated with either the Rio Grande silvery minnow or southwestern willow flycatcher. No consultations for western yellow-billed cuckoo have occurred for actions on Santa Ana Pueblo lands. The consultation history, surveys, and conservation, restoration and management information historically submitted by the Pueblo documents that meaningful collaborative and cooperative work for listed species and their habitat that have occurred within their lands. These commitments demonstrate the willingness of the Pueblo to work cooperatively with us toward conservation efforts that will benefit the western yellow-billed cuckoo. The Pueblo has committed to several ongoing or future management, restoration, enhancement, and survey activities that may not occur with critical habitat designation. The Santa Ana Pueblo has completed restoration and conservation efforts, including a Safe Harbor Agreement, for the efforts associated with the southwestern willow flycatcher, and our ongoing conservation partnership. We have determined that the management practices of Santa Ana Pueblo fulfills our criteria for exclusion.

Benefits of Inclusion—Santa Ana Pueblo

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of

any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved.

Another possible benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the western yellow-billed cuckoo and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable. However, the Pueblo is already working with the Service to address the habitat needs of the species. For these reasons, then, we have determined that designation of critical habitat would have few, if any, additional benefits beyond those that will result from continued consultation for the presence of the species.

Another possible benefit of the designation of critical habitat is that it may also affect the implementation of Federal laws, such as the Clean Water Act. These laws require analysis of the potential for proposed projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Finally, there is the possible benefit that additional funding could be generated for habitat improvement by an area being designated as critical habitat. Some funding sources may rank a project higher if the area is designated as critical habitat. Tribes or pueblos often seek additional sources of funding in order to conduct wildlife-related conservation activities. Therefore, having an area designated as critical habitat could improve the chances of receiving funding for western yellow-billed cuckoo habitat-related projects.

Benefits of Exclusion—Santa Ana Pueblo

The benefits of excluding the Pueblo from designated critical habitat are significant and include: (1) Our deference to the Pueblo to develop and implement conservation and natural resource management plans for their lands and resources, which includes benefits to the western yellow-billed cuckoo and its habitat that might not otherwise occur; (2) the continuance and strengthening of our effective working relationships with the Pueblo to promote the conservation of the western yellow-billed cuckoo and its habitat; and (3) the maintenance of effective partnerships with the Pueblo and working in collaboration and cooperation to promote additional conservation of the western yellow-billed cuckoo and their habitat.

We have determined that Santa Ana Pueblo should be the governmental entity to manage and promote the conservation of the western yellow-billed cuckoo on their land. In comments submitted on October 21, 2014, the Santa Ana Pueblo indicated that they would discourage designation of critical habitat on their lands. During our discussions with Santa Ana Pueblo in development of this final designation, it became clear to the Service that a critical habitat designation on Santa Ana land would be viewed as disrespectful and an intrusion on their sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws. The perceived restrictions of a critical habitat designation could have a more damaging effect to coordination efforts, possibly preventing actions that might maintain, improve, or restore habitat for the western yellow-billed cuckoo and other endangered or threatened species like the southwestern willow flycatcher and the Rio Grande silvery minnow.

As part of our working relationship with the Pueblo, conservation benefits, including listed species' surveys, nest and/or habitat monitoring, and/or habitat restoration and enhancement have been possible. By excluding critical habitat from the Santa Ana Pueblo, we have determined that our working relationship with the Pueblo would be maintained. We view this as a substantial benefit.

Therefore, we have determined that the results of these activities will promote long-term protection and conserve the western yellow-billed cuckoo and its habitat within the Pueblo lands. The benefits of excluding this area from critical habitat will encourage the continued cooperation and development of data-sharing and management plans.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Santa Ana Pueblo

The benefits of including the Pueblo in the critical habitat designation are limited to the incremental benefits gained through the regulatory requirement to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat, agency and educational awareness, potential additional grant funding, and the implementation of other law and regulations. However, due to the rarity of Federal actions resulting in formal section 7 consultations (an estimated 3 formal consultations over the last 26 years and all associated with either Rio Grande silvery minnow or southwestern willow flycatcher), the benefits of a critical habitat designation are minimized. In addition, the benefits of consultation are further minimized because any conservation measures which may have resulted from consultation are already provided through other mechanisms, such as (1) the conservation benefits to the western yellow-billed cuckoo and their habitat from implementation of the Pueblo's management plans; and (2) the maintenance of effective collaboration and cooperation to promote the conservation of the southwestern willow flycatcher and western yellow-billed cuckoo and their habitat.

The Pueblo will continue to protect its bosque habitat and does not intend to develop the areas we proposed as western yellow-billed cuckoo critical habitat. Moreover, under the historical and present management program, the Pueblo has conducted a variety of voluntary measures, restoration projects, monitoring programs and management actions to conserve riparian vegetation, including protecting riparian habitat from fire, maintaining native vegetation, completing surveys, working with BIA, Reclamation, USFS, the State of New Mexico, and the Service to acquire funding for restoration projects, and preventing habitat fragmentation.

For these reasons, we have determined that our working relationship will be better maintained if Santa Ana Pueblo was excluded from the designation of western yellow-billed cuckoo critical habitat. We view this as a substantial benefit since we have developed a cooperative working relationship for the mutual benefit of endangered and threatened species, including the western yellow-billed cuckoo.

In summary, the benefits of including the Pueblo in critical habitat are low, and are limited to insignificant educational benefits. The benefits of excluding these areas from designation as critical habitat for the western yellow-billed cuckoo are significant, and include encouraging the continued development and implementation of special management measures such as monitoring, surveys, enhancement, and restoration activities that the Pueblo

plans for the future or is currently implementing. These activities and projects will allow the Pueblo to manage their natural resources to benefit the Middle Rio Grande Unit and the western yellow-billed cuckoo, without the perception of Federal Government intrusion. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of this area will likely also provide additional benefits to the species that would not otherwise be available to encourage and maintain cooperative working relationships. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area.

Exclusion Will Not Result in Extinction of the Species—Santa Ana Pueblo

We have determined that exclusion of the Pueblo land will not result in extinction of the species. First, activities on this area that may affect the western yellow-billed cuckoo will require consultation under section 7 of the Act. Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species. Therefore, even without critical habitat designation on this land, activities that occur on this land cannot jeopardize the continued existence of the western yellow-billed cuckoo. Second, the Pueblo is committed to protecting and managing Pueblo lands and species found on those lands according to their tribal and cultural management plans and natural resource management objectives, which provide conservation benefits for the species and its habitat. In short, the Pueblo is committed to greater conservation measures on their land than would be available through the designation of critical habitat. Accordingly, we have determined that the 862 ac (349 ha) of Pueblo lands of Santa Ana be excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species.

Unit 37 (NM–6A) Middle Rio Grande—Santo Domingo Tribe, NM

On Santo Domingo Tribal Lands, we proposed 1,872 ac (758 ha) of critical habitat within Sandoval County, New Mexico. We are excluding the Santo Domingo Tribe from this final designation. The Tribe is an important land manager in the Middle Rio Grande. Their history of conservation includes completing surveys, providing for conservation, management, and restoration of habitat, and working in a meaningful, collaborative, and cooperative approach toward listed species conservation. To document this the Santo Domingo Tribe has developed a Western Yellow-billed Cuckoo Management Plan. We have determined that the plan fulfills our criteria for exclusion. Under the comprehensive Western Yellow-billed Cuckoo Management Plan, the Santo Domingo Tribe has conducted a variety of voluntary measures, restoration projects, and management actions to conserve riparian vegetation, including native vegetation enhancement, promotion of overbank flooding, pollution monitoring, species surveys and creating side channels, oxbows and wetlands. Despite conducting these activities, the consultation history with the Service has been minimal (1 formal consultation involving the Rio Grande silvery minnow dating back to 1995).

Benefits of Inclusion—Santo Domingo Tribe

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved.

Another possible benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the western yellow-billed cuckoo and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable.

Another possible benefit of the designation of critical habitat is that it may also affect the implementation of Federal laws, such as the Clean Water Act. These laws require analysis of the potential for proposed projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Finally, there is the possible benefit that additional funding could be generated for habitat improvement by an area being designated as critical habitat. Some funding sources may rank a project higher if the area is designated as critical habitat. Tribes or pueblos often seek additional sources of funding in order to conduct wildlife-related conservation activities. Therefore, having an area designated as critical habitat could improve the chances of receiving funding for western yellow-billed cuckoo habitat-related projects.

Benefits of Exclusion—Santo Domingo Tribe

The benefits of excluding the Tribe from designated critical habitat include: (1) Our deference to the Pueblo to develop and implement conservation and natural resource management plans for their lands and resources, which includes benefits to the western yellow-billed cuckoo and its habitat that might not otherwise occur; (2) the continuance and strengthening of our effective working relationships with the Pueblo to promote the conservation of the western yellow-billed cuckoo and its habitat; and (3) the maintenance of effective partnerships with the Pueblo and working in collaboration and cooperation to promote additional conservation of the western yellow-billed cuckoo and their habitat.

We have determined that Santo Domingo Tribe should be the governmental entity to manage and promote the conservation of the western yellow-billed cuckoo on their land. The designation of critical habitat on Santo Domingo would be expected to have an adverse impact on our working relationship. From comments we received from Santo Domingo Pueblo on September 16, 2019, on the proposed designation of critical habitat for the western yellow-billed cuckoo, it became clear to the Service that critical habitat would be viewed as an intrusion on their sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws. The perceived restrictions of a critical habitat designation could have a more damaging effect to coordination efforts, possibly preventing actions that might maintain, improve, or restore habitat for the western yellow-billed.

We find that other conservation benefits are provided to the Middle Rio Grande Unit and the western yellow-billed cuckoo and its habitat by excluding the Tribe from the designation. For example, as part of maintaining a cooperative working

relationship with the Tribe, conservation benefits, including listed species' surveys, nest and/or habitat monitoring, and/or habitat restoration and enhancement have been possible as evidenced by the development of the Western Yellow-billed Cuckoo Management Plan and their history of completing bird surveys on their tribal lands for more than ten years. The objective of their Management Plan is to protect and improve habitat for all avian species and wildlife on their tribal lands. IN comments submitted on September 16, 2019, the Santo Domingo Tribe indicated that it opposes the designation of critical habitat. The Santo Domingo Tribe would like to manage natural resources in accordance with their own policies, customs, and laws. For these reasons, we have determined that our working relationship with the Tribe would be maintained if they are excluded from the designation of critical habitat for the western yellow-billed cuckoo. We view this as a substantial benefit.

Proactive voluntary conservation efforts have and will continue to promote the recovery of the western yellow-billed cuckoo. As mentioned above, the Tribe is an important land manager in the Middle Rio Grande Unit. The history in completing surveys, conservation, restoration and management documents that meaningful collaborative and cooperative work for listed species and their habitat will continue within their lands. These commitments demonstrate the willingness of the Tribe to work cooperatively with us toward conservation efforts that will benefit the western yellow-billed cuckoo. The Tribe has committed to several ongoing or future management, restoration, enhancement, and survey activities that may not occur with critical habitat designation. Therefore, we have determined that the results of these activities will promote long-term protection and conserve the western yellow-billed cuckoo and its habitat within the Tribal lands. The benefits of excluding this area from critical habitat will encourage the continued cooperation and development of data-sharing and management plans.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Santo Domingo Tribe

The benefits of including the Tribe in the critical habitat designation are limited to the incremental benefits gained through the regulatory requirement to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat, agency and educational awareness, potential additional grant funding, and the implementation of other law and regulations. However, due to the rarity of Federal actions resulting in formal section 7 consultations (one formal consultation since 1995), the benefits of a critical habitat designation are minimized. In addition, the benefits of consultation are further minimized because any conservation measures which may have resulted from consultation are already provided through other mechanisms, such as (1) the conservation benefits to the western yellow-billed cuckoo and their habitat from implementation of the Tribe's Western Yellow-billed Cuckoo Management Plan; and (2) the maintenance of effective collaboration and cooperation to promote the conservation of the western yellow-billed cuckoo and its habitat. We view these as substantial benefits since we have developed a cooperative working relationship with the Tribe for the mutual benefit of endangered and threatened species, including the western yellow-billed cuckoo. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area.

Exclusion Will Not Result in Extinction of the Species—Santo Domingo Tribe

We have determined that exclusion of the Tribal land will not result in extinction of the species. Firstly, as discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Secondly, the Tribe is committed to protecting and managing Tribal lands and species found on those lands according to their tribal and cultural management plans and natural resource management objectives, which provide conservation benefits for the species and its habitat. In short, the Tribe is committed to greater conservation measures on their land than would be available through the designation of critical habitat. Accordingly, we have determined that the 1,872 ac (758 ha) of Tribal lands of Santo Domingo are excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species.

Unit 37 (NM–6A) Middle Rio Grande—Cochiti Pueblo, NM

We proposed 1,458 ac (590 ha) of Cochiti Pueblo as critical habitat along the Rio Grande. We excluding all of Cochiti Pueblo lands from the final designation.

The Cochiti Pueblo has a demonstrated productive working relationship with the Service in conservation of listed species and we are aware of Cochiti Pueblo's history of conducting a variety of voluntary measures, restoration projects, and management actions to conserve riparian vegetation, including the prevention of riparian habitat from fire, maintaining native vegetation, and preventing habitat fragmentation. These measures shows the commitment and history of activities being implemented by the Pueblo for meaningful, collaborative, and cooperative work for conservation of listed species. This history demonstrates the willingness of the Pueblo to work cooperatively with us toward conservation efforts that will benefit the western yellow-billed cuckoo. The Pueblo has committed to several ongoing or future management, restoration, enhancement, and survey activities on their lands. However, dating back to 1989, there have been just two formal consultations and they were associated with the Rio Grande silvery minnow and Bald eagle (*Haliaeetus leucocephalus*).

Benefits of Inclusion—Cochiti Pueblo

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved.

Another possible benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the western yellow-billed cuckoo and its habitat that

reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable. However, Cochiti Pueblo is already working with the Service to address the habitat needs of the species. For these reasons, then, we have determined that designation of critical habitat would have few, if any, additional benefits beyond those that will result from continued consultation for the presence of the species due to the implementation of the Pueblo's voluntary conservation measures, restoration projects, and management.

Another possible benefit of the designation of critical habitat is that it may also affect the implementation of Federal laws, such as the Clean Water Act. These laws require analysis of the potential for proposed projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Finally, there is the possible benefit that additional funding could be generated for habitat improvement by an area being designated as critical habitat. Some funding sources may rank a project higher if the area is designated as critical habitat. Tribes or pueblos often seek additional sources of funding in order to conduct wildlife-related conservation activities. Therefore, having an area designated as critical habitat could improve the chances of receiving funding for western yellow-billed cuckoo habitat-related projects.

Benefits of Exclusion—Cochiti Pueblo

The benefits of excluding Cochiti Pueblo from designated critical habitat include: (1) Our deference to the Pueblo to develop and implement conservation and natural resource management plans for their lands and resources, which includes benefits to the western yellow-billed cuckoo and its habitat that might not otherwise occur; (2) the continuance and strengthening of our effective working relationships with the Pueblo to promote the conservation of the western yellow-billed cuckoo and its habitat; and (3) the maintenance of effective partnerships with the Pueblo and working in collaboration and cooperation to promote additional conservation of the western yellow-billed cuckoo and their habitat.

We have determined that Cochiti Pueblo should be the governmental entity to manage and promote the conservation of the western yellow-billed cuckoo on their land. During our coordination with Cochiti Pueblo on February 25, 2020, during the development of this final designation, we were informed that the Pueblo prefers exclusion of its lands from critical habitat and the ability to manage their lands as appropriate for their cultural needs and traditional values. Proactive voluntary conservation efforts have and will continue to promote the recovery of the western yellow-billed cuckoo. As mentioned above, the Pueblo is an important land manager in the Middle Rio Grande Unit and historically has provided for conservation of listed species including the western yellow-billed cuckoo. The Pueblo has committed to several ongoing or future management, restoration, enhancement, and survey activities that may not occur with critical habitat designation. Therefore, we have determined that the results of these activities will promote long-term protection and conserve the western yellow-billed cuckoo and its habitat within the Pueblo lands. The benefits of excluding this area from critical habitat will encourage the continued cooperation and development of data-sharing and management plans. We view this as a substantial benefit.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Cochiti Pueblo

The benefits of including the Pueblo in the critical habitat designation are limited to the incremental benefits gained through the regulatory requirement to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat, agency and educational awareness, potential additional grant funding, and the implementation of other law and regulations. However, due to the rarity of Federal actions resulting in formal section 7 consultations (two formal consultations since 1989), the benefits of a critical habitat designation are minimized. In addition, the benefits of consultation are further minimized because any conservation measures which may have resulted from consultation are already provided through other mechanisms, such as (1) the conservation benefits to the western yellow-billed cuckoo and their habitat from actions being implemented by the Pueblo; and (2) the maintenance of effective collaboration and cooperation to promote the conservation of the western yellow-billed cuckoo and its habitat. We view these as substantial benefits since we have developed a cooperative working relationship with the Pueblo for the mutual benefit of endangered and threatened species, including the western yellow-billed cuckoo.

Because the Pueblo has developed a history of conservation activities for the western yellow-billed cuckoo, has been involved with the critical habitat designation process, and is aware of the value of their lands for western yellow-billed cuckoo conservation, the educational benefits of a western yellow-billed cuckoo critical habitat designation are also minimized.

By allowing the Pueblo to implement its own resource conservation programs, it gives the Pueblo the opportunity to manage their natural resources to benefit riparian habitat for the western yellow-billed cuckoo, without the perception of Federal Government intrusion. The exclusion of these areas will likely also provide additional benefits to the western yellow-billed cuckoo and other listed species that would not otherwise be available without the Service's maintaining a cooperative working relationships with the Pueblo. The actions taken by the Pueblo to manage and protect habitat needed for western yellow-billed cuckoo are above those conservation measures which may be required if the area was designated as critical habitat. As a result, we have determined that the benefits of excluding these tribal lands from critical habitat designation outweigh the benefits of including these areas. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area.

Exclusion Will Not Result in Extinction of the Species—Cochiti Pueblo

We have determined that exclusion of the Pueblo land will not result in extinction of the species. We base this determination on several points. Firstly, as discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Second, the Pueblo is committed to protecting and managing Pueblo lands and the species found on those lands according to their tribal, cultural, and natural resource management history, which provide conservation benefits for the species and its habitat.

In short, Cochiti Pueblo is committed to greater conservation measures on their land than would be available through the designation of critical habitat. We have determined that this commitment accomplishes greater conservation than would be available through the implementation of a designation of critical habitat on a project-by-project basis. Accordingly,

we have determined that 1,458 ac (590 ha) of the Cochiti Pueblo lands be excluded from the final designation under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species.

Unit 37 (NM–6A) Middle Rio Grande—San Felipe Pueblo, NM

On San Felipe Pueblo, we proposed 2,368 ac (958 ha) of critical habitat within Sandoval County, New Mexico. We are excluding the entire area from the final designation of critical habitat.

The San Felipe Pueblo has a demonstrated productive working relationship with the Service in conservation of listed species and we are aware of San Felipe Pueblo's history of conducting a variety of voluntary measures, restoration projects, and management actions to conserve riparian vegetation, including conducting listed species' surveys, nest and habitat monitoring, and habitat restoration and enhancement through the Pueblo's development and implementation of their Wildlife Management Plan specific to the western yellow-billed cuckoo. The objective of this plan is to protect, conserve, and promote the management of the western yellow-billed cuckoo and their associated habitats within the Pueblo's boundaries. The development and implementation of the plan demonstrates the Pueblo's willingness to work cooperatively with the Service and other partners on conservation efforts that will benefit the western yellow-billed cuckoo.

Benefits of Inclusion—San Felipe Pueblo

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat.

Another possible benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the western yellow-billed cuckoo and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable. However, the Pueblo is already working with the Service to address the habitat needs of the species. For these reasons, then, we have determined that designation of critical habitat would have few, if any, additional benefits beyond those that will result from continued consultation for the presence of the species.

Another possible benefit of the designation of critical habitat is that it may also affect the implementation of Federal laws, such as the Clean Water Act. These laws require analysis of the potential for proposed projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Finally, there is the possible benefit that additional funding could be generated for habitat improvement by an area being designated as critical habitat. Some funding sources may rank a project higher if the area is designated as critical habitat. Tribes or pueblos often seek additional sources of funding in order to conduct wildlife-related conservation activities. Therefore, having an area designated as critical habitat could improve the chances of receiving funding for western yellow-billed cuckoo habitat-related projects.

Benefits of Exclusion—San Felipe Pueblo

We have determined that significant benefits would be realized by foregoing the designation of critical habitat. These benefits include: (1) Our deference to the Pueblo to develop and implement conservation and natural resource management plans for their lands and resources, which includes benefits to the western yellow-billed cuckoo and its habitat that might not otherwise occur; (2) the continuance and strengthening of our effective working relationships with the Pueblo to promote the conservation of the western yellow-billed cuckoo and its habitat; and (3) the maintenance of effective partnerships with the Pueblo and working in collaboration and cooperation to promote additional conservation of the western yellow-billed cuckoo and their habitat.

We have determined that San Felipe Pueblo should be the governmental entity to manage and promote the conservation of the western yellow-billed cuckoo on their land due to the additional conservation benefits that would be provided for the western yellow-billed cuckoo and its habitat by excluding the Pueblo from the designation. Comments submitted by San Felipe Pueblo on December 19, 2014, informed us that a critical habitat designation would limit the ability of the Pueblo to manage their lands and restrict their cultural needs and traditional values, and recommended exclusion. For these reasons, we have determined that our working relationship with the Pueblo would be better maintained if they are excluded from the designation of critical habitat for the western yellow-billed cuckoo. We view this as a substantial benefit. The perceived restrictions of a critical habitat designation could have a more damaging effect to coordination efforts, possibly preventing actions that might maintain, improve, or restore habitat for the western yellow-billed cuckoo and other endangered or threatened species like the southwestern willow flycatcher.

Proactive voluntary conservation efforts have and will continue to promote the recovery of the western yellow-billed cuckoo. As mentioned above, the Pueblo is an important land manager in the Middle Rio Grande Unit. The consultation history, surveys, and conservation, restoration and management information historically submitted by the Pueblo documents that meaningful collaborative and cooperative work for listed species and their habitat will continue within their lands. These commitments demonstrate the willingness of the Pueblo to work cooperatively with us toward conservation efforts that will benefit the western yellow-billed cuckoo. Overall, the commitments toward management of western yellow-billed cuckoo habitat by the Pueblo likely accomplish greater conservation than would be available through the implementation of a designation of critical habitat on a project-by-project basis.

The Pueblo has committed to several ongoing or future management, restoration, enhancement, and survey activities that may not occur with critical habitat designation. Therefore, we have determined that the results of these activities will promote long-term protection and conserve the western yellow-billed cuckoo and its habitat within the Pueblo lands. The benefits of excluding this area from critical habitat will encourage the continued cooperation and development of data-sharing and management plans.

Benefits of Exclusion Outweigh the Benefits of Inclusion—San Felipe Pueblo

The benefits of including the Pueblo in the critical habitat designation are limited to the incremental benefits

gained through the regulatory requirement to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat, agency and educational awareness, potential additional grant funding, and the implementation of other law and regulations. However, as discussed above, we have determined that these benefits are minimized because they are provided through other mechanisms, such as (1) the conservation benefits to the western yellow-billed cuckoo and their habitat from implementation the Pueblo's Wildlife Management Plan; and (2) the maintenance of effective collaboration and cooperation to promote the conservation of the western yellow-billed cuckoo and their habitat. The Pueblo will continue to protect its bosque habitat and does not intend to develop the areas we proposed as western yellow-billed cuckoo critical habitat. Moreover, under the comprehensive Wildlife Management Plan, San Felipe Pueblo has conducted a variety of voluntary measures, restoration projects, and management actions to conserve riparian vegetation, including the prevention of riparian habitat from fire, maintaining native vegetation, and preventing habitat fragmentation.

We have determined that our working relationship will be better maintained if San Felipe Pueblo was excluded from the designation of western yellow-billed cuckoo critical habitat. We view this as a substantial benefit since we have developed a cooperative working relationship for the mutual benefit of endangered and threatened species, including the western yellow-billed cuckoo.

In summary, the benefits of including the Pueblo in critical habitat are low, and are limited to insignificant educational benefits. The benefits of excluding these areas from designation as critical habitat for the western yellow-billed cuckoo are significant, and include encouraging the continued development and implementation of special management measures such as monitoring, surveys, enhancement, and restoration activities that the Pueblo plans for the future or is currently implementing. These activities and projects will allow the Pueblo to manage their natural resources to benefit the Middle Rio Grande Unit and the western yellow-billed cuckoo, without the perception of Federal Government intrusion. The exclusion of this area will likely also provide additional benefits to the species that would not otherwise be available to encourage and maintain cooperative working relationships. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area.

Exclusion Will Not Result in Extinction of the Species—San Felipe Pueblo

We have determined that exclusion of the Pueblo land will not result in extinction of the species. Firstly, as discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Secondly, the Pueblo is committed to protecting and managing Pueblo lands and species found on those lands according to their tribal and cultural management plans and natural resource management objectives, which provide conservation benefits for the species and its habitat. In short, the Pueblo is committed to greater conservation measures on their land than would be available through the designation of critical habitat. Accordingly, we have determined that the Pueblo lands of San Felipe should be excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species. Therefore, we are excluding the 2,368 ac (958 ha) of Pueblo lands of San Felipe of Unit 37 NM–6A from the final critical habitat designation.

Unit 37 (NM–6B) Middle Rio Grande—Isleta Pueblo, NM

On Isleta Pueblo, approximately 2,165 ac (876 ha) of critical habitat was identified within Bernalillo County, New Mexico. We are excluding the entire area from critical habitat. The Isleta Pueblo have developed and implemented a Riverine Management Plan for conservation of riparian resources on their lands (Isleta Pueblo 2015, entire). We have determined that the Isleta Riverine Management Plan fulfills our criteria for exclusion and includes measures to maintain, improve, or restore habitat for the western yellow-billed cuckoo and other endangered or threatened species like the southwestern willow flycatcher, silvery minnow, and New Mexico meadow jumping mouse.

Benefits of Inclusion—Isleta Pueblo

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved. Another possible benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the western yellow-billed cuckoo and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable. However, the Pueblo is already working with the Service to address the habitat needs of the species. For these reasons, then, we have determined that designation of critical habitat would have few, if any, additional benefits beyond those that will result from continued consultation for the presence of the species.

Another possible benefit of the designation of critical habitat is that it may also affect the implementation of Federal laws, such as the Clean Water Act. These laws require analysis of the potential for proposed projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Finally, there is the possible benefit that additional funding could be generated for habitat improvement by an area being designated as critical habitat. Some funding sources may rank a project higher if the area is designated as critical habitat. Tribes or pueblos often seek additional sources of funding in order to conduct wildlife-related conservation activities. Therefore, having an area designated as critical habitat could improve the chances of receiving funding for western yellow-billed cuckoo habitat-related projects.

Benefits of Exclusion—Isleta Pueblo

The benefits of excluding the Pueblo from designated critical habitat are significant and include: (1) Our deference to the Pueblo to develop and implement conservation and natural resource management plans for their

lands and resources, which includes benefits to the western yellow-billed cuckoo and its habitat that might not otherwise occur; (2) the continuance and strengthening of our effective working relationships with the Pueblo to promote the conservation of the western yellow-billed cuckoo and its habitat; and (3) the maintenance of effective partnerships with the Pueblo and working in collaboration and cooperation to promote additional conservation of the western yellow-billed cuckoo and their habitat.

We have determined that Isleta Pueblo should be the governmental entity to manage and promote the conservation of the western yellow-billed cuckoo on their land due to the additional conservation benefits that would be provided for the western yellow-billed cuckoo and its habitat by excluding the Pueblo from the designation. In comments received from the Isleta Pueblo on January 14, 2015, and July 17, 2020, we were informed that critical habitat would be viewed as an intrusion on their sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws. During our discussions with Isleta Pueblo, they informed us that their perceived restrictions of a critical habitat designation could have a damaging effect to coordination efforts, possibly preventing actions that might maintain, improve, or restore habitat for the western yellow-billed cuckoo and other endangered or threatened species. For these reasons, we have determined that our working relationship with the Pueblo would be better maintained if they are excluded from the designation of critical habitat for the western yellow-billed cuckoo. For example, as part of maintaining a cooperative working relationship with the Pueblo, conservation benefits, including listed species' surveys, nest and/or habitat monitoring, and/or habitat restoration and enhancement have been possible. We view this as a substantial benefit.

Proactive voluntary conservation efforts have and will continue to promote the recovery of the western yellow-billed cuckoo. The Pueblo of Isleta has developed and maintained a Riverine Management Plan that includes the southwestern willow flycatcher, Rio Grande silvery minnow, New Mexico meadow jumping mouse, and now contains an amendment to include the western yellow-billed cuckoo. The objective of this plan is to protect, conserve, and promote the management of the southwestern willow flycatcher, Rio Grande silvery minnow, and New Mexico meadow jumping mouse and their associated habitats within the Pueblo's boundaries. As mentioned above, the Pueblo is an important land manager in the Middle Rio Grande Unit. The consultation history, surveys, and conservation, restoration and management information historically submitted by the Pueblo documents that meaningful collaborative and cooperative work for listed species and their habitat will continue within their lands. These commitments demonstrate the willingness of the Pueblo to work cooperatively with us toward conservation efforts that will benefit the western yellow-billed cuckoo. The Pueblo has committed to several ongoing or future management, restoration, enhancement, and survey activities that may not occur with critical habitat designation. Therefore, we have determined that the results of these activities will promote long-term protection and conserve the western yellow-billed cuckoo and its habitat within the Pueblo lands. The benefits of excluding this area from critical habitat will encourage the continued cooperation and development of data-sharing and management plans.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Isleta Pueblo

The benefits of including Pueblo lands in the critical habitat designation are limited to the incremental benefits gained through the regulatory requirement to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat, agency and educational awareness, potential additional grant funding, and the implementation of other law and regulations. However, as discussed in detail above, we have determined that these benefits are minimized because they are provided through other mechanisms, such as (1) the conservation benefits to the western yellow-billed cuckoo and their habitat from implementation of the Pueblo's management plans; and (2) the maintenance of effective collaboration and cooperation to promote the conservation of the western yellow-billed cuckoo and their habitat.

The Pueblo will continue to protect its bosque habitat and does not intend to develop the areas we proposed as western yellow-billed cuckoo critical habitat. Moreover, under the comprehensive Riverine Management Plan, the Isleta Pueblo has conducted a variety of voluntary measures, restoration projects, and management actions to conserve riparian vegetation, including not allowing cattle to graze within the bosque, protecting riparian habitat from fire, maintaining native vegetation, and preventing habitat fragmentation. For these reasons, we have determined that our working relationship will be better maintained if Isleta Pueblo was excluded from the designation of western yellow-billed cuckoo critical habitat. We view this as a substantial benefit since we have developed a cooperative working relationship for the mutual benefit of endangered and threatened species, including the western yellow-billed cuckoo.

In summary, the benefits of including the Pueblo in critical habitat are low, and are limited to insignificant educational benefits. The benefits of excluding these areas from designation as critical habitat for the western yellow-billed cuckoo are significant, and include encouraging the continued development and implementation of special management measures such as monitoring, surveys, enhancement, and restoration activities that the Pueblo plans for the future or is currently implementing. These activities and projects will allow the Pueblo to manage their natural resources to benefit the Middle Rio Grande Unit and the western yellow-billed cuckoo, without the perception of Federal Government intrusion. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of this area will likely also provide additional benefits to the species that would not otherwise be available to encourage and maintain cooperative working relationships. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area.

Exclusion Will Not Result in Extinction of the Species—Isleta Pueblo

We have determined that exclusion of the Pueblo land will not result in extinction of the species. Firstly, as discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Secondly, the Pueblo is committed to protecting and managing Pueblo lands and species found on those lands according to their tribal and cultural management plans and natural resource management objectives, which provide conservation benefits for the species and its habitat. In short, the Pueblo is committed to greater conservation measures on their

land than would be available through the designation of critical habitat. Accordingly, we have determined that the 2,165 ac (876 ha) of Isleta Pueblo be excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species.

Unit 70 (UT–1) Green River 1—Uintah and Ouray Indian Reservation Lands

The Ute Tribe of the Uintah and Ouray Indian Reservation (Ute Tribe) owns and manages lands along the Green and Duchene Rivers in Uintah and Duchesne Counties, Utah within Unit 70 for the western yellow-billed cuckoo. Since at least 2016, the Ute Tribe has conducted conservation actions for the western yellow-billed cuckoo and its habitat on their lands and lands they manage, as described in the Ute Tribe's Conservation Strategy for the Western Yellow-billed Cuckoo on the Uintah and Ouray Indian Reservation ((Conservation Strategy) Sinclear and Simpson 2016, pp. i–20). The Conservation Strategy outlines conservation measures being implemented by the Ute Tribe including limiting development within 0.5 mi (0.8 ha) of western yellow-billed cuckoo habitat; ensuring that there is no net loss of riparian and wetland areas on Ute Tribal lands; supporting the restoration and enhancement of riparian and wetland areas; establishing a conservation mitigation fund; and designating western yellow-billed cuckoo refuge areas. We coordinated with and assisted the Ute Tribe in the development of the Conservation Strategy in 2016. Due to implementation of the Conservation Strategy, we identified approximately 14,611 ac (5,913 ha) of Ute Tribal lands for exclusion in the revised proposed rule. During the public comment period, we received additional land ownership information from Duchesne County regarding Tribal and other acquired land under tribal management. The acquired lands are lands purchased by the Utah Reclamation Mitigation and Conservation Commission (Mitigation Commission) for the Lower Duchesne Wetlands Mitigation Project, a project implemented due to impacts resulting from construction and operation of the Central Utah Project (Utah Reclamation Mitigation and Conservation Commission *et al.* 2008, p. S–1). As a result, we adjusted the area we are excluding to approximately 15,017 ac (6,077 ha). A portion are owned by the Ute Tribe and a portion are federally acquired lands being managed by the Ute Tribe.

Benefits of Inclusion—Uintah and Ouray Indian Reservation Lands

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved. Designation of critical habitat on the Ute Tribal portion of Unit 70 could potentially benefit the western yellow-billed cuckoo because it provides habitat for the western yellow-billed cuckoo, is relatively undisturbed by human activity, encompasses features essential to conservation of the species, and is occupied by the species. The most likely Federal nexuses would be associated with Federal funding through the Bureau of Indian Affairs, permitting from the Corps if work involves activities in riparian or wetland areas, and Reclamation in their assistance to the Utah Reclamation Mitigation and Conservation Commission (Mitigation Commission) in acquiring lands for the Lower Duchesne Wetlands Mitigation Project. However, since the listing of the western yellow-billed cuckoo in 2014, only one section 7 consultation involving the species has occurred on Ute Tribal lands, and we do not expect this trend to increase for future activities. As previously described, the Ute Tribe has implemented their Conservation Strategy for the species and its conservation actions will be coordinated with all future projects to minimize negative effects to the species. Therefore, we would not expect any additional conservation benefits through the section 7 process from the inclusion of Ute Tribal land in the final critical habitat designation.

Another important benefit of including lands in a critical habitat designation is that the designation can serve to educate landowners and the public regarding the potential conservation value of an area, and it may help focus management efforts on areas of high value for certain species.

Another possible benefit of the designation of critical habitat is that it may also affect the implementation of Federal laws, such as the Clean Water Act. These laws require analysis of the potential for proposed projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Finally, there is the possible benefit that additional funding could be generated for habitat improvement by an area being designated as critical habitat. Some funding sources may rank a project higher if the area is designated as critical habitat. Tribes or pueblos often seek additional sources of funding in order to conduct wildlife-related conservation activities. Therefore, having an area designated as critical habitat could improve the chances of receiving funding for western yellow-billed cuckoo habitat-related projects.

Benefits of Exclusion—Uintah and Ouray Indian Reservation Lands

The benefits of excluding the Uintah and Ouray Indian Reservation lands from designated critical habitat are significant and include: (1) Our deference to the Tribe to develop and implement conservation and natural resource management plans for their lands and resources, which includes benefits to the western yellow-billed cuckoo and its habitat that might not otherwise occur; (2) the continuance and strengthening of our effective working relationships with the Tribe to promote the conservation of the western yellow-billed cuckoo and its habitat; and (3) the maintenance of effective partnerships with the Tribe and working in collaboration and cooperation to promote additional conservation of the western yellow-billed cuckoo and their habitat.

In working with the Ute Tribe, we have found that fish, wildlife, and other natural resources on tribal lands are better managed under tribal authorities, policies, and programs than through Federal regulation wherever possible and practicable. Additionally, critical habitat designations may be viewed by tribes as an unwanted intrusion into tribal self-governance, thus compromising our working relationship with the Tribe which is essential to achieving our mutual goals of managing for healthy ecosystems upon which the viability of threatened and endangered species populations depend.

The Ute Tribe in coordination with the Service created the Conservation Strategy to addresses threats specific to the western yellow-billed cuckoo, and to provide protective management for the species on Ute Tribal lands. Within their strategy, the Ute Tribe developed

a set of conservation actions which benefit the western yellow-billed cuckoo. These actions include identification, protection, and retention of suitable habitat; management of livestock activities and invasive weeds; restriction of motorized vehicles; and avoiding development in western yellow-billed cuckoo occupied habitat areas. The Conservation Strategy provides recommended measures for best management practices to avoid and minimize impacts to the western yellow-billed cuckoo and surrounding habitat within a half mile (approximately 2,624 ft (800 m)) of suitable habitat. In addition, the Conservation Strategy identifies opportunities for and recommends participation in recovery efforts and research. The Ute Tribe's Conservation Strategy is consistent with their past record of conservation, restoration, and management actions for listed species and their habitat, and provides their commitment to continue implementing important conservation actions on their lands in the future.

Benefits of Exclusion Outweigh Benefits of Inclusion—Uintah and Ouray Indian Reservation Lands

The benefits of including Ute Tribe's lands in the critical habitat designation are limited to the incremental benefits gained through the regulatory requirement to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat, agency and educational awareness, potential additional grant funding, and the implementation of other law and regulations. However, as discussed in detail above, we have determined that these benefits are minimized because they are provided through other mechanisms, such as (1) the conservation benefits to the western yellow-billed cuckoo and their habitat from implementation of the Ute Tribe's management plans; and (2) the maintenance of effective collaboration and cooperation to promote the conservation of the western yellow-billed cuckoo and their habitat.

The Ute Tribe's Conservation Strategy is expected to provide conservation and long-term management for the western yellow-billed cuckoo outside of the section 7 consultation process and through covering a broader area for the species. We have found that there would be little additional educational benefit gained from designating these Ute Tribal lands as critical habitat because the Ute Tribe is well aware of the species' presence, has developed conservation measures and mitigation methods to minimize development close to western yellow-billed cuckoo habitat, and has provided protection through commitments to restore and enhance riparian areas on Ute Tribal lands.

We have found that the Ute Tribe's Conservation Strategy provides greater protection than critical habitat designation would provide because it is a comprehensive conservation plan that is specific to western yellow-billed cuckoo conservation needs on Ute Tribal lands. The Ute Tribe developed the Conservation Strategy partially in response to the initial proposed designation of critical habitat for the western yellow-billed cuckoo for the purpose of maintaining management and conservation authority, and thus having a final critical habitat designation removed. Therefore, it is likely that the exclusion of Ute Tribal land as designated critical habitat will foster a better partnership and working relationship with the Tribe and implement coordinated efforts to continue conservation of western yellow-billed cuckoo and its habitat.

Because the Ute Tribe has conserved western yellow-billed cuckoos on their lands with implementation of the Conservation Strategy, and will continue to do so, we see no additional benefits to the inclusion of Ute Tribal land in a final critical habitat rule. We have determined that conservation of the western yellow-billed cuckoo will continue to be achieved by the Ute Tribe as has been demonstrated by the proactive conservation from their Conservation Strategy. Given the importance of the Ute Tribe's Conservation Strategy to the current and future conservation of the western yellow-billed cuckoo and our working relationship with the Ute Tribe, the benefit of excluding Ute Tribal lands outweighs the benefit of including them in proposed designated critical habitat. Therefore, we would not expect any additional conservation benefits from the inclusion of Ute Tribal land in a final critical habitat designation, and Ute Tribal lands have been excluded from designation as final critical habitat under section 4(b)(2) of the Act for the western yellow-billed cuckoo.

Exclusion Will Not Result in Extinction of the Species—Uintah and Ouray Indian Reservation Lands

We have determined that exclusion of the Ute Tribal lands from the critical habitat designation will not result in the extinction of the western yellow-billed cuckoo. We base this determination on several points. Firstly, as discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Secondly, the Ute Tribes have a long term record of conserving species and habitat and is committed to protecting and managing western yellow-billed cuckoo habitat according to their cultural history, management plans, and natural resource management objectives. We have determined that this commitment accomplishes greater conservation than would be available through the implementation of a designation of critical habitat on a project-by-project basis. With the implementation of these conservation measures, based upon strategies developed in the management plan, we have concluded that this exclusion from critical habitat will not result in the extinction of the western yellow-billed cuckoo. Although the exclusion of approximately 15,017 ac (6,077 ha) of Ute Tribal lands equals approximately 50 percent of the area of proposed as critical habitat for western yellow-billed cuckoo in Utah, the exclusion totals just 5 percent of the total area identified in the proposed rule. Significant portions of land adjacent to the excluded areas are still within the final designation. In addition, management and conservation of habitat for the western yellow-billed cuckoo on these excluded lands will continue based on existing management of the area by the Ute Tribe and benefit of the species pursuant to the Ute Tribe's Conservation Strategy.

As explained above, we find that including western yellow-billed cuckoo critical habitat on Ute Tribal land would result in minimal additional benefits to the species. We also find that the exclusion of these lands will not lead to the extinction of the western yellow-billed cuckoo, nor hinder its recovery because of the Ute Tribe's emphasis to protect and enhance riparian habitat for the western yellow-billed cuckoo. This emphasis on conserving riparian habitat on Ute Tribal lands will ensure the long-term conservation of the western yellow-billed cuckoo and contribute to the species' recovery. Accordingly, we have determined that 15,017 ac (6,077 ha) of Uintah and Ouray Indian Reservation lands be excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species.

Federal Lands

Unit 65 (ID–1) Snake River 1—American Falls Reservoir

We have identified approximately 1,352 ac (547 ha) of federally owned, withdrawn, or easement lands associated with the full-pool elevation for the American Falls Reservoir for exclusion from the final critical habitat. The land is comprised of several large parcels of land which were either acquired by Reclamation under fee title, withdrawn from public domain for Reclamation purposes, or granted under prescriptive easement to Reclamation at the time of the construction of American Falls Dam and Reservoir. American Falls Dam and Reservoir comprise a multipurpose facility constructed for the Congressionally-authorized purposes of irrigation and power generation and is part of the larger Minidoka Project. The land is located at the northeastern end of American Falls Reservoir where both the Snake River and McTucker Creek enter the reservoir in Bingham County, Idaho. The area is vegetated to varying degrees by a shifting mosaic of riparian communities, including suitable nesting habitat for the yellow-billed cuckoo. Reclamation has demonstrated a track record of maintaining these lands for natural resources through the implementation of their Ecologically Based System Management (EBSM) approach to the operation of the upstream Palisades Dam, conservation efforts to reduce impacts from livestock grazing, annual planting efforts, and annual noxious weed treatments. The EBSM was implemented in 2004, and mimics historical hydrographs to the greatest extent feasible. Significant changes in riparian cottonwood habitat conditions in the area adjacent to the full-pool have not occurred over the past decade and existing habitat conditions are not expected to change, expect for those positive projected habitat projects Reclamation are undertaking, in the near or long term.

Benefits of Inclusion—American Falls Reservoir

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved.

Our section 7 consultation history within Reclamation lands being considered for exclusion, shows that since listing in 2014, no formal consultations have occurred for actions conducted on those lands. We have conducted an informal consultation for the operation and maintenance of Reclamation resources on the Snake River; however, overall, since listing in 2014, section 7 consultations have been rare on this area of Reclamation lands. Because of how Reclamation have chosen to manage and conserve their lands and the lack of past section 7 consultation history, we do not anticipate that Reclamation actions would considerably change in the future, generating a noticeable increase in section 7 consultations or that consultation would cause significant changes to the current management of western yellow-billed cuckoo and its habitat.

Another important benefit of including lands in a critical habitat designation is that the designation can serve to educate landowners and the public regarding the potential conservation value of an area, and it may help focus management efforts on areas of high value for certain species. Any information about the western yellow-billed cuckoo that reaches a wide audience, including parties engaged in conservation activities, is valuable. Reclamation are currently working to maintain and improve western yellow-billed cuckoo habitat, participating in working groups, and exchanging management information.

Another possible benefit of the designation of critical habitat is that it may also affect the implementation of Federal laws, such as the Clean Water Act. These laws require analysis of the potential for proposed projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Finally, there is the possible benefit that additional funding could be generated for habitat improvement by an area being designated as critical habitat. Some funding sources may rank a project higher if the area is designated as critical habitat. Therefore, having an area designated as critical habitat could improve the chances of receiving funding for western yellow-billed cuckoo habitat-related projects.

Benefits of Exclusion—American Falls Reservoir

The main benefit of excluding Reclamation managed lands associated with the American Falls Reservoir from designated critical habitat is to remove any potential conflict with the Congressionally authorized project purposes of the American Fall Reservoir Federal Water Resource Project. We have already developed an effective approach to conservation of the western yellow-billed cuckoo, its habitat, and other species in this area.

During the development of the western yellow-billed cuckoo critical habitat proposal, we have communicated with Reclamation to discuss how they might be affected by the regulations associated with western yellow-billed cuckoo management, western yellow-billed cuckoo recovery, and the designation of critical habitat. As part of these discussions, we have provided technical assistance to Reclamation to conserve the western yellow-billed cuckoo and its habitat on their lands. Reclamation implemented the EBSM and included measures taken in efforts to conserve western yellow-billed cuckoo habitat that we have in our supporting record for this decision.

Reclamation, through their EBSM, address western yellow-billed cuckoo habitat. The proposed critical habitat segment we identified on lands managed by Reclamation are where western yellow-billed cuckoo have been recorded (or are expected to occur). Reclamation have demonstrated that maintaining western yellow-billed cuckoo habitat, while meeting their regulatory obligations is a priority. Reclamation, through their previous management actions and the implementation of the EBSM, have a demonstrated record of their commitment to the conservation of cottonwood forest habitat important to western yellow billed-cuckoo including; reducing impacts from livestock grazing, increasing cottonwood regeneration, decreasing the spread of nonnative plants, and maintaining and improving riparian conditions. Specific habitat improvements previously carried out within this inundation zone include the termination of a 500-unit livestock grazing lease, repairing riparian fencing, the establishment of close working partnerships with adjacent landowners to support exclusion efforts, and completing annual noxious and invasive weed treatments. Lastly, Reclamation precludes construction of permanent structures in this area. Overall, these actions commit to management of riparian habitat that likely accomplishes

greater conservation than would be available through the implementation of a designation of critical habitat on a project-by-project basis.

The designation of critical habitat on Reclamation lands associated with the full-pool of American Falls Reservoir may potentially impact the Congressionally authorized operation and maintenance of the Federal Water Resource Project. As such, exclusion would reduce the potential conflict and ensure that the Federal Water Resource Project would continue to operate unobstructed. This would further help to maintain our working relationship with Reclamation.

The designation of critical habitat on Reclamation lands would be expected to indirectly impact our working relationship with other water users, since the American River Falls Reservoir is closely tied to water users in Idaho. The perceived restrictions of a critical habitat designation could have a damaging effect on coordination efforts, possibly preventing actions that might maintain, improve, or restore habitat for the western yellow-billed cuckoo and other species. For these reasons, we have determined that our working relationships with water users would be better maintained if we excluded the American River Falls Reservoir from the designation of western yellow-billed cuckoo critical habitat. We view this as a substantial benefit since we have developed a cooperative working relationship with Reclamation for the mutual benefit of western yellow-billed cuckoo conservation and other endangered and threatened species using this area.

Benefits of Exclusion Outweigh Benefits of Inclusion—American Falls Reservoir

The benefits of including Reclamation lands in the critical habitat designation are limited to the incremental benefits gained through the regulatory requirement to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat, agency and educational awareness, and potential additional grant funding. However, we have determined that these benefits are minimized because they are provided for through other mechanisms, such as (1) the conservation benefits to the western yellow-billed cuckoo and its habitat from implementation of EBSM and other conservation actions; and (2) the maintenance of effective collaboration and cooperation to promote the conservation of the western yellow-billed cuckoo and its habitat.

Because Reclamation has developed and implemented the EBSM and are aware of the value of their lands for western yellow-billed cuckoo conservation, the conservation and educational benefits of a western yellow-billed cuckoo critical habitat designation are minimized.

The benefits of excluding these areas from being designated as western yellow-billed cuckoo critical habitat are more significant and include avoiding conflict with Congressionally authorized purposes of the reservoir, and encouraging the continued implementation of the EBSM and conservation measures such as habitat management and protection, reduction of livestock impacts, and annul riparian planting efforts. The exclusion of these areas will likely also provide additional benefits to the western yellow-billed cuckoo and other listed species that would not otherwise be available without the Service's maintaining a cooperative working relationship with Reclamation. In conclusion, we find that the benefits of excluding Reclamation lands associated with the full-pool of American Falls Reservoir in Idaho, from critical habitat designation outweigh the benefits of including these areas.

Exclusion Will Not Result in Extinction—American Falls Reservoir

We have determined that exclusion of Reclamation lands associated with the full-pool of American Falls Reservoir from the critical habitat designation are significant and will not result in the extinction of the western yellow-billed cuckoo. We base this determination on several points. Firstly, as discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Secondly, Reclamation have committed to protecting and managing western yellow-billed cuckoo habitat through their EBSM approach and implementation of conservation actions. We have determined that this commitment accomplishes greater conservation than would be available through the implementation of a designation of critical habitat on a project-by-project basis. With the implementation of these plans, we have concluded that this exclusion from critical habitat will not result in the extinction of the western yellow-billed cuckoo. Accordingly, we have determined that 1,352 ac (547 ha) of Reclamation lands associated with the full-pool of American Falls Reservoir are excluded under subsection 4(b)(2) of the Act because the benefits of excluding these lands from critical habitat for the western yellow-billed cuckoo outweigh the benefits of their inclusion, and the exclusion of these lands from the designation will not result in the extinction of the species.

Unit 37 (NM–6B) Middle Rio Grande and Unit 39 (NM–8AB) Caballo Delta—Bureau of Reclamation Yellow-Billed Cuckoo Management Plan

The Elephant Butte and Caballo Reservoirs (Reservoirs) near Truth or Consequences, in Sierra County, New Mexico are owned and operated by Reclamation. We are excluding portions of the upper reaches of Elephant Butte Reservoir (Unit 37 NM–6B 8,091 ac (3.274 ha)) and the entire Caballo Reservoir (Unit 39 NM–8A and 8B (245 ac (120 ha)) from critical habitat. Reclamation has a Congressionally authorized purpose of managing these reservoirs and delivering water to downstream users. Through their historical conservation efforts and consultation history, Reclamation has demonstrated a commitment to management practices within both Reservoirs that have benefited the western yellow-billed cuckoo population over the past decade and a half while still meeting their Congressionally authorized responsibilities. The riparian habitat within these Reservoirs now supports a large number of nesting western yellow-billed cuckoos. In both these Reservoirs, the filling and draw-down of surface water mimics the flooding and drying events associated with intact riparian woodland habitat and river systems providing habitat for the western yellow-billed cuckoo. However, these areas could also be completely inundated with surface water on occasion and thus, provide no habitat other than what is available in adjacent areas. For Elephant Butte Reservoir, we identified the area from the dam at Elephant Butte Reservoir upstream to RM 54 as the active reservoir pool (as opposed to the full pool location of approximately RM 62). From a practicality standpoint, RM 54 is as far upstream as the reservoir has been modeled to receive surface water over the next 30 years in a scenario providing the wettest conditions (Reclamation 2015, entire; Service 2016b, entire). In the model, the reservoir would reach RM 54 for short intervals of time in 3 separate events.

Reclamation has supported collecting annual western yellow-billed cuckoo population data since 2006 at Elephant Butte Reservoir (even prior to the

species' listing and prior to the establishment of a formal survey protocol). Over the last decade and a half, Reclamation has assisted in the development of the formal survey protocol and has also instructed training courses. The ongoing survey effort within Elephant Butte and Caballo Reservoirs indicate that the western yellow-billed cuckoo is a common summer resident.

Through these efforts, and the recent development in including the western yellow-billed cuckoo within their Management Plan, Reclamation has demonstrated a commitment to management practices within their Reservoirs that have conserved and benefited the western yellow-billed cuckoo population in that area over the past decade and a half. In addition, Reclamation funded scientific research within Elephant Butte Reservoir and surrounding areas that has contributed to the understanding of habitat selection and distribution of the western yellow-billed cuckoo such as telemetry and home range studies, and geolocator studies to better understand migration patterns. Considering the past and ongoing efforts of management and research to benefit the western yellow-billed cuckoo, done in coordination and cooperation with the Service, we find the benefits of excluding areas more prone to surface water inundation within Elephant Butte Reservoir in the Middle Rio Grande Unit and Caballo Delta Units outweigh the benefits of including it in critical habitat.

In addition to the conservation effort described above, Reclamation works with BLM to ensure grazing is minimized during the breeding season for the western yellow-billed cuckoo. They also map habitat characteristics of the riparian habitat in intervals less than 5 years to ensure that suitable habitat for the western yellow-billed cuckoo is not a limiting factor. These long practiced flexible and adaptive management practices are provided as examples which have resulted in the expansion, protection, and successful continuance of a western yellow-billed cuckoo population, and have also provided benefit to other listed species such as the southwestern willow flycatcher.

Benefits of Inclusion—Bureau of Reclamation Yellow-Billed Cuckoo Management Plan

As discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved.

Another possible benefit is that the designation of critical habitat can serve to educate landowners and the public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the western yellow-billed cuckoo and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable.

Another possible benefit of the designation of critical habitat is that it may also affect the implementation of Federal laws, such as the Clean Water Act. These laws require analysis of the potential for proposed projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws. Finally, there is the possible benefit that additional funding could be generated for habitat improvement by an area being designated as critical habitat. Some funding sources may rank a project higher if the area is designated as critical habitat. Therefore, having an area designated as critical habitat could improve the chances of receiving funding for western yellow-billed cuckoo habitat-related projects.

Benefits of Exclusion—Bureau of Reclamation Yellow-Billed Cuckoo Management Plan

We have determined that significant benefits would be realized by excluding areas within Elephant Butte and Caballo Reservoirs. Our reasoning for our determination includes: (1) The management regime and commitments by Reclamation provide a more holistic approach toward implementing conservation actions to protect and enhance western yellow-billed cuckoos and their habitat than a case-by-case section 7 consultation process would provide; and (2) an exclusion would give Reclamation better flexibility to meet its Congressionally authorized responsibilities for water storage and delivery while still providing conservation for the western yellow-billed cuckoo. As mentioned above, Reclamation is an important land manager in the Middle and Lower Rio Grande. The surveys, conservation, restoration and management information submitted by Reclamation within their Southwestern Willow Flycatcher and Yellow-billed Cuckoo Management Plan document that meaningful collaborative and cooperative work for the western yellow-billed cuckoo and its habitat will continue within Elephant Butte and Caballo Reservoirs. We have determined that the results of these activities promote long-term protection and conserve the western yellow-billed cuckoo and its habitat within Elephant Butte and Caballo Reservoirs, as well as the riparian habitat in surrounding areas. Reclamation, through their historical efforts and inclusion of the western yellow-billed cuckoo within their management plan has committed to development of habitat to support nesting activity of the species outside the reservoir pools, this includes items such as realigning approximately 8 mi (12.8 km) of river to mimic the dynamic process of river movement to an area of a lower elevation which will result in roughly 800 ac (324 ha) of potential western yellow-billed cuckoo habitat, as well as roughly 2,000 ac (809 ha) of potential habitat restoration after the large Tiffany Fire in 2017. In all, as a result of the commitments associated with Reclamations' Southwestern Willow Flycatcher and Yellow-billed Cuckoo Management Plan, a potential of approximately 5,500 ac (2,226 ha) of habitat is expected to benefit the western yellow-billed cuckoo.

The benefits of excluding areas within Elephant Butte and Caballo Reservoirs from critical habitat will give Reclamation management flexibility to meet its Congressionally authorized obligations and provide for better conservation than would be achieved from case-by-case section 7 consultations.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Bureau of Reclamation Yellow-Billed Cuckoo Management Plan

The benefits of including the areas within the Middle Rio Grande and Caballo Delta Units In the critical habitat designation are limited to the incremental benefits gained through the regulatory requirement to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat, agency and educational awareness, potential additional grant funding, and the implementation of

other law and regulations. However, as discussed above, we have determined that these benefits are minimized because: (1) The current management regime and commitments by Reclamation provide a more holistic approach toward implementing conservation actions to protect and enhance western yellow-billed cuckoos and their habitat than a case-by-case section 7 consultation process would provide; and (2) the conservation benefits to the western yellow-billed cuckoo and its habitat from implementation of Reclamation's Western Yellow-billed Cuckoo Management Plan.

The benefits of excluding this area from designation as critical habitat for the western yellow-billed cuckoo are significant, and include allowing Reclamation the flexibility to store and deliver water for this area and encouraging the continuation of adaptive management measures such as monitoring, surveys, research, enhancement, and restoration activities that Reclamation currently implements and plans for the future. The exclusion of this area will likely also provide additional benefits to the species by encouraging and maintaining a cooperative working relationship with stakeholders associated with water storage and delivery. The actions taken by Reclamation to manage and protect habitat needed for western yellow-billed cuckoo are above those conservation measures which may be required if the area was designated as critical habitat. As a result, we find that the benefits of excluding these areas from critical habitat designation outweigh the benefits of including these areas.

Exclusion Will Not Result in Extinction of the Species—Bureau of Reclamation Yellow-Billed Cuckoo Management Plan

We have determined that exclusion of the Reclamation lands at Elephant Butte and Caballo Reservoirs from the critical habitat designation will not result in the extinction of the western yellow-billed cuckoo. We base this determination on several points. Firstly, as discussed above under Effects of Critical Habitat Designation *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of western yellow-billed cuckoos or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Secondly, Reclamation's management of the areas will ensure the long-term persistence and protection of western yellow-billed cuckoo habitat within and/or adjacent to the Reservoirs and because Reclamation is committed to greater conservation measures within and/or adjacent to their Reservoirs than would be available through the designation of critical habitat. Accordingly, we have determined that areas of Elephant Butte (NM–6B) (8,091 ac (3,274 ha)) and Caballo Reservoirs (Unit NM–8AB) (245 ac (120 ha)) are excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Under the RFA, as amended, and consistent with recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking only on those entities directly regulated by the rulemaking itself and, therefore, are not required to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies would be directly regulated if we adopt the proposed critical habitat designation. There is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly

regulated by this rulemaking, the Service certifies that the final critical habitat designation will not have a significant economic impact on a substantial number of small entities.

During the development of this final rule we reviewed and evaluated all information submitted during the comment period that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Based on this information, we affirm our certification that this final critical habitat designation will not have a significant economic impact on a substantial number of small entities.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. We do not find that this critical habitat designation would significantly affect energy supplies, distribution, or use, as the areas identified as critical habitat are along riparian corridors in mostly remote areas with little energy supplies, distribution, or infrastructure in place. Moreover, the Administrator of the Office of Information and Regulatory Affairs did not otherwise designate this action as a significant energy action pursuant to the Executive order. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following finding:

(1) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We have determined that this rule will not significantly or uniquely affect small governments because it would not produce a Federal mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. By definition, Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. Consequently, we have determined that the critical habitat designation would not significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for western yellow-billed cuckoo in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed and concludes that this designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this final rule does not have significant federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this final critical habitat designation with, appropriate State resource agencies in Arizona, California, Colorado, Idaho, New Mexico, Texas, and Utah. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies.

The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the final rule does not have substantial direct effects either on the States, or on the relationship between the National Government and the States, or on the distribution of powers and responsibilities among the various levels of government. The designation may have some benefit to these governments because the areas that

contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the order. We are designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this rule identifies the elements of physical or biological features essential to the conservation of the species. The designated areas of critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995)). However, when the range of the species includes States within the Tenth Circuit, such as that of the western yellow-billed cuckoo, under the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996), we undertake a NEPA analysis for critical habitat designations.

We invited the public to comment on our draft environmental assessment (Service 2019d, entire) and whether the proposed regulation may have a significant impact on the human environment, or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We did not receive any comments or other information during the comment period for the revised proposed rule. Our environmental assessment found that the impacts of the proposed critical habitat designation would be minor and not rise to a significant level, so preparation of an environmental impact statement is not required. Copies of our final environmental assessment and Finding of No Significant Impact (Service 2021, entire) can be obtained by contacting the Field Supervisor of the Sacramento Fish and Wildlife Office, or on the Sacramento Fish and Wildlife Office website at *http://www.fws.gov/sacramento* (see **ADDRESSES**).

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.

The following Tribes were contacted directly during the proposed and final rule process: Ak-Chin Indian Community; Fort Mojave Indian Tribe; Colorado River Indian Reservation; Fort Yuma Indian Reservation; Cocopah Indian Tribe; Chemehuevi Indian Tribe; Fort McDowell Yavapai Nation; Yavapai-Apache Nation; Yavapai-Prescott Indian Tribe; Tohono O'odham Nation; Tonto Apache Tribe; Havasupai Tribe; Hualapai Indian Tribe; Hopi Tribe; Pasua Yaqui Tribe; San Carlos Apache Tribe; Gila River Indian Community; Salt River Pima-Maricopa Indian Community; White Mountain Apache Tribe; Navajo Nation; Santa Clara, Ohkay Owingeh, and San Ildefonso Pueblos; Cochiti, Santo Domingo, San Felipe, Sandia, Santa Ana and Isleta Pueblos; Shoshone-Bannock, Fort Hall Reservation; the Cachil DeHe Band of Wintun Indians; and the Ute Tribe of the Uinta and Ouray Reservation. We will continue to work on a government-to-government basis with Tribal entities on conservation of habitat after the designation of critical habitat for the western yellow-billed cuckoo.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *http://www.regulations.gov* in Docket No. FWS–R8–ES–2013–0011 and upon request from the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this final rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and Service staff in each associated Ecological Services Field Office.

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; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.11(h) by revising the entry for ''Cuckoo, yellow-billed [Western DPS]'' under ''BIRDS'' in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Vertebrate population where endangered or threatened	Status	Listing citations and applicable rules
*	*	*	*	*	*
Birds					
*	*	*	*	*	*
Cuckoo, yellow-billed [Western DPS].	*Coccyzus americanus*.	U.S.A., Canada, Mexico, Central and South America.	Western DPS: U.S.A. (AZ, CA, CO (western), ID, MT (western), NM (western), NV, OR, TX (western), UT, WA, WY (western)); Canada (British Columbia (southwestern); Mexico (Baja California, Baja California Sur, Chihuahua, Durango (western), Sinaloa, Sonora).	T	79 FR 59991, 10/3/2014; 50 CFR 17.95(b).[CH]
*	*	*	*	*	*

■ 3. In § 17.95, amend paragraph (b) by adding an entry for ''Yellow-billed Cuckoo (*Coccyzus americanus*), Western DPS'' after the entry for ''MARIANA CROW (*CORVUS KUBARYI*)'' to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(b) *Birds.*

* * * * *

Yellow-Billed Cuckoo (Coccyzus americanus), Western DPS

(1) Critical habitat units are depicted for Arizona, California, Colorado, Idaho, New Mexico, Texas, and Utah, on the maps in this entry.

(2) Within these areas, the specific physical or biological features essential to the conservation of western yellow-billed cuckoo consist of three components:

(i) *Rangewide breeding habitat.* Riparian woodlands across the Distinct Population Segment (DPS); Southwestern breeding habitat, primarily in Arizona and New Mexico: Drainages with varying combinations of riparian, xeroriparian, and/or nonriparian trees and large shrubs. This physical or biological feature includes breeding habitat found throughout the DPS range as well as additional breeding habitat characteristics unique to the Southwest.

(A) *Rangewide breeding habitat* (*including areas in the Southwest*). Rangewide breeding habitat is composed of riparian woodlands within floodplains or in upland areas or terraces often greater than 325 ft (100 m) in width and 200 ac (81 ha) or more in extent with an overstory and understory vegetation component in contiguous or nearly contiguous patches adjacent to intermittent or perennial watercourses. The slope of the watercourses is generally less than 3 percent but may be greater in some instances. Nesting sites within the habitat have an above-average canopy closure (greater than 70 percent), and have a cooler, more humid environment than the surrounding riparian and upland habitats. Rangewide breeding habitat is composed of varying combinations of riparian species including the following nest trees: Cottonwood, willow, ash, sycamore, boxelder, alder, and walnut.

(B) *Southwestern breeding habitat.* Southwestern breeding habitat, found primarily in Arizona and New Mexico, is more variable than rangewide breeding habitat. Southwestern breeding habitat occurs within or along perennial, intermittent, and ephemeral drainages in montane canyons, foothills, desert floodplains, and arroyos. It may include woody side drainages, terraces, and hillsides immediately adjacent to the main drainage bottom. Drainages intersect a variety of habitat types including, but not limited to, desert scrub, desert grassland, and Madrean evergreen woodlands (presence of oak). Southwestern breeding habitat is composed of varying combinations of riparian, xeroriparian, and/or nonriparian tree and large shrub species including, but not limited to, the following nest trees: Cottonwood, willow, mesquite, ash, hackberry, sycamore, walnut, desert willow, soapberry, tamarisk, Russian olive, juniper, acacia, and/or oak. In perennial and intermittent drainages, Southwestern riparian breeding habitat is often narrower, patchier, and/or sparser than rangewide riparian breeding habitat and may contain a greater proportion of xeroriparian trees and large shrub species. Although some cottonwood and willow may be present in Southwestern riparian habitat, xeroriparian species may be more prevalent. Mesquite woodland may be present within the riparian floodplain, flanking the outer edges of wetter riparian habitat, or scattered on the adjacent hillsides. The more arid the drainage, the greater the likelihood that it will be dominated by xeroriparian and nonriparian nest tree species. Arid ephemeral drainages in southeastern Arizona receive summer humidity and rainfall from the North American Monsoon, with a pronounced green-up of grasses and forbs. These arid ephemeral drainages often contain xeroriparian species like hackberry or nonriparian species associated with the adjacent habitat type like oak, mesquite, acacia, mimosa, greythorn, and juniper. In southeastern Arizona mountains, breeding habitat is typically below pine woodlands (~6,000 ft (1,829 m)).

(ii) *Adequate prey base.* Presence of prey base consisting of large insect fauna (for example, cicadas, caterpillars, katydids, grasshoppers, large beetles, dragonflies, moth larvae, spiders), lizards, or frogs for adults and young in breeding areas during the nesting season and in post-breeding dispersal areas.

(iii) *Hydrologic processes.* The movement of water and sediment in natural or altered systems that maintains and regenerates breeding

habitat. This physical or biological feature includes hydrologic processes found in rangewide breeding habitat as well as additional hydrologic processes unique to the Southwest in southwestern breeding habitat:

(A) *Rangewide breeding habitat hydrologic processes (including the Southwest).* Hydrologic processes (either natural or managed) in river and reservoir systems that encourage sediment movement and deposits and promote riparian tree seedling germination and plant growth, maintenance, health, and vigor (*e.g.,* lower-gradient streams and broad floodplains, elevated subsurface groundwater table, and perennial rivers and streams). In some areas where habitat is being restored, such as on terraced slopes above the floodplain, this may include managed irrigated systems that may not naturally flood due to their elevation above the floodplain.

(B) *Southwestern breeding habitat hydrologic processes.* In southwestern breeding habitat, elevated summer humidity and runoff resulting from seasonal water management practices or weather patterns and precipitation (typically from North American Monsoon or other tropical weather events) provide suitable conditions for prey species production and vegetation regeneration and growth. Elevated humidity is especially important in southeastern Arizona, where cuckoos breed in intermittent and ephemeral drainages.

(3) Critical habitat does not include humanmade structures (such as buildings, aqueducts, runways, roads, bridges, and other paved or hardened areas as a result of development) and the land on which they are located existing within the legal boundaries of the critical habitat units designated for the species on May 21, 2021. Due to the scale on which the critical habitat boundaries are developed, some areas within these legal boundaries may not contain the physical or biological features and therefore are not considered critical habitat.

(4) Data layers defining map units were created on a base of the Natural Resources Conservation Service National Agriculture Imagery Program (NAIP 2011), and critical habitat was then mapped using North American Datum (NAD) 83, Universal Transverse Mercator Zone 10N coordinates. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's Sacramento Fish and Wildlife Office's internet site at *http://www.fws.gov/sacramento,* or on *http://www.regulations.gov* at Docket No. FWS–R8–ES–2013–0011. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

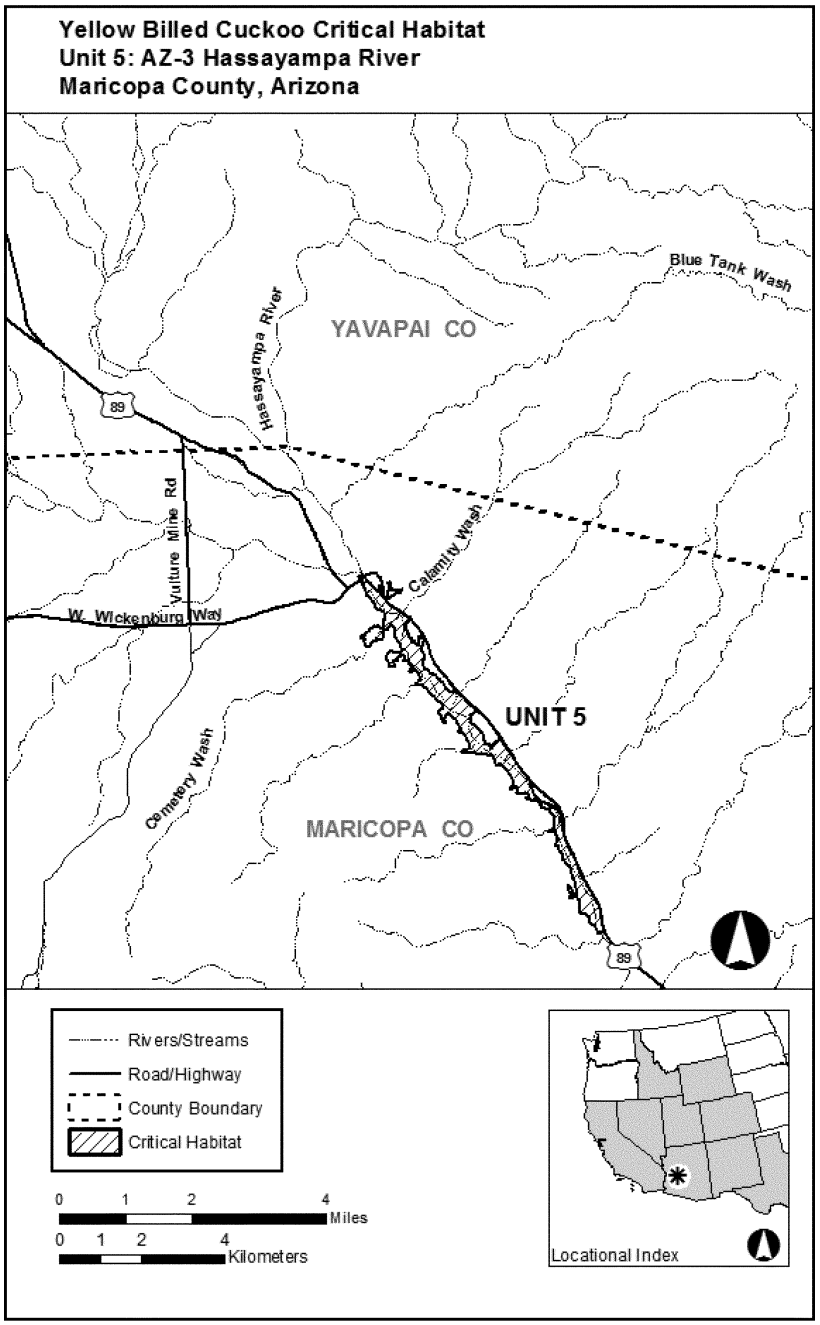
(5) *Unit 1:* CA/AZ–1, Colorado River 1; Imperial, Riverside, and San Bernardino Counties, California, and Yuma and La Paz Counties, Arizona. This unit was excluded from the designation pursuant to section 4(b)(2) of the Act.

(6) *Unit 2:* CA/AZ–2, Colorado River 2; San Bernardino County, California, and Mohave County, Arizona. This unit was excluded from the designation pursuant to section 4(b)(2) of the Act.

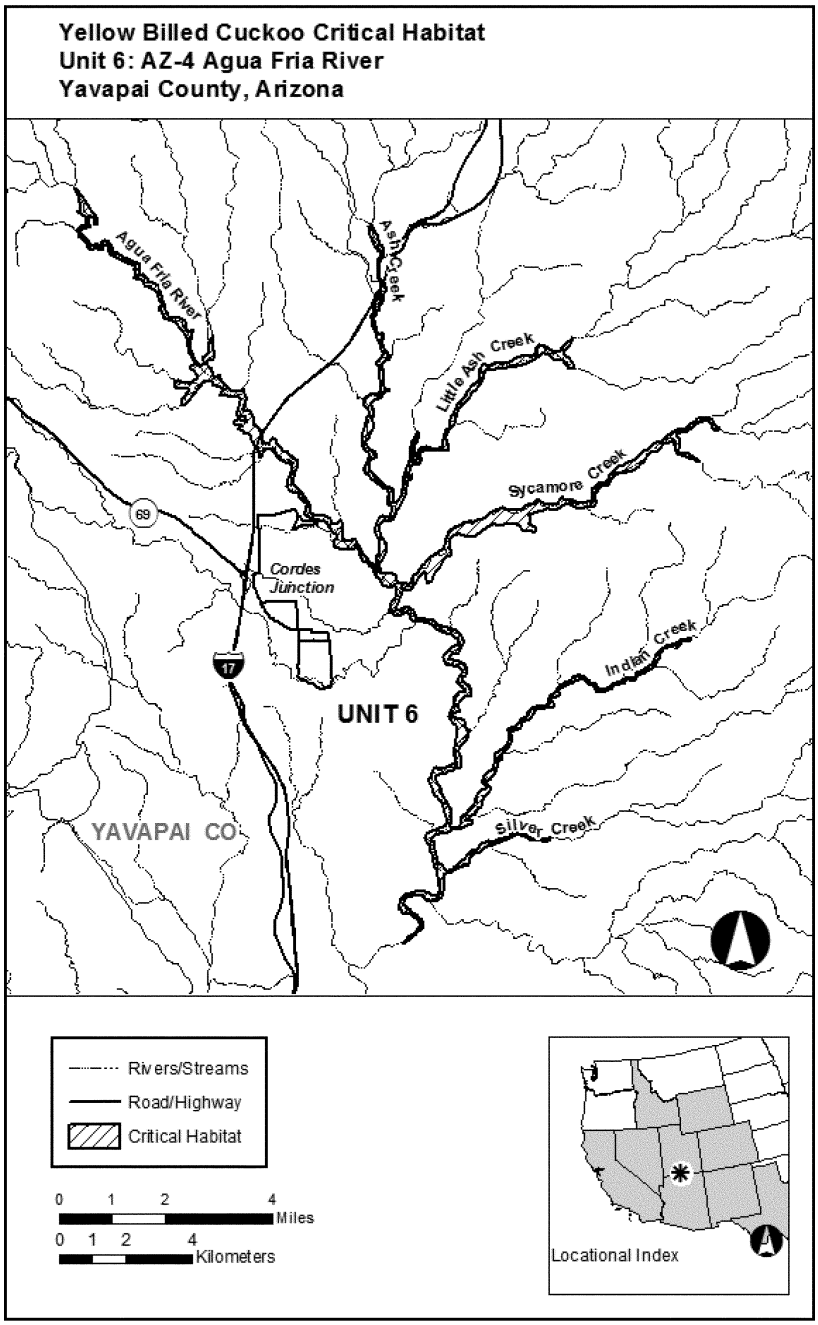
(7) *Unit 3:* AZ–1, Bill Williams River; Mohave and La Paz Counties, Arizona. This unit was excluded from the designation pursuant to section 4(b)(2) of the Act.

(8) *Unit 4:* AZ–2, Alamo Lake, Mohave and La Paz Counties, Arizona. This unit was excluded from the designation pursuant to section 4(b)(2) of the Act.

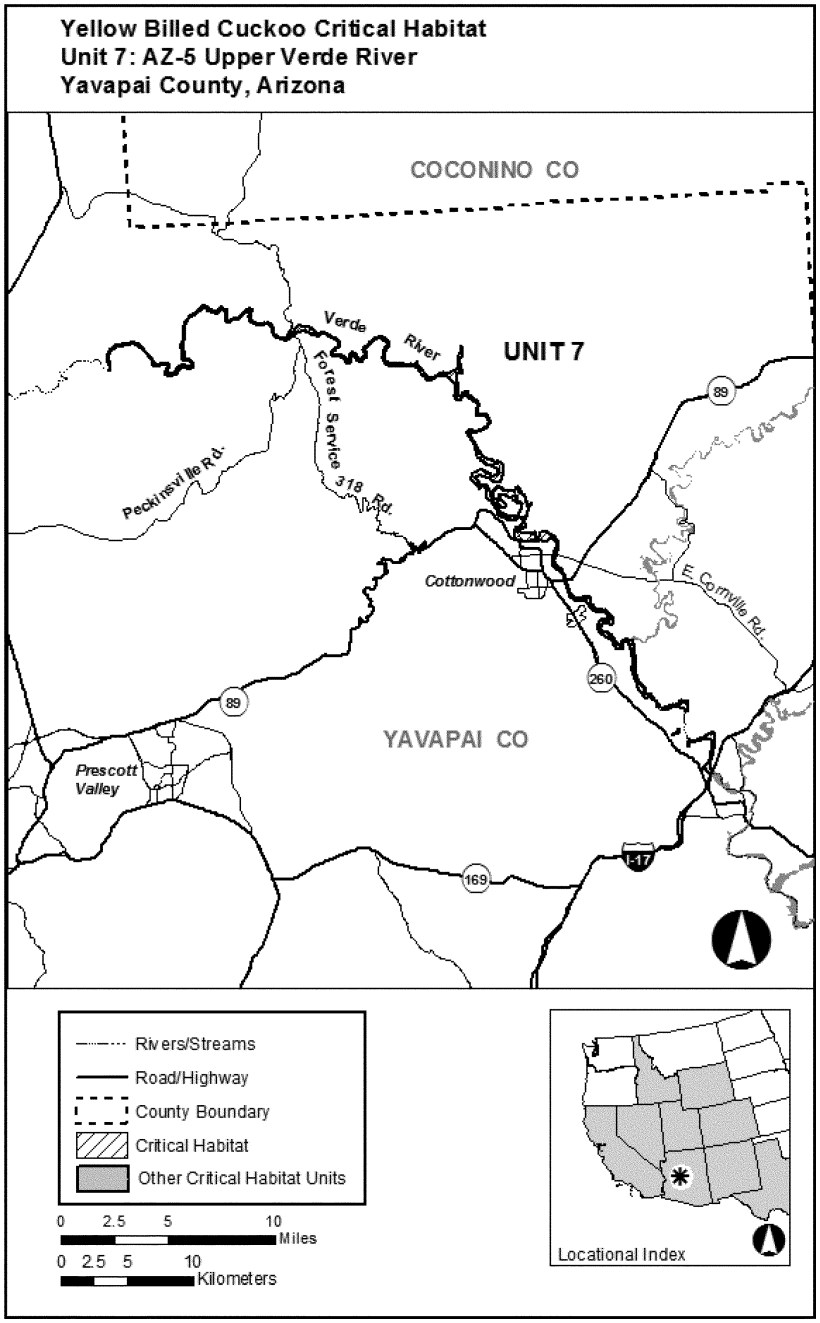
(9) *Unit 5:* AZ–3, Hassayampa River; Maricopa County, Arizona. Map of Unit 5 follows:



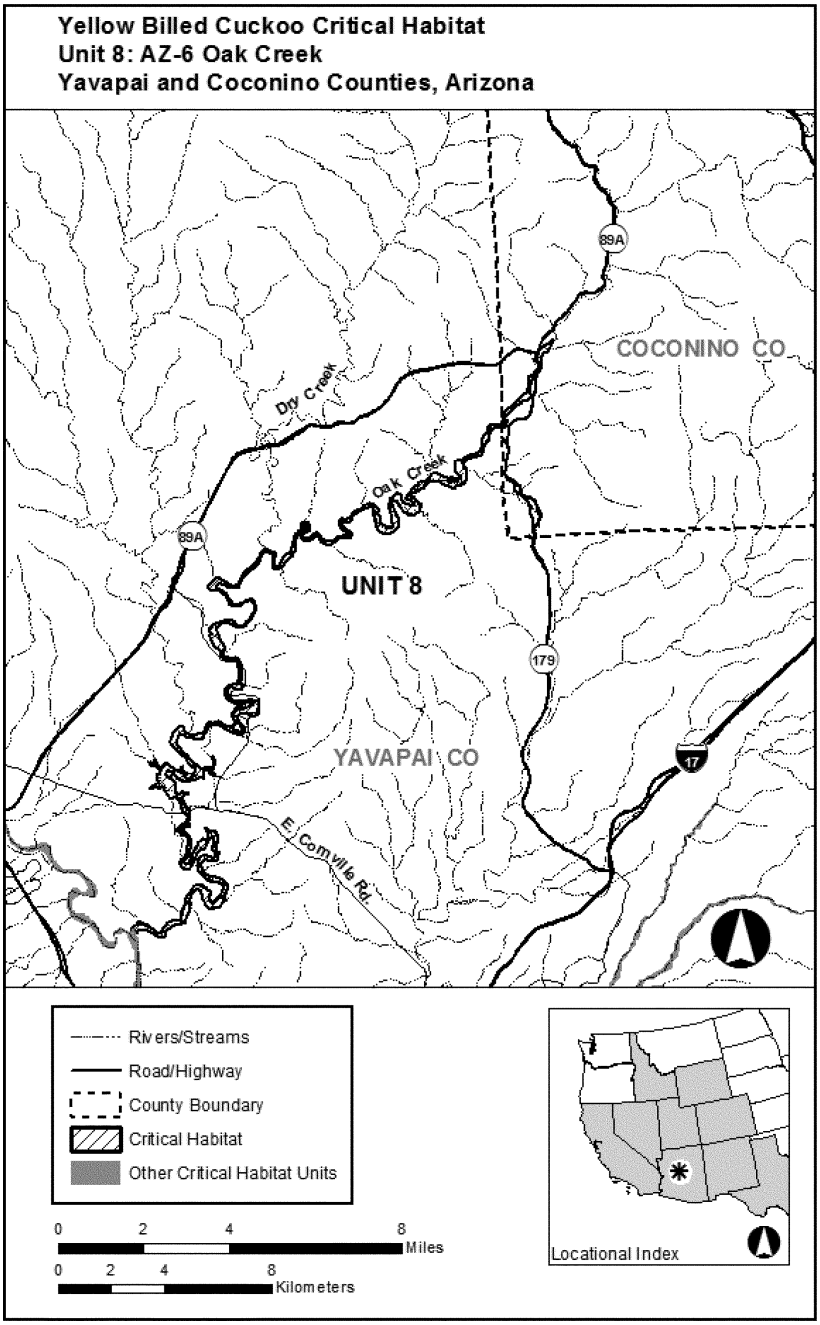
(10) *Unit 6:* AZ–4, Agua Fria River; Yavapai County, Arizona. Map of Unit 6 follows:



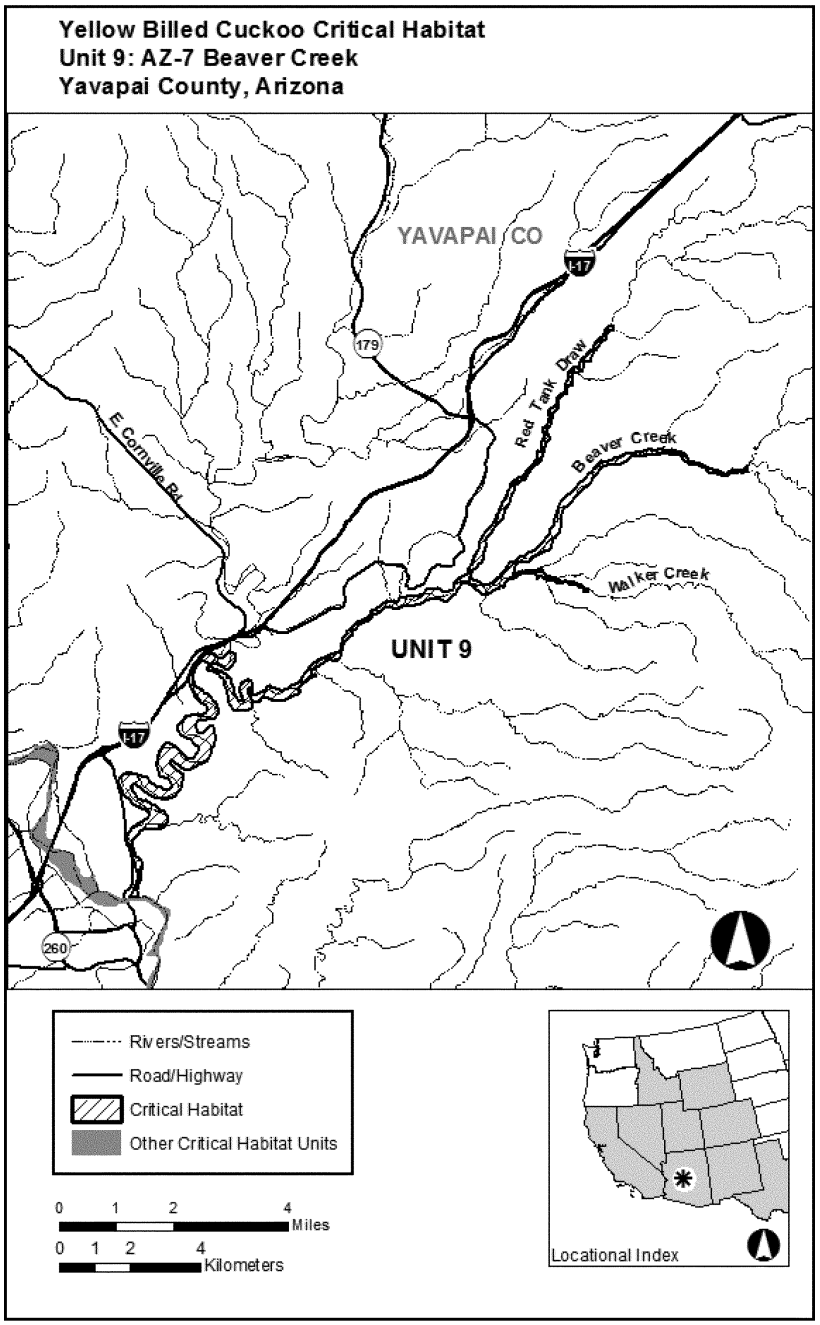
(11) *Unit 7:* AZ–5, Upper Verde River; Yavapai County, Arizona. Map of Unit 7 follows:



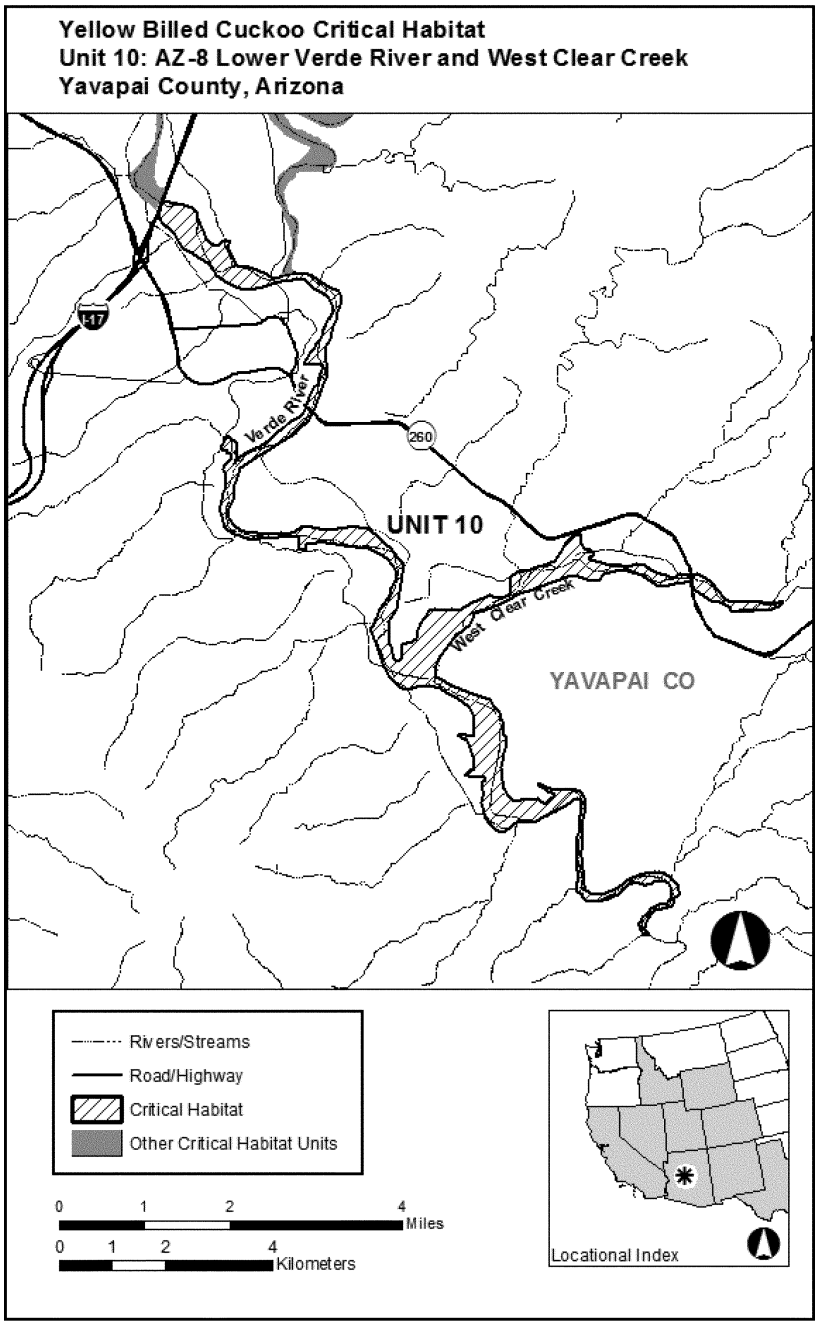
(12) *Unit 8:* AZ–6, Oak Creek; Yavapai and Coconino Counties, Arizona. Map of Unit 8 follows:



(13) *Unit 9:* AZ–7, Beaver Creek; Yavapai County, Arizona. Map of Unit 9 follows:

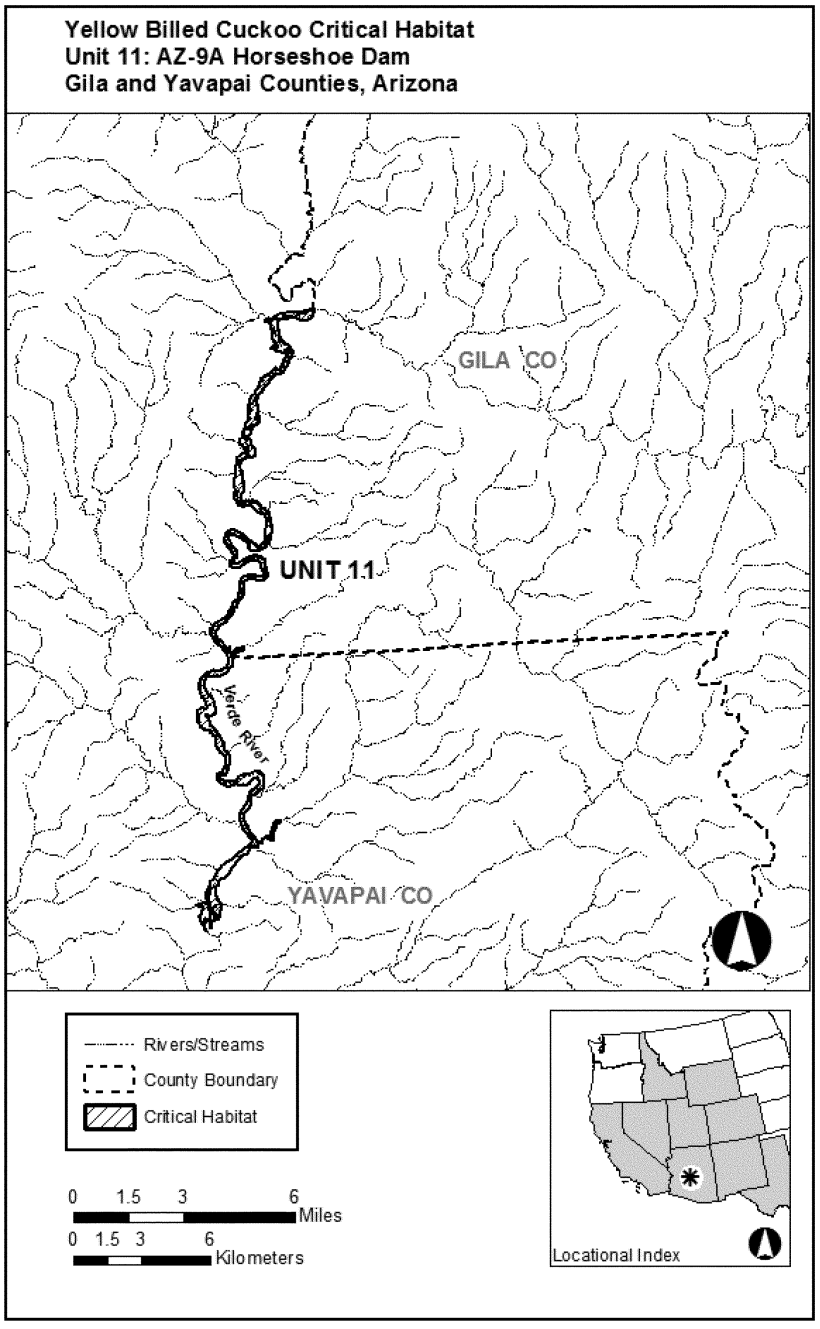


(14) *Unit 10:* AZ–8, Lower Verde River and West Clear Creek; Yavapai County, Arizona. Map of Unit 10 follows:

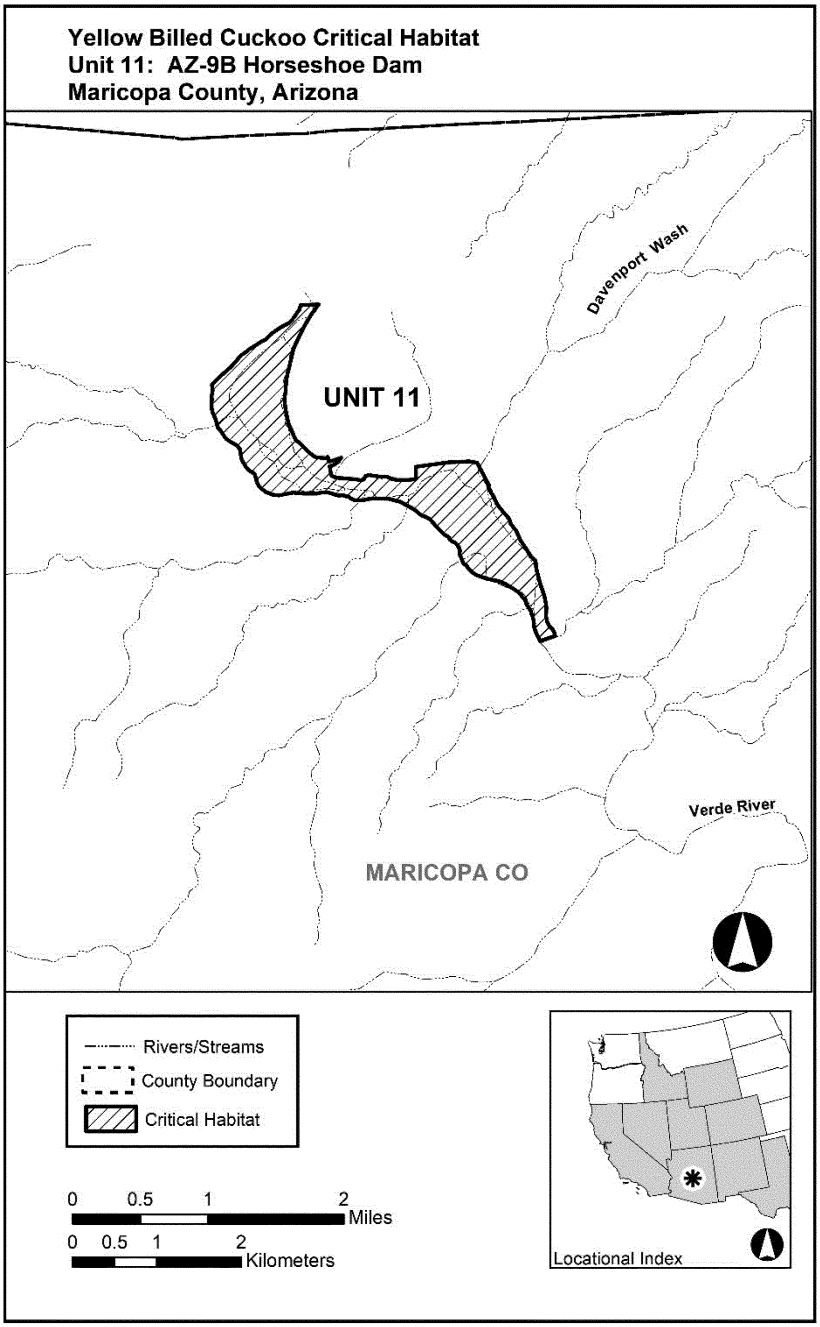


(15) *Unit 11:* AZ–9A and AZ–9B, Horseshoe Dam; Gila, Maricopa, and Yavapai Counties, Arizona. Maps of Unit 11 follow:

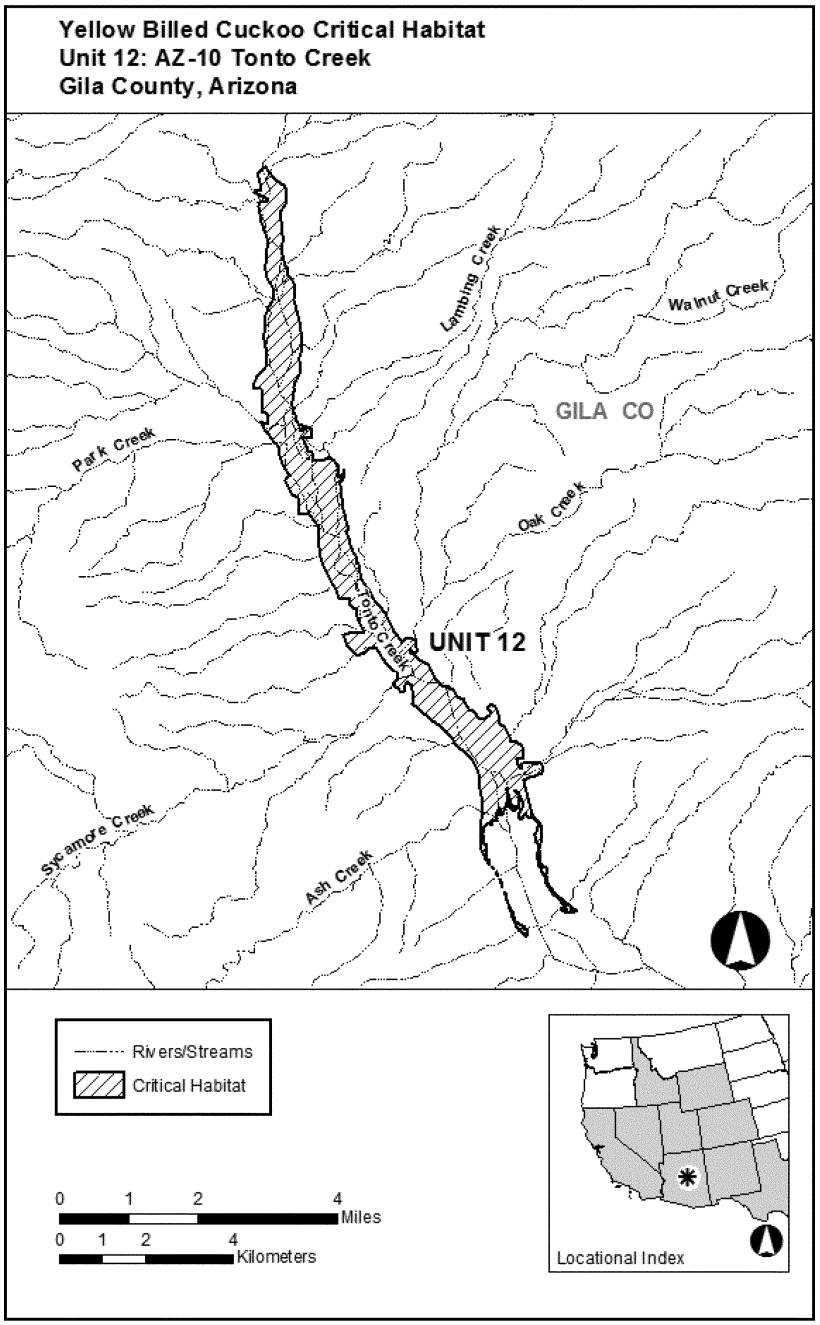
(i) *Map of Unit 11:* AZ–9A, Horseshoe Dam.



(ii) *Map of Unit 11:* AZ–9B, Horseshoe Dam.

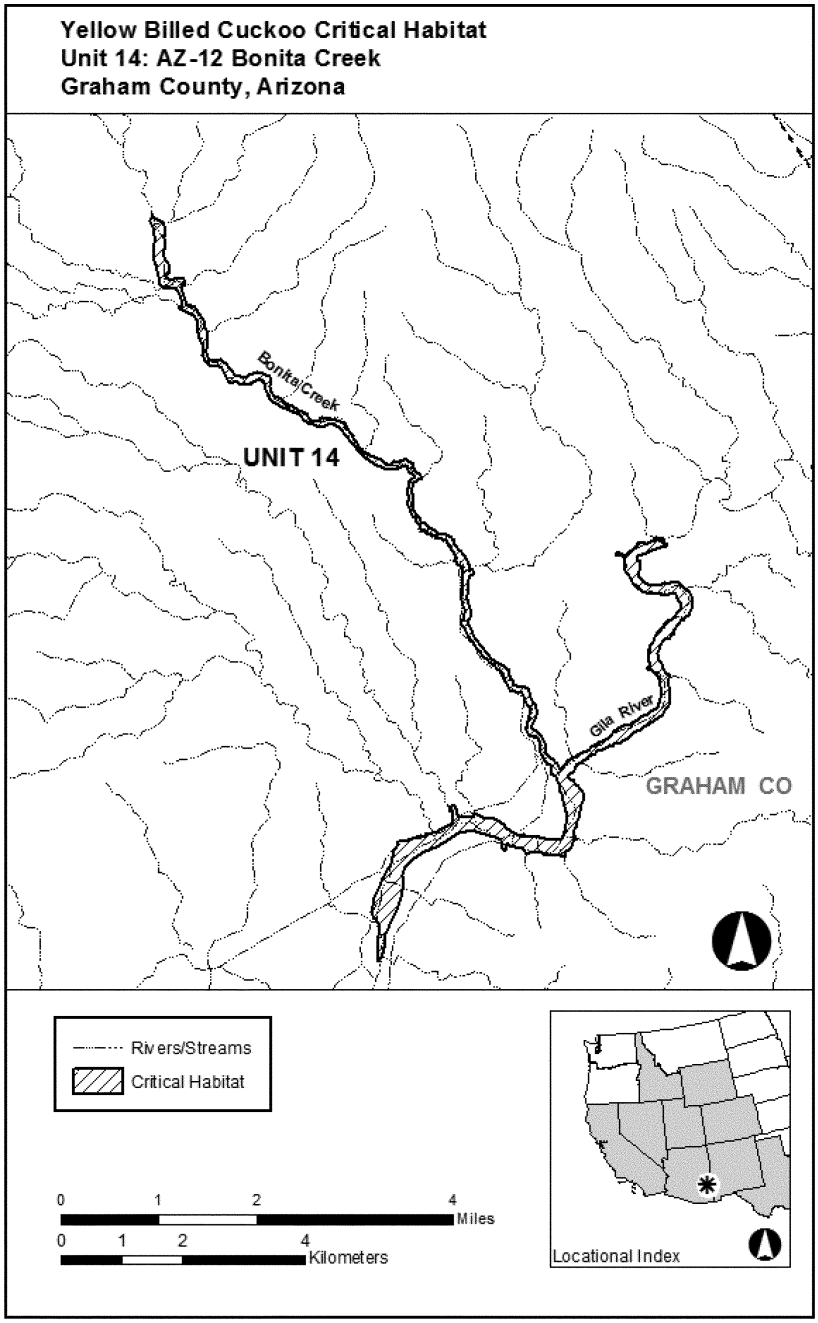


(16) *Unit 12:* AZ–10, Tonto Creek; Gila County, Arizona. Map of Unit 12 follows:

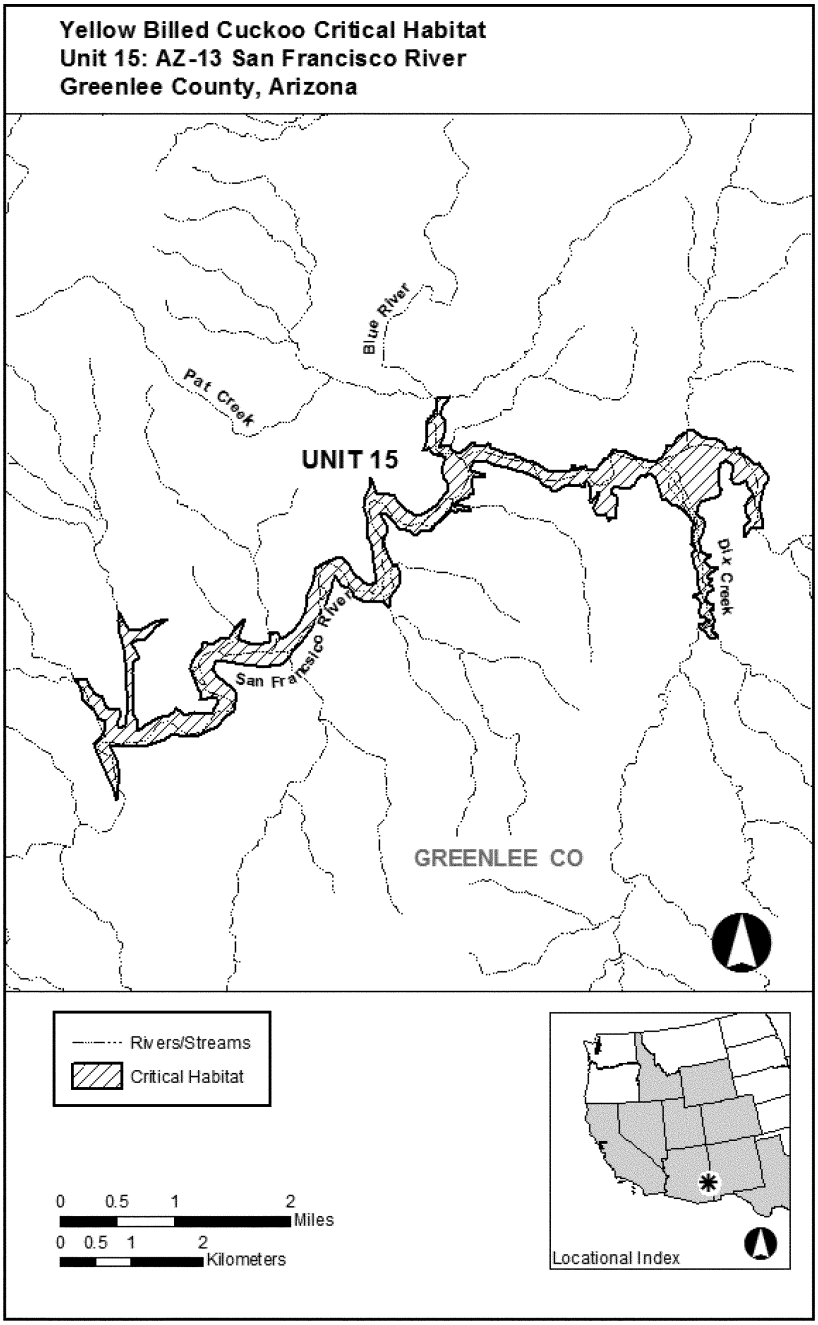


(17) *Unit 13:* AZ–11, Pinal Creek; Gila County, Arizona. This unit was excluded from the designation pursuant to section 4(b)(2) of the Act.

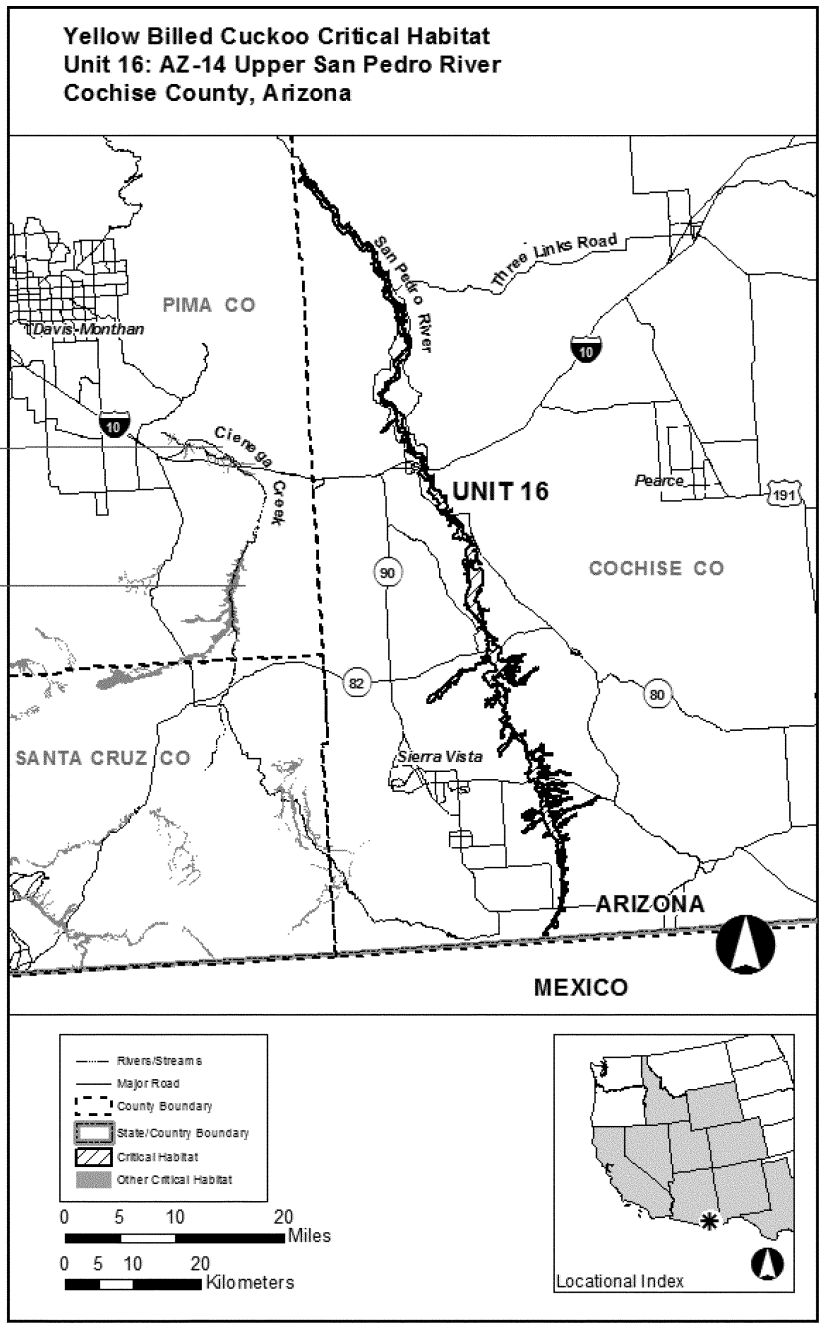
(18) *Unit 14:* AZ–12, Bonita Creek; Graham County, Arizona. Map of Unit 14 follows:



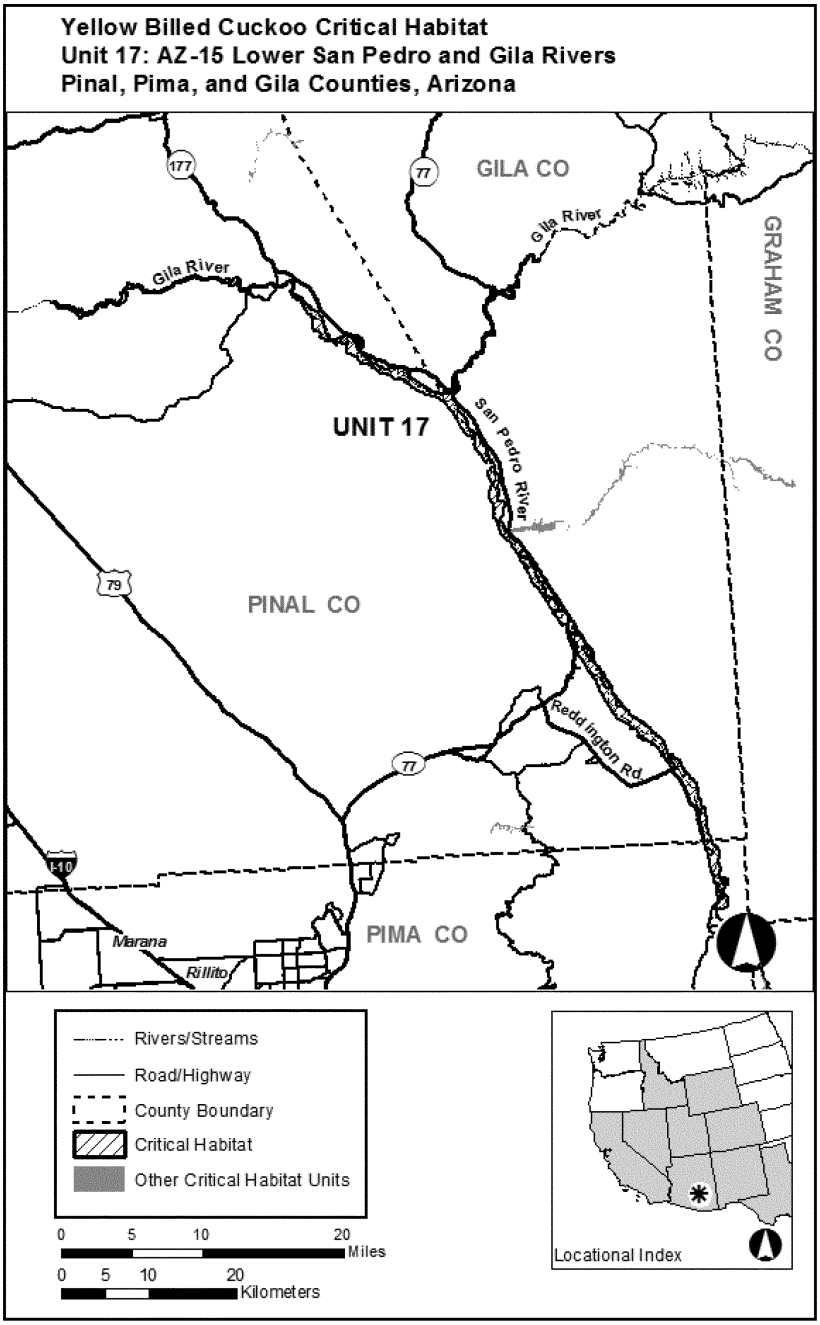
(19) *Unit 15:* AZ–13, San Francisco River; Greenlee County, Arizona. Map of Unit 15 follows:



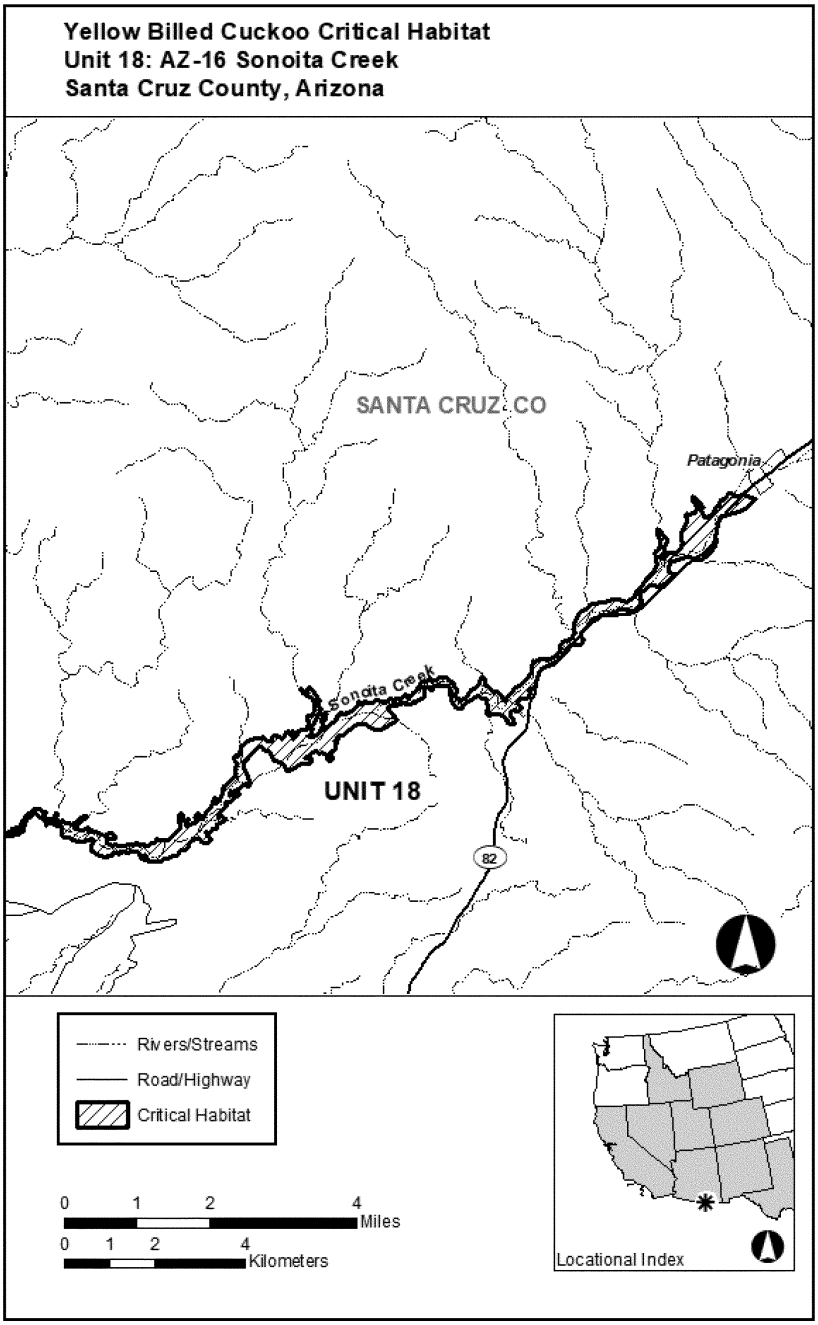
(20) *Unit 16:* AZ–14, Upper San Pedro River; Cochise County, Arizona. Map of Unit 16 follows:



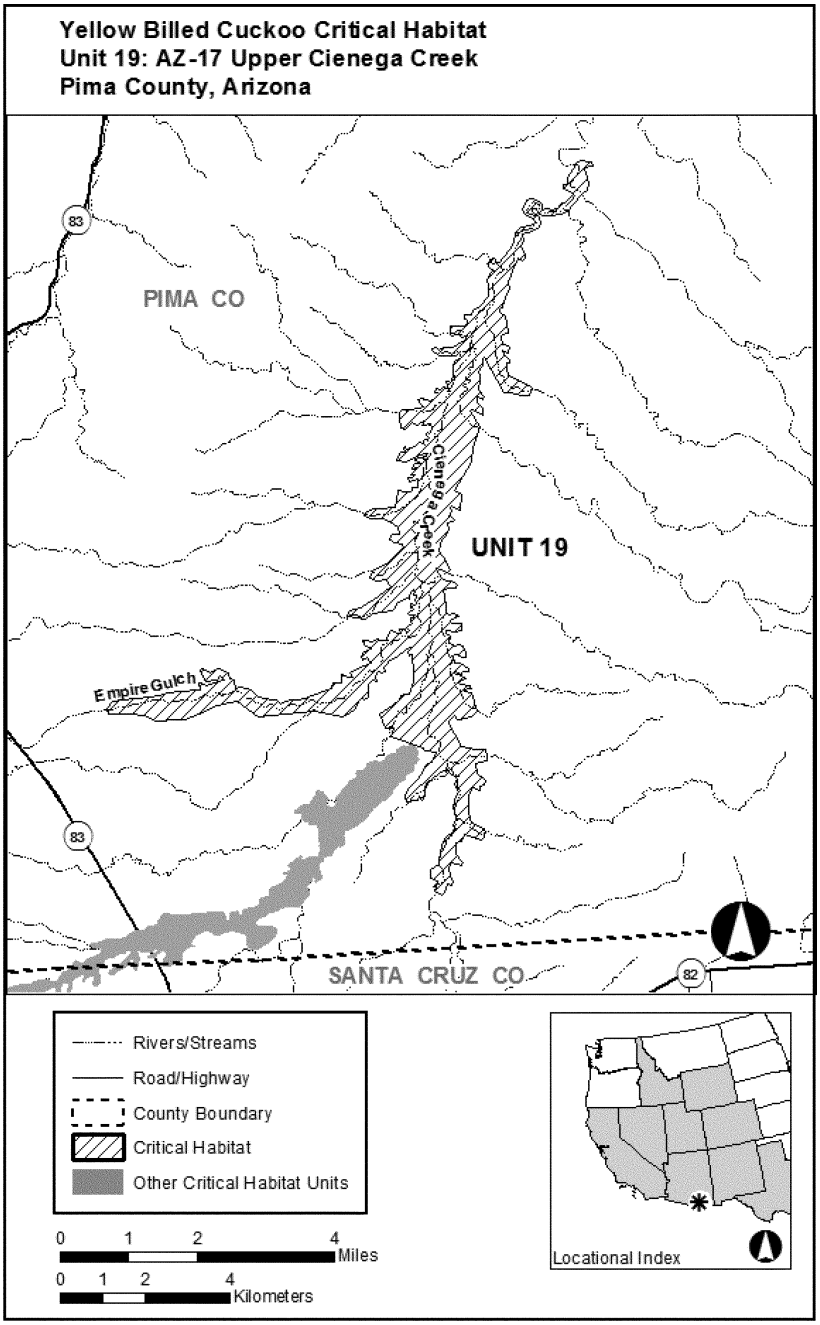
(21) *Unit 17:* AZ–15, Lower San Pedro River and Gila River; Pima, Pinal, and Gila Counties, Arizona. Map of Unit 17 follows:



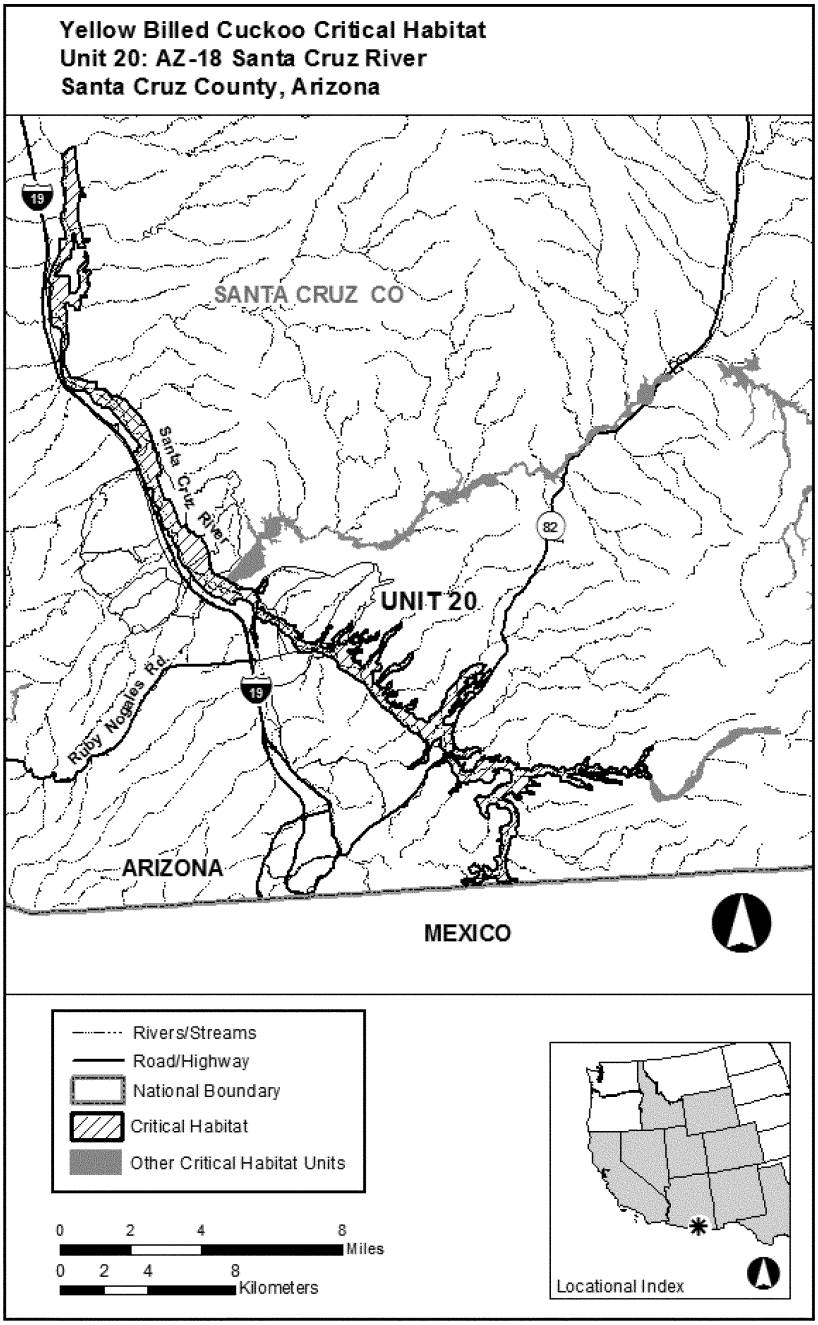
(22) *Unit 18:* AZ–16, Sonoita Creek; Santa Cruz County, Arizona. Map of Unit 18 follows:



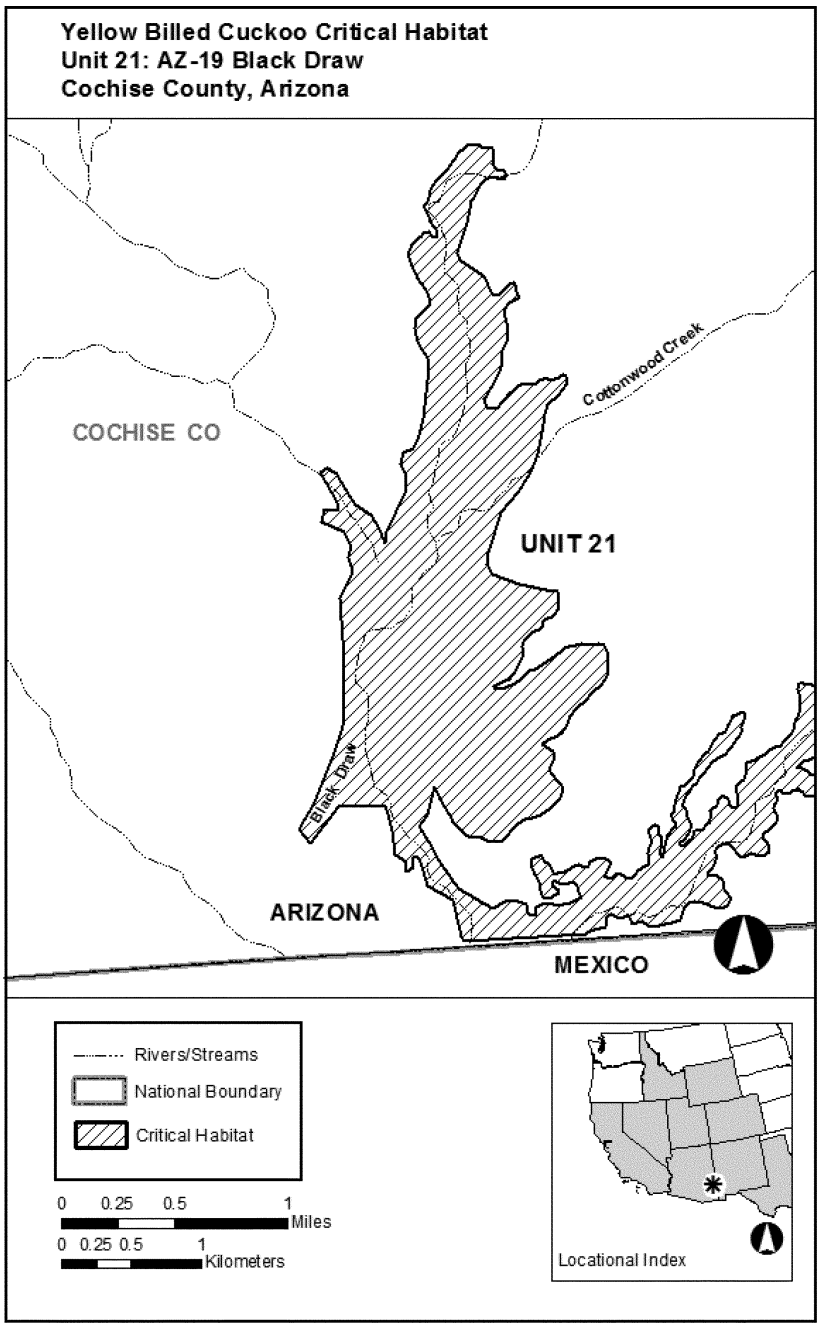
(23) *Unit 19:* AZ–17, Upper Cienega Creek; Pima County, Arizona. Map of Unit 19 follows:



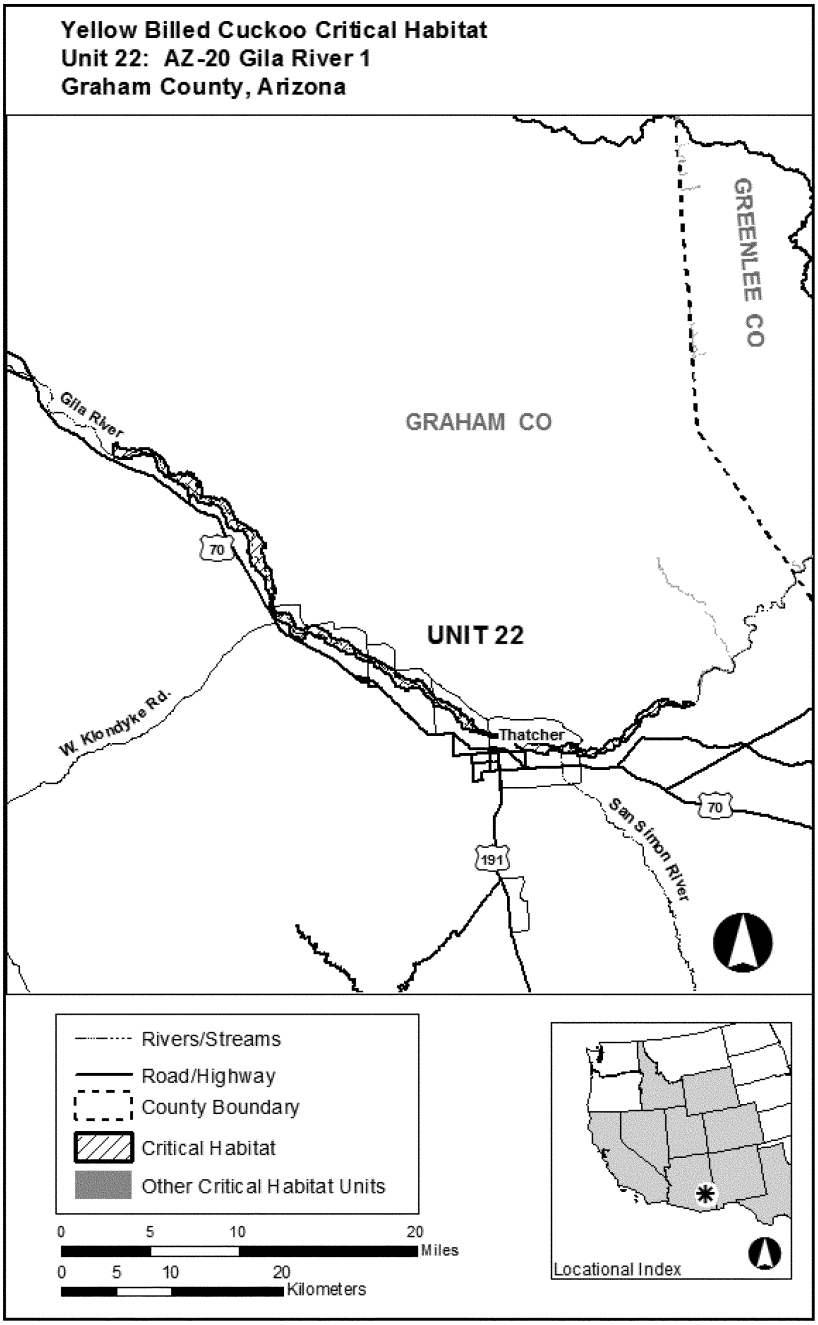
(24) *Unit 20:* AZ–18, Santa Cruz River; Santa Cruz County, Arizona. Map of Unit 20 follows:



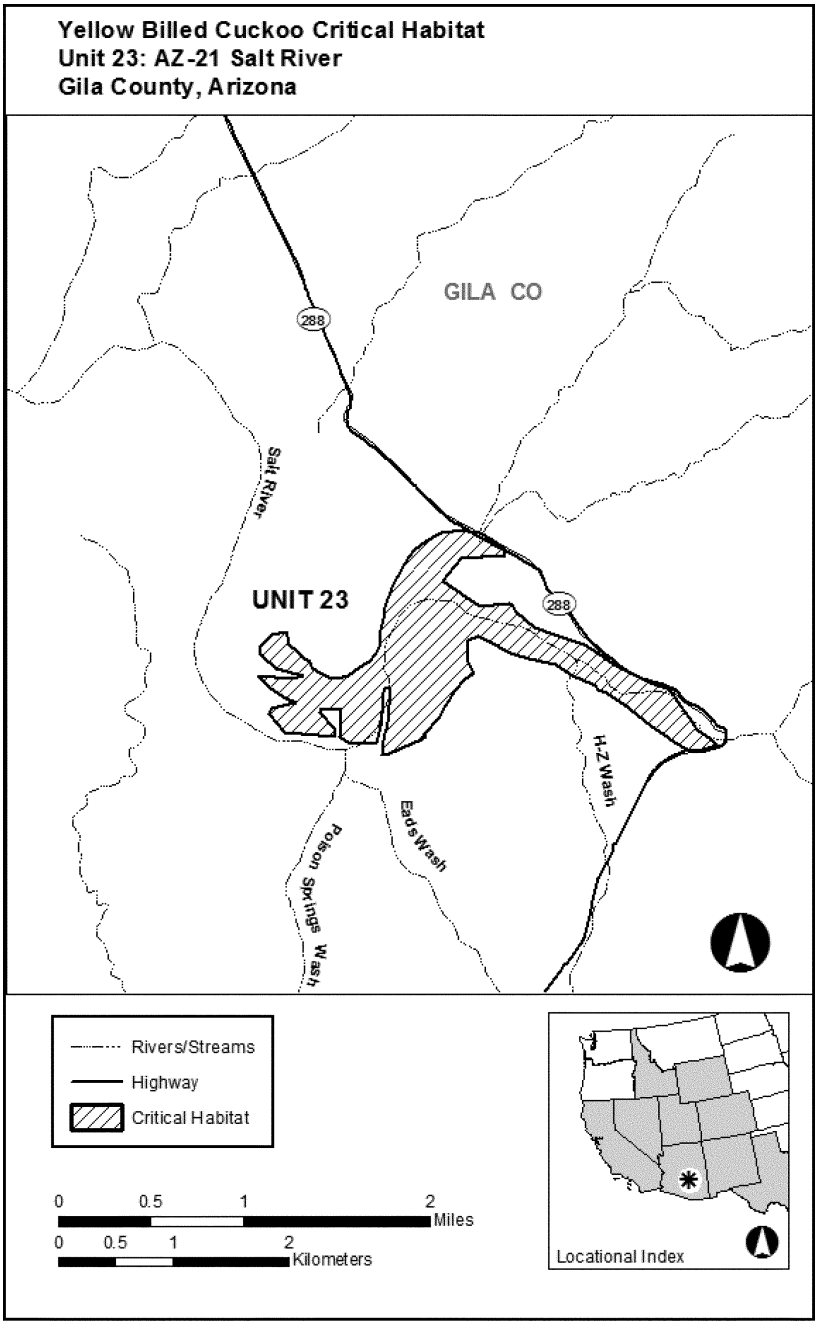
(25) *Unit 21:* AZ–19, Black Draw; Cochise County, Arizona. Map of Unit 21 follows:



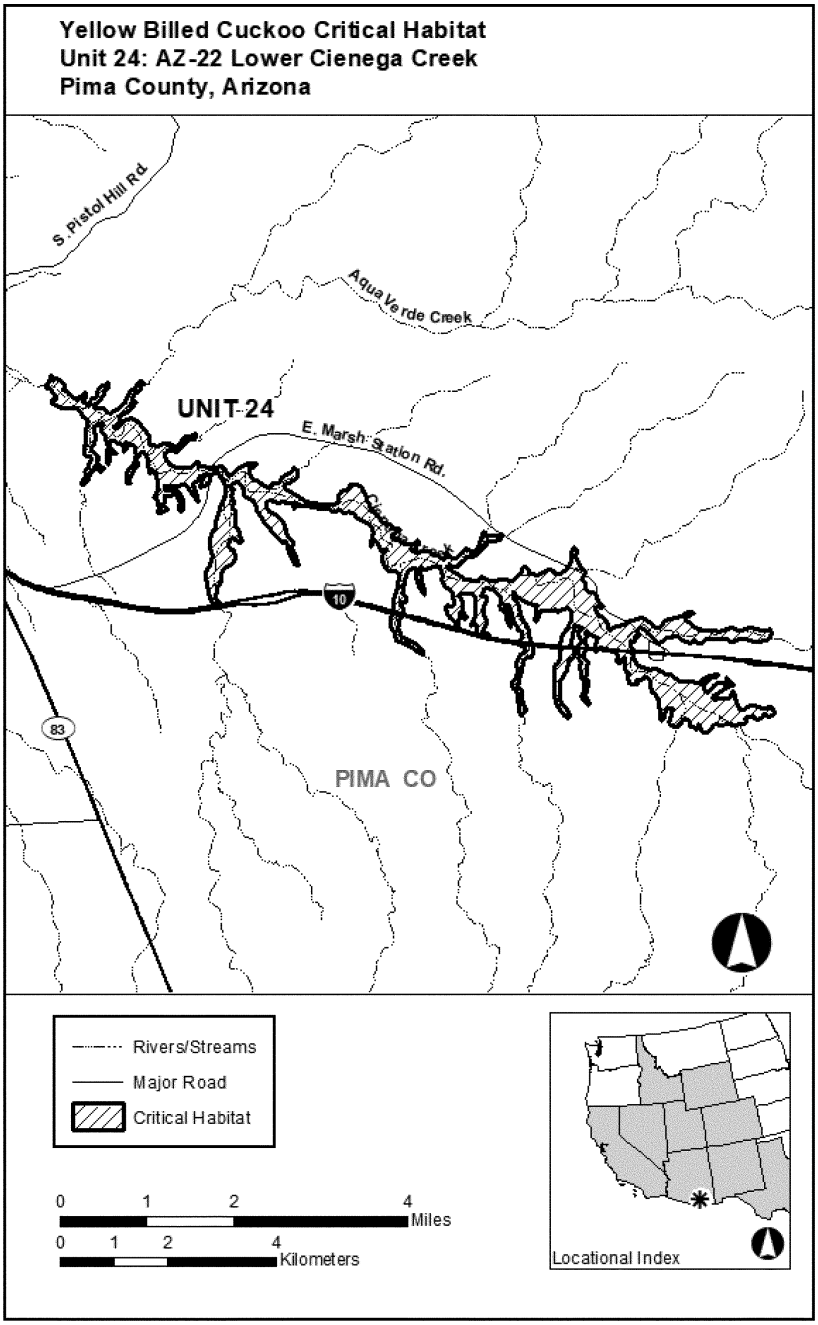
(26) *Unit 22:* AZ–20, Gila River 1; Graham County, Arizona. Map of Unit 22 follows:



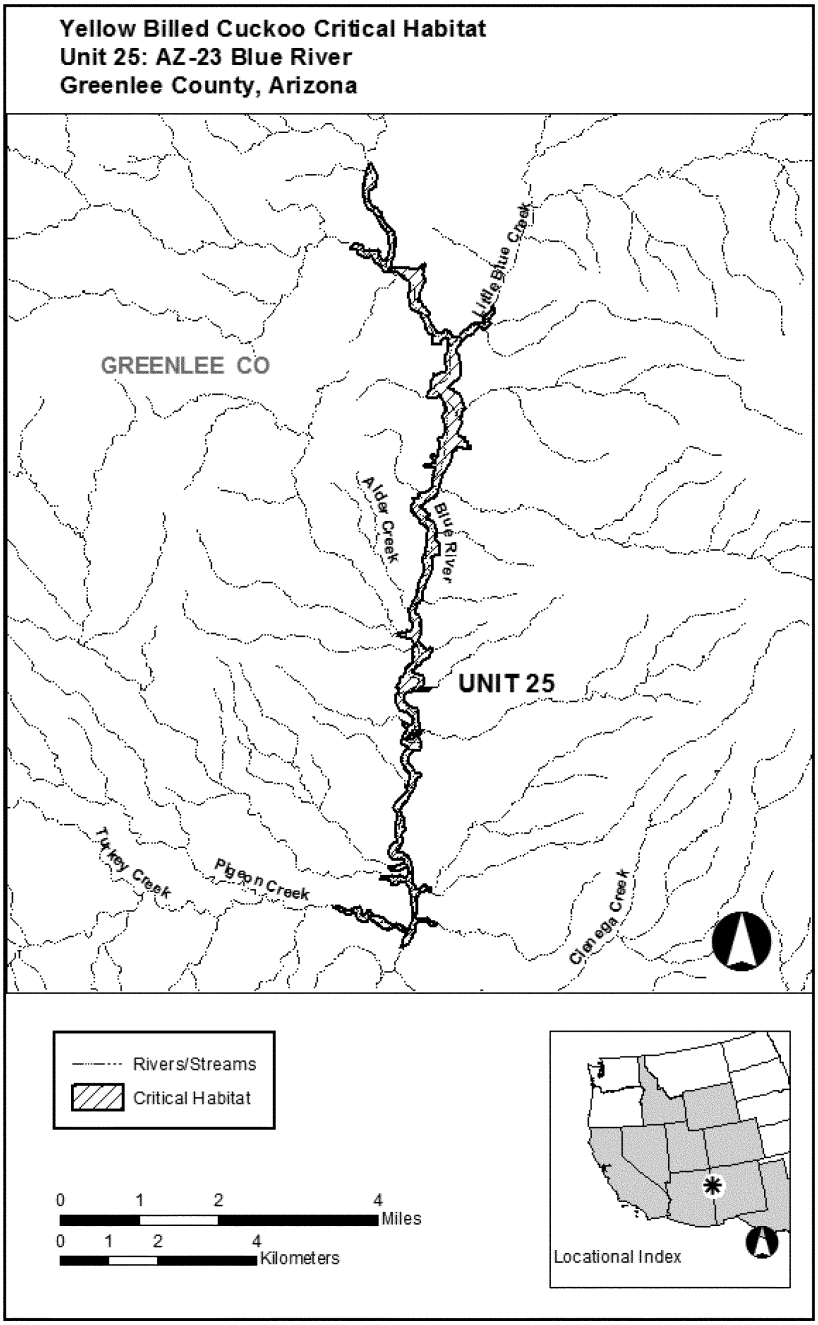
(27) *Unit 23:* AZ–21, Salt River; Gila County, Arizona. Map of Unit 23 follows:



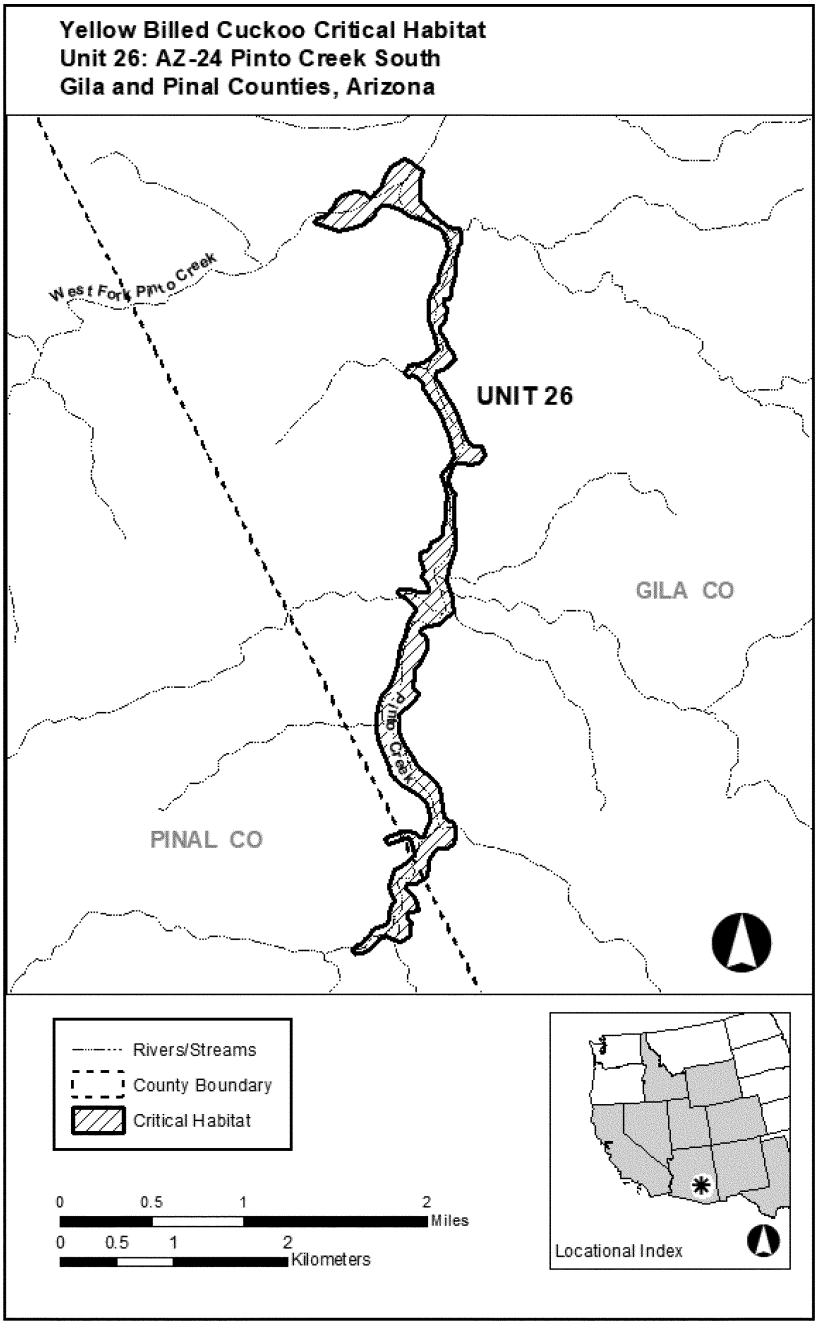
(28) *Unit 24:* AZ–22, Lower Cienega Creek; Pima County, Arizona. Map of Unit 24 follows:



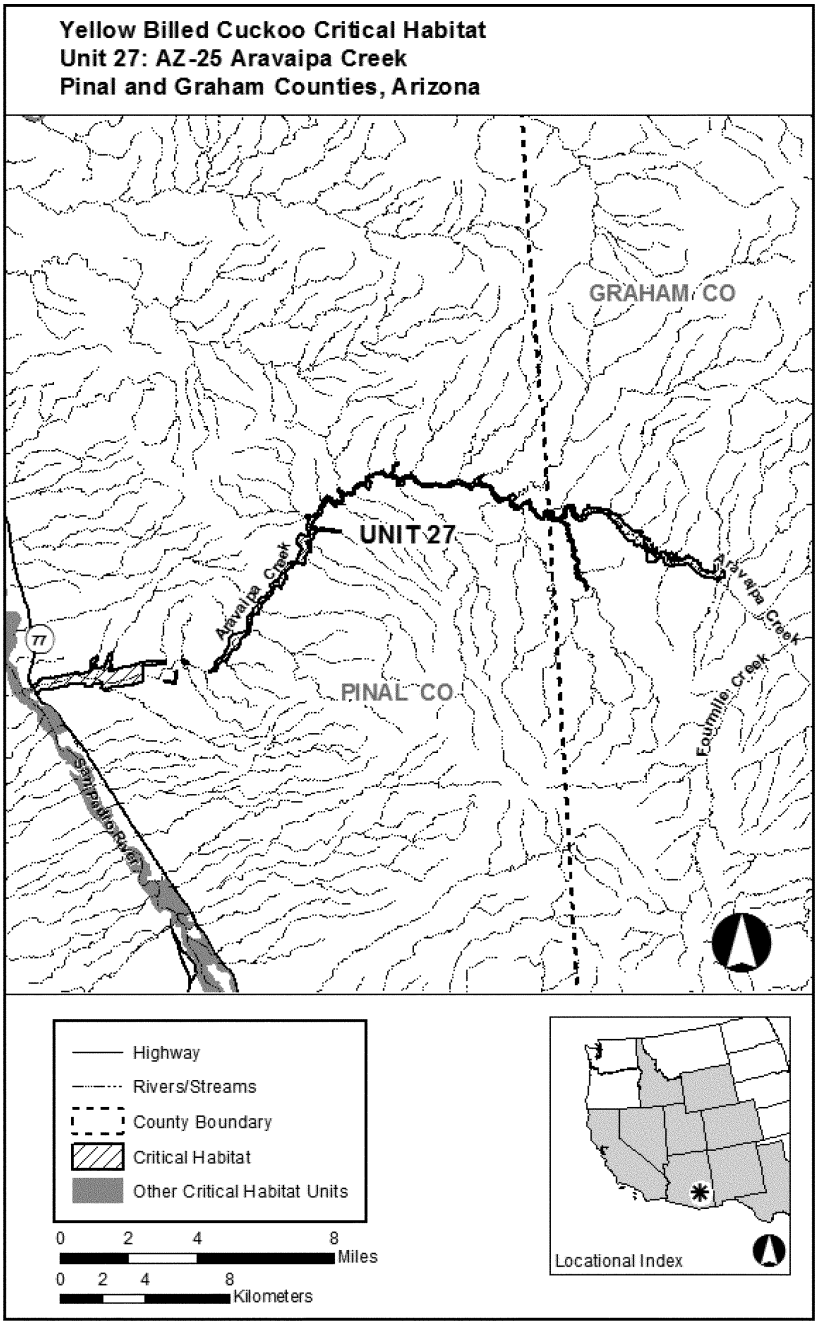
(29) *Unit 25:* AZ–23, Blue River; Greenlee County, Arizona. Map of Unit 25 follows:



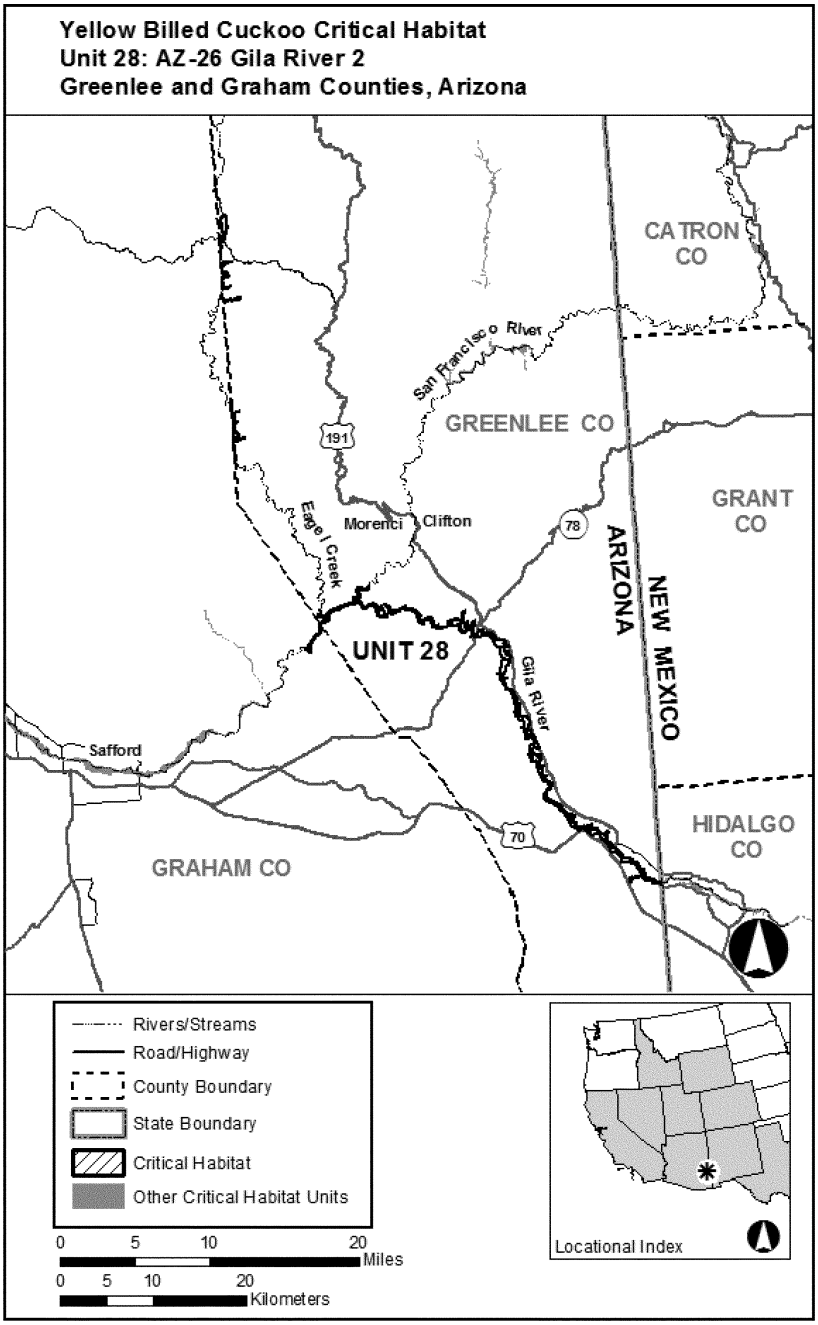
(30) *Unit 26:* AZ–24, Pinto Creek South; Gila and Pinal Counties, Arizona.
Map of Unit 26 follows:



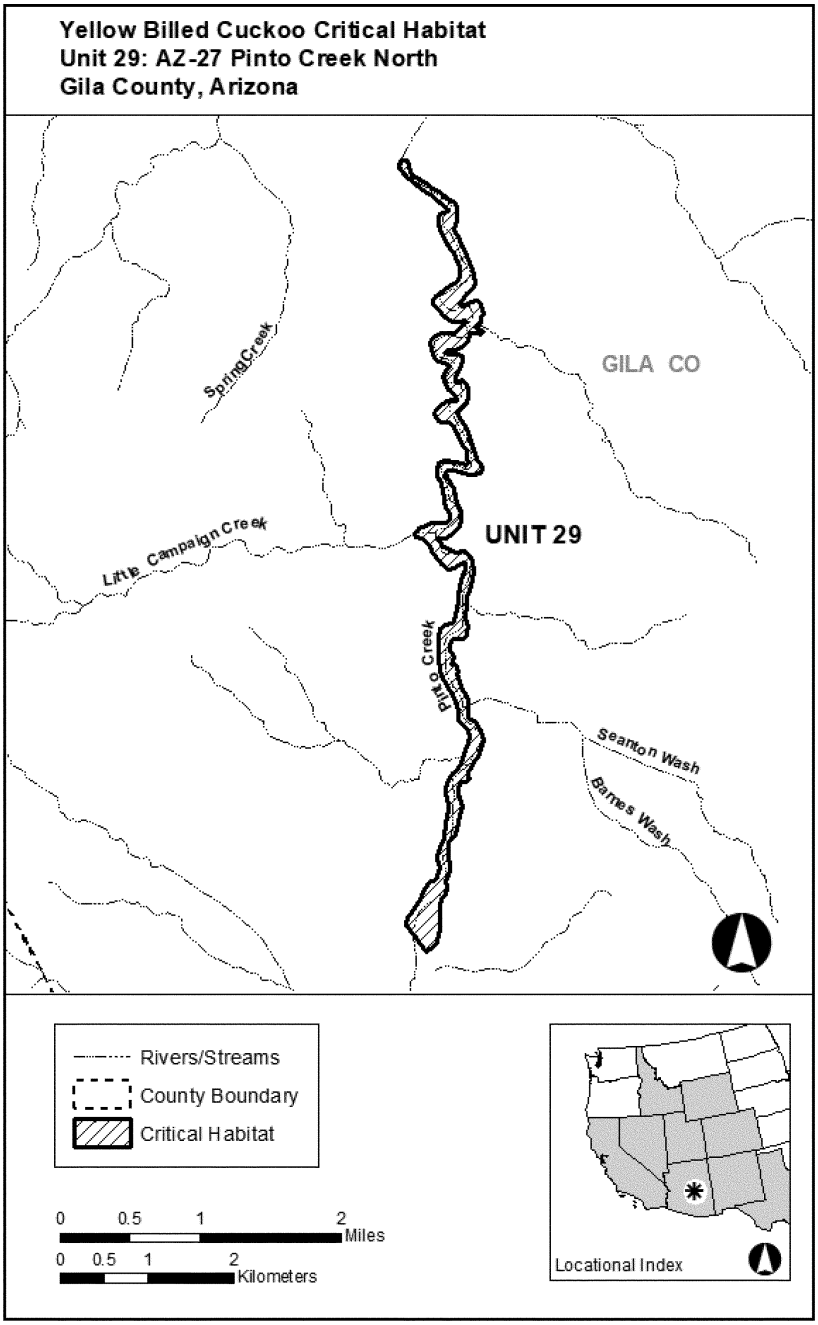
(31) *Unit 27:* AZ–25, Aravaipa Creek; Pinal and Graham Counties, Arizona.
Map of Unit 27 follows:



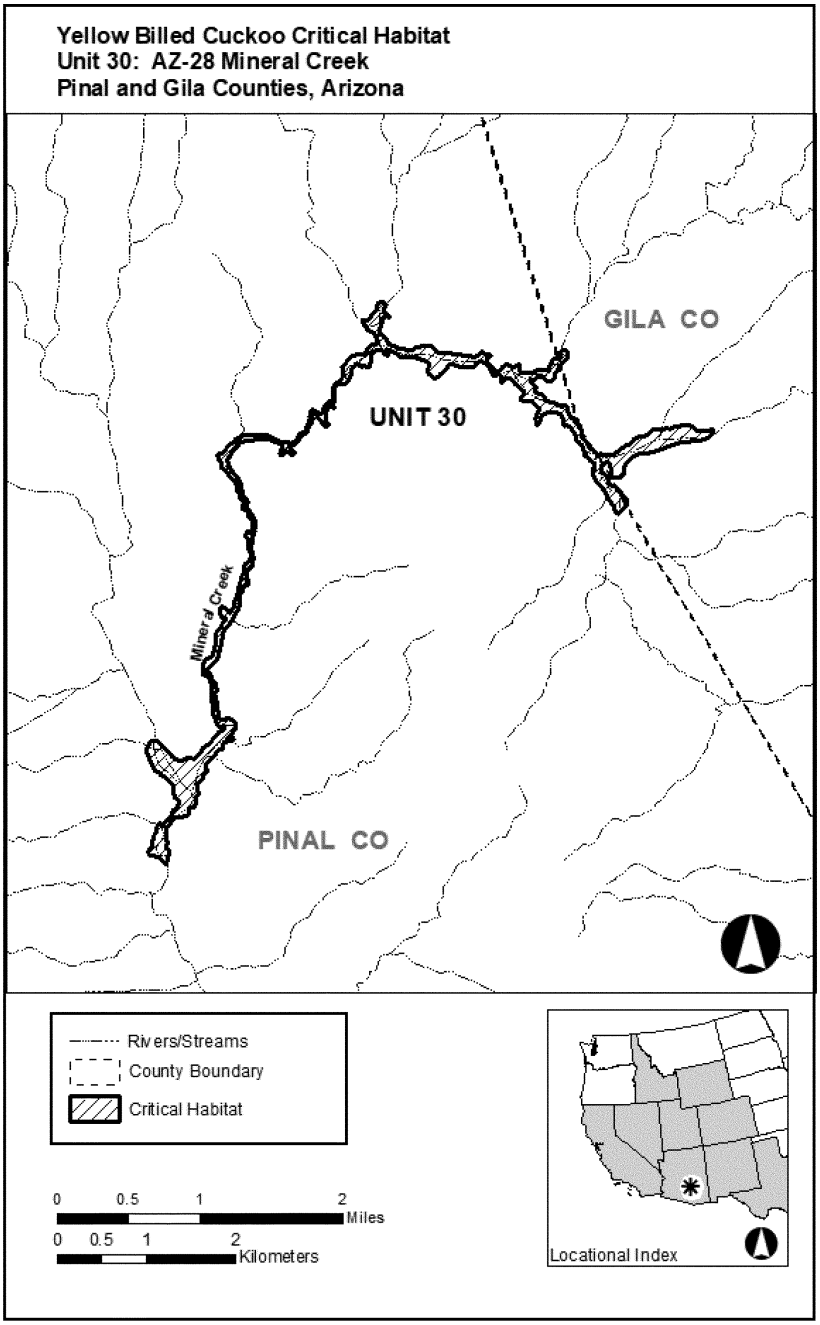
(32) *Unit 28:* AZ–26, Gila River 2; Graham and Greenlee Counties, Arizona. Map of Unit 28 follows:



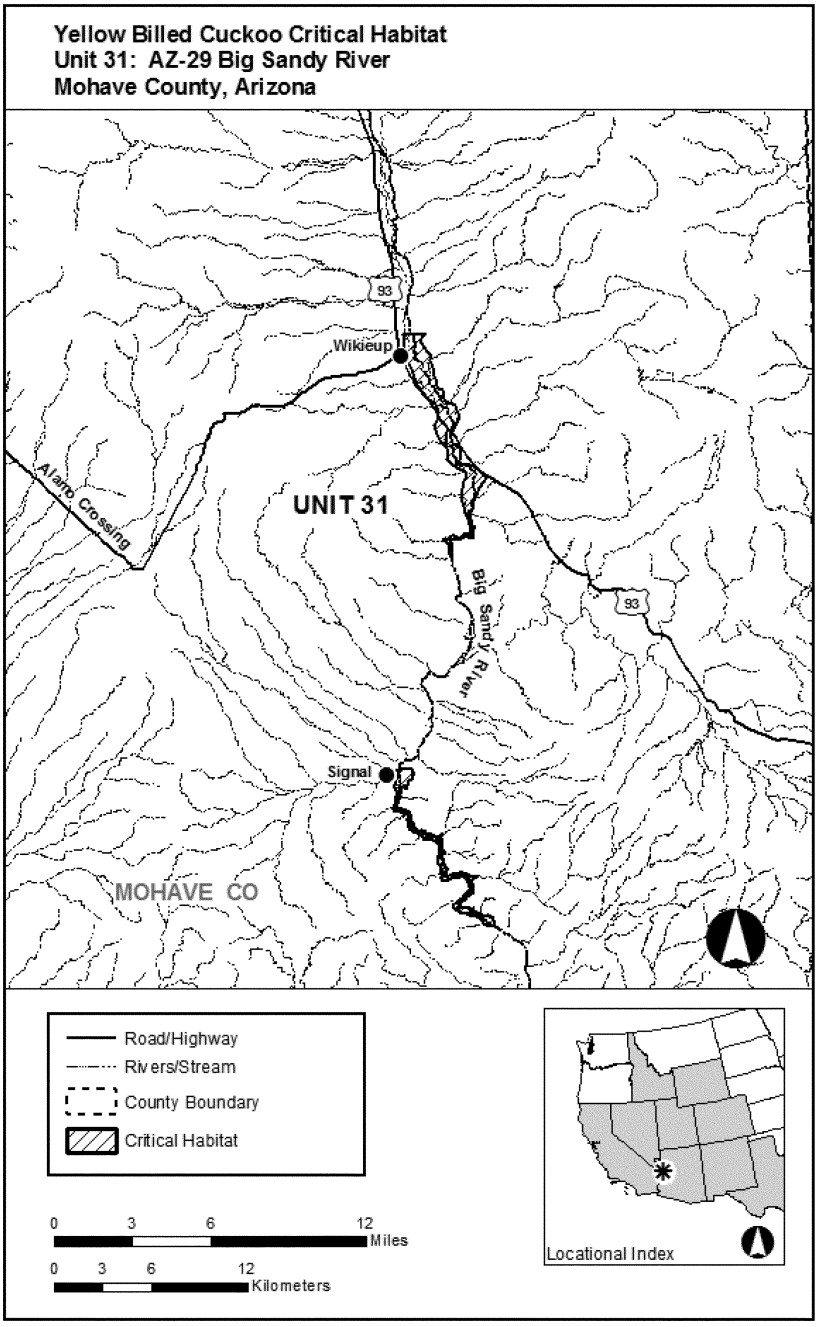
(33) *Unit 29:* AZ–27, Pinto Creek North; Gila County, Arizona. Map of Unit 29 follows:



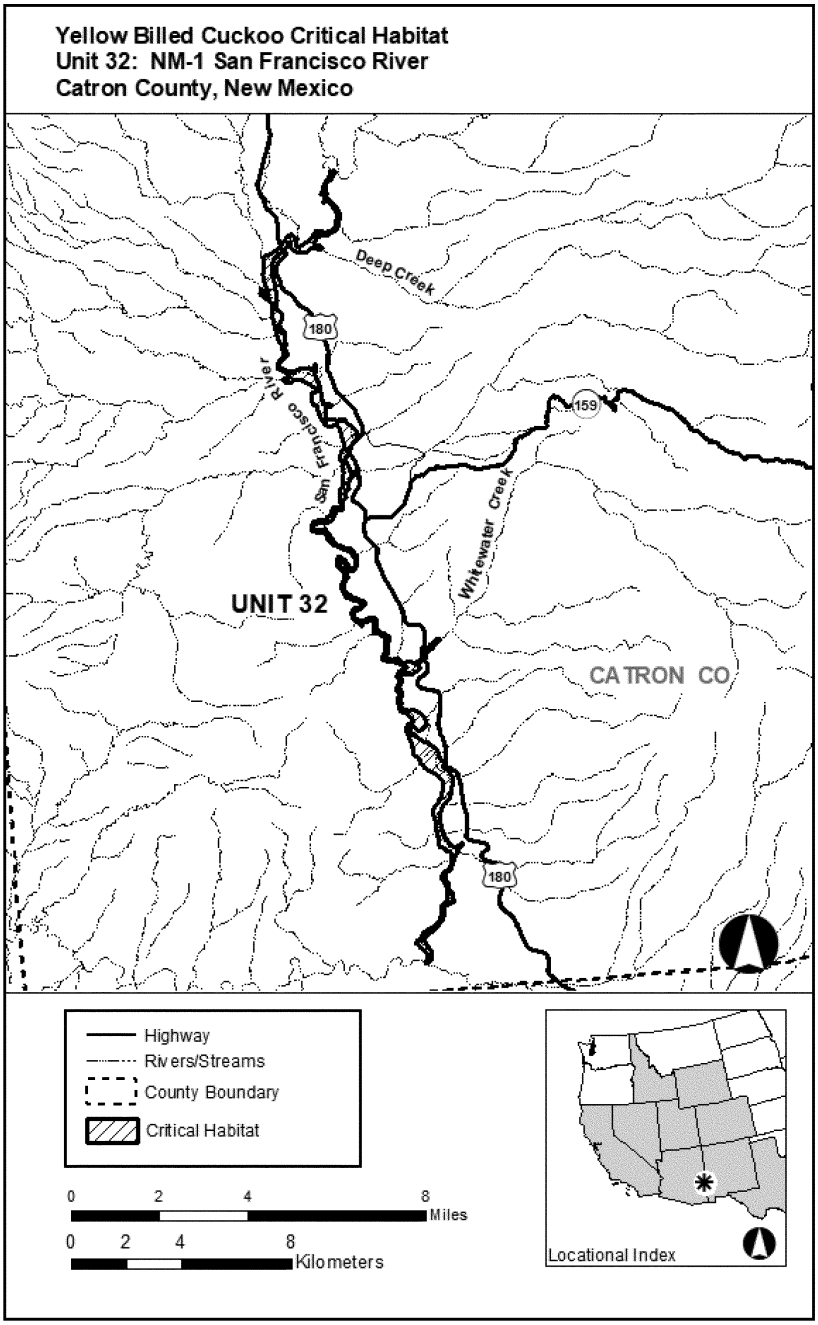
(34) *Unit 30:* AZ–28, Mineral Creek; Pinal and Gila Counties, Arizona. Map of Unit 30 follows:



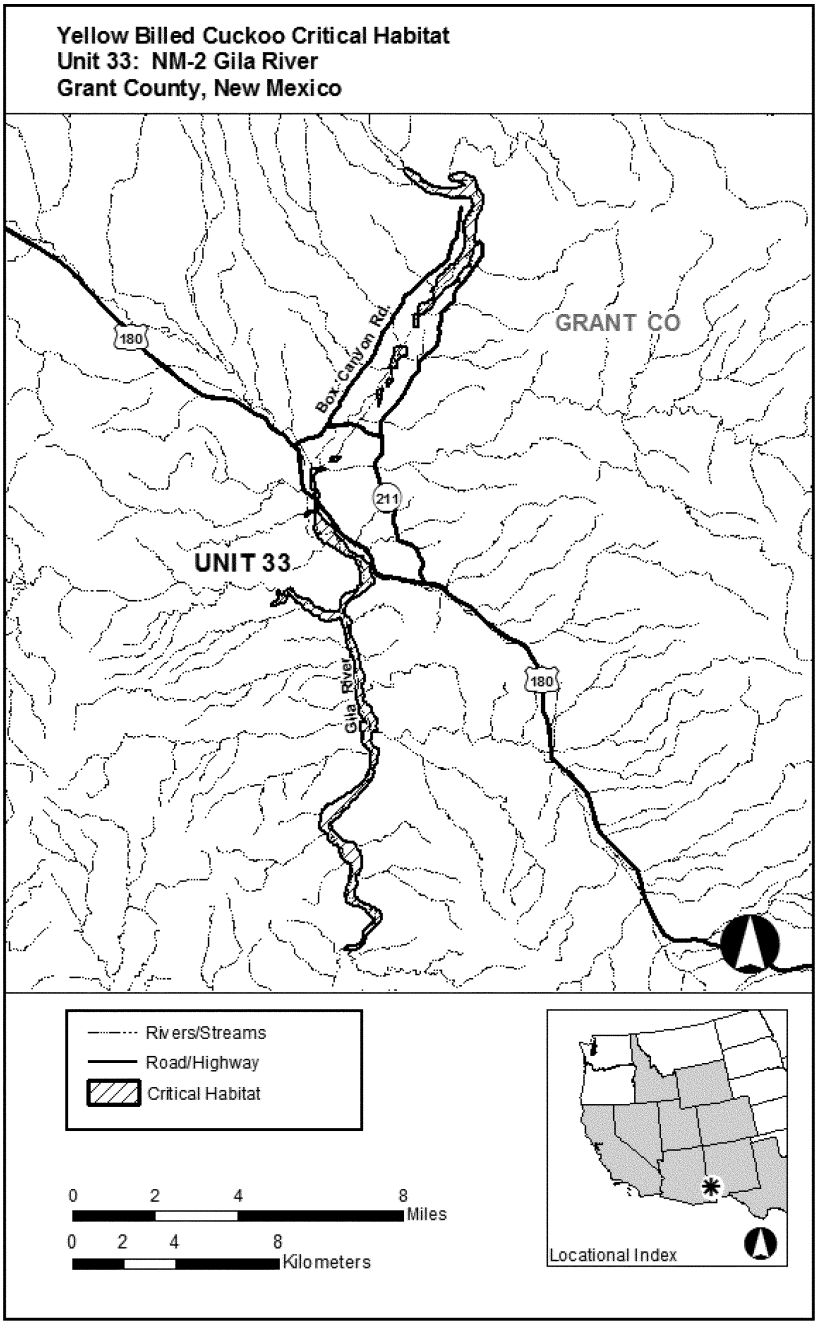
(35) *Unit 31:* AZ–29, Big Sandy River; Mohave County, Arizona. Map of Unit 31 follows:



(36) *Unit 32:* NM–1, San Francisco River; Catron County, New Mexico. Map of Unit 32 follows:

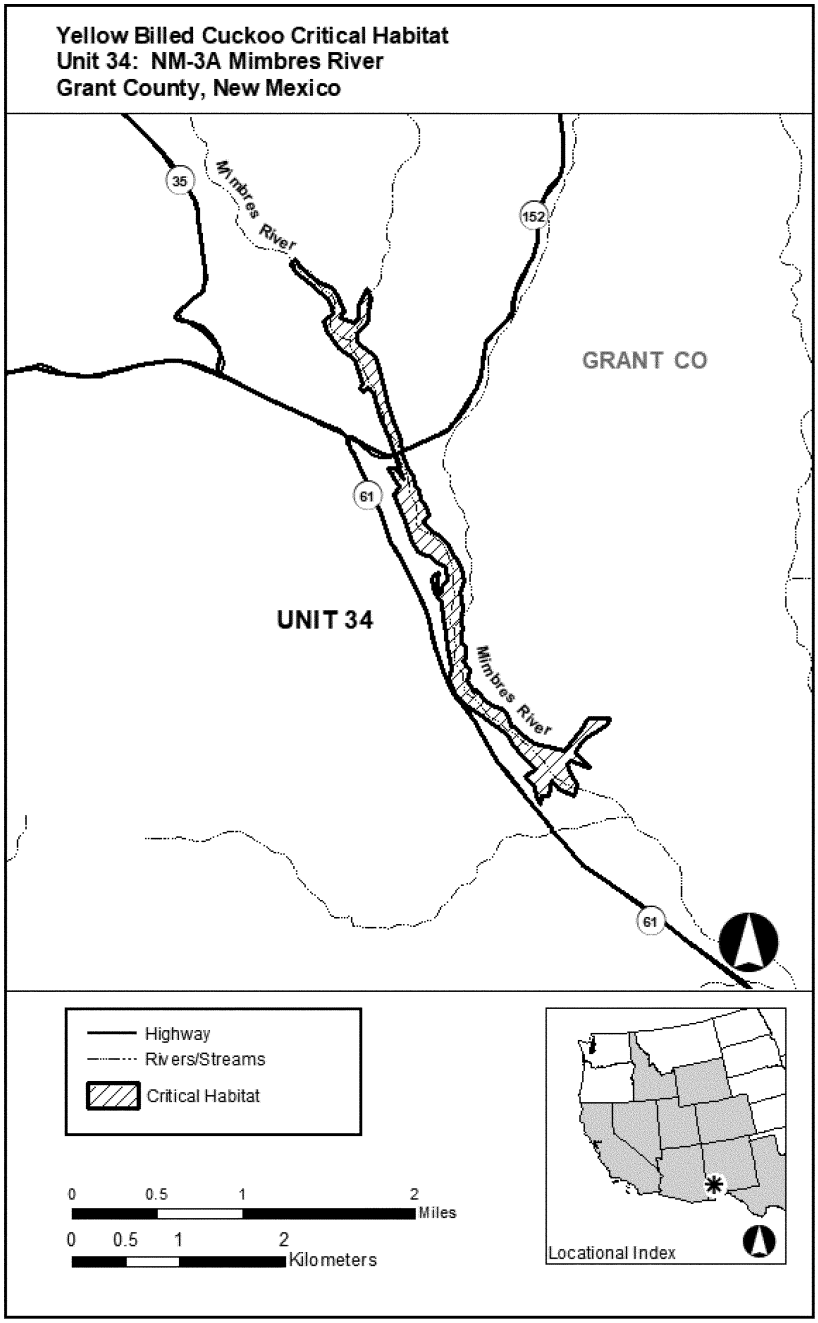


(37) *Unit 33:* NM–2, Gila River; Grant County, New Mexico. Map of Unit 33 follows:

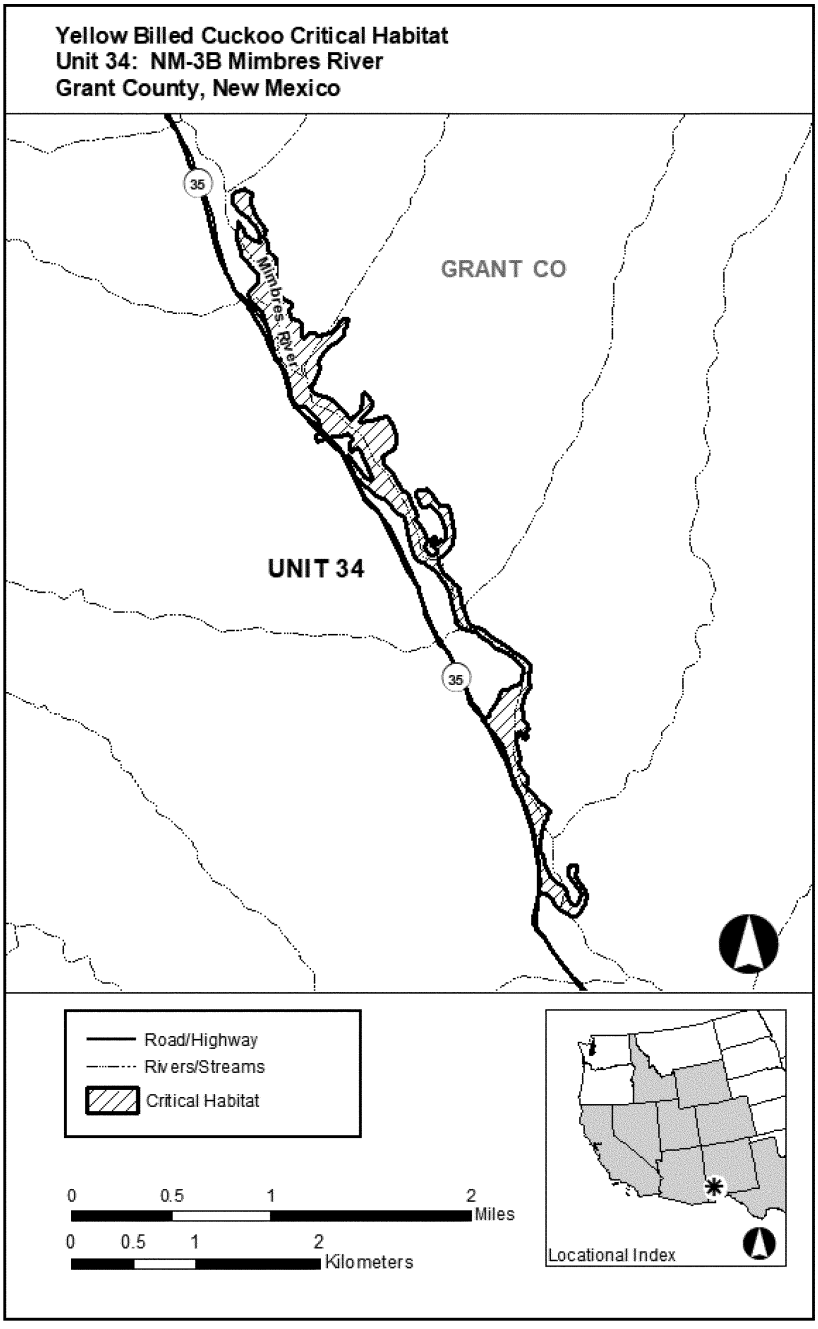


(38) *Unit 34:* NM–3A and NM–3B, Mimbres River; Grant County, New Mexico. Maps of Unit 34 follow:

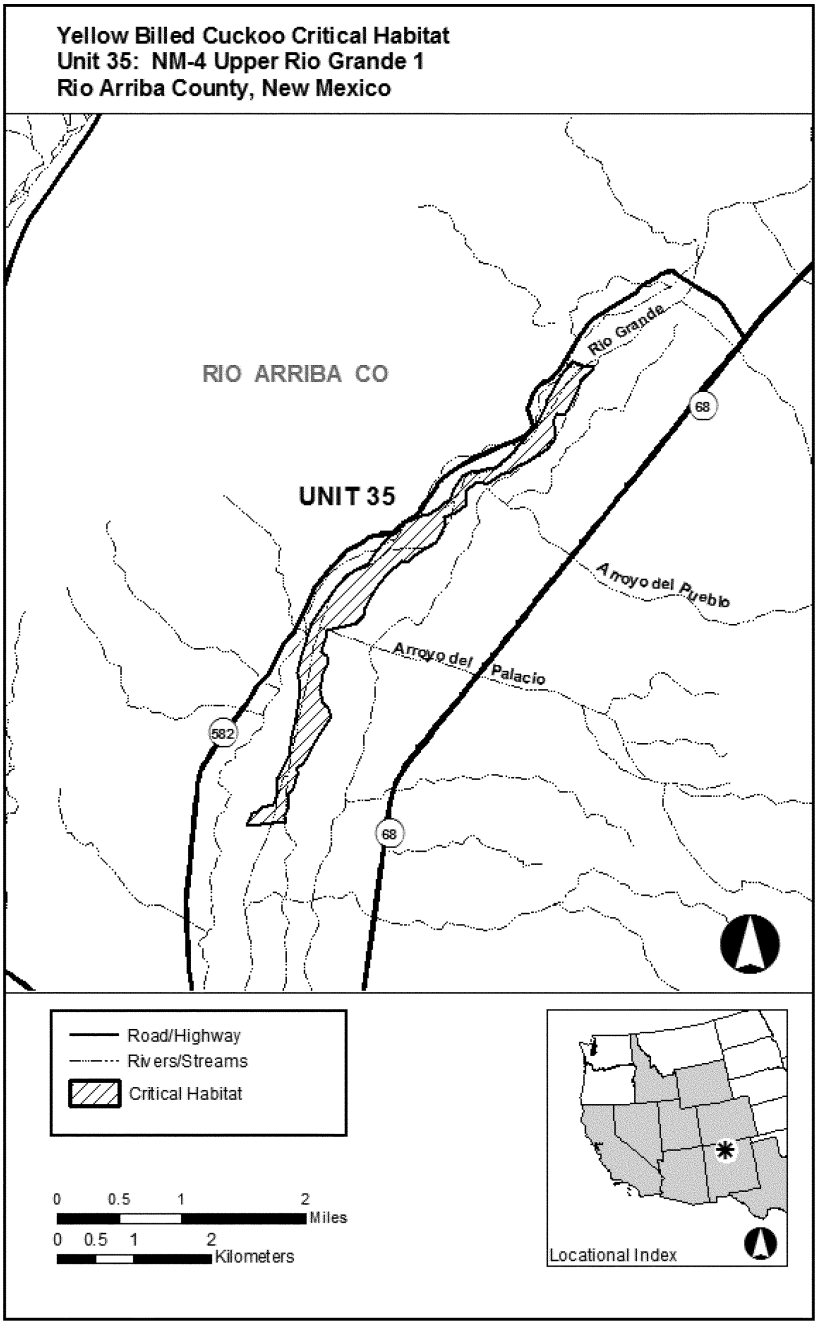
(i) *Map of Unit 34:* NM–3A, Mimbres River.



(ii) *Map of Unit 34:* NM–3B, Mimbres River.

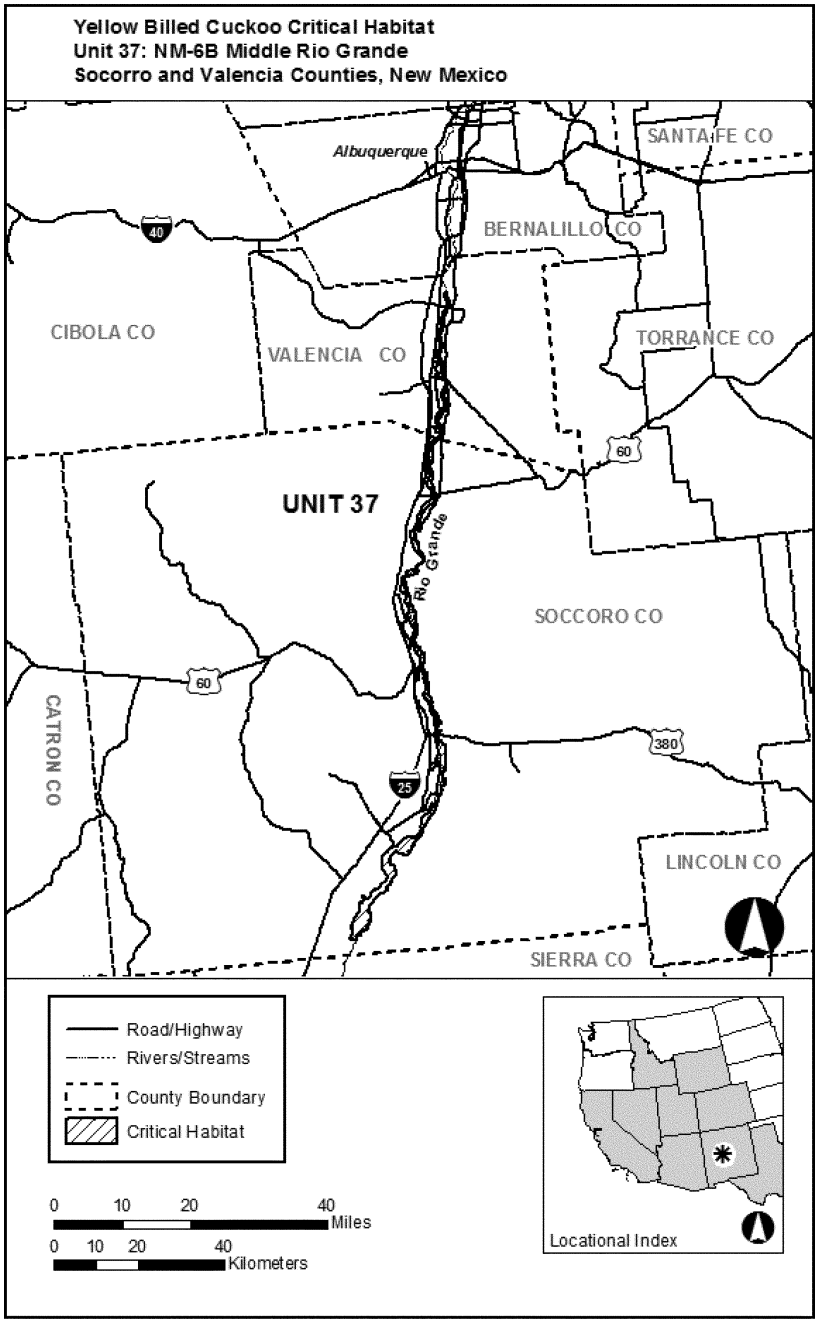


(39) *Unit 35:* NM–4, Upper Rio Grande 1; Rio Arriba County, New Mexico. Map of Unit 35 follows:

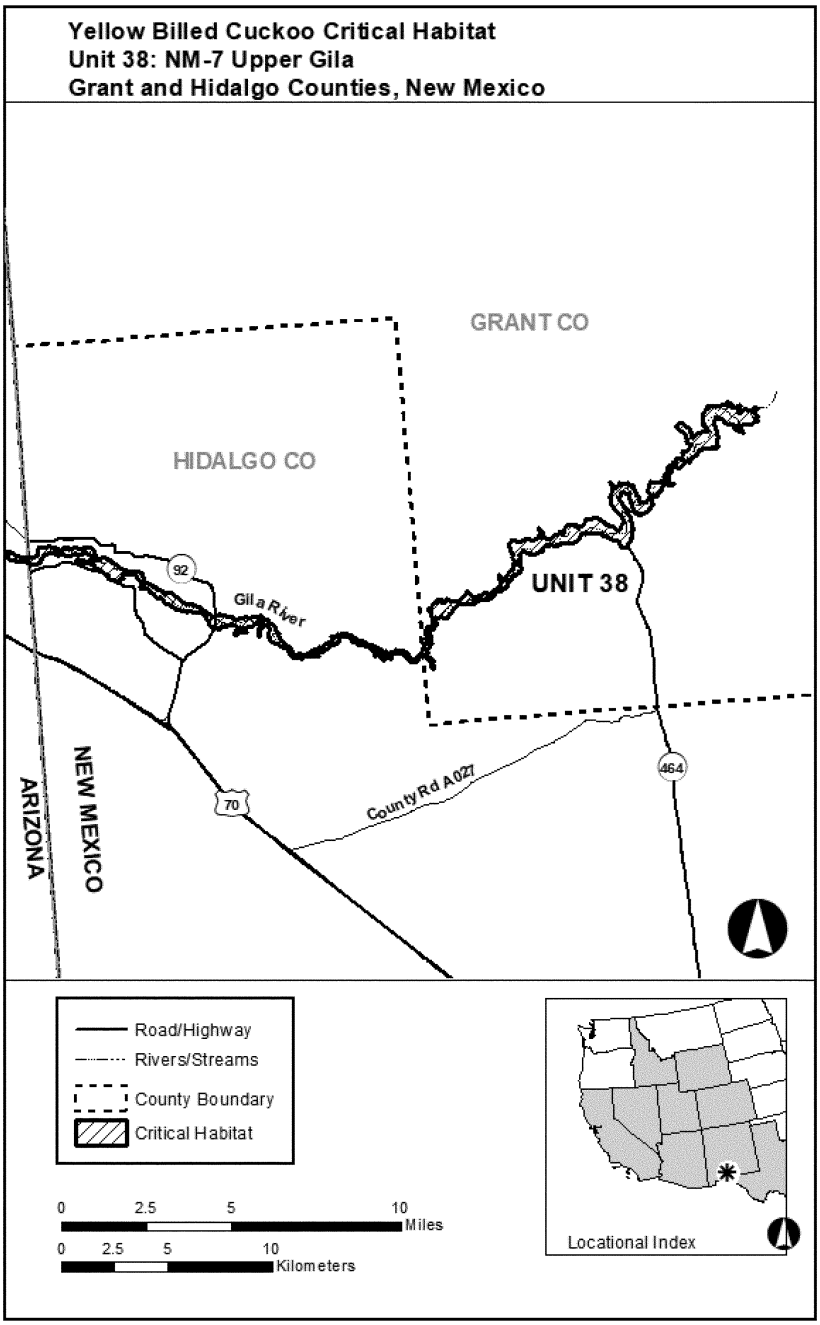


(40) *Unit 36:* NM–5, Upper Rio Grande 2; Santa Fe and Rio Arriba Counties, New Mexico. This unit was excluded from the designation pursuant to section 4(b)(2) of the Act.

(41) *Unit 37:* NM–6A and NM–6B, Middle Rio Grande; Sierra, Socorro, Valencia and Bernalillo Counties, New Mexico. Unit 37: NM–6A was excluded from the designation pursuant to section 4(b)(2) of the Act. Map of Unit 37: NM–6B, Middle Rio Grande, follows:



(42) *Unit 38:* NM–7, Upper Gila River; Grant and Hidalgo Counties, New Mexico. Map of Unit 38 follows:

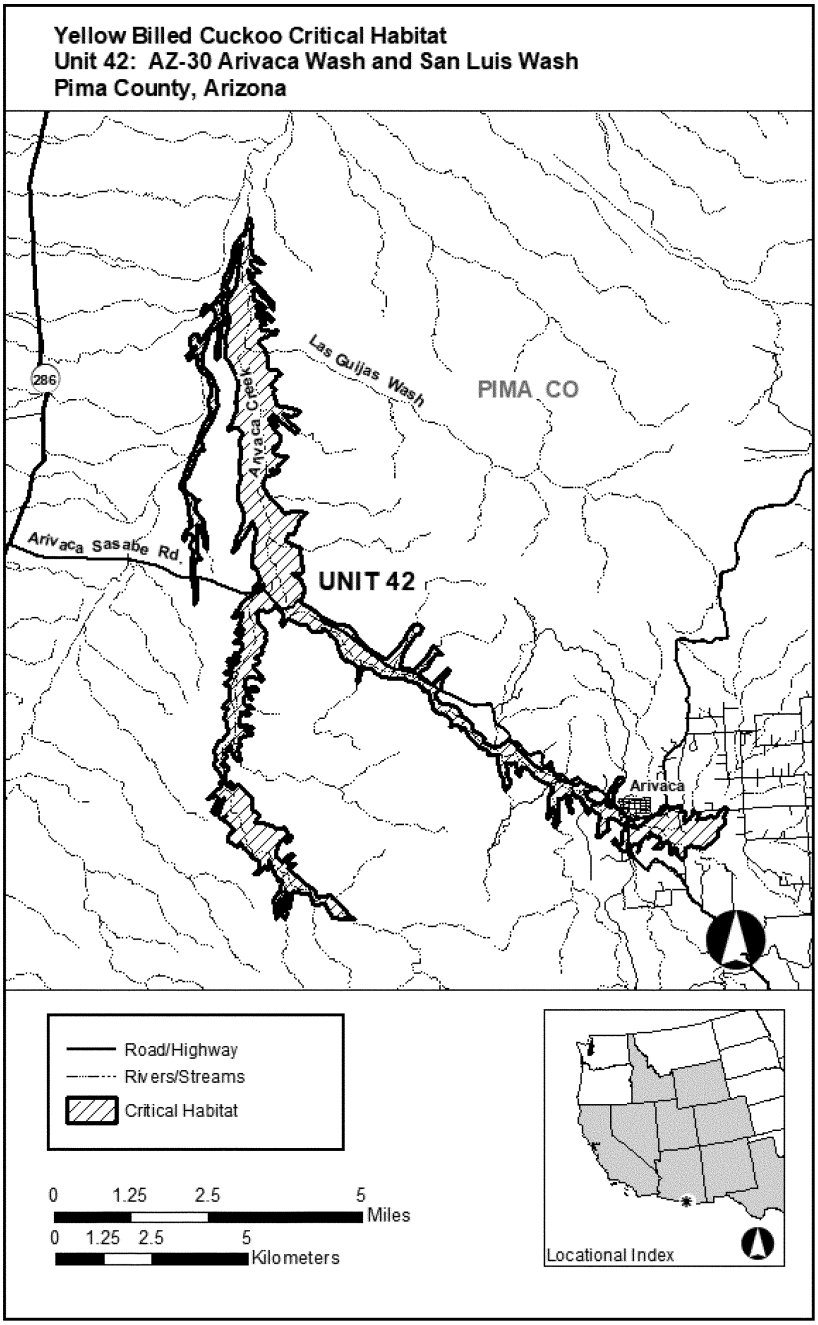


(43) *Unit 39:* NM–8A, Caballo Delta North and NM–8B, Caballo Delta South; Sierra County, New Mexico. This unit was excluded from the designation pursuant to section 4(b)(2) of the Act.

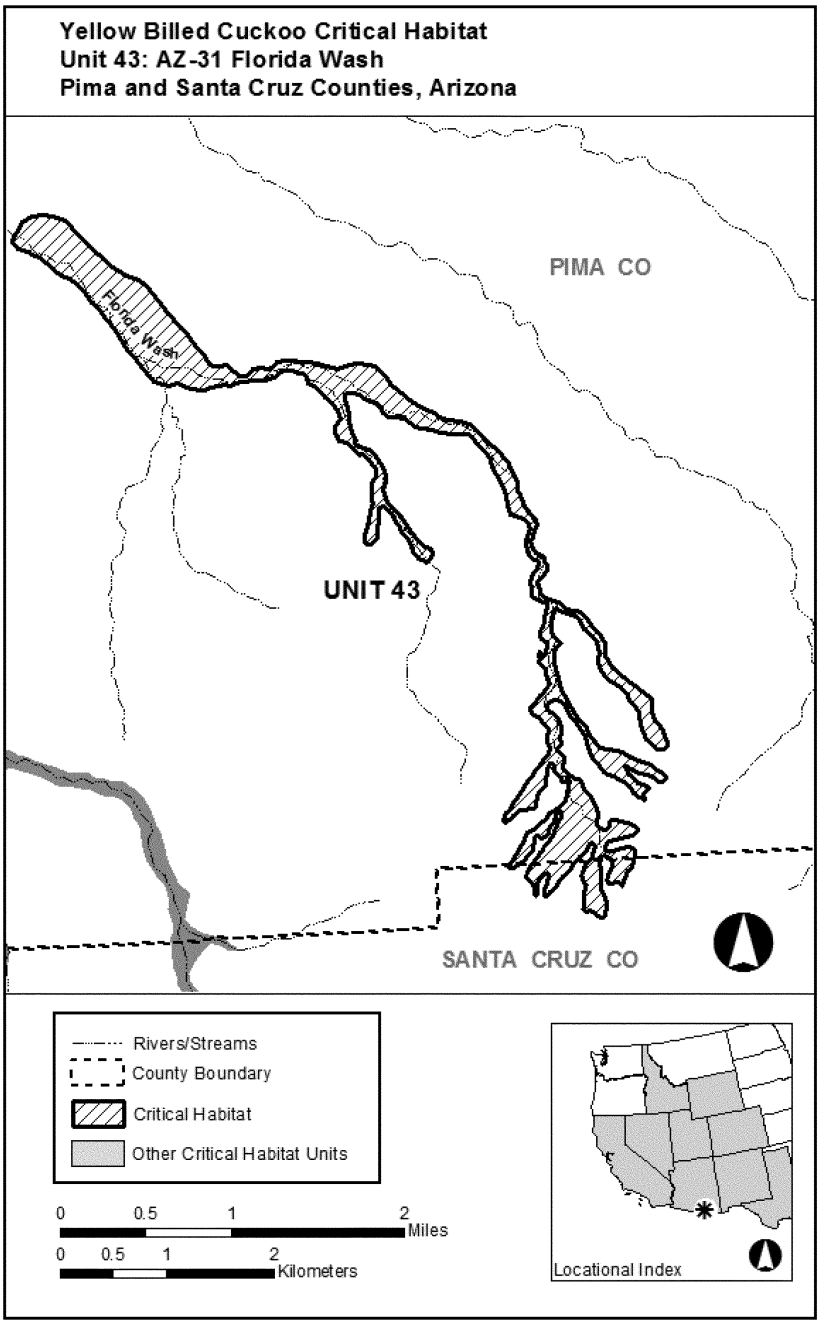
(44) *Unit 40:* NM–9, Animas; Sierra County, New Mexico. This unit was excluded from the designation pursuant to section 4(b)(2) of the Act.

(45) *Unit 41:* NM–10, Selden Canyon and Radium Springs; Doña Ana County, New Mexico. This unit was excluded from the designation pursuant to section 4(b)(2) of the Act.

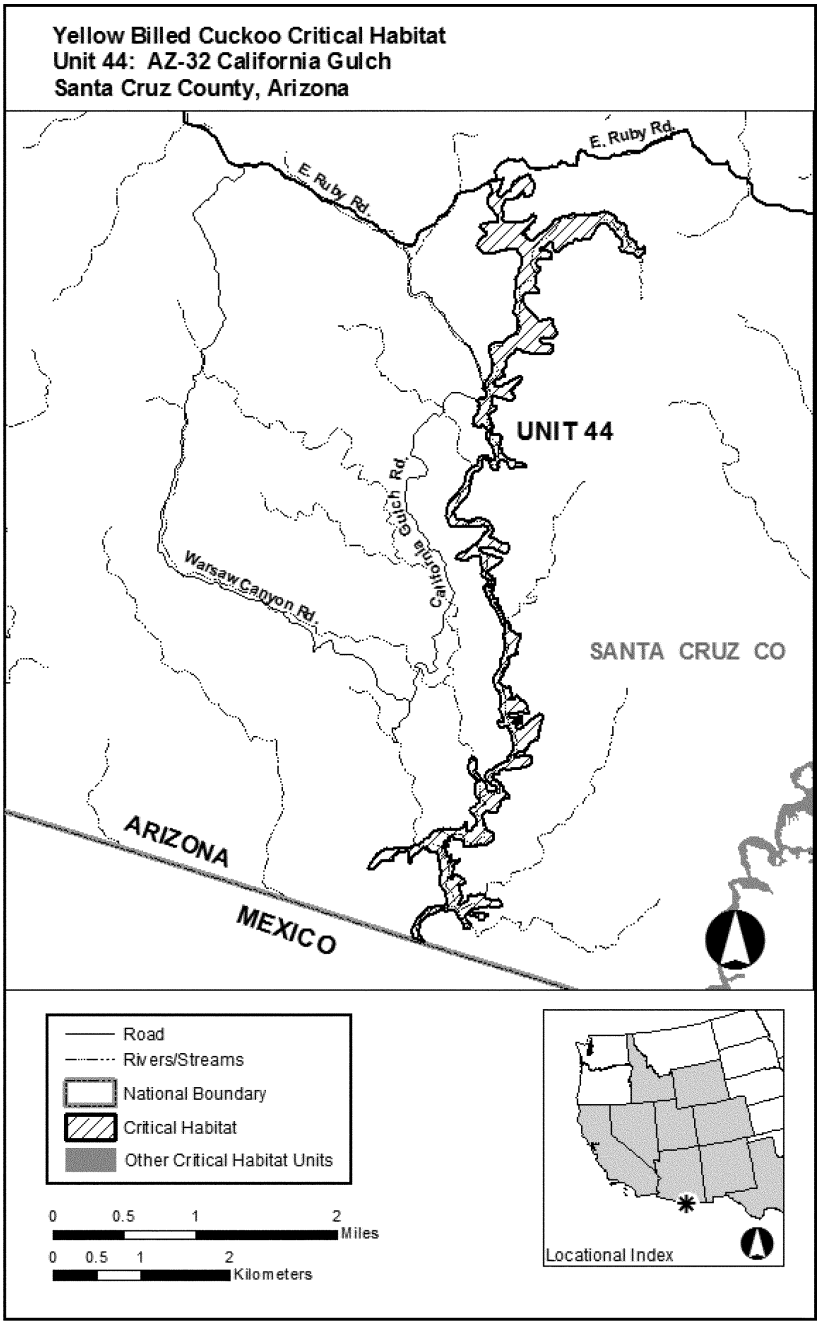
(46) *Unit 42:* AZ–30, Arivaca Wash and San Luis Wash; Pima County, Arizona. Map of Unit 42 follows:



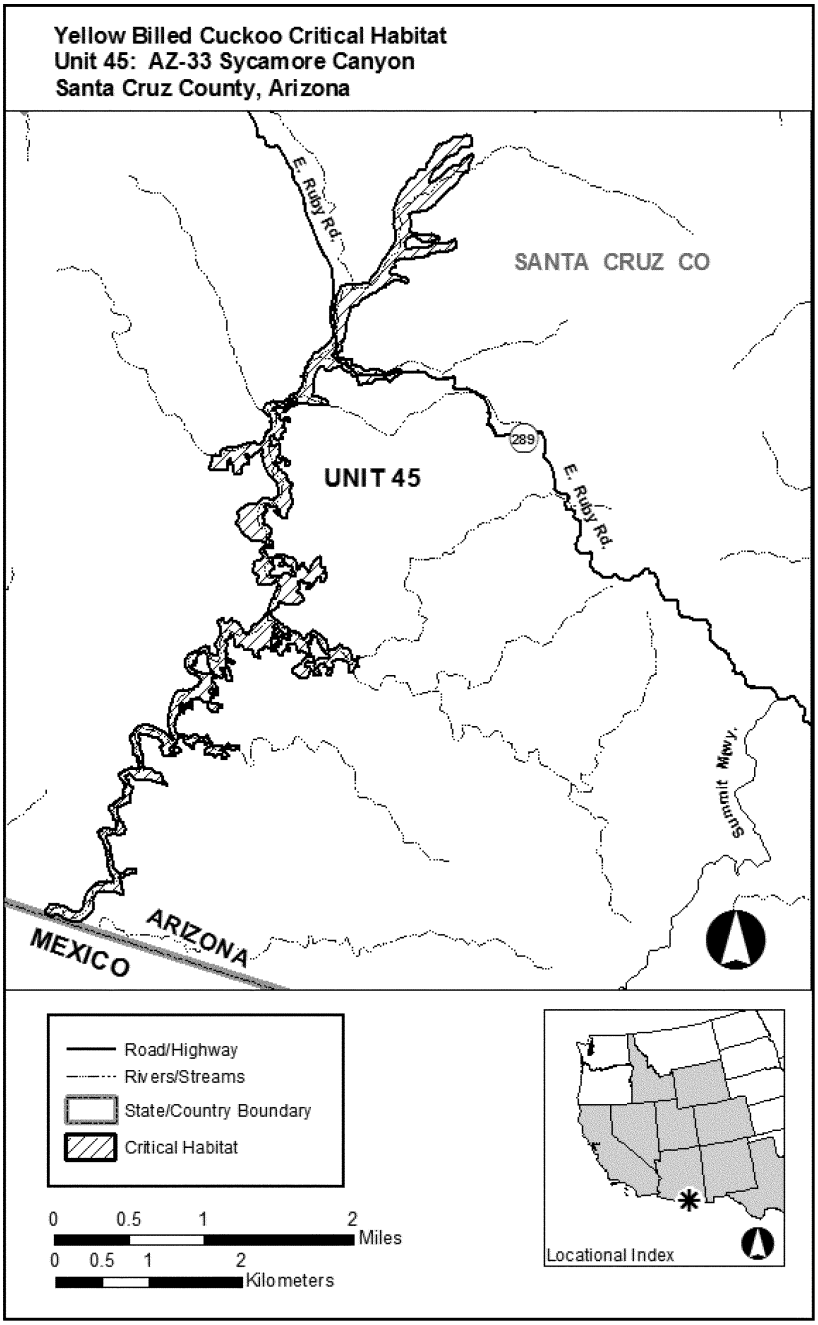
(47) *Unit 43:* AZ–31, Florida Wash; Pima and Santa Cruz Counties, Arizona. Map of Unit 43 follows:


Yellow Billed Cuckoo Critical Habitat
Unit 43: AZ-31 Florida Wash
Pima and Santa Cruz Counties, Arizona
PIMA CO
Florida Wash
UNIT 43
SANTA CRUZ CO
Rivers/Streams
County Boundary
Critical Habitat
Other Critical Habitat Units
0 0.5 1 2 Miles
0 0.5 1 2 Kilometers
Locational Index

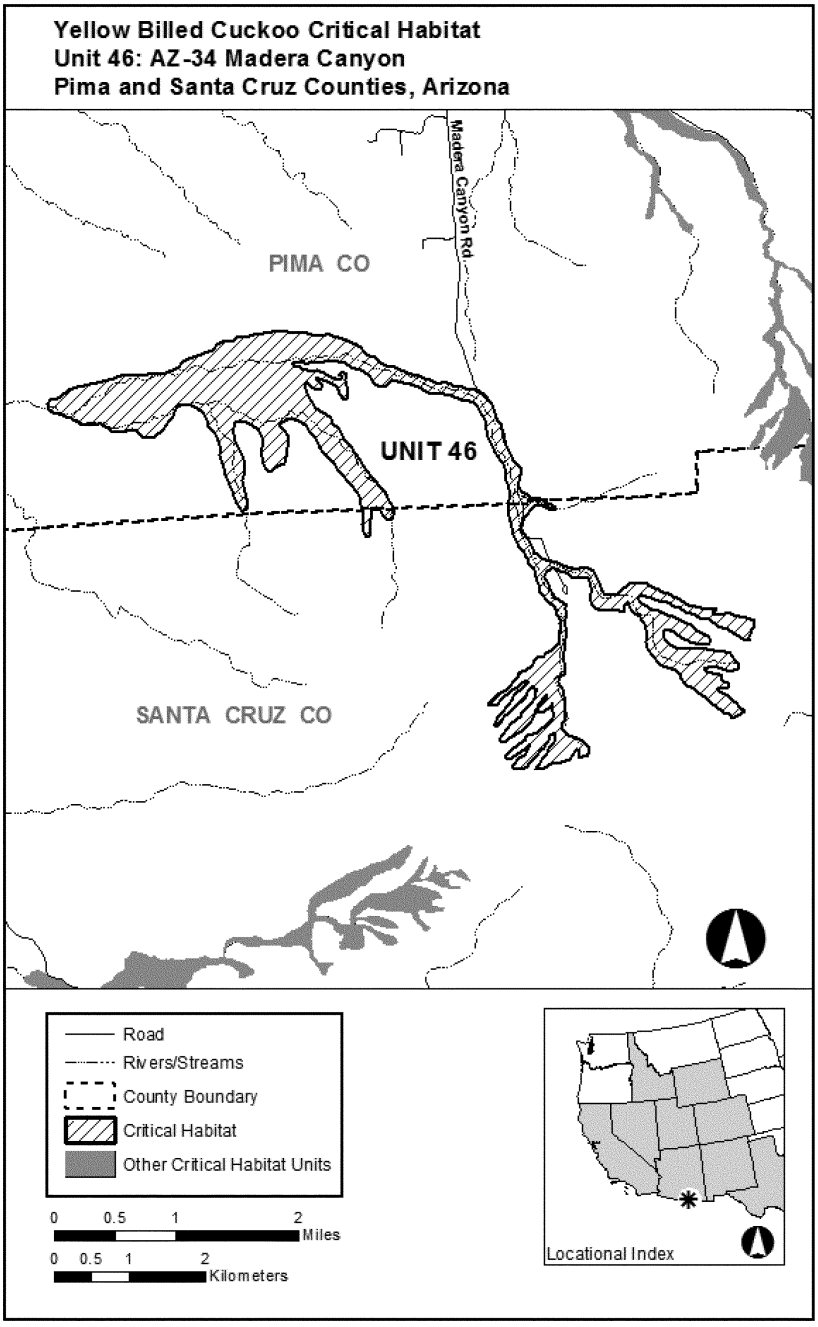
(48) *Unit 44:* AZ–32, California Gulch; Santa Cruz County, Arizona. Map of Unit 44 follows:



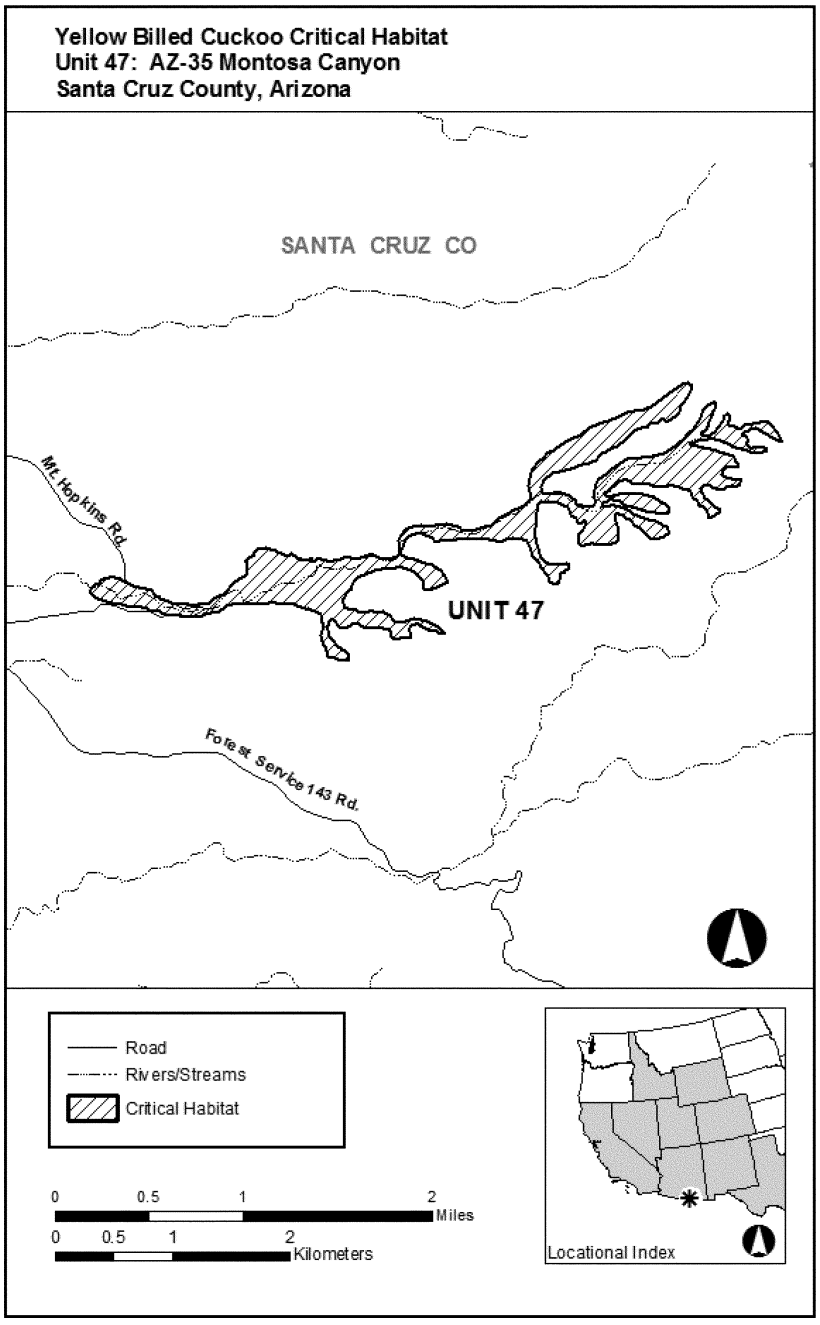
(49) *Unit 45:* AZ–33, Sycamore Canyon; Santa Cruz County, Arizona.
Map of Unit 45 follows:



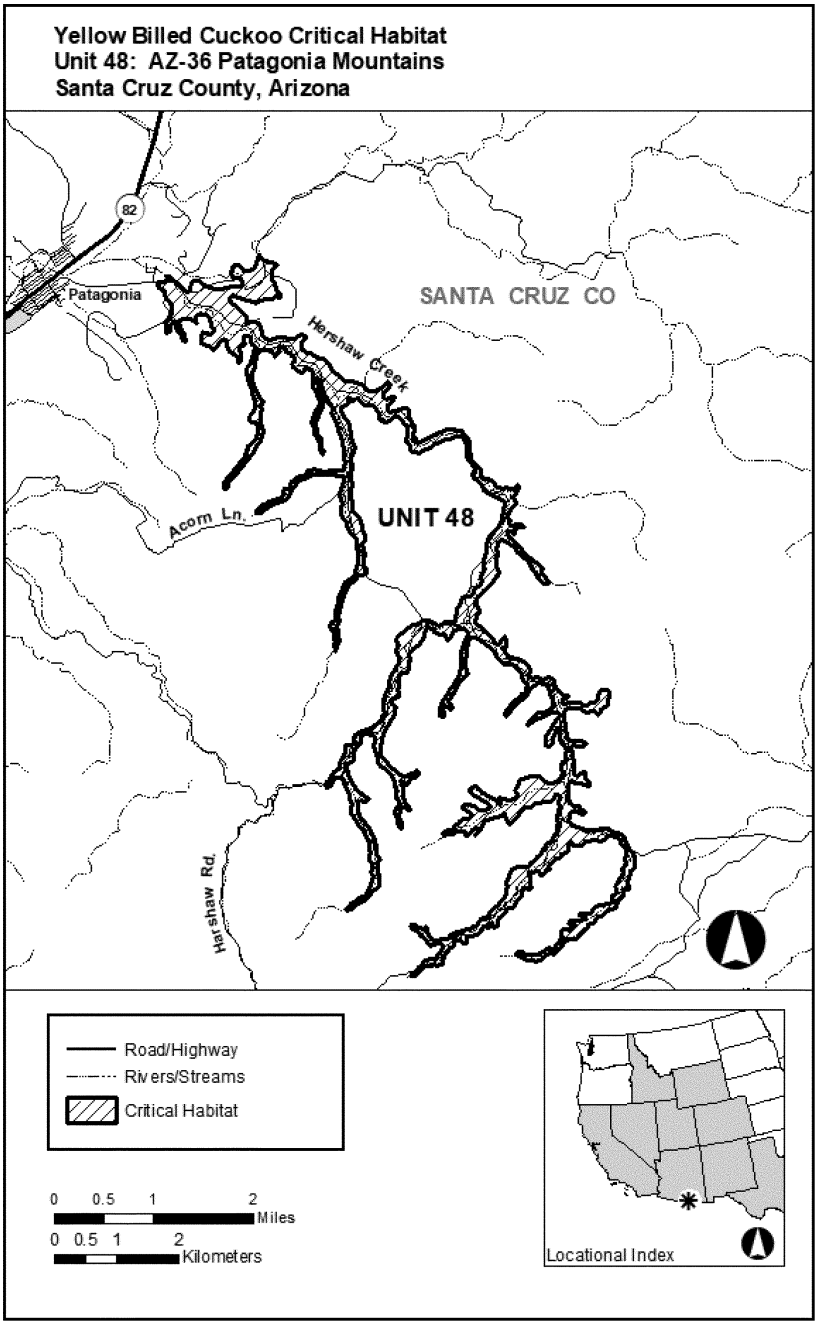
(50) *Unit 46:* AZ–34, Madera Canyon; Pima and Santa Cruz Counties, Arizona.
Map of Unit 46 follows:



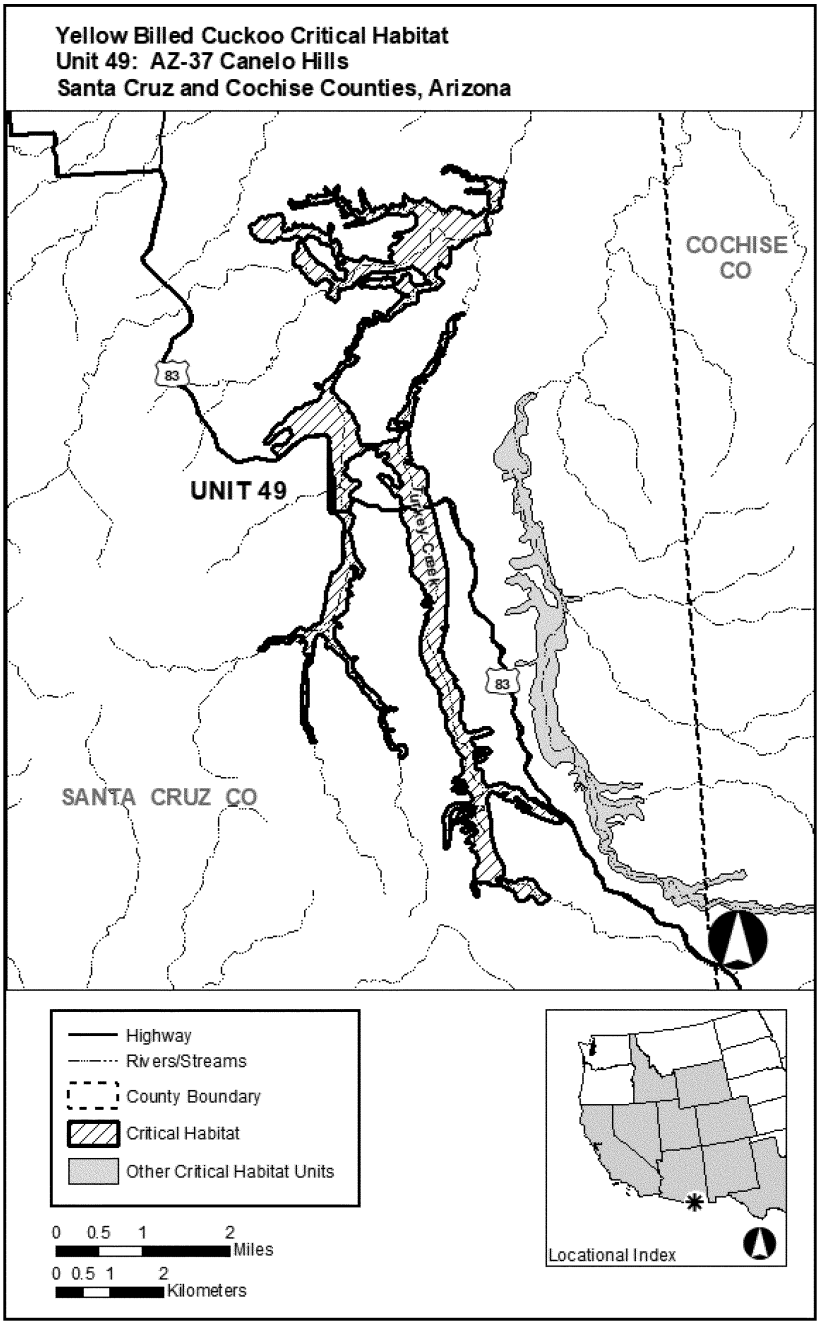
(51) *Unit 47:* AZ–35, Montosa Canyon; Santa Cruz County, Arizona.
Map of Unit 47 follows:



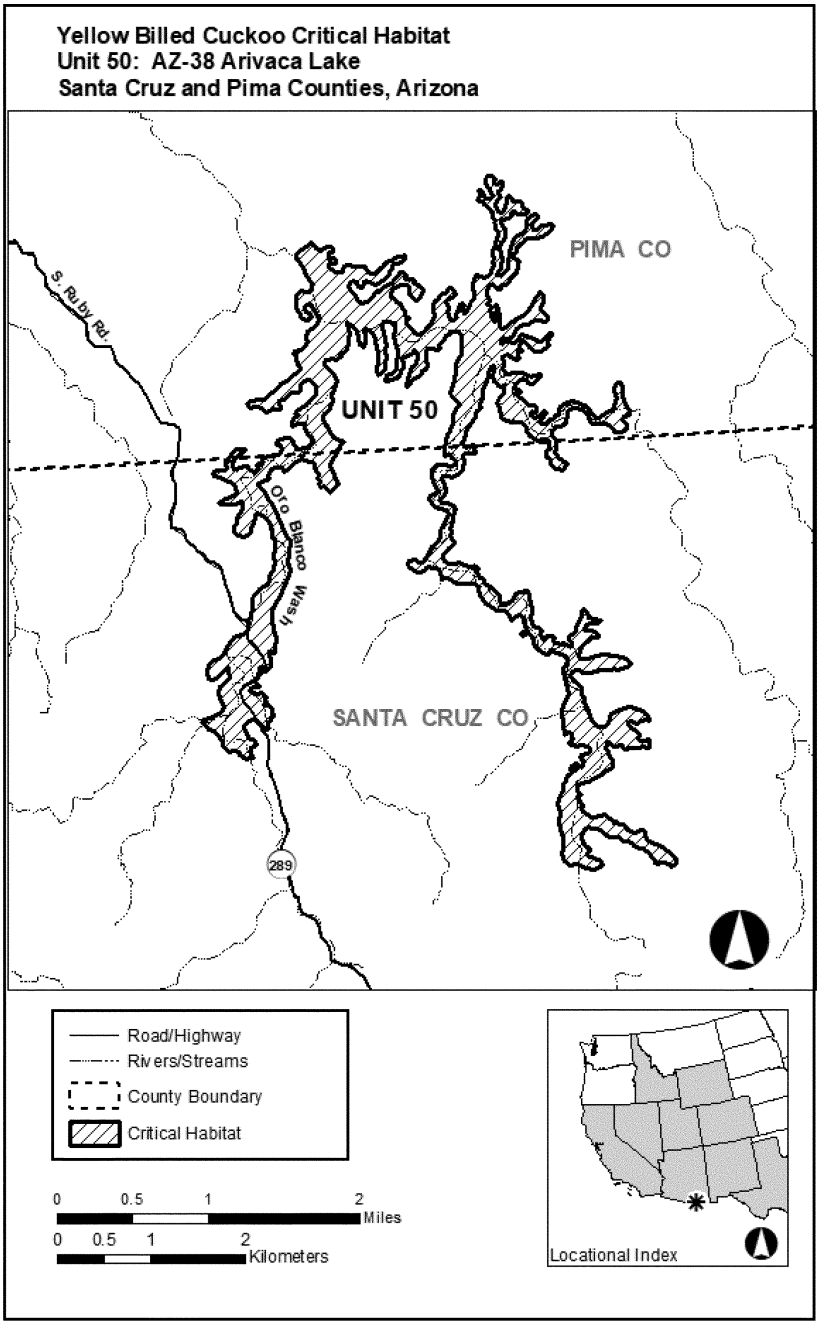
(52) *Unit 48:* AZ–36, Patagonia Mountains; Santa Cruz County, Arizona.
Map of Unit 48 follows:



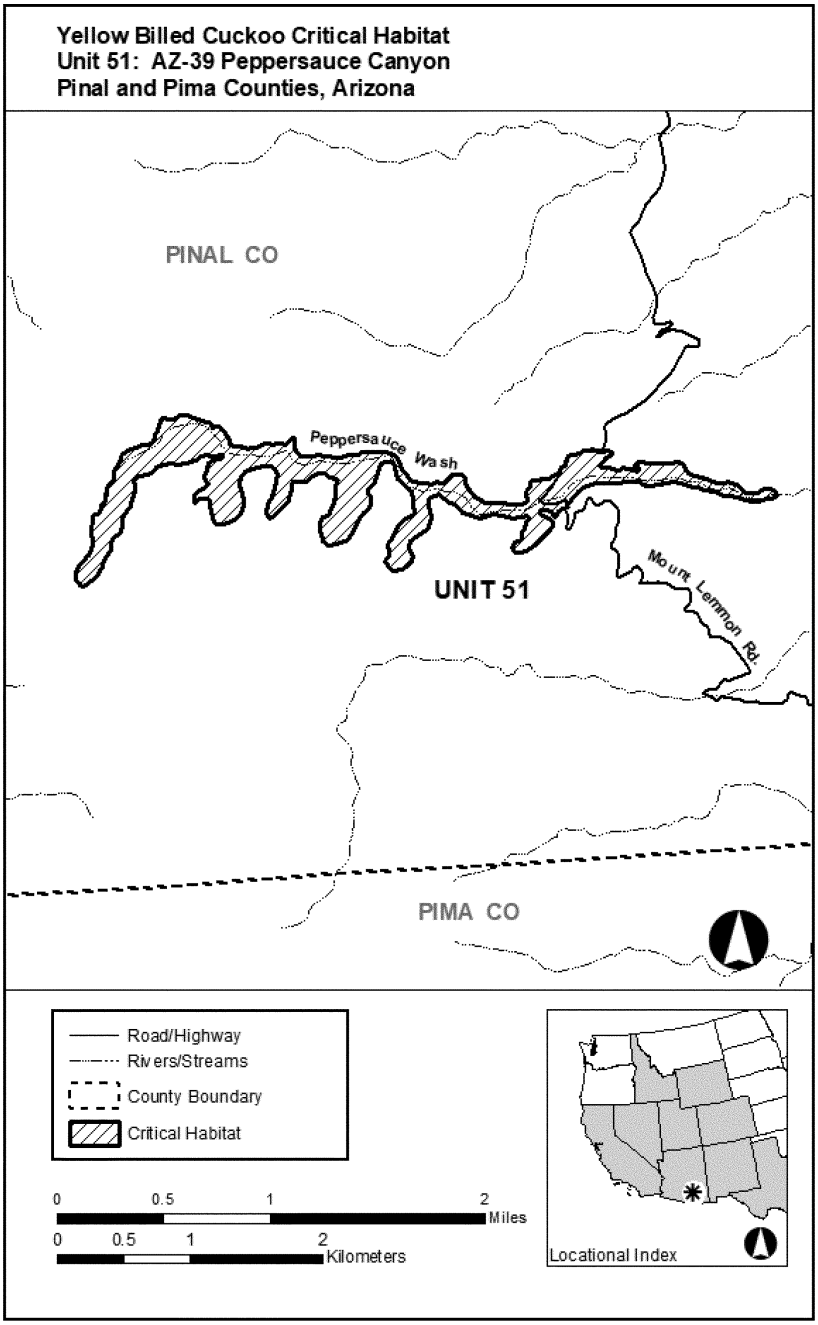
(53) *Unit 49:* AZ–37, Canelo Hills; Santa Cruz County, Arizona. Map of Unit 49 follows:



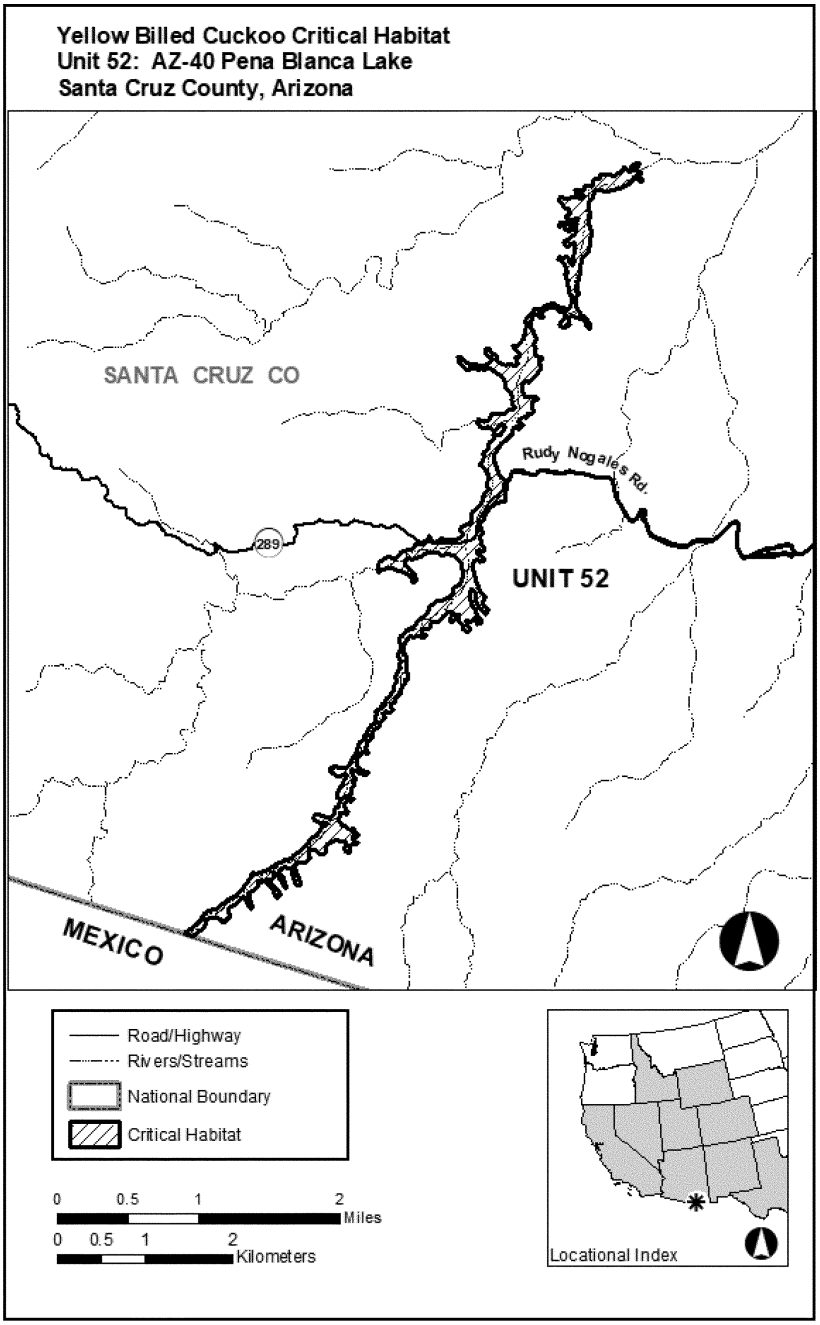
(54) *Unit 50:* AZ–38, Arivaca Lake; Pima and Santa Cruz Counties, Arizona.
Map of Unit 50 follows:



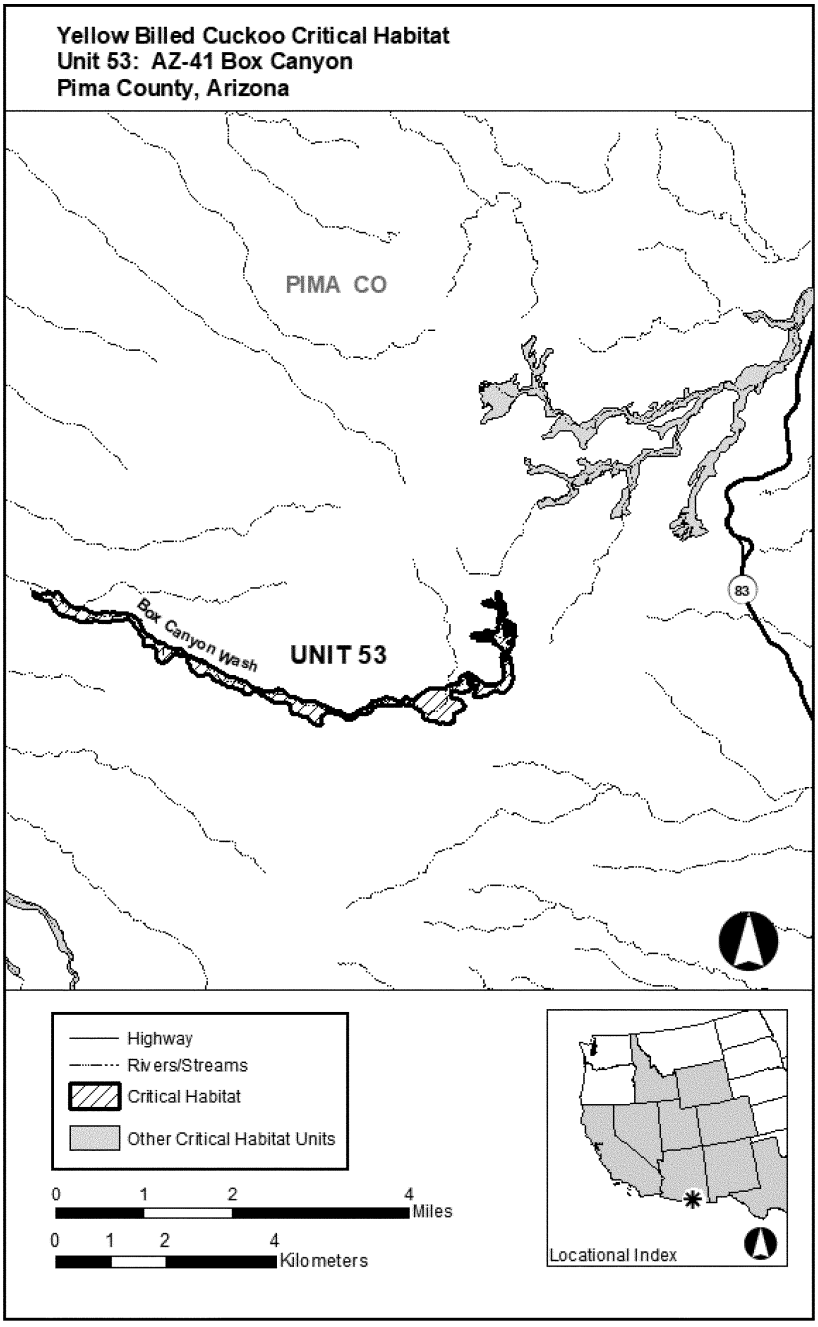
(55) *Unit 51:* AZ–39, Peppersauce Canyon; Pinal County, Arizona. Map of Unit 51 follows:



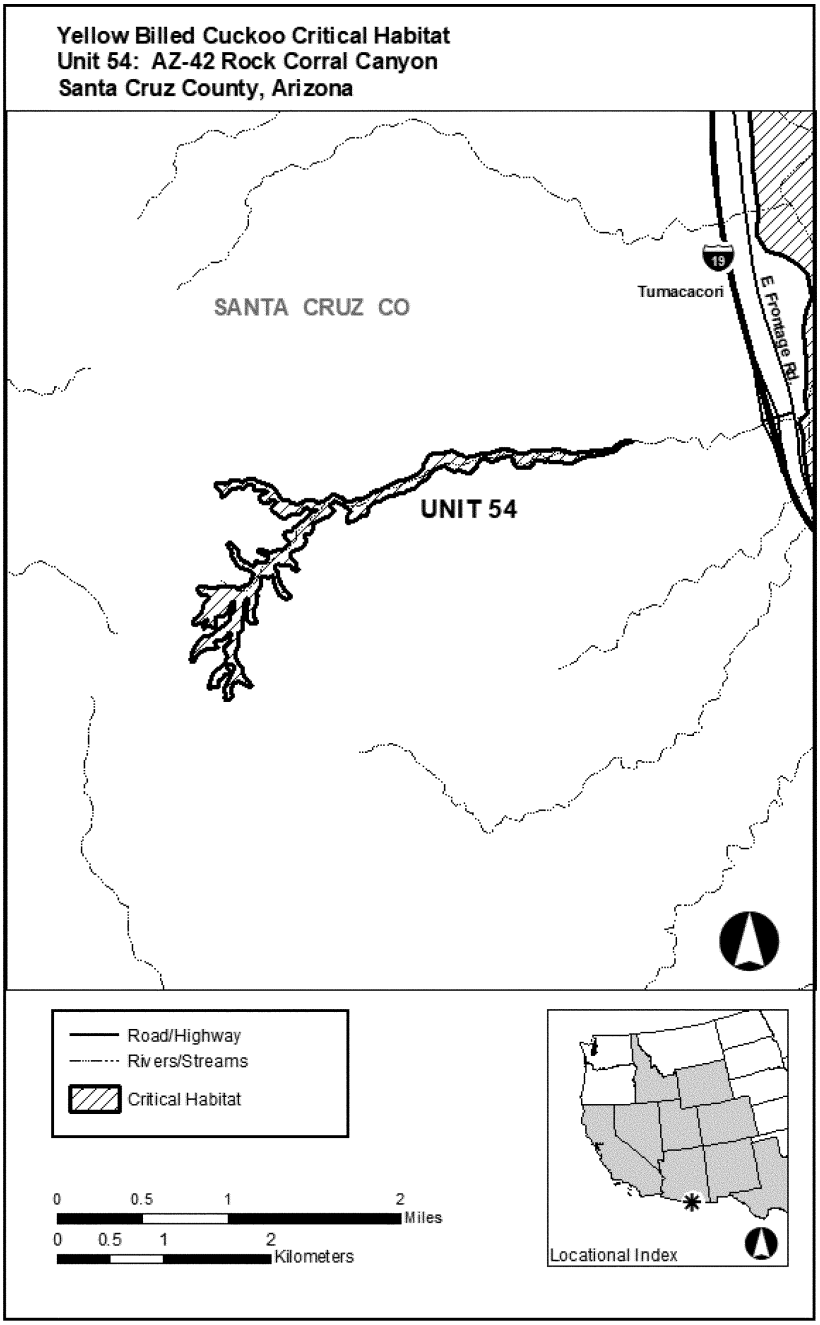
(56) *Unit 52:* AZ–40, Pena Blanca Canyon; Santa Cruz County, Arizona. Map of Unit 52 follows:



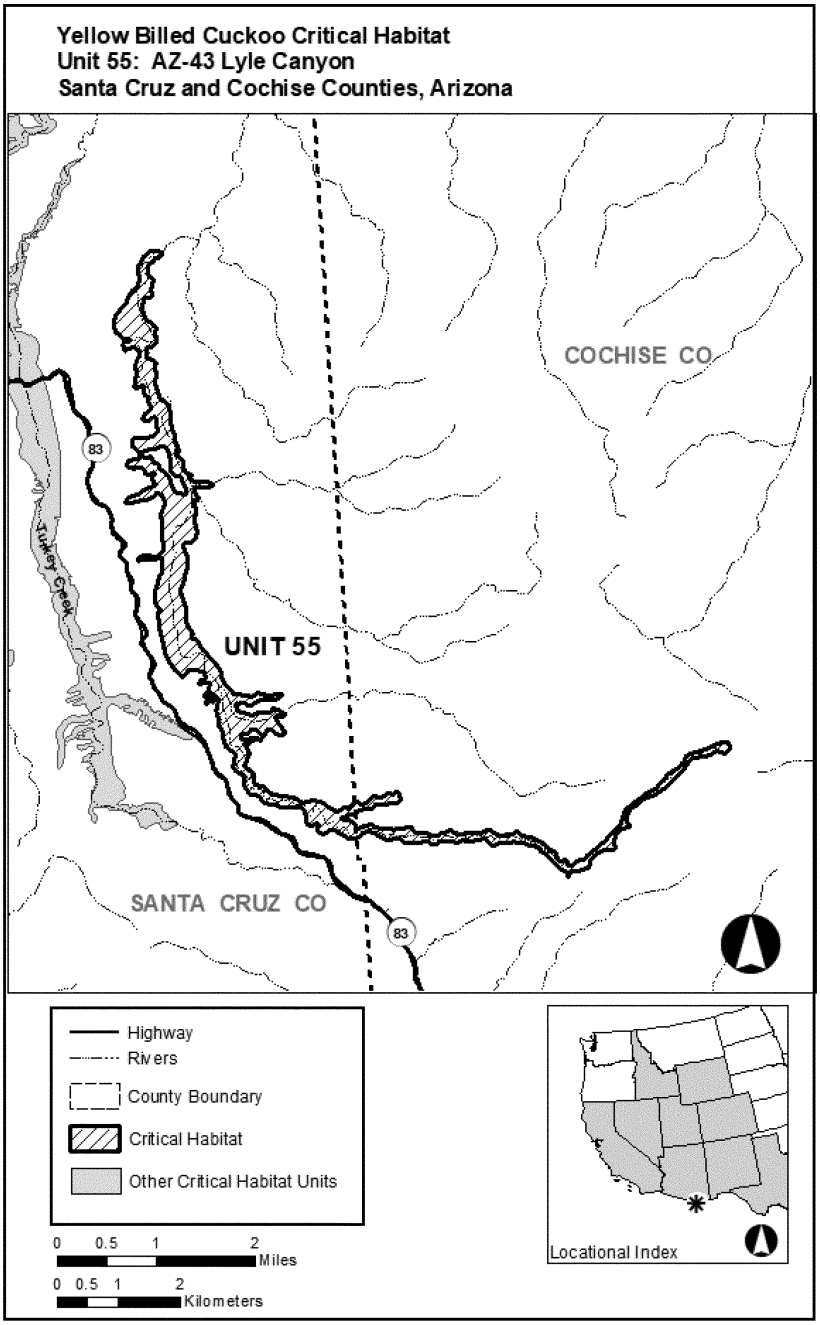
(57) *Unit 53:* AZ–41, Box Canyon; Pima County, Arizona. Map of Unit 53 follows:



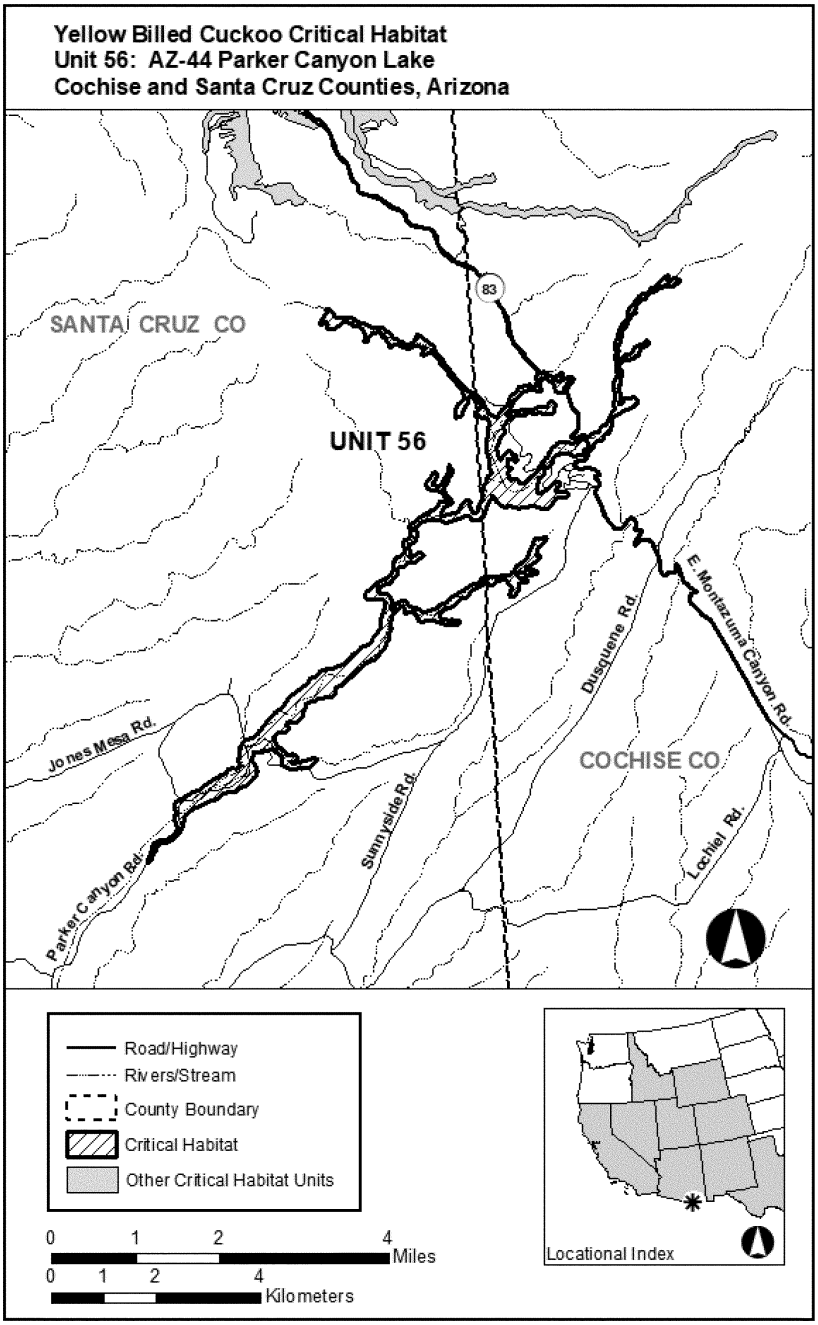
(58) *Unit 54:* AZ–42, Rock Corral Canyon; Santa Cruz County, Arizona. Map of Unit 54 follows:



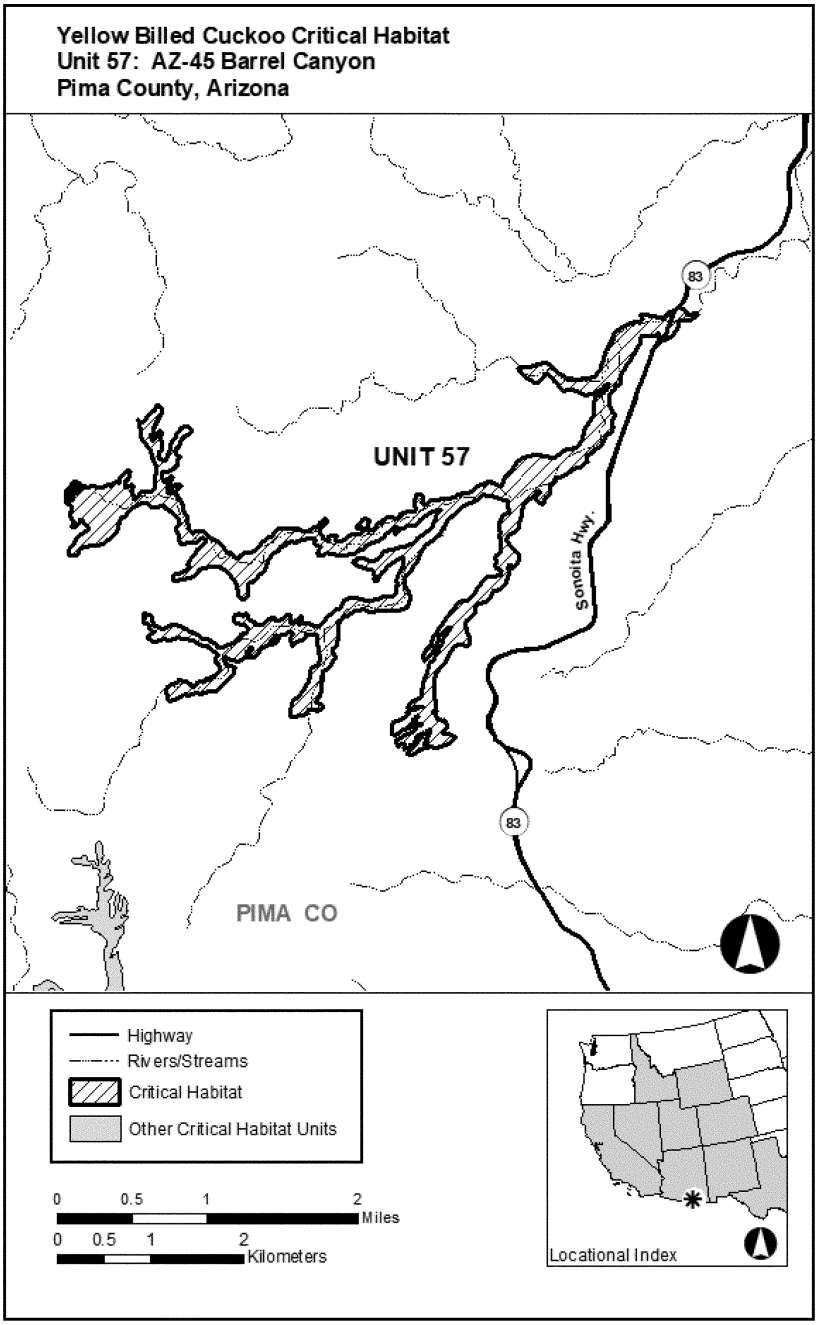
(59) *Unit 55:* AZ–43, Lyle Canyon; Santa Cruz and Cochise Counties, Arizona. Map of Unit 55 follows:



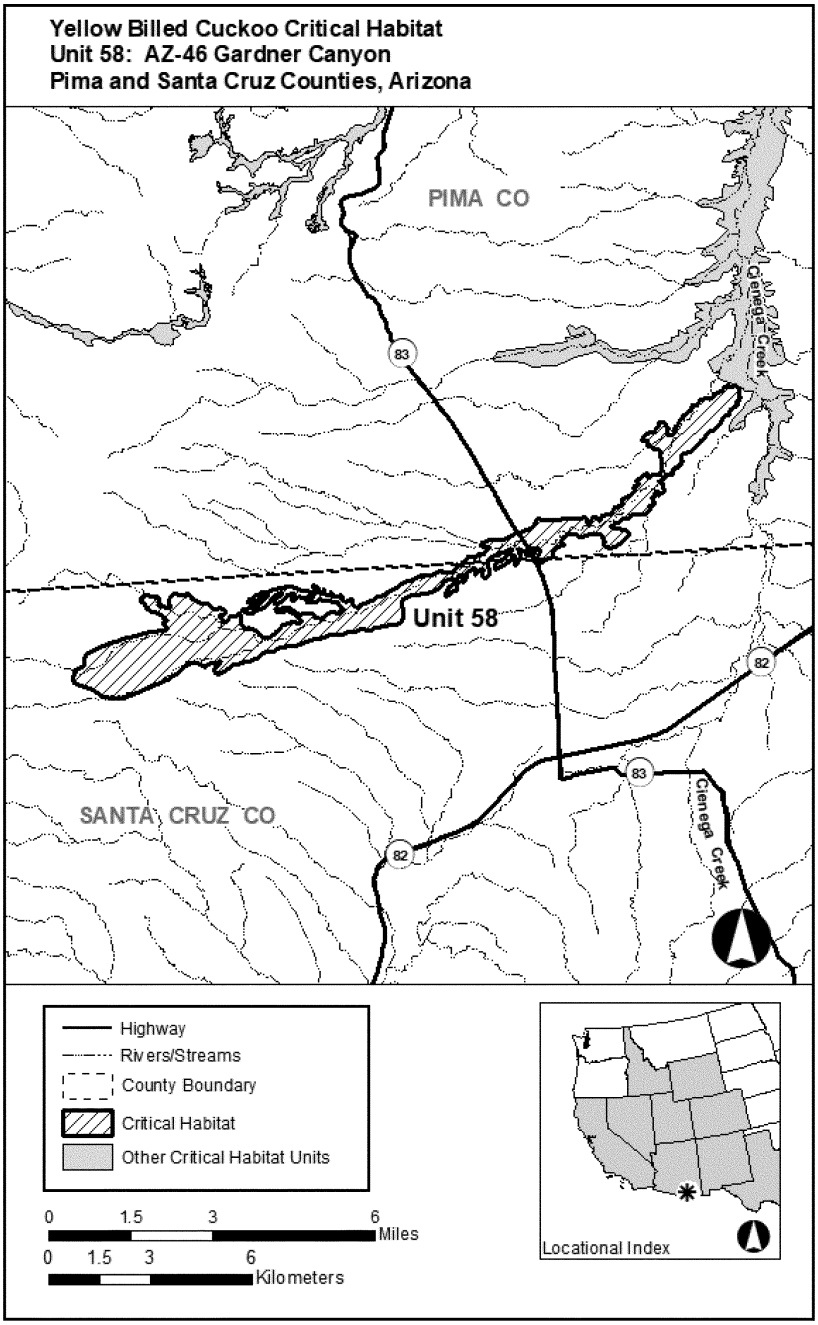
(60) *Unit 56:* AZ–44, Parker Canyon Lake; Santa Cruz and Cochise Counties, Arizona. Map of Unit 56 follows:



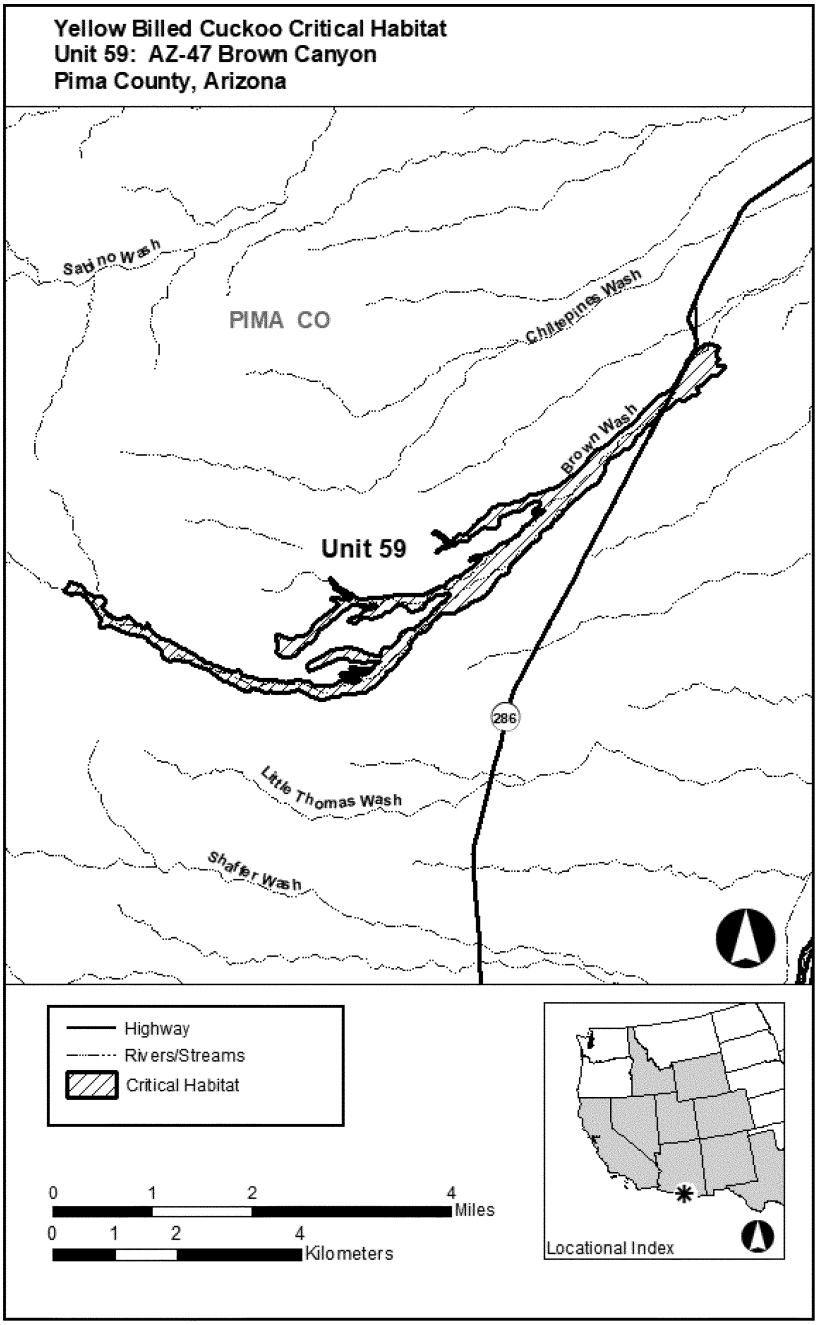
(61) *Unit 57:* AZ–45, Barrel Canyon; Pima County, Arizona. Map of Unit 57 follows:



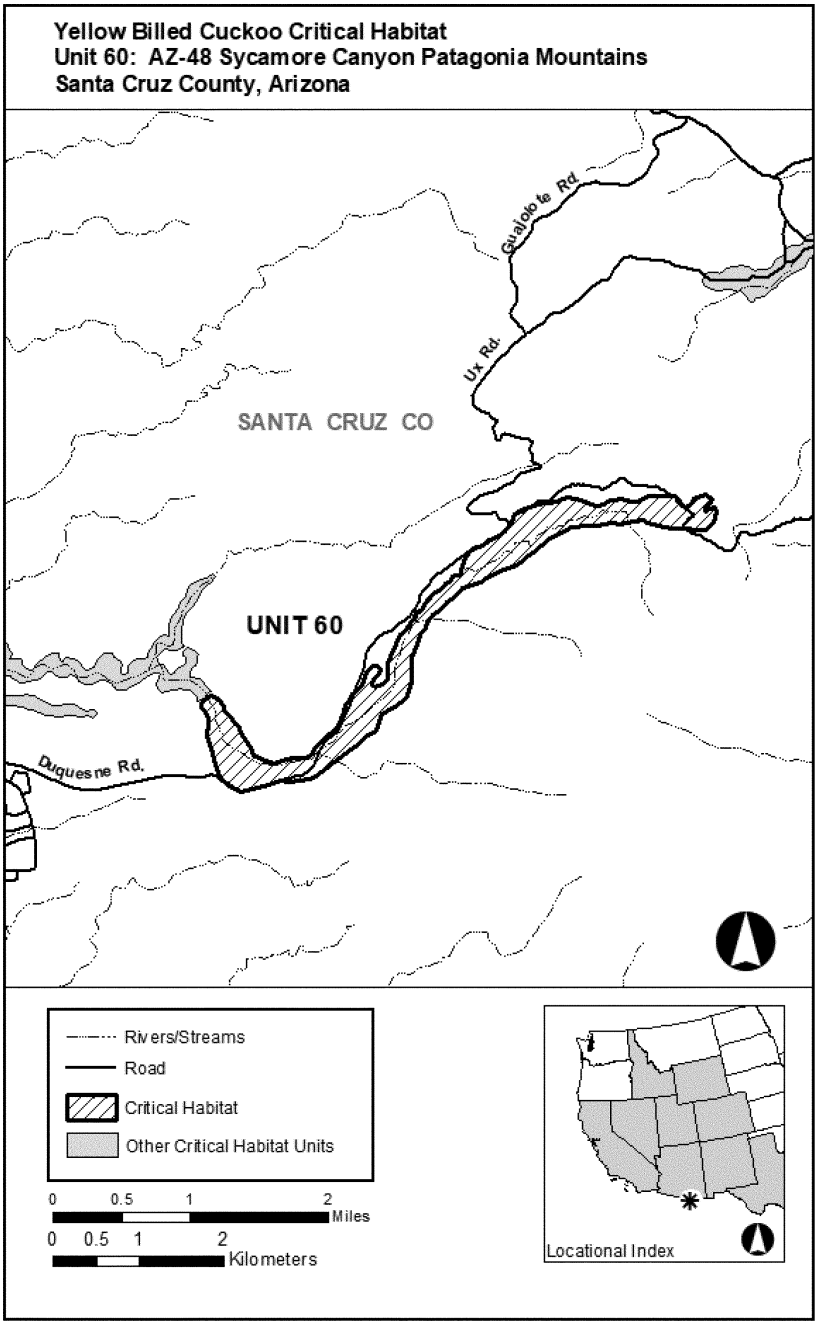
(62) *Unit 58:* AZ–46, Gardner Canyon; Pima and Santa Cruz Counties, Arizona.
Map of Unit 58 follows:



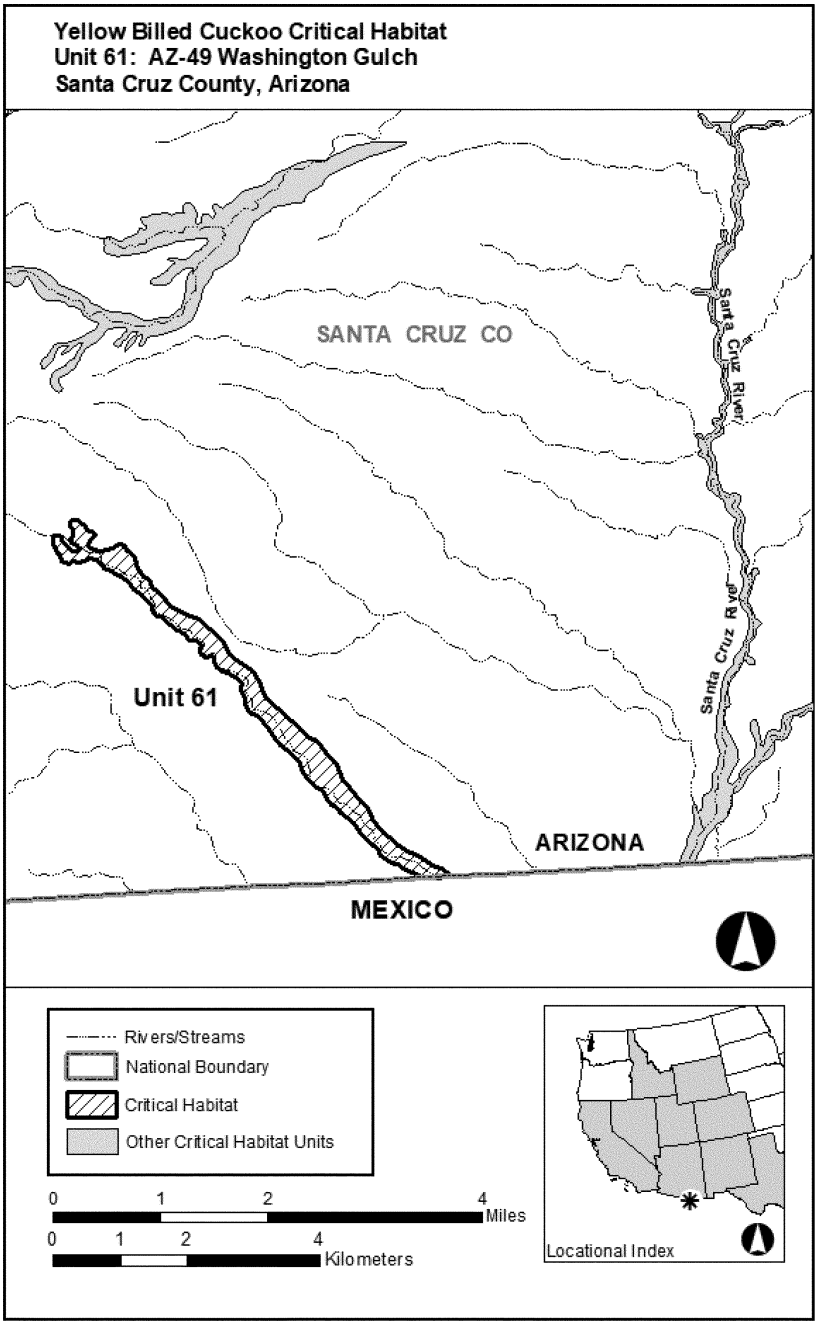
(63) *Unit 59:* AZ–47, Brown Canyon; Pima County, Arizona. Map of Unit 59 follows:



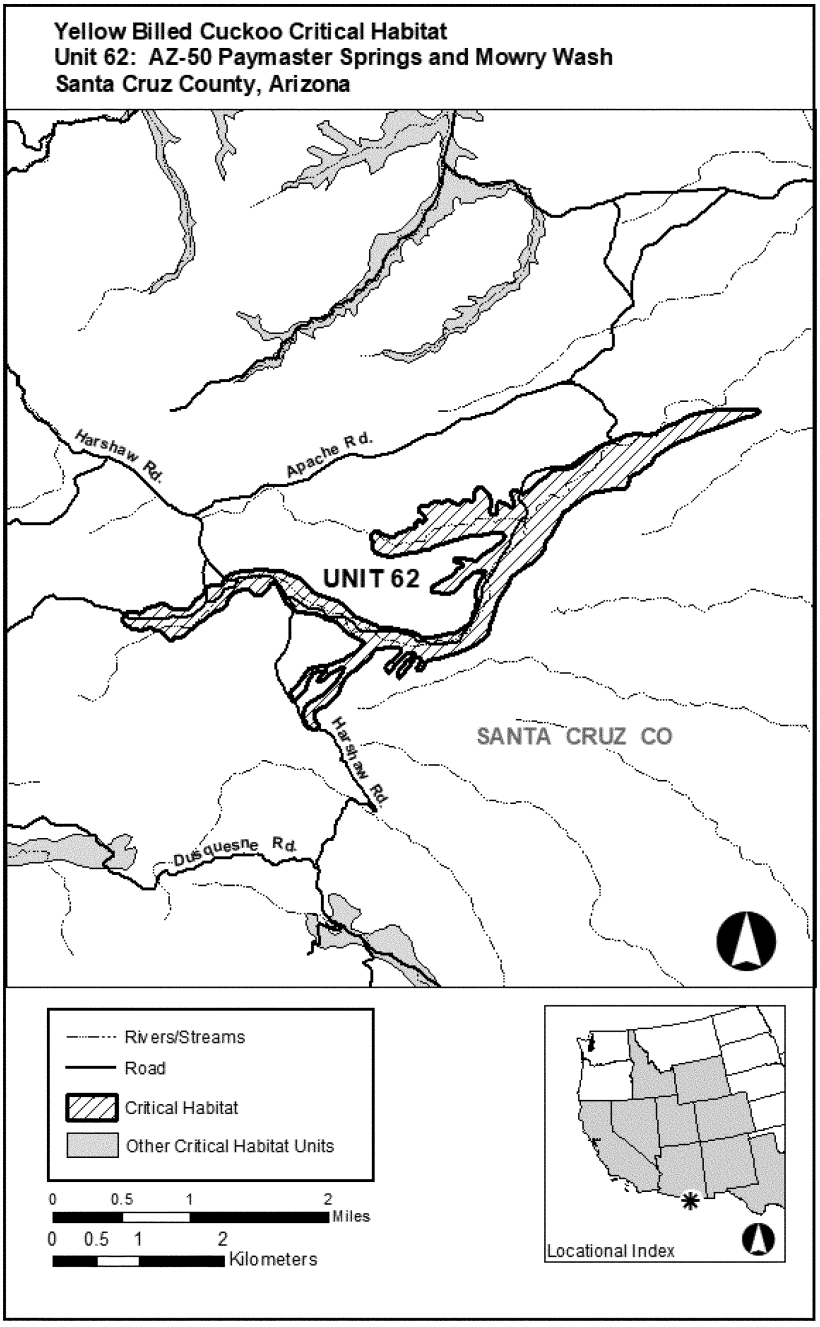
(64) *Unit 60:* AZ–48, Sycamore Canyon; Santa Cruz County, Arizona. Map of Unit 60 follows:



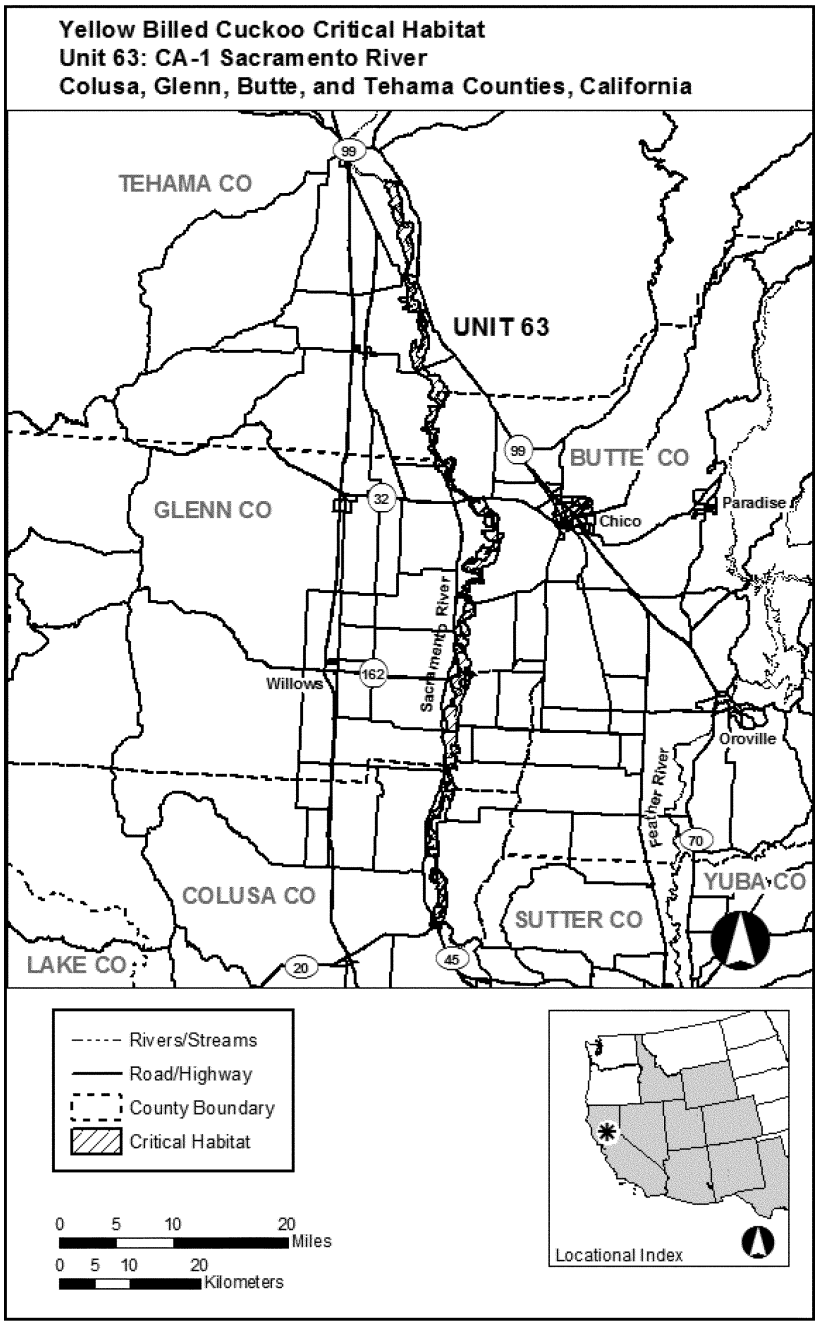
(65) *Unit 61:* AZ–49, Washington Gulch; Santa Cruz County, Arizona. Map of Unit 61 follows:



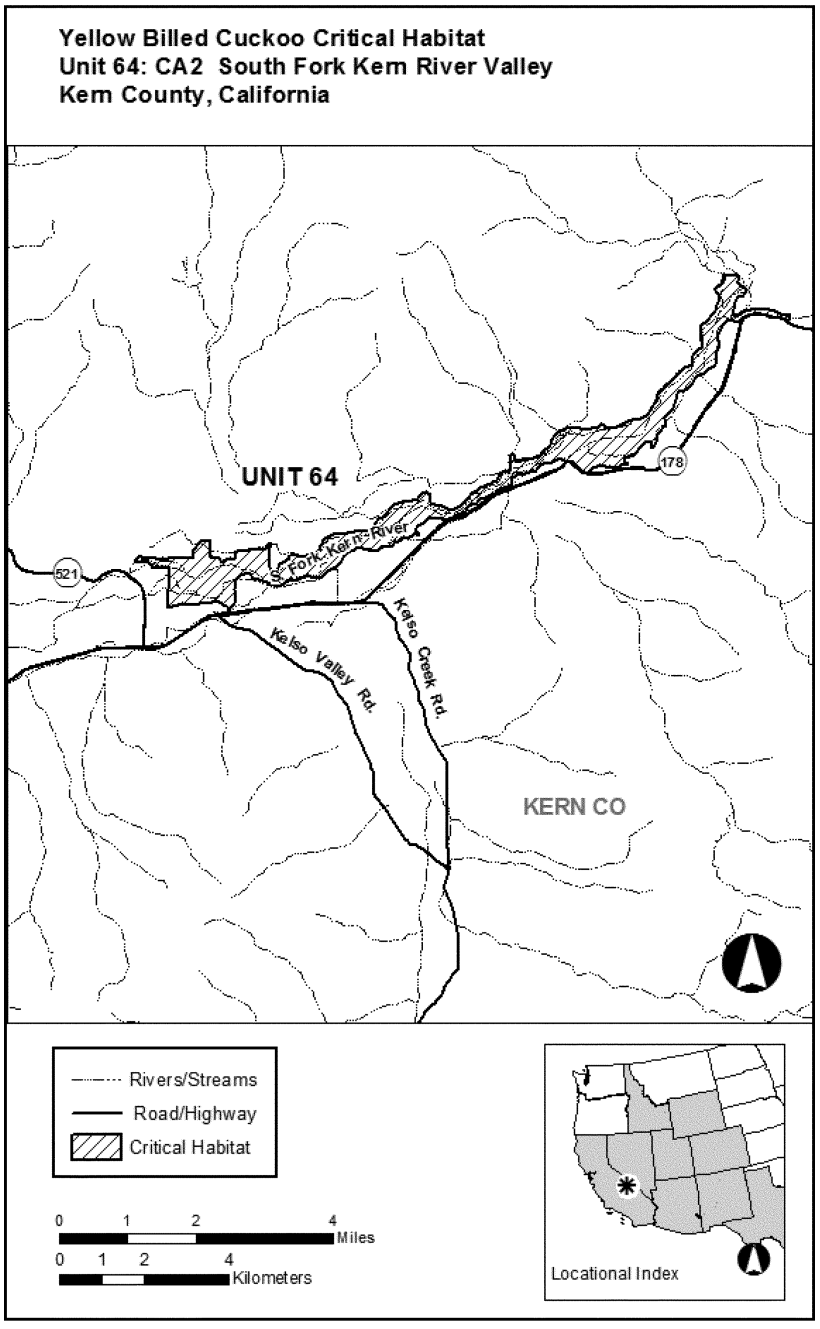
(66) *Unit 62:* AZ–50, Paymaster Spring and Mowry Wash; Santa Cruz County, Arizona. Map of Unit 62 follows:



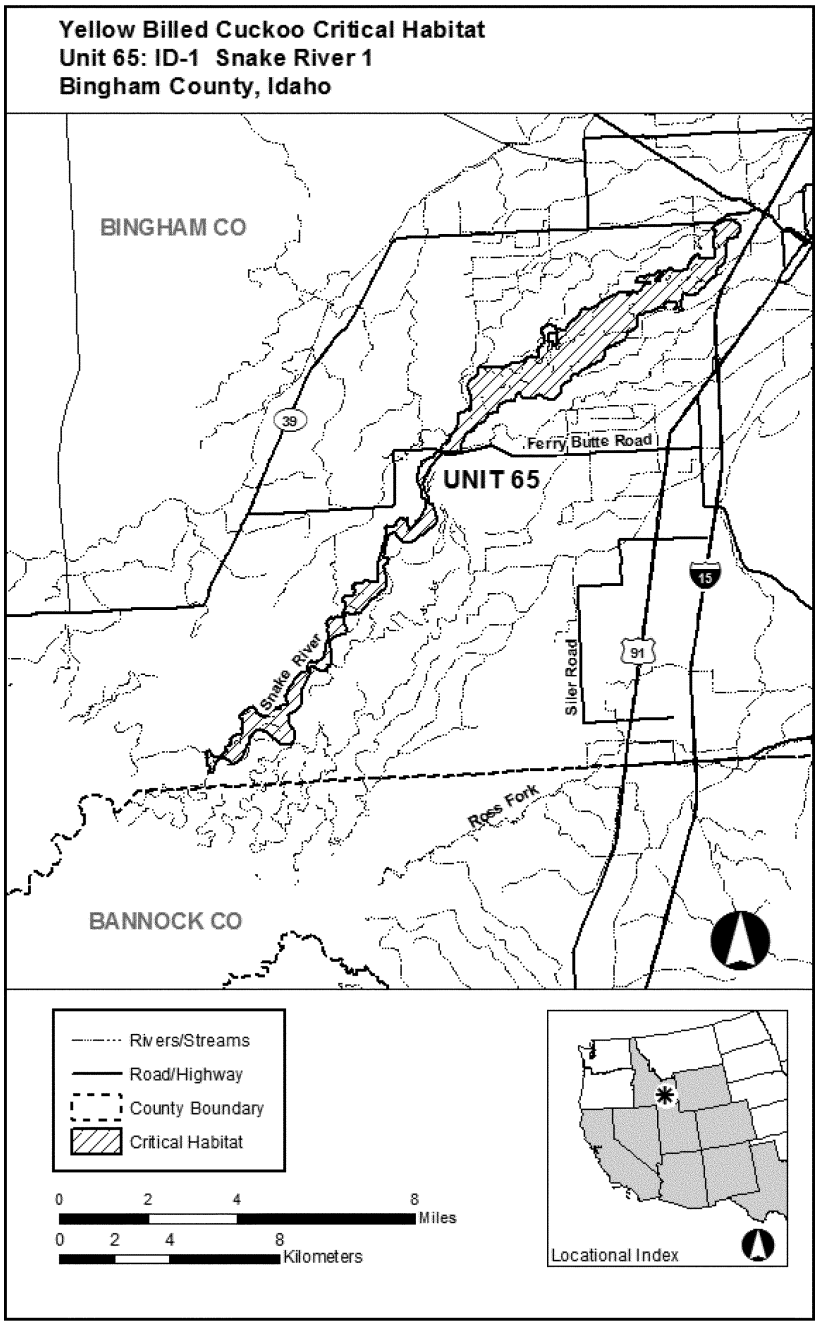
(67) *Unit 63:* CA–1, Sacramento River, Colusa, Glenn, Butte, and Tehama Counties, California. Map of Unit 63 follows:



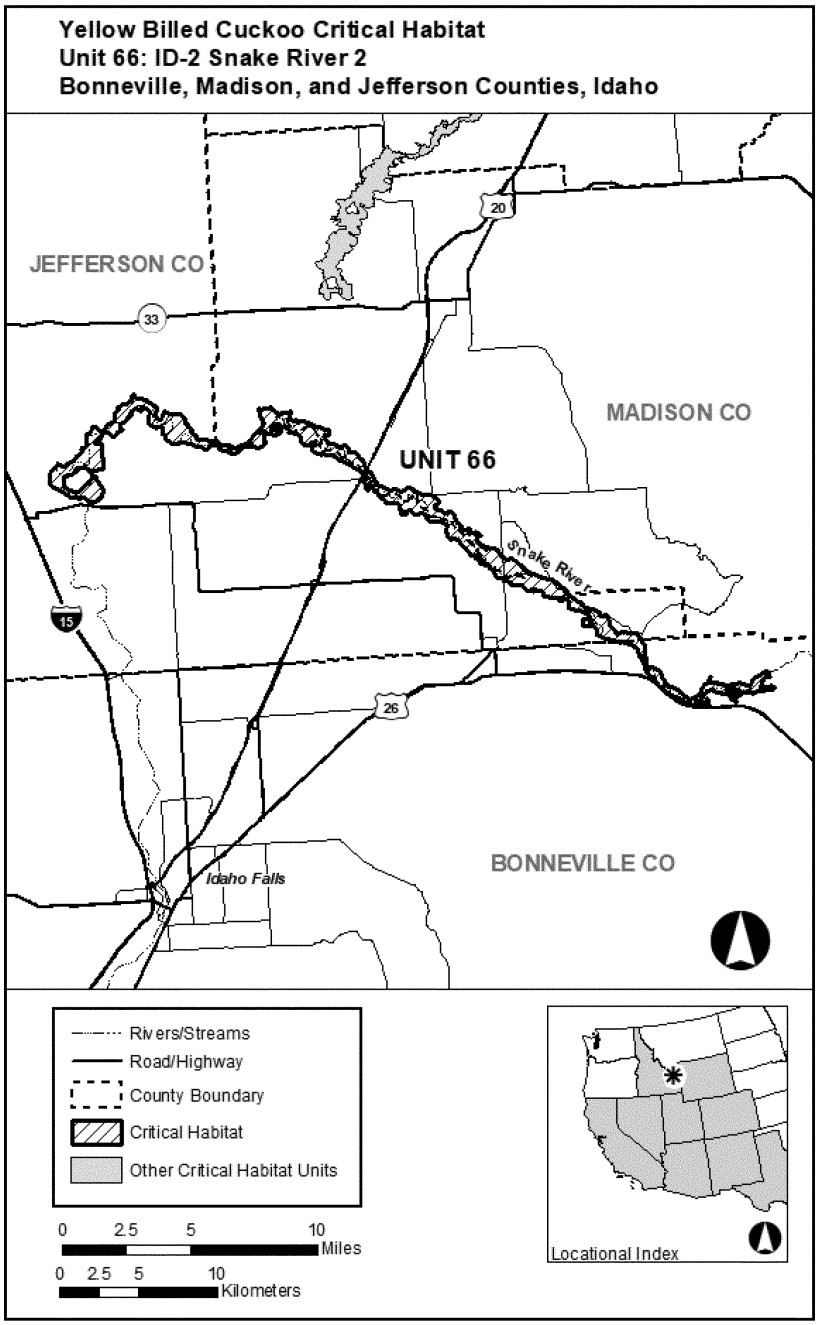
(68) *Unit 64:* CA–2, South Fork Kern River Valley; Kern County, California.
Map of Unit 64 follows:



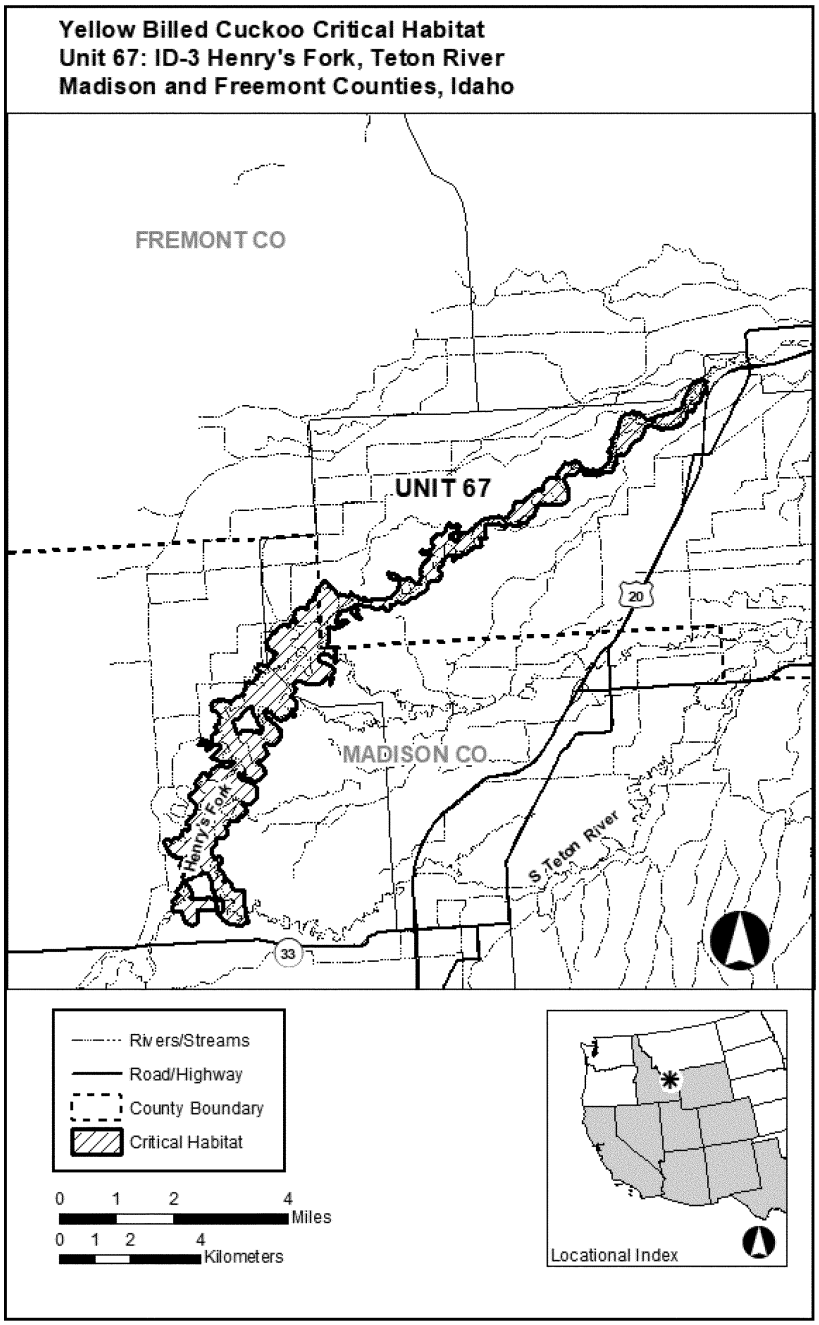
(69) *Unit 65:* ID–1, Snake River 1; Bannock and Bingham Counties, Idaho.
Map of Unit 65 follows:



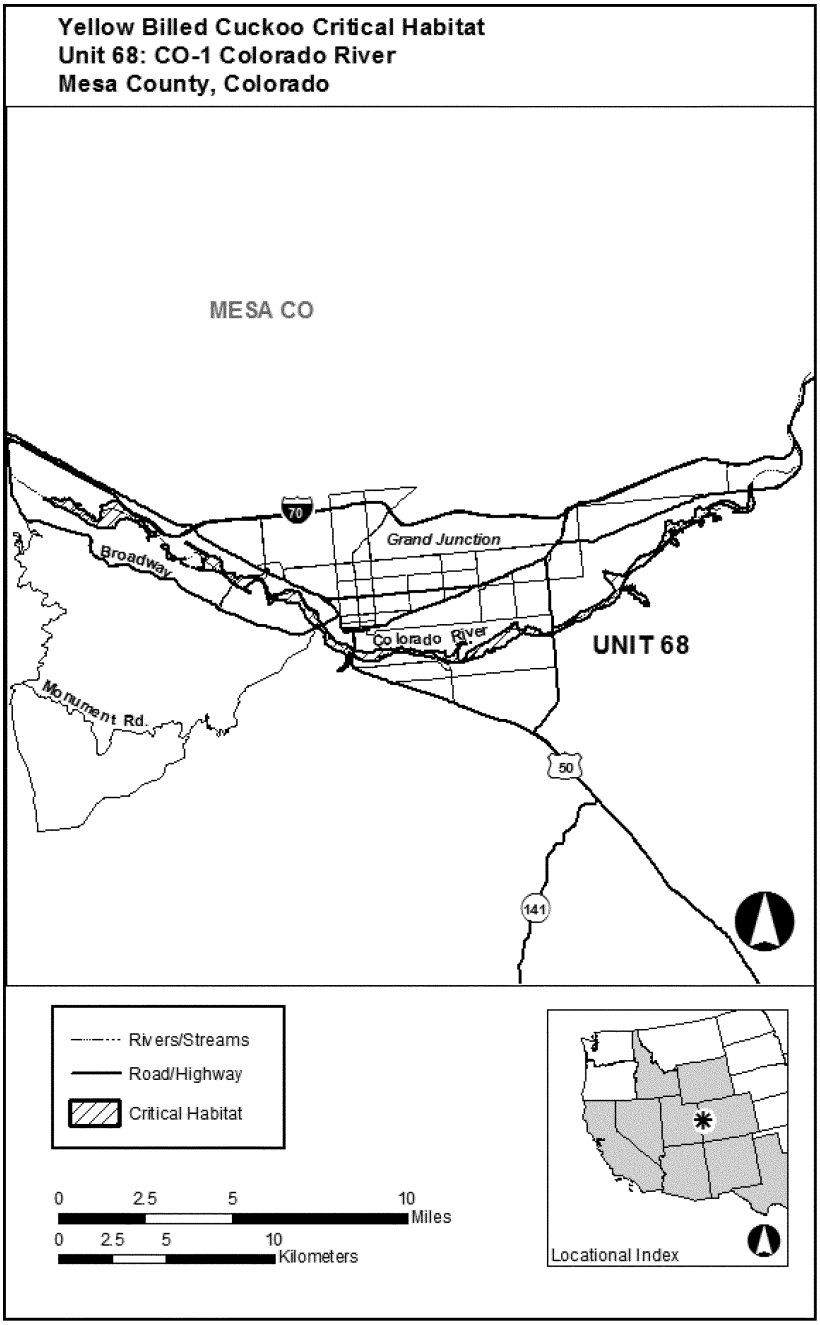
(70) *Unit 66:* ID–2, Snake River 2; Bonneville, Madison, and Jefferson Counties, Idaho. Map of Unit 66 follows:



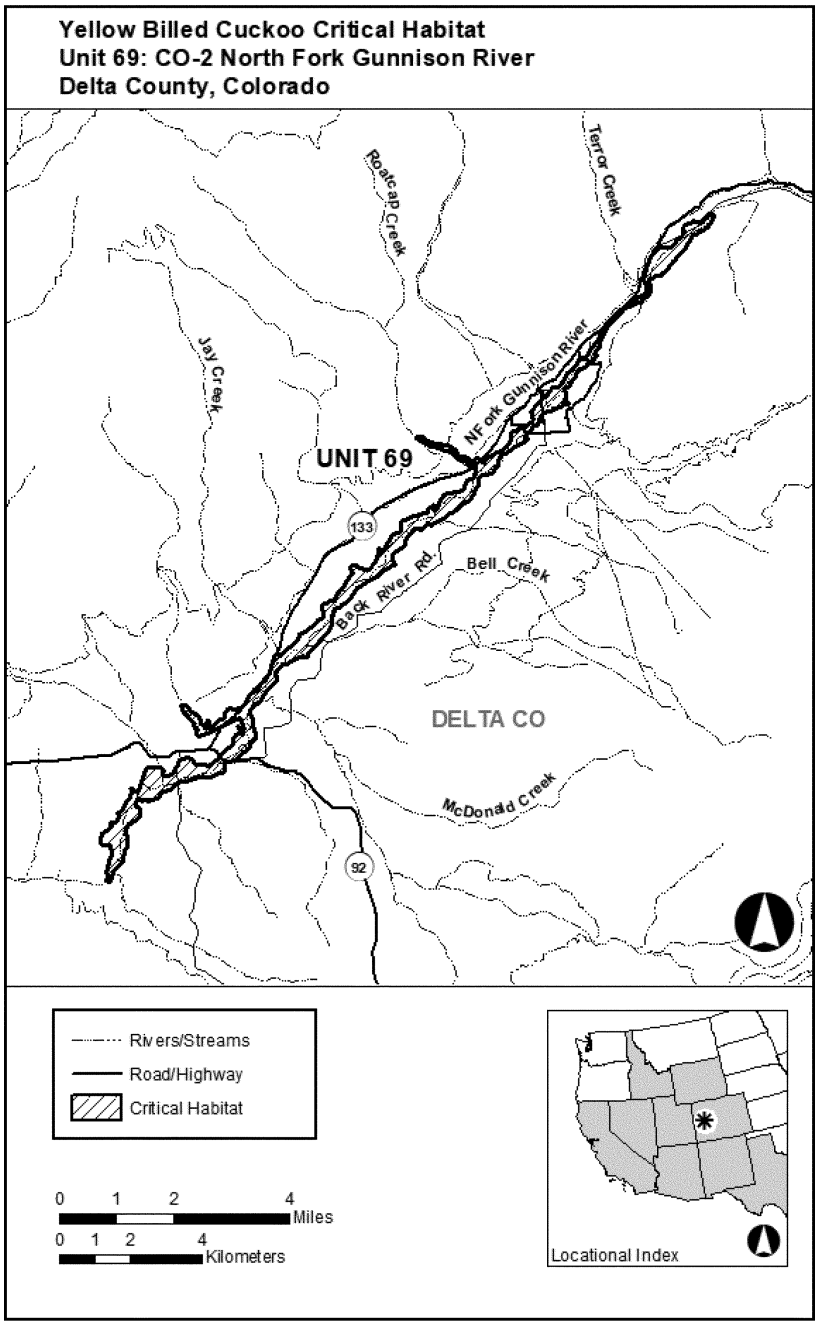
(71) *Unit 67:* ID–3, Henry's Fork and Teton Rivers; Madison and Fremont Counties, Idaho. Map of Unit 67 follows:



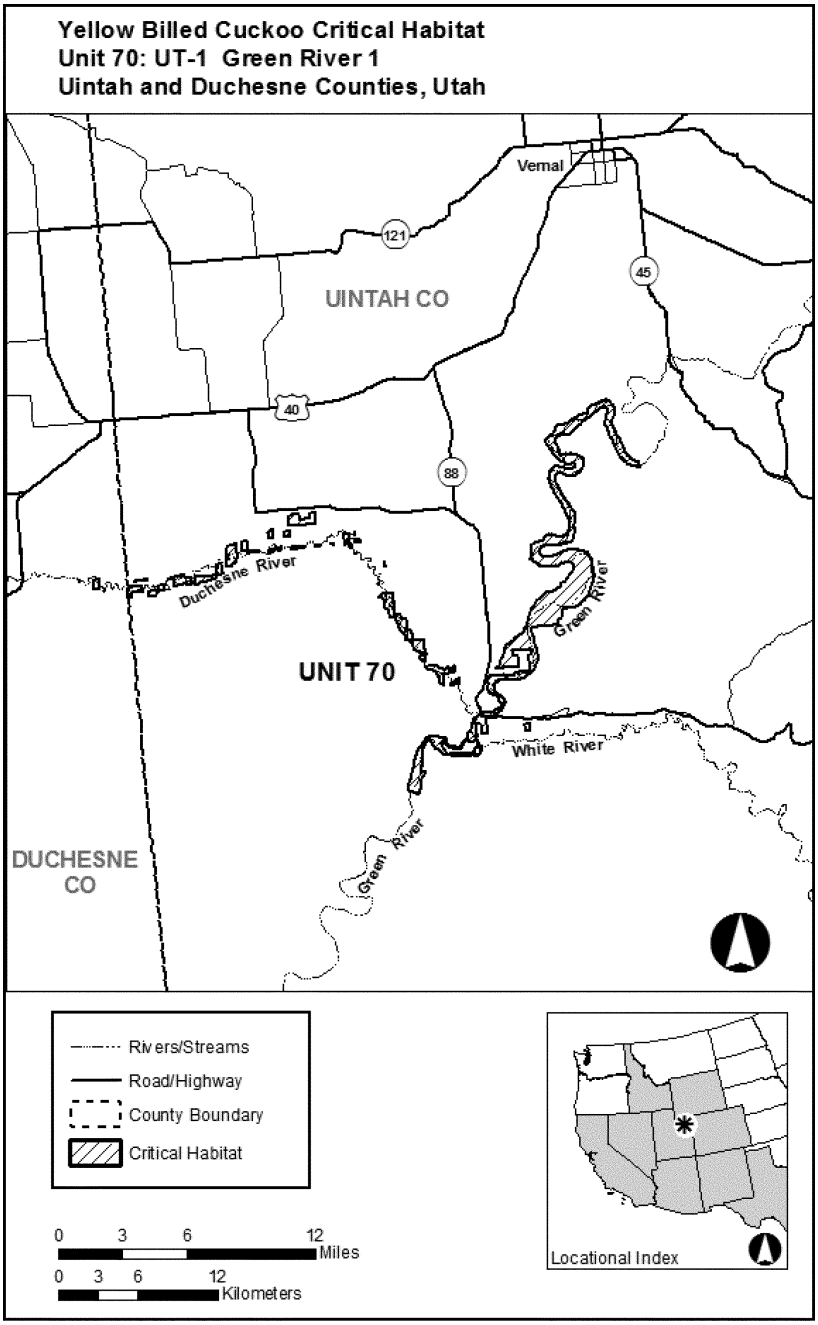
(72) *Unit 68:* CO–1, Colorado River; Mesa County, Colorado. Map of Unit 68 follows:



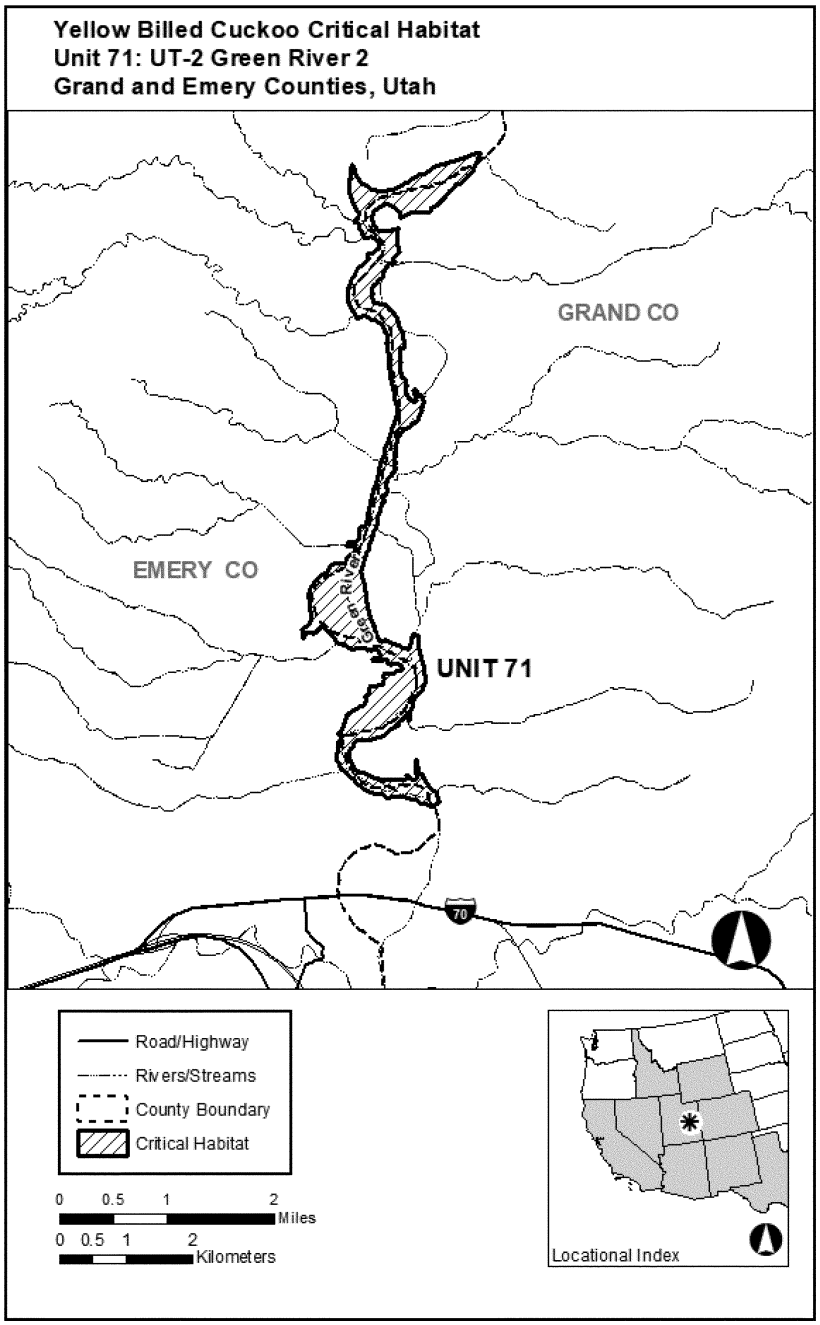
(73) *Unit 69:* CO–2, North Fork Gunnison River; Delta County, Colorado. Map of Unit 69 follows:



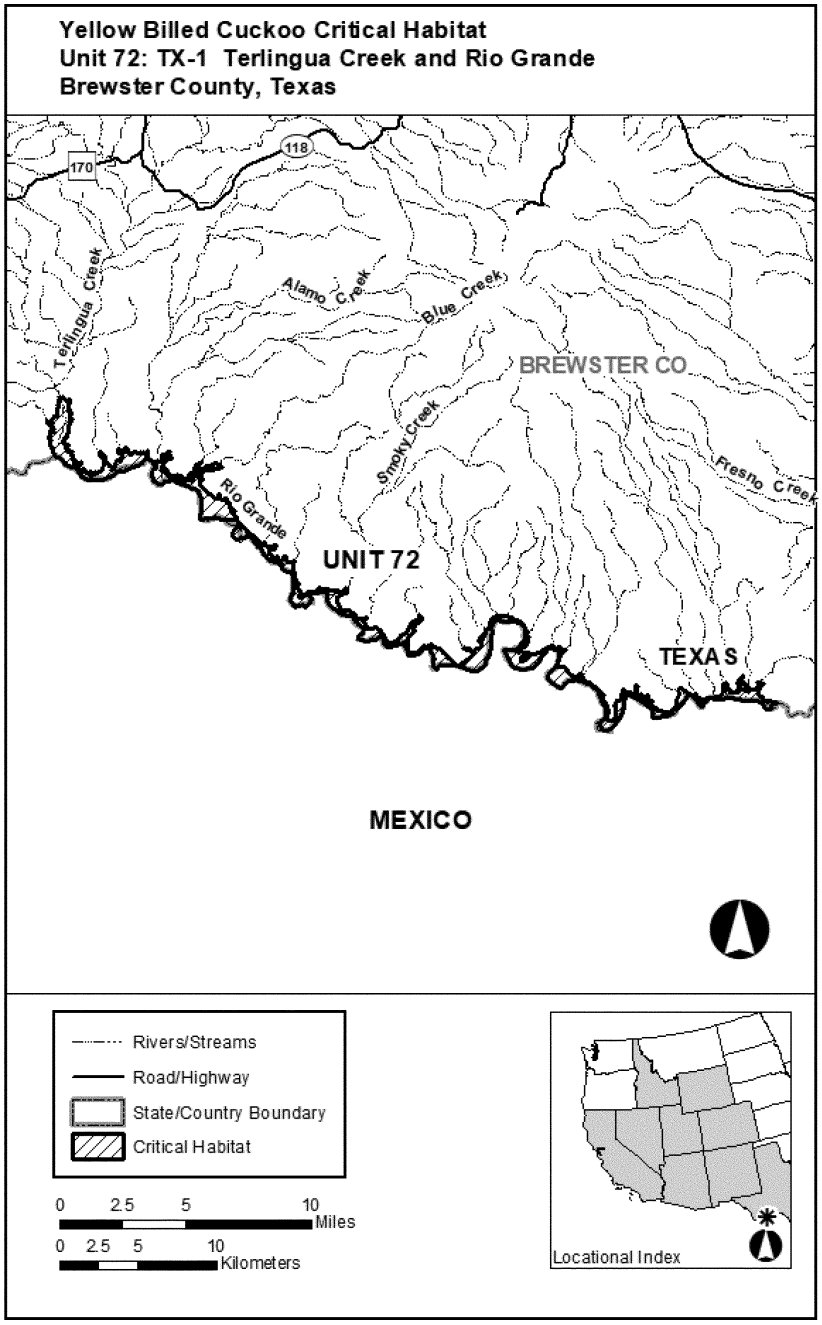
(74) *Unit 70:* UT–1, Green River 1; Uintah and Duchesne Counties, Utah.
Map of Unit 70 follows:



(75) *Unit 71:* UT–2, Green River 2; Emery and Grand Counties, Utah. Map of Unit 71 follows:



(76) *Unit 72:* TX–1, Terlingua Creek and Rio Grande; Brewster County, Texas. Map of Unit 72 follows:



* * * * *

Martha Williams,

Principal Deputy Director, Exercising the Delegated Authority of the Director U.S. Fish and Wildlife Service.

[FR Doc. 2021–07402 Filed 4–20–21; 8:45 am]

BILLING CODE 4333–15–C



FEDERAL REGISTER

Vol. 86 Wednesday,
No. 75 April 21, 2021

Part III

Department of Justice

Drug Enforcement Administration

The Pharmacy Place Order; Notice

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 17–26]

The Pharmacy Place Order

On April 3, 2017, a former Assistant Administrator of the Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to The Pharmacy Place (hereinafter, Respondent) of Plano, Texas. Administrative Law Judge Exhibit 1 (OSC), at 1. The OSC proposed to revoke Respondent's DEA Certificate of Registration No. FT4134805 and deny any pending applications for a modified or new DEA registration pursuant to 21 U.S.C. 823(f) because Respondent's ''continued registration is inconsistent with the public interest.'' *Id.*

In response to the OSC, Respondent timely requested a hearing before an Administrative Law Judge. ALJ–5. The first two sessions of the hearing in the matter were held in Dallas, Texas from September 12–13, 2017. The Respondent's expert, however, failed to appear on either of those days. To accommodate the Respondent, the hearing was continued. On November 20, 2017, the hearing reconvened. The November 20, 2017 session of the hearing was conducted by video teleconference from the DEA Hearing Facility in Arlington, Virginia, with the parties and witnesses located at the DEA District Office in San Antonio, Texas.

On February 13, 2018, Administrative Law Judge Charles Wm. Dorman (hereinafter, ALJ) issued the incorporated Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision (hereinafter, Recommended Decision or RD). Respondent filed Exceptions to the Recommended Decision on March 5, 2018, and, with the permission of the ALJ, a Show to the Contrary on March 14, 2018 (hereinafter, collectively Respondent's Exceptions or Exceptions). The Government filed a Response to Respondent's Exceptions and Show to the Contrary on March 28, 2018 (hereinafter, Govt Response). The record was then forwarded to me for final agency action.

Suggestion of Mootness

On October 18, 2018, the Government filed a Notice of Suggestion of Mootness (hereinafter, Suggestion of Mootness). The Government provided evidence that Respondent had closed and that Respondent's owner had transferred the inventory of controlled substances to a reverse distributor. Suggestion of Mootness, at 2, Exs. 1–3.[A] DEA regulations promulgated pursuant to the authority delegated by the Controlled Substances Act (CSA) provide that ''the registration of any person . . . shall terminate, without any further action by the Administration, if and when such person . . . discontinues business or professional practice . . . .'' 21 CFR 1301.52. As Respondent discontinued business and transferred its controlled substances, pursuant to the regulation, its registration is terminated, and Respondent is no longer authorized to dispense controlled substances under federal law. *Id.* The Government argued that because Respondent no longer possesses a DEA registration, the case is now moot. Suggestion of Mootness, at 3 (citing *Louisiana All Snax, Inc.,* 76 FR 20034 (2011); *John G. Costino, D.O.,* 76 FR 4940 (2011)).

Since the Government filed its Suggestion of Mootness, however, the Agency has published two decisions that are directly applicable to the instant matter. The first, *Jeffrey D. Olsen, M.D.,* in which my predecessor ordered the revocation of an expired registration, stated that ''mootness does not play the same role in administrative agency adjudications as it plays in Article III court proceedings'' and '' '[t]he agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.' '' 84 FR 68474, 68478 (2019) (quoting *Tennessee Gas Pipeline* v. *Federal Power Comm'n,* 606 F.2d 1373, 1380 (D.C. Cir. 1979); 5 U.S.C. 554(e)); *see also Climax Molybdenum Co.* v. *Sec'y of Labor, Mine Safety and Health Admin.,* 703 F.2d 447, 451 (10th Cir. 1983) (''At the outset, we note that an administrative agency is not bound by the constitutional requirement of a 'case or controversy' that limits the authority of [A]rticle III courts to rule on moot issues.''). *Olsen* concluded, therefore, that the Agency was free to, and would, adjudicate orders to show cause to finality in matters with expired registrations. *Id.* at 68479.

The second, *Steven M. Kotsonis, M.D.,* applied *Olsen* to matters where a registration is terminated pursuant to 21 CFR 1301.52 for a surrender for cause after an ALJ had issued a recommended decision and transmitted the matter to the Administrator for final decision. 85 FR 85667, 85668 (2020). *Kotsonis* concluded that the termination of a DEA registration under 21 CFR 1301.52 does not preclude DEA from issuing a final decision on an order to show cause against that registration and stated that the Agency would assess such matters on a case-by-case basis to determine if a final adjudication is warranted or if the matter should be dismissed. *Id.* at 85668–69.

In this matter, as in *Kotsonis,* Respondent's registration terminated under 21 CFR 1301.52 after the ALJ had issued a recommended decision on the order to show cause and had transmitted the record to me for final decision. Accordingly, I am declining the Government's Suggestion of Mootness as the matter is not mooted by the termination. Instead, I have evaluated the particular circumstances of this matter and determined that the matter should be adjudicated to finality. As my predecessor identified in *Olsen,*

> [f]inal adjudications are particularly helpful in supporting the purposes of the CSA and my responsibilities to enforce the CSA because nothing in the CSA prohibits an individual or an entity from applying for a registration even when there is a history of being denied a registration, or a history of having a registration suspended or revoked. As such, having a final, official record of allegations, evidence, and the Administrator's decisions regarding those allegations and evidence, assists and supports future interactions between the Agency and the registrant or applicant.

84 FR at 68479. Absent a final adjudication, there would be no final record of the allegations and evidence from this matter.[B] Adjudicating this matter to finality will create an official record the Agency can use in any future interactions with Respondent's owners, employees, or other persons who were associated with Respondent. As additionally noted in *Olsen,* ''a final adjudication is a public record of the Agency's expectations for current and prospective members of that community,'' and adjudications inform stakeholders, such as legislators and the public, about the Agency's work and allow them to provide feedback to the Agency, thereby helping shape how the Agency carries out its responsibilities under the CSA. *Id.* Adjudicating this matter to finality will create a public record to educate current and prospective registrants about the Agency's expectations regarding the responsibilities of registrant pharmacies under the CSA and allow stakeholders

[A] The Government also provided electronic correspondence between a DEA attorney and Respondent's attorney informing Respondent that DEA would treat the discontinuation of business as ''a surrender for cause and the registration history [would] be documented as such.'' Suggestion of Mootness, Ex. 4 (citing 21 CFR 1301.76).

[B] Contrast with *Kotsonis* in which the plea agreement and judgment from the respondent's concurrent criminal case provided a final record on which the Agency could rely in any future interactions with the respondent. 85 FR at 85667.

to provide feedback regarding the Agency's enforcement priorities and practices.

Having determined that this matter should be adjudicated to finality and considered the record in its entirety, including the Respondent's Exceptions and the Govt Response, I have decided to adopt the ALJ's recommended rulings, findings of fact, conclusions of law, and proposed sanction from the Recommended Decision, with minor modifications, where noted herein.[C] A discussion of Respondent's Exceptions follows.

Respondent's Exceptions

Respondent filed 49 exceptions—19 exceptions to the RD's Findings of Fact and 30 exceptions to the RD's Analysis and Conclusions of Law, the final two of which were expounded upon in greater detail in Respondent's Show to the Contrary.

Respondent's Exceptions to the Findings of Fact

I find that the majority of Respondent's exceptions to the Findings of Fact do not actually dispute the RD's findings of fact but rather provide explanations, arguments, or interpretations. Consequently, I reject Respondent's Exceptions 1–2, 7, 9, 11–14, and 16–18. I also reject Respondent's Exceptions 3, 6, 8, and 19. I have reviewed the findings of fact to which Respondent objected in those exceptions and have determined that the findings are supported by the administrative record.

I am partially sustaining Respondent's Exceptions 10 and 15. In Exception 10, Respondent objected to the ALJ's finding that ''Ms. Igwe is familiar with the Texas regulation that requires a pharmacist to document notes regarding the resolution of red flags.'' RD, at 29 (citing Tr. 585). Respondent stated in its exceptions that

> Ms. Igwe is familiar with the Texas regulations that require a pharmacist to document notes, but not every red flag, or its resolution must be documented under Texas law. See 22 TAC § 291.33(c)(2)(A)(ii) and (iv). (ii) requires documentation when a clinically significant condition exists that is resolved by the pharmacist, and (iv) requires documentation when the pharmacist has a question about the drug regimen review per (A) of that regulation.''

Respondent's Exceptions, at 4. While I find that Respondent's explanation for Exception 10 provides an argument on what it believes to be the correct interpretation of the Texas regulation rather than disputing the factual finding, I am partially sustaining the exception because I find that the RD's characterization of Ms. Igwe's testimony was incomplete. When asked by the ALJ if she was familiar with ''a Texas regulation that requires that if you check with a doctor about a particular prescription, that you're supposed to document that,'' Ms. Igwe answered ''Yes.'' Tr. 585. However, Ms. Igwe qualified her answer stating ''[b]ut . . . it depends on what I check with the doctor about . . . so it would depend—if I'm calling the doctor and saying anything that isn't clinical in nature, I may not necessarily document it.'' *Id.* The RD, therefore, correctly found that Ms. Igwe was familiar with the regulation the ALJ was referencing in his question; however, I will add the clarification to the finding that Ms. Igwe did not expressly testify that the regulation requires a pharmacist to document notes regarding the resolution of red flags.

Respondent's Exception 15 took exception to the RD's finding of fact that

> [t]he prescription that [L.R.] wrote for [M.W.] raises the following red flags: No patient address; no provider DEA number; large quantity of high-alert controlled substance; the prescription was written on July 29, 2014, but not faxed to the Pharmacy until August 1, 2014 and not picked up until August 4, 2014; and an unusual path and distance to obtain the prescription and get it filled.

RD, at 33–34 (citing Tr. 188–85). Respondent argues that ''[p]ursuant to Dr. Witte, the prescription for hydrocodone that '[M.W.]' received was a typical or therapeutic dosage.'' Respondent Exceptions, at 5 (citing Tr. 176, 283, 366, 679). I have reviewed Dr. Witte's testimony regarding the red flags on the ''M.W.'' prescription and find that while Dr. Witte did testify that the prescription was for a ''large quantity,'' when asked if the quantity was a red flag, she stated that ''[i]t *could* be.'' Tr. 189 (emphasis added). I, therefore, will partially sustain Respondent's Exception 15 as Dr. Witte did not unequivocally testify that the quantity of the controlled substance in the M.W. prescription was a red flag, only that such a quantity could be a red flag on a prescription.

I have amended Findings of Fact 94 and 135 of the Recommended Decision to reflect my determinations on Respondent's Exceptions to the Recommended Decision's findings of fact.

Respondent's Exceptions to the ALJ's Analysis and Conclusions of Law

Respondent filed 30 exceptions to the Recommended Decision's Analysis and Conclusions of Law and a Show to the Contrary that provided further explanation and documentation for its final two exceptions. I have reviewed the exceptions and find they can be grouped into five general exceptions:

(1) Respondent objects to the Government's allegation that there was no evidence of Respondent filling prescriptions prior to July 7, 2014;[D]

(2) Respondent objects to the ALJ's official notice of 22 Tex. Admin. Code § 291.33(c)(7)(A);[E]

(3) Respondent argues the Recommended Decision did not properly weigh the five factors from 21 U.S.C. 823(f);[F]

(4) Respondent objects to the ALJ's determination that it violated various federal and state regulations when it dispensed controlled substance prescriptions that raised red flags without properly resolving the red flags and documenting the resolution;[G] and

(5) Respondent argues the recommended sanction is not supported by the record.[H]

1. Prescriptions Filled Prior to July 7, 2014

Respondent filed an exception against ''[t]he Government's alleg[ation] that there was no evidence of prescriptions being filled prior to July 7, 2014 due to the lack of earlier information in the patient profiles.'' Exceptions, at 13 (citing Gov. Ex. 6). Respondent's exception, however, does not object to any of the ALJ's findings or conclusions from the Recommended Decision. As Respondent stated itself in the exception, the ALJ ''found evidence of prior filled prescriptions.'' *Id.* (citing RD, at 51 n.34 (''The Respondent did produce evidence of dispensing prior to July 7, 2014 . . . Those records, however, were not produced until long after the Pharmacy was required to produce them.'')). *See also* RD, at 24 (citing Tr. 60, 76) (''The dispensing records showed that the first dispensing took place on July 7, 2014, but the PMP showed that the Pharmacy filled prescriptions for hydrocodone between January and June 2014.''). Pursuant to

[C] I have made minor modifications to the Recommended Decision. I have substituted initials or titles for the names of witnesses and practitioners to protect their privacy, and I have made minor, nonsubstantive grammatical changes. Where I have made substantive changes to align the RD with my findings on Respondent's Exceptions or otherwise added to or modified the ALJ's decision, I have placed the edited text in brackets and included a specific description of the modification in a footnote marked with an asterisk.

[D] Exceptions, at 13, no. 38.

[E] Exceptions, at 17, nos. 48–49; Respondent's Show to the Contrary.

[F] Exceptions, at 10; nos. 31–32.

[G] Exceptions, at 6–13, 16–17; nos. 20–30, 33–37, 39, 45–47.

[H] Exceptions, at 14–16, nos. 40–44.

21 CFR 1316.66, an exception must be to ''the recommended decision, findings of fact and conclusions of law contained in the report'' from the ALJ to the Administrator. Respondent's ''exception'' is, therefore, invalid.

2. Official Notice of 22 Tex. Admin. Code § 291.33(c)(7)(A)

In the RD, the ALJ took official notice of 22 Tex. Admin. Code § 291.33(c)(7)(A), which sets forth several requirements for labels on prescription bottles. RD, at 59 n.41. Respondent objected to the ALJ's notice of 22 Tex. Admin. Code § 291.33(c)(7)(A), or in the alternative, requested an opportunity to show to the contrary pursuant to 21 CFR 1316.59(e). The ALJ issued an Order Granting Respondent Request for Opportunity to Show to the Contrary on March 6, 2018. In his Order, the ALJ cited two instances in the record where taking notice of this regulation was helpful. First, the ALJ ''looked to the regulation for additional support for Dr. Witte's testimony that the dispensing pharmacist's initials must be associated with each prescription and that [PIC] Igwe was the pharmacist who filled all the prescriptions in the Administrative Record.'' *See* RD, at 39; Tr. 389–90. Second, the ALJ stated that he relied on the regulation in determining when a prescription was filled by Respondent, as the regulation requires the label to include the date the drug was dispensed.

I can find no reason why Respondent objected to the ALJ's official notice of 22 Tex. Admin. Code § 291.33(c)(7)(A) or why Respondent filed the Show to the Contrary with documentation of labels from the prescriptions at issue in this matter—all of which display the initials of Respondent's Pharmacist in Charge Ijeoma Igwe (hereinafter, PIC Igwe) and a date. Respondent asserts in the Show to the Contrary that the labels demonstrate that Respondent fully complied with section 291.33(c)(7)(A), but there was never any allegation that Respondent did not. In the RD, the ALJ assumed that Respondent had fully complied with the regulation when labeling prescription bottles.

To the extent, if any, Respondent is objecting to the ALJ's official notice of 22 Tex. Admin. Code § 291.33(c)(7)(A), Respondent's objection is denied as the RD properly characterized the content of the regulation and Respondent acknowledges the regulation applied to Respondent's pharmacy practice.

3. Weighing the Factors From 21 U.S.C. 823(f)

Respondent filed exceptions arguing that the ALJ did not properly weigh all five factors from 21 U.S.C. 823(f). Specifically, Respondent argues the ALJ did not properly consider that (1) ''there is no evidence that the State licensing board has taken a disciplinary action against [Respondent]'' or (2) Respondent's experience dispensing or conducting research with respect to controlled substances. Exceptions, at 10.

The DEA considers the five public interest factors from 21 U.S.C. 823(f) separately. *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). Each factor is weighed on a case-by-case basis. *Morall* v. *Drug Enf't Admin.,* 412 F.3d 165, 173–74 (D.C. Cir. 2005). Any one factor, or combination of factors, may be decisive. *David H. Gillis, M.D.,* 58 FR 37507, 37508 (1993). Thus, there is no need to enter findings on each of the factors. *Hoxie* v. *Drug Enf't Admin.,* 419 F.3d 477, 482 (6th Cir. 2005). Furthermore, there is no requirement to consider a factor in any given level of detail. *Trawick* v. *Drug Enf't Admin.,* 861 F.2d 72, 76–77 (4th Cir. 1988). The balancing of the public interest factors ''is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest . . . .'' *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 462 (2009). When deciding whether registration is in the public interest, the DEA must consider the totality of the circumstances. *See generally Joseph Gaudio, M.D.,* 74 FR 10083, 10094–95 (2009) (basing sanction on all evidence on record).

Having reviewed the Recommended Decision, I find that the ALJ did properly weigh the public interest factors. First, as stated above, the ALJ was not required to enter findings on each of the factors or to consider a factor in any given level of detail. Second, contrary to Respondent's assertion, the ALJ did enter findings regarding the recommendation of the State licensing board and concluded that Factor One (21 U.S.C. 823(f)(1)) does not weigh for or against revocation in this matter. The RD found that ''it is undisputed that the Respondent holds a valid state pharmacy license in Texas'' and ''[t]he record contains no evidence of a recommendation regarding the Respondent's privilege to operate as a pharmacy by a relevant state licensing board or professional disciplinary authority.'' RD, at 54. As accurately stated in the RD, ''Agency precedent establishes that where the record contains no evidence of a recommendation by a state licensing board, that absence does not weigh for or against revocation.'' *Id.* (citing *Roni Dreszer, M.D.,* 76 FR 19434, 19444 (2011)). Accordingly, I agree with the ALJ's findings and conclusions regarding Factor One.

Finally, I find that Respondent's assertion that the ALJ failed to adequately consider evidence of Respondent's ''experience with her other patients'' is without merit. Exceptions, at 10 (citing *Jayam Krishna-Iyer,* 249 F. App'x 159 (11th Cir. 2007). Respondent argued that Respondent ''dispensed over 900 hydrocodone/APAP prescriptions prescribed from the 5 or 6 clinics under investigation, and only 75 prescriptions were submitted for adjudication for approximately 27 patients.'' *Id.* Under Factor 2, 21 U.S.C. 823(f)(2), the Agency must consider a registrant's experience dispensing controlled substances. As previously stated, however, the Agency ''is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest; what matters is the seriousness of the registrant's misconduct.'' *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 462 (2009). Accordingly, as the Tenth Circuit has recognized, findings under a single factor can support the revocation of a registration. *MacKay* v. *Drug Enf't Admin.,* 664 F.3d 808, 821 (10th Cir. 2011).

In this matter, even presuming that the hundreds of other prescriptions Respondent has referenced were legally dispensed, those prescriptions do not render Respondent's unlawful dispensing of the subject prescriptions any less unlawful or ''any less 'acts which are inconsistent with the public interest.' '' *Jayam Krishna-Iyer,* 74 FR at 462–463 (quoting 21 U.S.C. 823(f)). Moreover, the unlawful dispensings were not an isolated incident—the Government has proven by substantial evidence that Respondent dispensed 75 prescriptions that raised multiple red flags to over two dozen patients in less than a year. RD, at 88. The Agency has consistently taken the position that a registrant's positive dispensing experience under Factor 2 can be outweighed by acts held to be inconsistent with the public interest. *See, e.g., Holiday CVS, L.L.C., d/b/a CVS/Pharmacy Nos. 219 and 5195,* 77 FR 62316, 62340 (2012); *Paul J. Cargine, Jr.,* 63 FR 51592, 51560 (1998) (''[E]ven though the patients at issue are only a

small portion of Respondent's patient population, his prescribing of controlled substances to these individuals raises serious concerns regarding [his] ability to responsibly handle controlled substances in the future.''). I find that Respondent's repeated, serious violations of federal and state laws related to controlled substances support the ALJ's finding that the Government has made a *prima facie* case showing that the Respondent's registration is inconsistent with the public interest.

4. Unlawful Dispensing Allegations

Respondent has filed exceptions against the ALJ's determination that Respondent dispensed 75 controlled substance prescriptions that raised red flags without resolving those red flags and documenting the resolution in contravention of Respondent's corresponding responsibility under 21 CFR 1306.04; outside the usual course of professional practice in violation of 21 CFR 1306.06; and in violation of 22 Tex. Admin. Code § 291.33(c)(2).[I] Respondent has stated in its Exceptions that, contrary to the ALJ's findings, the subject prescriptions did not display the red flags of pattern prescribing, distance, and cash payments, and, to the extent that there were red flags on the subject prescriptions, Respondent cleared the red flags before filling the prescriptions.

Red Flags on the Subject Prescriptions

Pattern Prescribing

As fully explained in the Recommended Decision, pattern prescribing occurs when a provider or group of providers repeatedly prescribe patients the same drug and the same quantity without any difference in treatment. RD, at 25, 60–62 (citing Tr. 171, 228–29, 232–33, 244, 250, 264–65, 279, 289, 353, 745). The expert witnesses in this matter testified that pattern prescribing raises a red flag because the lack of individualized therapy can indicate the prescriber is not prescribing the controlled substances for a legitimate medical purpose. Tr. 171, 244, 745. *See Jones Total Health Care Pharmacy, L.L.C.,* 81 FR 79188, 79195 (2016) (citing *E. Main St. Pharmacy,* 75 FR 66149, 66163 (2010)); 21 CFR 1306.04 (''A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose . . .''). Unlike some red flags, such as distance and cash payments, pattern prescribing can manifest over an extended period of time and may not be immediately recognizable to a pharmacist. Tr. 210, 239–40, 333, 358–59. Both experts agreed that a pharmacist can resolve a red flag of pattern prescribing raised by a prescription by speaking with the prescriber and receiving information that satisfies the pharmacist that a prescription was issued for a legitimate medical purpose. Tr. 240, 332–334, 660. The Government's expert, Dr. Witte, stated that if the pharmacist is not satisfied by the prescriber's responses to their questions, the pharmacist should refuse to fill the prescriptions. Tr. 171, 333–34.

In its Exceptions, Respondent objects to the ALJ's finding that many of the subject prescriptions exhibited the red flag of pattern prescribing and that Respondent filled the prescriptions without resolving the red flag. Exceptions, at 10–12. Respondent claims that it resolved the red flag of pattern prescribing in the subject prescriptions by calling the prescriber whenever a patient presented a controlled substance prescription for the first time. *Id.*

Respondent claims in the Exceptions that ''[e]ach new time a new patients [sic] comes to [Respondent], or an existing patient received a change in medication, the pharmacist places a call to the practitioner to ensure the doctor/patient relationship, to verify the dosing and prescriptions, and to inquire as to the condition or illness being treated.'' Exceptions, at 11 (citing Tr. 477–78). Respondent's claim, however, is unsupported by the record evidence and misrepresents PIC Igwe's testimony. In the portion of PIC Igwe's testimony cited by Respondent, PIC Igwe said ''if I have a patient who is a controlled drug [sic] and they haven't been before, I would call the clinic and make sure that the clinic did write the prescription, and the number that I would use would not be—would be like a number in the—you know, on my—it wouldn't be what's on the prescription, in case it was no—it was forged, for example.'' Tr. 477–78. In other words, PIC Igwe testified that she called the prescriber's office to ensure the prescription was not forged, but she did not testify that she ''verif[ied] the dosing'' or ''inquire[d] as to the condition or illness being treated'' as Respondent claims in its Exceptions.[J] Checking that a prescription was, in fact, issued by a clinic would show that the prescription is not an outright fraud, but it would not ensure that the prescription was issued for a legitimate medical purpose. 21 CFR 1306.04(a); *Pharmacy Doctors Enterprises d/b/a/ Zion Clinic Pharmacy,* 83 FR 10,876, 10,897 (2018), *pet. for rev. denied,* 789 F. App'x 724 (11th Cir. 2019).

There is also no documentary evidence in the record that PIC Igwe ''verif[ied] the dosing,'' ''inquire[d] as to the condition or illness being treated,'' or otherwise resolved the red flag of pattern prescribing on the subject prescriptions as Dr. Witte testified was required for a pharmacist following the accepted standard of practice of pharmacy in Texas. *See, e.g.,* Tr. 210–211. There are no notes in any of Respondent's patient profiles documenting conversations with prescribers. Tr. 210, 244*; see* GX 2. And while PIC Igwe testified that she would sometimes mark a prescription with a ''V'' to indicate she had verified a prescription, Tr. 477, 482, only one of the subject prescriptions is marked with a ''V'' and that prescription was the sixth time Respondent had filled that prescription for the patient, GX 2, at 44–46, 53–55. The credibility of Respondent's claim that PIC Igwe always checked with the prescriber the first time she filled a controlled substance prescription for a patient was also brought into question by her testimony that she had never had a conversation with Dr. C.V. regarding a patient and the only time she had spoken to him was when Dr. C.V. called her to ask for the pharmacy's fax number. Tr. 561–62. Yet, Dr. C.V. prescribed 14 of the subject prescriptions for hydrocodone, GX 2; and Respondent's dispensing logs show that Respondent filled hundreds of additional hydrocodone prescriptions from Dr. C.V., including 8 hydrocodone prescriptions in a single day.[K] GX 6; RX G at 44–45; Tr. 424–25. Given the lack of documentary evidence and the contrary testimony from PIC Igwe, I agree with the ALJ and find that Respondent did not clear the red flags of pattern prescribing before dispensing the subject prescriptions. Accordingly, I

[I] The Recommended Decision also found that Respondent violated other state laws when dispensing the subject prescriptions, but Respondent has not filed exceptions against those findings.

[J] *Compare* PIC Igwe's testimony at Tr. 477–78 *with* Respondent's Exceptions at 11.

[K] The OSC did not allege that Respondent unlawfully dispensed any prescriptions prior to August 2014. Accordingly, while Respondent's dispensing history prior to August 2014 is relevant to rebutting Respondent's claim that the subject prescriptions did not display the red flag of pattern prescribing or that PIC Igwe had resolved the red flags prior to dispensing the subject prescriptions, any deficiencies in Respondent's prescription dispensing practices outside of the subject prescriptions do not weigh for or against Respondent retaining its registration.

reject Respondent's exceptions to the ALJ's findings on pattern prescribing.[L]

Distance

The ALJ found that the distances the patients travelled to obtain the subject prescriptions were a red flag that Respondent failed to clear before dispensing the prescriptions. RD at 63–65, 72–73, 76, and 79. Dr. Witte credibly testified that the distance or route a patient travels to fill a prescription can be a red flag, Tr. 172–76; and Agency decisions have long found that the distance a patient is willing to travel to obtain a prescription is a factor a pharmacist must consider pursuant to their corresponding responsibility; *e.g., Morning Star Pharmacy & Medical Supply 1,* 85 FR 51045, 51052 (2020); *Hills Pharmacy, L.L.C.,* 81 FR 49,815, 49841 n. 45 (2016); *East Main Street Pharmacy,* 75 FR 66149, 66165 (2010). Texas regulations also require pharmacists to ''exercise sound professional judgment with respect to'' the legitimacy of a prescription, 22 Tex. Admin. Code § 291.29(a), and provide a non-exhaustive list of circumstances a pharmacist should weigh when evaluating a prescription's legitimacy, including ''the geographical distance between the practitioner and the patient or between the pharmacy and the patient.'' 22 Tex. Admin. Code § 291.29(c)(4).

Respondent filed exceptions against the ALJ's determination that the distances traveled by the subject patients were a red flag. Exceptions, at 16–17. Respondent argues that ''various pharmacists have various thresholds for distances traveled,'' and that its expert, Mr. Litman, testified that he would only be concerned about distance if a patient were coming from out-of-state. *Id.;* Tr. 695–96, 730. Mr. Litman, however, was not aware of DEA cases that deal with pharmacy customers who had travelled long distances to obtain their prescriptions and have them filled. Tr. 727. He was also not admitted as an expert on Texas pharmacy practice or law (Mr. Litman was a practicing pharmacist in Florida), Tr. 624, 655–56; and while Mr. Litman stated that he had reviewed the Texas regulations for pharmacists, Tr. 657, he seemed to be unaware of the Texas regulation that requires pharmacists to consider the distance a customer traveled to fill a prescription, *see* Tr. 727, 739. For these reasons, I agree with, and will follow, the ALJ's decision to give no weight to Mr. Litman's testimony that the distance the patients travelled to obtain the subject prescriptions was not a red flag. *See* RD, at 65.

In contrast to Mr. Litman, the Government's expert, Dr. Witte, testified that it would be outside the usual course of professional practice in the state of Texas for a pharmacist to dispense a prescription for a controlled substance without considering the distance the patient traveled to obtain and fill the prescription. Tr. 171–76. The Government provided evidence that the roundtrip distance between the subject patients' homes, providers, and Respondent ranged between 55–121 miles through urban areas. Stipulations 9–45. Dr. Witte testified that the distances traveled by the patients were a red flag, noting concern about patients driving across the city of Dallas to Respondent in Plano to fill the prescriptions because ''more than likely, there are many pharmacies located between . . . where the patient lives and where the clinic is.'' Tr. 174–75, 189–94, 281, 321. I credit Dr. Witte's testimony that the distances traveled by Respondent's patients to obtain the subject prescriptions were a red flag and, accordingly, reject Respondent's exceptions.[M]

Cash Payments

The ALJ found that paying cash for a prescription can be a red flag and determined that cash payments, combined with other red flags, can be enough to find a pharmacist violated 21 CFR 1306.04. RD, at 66. This determination is consistent with the testimony of both the Government and Respondent's expert witnesses, *see, e.g.,* Tr. 172–73; and with other Agency decisions, which have found that paying cash for controlled substances, rather than billing insurance, can be a red flag that the patient is seeking the substances for illicit purposes*; see, e.g., Morning Star Pharmacy and Medical Supply 1,* 85 FR 51045, 51052 (2020), *Jones Total Health Care Pharmacy, L.L.C., and SND Health Care, L.L.C.,* 81 FR 79,188, 79191 (2016); *E. Main St. Pharmacy,* 75 FR 66149, 66158 (2010).

Respondent concedes that cash payments can be a red flag. Exceptions, at 13. Respondent, however, argues that the cash payments made on the subject prescriptions were not red flags because ''many of [Respondent's] patrons paid in cash'' and because many of the cash payments for the subject prescriptions were ''just over'' $200, which Respondent's expert, Mr. Litman, ''gave [as] a ceiling . . . for a pretty reasonable average cash payment.'' *Id.* I am rejecting Respondent's exception because it is inconsistent with the testimony of Respondent's PIC and Mr. Litman and ignores the credible testimony of Dr. Witte. RD, at 7.

Dr. Witte testified that cash payments for controlled substance prescriptions, such as those for the subject prescriptions, are a red flag. *E.g.,* Tr. 172–73, 226, 313. The large majority of patients who received the subject prescriptions paid Respondent $179.99 for 90 tablets of hydrocodone and $59.99 for 60 tablets of alprazolam. GX 2. When a patient purchased prescriptions for both hydrocodone and alprazolam at the same visit, the patient would pay $239.98. *Id.* Respondent's expert, Mr. Litman, testified that he would be concerned about cash payments in excess of $200. Tr. 692, 753. Mr. Litman downplayed the significance of cash payments as a red flag because ''cash payments are more common these days.'' Tr. 753. PIC Igwe testified, however, that the majority of Respondent's customers used insurance to pay for their prescriptions, which brings into question why all of the subject patients paid with cash. Tr. 496.

Accordingly, I reject Respondent's exceptions to the findings in the Recommended Decision that the cash payments for the subject prescriptions were a red flag.

ALJ's Determinations That Respondent Violated 21 CFR 1306.04 and 1306.06

In addition to arguing that the subject prescriptions did not raise the red flags of distance, cash payments, and pattern prescribing and/or those red flags were resolved before Respondent filled the prescriptions, Respondent argues in its Exceptions that the Government failed to establish that PIC Igwe had the requisite degree of scienter to prove a violation of her corresponding responsibility under 21 CFR 1306.04(a). Exceptions, at 7–9, 12–13. Respondent

[L] Respondent also argues that the ALJ's finding that many of the subject prescriptions presented the red flag of pattern prescribing was inappropriate because the prescribers engaged in ''masking.'' Exceptions, at 12. Respondent's argument is contrary to the expert testimony presented at the hearing. Both the Government's expert, Dr. Witte, and Respondent's own expert, Mr. Litman, testified that the subject prescriptions raised the red flag of pattern prescribing. *E.g.,* Tr. 745 (''Judge Dorman: 'Do you consider pattern prescribing to be a red flag?' [Mr. Litman]: 'Yes.' Judge Dorman: 'Okay. Did you see anything in the documentation that you were provided that would suggest pattern prescribing?' [Mr. Litman]: 'Yes.' '')

[M] As the ALJ noted in the Recommended Decision, Dr. Witte was accepted as an expert in the field of pharmacy in the state of Texas, not geography. Tr. 169; RD, at 64. Thus, I do not credit her testimony concerning distances and the availability of pharmacies as that of an expert; I do, however, credit it as a reasonable observation based upon common experience. As the ALJ found, common experience suggests that one is more likely to pass a pharmacy in an urban area than a rural one and that, in general, it is more time consuming to travel a specific distance in an urban area than a rural one. RD, at 64.

also argues that the Government has not met its burden under 21 CFR 1306.06 ''to prove the pharmacist repeatedly filled controlled substance prescriptions that contained multiple red flags of diversion and/or abuse without addressing or resolving those red flags, based on a lack of documentation of the resolution, or a failure of the corresponding responsibility.'' *Id.* at 6.

According to the CSA's implementing regulations, a lawful controlled substance order or prescription is one that is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). While the ''responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, . . . a corresponding responsibility rests with the pharmacist who fills the prescription.'' *Id.* The regulations establish the parameters of the pharmacy's corresponding responsibility.

> An order purporting to be a prescription issued not in the usual course of professional treatment . . . is not a prescription within the meaning and intent of . . . 21 U.S.C. 829 . . . and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

Id. ''The language in 21 CFR 1306.04 and caselaw could not be more explicit. A pharmacist has his own responsibility to ensure that controlled substances are not dispensed for non-medical reasons.'' *Ralph J. Bertolino, d/b/a Ralph J. Bertolino Pharmacy,* 55 FR 4729, 4730 (1990) (citing United *States* v. *Hayes,* 595 F.2d 258 (5th Cir. 1979), *cert. denied,* 444 U.S. 866 (1979); *United States* v. *Henry,* 727 F.2d 1373 (5th Cir. 1984) (reversed on other grounds)). As the Supreme Court explained in the context of the CSA's requirement that schedule II controlled substances may be dispensed only by written prescription, ''the prescription requirement . . . ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse . . . [and] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006).

To prove a pharmacist violated her corresponding responsibility, the Government must show that the pharmacist acted with the requisite degree of scienter. *See* 21 CFR 1306.04(a) (''[T]he person *knowingly* filling [a prescription issued not in the usual course of professional treatment] . . . shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.'') (emphasis added). DEA has also consistently interpreted the corresponding responsibility regulation such that ''[w]hen prescriptions are clearly not issued for legitimate medical purposes, a pharmacist may not intentionally close his eyes and thereby avoid [actual] knowledge of the real purpose of the prescription.'' *Bertolino,* 55 FR at 4730 (citations omitted); *see, also JM Pharmacy Group, Inc. d/b/a Pharmacia Nueva and Best Pharmacy Corp.,* 80 FR 28667, 28670–72 (2015) (applying the standard of willful blindness in assessing whether a pharmacist acted with the requisite scienter). Pursuant to their corresponding responsibility, pharmacists must exercise ''common sense and professional judgment'' when filling a prescription issued by a physician. *Bertolino,* 55 FR at 4730. When a pharmacist's suspicions are aroused by a red flag, the pharmacist must question the prescription and, if unable to resolve the red flag, refuse to fill the prescription. *Id.; Medicine Shoppe-Jonesborough,* 300 F. App'x 409, 412 (6th Cir. 2008) (''When pharmacists' suspicions are aroused as reasonable professionals, they must at least verify the prescription's propriety, and if not satisfied by the answer they must refuse to dispense.'').

In this matter, the Government did not allege that Respondent dispensed the subject prescriptions having actual knowledge that the prescriptions lacked a legitimate medical purpose. Instead, the Government alleged that Respondent violated the corresponding responsibility regulation as evidenced by it ''repeatedly distribut[ing] controlled substances pursuant to prescriptions that contained one or more unresolved red flags for diversion.'' Govt Posthearing, at 29. *See also* OSC, at 5 (''Pharmacy Place's pharmacists were willfully blind to or deliberately ignorant of the high probability that the [subject prescriptions] lacked a legitimate medical purpose. Pharmacy Place pharmacists were willfully blind to the fact that large numbers of customers seeking controlled substance prescriptions, often prescription cocktails, and residing long distances from Pharmacy Place's location and/or their respective physicians created a suspicious situation requiring increased scrutiny.'').

As partially discussed above, I agree with the ALJ's findings that the subject prescriptions presented multiple red flags including pattern prescribing, distance, cash payments, drug cocktails, high doses/quantities of high-alert controlled substances, and prescriptions lacking the patient's address or the prescriber's DEA number. Agency decisions have consistently found that prescriptions with the same red flags at issue here were so suspicious as to support a finding that the pharmacists who filled them violated the Agency's corresponding responsibility rule due to actual knowledge of, or willful blindness to, the prescriptions' illegitimacy. 21 CFR 1306.04(a); *see, e.g., Morning Star Pharmacy and Medical Supply 1,* 85 FR at 51061 (pattern prescribing; distance; cash payments; drug cocktails; high doses/quantities of high-alert controlled substances; different doctors prescribing controlled substances to the same patient; prescriptions lacking the patient's address or the prescriber's DEA number); *Pharmacy Doctors Enterprises d/b/a Zion Clinic Pharmacy,* 83 FR at 10898 (long distances; pattern prescribing; drug cocktails; cash payments; early refills); *Hills Pharmacy,* 81 FR 49,816, 49,836–39 (2016) (multiple customers filling prescriptions written by the same prescriber for the same drugs in the same quantities; customers with the same last name and street address presenting similar prescriptions on the same day; long distances; drug cocktails); *The Medicine Shoppe,* 79 FR 59504, 59507, 59512–13 (2014) (unusually large quantity of a controlled substance; pattern prescribing; irregular dosing instructions; drug cocktails); *Holiday CVS, L.L.C., d/b/a CVS Pharmacy Nos. 219 and 5195,* 77 FR 62316, 62317–22 (2012) (long distances; pattern prescribing; cash payments); *East Main Street Pharmacy,* 75 FR 66149, 66,163–65 (2010) (long distances; pattern prescribing; drug cocktails; early fills/refills; other pharmacies' refusals to fill the prescriptions). Dr. Witte credibly testified that a Texas pharmacist acting in the usual course of professional practice would have recognized these red flags and that a Texas pharmacist acting in the usual course of professional practice and fulfilling her corresponding responsibility will not fill prescriptions for controlled substances without investigating, documenting the investigation, and resolving any red flags. *E.g.,* Tr. 171–82, 195, 210–211, 216–17, 227.

PIC Igwe also admitted during her testimony that she had *actual* knowledge of some of the red flags on the prescriptions. *See, e.g.,* Tr. 546–47. For example, PIC Igwe testified that she

was aware of, but unconcerned by, the distances the patients were traveling and the large number of substantially identical prescriptions for hydrocodone and alprazolam from the clinics that prescribed the subject prescriptions because she assumed the clinics were pain management clinics and based her dispensing decisions on that assumption. Tr. 516, 537–38. In the State of Texas, pain management clinics must be certified by the state, 22 Tex. Admin. Code §§ 195.1–195.44; and the Texas regulations governing the professional responsibilities of pharmacists state that a ''prescription drug order may not be dispensed or delivered if issued by a practitioner practicing at a pain management clinic'' that is not certified. 22 Tex. Admin. Code § 291.29(e) (2011).[N] Yet, PIC Igwe testified that she never checked if the clinics were certified as pain management clinics. Tr. 537–38. Moreover, Dr. Witte testified that a Texas pharmacist should still investigate and resolve the red flags on the subject prescriptions even if they were from a specialty clinic, such as a pain management clinic. Tr. 276–277; *see also* 22 Tex. Admin. Code § 291.29(d) (2011) (''A pharmacist shall ensure that prescription drug orders for the treatment of chronic pain have been issued in accordance with the guidelines set forth by the Texas Medical Board in 22 Tex. Admin. Code § 170.3 (relating to Guidelines), prior to dispensing or delivering such prescriptions.'').

I have considered and reject Respondent's claim that it investigated and resolved the red flags on the subject prescriptions before they were filled and therefore complied with its corresponding responsibility. Exceptions, at 7–9, 11–12. In its Exceptions, Respondent claims that PIC Igwe testified that

> when she initially gets a new customer's prescription, she calls the clinic and practitioner to verify the patient is being seen by the practitioner, the clinic is treating the patient, the condition that is treated, and whether the medication prescribed for the patient is appropriate. Upon the verification by the practitioner that the patient is being treated for a condition with the prescribed drugs, the pharmacist will discuss the prescription with the customer, as appropriate. If a different pharmacy is shown on the PMP, the pharmacist will occasionally call that pharmacy to discern that pharmacist's comfort with the previous prescription.

Exceptions, at 7 (citing Tr. 477–80, 492). Respondent argues that through this process it resolved any red flags on the subject prescriptions. *Id.* at 9.

Once again, however, Respondent has partially misrepresented PIC Igwe's testimony. PIC Igwe testified that for new patients presenting a controlled substance prescription, she would always ''call the clinic and make sure that the clinic did write the prescription.'' Tr. 477–481. She did not testify that she asked about the condition being treated or whether the medication prescribed for the patient is appropriate. PIC Igwe did testify that she would check with the prescriber if she had a concern about ''the dose, the interactions or what not,'' but she did not testify that she did this for all patients presenting controlled substance prescriptions for the first time. Tr. 481.

Additionally, as I discussed *supra,* there is no documentary evidence in the administrative record that Respondent followed the protocols she described in her testimony. The Government issued a subpoena to Respondent requesting ''a copy of the complete patient profile record or any other patient record (paper or electronic) that your pharmacy maintained [for the subject patients], pursuant to the requirements of the Texas Administrative Code Title 22 § 291.33(c)(2)(A) & (C) Operational Standards'' and instructed Respondent to include ''the entire patient record that your pharmacy maintained for each individual, including, but not limited to, any and all Pharmacist comments relevant to the individuals drug therapy, including any information peculiar to the specific patient or drug as well as any consultation with the prescribing practitioner . . . .'' GX 9 (Sept. 6, 2016 Subpoena) and 10 (June 14, 2017 Subpoena). There is no documentation in any of the records Respondent provided in response to the Government's subpoenas that Respondent ever contacted a practitioner or other pharmacy regarding the subject patients the first time they visited Respondent. GX 2. In fact, the only pharmacist notes on any of the records was a ''V'' on one prescription, which PIC Igwe testified meant she had verified the prescription, but the marked prescription was not the first time Respondent had dispensed the same controlled substances to the patient. *Id.;* GX 2, at 44–55.

Respondent claims that PIC Igwe made notes in the ''Demographics'' section of the patient profiles when she had discussions with a prescriber regarding ''the dose, the interactions or what not.'' Tr. 481, 546; Exceptions, at 15. PIC Igwe, however, had no explanation for why she did not produce this claimed documentation to the Government in response to the subpoenas other than to say that it ''is not typically printed in the patient profile sheet,'' and she had no explanation for why she did not provide it as an exhibit or otherwise bring it to the administrative hearing. Tr. 481–482, 546–47. PIC Igwe had a similar response when asked why she filled controlled substance prescriptions that lacked the prescriber's DEA number, a requirement for a valid prescription. Tr. 391, 412; 21 CFR 1306.05(a); Tex. Health & Safety Code § 481.074(k). When a prescription lacks the prescriber's DEA number, Dr. Witte testified that the pharmacist should contact the prescriber and annotate the DEA number on the prescription itself or in the patient profile. Tr. 391. PIC Igwe stated that she would have the prescriber fax her a copy of his or her DEA license with the DEA number, but she did not produce those faxes in response to the Government subpoenas or bring them with her to the hearing. Tr. 535–36. In light of the allegations against Respondent and the explicit requests of the Government subpoenas, I find that it strains credulity that Respondent's claimed documentation exists, but that Respondent did not think it was necessary to provide it to the Government or at the hearing. I, therefore, do not credit Respondent's claims that it adequately investigated and resolved the red flags on the subject prescriptions.

Further, this Agency has applied, and I apply here, the ''adverse inference rule.'' *E.g., Pharmacy Doctors Enterprises d/b/a/Zion Clinic Pharmacy,* 83 FR at 10899. As the D.C. Circuit explained, ''Simply stated, the rule provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.'' *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW)* v. *Nat'l Labor Relations Bd.,* 459 F.2d 1329, 1336 (D.C. Cir. 1972). The Court reiterated this rule in *Huthnance* v. *District of Columbia,* 722 F.3d 371, 378 (D.C. Cir. 2013). According to this legal principle, Respondent's decision not to provide records gives rise to an inference that any such evidence is unfavorable to Respondent.

Based on Respondent's failure to adequately investigate and resolve the many red flags on the subject prescriptions before filling them, I find

[N] 22 Tex. Admin Code § 291.29 has subsequently been amended since the time frame relevant to this matter. The citations and quotations to the Texas Administrative Code in this decision reflect the law as it was at the time the subject prescriptions were dispensed.

that Respondent either knew the prescriptions were issued without a legitimate medical purpose or dispensed the prescriptions knowing there was a high probability that the prescriptions were issued without a legitimate medical purpose. Accordingly, I agree with the ALJ's finding in the Recommended Decision that the Government has proven by substantial evidence that Respondent filled prescriptions for controlled substances that it knew were not prescribed for legitimate medical purposes, or was willfully blind to such, in violation of its corresponding responsibility under 21 CFR 1306.04(a). I also agree with the ALJ's finding that by filling the subject prescriptions without resolving the red flags and documenting the resolution, Respondent acted outside the usual course of professional practice in violation of 21 CFR 1306.06.

ALJ's Determination That Respondent Violated 22 Tex. Amin. Code § 291.33(c)(2)

Respondent filed additional exceptions to the ALJ's determination that Respondent violated the Texas State Board of Pharmacy's Operational Standards for Community Pharmacies, 22 Tex. Admin. Code § 291.33(c)(2). The Texas regulation requires that ''a pharmacist shall, prior to or at the time of dispensing a prescription drug order, review the patient's medication record. Such review shall at a minimum identify clinically significant: . . . reasonable dose and route of administration; . . . duplication of therapy; . . . and, proper utilization, including overutilization or underutilization.'' *Id.* at § 291.33(c)(2)(A)(i). If a pharmacist identifies one of the listed ''clinically significant conditions [or] situations . . . the pharmacist shall take appropriate steps to avoid or resolve the problem including consultation with the prescribing practitioner.'' *Id.* at § 291.33(c)(2)(A)(ii). The pharmacist must also document the consultation with the prescriber including the date the pharmacist consulted with the prescriber, the name of the person with whom the pharmacist spoke, and any applicable information pertaining to the consultation. *Id.* at § 291.33(c)(2)(C).

The Government alleged, and the ALJ agreed, that Respondent violated 22 Tex. Admin. Code § 291.33(c)(2) by failing to contact prescribers and document the conversations when presented with prescriptions that raised red flags. OSC, at 2–5; *e.g.,* RD, at 77–79, 82, 87. Respondent objects to the Government's and the ALJ's interpretation of the regulation as requiring a pharmacist to consult with prescribers and document the consultation for all red flags raised by a prescription. Exceptions, at 9–10. Respondent argues that the regulation only requires a pharmacist to document the resolution of ''a clinically significant condition or drug regimen review related question'' and that not all red flags, such as geographical distance, are ''a clinically significant condition or drug regimen review question'' that require documentation under the regulation. *Id.* (citing 22 Tex. Admin. Code § 291.33(c)(2)(A)).

Neither the Government nor the Respondent elicited expert testimony or provided other evidence of what conditions or situations qualify as ''clinically significant'' such that a Texas pharmacist is required by the regulation to consult with the prescriber and document the consultation. During the hearing, Dr. Witte was asked by the ALJ if she was ''aware of whether or not Texas law requires the documentation of red flags'' and she replied ''No. I don't believe so. . . . I'm not aware if there's an actual law.'' [O] Tr. 378. Because there is insufficient evidence on the record through expert testimony or other evidence of state law that the red flags raised by the subject prescriptions are ''clinically significant'' and therefore required documentation of their resolution under Texas regulation, I cannot determine, based on the record before me, that Respondent violated 22 Tex. Admin. Code § 291.33(c). Accordingly, I have edited the Recommended Decision, which I am adopting, to remove the findings that Respondent violated 22 Tex. Admin. Code § 291.33(c).

However, my determination regarding 22 Tex. Admin. Code § 291.33(c) has no effect on the ultimate outcome of this matter. The substantial evidence on the record demonstrates that failing to resolve and document the resolution of red flags falls below the minimum standards of practice of pharmacy in the State of Texas and is, therefore, a violation of 21 CFR 1306.06. *See* Tr. 178–82, 261–62.

5. Sanction

In the RD, the ALJ found that Respondent had taken ''no responsibility for its egregious and repeated failure to fulfill its corresponding responsibility to ensure the proper prescribing and dispensing of controlled substances and other responsibilities of a registration'' and ''presented no evidence of mitigation or remediation'' RD, at 94. The ALJ, therefore, recommended that I revoke Respondent's registration and deny any pending application for renewal or modification. *Id.* Respondent filed exceptions to the ALJ's finding that Respondent did not accept responsibility for its misconduct or ''show the requisite remorse for the wrongdoing alleged against [Respondent].'' Exceptions, at 14.

Where, as here, the Government has met its *prima facie* burden of showing that the respondent's continued registration is inconsistent with the public interest due to its violations pertaining to controlled substance dispensing and recordkeeping, the burden shifts to the respondent to show why it can be entrusted with the responsibility carried by its registration. *Garret Howard Smith, M.D.,* 83 FR 18882, 18910 (2018) (citing *Samuel S. Jackson,* 72 FR 23848, 23853 (2007)). DEA cases have repeatedly found that when a registrant has committed acts inconsistent with the public interest, ''the Respondent is required not only to accept responsibility for [the established] misconduct, but also to demonstrate what corrective measures [have been] undertaken to prevent the reoccurrence of similar acts.'' *Holiday CVS,* 77 FR at 62339 (internal quotations omitted). *See, also, Hoxie* v. *Drug Enf't Admin.,* 419 F.3d 477, 483 (6th Cir. 2005); *Ronald Lynch, M.D.,* 75 FR 78745, 78749, 78754 (2010) (holding that respondent's attempts to minimize misconduct undermined acceptance of responsibility); *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008) (noting that the respondent did not acknowledge recordkeeping problems, let alone more serious violations of federal law, and concluding that revocation was warranted).

I agree with the ALJ's finding that there is nothing in the Administrative Record that suggests Respondent has accepted responsibility for its actions. At the hearing, PIC Igwe was asked, ''Do you believe you failed to ensure that the prescriptions for controlled substances which you dispensed were issued for a legitimate medical purpose?'' and PIC

[O] Dr. Witte was later asked if she was familiar with the Texas rule that ''mandates that, 'Upon identifying any clinically significant conditions, situation,' the pharmacist shall take appropriate steps to avoid or resolve the problem, including consultation with the prescribing practitioner . . .'' and also mandates that ''Prior to dispensing, any questions regarding a prescription drug order must be resolved with the prescriber, and written documentation of these discussions made and maintained.'' Tr. 411–412. Dr. Witte responded that ''Yes'' the rule sounded familiar. *Id.* Dr. Witte, however, did not provide any testimony regarding which, if any, of the red flags raised by the subject prescriptions were clinically significant conditions or situations that required consultation and documentation under the rule.

Igwe responded, ''I don't believe that I failed.'' Tr. 567. There is also nothing in Respondent's Proposed Findings or Closing Brief accepting responsibility for the controlled substances dispensed outside the usual course of professional practice and in violation of Respondent's corresponding responsibility. Respondent argues that PIC Igwe took responsibility by admitting that she provided DEA investigators with an incomplete inventory printout during the Administrative Inspection. Exceptions, at 14. I acknowledge PIC Igwe's admission to providing inaccurate documents; however, she did not accept her responsibility as a registrant to have a ''readily retrievable'' dispensing log that met the requirements of 21 CFR 1304.22(c)–repeatedly minimizing her conduct by blaming it on her computer software and failing to correct her conduct by providing DEA with an accurate and complete log within a reasonable time following the inspection.[P] *See* 21 CFR 1304.04(g) (requiring registrants to maintain specified records such that the information is readily retrievable); *Edmund Chein, M.D.,* 72 FR 6580, 6593 (2007); *Pharmacy Doctors Enterprises d/b/a Zion Clinic Pharmacy,* 83 FR at 10901, *aff'd Pharmacy Doctors Enterprises, Inc.* v. *Drug Enf't Admin.,* 789 F. App'x 724, 730 (2019) (finding that producing records as an exhibit for the hearing did not comply with the ''readily retrievable'' requirement of the regulation). Accordingly, I agree with the ALJ that Respondent has not rebutted the Government's *prima facie* case and has not accepted responsibility such that I can entrust it with a registration.

Respondent further argues that the ALJ should have weighed sanctions other than revocation, such as temporary suspension. Exceptions, at 15. While the Agency possesses the discretion to order a sanction short of revocation, I conclude that exercising that discretion here would ill-serve the public interest. Respondent has not shown that it can be entrusted with the responsibility carried by its registration—having failed to accept responsibility for its conduct, I have no assurance that Respondent would not repeat the conduct if it were to retain a registration. My predecessors have also revoked the pharmacy registrations for conduct similar to Respondent's. *See, e.g., Morning Star Pharmacy & Medical Supply 1,* 85 FR 51045 (2020); *Heavenly Care Pharmacy,* 85 FR 53402 (2020); *Pharmacy Doctors Enterprises d/b/a/ Zion Clinic Pharmacy,* 83 FR 10876 (2018).

Finally, Respondent has argued that revocation is inappropriate because the ''DEA investigators did not make a finding of Imminent Harm the day they presented the Administrative Inspection Warrant to [Respondent] back in June of 2015.'' Exceptions, at 14. Respondent has provided no citation for its argument, and I reject the claim as it lacks any basis in Agency statute, regulation, or prior decisions.

For the reasons above, I reject Respondent's contention that the ALJ's recommendation is overly broad and adopt the ALJ's recommended sanction.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration FT4134805 issued to The Pharmacy Place. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of The Pharmacy Place to renew or modify this registration. This order is effective May 21, 2021.

D. Christopher Evans,

Acting Administrator.

Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision

Charles Wm. Dorman

Administrative Law Judge

February 13, 2018

Appearances:

Frank W. Mann, Esq. *for the Government*

Lurese A. Terrell, Esq. *for the Respondent*

The Drug Enforcement Administration (''DEA'' or ''Government'') served The Pharmacy Place (''Pharmacy'' or ''Respondent'') with an Order to Show Cause (''OSC''), seeking to revoke DEA Certificate of Registration (''COR''), Number FT4134805. Administrative Law Judge Exhibit (''ALJ-'') 1. In response to the OSC, the Respondent timely requested a hearing before an Administrative Law Judge. ALJ–2. The first two sessions of the hearing in this matter were held in Dallas, Texas, from September 12–13, 2017. The Respondent's expert, however, failed to appear on either of those days. To accommodate the Respondent, the hearing was continued. On November 20, 2017, the hearing reconvened. The November 20, 2017 session of the hearing was conducted by video teleconference from the DEA Hearing Facility in Arlington, Virginia, with the parties and witnesses located at the DEA District Office in San Antonio, Texas.

At the conclusion of the hearing on November 20, 2017, the Parties were directed to submit their post-hearing briefs no later than January 10, 2018. Tr. 767. On January 8, 2018, however, the Government filed a Consent Motion for Enlargement of Time to File Post-Hearing Briefs, requesting a new filing date of January 24, 2018. ALJ–31. That motion was granted. ALJ–32. Then on January 19, 2018, the Respondent filed a similar motion, requesting an extension of time to file post-hearing briefs until February 7, 2018. ALJ–33. That motion was also granted. ALJ–34.

The issue before the Acting Administrator is whether a preponderance of the evidence supports the revocation of the Respondent's DEA Certificate of Registration (''DEA–COR''), No. FT4134805, pursuant to 21 U.S.C. 824(a)(4) and 823(f), and the denial of any pending applications for renewal or modification of such registration, pursuant to 21 U.S.C. 823(f).

This Recommended Decision is based on my consideration of the entire Administrative Record, including all of the testimony, admitted exhibits, and the oral and written arguments of counsel.

Allegations

1. Between August 2014 and May 2015, the Pharmacy filled 75 controlled substance prescriptions outside the usual course of pharmacy practice, in violation of 21 CFR 1306.06, and in contravention of the Pharmacy's ''corresponding responsibility'' under 21 CFR 1306.04(a). The Pharmacy did so by repeatedly filling controlled substance prescriptions that contained red flags of diversion and/or abuse without addressing or resolving those red flags. The Pharmacy's conduct in doing so violated 21 U.S.C. 823(f)(4); Tex. Health & Safety Code § 481.070-.075; Tex. Health & Safety Code § 481,128; and Tex. Admin. Code § 291.22(c)(2). Additionally, the Pharmacy engaged in conduct that demonstrates negative experience in its dispensing of controlled substances, in violation of 21 U.S.C. 823(f)(2). ALJ–1, at 2–3, para. 3, 6–8.

2. Between August 2014 and May 2015, the Pharmacy's pharmacists filled numerous prescriptions for highly-abused controlled substances that contained one or more of the following red flags, without resolving those red

[P] Although Respondent eventually produced Respondent Exhibit C, which PIC Igwe testified was Respondent's complete dispensing log for the controlled substance audited by DEA investigators, Tr. 467–71, the document does not comply with the requirements of 21 CFR 1304.22(c), RD, at 85–86.

flags: (1) Prescriptions written to individuals traveling long and/or unusual distances to obtain the prescriptions and/or to fill them at the Pharmacy; (2) prescriptions from individuals obtaining the same or similar combinations of controlled substances from the same small number of providers; (3) prescriptions for highly-abused ''drug cocktails'', such as hydrocodone and alprazolam; (4) prescriptions containing inappropriate and/or unusual directions for use; and (5) prescriptions for controlled substances which the customer purchased with cash. The Pharmacy's practice of filling prescriptions for controlled substances, despite unresolved red flags, included, but was not limited to, the following instances:

a. On August 1, 2014, the Pharmacy filled a prescription for 120, 10 mg tablets of hydrocodone presented by an undercover agent. The agent obtained the prescription from a practitioner in a clinic in south Dallas, more than 30 miles from the Pharmacy, which is located north of Dallas. There was no legitimate medical purpose for the prescription and the agent's address on the prescription was fictitious. The agent also sought to purchase the prescription with cash. ALJ–1, at 3–4, para. 10(a).

b. From August 2014 to May 2015, the Pharmacy dispensed prescription cocktails (hydrocodone and alprazolam) to 25 different individuals, all of whom traveled unusual paths and distances to obtain their prescriptions for these controlled substances and to have them filled at the Pharmacy. Six individuals, J.W., H.J., M.H., A.S., K.S., and M.A., traveled more than 100 miles to obtain their prescriptions, have them filled at the Pharmacy, and return home. Another 17 individuals, J.S., C.J., SW, J.W.2, S.H., R.E., R.N., R.H., B.B., S.N., I.B., M.W.2, Y.S., R.H.2, C.D., A.K., and S.B., traveled between 70–100 miles to obtain their prescriptions, have them filled at the Pharmacy, and return home. Four individuals, R.N., E.H., B.B., and T.H., traveled between 60–70 miles to obtain their prescriptions, have them filled at the Pharmacy, and return home. All of these individuals sought to purchase their prescriptions with cash. Additionally, the prescriptions issued to M.W., J.S., J.W., C.J., S.N., J.W.2, S.H., H.J., E.H., A.S., R.E., K.S., S.B., R.H., T.W., I.B., M.W.2, Y.S., M.A., R.H.2, B.B., C.D., A.K., and R.N., were facially invalid and in violation of federal and state law because they lacked the patient's address and the practitioner's DEA number. ALJ–1, at 4, para. 10(b).

c. Many of the individuals mentioned in paragraph (b), above, obtained the prescriptions from physicians who were engaged in ''pattern prescribing,'' *i.e.,* prescribing the same controlled substances in identical or substantially similar quantities. For instance, between August 19, 2014 and October 2, 2014, C.J., SW, J.W.2, S.H., and H.J. all received prescriptions for hydrocodone and alprazolam from the same physician, I.I., and they traveled long and unusual paths to obtain their prescriptions and have them filled at the Pharmacy. Then between November 14, 2014, and May 1, 2015, the Pharmacy filled 12 prescriptions for hydrocodone written by C.V. for patients A.S., R.E., K.S., G.B., M.A., R.H.2, A.K., R.N., and M.H. All of these patients traveled long and unusual paths to obtain their prescriptions and have them filled. The Pharmacy also filled prescription cocktails (hydrocodone and alprazolam), written by C.V. for patients M.A., R.H.2, and A.K. on April 17, 21, and May 1, 2015, respectively. Additionally, between January 13, 2015 and May 11, 2015, the Pharmacy dispensed controlled substances pursuant to ''pattern-style'' prescriptions issued by NE On 14 different occasions, the Pharmacy dispensed 90, 10 mg tablets of hydrocodone to 11 different customers. On 8 different occasions, the Pharmacy filled identical prescription cocktails written by NE consisting of 90, 10 mg tablets of hydrocodone and 60, 2 mg tablets of alprazolam. Identical prescription cocktails were dispensed to both I.B. and T.W. on April 10, 2015, and to B.B. and C.D. on April 23, 2015. ALJ–1, at 4, para. 10(c).

d. On April 17, 2015, the Pharmacy filled a prescription for hydrocodone to G.B., who had traveled an unusual path and distance of more than 75 miles to obtain her prescription and have it filled at the Pharmacy, and then return home. ALJ–1, at 5, para. 10(d).

3. A DEA audit of the Pharmacy's 10 mg hydrocodone, covering the period of September 25, 2013 through June 18, 2015, revealed a shortage of 47,183 dosage units. Because the Controlled Substances Act requires the maintenance of ''complete and accurate'' inventories, as well as a ''complete accurate record of each substance . . . received, sold, delivered or otherwise disposed of,'' this shortage violated 21 U.S.C. 827(a). ALJ–1, at 5, para. 13.

Witnesses

I. The Government's Witnesses

The Government presented its case through the testimony of four witnesses and a sworn declaration. The Government's first witness was retired Diversion Investigator 1 (hereinafter, DI 1). Tr. 25–146. DI 1 served as a DI with the DEA for 14 years and was assigned to the Dallas, Texas office since June 2008. Tr. 26, 78. As a DI, DI 1 conducted scheduled regulatory investigations, all of which required that he conduct an audit of controlled substances. Tr. 78. DI 1 estimated that he had conducted about 70 audits in his career. Tr. 80.

DI 1 was part of a DEA team that conducted an Administrative Inspection Warrant (''AIW'') of the Pharmacy on June 18, 2015. Tr. 26–27, 60, 451. During that inspection, the DEA obtained documents from the Pharmacy, including: Prescriptions; copies of order forms, invoices, and packing forms concerning the Pharmacy's receipt of controlled substances; and the Pharmacy's dispensing history of hydrocodone. Tr. 35–36, 77–78.

While at the Pharmacy on June 18, 2015, DI 1 conducted a closing inventory of the Pharmacy's hydrocodone, during which all of the medication in the Pharmacy was examined. Tr. 47, 130, 132. That inventory revealed that the Pharmacy was short more than 47,000 tablets of hydrocodone. Tr. 87.

The primary purpose of DI 1's testimony was to lay the foundation for the introduction of Government Exhibits 1–12. During his testimony, all of those exhibits were admitted into evidence. Tr. 3–4. DI 1 also testified that he asked the Pharmacy to provide the DEA with a ''complete history'' of its dispensing of hydrocodone, and that in response to that request the Pharmacy provided the DEA with Government Exhibit 6. Tr. 36–37.

DI 1's testimony was presented in a professional, candid and straightforward manner. In addition, DI 1's testimony was sufficiently objective, detailed, plausible, and internally consistent. Therefore, I merit it as credible in this Recommended Decision.

The Government next presented the testimony of its expert, Dr. Amy Witte, Pharm.D. (''Dr. Witte''). Tr. 150–345, 355–425, 763. Government Exhibit 13 is a copy of Dr. Witte's curriculum vitae. Tr. 153–55. Dr. Witte holds a Doctor of Pharmacy degree from the University of Texas at Austin. Tr. 152. Dr. Witte has been a licensed pharmacist in Texas since 2004. Tr. 152–53. Dr. Witte is currently employed with the University of the Incarnate Word, Feik School of Pharmacy, Department of Pharmacy Practice, in San Antonio, Texas, as a full professor, where she has taught Federal and Texas pharmacy law. Tr. 150, 157–58. She is currently the main professor in the endocrine module, with a

specialty in diabetes and thyroid disorders. Tr. 151, 163. She is also currently employed as a clinical pharmacist with the Texas Veterans Health Care System. Tr. 150, 156. Dr. Witte worked as a pharmacist for Walgreens from 2004 until 2011. Tr. 157. Dr. Witte testified that she was certified as an expert witness with the DEA in 2013. Tr. 156. After Respondent's counsel conducted voir dire examination of Dr. Witte, Tr. 158–67, she objected to Dr. Witte being accepted as an expert because Dr. Witte's qualifications were ''all academic.'' Tr. 167–69. The Respondent's objection was overruled and Dr. Witte was then accepted as an ''[e]xpert in the field of pharmacy in the state of Texas.'' Tr. 169.

Dr. Witte presented testimony concerning what a pharmacist is required to do before filling a prescription for a controlled substance in Texas. Tr. 169–71, 178–80, 192, 210. In addition, she testified about circumstances that may give rise to a red flag, which a pharmacist would need to resolve before filling a prescription for a controlled substance. Tr. 171–74, 177–80, 189, 191–93, 244, 281, 321, 323. She also provided testimony based upon her review of Government Exhibits 2, 3, and 12, and rendered her opinion as to whether filling various prescriptions in those exhibits fell below the minimal standard of the practice of pharmacy in Texas, whether filling those prescriptions was within the usual course of the practice of pharmacy in Texas, and whether the pharmacist who filled the prescriptions had satisfied the corresponding responsibility to ensure that only prescriptions issued for a legitimate medical purpose were filled. *See, e.g.,* Tr. 211, 217, 227–28, 236–37, 244–45.

Having closely listened to Dr. Witte's testimony, and having closely reviewed the transcript of her testimony, I find that it was sufficiently objective, detailed, plausible, and internally consistent to be considered credible in this Recommended Decision.

The Government's third witness was DI 2. Tr. 426–440. She testified that she has been a DI with the DEA since 2005. Tr. 426. To become a DI, DI 2 received 12 weeks of training at the DEA Training Academy concerning, ''diversion investigations, pharmacology of drugs, regulatory audits, administrative inspection warrants, . . . and criminal cases.'' Tr. 427. DI 2 is currently assigned to DEA's tactical diversion squad in Dallas, Texas, where she primarily focuses on criminal investigations. Tr. 427. Prior to becoming a DI, DI 2 was an adjunct professor in NASA's aerospace education program at Oklahoma State University. Tr. 427.

DI 2 provided testimony concerning her involvement of DEA's investigation of the Pharmacy, indicating that the Pharmacy had come to DEA's attention as part of a larger investigation into pill mills. Tr. 428. DI 2 was the case agent for the larger investigation. Tr. 428. DI 2 noted that the Pharmacy stood out to her because it was located quite a distance from the offices of the pill mill doctors whose prescriptions the Respondent was filling. Tr. 430. DI 2 participated in the execution of the AIW. Tr. 430.

DI 2's testimony was presented in a professional, candid, and straightforward manner. In addition, DI 2's testimony was sufficiently objective, detailed, plausible, and internally consistent. Therefore, I merit it as credible in this Recommended Decision.

Pursuant to an agreement with the Respondent, the Government did not call Ms. Ijeoma Igwe, the Pharmacy's manager and pharmacist-in-charge, as a witness so long as the Respondent called her to testify. Thus, an assessment of her credibility is contained under the discussion of the Respondent's witnesses.

The Government also presented the sworn declaration of UC 1. GE–11. UC 1 presented to the Pharmacy as an undercover agent using the name ''M.W.'' Tr. 41; GE–10, at 3; GE–11, at 2. Prior to the hearing, the Respondent filed an objection ''to the affidavit testimony of [UC 1] because it deprives the Respondent of its cross examination of said witness.'' ALJ–15, at 2. The Respondent's objection to the use of the sworn declaration of UC 1 was overruled in a prehearing Order issued on August 29, 2017. ALJ–18, at 1–2. When the Government introduced UC 1's declaration at the hearing, the Respondent again objected, and again that objection was overruled. Tr. 31–32. In admitting the declaration, I noted that it was a hearsay document and Respondent's lack of opportunity to cross examine UC 1 would be considered in determining what weight to give to the Exhibit. Tr. 32; *see* 21 CFR 1316.58(b). Having examined the sworn declaration of UC 1, I find that its contents are consistent with other evidence of record. For example, UC 1's description of the operation of the Redbird Medical Clinic is consistent with the testimony of DI 2. Tr. 120, 428–31, 435–37. Also, the declaration's statements that: UC 1 received a prescription from Nurse L.R. at the Redbird Medical Clinic for 120 tablets of hydrocodone; the prescription was faxed to the Pharmacy; he was waited on by a female employee at the Pharmacy when he arrived; and he paid $150 for the hydrocodone, are consistent with the content of Government Exhibit 2, at 1, and the fact that the prescription was filled by Ms. Igwe. Tr. 577–78. Finally, none of the evidence presented by the Respondent contradicts the content of the sworn declaration of UC 1. Accordingly, I fully credit the sworn declaration of UC 1.

II. The Respondent's Witnesses

The Respondent presented its case through the testimony of two witnesses. The first witness the Respondent called was Ms. Ijeoma Igwe. Tr. 442–607. Ms. Igwe obtained her pharmacy degree at the University of Liverpool in England and she worked as a clinical pharmacist in England. Tr. 445. Ms. Igwe immigrated to the United States in 2005. Tr. 445, 605–06. Ms. Igwe began her pharmacy career in the United States serving an internship for 8 to 10 months with CVS Pharmacies in Texas. Tr. 445, 606. Ms. Igwe then worked as a pharmacist for Target, filling in where needed at different Target stores. Tr. 446. Ms. Igwe then became interested in compounding pharmacy, which entails making custom medications, and worked for a compounding pharmacy for three years until April 2013. Tr. 447–48. Then in September 2013, Ms. Igwe opened The Pharmacy Place. Tr. 448.

Ms. Igwe presented testimony about the character and operation of the Pharmacy. Tr. 448–51. She also testified about being present at the Pharmacy when the DEA executed the AIW on June 18, 2015, and her interaction with the DEA investigators. Tr. 451–54, 456–58, 465–67. Ms. Igwe described herself as being perplexed, surprised, and shocked during the execution of the AIW, and that she did her best to assist the investigators. Tr. 452. Ms. Igwe testified that after the DEA investigators left the Pharmacy she discovered that she had not provided them a complete record of her hydrocodone dispensing history, attributing her error to a lack of familiarity with the software program. Tr. 466–67. Working with her ''software people,'' Ms. Igwe was able to print out another dispensing log, which she sent to her attorney. Tr. 467–71, 548.

Ms. Igwe testified concerning her standard procedures she used when filling prescriptions. Tr. 477–81. Those procedures included calling a prescriber to verify a prescription for a new patient, checking the prescription monitoring program (''PMP''), as well as checking the dosing and normal things a pharmacist looks for. Tr. 477–84, 503, 517, 586, 590, 607. She also testified

that she would sometimes put a ''V'' on prescriptions to indicate that she had verified them. Tr. 482, 557. She also testified that she would make notes in the ''Demographics'' section of the patient profile to resolve a red flag if she had a discussion with a prescriber about a ''clinical'' matter. Tr. 481, 585.

Ms. Igwe testified that the Pharmacy receives prescriptions from other providers similar to the prescriptions at issue in this case. Tr. 518–22. She noted that there was an orthopedist downstairs from the Pharmacy and he prescribes hydrocodone which she fills, and that there is one customer who gets 150 tablets a month and another who gets 180 tablets a month. Tr. 476–77, 518, 522. She further testified that because she gets other similar prescriptions she believed the prescriptions at issue in this case were in line with what other patients were receiving from other clinics. Tr. 522.

Ms. Igwe also testified that she was not concerned about the distance a customer traveled if they lived in the Dallas-Fort Worth metroplex. Tr. 493–94. Later she testified that distance would be a concern if she did not know the source of the prescription. Tr. 578. She also testified that she did not know where Everman, Texas, was located, yet she filled multiple prescriptions for patient A.S., who lived in Everman. Tr. 579; GE–2, at 22–33. Ms. Igwe also testified that she would not fill a prescription if the address on the prescription did not match the address on the customer's driver's license. Tr. 539.

While Ms. Igwe seemed confident while she testified, and her testimony appeared sincere and candid, there are several issues with her testimony that detract from its overall believability. First, she testified that she would call the prescriber the first time a patient presented with a prescription for a controlled substance and that she would sometimes mark the prescription with a ''V'' to indicate that she had verified the prescription. Tr. 477, 482, 557. The documentary evidence, however, does not support that testimony. For example, there are 68 prescriptions contained in Government Exhibit 2, but only one is marked with a ''V.'' [1] GE–2, at 49. Furthermore, the alprazolam prescription marked with a ''V'' for patient K.S. is dated February 26, 2015. *Id.* K.S., however, had filled prescriptions for both alprazolam, as well as hydrocodone, at the Pharmacy six times before Ms. Igwe marked the February 26, 2015 prescription with a ''V.'' GE–2, at 44–46, 53–55. In addition, Government Exhibit 6 establishes that Dr. C.V. wrote many prescriptions for hydrocodone, but in spite of all those prescriptions, Ms. Igwe never had a conversation with Dr. C.V. about a patient. Tr. 561. In fact, the only time Ms. Igwe talked with Dr. C.V. was when he called her about a non-patient matter. Tr. 561.

Second, Ms. Igwe testified that she did not find the prescriptions at issue in this case to be out of line with other prescriptions she filled. Tr. 522. She also testified that she filled prescriptions for an orthopedist, who performed surgery downstairs from the Pharmacy, and that the orthopedist prescribed hydrocodone. Tr. 476, 518. She further testified that she had one customer who took 150 hydrocodone tablets a month and another who took 180. Tr. 518, 522. While the documentary evidence does not necessarily contradict that testimony, the documentary evidence clearly does not support Ms. Igwe's testimony. For example, Government Exhibit 6 details 929 prescriptions that the Pharmacy filled for hydrocodone. All but 25 of those prescriptions were written by the same small group of prescribers, whose prescriptions are identified on the patient profiles contained in Government Exhibit 2. Further examination of Government Exhibit 6 fails to reveal any patient with a prescription for 150 or 180 tablets of hydrocodone. In addition, there is only one prescription written by a prescriber, Dr. V.K., with the same address as the Pharmacy; she wrote a prescription for 30 tablets of hydrocodone. GE–6, at 13.

Third, Ms. Igwe's explanation about why she was not concerned about the delay between the hydrocodone that was prescribed for pain and the date the patient picked it up with respect to Government Exhibit 2, at 1, makes little sense. She explained that a patient with chronic pain might possibly have pain medicine they had received before to tide them over until they could pick up a new prescription. Tr. 564–65. She also testified that she always checked the PMP before filling prescriptions. Tr. 479. The prescription on page 1 of Government Exhibit 2 was for an undercover agent using a fake name. Had Ms. Igwe checked the PMP for that patient, she would not have found any prior prescriptions, eliminating the possibility that the patient had leftover medication to tide him over. Clearly, as Government counsel suggested, Ms. Igwe was simply speculating about reasons for the delay. Tr. 545, 565; *see also* ALJ–35, at 24.

When initially explaining the ''Rx Date'' on the entries in Government Exhibit 6, Ms. Igwe testified that all of the hydrocodone prescriptions identified in Government Exhibit 6 were electronic prescriptions and the ''Rx Date'' was the date the prescriptions were received. Tr. 533, 560, 562. She backtracked from that position when confronted by the fact that the prescription at Government Exhibit 2, at 1, was a handwritten prescription and it was also recorded on page 8 of Government Exhibit 6. Tr. 562, 580. Other handwritten prescriptions contained in Government Exhibit 2 are also recorded in Government Exhibit 6. *Compare* GE–2, at 16 *with* GE–6, at 28; *compare* GE–2, at 28 *with* GE–6, at 65. At the hearing, my impression was that Ms. Igwe was downplaying the significance of the ''Rx Date,'' because to do so decreased the likelihood that she would have observed one prescription after another for hydrocodone coming into the Pharmacy, written by the same doctors and for the same strengths and normally for the same quantity.

Finally, Ms. Igwe testified that when she received faxed prescriptions from medical clinics, the clinics also faxed additional information such as the patient's address and identification on separate pages. Tr. 488–89, 539–40. Ms. Igwe also testified that when she would resolve red flags concerning clinical matters about a prescription she would make notes in the demographics section of the patient profile. Tr. 481, 546. She further explained that these notes did not print out when she printed the patient profile. Tr. 482. When asked why she did not bring copies of the materials the medical clinics had faxed to her, or copies of her notes that showed she had resolved red flags, Ms. Igwe testified that she did not think she needed to or that she did not think it was necessary. Tr. 547. This explanation makes no sense in light of the allegations against her and it is not credible. Ms. Igwe's credibility on this issue is further undermined by the fact that this type of information was sought by the investigators during the execution of the AIW and by the September 6, 2016 subpoena. Tr. 78, 356–57; GE–9.

In light of the aspects of Ms. Igwe's testimony outlined above, and those are but a few of the examples that could be given, I find that her testimony merits only limited belief. Thus, where Ms. Igwe's testimony conflicts with the testimony of other witnesses, or with the documentary evidence of record, I credit that other testimony and those documents over Ms. Igwe's testimony.

[1] None of the prescriptions submitted by the Respondent in Respondent Exhibit H are marked with a ''V.''

The Respondent's second witness was Mr. Robert Litman. Tr. 623–762. His curriculum vitae is contained in Respondent's Exhibit B. Tr. 632. Mr. Litman testified concerning his background education and work history. Tr. 624–631, 652–655. Mr. Litman earned his pharmacy degree from the University of Florida in 1981 and he has worked as a pharmacist since then. Tr. 624. Mr. Litman has managed about a dozen small pharmacies over the past 36 years. Tr. 624. He is currently the Director of Consultant and Management Services with Ultimed Health Advisors, dealing with, among other things, the ''management of retail pharmacy operations.'' Tr. 622; RE–B, at 1. Mr. Litman is also a Clinical Assistant Professor of Pharmacy Practice in geriatric medicine at Nova Southeastern University, Ohio State University, and Palm Beach Atlantic University. Tr. 641, 644; RE–B, at 2. Mr. Litman has previously testified as an expert witness, but only in Florida. Tr. 623, 638–39. Mr. Litman currently works a couple of days per month as a retail pharmacist. Tr. 650, 652. Following voir dire by Government counsel, Mr. Litman was accepted as an expert witness, without objection, in the area of ''retail pharmacy practices.'' Tr. 656.

Mr. Litman presented his testimony in a direct, straightforward, and candid manner. Mr. Litman had a professional demeanor while he testified. During voir dire of Mr. Litman, the Government noted that Mr. Litman's expert testimony was evaluated by another Administrative Law Judge (''ALJ'') in an earlier case before the DEA. Tr. 650–52; *see Howard N. Robinson, M.D.,* 79 FR 19356 (2014). While the ALJ in that case found some portions of a report that Mr. Litman prepared to be ''peculiar,'' the ALJ credited his testimony, describing it as ''sufficiently detailed, authoritative and candid.'' Tr. 652; *Robinson, M.D.,* 79 FR at 19364–65. While I too find portions of Mr. Litman's testimony to be a bit peculiar or inconsistent, in general I find that he presented testimony that was ''sufficiently detailed, authoritative, and candid'' to be generally credited in this decision.

Some portions of Mr. Litman's testimony that were peculiar or inconsistent concerned the following areas: Distance that customers traveled; a lack of concern for pattern prescribing; drug cocktails; and a delay between the date a prescription was written to treat pain and the date the customer picked up the prescription. Mr. Litman was not particularly concerned about the distance a customer traveled to fill a prescription. Tr. 726–30. While he did testify that as a pharmacist working in Miami, he would find it a little leery if a customer traveled from South Carolina to fill a prescription, he also testified that there was no problem if the customers were from in-state. Tr. 730. Mr. Litman's approach seemingly ignores the fact that portions of South Carolina are closer to Miami than is, ''in-state'', Pensacola, Florida. Further, and of greater significance, Mr. Litman was not familiar with DEA case law concerning pharmacy customers driving long distances, or of the Texas requirement for pharmacists to consider distance. Tr. 727. Thus, without an understanding of the law, it is understandable why Mr. Litman has little concern for the distance a customer travels to obtain a prescription and have it filled.

Mr. Litman also testified that he would not be concerned about pattern prescribing when filling 23 successive prescriptions for hydrocodone from the same provider. Tr. 747–49. Nevertheless, Mr. Litman testified that he would call the prescriber every time he was presented with a new prescription for hydrocodone. Tr. 747, 749. Mr. Litman also testified that he would not be concerned about pattern prescribing if he had spoken with the doctor and was comfortable that there was a legitimate doctor-patient relationship. Tr. 748.

Mr. Litman's testimony concerning drug cocktails was difficult to follow. Mr. Litman first acknowledged that a customer presenting prescriptions for hydrocodone and alprazolam would be presenting prescriptions for a drug cocktail. Tr. 740. Mr. Litman further testified that he would only be concerned about filling such prescriptions if the customer was diverting or abusing the controlled substances. Tr. 741. Mr. Litman, however, could not explain how a pharmacist would know if the customer was diverting or abusing the controlled substances. Tr. 741. He later explained that the combination of these two drugs could be a drug cocktail depending on the reason the patient received the prescription. Tr. 741–42. Mr. Litman's explanation ignores the fact that the only way the pharmacist could make an informed decision as to whether the prescriptions had been issued for a legitimate medical purpose would be to call the prescriber. Coming full circle, Mr. Litman then testified that when confronted with prescriptions for hydrocodone and alprazolam he would call the prescriber to ''make sure that [the prescriber] wrote those prescriptions, that they were valid prescriptions for a patient, and there was a doctor-patient relationship.'' Tr. 743.

Mr. Litman was also asked whether he would have any concern where a patient delayed picking up a prescription written for pain, and he said it would not concern him at all. Tr. 749–50. When asked why he would have no concern, not surprisingly he gave the same speculative answer given by Ms. Igwe—he would assume the patient had some medication left over from a prior prescription or the patient had obtained medication samples directly from the prescriber. Tr. 750–52. The answer is not surprising because Mr. Litman was able to read Ms. Igwe's testimony before he testified. Tr. 683. Although this delay would be of no concern to Mr. Litman, he did testify that he would call the doctor to ''let him know that the patient hadn't filled [the prescription] for a week, and [ask] if there was an issue.'' Tr. 751. Mr. Litman's explanation suggests that he would be concerned about a delay in picking up a prescription for pain medication, even though he would not acknowledge it.

These four examples of areas in which Mr. Litman's testimony was peculiar or inconsistent are not all-inclusive. Thus, while I find Mr. Litman's testimony to be generally worthy of belief, where it conflicts with Dr. Witte's testimony, or laws, regulations, or DEA precedent, I give greater weight to her testimony and to legal authority.

The Facts

I. Stipulations of Fact

The parties agree to 45 stipulations (''Stip.''), which are accepted as facts in these proceedings:

1. Respondent Pharmacy Place is registered with DEA as a retail pharmacy authorized to handle controlled substances in Schedules II–V under DEA COR number FT4134805 at 4031 W. Plano Parkway, Suite 211, Plano, Texas 75093. DEA COR FT4134805 expires on November 30, 2019.

2. The pharmacy is owned by HOIC Enterprises, LLC, a Texas limited liability company, and does business as The Pharmacy Place. It is operated and managed by Harrison and Ijeoma Igwe.

3. According to the Texas Office of the Comptroller, Harrison Igwe and Ijeoma Igwe are listed as managers of HOIC Enterprises LLC.

4. According to the Texas Board of Pharmacy, The Pharmacy Place is a licensed community pharmacy in the State of Texas, license no. 28650.

5. According to the Texas Board of Pharmacy, Ijeoma Igwe is a licensed pharmacist (License No. 44785) in the

State of Texas and is the Pharmacist-in-Charge (''PIC'') of The Pharmacy Place.

6. Norco is a brand name of a combination medication containing the Schedule II generic drug hydrocodone.

7. Xanax is the brand name of the Schedule IV generic drug alprazolam.

8. Promethazine with codeine is a Schedule V controlled substance.

9. Government Exhibit (''GE'') 3, pp. 1–5, is a Mapquest printout showing the path and distance from M.A.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. C.V. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) M.A.'s residence. (107 miles total).

10. Government Exhibit (''GE'') 3, pp. 6–10, is a Mapquest printout showing the path and distance from B.B.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. NE on 201 Billings Street in Arlington, Texas (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) B.B.'s residence. (80 miles total).

11. Government Exhibit (''GE'') 3, pp. 11–15, is a Mapquest printout showing the path and distance from B.B.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. NE on 2617 Bolton Boone Drive in DeSoto, Texas (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) B.B.'s residence. (66 miles total).

12. Government Exhibit (''GE'') 3, pp. 16–19, is a Mapquest printout showing the path and distance from G.B.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. C.V. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) G.B.'s residence. (55 miles total).

13. Government Exhibit (''GE'') 3, pp. 20–24, is a Mapquest printout showing the path and distance from I.B.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. NE (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) I.B.'s residence. (79 miles total).

14. Government Exhibit (''GE'') 3, pp. 25–29, is a Mapquest printout showing the path and distance from S.B.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. NE (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) S.B.'s residence. (79 miles total).

15. Government Exhibit (''GE'') 3, pp. 30–34, is a Mapquest printout showing the path and distance from C.D.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. NE (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) C.D.'s residence. (81 miles total).

16. Government Exhibit (''GE'') 3, pp. 35–39, is a Mapquest printout showing the path and distance from R.E.'s residence (as listed in Respondent's Patient Profile) to (1) C.Z., S.G., and/or L.R. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) R.E.'s residence. (86 miles total).

17. Government Exhibit (''GE'') 3, pp. 40–44, is a Mapquest printout showing the path and distance from R.E.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. C.V. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) R.E.'s residence. (94 miles total).

18. Government Exhibit (''GE'') 3, pp. 45–48, is a Mapquest printout showing the path and distance from E.H's residence (as listed in Respondent's Patient Profile) to (1) I.I. and/or Dr. A.Q. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) E.H's residence. (68 miles total).

19. Government Exhibit (''GE'') 3, pp. 49–53, is a Mapquest printout showing the path and distance from M.H.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. NE (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) M.H.'s residence. (116 miles total).

20. Government Exhibit (''GE'') 3, pp. 54–58, is a Mapquest printout showing the path and distance from M.H.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. C.V. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) M.H.'s residence. (121 miles total).

21. Government Exhibit (''GE'') 3, pp. 59–63, is a Mapquest printout showing the path and distance from R.H.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. A.Q. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) R.H.'s residence. (79 miles total).

22. Government Exhibit (''GE'') 3, pp. 64–68, is a Mapquest printout showing the path and distance from R.H.'s residence (as listed in Respondent's Patient Profile) to (1) J.W. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) R.H.'s residence. (76 miles total).

23. Government Exhibit (''GE'') 3, pp. 69–73, is a Mapquest printout showing the path and distance from R.H.2's residence (as listed in Respondent's Patient Profile) to (1) Dr. C.V. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) R.H.2's residence. (92 miles total).

24. Government Exhibit (''GE'') 3, pp. 74–78, is a Mapquest printout showing the path and distance from S.H.'s residence (as listed in Respondent's Patient Profile) to (1) I.I. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) S.H.'s residence. (76 miles total).

25. Government Exhibit (''GE'') 3, pp. 79–83, is a Mapquest printout showing the path and distance from C.J.'s residence (as listed in Respondent's Patient Profile) to (1) I.I. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) C.J.'s residence. (81 miles total).

26. Government Exhibit (''GE'') 3, pp. 84–88, is a Mapquest printout showing the path and distance from H.J.'s residence (as listed in Respondent's Patient Profile) to (1) I.I. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) H.J.'s residence. (105 miles total).

27. Government Exhibit (''GE'') 3, pp. 89–93, is a Mapquest printout showing the path and distance from A.K.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. C.V. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) A.K.'s residence. (81 miles total).

28. Government Exhibit (''GE'') 3, pp. 94–98, is a Mapquest printout showing the path and distance from R.N.'s residence (as listed in Respondent's Patient Profile) to (1) the Billings Street address in Arlington, Texas, where C.Z., S.G., Dr. NE and/or L.R. are listed as practicing according to Respondent's Patient Profile) to (2) Respondent's address to (3) R.N.'s residence. (95 miles total).

29. Government Exhibit (''GE'') 3, pp. 99–103, is a Mapquest printout showing the path and distance from R.N.'s residence (as listed in Respondent's Patient Profile) to (1) the Bolton Boone Drive address in DeSoto, Texas, where Dr. NE is listed as practicing according to Respondent's Patient Profile) to (2) Respondent's address to (3) R.N.'s residence. (78 miles total).

30. Government Exhibit (''GE'') 3, pp. 104–108, is a Mapquest printout showing the path and distance from R.N.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. C.V. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) R.N.'s residence. (64 miles total).

31. Government Exhibit (''GE'') 3, pp.109–112, is a Mapquest printout showing the path and distance from S.N.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. NE (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) S.N.'s residence. (81 miles total).

32. Government Exhibit (''GE'') 3, pp.113–117, is a Mapquest printout showing the path and distance from A.S.'s residence (as listed in Respondent's Patient Profile) to (1) C.Z., Dr. NE, L.R., and/or S.G. (as listed in

Respondent's Patient Profile) to (2) Respondent's address to (3) A.S's residence. (104 miles total).

33. Government Exhibit (''GE'') 3, pp.118–122, is a Mapquest printout showing the path and distance from A.S.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. C.V. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) A.S.'s residence. (111 miles total).

34. Government Exhibit (''GE'') 3, pp.123–127, is a Mapquest printout showing the path and distance from J.S.'s residence (as listed in Respondent's Patient Profile) to (1) L.R. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) J.S.'s residence. (80 miles total).

35. Government Exhibit (''GE'') 3, pp.128–133, is a Mapquest printout showing the path and distance from K.S.'s residence (as listed in Respondent's Patient Profile) to (1) C.Z., Dr. NE, S.G., and/or L.R. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) K.S.'s residence. (101 miles total).

36. Government Exhibit (''GE'') 3, pp.134–139, is a Mapquest printout showing the path and distance from K.S.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. C.V. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) K.S.'s residence. (109 miles total).

37. Government Exhibit (''GE'') 3, pp.140–144, is a Mapquest printout showing the path and distance from Y.S.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. NE on Billings Street in Arlington, Texas, (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) Y.S.'s residence. (97 miles total).

38. Government Exhibit (''GE'') 3, pp.145–150, is a Mapquest printout showing the path and distance from Y.S.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. NE on Bolton Boone Drive in DeSoto, Texas (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) Y.S.'s residence. (79 miles total).

39. Government Exhibit (''GE'') 3, pp.151–156, is a Mapquest printout showing the path and distance from J.W.'s residence (as listed in Respondent's Patient Profile) to (1) S.G. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) J.W.'s residence. (108 miles total).

40. Government Exhibit (''GE'') 3, pp.157–161, is a Mapquest printout showing the path and distance from J.W.2's residence (as listed in Respondent's Patient Profile) to (1) I.I. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) J.W.2's residence. (98 miles total).

41. Government Exhibit (''GE'') 3, pp.162–166, is a Mapquest printout showing the path and distance from M.W.2's residence (as listed in Respondent's Patient Profile) to (1) L.R. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) M.W.2's residence. (97 miles total).

42. Government Exhibit (''GE'') 3, pp.167–171, is a Mapquest printout showing the path and distance from M.W.2's residence (as listed in Respondent's Patient Profile) to (1) Dr. NE (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) M.W.2's residence. (79 miles total).

43. Government Exhibit (''GE'') 3, pp.172–176, is a Mapquest printout showing the path and distance from SW's residence (as listed in Respondent's Patient Profile) to (1) I.I. (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) SW2's residence. (99 miles total).

44. Government Exhibit (''GE'') 3, pp.177–181, is a Mapquest printout showing the path and distance from T.W.'s residence (as listed in Respondent's Patient Profile) to (1) Dr. NE (as listed in Respondent's Patient Profile) to (2) Respondent's address to (3) T.W.'s residence. (66 miles total).

45. Government Exhibit (''GE'') 12, pp.1–5, is a Mapquest printout showing the path and distance from 5944 Callaston Lane, Ft. Worth, Texas to (1) Redbird Medical Clinic (3107 Camp Wisdom Road, Dallas, Texas) to (2) Respondent's location to (3) 5944 Callaston Lane, Ft. Worth, Texas.

II. Findings of Fact

The factual findings below are based on a preponderance of the evidence, including the detailed, credible, and competent testimony of the aforementioned witnesses, the exhibits entered into evidence, and the record before me.

The Pharmacy

1. Ms. Ijeoma Igwe (''Ms. Igwe'') graduated from pharmacy school at the University of Liverpool in England in 1989. Tr. 445, 605–06. After graduating, she worked as a clinical pharmacist in England until she relocated to the United States in 2005. *Id.* at 445.

2. Ms. Igwe began practicing pharmacy in Texas in 2006 by working as a pharmacy intern with CVS for 8–10 months. *Id.* at 445–46, 606. She then worked as a full-time floater pharmacist at various Target stores. *Id.* at 446–47. She eventually left Target and worked for a rehabilitation hospital for three months. *Id.* at 447. She then worked as a pharmacist at Albertson's. *Id.* at 447.

3. Ms. Igwe is a licensed Texas pharmacist. *Id.* at 516.

4. While working at Albertson's, Ms. Igwe developed an interest in compounding pharmacy. Tr. 447. She then worked at a compounding pharmacy for approximately three years until April 2013. *Id.* at 447.

5. Ms. Igwe opened the Pharmacy in September 2013. *Id.* at 448.

6. The Pharmacy is owned by HOIC Enterprises, LLC, and Ms. Igwe is the pharmacist-in-charge of the Pharmacy. *Id.* at 35.

7. The Pharmacy is a small pharmacy. *Id.* at 433, 449. When the DEA inspected the Pharmacy, the Pharmacy was filling approximately 60–100 prescriptions a day. *Id.* at 474, 696–97.

8. Ms. Igwe is the only pharmacist who works at the Pharmacy. *Id.* at 449, 481–82, 577.

9. Because Ms. Igwe is the only pharmacist at the Pharmacy, she filled all the prescriptions in Government Exhibit 2. *Id.* at 577–78.

10. Most of the Pharmacy's prescriptions are electronically received through ''e-script.'' *Id.* at 487–88. Some prescriptions are sent by fax. *Id.* at 488.

11. The Pharmacy began seeing prescriptions from Redbird Medical Clinic, and other clinics under investigation, around January or February 2014. *Id.* at 475.

The Inspection

12. The Pharmacy came to DEA's attention during a larger investigation of ''pill mill'' clinics in the Dallas area in 2013. *Id.* at 428. The DEA went to the Pharmacy because it had been identified as a pharmacy that was filling prescriptions issued by ''pill mill'' clinics. *Id.* at 63–64, 430.

13. The DEA suspected that some prescriptions the Pharmacy filled were not issued for legitimate medical purposes because they were issued from a ''pill mill'' clinic. *Id.* at 120. The suspected ''pill mill'' clinic had a security guard in the parking lot who ushered people into the clinic. *Id.* at 120.

14. At least two doctors and four nurse practitioners involved in the DEA's investigation of Dallas-area pill mills were indicted. *Id.* at 437–38. One of the doctors pled guilty and was sentenced. *Id.* at 437. Additionally, two pharmacists were indicted, pled guilty, and sentenced. *Id.* at 438.

15. On June 18, 2015, Diversion Investigators, DI 1and DI 2 were part of the DEA investigative team that executed an Administrative Inspection

Warrant (''AIW'' or ''Inspection'') at the Pharmacy. *Id.* at 27, 60, 431, 451.

16. During the inspection, Ms. Igwe was the only employee working at the Pharmacy. *Id.* at 141–42.

17. During the inspection, DEA investigators discussed their concerns about the Pharmacy with Ms. Igwe. *Id.* at 431–32.

18. During the inspection, DEA asked Ms. Igwe for any documentation she had to show that the Pharmacy had verified the prescriptions it had filled. *Id.* at 78, 431–32.

19. DEA investigators also requested that the Pharmacy turn over all of the notes it had concerning the resolution of red flags. *Id.* at 356–57, 431–32; GE–9.

20. Ms. Igwe told investigators that she did not verify the legitimacy of every prescription the Pharmacy filled. Tr. 432.

21. During the inspection, DI 1 and DI 2 asked Ms. Igwe if she believed the prescriptions were genuine, and Ms. Igwe stated that she believed they were. *Id.* at 457.

22. The Pharmacy was asked to provide DEA with a complete history of its dispensing of hydrocodone [2] from the date the Pharmacy opened to the date of the inspection, June 18, 2015. *Id.* at 36, 431–32.

23. During the inspection, when DEA investigators asked Ms. Igwe for documentation concerning the Pharmacy, Ms. Igwe pointed to where the documentation was located. *Id.* at 66, 431–32. At the time of the inspection, the Pharmacy was in disarray. *Id.* at 66. Investigators also seized invoices, 222 Forms, hard-copy prescriptions, and the Pharmacy's dispensing history for hydrocodone. *Id.* at 35–36, 77–78, 434, 456.

24. Government Exhibit 6 is the hydrocodone dispensing log Ms. Igwe printed from the Pharmacy's computer and provided to DI 2 and DI 1 when they executed the AIW at the Pharmacy. *Id.* at 37, 67, 135, 456, 553.

25. The date range printed at the top of Government Exhibit 6 runs from October 23, 2013, to June 18, 2015. *Id.* at 553.

26. Ms. Igwe later realized that the dispensing log she gave to the investigators was incomplete. *Id.* at 466. She had never printed an inventory report before. *Id.* at 466.

27. Sometime after the inspection, Ms. Igwe contacted the manufacturer of the software the Pharmacy used, and the manufacturer showed her how to run the complete hydrocodone dispensing report. *Id.* at 467. She then gave this report, contained in Respondent Exhibit C, to an attorney to forward to the DEA. *Id.* at 468–69, 470–71, 549.

28. There are no dates or date range on any of the documents in Respondent Exhibit C. *Id.* at 551.

29. Pages 5–133 of Government Exhibit 2 contain prescriptions obtained from the Pharmacy during the administrative inspection on June 18, 2015, and patient profiles the Pharmacy provided to the DEA in response to an administrative subpoena. *Id.* at 44–45; GE–2.

30. The Pharmacy's computer system automatically assigns a date, time, and prescription number to the prescription when it is received. Tr. 533–34, 562, 580.

31. Government Exhibit 8 contains invoices showing the quantity of hydrocodone shipped to the Pharmacy. *Id.* at 49–50. The invoices in Government Exhibit 8 are some of the invoice documents DI 1 reviewed in conducting an audit of the Pharmacy's hydrocodone during the inspection. *Id.* at 52–54. DI 1 conducted the inspection at DI 2's direction. *Id.* at 64–65.

32. During the inspection, Ms. Igwe informed DEA investigators that they had all the documentation they had requested. *Id.* at 77.

33. During the inspection, Ms. Igwe was ''pretty upset'' and ''a little freaked out.'' *Id.* at 95, 97, 452.

34. During the inspection, Ms. Igwe had no response when asked if she found it suspicious that customers were traveling from a clinic 30 miles away to get their prescriptions filled at the Pharmacy. *Id.* at 76–77, 101–02.

35. During the inspection, Ms. Igwe told DEA investigators that she had spoken to one of the prescribers, Dr. C.V., on one occasion. *Id.* at 106.

36. After the administrative inspection, DI 1 conducted an audit of the Pharmacy's inventory of hydrocodone 10/325 mg. *Id.* at 45–46.

37. In conducting the audit, the Pharmacy's initial inventory showed zero hydrocodone. *Id.* at 46–47. DI 1 reviewed the Pharmacy's receiving documents for controlled substances and he took a closing inventory for hydrocodone on June 18, 2015. *Id.* at 47. The audit revealed that the Pharmacy was short 47,183 tablets of hydrocodone 10/325 mg. *Id.* at 56–58; GE–7.

38. DI 1 looked at all medications in the Pharmacy when he conducted the closing inventory of hydrocodone on June 18, 2015. Tr. 130, 132.

39. During the inspection, Ms. Igwe signed the closing inventory. *Id.* at 141.

40. In all of the audits that DI 1 has conducted in his career, he has never identified a shortage as large as the shortage he identified at the Pharmacy. *Id.* at 90. Even a shortage of 2500 tablets of hydrocodone is a substantial shortage. *Id.* at 88–89.

41. The Texas Prescription Monitoring Program (''PMP'') did not match up with the Pharmacy's dispensing records. *Id.* at 60. The dispensing records showed that the first dispensing took place on July 7, 2014, but the PMP showed that the Pharmacy filled prescriptions for hydrocodone between January and June 2014. *Id.* at 60. Those prescriptions are not contained in the Pharmacy's dispensing record for hydrocodone. *Id.;* GE–6. The shortage that DI 1 found when auditing the Pharmacy's hydrocodone would be reduced if the information contained in the PMP concerning the prescriptions the Pharmacy filled prior to July 7, 2014, were considered. Tr. 76.

42. The PMP is not a Pharmacy record. *Id.* at 123–24.

43. The DEA did not receive any explanation from the Pharmacy concerning why its distribution report, Government Exhibit 6, did not report a distribution of hydrocodone until July 7, 2014. *Id.* at 138.

44. DI 1 was never informed that the Pharmacy had additional information to provide him concerning the audit he conducted. *Id.* at 85.

Controlled Substances

45. Hydrocodone has been a schedule II controlled substance since October 6, 2014. *Id.* at 132–33.

46. The highest strength of hydrocodone is 10/325 mg. *Id.* at 176.

47. A prescription for 90 tablets of hydrocodone would be a large quantity of tablets. *Id.* at 366–67, 394.

48. Hydrocodone is usually prescribed to be taken once every 4 to 6 hours, as needed for moderate to severe pain, not to exceed 6 tablets in 24 hours. *Id.* at 176, 283, 366, 680. Normally a patient would have another medication for moderate to severe pain. *Id.* at 176–77, 681.

49. The highest strength for alprazolam is 2 mg. *Id.* at 177, 723.

50. A prescription for 60 tablets of alprazolam would be a large quantity of tablets. *Id.* at 394–95.

51. Prescriptions for the highest strength of a controlled substance raise a concern that the patient could exceed the maximum daily dose. *Id.* at 230.

52. The maximum dose of acetaminophen is 4 grams per day. *Id.* at 531, 680. A pharmacist's concern with the dose of hydrocodone would lie with the acetaminophen component of

[2] All of the hydrocodone dispensed by the Pharmacy in this case was hydrocodone/APAP 10/325 mg. This Recommended Decision will simply refer to it as ''hydrocodone.'' ''APAP'' is the abbreviation for acetaminophen. Tr. 398.

the drug. *Id.* at 531, 662. Ten tablets of hydrocodone contain 3.25 grams, which is below the maximum per day. *Id.* at 531, 680. According to the standard instruction of one tablet every four to six hours, a patient would take no more than six tablets of hydrocodone per day, which would be less than the maximum daily dose of acetaminophen. *Id.* at 531, 680.

53. Alprazolam, hydrocodone, and promethazine with codeine are high-alert drugs. *Id.* at 269.

54. Any combination of alprazolam, hydrocodone, promethazine with codeine, and carisoprodol constitutes a drug cocktail of high-alert drugs. *Id.* at 178, 270–71, 710, 740.

55. When taken together, alprazolam and hydrocodone can produce a euphoric and addictive effect very similar to that of a heroin high. *Id.* at 178, 269, 711.

56. Alprazolam and hydrocodone are among the top 10 most frequently prescribed controlled substances in the United States. *Id.* at 271, 273, 668.

Red Flags

57. The term ''red flag'' is not contained in any DEA regulation. *Id.* at 256, 657.

58. Pharmacists use the term ''red flag'' to denote a potential issue with a prescription. *Id.* at 170–71, 569, 657. The minimum standard of the practice of pharmacy in Texas requires a pharmacist to look for red flags. *Id.* at 171.

59. A red flag can be indicative of drug abuse or diversion. *Id.* at 172, 741.

60. Ms. Igwe did not learn the term ''red flag'' during her pharmacist training in England, but she now understands what it means. *Id.* at 521.

61. Pattern prescribing is a red flag because it indicates no individualization of therapy. *Id.* at 171, 244, 745. An example of pattern prescribing would be multiple prescriptions from the same prescriber or medical group for the same medications, in the same quantities, dosages, and strengths, written for different patients. *Id.* at 171.

62. When a medical provider only prescribes the maximum strength of a controlled substance, the prescriptions suggest that the provider is engaged in pattern prescribing. *Id.* at 231–32.

63. The distance a person travels, or the route a person travels, to fill a prescription can be a red flag because it is likely there are multiple pharmacies along the same route. *Id.* at 172, 174–75.

64. When a patient travels all over a metropolitan area to get to a doctor and then to a pharmacy to fill a prescription, that behavior raises a red flag because there would be multiple pharmacies along the way where the patient could fill the prescription.[3] *Id.* at 281, 321, 323.

65. Paying cash for a prescription can be a red flag. *Id.* at 172, 692.

66. Most patients have some sort of third-party payer, such as health insurance, to pay for their prescriptions. *Id.* at 358.

67. Hydrocodone and alprazolam are normally covered by insurance. *Id.* at 399.

68. The lack of a patient's address and/or the prescriber's DEA registration number on a prescription is a red flag. *Id.* at 179, 391, 412, 693–94.

69. Prescriptions for high-alert drugs such as alprazolam, hydrocodone, and promethazine with codeine, have the potential for abuse and diversion, and thus can be a red flag. *Id.* at 172–74, 720.

70. A drug cocktail is a red flag. *Id.* at 178.

71. Dosing instructions for hydrocodone that require the patient to take one tablet twice a day for moderate to severe pain would be a red flag, because it is less than the normal dosage for hydrocodone. *Id.* at 177.

72. Many of the prescriptions for hydrocodone contained in Government Exhibit 2 had dosing instructions to take one tablet every four to six hours, which is the normal dosing for hydrocodone, and not a red flag. *Id.* at 343–44

73. Dosing instructions for alprazolam that require the patient to take one tablet twice a day for anxiety raises a red flag because alprazolam is typically dosed more frequently than twice per day when it is prescribed for anxiety. *Id.* at 177.

74. Alprazolam can be prescribed to treat pain. *Id.* at 665–66.

75. A delay between the date that a prescription is written for moderate to severe pain and the date the prescription is filled can be a red flag. *Id.* at 396–97.

Standards of Pharmacy Practice

76. When a customer presents a prescription to a pharmacy, the pharmacist should examine the prescription, looking at the date of the prescription, the patient's name and address, the medication and its strength and quantity, as well as its directions for use, and the signature of the provider. *Id.* at 169–70.

77. If the prescription does not contain the patient's address or the prescriber's DEA number, the prescription is invalid and the pharmacist should not fill the prescription. Tr. 179, 391, 412; *see also* 21 CFR 1306.05(a); Tex. Health & Safety Code § 481.074(k). When the prescription lacks a patient address, the pharmacist could resolve that red flag by speaking with the patient, checking the patient's driver's license, or checking the patient's profile, and then documenting the action the pharmacist took to resolve the red flag. Tr. 179–80. When the prescription lacks the prescriber's DEA number, the pharmacist should contact the prescriber and annotate the DEA number on the prescription itself and in the patient profile. *Id.* at 391.

78. Information contained on a cover sheet of a faxed prescription could resolve a red flag, but that information still must be documented. *Id.* at 302–03. That information must be documented so that when the customer returns with an identical prescription there would be no need to call the provider. *Id.* at 319–20. The Respondent has produced no cover sheets. *Id.* at 547.

79. When a pharmacist is presented with a prescription that contains one or more red flags, the pharmacist should call the prescriber to try to resolve the red flag or flags and then document the information that resolves the red flag on the prescription itself or in the patient's profile. *Id.* at 178–79.

80. A reasonably prudent pharmacist would investigate prescriptions after seeing several prescriptions written by the same doctor or medical practice for the same drugs and the same quantity, and with the same dosing instructions. *Id.* at 210.

81. The first time a patient presents prescriptions for hydrocodone and alprazolam to a pharmacy, the pharmacist might fill the prescriptions. *Id.* at 239–40. But when the patient keeps returning with the same prescriptions, the pharmacist should contact the provider. *Id.* at 239–40.

82. When presented with the first prescription of the day for hydrocodone and alprazolam, a pharmacist might not think much about filling the prescription, but after seeing a handful of prescriptions written for the same drug, the same dose, the same strength, and by the same providers, the pharmacist should identify and resolve those red flags. *Id.* at 333.

83. Evidence of pattern prescribing raises the concern of diversion and/or the abuse of high-alert drugs. *Id.* at 257.

84. After seeing a handful of prescriptions for the same controlled substances with the same strengths and instructions for use, the prescriptions become suspicious. *Id.* at 358–59.

[3] In this case, the term ''round-trip distance'' refers to the distance from a patient's residence to the prescriber, continuing to the Pharmacy, and then returning home. Tr. 176.

85. A pharmacist concerned about pattern prescribing should call the prescriber to ask about the medical purpose and dosing, and then document the discussion the pharmacist had with the prescriber. *Id.* at 261.

86. A pharmacist cannot resolve problems concerning the medication, directions for use, or medical purpose by talking to the patient. *Id.* at 179.

87. The patient profile should contain the correct address for the prescriber. *Id.* at 361–62.

88. A prudent pharmacist would question the distance a patient traveled if a patient lives in Fort Worth but sees a doctor in Dallas. *Id.* at 192.

89. A pharmacist could resolve a red flag concerning the distance a patient traveled by talking with the patient and documenting the conversation. *Id.* at 402–05.

90. The failure to document the resolution of a red flag is below the minimum standard of the practice of pharmacy in Texas. *Id.* at 180.

91. A pharmacist can use the PMP to determine whether a patient is filling prescriptions at another pharmacy. *Id.* at 398. Most pharmacies have access to the PMP. *Id.* at 398.

92. The PMP shows the names of the doctors and pharmacies a patient has been using. *Id.* at 479–82.

93. Information regarding a patient is only in the PMP if a pharmacy inputs the information into the system. *Id.* at 484.

The Pharmacy's Practices

94. Ms. Igwe is familiar with a Texas regulation that [she testified requires a pharmacist to document conversations with practitioners regarding clinical matters about a particular prescription.] [*A] *Id.* at 585.

95. There are no pharmacist notes in the record that resolve the red flags in Government Exhibit 2. *Id.* at 566–67.

96. Sometimes Ms. Igwe would write a ''V'' indicating ''verified'' on the hard-copy prescription, but she did not do this for every prescription. *Id.* at 482, 557.

97. Ms. Igwe testified that when she verified a prescription, she would make a note on the ''demographics'' page of the patient's profile that the provider confirmed the prescription. Tr. 481, 585. This information does not print out along with the patient profile. *Id.* at 482.

98. When a customer came to the Pharmacy for the first time to fill a prescription for a controlled substance, she would call the prescriber's office to confirm that the doctor wrote the prescription and that the patient was actually seen at the clinic. *Id.* at 477–78, 503, 517, 586, 590, 607.

99. Ms. Igwe has never verified whether Redbird, AC Medical, or Arlington Oaks was registered with the State of Texas as a pain management clinic. *Id.* at 537–38.

100. There were no notes in the Pharmacy's records concerning specialty clinics or other pharmacies refusing to fill prescriptions filled by the Pharmacy. *Id.* at 360–61.

101. If the doctor confirmed that he or she wrote the prescription, Ms. Igwe would look up the patient in the PMP to make sure the patient was not doctor or pharmacy shopping. *Id.* at 478, 484, 573.

102. Ms. Igwe does not consider it doctor shopping if a patient obtains prescriptions from multiple providers in the same practice. *Id.* at 556. She only considers it doctor shopping if the patient obtains prescriptions from ''totally different'' clinics with which she was unfamiliar. *Id.* at 556.

103. Ms. Igwe testified that before filling a prescription for a controlled substance, she would search the patient's name in the PMP, verify the dosage was correct, and check for any potential drug interactions. *Id.* at 478, 554.

104. Ms. Igwe testified that if she received multiple prescriptions from the same provider, she would not check with the provider for subsequent prescriptions because she did not ''see the point of doing it'' again when she already contacted the provider about the first prescription the patient presented to the Pharmacy. *Id.* at 478–79, 517. She would only contact the provider again if the prescription changed. *Id.* at 482.

105. Ms. Igwe testified that she checked the PMP each time a customer came back to the Pharmacy to make sure that customer had not been obtaining controlled substances from other doctors. *Id.* at 479, 504, 517.

106. Ms. Igwe testified that the first page of a faxed prescription would be a cover sheet with the patient's identification (typically a driver's license) and home address. *Id.* at 489.

107. Ms. Igwe testified that when a patient picked up a controlled substance at the Pharmacy, she would ask the patient for his or her driver's license and check it against the copy of the driver's license faxed by the provider. *Id.* at 490. She would then scan the patient's identification card into the Pharmacy's computer database. *Id.* at 490.

108. Ms. Igwe testified that if the identification card presented by the patient at the Pharmacy did not match the information faxed with the prescription, then she would not fill the prescription. *Id.* at 491, 539.

109. There were no notes in the Pharmacy's records concerning the distances customers traveled to get their prescriptions filled at the Pharmacy. *Id.* at 360–61.

110. The Pharmacy's records do not make a distinction between cash payments and insurance payments. *Id.* at 522. Ms. Igwe testified that approximately half of the prescriptions the Pharmacy fills are paid for using insurance. *Id.* at 496–97, 522. The remaining prescriptions are paid for in cash. *Id.* at 497.

111. The ''co-pay'' information on the Pharmacy's fill stickers indicates the amount the customer paid for the prescription. *Id.* at 499–500. On Government Exhibit 6, the information under ''billed'' is the amount the Pharmacy billed to the customer or insurance. *Id.* at 498. On Government Exhibit 6, ''margin'' represents the Pharmacy's profit on a particular sale. *Id.*

112. On the Pharmacy's fill stickers, the number underneath the patient's name is the prescription, or ''Rx'', number, which is assigned when the prescription is entered into the pharmacy's computer system. *Id.* at 184–85, 583; GE–2, at 1. The Rx numbers are assigned sequentially; the higher the number the more recent the prescription was filled. *Id.* at 185–86. For example, the Rx number ending in 6330 would have been filled prior to Rx number 6331. *Id.* at 185–86.

113. The fill sticker also shows the date the prescription was filled, but not the date it was written. *Id.* at 186. The date the prescription was written is recorded on the prescription itself. *Id.*

114. On the fill stickers, the abbreviation ''Cpy'' stands for copay. *Id.* at 499.

115. Ms. Igwe spoke to Dr. C.V. on only one occasion. *Id.* at 500, 561, 587. Dr. C.V. called the Pharmacy to ask for the Pharmacy's fax number to send a statement that he was leaving Redbird Clinic. *Id.* at 500, 561. During that phone call, Ms. Igwe did not talk to Dr. C.V. about any prescriptions. *Id.* at 561–62.

116. Ms. Igwe would sometimes ask her customers if the medications they were prescribed were still working for them. *Id.* at 527.

117. Ms. Igwe did not always fill a bottle with medication on the same day that she printed its label. *Id.* at 560, 575.

[*A] Text adjusted in response to Respondent's Exceptions.

The Prescribers [4]

118. The prescription pad for Redbird Medical clinic (''Redbird'') contains the names of the following medical providers: C.V., M.D.; L.R., ACNS–BC; I.I., DNP–FNP; L.O., FNP–C; and J.W., ANP–BC, with an address on West Camp Wisdom Road in Dallas, Texas. *Id.* at 207–08; GE–2, at 12, 67. Although a prescriber identified as Dr. A.Q. was not listed on the prescription pad for Redbird, he had the same address on West Camp Wisdom Road. GE–2, at 70.

119. On October 2, 2014, the prescription pad for AC Medical clinic (''AC Medical'') contained the names of the following medical providers: C.V., M.D.; I.I., DNP–FMP; L.R., ACNS–BC; S.G., FNP; and C.Z., PA, with an address on Billing Street in Arlington, Texas. GE–2, at 16.

120. On January 13, 2015, the prescription pad for AC Medical contained the names of the following medical providers: C.V., M.D.; NE, M.D.; L.R., ACNS–BC; S.G., FNP; and C.Z., PA, with an address on East Arkansas Lane in Arlington, Texas. Tr. 207; GE–2, at 132.

121. The prescription pad for Arlington Oaks medical clinic (''Arlington Oaks'') contains the names of the following medical providers: C.V., M.D.; S.G., FNP; L.R., ACNS–BC; and C.Z., PA, with an address on Billing Street in Arlington, Texas. Tr. 206; GE–2, at 5.

The M.W. Prescription

122. DI 1 identified Government Exhibit 11 as the declaration of UC 1, an agent of the Texas Department of Public Safety. Tr. 30. In the declaration, UC 1 describes an undercover operation in which he obtained a prescription from the Redbird Clinic and filled the prescription at the Pharmacy. *Id.* at 30.

123. DI 1 knew UC 1 from his work on the investigation of the Pharmacy, but he did not know that UC 1 was going undercover. *Id.* at 68–69, 140. DI 1 reviewed UC 1's declaration and discussed it with him. *Id.* at 31–32.

124. During the undercover operation, UC 1 used the name M.W., and he used a driver's license with that name. Tr. 41; GE–10, at 3. The driver's license had a fictitious Fort Worth address. Tr. 189, 541; GE–11, at 2. The Pharmacy maintained a copy of the prescription it filled for M.W. and a copy of M.W.'s patient profile. Tr. 41; GE–10, at 4–5.[5]

125. At 6:55 a.m. on July 29, 2014, undercover agent UC 1 was in a car in the Redbird parking lot. GE–11, at 2. There were about 15 other occupied vehicles in the parking lot at that time. *Id.* An individual came out of the clinic and asked the drivers to inform him how many people were in each vehicle, and the drivers indicated between two and five persons were in each car. *Id.* The individual then began directing traffic and controlling the flow of traffic into the clinic. *Id.*

126. When UC 1 entered the Redbird clinic he was searched by an armed security guard and was seated in the order that he had entered the clinic. GE–11, at 2. When called to the receptionist's counter, UC 1 paid a fee of $170.00, and filled out a questionnaire, using the ''M.W.'' alias. *Id.* He provided the fictitious address of 5944 Callaston Lane, Fort Worth, Texas.[6] *Id.* UC 1 indicated that he was experiencing back pain due to sleeping on an old mattress. GE–11, at 3.

127. At 10:40 a.m. UC 1 met with L.R., ACNS–BC, who checked his heart, looked at his back, and an old scar on his knee. GE–11, at 3. L.R. then issued ''M.W.'' three prescriptions, to include 120 tablets of hydrocodone 10 mg. *Id.* Redbird informed ''M.W.'' that the prescription would be sent to the Pharmacy and UC 1 confirmed that the Pharmacy received it on August 1, 2014. *Id.;* Tr. 190.

128. The M.W. prescription was written on July 29, 2014, and received by the Pharmacy on August 1, 2014. Tr. 543, 562–63; GE–2, at 1; GE–11, at 3; RE–G, at 8.

129. The M.W. prescription was written to treat pain. Tr. 543; GE–2, at 1.

130. The M.W. prescription was faxed by Redbird to the Pharmacy. Tr. 192, 430, 571–72, 592; GE–2, at 1; GE–11, at 3; RE–G, at 8.

131. A copy of the prescription that undercover agent UC 1 received from Redbird, under the name of ''M.W.,'' as well as the Pharmacy's fill sticker for that prescription, are both contained on page 1 of Government Exhibit 2. Tr. 183–84.

132. On August 4, UC 1 presented to the Pharmacy as ''M.W.,'' and purchased the prescriptions, paying $150.00 for the hydrocodone. Tr. 576, 591; GE–2, at 1; GE–11, at 3.

133. The fact that the M.W. prescription was written on July 29, 2014, and not picked up until August 4, 2014, did not cause Ms. Igwe any concern. Tr. 577.

134. Ms. Igwe did not look up the address on M.W.'s driver's license to verify whether it was a real or fictitious address. Tr. 541; GE–11, at 3.

135. The prescription that L.R. wrote for M.W. raises the following red flags: No patient address; no provider DEA number; [ ] [*B] the prescription was written on July 29, 2014, but not faxed to the Pharmacy until August 1, 2014, and not picked up until August 4, 2014; and an unusual path and distance to obtain the prescription and get it filled.[7] Tr. 188–94.

136. There are no notes on the M.W. prescription or in the Pharmacy's patient profile for M.W. indicating that any of the red flags were resolved prior to filling the prescription. Tr. 194–95; GE–2, at 1; GE–10, at 4–5.

137. Based on the information provided to the Pharmacy, M.W., more likely than not, would have passed many pharmacies as he traveled the 99 miles from his purported residence in Fort Worth, to Redbird south of Dallas, to the Pharmacy, north of Dallas, and then return to his purported Fort Worth home. Tr. 193–94, 364–65; GE–12.

138. Ms. Igwe had no concern about the distance between M.W.'s fictitious address in Fort Worth and the Pharmacy in Plano. Tr. 542–43.

139. There is transmission data printed along the top of the page that contains the M.W. prescription and fill sticker indicating that the page was ''4 of 4'' of the pages Redbird faxed to the Pharmacy. GE–2, at 1. Dr. Witte was not provided pages one through three to review, nor are those pages contained in the Administrative Record. Tr. 255; GE–2, at 1.

The Other Prescriptions

140. Government Exhibit 2 contains 77 prescriptions for 27 of the Pharmacy's customers. Tr. 254; GE–2. Government Exhibit 2 also contains patient profiles for 26 of the Pharmacy's customers. GE–2. Several of the patient profiles contained in Government Exhibit 2 reveal prescriptions the Pharmacy filled for hydrocodone and

[4] The medical professionals mentioned in Findings of Fact 118–121, and 155, when referred to as a group, will be referred to as ''the Prescribers'' in this Recommended Decision. This group is comprised of C.V., L.R., I.I., L.O., A.Q., J.W., S.G., C.Z., and NE

[5] Government Exhibit 2, page 1, is another copy of the prescription issued to ''M.W.'' Tr. 40. Government Exhibit 2, page 2, is a photo of the prescription bottle of hydrocodone filled by the Pharmacy for ''M.W.'' Tr. 43.

[6] I find that the fact that M.W. used a fictitious address to be irrelevant. *See* Tr. 191; *infra* note 40.

[*B] Text adjusted in response to Respondent's Exceptions.

[7] Dr. Witte testified that the delay in picking up this prescription raises the question of whether the patient actually needed the prescription for pain and whether the prescription was written for a legitimate medical purpose. Tr. 193. That concern is exacerbated by the fact that the patient waited an additional three days to pick up the prescription after Redbird faxed it to the Pharmacy. Tr. 193; GE–2, at 1; GE–11, at 3. [Dr. Witte also testified that M.W. received a ''large quantity'' of a high-alert drug, which could be a red flag. Tr. 189.]*

alprazolam prior to August 2014, for which the actual prescriptions are not contained in the Administrative Record. *Id.* at 32–33, 42–43, 54–55, 82.

141. On several occasions, prescription cocktails of hydrocodone and alprazolam, contained in Government Exhibit 2, were written or filled on different days. Tr. 311; GE–2, at 28–30, 34–36, 50–52, 94–96, 109–11, 117–19.

142. The patient profile for A.S. raises a red flag of pattern prescribing: The same controlled substances; the same strength and dosages (90 hydrocodone 10/325 mg, 60 alprazolam 2 mg); the same small group of providers; and cash payments. Tr. 241, 408–09; GE–2, at 22–33. Between February 24, 2014 and March 30, 2015, A.S. filled six prescriptions for hydrocodone and six prescriptions for alprazolam at the Pharmacy. GE–2, at 31–33. On February 24, 2014, the Pharmacy filled prescriptions of 120, 10 mg tablets of hydrocodone and 60 tablets of alprazolam for A.S., written by S.G., a family nurse practitioner at AC Medical and Arlington Oaks. *Id.* at 32–33; *see also id.* at 5, 16 (displaying S.G.'s name on prescription pads of those two practices). On May 1, 2014, the Pharmacy filled prescriptions of 90, 10 mg tablets of hydrocodone and 60 tablets of alprazolam for A.S., written by S.G. *Id.* at 32. The round-trip distance [8] for A.S. to obtain her prescriptions and have them filled at the Pharmacy was 104 miles. Stip. 32.

143. The patient profile for R.E. raises a red flag of pattern prescribing: The same controlled substances; the same strength and dosages (90 hydrocodone 10/325 mg, 60 alprazolam 2 mg); the same small group of providers; and cash payments. Tr. 237–39; GE–2, at 34–43. Between April 3, 2014 and March 23, 2015, R.E. filled five prescriptions for hydrocodone and five prescriptions for alprazolam at the Pharmacy. GE–2, at 42–43. On April 3, 2014, the Pharmacy filled prescriptions of 90, 10 mg tablets of hydrocodone and 60 tablets of alprazolam for R.E., written by S.G. *Id.* at 43. On May 30, 2014, the Pharmacy filled prescriptions of 90, 10 mg tablets of hydrocodone and 60 tablets of alprazolam for R.E., written by C.Z., a physician's assistant at AC Medical and Arlington Oaks. *Id.* at 42–43; *see also Id.* at 5, 16 (displaying C.Z.'s name on prescription pads of those two practices). The round-trip distance for R.E. to obtain his prescriptions and have them filled at the Pharmacy was 86 miles. GE–3, at 35–40.

144. On March 18, 2014, the Pharmacy filled prescriptions of 120, 10 mg tablets of hydrocodone and 60 tablets of alprazolam for K.S., written by L.R., a nurse practitioner at Redbird, AC Medical, and Arlington Oaks. GE–2, at 55; *see also id.* at 5, 12, 16 (displaying L.R.'s name on prescription pads of those three practices). On April 15, 2014, the Pharmacy filled prescriptions of 90, 10 mg tablets of hydrocodone and 60 tablets of Alprazolam for K.S., written by S.G. *Id.* at 55. On May 27, 2014, the Pharmacy filled prescriptions of 90, 10 mg tablets of hydrocodone and 60 tablets of alprazolam for K.S., written by S.G. *Id.* at 54–55. Then on June 26, 2014, the Pharmacy filled prescriptions of 120, 10 mg tablets of hydrocodone and 60 tablets of alprazolam for K.S., written by S.G. *Id.* at 54. The round-trip distance for K.S. to obtain her prescriptions and have them filled at the Pharmacy was 101 miles. Stip. 35

145. On June 19, 2014, the Pharmacy filled prescriptions of 120, 10 mg tablets of hydrocodone and 60 tablets of alprazolam for M.W.2, written by L.R. *Id.* at 82. The round-trip distance for M.W.2 to obtain her prescriptions and have them filled at the Pharmacy was 97 miles. Stip. 41.

146. The patient profile for R.N. raises a red flag of pattern prescribing: The same controlled substances; the same strength and dosages (90 hydrocodone 10/325 mg, 60 alprazolam 2 mg); the same small group of providers; and cash payments. Tr. 239–41; GE–2, at 117–29. Between November 17, 2014 and May 11, 2015, R.N. filled five prescriptions for hydrocodone and five prescriptions for alprazolam at the Pharmacy. GE–2, at 128–29.

147. On August 6, 2014, L.R. wrote prescriptions for 120 tablets of hydrocodone and 60 tablets of alprazolam for patient J.S. GE–2, at 3–4. The prescriptions were filled the same day at the Pharmacy where the customer paid $59.99 for the alprazolam and $150.00 for the hydrocodone. *Id.* at 3. To obtain the prescription and have it filled, J.S. would have traveled 80 miles. Stip. 34.

148. On August 8, 2014, S.G. wrote prescriptions for a drug cocktail of 90 hydrocodone and 60 alprazolam for patient J.W. Tr. 197–98, 399; GE–2, at 5. The prescriptions were filled at the Pharmacy on August 11, 2014, where the customer paid $59.99 for the alprazolam and $125.00 for the hydrocodone. GE–2, at 5. To obtain the prescription and have it filled, J.W. would have traveled 108 miles. Stip. 39.

149. On August 29, 2014, S.G. wrote prescriptions for 120 hydrocodone and 60 alprazolam for patient J.W. GE–2, at 6. The prescriptions were filled at the Pharmacy on September 12, 2014, where the customer paid $59.99 for the alprazolam and $160.00 for the hydrocodone. *Id.* To obtain the prescription and have it filled, J.W. would have traveled 108 miles. Stip. 39. The patient picked up the prescription at the Pharmacy 14 days after the prescription was written. GE–2, at 6. Neither the prescriptions for J.W. nor his patient profile, maintained by the Pharmacy, contain any notes resolving the red flags presented by these prescriptions. Tr. 208–10.

150. The January 16, 2015 prescription for R.H. for alprazolam raises a red flag. Tr. 242. The prescription indicates that the alprazolam was to be taken once every eight hours, but the prescription label has instructions indicating that it was to be taken one tablet twice per day.[9] Tr. 242, 753–54; GE–2, at 66.

151. The January 16, 2015 prescription for R.H. for hydrocodone raises several red flags. Tr. 242. The prescription indicates that the hydrocodone was to be taken once every 8 to 12 hours for moderate to severe pain. *Id.* at 396; GE–2, at 64–65. If the patient had moderate to severe pain, the patient would be taking the medication once every four to six hours. Tr. 396, 681, 686. In addition, while the prescription was written for moderate to severe pain on January 16, 2015, the prescription was not filled until January 20, 2015. Tr. 396; GE–2, at 64–65. Filling a prescription for moderate to severe pain four days after it was written raises a red flag. Tr. 193, 396–97. Further, R.H. paid cash for his hydrocodone and alprazolam prescriptions, paying a total of $212.98 on January 20, 2015. GE–2, at 65–66. Finally, to obtain his prescriptions and have them filled, R.H. would have traveled more than 75 miles. Stips. 21, 22.

152. The April 6, 2015 prescription for R.H. for hydrocodone indicates that it was to be taken 1 to 2 tablets every 8 to 12 hours for moderate to severe pain. Tr. 241; GE–2 at 68. These dosing

[8] The ''round-trip distance'' is the distance, as measured by MapQuest, from the patient's address as recorded in the Pharmacy's records, to the prescriber's office, as reflected in the patient's profile maintained by the Pharmacy, then to the Pharmacy, and returning to the patient's home. *See, e.g.,* GE–3, at 1–5. There is no evidence that any patient traveled this round-trip distance, as a continuous or single trip, upon leaving the patient's home. Nevertheless, the three addresses used to calculate the distances are taken from the Pharmacy's records.

[9] Litman testified that a pharmacist should document in the pharmacy's computer system if he or she was dispensing a medication with dosing instructions different than prescribed. Tr. 753–54. There is no such documentation in this Administrative Record.

instructions are a red flag because for moderate to severe pain the patient should be taking the medication more frequently. Tr. 241, 395–96; GE–2, at 64–65, 68–69.

153. R.H. was receiving two different controlled substances from two different doctors, hydrocodone from Dr. A.Q. and promethazine with codeine from Nurse J.W. Tr. 242–43, 341; GE–2, at 70. Dr. A.Q. and Nurse J.W. had different addresses. Tr. 243, 362–64; GE–2, at 70. A pharmacist would want to determine why a patient was obtaining controlled substances from two different doctors from different locations. Tr. 243, 362–64.

154. There are no pharmacist's notes or remarks written on R.H's prescriptions or in his patient profile that resolves the red flags raised by his controlled substance prescriptions. Tr. 243.

155. Government Exhibit 6 contains the Pharmacy's hydrocodone dispensing history between July 7, 2014 and May 21, 2015. Tr. 37, 138, 168; GE–6, at 1, 85. Government Exhibit 6 documents 927 prescriptions that the Pharmacy filled for hydrocodone. GE–6. All but 25 of those prescriptions were written by the same small group of prescribers, who wrote the prescriptions identified on the patient profiles contained in Government Exhibit 2: Dr. C.V., Dr. NE, ANP J.W., Dr. A.Q., PA C.Z., NP L.O., DNP I.I., NP S.G., and ACNS L.R.[10] The Pharmacy filled 104 prescriptions for hydrocodone before it filled the hydrocodone prescription for J.S. on August 6, 2014. GE–2, at 3; GE–6, at 1–10.

156. Between October 10–23, 2014, the Pharmacy received 26 consecutive prescriptions for 90 tablets of hydrocodone written by Dr. C.V. GE–6, at 29–31. Between November 7–12, 2014, the Pharmacy filled 17 consecutive prescriptions for 90 tablets of hydrocodone written by Dr. C.V. GE–6, at 33–35.

157. Between November 12–20, 2014, the Pharmacy received 20 consecutive prescriptions for hydrocodone written by Dr. C.V., all but one of which were for 90 tablets. GE–6, at 35–37.

158. The Pharmacy received 9 prescriptions for 90 tablets of hydrocodone 10/325 mg on December 31, 2014. Tr. 424–25, 560; RE–G, at 44–45; GE–6, at 44–45. Eight of the nine prescriptions were written by Dr. C.V. Tr. 424–25; RE–G, at 44–45; GE–6, at 44–45. Receiving these nine prescriptions on the same date did not cause Ms. Igwe any concern. Tr. 561.

159. Between April 9 and May 8, 2015, the Pharmacy received 105 consecutive prescriptions for hydrocodone written by either Dr. C.V. or Dr. NE, all but six of which were for 90 tablets. GE–6, at 69–79. Finally, between May 18–21, 2015, the Pharmacy filled 23 consecutive prescriptions for hydrocodone 10/325 mg written by Dr. NE, all but one of which were for 90 tablets. Tr. 594–95; GE–6, at 83–85.

160. The prescriptions identified in Findings of Fact 155–159 are examples of pattern prescribing. Tr. 171, 231, 388.

161. All the prescriptions in Government Exhibit 6 were filled by Ms. Igwe. Tr. 390; *see also* 22 Tex. Admin. Code § 291.33(c)(7)(A)(iv) (requiring the dispensing pharmacist to write his or her initials on the prescription label).

162. *Prescriptions Written by Nurse Practitioner I.I.:*

Patient	Date prescription written; filled	Controlled substance(s); quantity	Round-trip distance (miles)	Cost	Record citations
J.W.2	8/18/14; 8/20/14	Hydrocodone (120); Alprazolam (60).	98	$150.00; $59.99	Tr. 234; GE–2, at 12; Stip. 40.
C.J	8/18/14; 8/19/14	Hydrocodone (90); Alprazolam (60).	81	$125.00; $59.99	Tr. 233; GE–2, at 8; Stip. 25.
S.W	8/19/14; 8/19/14	Hydrocodone (120); Alprazolam (60).	99	$150.00; $59.99	Tr. 234; GE–2, at 10; Stip. 43.
S.H	9/4/14; 9/4/14	Hydrocodone (90); Alprazolam (60).	76	$120.00; $59.99	Tr. 234–35; GE–2, at 14; Stip. 24.
H.J	10/2/14; 10/2/14	Hydrocodone (120); Alprazolam (60).	105	$160.00; $59.99	Tr. 235; GE–2, at 16; Stip. 26.

[10] *See* GE–6, at 13, 17, 41, 43, 47, 53, 56, 58, 64, 65, and 85 for prescriptions written by eight other prescribers.

163. These prescriptions written by Nurse Practitioner I.I. are indicative of pattern prescribing: Same controlled substances; same quantity; same dosages; same prescriber; same drug cocktails. Tr. 236. This pattern indicates a lack of individualization of therapy. *Id.* at 209. In addition, these patients took unusual paths and distances to obtain and fill their prescriptions. *Id.* at 236. The similarities would make a pharmacist wonder why multiple patients from this medical provider were being prescribed the same quantity of hydrocodone, and in the same strength and dosing. *Id.* at 258.

164. The unusual path and distance that I.I.'s patients traveled to obtain their prescriptions and get them filled is a red flag. *Id.* at 236.

165. The fill stickers for all of I.I.'s patients indicate that they paid $120 to $160 for their prescriptions for hydrocodone, which is much higher than the usual cost of hydrocodone. *Id.* at 222–23. The cash price for 90 tablets of hydrocodone is about $70, and the cash price for 60 tablets of alprazolam is about $35. *Id.* at 223.

166. There are no notes on I.I.'s prescriptions or the patient profiles documenting the Pharmacy's resolution of any red flag or consultation with I.I. regarding the red flags. *Id.* at 236; GE–2, at 4, 7, 9, 11, 13, 15, 17, 21, 31–33, 42–43, 53–55, 59, 63, 70, 74, 78, 82, 85, 92–93, 97, 102, 104–05, 107–08, 112, 116, 128–29, 133.

167. *Prescriptions Written by Dr. C.V.:*

Patient	Date prescription written; filled	Controlled substance(s); quantity	Round-trip distance (miles)	Cost	Record citations
R.E	11/14/14; 11/14/14	Hydrocodone (90) [11]	94	$180	Tr. 218, 226, 238–39; GE–2, at 35–36; Stip. 17.
R.N	11/15/2014; 11/17/2014	Hydrocodone (90) [12]	64	$180	Tr. 221, 226; GE–2, at 117–118; Stip. 30.
R.N	Filled: 12/19/14	Hydrocodone (90) [13]	64	Unknown	Tr. 222; GE–2, at 129; Stip. 30.
A.S	Filled: 12/22/14	Hydrocodone (90) [14]	111	Unknown	Tr. 217–18, 226, 241; GE–2, at 32; Stip. 33.
M.H	1/13/15; 1/13/15	Hydrocodone (90) [15]	121	$179.99	Tr. 222, 226; GE–2, at 130–31; Stip. 20.
K.S	1/27/15; 1/27/15	Hydrocodone (90) [16]	109	$179.99; $59.99	Tr. 204, 219, 226; GE–2, at 44–46; Stip. 36.
K.S	2/26/15; 2/26/15	Hydrocodone (90) [17]	109	$179.99	Tr. 205, 219, 226; GE–2, at 47–48; Stip. 36.
R.E	3/23/15; 3/23/15	Hydrocodone (90) [18]	94	$179.99; $59.99	Tr. 218, 226; GE–2, at 39–42; Stip. 17.
K.S	3/26/15; 3/26/15	Hydrocodone (90) [19]	109	$179.99	GE–2, at 50–52; Stip. 36.
A.S	3/28/15; 3/30/15	Hydrocodone (90) [20]	111	$179.99	Tr. 217, 226; GE–2, at 28–30; Stip. 33.
G.B	4/16/15; 4/17/15	Hydrocodone (90)	55	$179.99	Tr. 219–20, 226; GE–2, at 83–84; Stip. 12.
M.A	4/17/15; 4/17/15	Hydrocodone (90) [21]	107	$179.99	Tr. 205–06, 220, 226; GE–2, at 94–95; Stip. 9.
R.H.2	4/20/15; 4/21/15	Hydrocodone (90) [22]	92	$179.99 $59.99	Tr. 220, 226; GE–2, at 98–100; Stip. 23.
A.K	5/1/15; 5/1/15	Hydrocodone (90) [23]	81	$179.99 $59.99	Tr. 221, 226; GE–2, at 113–115; Stip. 27.

168. Theprescription that Dr. C.V. wrote for G.B. on April 16, 2015, contained unusual dosing instructions for hydrocodone, of one tablet three times per day. Tr. 383; GE–2, at 83. Faced with these dosing instructions, the pharmacist should have called the prescriber to confirm the dosing instructions before filling the prescription. Tr. 383.

169. The prescriptions written by Dr. C.V. are indicative of pattern prescribing: Same controlled substances; same quantity; same dosages; same prescriber; same drug cocktails. *Id.* at 215. This pattern indicates a lack of individualization of therapy. *Id.* at 209. In addition, these patients took unusual paths and distances to obtain and fill their prescriptions. *Id.* at 226–27. The similarities would make a pharmacist wonder why multiple patients from this doctor/medical practice were being prescribed the same quantity of hydrocodone, and in the same strength and dosing. *Id.* at 258.

170. The unusual path and distance that Dr. C.V.'s patients traveled to obtain their prescriptions and get them filled is a red flag. *Id.* at 236.

171. The fill stickers for all of these patients indicate that they paid $179.99 for their prescriptions for hydrocodone, which is much higher than the usual cost of 90 tablets of hydrocodone. *Id.* at 222–23. The cash price for 90 tablets of hydrocodone is about $70, and the cash price for 60 tablets of alprazolam is about $35. *Id.* at 223.

172. There are no notes on Dr. C.V.'s prescriptions or the patient profiles documenting that the Pharmacy resolved any red flag or consulted with Dr. C.V., or other prescribers. Tr. 227,

[11] The day before Dr. C.V. wrote R.E. a prescription for hydrocodone, S.G. FNP, of the same medical practice as Dr. C.V., wrote R.E. a prescription for 60 tablets of alprazolam 2 mg. The Pharmacy filled this prescription the same day it was written, November 13, 2014. GE–2, at 34–36. Although Dr. C.V. and FNP S.G. were with the same medical practice, the patient profile shows Dr. C.V. being located at 916 Wynnewood Shopping Center, Dallas, Texas, and FNP S.G. being located at 201 Billings Street, Arlington, Texas. GE–2, at 42.

[12] The day before Dr. C.V. wrote R.N. a prescription for hydrocodone, L.R., ACNS–BC, of the same medical practice as Dr. C.V., wrote R.N. a prescription for 60 tablets of alprazolam 2 mg. GE–2, at 119. The Pharmacy filled both prescriptions the same day, November 17, 2014. GE–2, at 117–19. Although Dr. C.V. and ACNS L.R. were with the same medical practice, the patient profile shows Dr. C.V. being located at 916 Wynnewood Shopping Center, Dallas, Texas, and ACNS L.R. being located at 202 Billings Street, Arlington, Texas. GE–2, at 119, 129.

[13] The same day the Pharmacy filled the prescription for hydrocodone, written by Dr. C.V. for R.N., it also filled a prescription for 60 tablets of alprazolam 2 mg, written by L.R., ACNS–BC, for R.N. GE–2, at 129. Although Dr. C.V. and ACNS L.R. were with the same medical practice, the patient profile shows Dr. C.V. being located at 916 Wynnewood Shopping Center, Dallas, Texas, and ACNS L.R. being located at 202 Billings Street, Arlington, Texas. GE–2, at 119, 129.

[14] The same day the Pharmacy filled the prescription for hydrocodone, written by Dr. C.V., for A.S., it also filled a prescription for 60 tablets of alprazolam 2 mg, written by L.R., ACNS–BC, for A.S. GE–2, at 32. Although Dr. C.V. and ACNS L.R. were with the same medical practice, the patient profile shows Dr. C.V. being located at 916 Wynnewood Shopping Center, Dallas, Texas, and ACNS L.R. being located at 202 Billings Street, Arlington, Texas. GE–2, at 30, 32.

[15] On the same day that Dr. C.V. wrote M.H. a prescription for hydrocodone, Dr. NE, of the same medical practice as Dr. C.V., wrote M.H. a prescription for 60 tablets of alprazolam 2 mg. Both prescriptions were filled by the Pharmacy on the same day, January 13, 2015. GE–2, at 130–32. Although Dr. C.V. and Dr. NE were with the same medical practice, the patient profile shows Dr. C.V. being located at 916 Wynnewood Shopping Center, Dallas, Texas, and Dr. NE being located at 201 Billings Street, Arlington, Texas. GE–2, at 132–33. Further, the address for Dr. NE in the patient profile is different from her address listed on the prescription, 2596 East Arkansas Lane, Arlington, Texas. *Id.*

[16] On the same day that Dr. C.V. wrote K.S. a prescription for hydrocodone, C.Z., PA, of the same medical practice as Dr. C.V., wrote K.S. a prescription for 60 tablets of alprazolam 2 mg. *Cf.* GE–2, at 46. Both prescriptions were filled by the Pharmacy on the same day, January 27, 2015. GE–2, at 44–46. The Pharmacy fill sticker for the alprazolam prescription inaccurately lists Dr. C.V. as the prescriber. *Compare* GE–2, at 46 *with* known signatures of C.Z. at GE–2, at 30, 52, 122–23. Although Dr. C.V. and C.Z. were with the same medical practice, the patient profile shows Dr. C.V. being located at 916 Wynnewood Shopping Center, Dallas, Texas, and C.Z. being located at 201 Billings Street, Arlington, Texas. GE–2, at 53. Further, the address for C.Z. in the patient profile is different from his address listed on the prescription for alprazolam, 2596 East Arkansas Lane, Arlington, Texas. *Compare* GE–2, at 46 *with* GE–2, at 53.

[17] On the same day that Dr. C.V. wrote K.S. a prescription for hydrocodone, Dr. NE, of the same medical practice as Dr. C.V., wrote K.S. a prescription for 60 alprazolam 2 mg. GE–2, at 49. Both prescriptions were filled by the Pharmacy on the same day, February 26, 2015. GE–2, at 47–49. Although Dr. C.V. and Dr. NE were with the same medical practice, the patient profile shows Dr. C.V. being located at 916 Wynnewood Shopping Center, Dallas, and Dr. NE being located at 201 Billings Street, Arlington, Texas. GE–2, at 49, 53. Further, the address for Dr. NE in the patient profile is different from her address listed on the prescription, 2596 East Arkansas Lane, Arlington, Texas. *Id.*

[18] Two days before Dr. C.V. wrote R.E. a prescription for hydrocodone, C.Z., PA, of the same medical practice as Dr. C.V., wrote R.E. a prescription for 60 tablets of alprazolam 2 mg. GE–2, at 41. Both prescriptions were filled by the Pharmacy on the same day, March 23, 2015. GE–2, at 39–41. The Pharmacy fill sticker for the prescription for alprazolam inaccurately lists Dr. C.V. as the prescriber. *Compare* GE–2, at 41 *with* known signatures of C.Z. at GE–2, at 30, 52, 122–23. Although Dr. C.V. and C.Z. were with the same medical practice, the patient profile shows Dr. C.V. being located at 916 Wynnewood Shopping Center, Dallas, Texas, and C.Z. being located at 201 Billings Street, Arlington, Texas. GE–2, at 42. Further, the address for C.Z. in the patient profile is different from his address listed on the prescription for alprazolam, 2596 East Arkansas Lane, Arlington, Texas. *Compare* GE–2, at 41 *with* GE–2, at 42.

[19] The day before Dr. C.V. wrote K.S. a prescription for hydrocodone, C.Z., PA, of the same medical practice as Dr. C.V., wrote K.S. a prescription for 60 tablets of alprazolam 2 mg. GE–2, at 52. Both prescriptions were filled by the Pharmacy the next day, March 26, 2015. GE–2, at 50–52. Although Dr. C.V. and PA C.Z. were with the same medical practice, the patient profile shows Dr. C.V. being located at 916 Wynnewood Shopping Center, Dallas, and PA C.Z. being located at 201 Billings Street, Arlington, Texas. GE–2, at 49, 53. Further, the address for PA C.Z. in the patient profile is different from his address listed on the prescription, 2596 East Arkansas Lane, Arlington, Texas. *Id.*

[20] The day after Dr. C.V. wrote A.S. a prescription for hydrocodone, C.Z., PA, of the same medical practice as Dr. C.V., wrote A.S. a prescription for 60 tablets of alprazolam 2 mg. GE–2, at 30. Both prescriptions were filled by the Pharmacy the next day, March 30, 2015. GE–2, at 28–30. Although Dr. C.V. and PA C.Z. were with the same medical practice, the patient profile shows Dr. C.V. being located at 916 Wynnewood Shopping Center, Dallas, Texas, and PA C.Z. being located at 201 Billings Street, Arlington, Texas. GE–2, at 30–31. Further, the address for Dr. C.V. in the patient profile is different from his address listed on the prescription, 8222 Douglas Avenue, Dallas, Texas, and the address for PA C.Z. in the patient profile is different from his address listed on the prescription, 2596 East Arkansas Lane, Arlington, Texas. GE–2, at 28, 30–31.

[21] The day before Dr. C.V. wrote M.A. a prescription for hydrocodone, L.R., ACNS–BC, of the same medical practice as Dr. C.V., wrote M.A. a prescription for 60 tablets of alprazolam 2 mg. GE–2, at 96. Both prescriptions were filled by the Pharmacy the next day, April 17, 2015. GE–2, at 94–96. Although Dr. C.V. and ACNS L.R. were with the same medical practice, Dr. C.V.'s prescription lists an address of 201 Billing Street, Arlington, Texas, and the prescription that L.R. wrote shows her address as being, 2596 East Arkansas Lane, Arlington, Texas. GE–2, at 94, 96. In addition, while the prescription for alprazolam clearly bears the signature of ACNS L.R., the fill sticker indicates that Dr. C.V. wrote the prescription. GE–2, at 96.

[22] Three days before Dr. C.V. wrote R.H.2 a prescription for hydrocodone, C.Z., PA, of the same medical practice as Dr. C.V., wrote R.H.2 a prescription for 60 tablets of alprazolam 2 mg. GE–2, at 100. Both prescriptions were filled by the Pharmacy on April 21, 2015. GE–2, at 98–100. The Pharmacy fill sticker for the prescription for alprazolam inaccurately lists Dr. C.V. as the prescriber. *Compare* GE–2, at 100 *with* known signatures of C.Z. at GE–2, at 30, 52, 122–23. Although Dr. C.V. and C.Z. were with the same medical practice, the patient profile shows Dr. C.V. being located at 916 Wynnewood Shopping Center, Dallas, Texas, yet the prescription for hydrocodone lists his address as 201 Billings Street, Arlington, Texas. GE–2, at 101. The prescription pad that C.Z. used to write the prescription for alprazolam lists his address as 2596 East Arkansas Lane, Arlington, Texas. GE–2, at 100.

[23] On the same day that Dr. C.V. wrote A.K. a prescription for hydrocodone, C.Z. wrote A.K. a prescription for 60 tablets of alprazolam 2 mg. GE–2, at 115. Both prescriptions were filled by the Pharmacy on the same day, May 1, 2015. GE–2, at 113–15. The Pharmacy fill sticker for the prescription for alprazolam inaccurately lists Dr. C.V. as the prescriber. *Compare* GE–2, at 115 *with* known signatures of C.Z. at GE–2, at 30, 52, 122–23. Although Dr. C.V. and C.Z. were with the same medical practice, the patient profile shows Dr. C.V. being located at 916 Wynnewood Shopping Center, Dallas, Texas, yet the prescription for hydrocodone lists his address as 201 Billings Street, Arlington, Texas. GE–2, at 113. The prescription pad that C.Z. used to write the prescription for alprazolam lists his address as 2596 East Arkansas Lane, Arlington, Texas. GE–2, at 115.

404–05; GE–2, at 4, 7, 9, 11, 13, 15, 17, 21, 31–33, 42–43, 53–55, 59, 63, 70, 74, 78, 82, 85, 92–93, 97, 102, 104–05, 107–08, 112, 116, 128–29, 133.

173. *Prescriptions written by Dr. NE:*

Patient	Date prescription written; filled	Controlled substance(s); quantity	Round-trip distance (miles)	Cost	Record citations
A.S	1/24/15; 1/26/15	Hydrocodone (90) [24]	104	$179.99	Tr. 200–01; GE–2, at 22–23; Stip. 32.
R.N	2/2/2015; 2/3/2015	Hydrocodone (90) [25]	95	$179.99	Tr. 239–41; GE–2, at 120–21; Stip. 28.
R.E	2/2/2015; 2/2/2015	Hydrocodone (90) [26]	86	$179.99	GE–2, at 38, 42; GE–3, at 35–40.
A.S	2/27/2015; 2/27/2015	Hydrocodone (90)[27]	104	$179.99	GE–2, at 26–27, 31; Stip. 32.
B.B	3/20/2015; 3/20/2015	Hydrocodone (90); Alprazolam (60).	80	$179.99; $59.99	Tr. 214; GE–2, at 102–04; Stip. 10.
S.B	3/26/2015; 3/27/2015	Hydrocodone (90); Alprazolam (60).	79	$179.99; $59.99	Tr. 212; GE–2, at 56–58; Stip. 14.
S.N	4/2/2015; 4/2/2015	Hydrocodone (90); Alprazolam (60).	81	$179.99; $59.99	Tr. 214, 214–15; GE–2, at 60–62; Stip. 31.
T.W	4/10/2015; 4/10/2015	Hydrocodone (90); Alprazolam (60).	66	$179.99; $59.99	Tr. 212–13, 215; GE–2, at 71–73; Stip. 44.
I.B	4/10/2015; 4/10/2015	Hydrocodone (90) [28]	79	$179.99; $59.99	Tr. 213, 215; GE–2, at 75–77; Stip. 13.
M.W.2	4/13/2015; 4/13/2015	Hydrocodone (90) [29]	79	$179.99; $59.99	Tr. 214, 215; GE–2, at 79–81; Stip. 42.
Y.S	4/17/2015; 4/17/2015	Hydrocodone (90); Alprazolam (60).	78	$179.99; $59.99	Tr. 214–15; GE–2, at 86–88; Stip. 38.
B.B	4/22/2015; 4/23/2015	Hydrocodone (90); Alprazolam (60).	66	$179.99; $59.99	GE–2, at 105–107; Stip. 11.
C.D	4/23/2015; 4/23/2015	Hydrocodone (90) [30]	81	$179.99; $59.99	Tr. 214–15; GE–2, at 109–111; Stip. 15.
R.N	5/11/2015; 5/11/2015	Hydrocodone (90); Alprazolam (60).	78	$179.99; $59.99	Tr. 214–15; GE–2, at 125–27; Stip. 29.
Y.S	5/18/2015; 5/18/2015	Hydrocodone (90) [31]	78	$179.99; $59.99	GE–2, at 89–91.

174. The prescriptions written by Dr. NE are indicative of pattern prescribing: same controlled substances; same quantity; same dosages; same prescriber; same drug cocktails. Tr. 215. This pattern indicates a lack of individualization of therapy. *Id.* at 209. In addition, these patients took unusual paths and distances to obtain and fill their prescriptions. *Id.* at 215–16.

175. The unusual paths and distances that Dr. NE's patients traveled to obtain their prescriptions and get them filled is a red flag. *Id.*

176. The fill stickers for all of Dr. NE's patients indicate that they paid $179.99 for their prescriptions for hydrocodone, which is much higher than the usual cost of 90 tablets of hydrocodone. *Id.* at 222–23. The average cash price at other pharmacies for 90 tablets of hydrocodone is about $70, and the cash price for 60 tablets of alprazolam is about $35. *Id.* at 223.

177. There are no notes on the hard-copies of Dr. NE's prescriptions or the patient profiles documenting that the Pharmacy resolved any of the red flags, or consulted with Dr. NE or any other prescriber regarding the red flags. *Id.* at 216–17; GE–2, at 4, 7, 9, 11, 13, 15, 17, 21, 31–33, 42–43, 53–55, 59, 63, 70, 74, 78, 82, 85, 92–93, 97, 102, 104–05, 107–08, 112, 116, 128–29, 133.

Additional facts required to resolve the issues in this case are included in the Analysis section of this Recommended Decision.

[24] The day before Dr. NE wrote A.S. a prescription for hydrocodone, L.R., ACNS–BC, also with the AC Medical practice, wrote A.S. a prescription for 60 tablets of alprazolam 2 mg. GE–2, at 24. Both prescriptions were filled by the Pharmacy on January 26, 2015. GE–2, at 22–24. The fill sticker, however, erroneously lists Dr. NE as the prescriber. The prescription pad for AC Medical shows an address on East Arkansas Lane, but Dr. NE's electronic prescription for A.C. shows an address of 201 Billings Street, and the patient profile for A.S. shows L.R's address as 202 Billing Street. *Id.* at 22, 31.

[25] On the same day that Dr. NE wrote R.N. a prescription for hydrocodone, C.Z., PA, of the same medical practice as Dr. NE, wrote R.N. a prescription for 60 tablets of alprazolam 2 mg. GE–2, at 122–23. Both prescriptions were filled by the Pharmacy on the following day, February 3, 2015. *Id.* at 120–23.

[26] The Administrative Record contains the Pharmacy's fill sticker for this prescription, but not the actual prescription. GE–2, at 38, 42. On the same day that the Pharmacy filled this prescription it also filled a prescription for 60, 2 mg tablets of alprazolam, which was written by L.R., ACNS–BC, on the same day. GE–2, at 37. Dr. NE's address is listed on R.E.'s patient profile as being at Billings Street in Arlington, Texas, while the office address on the prescription pad that L.R. used to write the prescription for alprazolam is East Arkansas Lane, Arlington, Texas. *Id.* at 37, 42.

[27] The day before Dr. NE wrote A.S. a prescription for hydrocodone, C.Z., PA, also with the AC Medical practice, wrote A.S. a prescription for 60, 2 mg tablets of alprazolam. GE–2, at 25. The Pharmacy also filled that prescription for alprazolam the day before it filled the prescription that Dr. NE wrote for hydrocodone. *Id.* at 25. The prescription pad for AC Medical shows an address on East Arkansas Lane for both Dr. NE, and C.Z., but Dr. NE's electronic prescription for A.C. shows an address of 201 Billings Street, Arlington, Texas. *Id.* at 22–26.

[28] On the same day that Dr. NE wrote I.B. a prescription for hydrocodone, S.G., FNP, of the same medical practice as Dr. NE, wrote I.B. a prescription for 60 tablets of alprazolam 2 mg. GE–2, at 77. Both prescriptions were filled by the Pharmacy on the same day, April 10, 2015. *Id.* at 75–77. The fill sticker for the alprazolam, however, erroneously lists Dr. NE as the prescriber. *Id.* at 77.

[29] On the same day that Dr. NE wrote M.W.2 a prescription for hydrocodone, S.G., FNP, of the same medical practice as Dr. NE, wrote M.W.2 a prescription for 60 tablets of alprazolam 2 mg. GE–2, at 81. Both prescriptions were filled by the Pharmacy on the same day, April 13, 2015. *Id.* at 79–81. The fill sticker for the alprazolam, however, erroneously lists Dr. NE as the prescriber. *Id.* at 81.

[30] The day before Dr. NE wrote C.D. a prescription for hydrocodone, S.G., FNP, of the same medical practice as Dr. NE, wrote C.D. a prescription for 60 tablets of alprazolam 2 mg. GE–2, at 111. Both prescriptions were filled by the Pharmacy on April 23, 2015. *Id.* at 109–11. The fill sticker for the alprazolam, however, erroneously lists Dr. NE as the prescriber. *Id.* at 111.

[31] On the same day that Dr. NE wrote Y.S. a prescription for hydrocodone, S.G., FNP, of the same medical practice as Dr. NE, wrote Y.S. a prescription for 60 tablets of alprazolam 2 mg. GE–2, at 91. Both prescriptions were filled by the Pharmacy on the same day, May 18, 2015. *Id.* at 89–91. The fill sticker for the alprazolam, however, erroneously lists Dr. NE as the prescriber. *Id.* at 91.

Analysis

To revoke a respondent's registration, the Government must prove, by a preponderance of the evidence, that the regulatory requirements for revocation are satisfied. *Steadman* v. *SEC,* 450 U.S. 91, 100–02 (1981); 21 CFR 1301.44(e). Under 21 U.S.C. 824(a)(4), the DEA may revoke a registrant's COR if the registrant acted in a way that renders continued registration ''inconsistent with the public interest.'' The DEA considers the following five factors to determine whether continued registration is in the public interest:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The [registrant's] experience in dispensing, or conducting research with respect to controlled substances.

(3) The [registrant's] conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.[32]

21 U.S.C. 823(f).

These public interest factors are considered separately. *See Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). Each factor is weighed on a case-by-case basis. *Morall* v. *DEA,* 412 F.3d 165, 173–74 (DC Cir. 2005). Any one factor, or combination of factors, may be decisive. *David H. Gillis, M.D.,* 58 FR 37507, 37508 (1993). Thus, there is no need to enter findings on each of the factors. *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005). Further, there is no requirement to consider a factor in any given level of detail. *Trawick* v. *DEA,* 861 F.2d 72, 76–77 (4th Cir. 1988). When deciding whether registration is in the public interest, the totality of the circumstances must be considered. *See generally Joseph Gaudio, M.D.,* 74 FR 10083, 10094–95 (2009).

The Government bears the initial burden of proof, and must justify revocation by a preponderance of the evidence. *Steadman,* 450 U.S. at 100–03. If the Government makes a *prima facie* case for revocation, the burden of proof shifts to the registrant to show that revocation would be inappropriate. *Med. Shoppe—Jonesborough,* 73 FR 364, 387 (2008). A registrant may prevail by successfully attacking the veracity of the Government's allegations or evidence. Alternatively, a registrant may rebut the Government's *prima facie* case for revocation by accepting responsibility for wrongful behavior and by taking remedial measures to ''prevent the re-occurrence of similar acts.'' *Jeri Hassman, M.D.,* 75 FR 8194, 8236 (2010) (citations omitted). In addition, when assessing the appropriateness and extent of sanctioning, the DEA considers the egregiousness of the offenses and the DEA's interest in specific and general deterrence. *David A. Ruben, M.D.,* 78 FR 38363, 38385 (2013).

Here, the Government's allegations focus on the manner in which the Pharmacy, through its agents, dispensed controlled substances. In addition, the Government has alleged recordkeeping violations.

I. The Government's Position

The Government submitted its Proposed Findings of Fact, Conclusions of Law, and Argument (''Government's Brief'') on February 7, 2018.[33] In its brief, the Government addressed: Numerous instances of the Pharmacy dispensing controlled substances in violation of its corresponding responsibility to ensure that the prescribing and dispensing of controlled substances was done only for legitimate medical purposes. ALJ–35, at 9–21. The Government also addressed the Pharmacy's recordkeeping violations, and as a result of those recordkeeping violations, the Pharmacy's inability to account for over 47,000 tablets of hydrocodone. ALJ–35, at 21.

With respect to the Pharmacy dispensing in violation of its corresponding responsibility, the Government pointed out the testimony of its expert witness, Dr. Witte. ALJ–35, at 6–21. Dr. Witte's testimony touched upon virtually each prescription contained in Government Exhibit 2. ALJ–35, at 9–21. The Government noted that Dr. Witte identified numerous red flags concerning the prescriptions the Pharmacy filled, to include: Pattern prescribing; long and unusual distances traveled to obtain and fill prescriptions; delay in filling prescriptions; cash payments for prescriptions; prescriptions for high-alert drugs, such as hydrocodone, alprazolam, and promethazine with codeine; prescriptions for high dosage strengths of the controlled substance; prescription cocktails, such as hydrocodone and alprazolam prescribed together; and prescriptions containing atypical directions for use. ALJ–35, at 7–9. In addition, Dr. Witte testified that to resolve a red flag, a pharmacist in Texas should call the prescriber and then document the prescriber's explanation either on the prescription itself, or in the patient's profile maintained by the pharmacy. ALJ–35, at 8. Failing to document the resolution of a red flag falls below the minimum standards of the practice of pharmacy in Texas. *Id.*

With respect to recordkeeping violations, the Government's Brief detailed that during execution of the Administrative Inspection Warrant in June 2015, the Pharmacy was asked for its inventories and its dispensing history for hydrocodone. ALJ–35, at 21. The dispensing records provided by the Pharmacy did not account for any dispensing prior to July 7, 2014, while other non-Pharmacy records showed dispensing prior to that date, and the Pharmacy had opened in September 2013. ALJ–35, at 21–22. As a result of the documentation provided by the Pharmacy, the Pharmacy could not account for over 47,000 tablets of hydrocodone. *Id*

Based upon the allegation contained in the OSC, and the evidence produced by the Government, the Government argues that Factors 2 and 4 of the five factors listed in 21 U.S.C. 823(f), are the relevant factors to consider in this case, specifically the registrant's experience in dispensing controlled substances and its compliance with applicable state, federal, or local laws relating to controlled substances. ALJ–35, at 27.

The Government argues that the Pharmacy violated 21 CFR 1306.04(a) and 1306.06 when it failed to meet its corresponding responsibility by filling prescriptions outside the usual course of professional practice. ALJ–35, at 27–34. Specifically, the Government alleges that the Pharmacy ''repeatedly distributed controlled substances pursuant to prescriptions that contained one or more unresolved red flags for diversion.'' *Id.* at 29. The Government notes that all of the prescriptions in Government Exhibit 2 gave rise to one or more of the above mentioned red flags. *Id.* Significantly, the Government notes there is no evidence that the Pharmacy documented the resolution of any of the red flags concerning the prescriptions presented in this case. *Id.* at 30. The Government also notes that the Respondent was served with a subpoena that specifically requested any and all documentation concerning the resolution of red flags, yet no such documentation has been produced. *Id.*

The Government noted that the Pharmacy also had recordkeeping shortcomings, and an audit revealed a substantial shortage of hydrocodone. *Id.* at 34–36. While recognizing that the Respondent produced records, Respondent Exhibit C, claiming they

[32] The Government has not made any Factor Five allegations against the Respondent. ALJ–35, at 27.

[33] The Government's Brief has been marked as ALJ–35.

represent all of the Respondent's dispensing of hydrocodone, the Government further argues that there is ''no record of any dispensing prior to July 7, 2014.'' [34] ALJ–35, at 34. Citing *Alexander Drug Co.,* 66 FR 18299, 18303 (2001), the Government noted that recordkeeping violations alone can serve as a sufficient bases to revoke a registration. *Id.* at 35. In addition, the Government cites to *Paul H. Volkman,* 73 FR 30630, 30644 (2008), for the proposition that failing to maintain dispensing logs with respect to an extraordinary quantity of controlled substances provides sufficient reason by itself to revoke a registration as being inconsistent with the public interest. *Id.* at 35.

In conclusion, the Government argued that the Pharmacy's COR should be revoked because a preponderance of the evidence establishes that allowing the Pharmacy to keep its registration would be contrary to the public interest. *Id.* at 39. In support of this argument, the Government noted that the Pharmacy had not accepted any responsibility for its actions and it had not indicated what actions it would take to ensure future compliance with laws and regulations governing the handling of controlled substances. *Id.*

II. The Respondent's Position

The Respondent submitted its Proposed Findings of Fact and Conclusions of Law (''Respondent's Proposed Findings'') on February 7, 2018.[35] The Respondent also submitted the Respondent's Closing Brief (''Respondent's Brief'') on February 7, 2018.[36] I have read and considered both documents in preparing this Recommended Decision.

In the Respondent's Proposed Findings, the Respondent highlighted the policies and procedures the Pharmacy has in place to confirm the legitimacy of new prescriptions for controlled substances. ALJ–36, at 4–7. Some of those policies and procedures include: verifying a prescriber's authorization to prescribe; checking the PMP for doctor shopping; entering prescription and patient information into the Pharmacy's computer system; contacting the prescriber's office when new patients present to the Pharmacy to ensure there is a doctor-patient relationship; questioning the patient about the need for the medication; and marking prescriptions with a ''V'' once the prescription has been verified.[37] *Id.* at 5–7. The Respondent also highlights testimony suggesting that it saw nothing unusual with the prescriptions contained in Government Exhibit 2. *Id.* at 8. For example, the Respondent notes that: It considered the prescriptions to be therapeutic and commonly prescribed; other physicians prescribe in similar patterns; the Prescribers only wrote 10% of the prescriptions the Pharmacy filled; the patients were not filling their prescriptions early or doctor shopping; and the patients did not show up in groups. *Id.* at 8.

Based upon the Respondent's proposed findings of fact,[38] the Respondent also offers several conclusions of law. Significantly, the Respondent concludes that the Government failed to meet its burden of proof to show that the Pharmacy had filled prescriptions for controlled substances that contained red flags without resolving those red flags. *Id.* at 15. The Respondent also concludes that the Pharmacy was never asked to provide the DEA with evidence of its documentation.[39] *Id.* at 15–16. Citing *Superior Pharmacy I & Superior Pharmacy II,* 81 FR 31310, 31335 (2016), the Respondent also concludes that the Government presented no proof of willful indifference, and that ''a reasonable suspicion is not enough to establish that a pharmacist acted with the requisite scienter.'' *Id.* at 15. Further, citing *JM Pharmacy Group, Inc., d/b/a Farmacia Nueva and Best Pharma Corp.,* 80 FR 28667, 28667 n.2 (2015), the Respondent concludes that there is no evidence of willful blindness. *Id.* at 16.

In the Respondent's Brief, the Respondent minimally summarizes some of the testimony.[40] The Respondent then sets out the standards that must be met to prove that a Pharmacy violated its corresponding responsibility, once again relying on *Superior Pharmacy I & Superior Pharmacy II,* 81 FR at 31335 and *JM Pharmacy,* 80 FR at 28667 n.2. In conclusion, the Respondent argues:

> Taking the admitted evidence and testimony as a whole, there is no evidence the pharmacist isn't completely committed to her duties as a pharmacist. She verifies early and checks the PMP every prescription. There was no evidence of diversion based on the surveillance by the DEA, and the 47000 doses of hydrocodone is probably wrong pursuant to the testimony of the man who wrote the report. Further, there is no evidence of willful blindness or willful indifference by the pharmacist. The

[34] This argument is an overstatement. The Respondent did produce evidence of dispensing prior to July 7, 2014, though it takes some digging to find it. The lowest RX number for a prescription for hydrocodone dispensed by the Pharmacy on July 7, 2014, is 105254. GE–6, at 1. The Respondent demonstrated that it dispensed more than 300 prescriptions for hydrocodone with prescription numbers lower than 10525. *See* RE–C, at 31–42. Based on the RX numbers of those prescriptions, and the manner in which those numbers are assigned to prescriptions, those 300 prescriptions were filled prior to July 7, 2014. Those records, however, were not produced until long after the Pharmacy was required to produce them.

[35] The Respondent's Proposed Findings has been marked as ALJ–36.

[36] The Respondent's Brief has been marked as ALJ–37.

[37] There is only one prescription in Government Exhibit 2 that is marked with a ''V''. *See* GE–2, at 49.

[38] Some of the Respondent's Proposed Findings of Fact (''PFF'') are not supported by the Administrative Record. Representative examples follow. In PFF 7 the Respondent states that the Pharmacy was under visual surveillance by DEA. ALJ–36, at 3. At best the Administrative Record would support a finding that DI 1 thinks that the ''tactical diversion squad was going out there and watching it.'' Tr. 93. This ''fact,'' whether accurate or not, is not relevant to the issues in this case. In PFF 38 the Respondent cites Government Exhibit 6 for its position that not more than 10% of the prescriptions issued each day were issued by one of the medical clinics under investigation. ALJ–36, at 7. Government Exhibit 7, however, only concerns hydrocodone. The Administrative Record makes abundantly clear that the ''Prescribers wrote far more prescriptions than just hydrocodone.'' PFF 32 has little resemblance to the actual testimony cited in support of the PFF. ALJ–36, at 6. In PFF 44 the Respondent states that distance and route traveled by the patients who obtained prescriptions from one of the Prescribers ''was often based on convenience to work, or proximity to the clinic rather than convenience to home.'' ALJ–36, at 8. There is no evidence to support this assertion. Rather, the citation to the record provided by the Respondent of Tr. 494–95, provides more reasonable support for the conclusion that Ms. Igwe did not find it uncommon for patients to be coming from different locations around the Dallas-Fort Worth area, and because it was not uncommon she did not question it. Further, the investigation of the Pharmacy began because the ''Pharmacy Place was so far from these clinics.'' Tr. 430. The Respondent also states that Mr. Litman testified that the only way to determine a physician was prescribing non-controlled substances to mask the illegitimate prescribing of controlled substances was to find another red flag in the prescription. *See* PFF 77, ALJ–36, at 13. That, however, is not Mr. Litman's testimony. He begins his answer by saying, ''the only thing to do is call the physician . . . .'' Tr. 683.

[39] This conclusion seemingly ignores Government Exhibit 9. *See also* Tr. 357.

[40] On at least two instances, the Respondent significantly mischaracterizes the testimony. The Respondent states that the ''DEA undercover agent did not divert the drugs . . . . nor was the Pharmacy Place related to any diversion activity by the Agent.'' ALJ–37, at 3. This statement reflects a total misunderstanding of diversion by the Respondent. Diversion occurs whenever anyone received a controlled substance they should not have received. Then the Respondent states that Dr. Witte testified ''she would probably not check the distance travelled by the customer.'' ALJ–37, at 5. Actually when the transcript is examined, what Dr. Witte said was that she would ''probably not'' check to see if an address was legitimate. Tr. 191. This issue is also not relevant to the issues in this case. What is relevant is the fact that the Pharmacy's own records indicate the patient in question traveled from Fort Worth to a clinic south of Dallas, then to the Pharmacy north of Dallas, and then back to Fort Worth in order to obtain a prescription and have it filled, yet the Pharmacy asked no questions about that distance the patient traveled or the unusual route the patient would have taken.

pharmacy is a neighborhood pharmacy that compounds medication and caters to children . . . . The Pharmacy Place is minority owned and operated by the owner. It compounds medications. Based on the pharmacist (sic) testimony in the trial, pharmacists' (sic) differ in approach and protocol based on experience, knowledge and background. The continued operation of the pharmacy is consistent with the public interest.

ALJ–37, at 7.

Factor One & Three: The Recommendation of the Appropriate State Licensing Board or Professional Disciplinary Authority, and Conviction Record Under Federal or State Laws Relating to the Manufacture, Distribution, or Dispensing of Controlled Substances

In this case, it is undisputed that the Respondent holds a valid state pharmacy license in Texas. The record contains no evidence of a recommendation regarding the Respondent's privilege to operate as a pharmacy by a relevant state licensing board or professional disciplinary authority. However, possession of a state license does not entitle a holder of that license to a DEA registration. *Mark De La Lama, P.A.,* 76 FR 20011, 20018 (2011). It is well established that a ''state license is a necessary, but not a sufficient condition for registration.'' *Robert A. Leslie, M.D.,* 68 FR 15,227, 15,230 (2003). The ultimate responsibility to determine whether a DEA registration is consistent with the public interest has been delegated exclusively to the DEA, not to entities within state government. *Edmund Chein, M.D.,* 72 FR 6580, 6590 (2007), *aff'd Chein* v. *DEA,* 533 F.3d 828 (D.C. Cir. 2008).

Agency precedent establishes that where the record contains no evidence of a recommendation by a state licensing board, that absence does not weigh for or against revocation. *See Roni Dreszer, M.D.,* 76 FR 19434, 19444 (2011) (''The fact that the record contains no evidence of a recommendation by a state licensing board does not weigh for or against a determination as to whether continuation of the Respondent's DEA certification is consistent with the public interest.'') Accordingly, Factor One does not weigh for or against revocation in this matter.

As to Factor Three, there is no evidence that Respondent, or any of its agents, have been convicted of an offense under either federal or Texas law ''relating to the manufacture, distribution, or dispensing of controlled substances.'' 21 U.S.C. 823(f)(3). However, there are a number of reasons why even a person who has engaged in criminal misconduct may never have been convicted of an offense or even prosecuted for one. *Dewey C. MacKay, M.D.,* 75 FR 49956, 49973 (2010), *pet. for rev. denied, MacKay* v. *DEA,* 664 F.3d 808, 822 (10th Cir. 2011). Therefore, the DEA has held that ''the absence of such a conviction is of considerably less consequence in the public interest inquiry'' and is not dispositive. *Id.* Accordingly, Factor Three weighs neither for nor against revocation in this case.

Factors Two and Four: The Respondent's Experience in Dispensing Controlled Substances and Compliance With Applicable State, Federal, or Local Laws Relating to Controlled Substances

Factors Two and Four are often analyzed together. *See, e.g., Fred Samimi, M.D.,* 79 FR 18698, 18709 (2014); *John V. Scalera, M.D.,* 78 FR 12092, 12098 (2013). Under Factor Two, the DEA analyzes a registrant's ''experience in dispensing . . . controlled substances.'' 21 U.S.C. 823(f)(2). Factor Two analysis focuses on a registrant's acts that are inconsistent with the public interest, rather than on a registrant's neutral or positive acts and experience. *Randall L. Wolff, M.D.,* 77 FR 5106, 5121 n.25 (2012) (explaining that ''every registrant can undoubtedly point to an extensive body of legitimate [dispensing] over the course of [the registrant's] professional career'') (quoting *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 463 (2009)). Similarly, under Factor Four, the DEA analyzes an applicant's compliance with federal and state laws concerning controlled substances. 21 U.S.C. 823(f)(4). Factor Four analysis also focuses on violations of state and federal regulations. *Volkman* v. *DEA,* 567 F.3d 215, 223–24 (6th Cir. 2009) (citing *Gonzales* v. *Oregon,* 546 U.S. 243, 272, 274 (2006)); *see Joseph Gaudio, M.D.,* 74 FR 10083, 10090–91 (2009).

[According to the CSA's implementing regulations, a lawful controlled substance order or prescription is one that is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). While the ''responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, . . . a corresponding responsibility rests with the pharmacist who fills the prescription.'' *Id.* The regulations establish the parameters of the pharmacy's corresponding responsibility.

An order purporting to be a prescription issued not in the usual course of professional treatment . . . is not a prescription within the meaning and intent of . . . 21 U.S.C. 829 . . . and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

Id. ''The language in 21 CFR 1306.04 and caselaw could not be more explicit. A pharmacist has his own responsibility to ensure that controlled substances are not dispensed for non-medical reasons.'' *Ralph J. Bertolino, d/b/a Ralph J. Bertolino Pharmacy,* 55 FR 4729, 4730 (1990) (citing United *States* v. *Hayes,* 595 F.2d 258 (5th Cir. 1979), *cert. denied,* 444 U.S. 866 (1979); *United States* v. *Henry,* 727 F.2d 1373 (5th Cir. 1984) (reversed on other grounds)). As the Supreme Court explained in the context of the CSA's requirement that schedule II controlled substances may be dispensed only by written prescription, ''the prescription requirement . . . ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse . . . [and] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006).

To prove a pharmacist violated her corresponding responsibility, the Government must show that the pharmacist acted with the requisite degree of scienter. *See* 21 CFR 1306.04(a) (''[T]he person *knowingly* filling [a prescription issued not in the usual course of professional treatment] . . . shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.'') (emphasis added). DEA has also consistently interpreted the corresponding responsibility regulation such that ''[w]hen prescriptions are clearly not issued for legitimate medical purposes, a pharmacist may not intentionally close his eyes and thereby avoid [actual] knowledge of the real purpose of the prescription.'' *Bertolino,* 55 FR at 4730 (citations omitted); *see also JM Pharmacy Group, Inc. d/b/a Pharmacia Nueva and Best Pharmacy Corp.,* 80 FR 28667, 28670–72 (2015) (applying the standard of willful blindness in assessing whether a pharmacist acted with the requisite scienter). Pursuant to their corresponding responsibility, pharmacists must exercise ''common sense and professional judgment'' when filling a prescription issued by a physician. *Bertolino,* 55 FR at 4730. When a pharmacist's suspicions are

aroused by a red flag, the pharmacist must question the prescription and, if unable to resolve the red flag, refuse to fill the prescription. *Id.; Medicine Shoppe-Jonesborough,* 300 F. App'x 409, 412 (6th Cir. 2008) (''When pharmacists' suspicions are aroused as reasonable professionals, they must at least verify the prescription's propriety, and if not satisfied by the answer they must refuse to dispense.'').

In this matter, the Government did not allege that Respondent dispensed the subject prescriptions having actual knowledge that the prescriptions lacked a legitimate medical purpose. Instead, the Government alleged that Respondent violated the corresponding responsibility regulation as evidenced by it ''repeatedly distribut[ing] controlled substances pursuant to prescriptions that contained one or more unresolved red flags for diversion.'' Govt Posthearing, at 29. *See also* OSC, at 5 (''Pharmacy Place's pharmacists were willfully blind to or deliberately ignorant of the high probability that the [subject prescriptions] lacked a legitimate medical purpose. Pharmacy Place pharmacists were willfully blind to the fact that large numbers of customers seeking controlled substance prescriptions, often prescription cocktails, and residing long distances from Pharmacy Place's location and/or their respective physicians created a suspicious situation requiring increased scrutiny.'').] [*C]

Because the Pharmacy is located in Texas, it is important to review the requirements of Texas law as it relates to pharmacists. To begin, Texas law provides that ''[a] pharmacist may not: (1) dispense . . . a controlled substance . . . except under a valid prescription and in the course of professional practice.'' Tex. Health & Safety Code § 481.074(a)(1). Texas law further provides that ''[a] pharmacist may not: (2) dispense a controlled substance if the pharmacist knows or should have known that the prescription was issued without a valid patient-practitioner relationship.'' *Id.* at § 481.074(a)(2). It is also unlawful in Texas for any ''registrant or dispenser'' to deliver a controlled substance in violation of section 481.074 of the Texas Health and Safety Code. *Id.* at § 481.128. Additionally, the Texas Health and Safety Code mandates that a ''prescription for a controlled substance'' must show ''the name, address, and date of birth or age of the patient'' as well as the ''Federal Drug Enforcement Administration number'' of the practitioner issuing the prescription. *Id.* at § 481.074(k)(3), (7).

In addition to Texas statutes, the Texas State Board of Pharmacy has issued rules for the operational standards that Texas pharmacists are expected to follow when filling a new or refill prescription. Those operational standards dictate that

> [f]or the purpose of promoting therapeutic appropriateness, a pharmacist shall, prior to or at the time of dispensing a prescription drug order, review the patient's medication record. Such review shall at a minimum identify clinically significant: . . . (III) reasonable dose and route of administration; (IV) reasonable directions for use; (V) duplication of therapy; (VI) drug-drug interactions; . . . [and] (X) proper utilization, including overutilization or underutilization.

See 22 Tex. Admin. Code § 291.33(c)(2)(A)(i).

The operational standards also mandate that ''[u]pon identifying any clinically significant conditions, [or] situations . . . the pharmacist shall take appropriate steps to avoid or resolve the problem including consultation with the prescribing practitioner.'' *Id.* at § 291.33(c)(2)(A)(ii). Furthermore, ''[p]rior to dispensing, any questions regarding a prescription drug order must be resolved with the prescriber and written documentation of these discussions made and maintained.'' *Id.* at § 291.33(c)(2)(A)(iv). [ ] [*D] Texas operational standards require at a minimum that such documentation be

> on the prescription or in the pharmacy's data processing system associated with the prescription . . . and shall include . . . (1) date the prescriber was consulted; (ii) name of the person communicating the prescriber's instructions; (iii) any applicable information pertaining to the consultation; and (iv) initials for the purpose of identifying the pharmacist who performed the consultation.

Id. at § 291.33(c)(2)(C). [ ] [*E]

The Texas State Board of Pharmacy has also issued rules concerning the labels that a pharmacist puts on the bottles of controlled substances being dispensed by a pharmacy. Those standards require that

> [a]t the time of delivery of the drug, the dispensing container shall bear a label in plain language and printed in an easily readable font size, unless otherwise specified, with at least the following information: (i) name, address and phone number of the pharmacy; (ii) unique identification number of the prescription that is printed in an easily readable font size comparable to but no smaller than ten-point Times Roman; (iii) date the prescription is dispensed; (iv) initials or an identification code of the dispensing pharmacist; (v) name of the prescribing practitioner; . . .

Id. at § 291.33(c)(7)(A). While this particular section of the operational standards was not cited in the OSC, it is relevant in this case because the Pharmacy should have been following these requirements when filling prescriptions.[41]

Finally, ''[t]he corresponding responsibility to ensure the dispensing of valid prescriptions extends to the pharmacy itself.'' *Holiday CVS,* 77 FR at 62341 (citing *Med. Shoppe—Jonesborough,* 73 FR at 384; *United Prescription Servs., Inc.,* 72 FR 50397, 50407–08 (2007); *EZRX, L.L.C.,* 69 FR 63178, 63181 (2004); *Role of Authorized Agents in Communicating Controlled Substance Prescriptions to Pharmacies,* 75 FR 61613, 61617 (2010); *Issuance of Multiple Prescriptions for Schedule II Controlled Substances,* 72 FR 64921, 64924 (2007) (other citations omitted)). The DEA has consistently held that the registration of a pharmacy may be revoked as the result of the unlawful activity of the pharmacy's owners, majority shareholders, officers, managing pharmacist, or other key employee. *EZRX, L.L.C.,* 69 FR at 63,181; *Plaza Pharmacy,* 53 FR 36,910, 36,911 (1988). Similarly, ''[k]nowledge obtained by the pharmacists and other employees acting within the scope of their employment may be imputed to the pharmacy itself.'' *Holiday CVS,* 77 FR at 62341.

In support of its allegations that the Pharmacy violated its corresponding responsibility, the Government convincingly argues that the Pharmacy filled prescriptions to customers without documenting the resolution of numerous red flags. Regarding the documentation of red flags in Texas, [Dr. Witte credibly testified that it would be below the minimum standards of practice and outside the usual course of professional practice for a Texas pharmacist to fail to document the resolution of red flags on a prescription before dispensing it. Tr. 178–82, 209–211 244–47]; [*F] *see also The Medicine Shoppe,* 79 FR 59,504, 59,509 n.14, 59,516 (2014) (concluding a Texas pharmacy violated its corresponding

[*C] I am omitting some language from the RD and adding the above to clarify the analysis of a pharmacist's corresponding responsibility under 21 CFR 1306.04(a).

[*D] Text adjusted in response to Respondent's Exceptions.

[*E] Text removed in response to Respondent's Exceptions.

[41] [The ALJ used this footnote to take official notice under the Administrative Procedure Act of 22 Tex. Admin. Code § 291.33(c)(7)(A). In the section on Respondent's Exceptions, *supra,* I addressed Respondent's response and found that the ALJ properly applied the regulation.]*

[*F] Text adjusted to add reference and citation to Dr. Witte's testimony.

duty by failing to document the resolution of red flags on hard-copy prescriptions and that the record as a whole lacked evidence that red flags were resolved).

Pattern Prescribing

[Both expert witnesses in this matter testified that pattern prescribing is a red flag that can be indicative of drug abuse or diversion. FF 58–59, 61; Tr. 171–72.] [*G] ''`Pattern prescribing' occurs when a physician prescribes the same drug and the same dosage to every patient the physician sees.'' *The Medicine Shoppe,* 79 FR 59504, 59512 (2014); *see also Jones Total Health Care Pharmacy, L.L.C., & SND Health Care, L.L.C.,* 81 FR 79188, 79215 (2016) (noting expert's definition of pattern prescribing as ''`patients going to the same doctor for the same ailments, receiving the same prescriptions in the same quantity without any difference in the treatment.' '). Pattern prescribing raises a red flag because a ''prescription should be tailored to each patient's individual needs based on their chronic conditions.'' *The Medicine Shoppe,* 79 FR at 59,512; *see also United States* v. *Hammond,* 781 F.2d 1536, 1538 (11th Cir. 1986) (accepting expert testimony that ''the lack of individualized dosing'' is indicative of diversion). When a doctor prescribes the same controlled substances to different patients with similar doses for everybody, it suggests the doctor is simply churning out controlled substance prescriptions indiscriminately rather than conducting legitimate medical treatment. [*See* FF 61;] [*H] *Jones Total Health Care Pharmacy, L.L.C., & SND Health Care, L.L.C.,* 81 FR at 79195; 21 CFR 1306.04(a) (requiring controlled substances to be prescribed only for ''legitimate medical purpose[s]''). Ultimately, the concern with pattern prescribing is that it indicates a lack of individualization of therapy. [FF 61.] [*I]

Agency [cases involving similar factual scenarios and credible expert testimony] [*J] demonstrate that pattern prescribing manifests itself in one of two forms. One form of pattern prescribing occurs where one physician or clinic prescribes the same controlled substances to different patients over an extended time period. *See Holiday CVS, L.L.C.,* 77 FR 62316, 62323 (2012) (determining that a doctor was clearly ''engaged in pattern prescribing'' where the doctor repeatedly prescribed ''oxycodone and alprazolam based on nearly uniform diagnoses'' over the course of six months). Another form of pattern prescribing occurs where one doctor or clinic writes the same prescription to different patients on the same day. *See Superior Pharmacy I & Superior Pharmacy II,* 81 FR 31310, 31322 (2016) (describing instance where various doctors of same clinic wrote 16 prescriptions for oxycodone 30 mg on the same date to different patients). The Respondent's expert witness, Mr. Litman, however, was only concerned about the second category of pattern prescribing—seeing the same prescription 20 times in one day. Tr. 659–60.

Some red flags, such as prescription cocktails, suboptimal dosing, and cash payment, should capture a pharmacist's attention early on, if not immediately. In contrast, with respect to the first variety of pattern prescribing—and to a lesser extent the second variety—the problem manifests itself over an extended period of time and is not immediately recognizable. FF 67, 92. Quite literally, pattern prescribing occurs when a single provider's or group of providers' prescriptions all share common characteristics and over time create a pattern of the same substances, doses, and strengths. Tr. 228–29, 232–33, 250, 264–65, 279, 289, 353.

In *East Main Street Pharmacy,* the respondent repeatedly dispensed similar prescription cocktails to different patients that were written by the same provider. 75 FR at 66163. The Deputy Administrator's decision in *East Main Street Pharmacy* observed that the prescriptions for hydrocodone and alprazolam were always prescribed at the maximum strength, and that the cocktails always contained some combination of the same substances. *Id.* Examples can be found in this case with the prescriptions issued to J.W., H.J., M.H., A.S., K.S., and M.A., where each patient received prescriptions for 90 to 120 tablets of 10 mg hydrocodone and 60 tablets of 2 mg alprazolam. Tr. 208–09. Dr. Witte noted that these prescriptions constituted a drug cocktail, and were indicative of pattern prescribing, with the ''same medications, the same directions, [and] the same quantity for different patients.'' *Id.* at 209. Dr. Witte further testified that upon receipt of such prescriptions ''a reasonably prudent pharmacist'' should investigate the red flag presented by the prescriptions. *Id.* at 210. [She further testified that a pharmacist acting in the usual course of professional practice and following the minimum standard of practice in Texas would not fill the prescriptions without resolving the red flag and documenting the resolution. Tr. 210–211.] [*K] There is no documentation in the Administrative Record, however, showing that the Pharmacy resolved any of the red flags. *Id.* at 210. Additional examples of unresolved pattern prescribing can also be seen in the prescriptions issued by I.I., C.V., and NE *See* FF 163, 169, 174.

Repeat prescriptions for the same handful of drug cocktails issued by the same providers for different patients should ''create[ ] an obvious and compelling level of suspicion that the prescriptions lacked a legitimate medical purpose.'' *Jones Total Health Care Pharmacy, L.L.C.,* 81 FR at 79199. Such is the case with the prescriptions filled by the Pharmacy. FF 162–177. Based upon her review of Government Exhibit 2, Dr. Witte credibly testified that while the prescriptions presented numerous red flags, the issue of pattern prescribing stood out and was suspicious. Tr. 171, 244, 296, 335, 358–59.

Varying the substances and doses, however, would weigh against a finding of pattern prescribing. In *Hills Pharmacy,* for example, the Administrator rejected the Government's claim of pattern prescribing because the dosages ranged from 140 to 240 tablets. 81 FR at 49841 n.46. Additionally, out of a set of 20 prescriptions provided by the Government, there were 3 different controlled substances prescribed in various strengths. *Id.*

In this case, Dr. Witte identified pattern prescribing as a recurring issue with the prescriptions she reviewed that had been filled by the Pharmacy [and testified that a pharmacist dispensing prescriptions within the minimum standard of practice in Texas would have recognized the pattern prescribing in the subject prescriptions as a red flag].[*L] Tr. 171, 244, 296, 335, 358–59; FF 61–62. Her testimony and analysis concerning those prescriptions is consistent with the DEA cases discussed above. FF 61–62. Furthermore, when examining the prescriptions filled by the Pharmacy beginning in August 2014 and running through May 2015, the pattern prescribing becomes more and more apparent with each prescription filled. Because Ms. Igwe filled all of these prescriptions, the pattern should have become obvious to her. Tr. 578.

Distance

The distance a patient is willing to travel to obtain a prescription and fill it is one factor a pharmacist must consider when discharging his or her

[*G] Text and citations added for clarity.

[*H] Citation added.

[*I] Citation replaced and text removed for brevity.

[*J] Text adjusted for clarity.

[*K] Text added for clarity.

[*L] Text adjusted for clarity.

corresponding responsibility. [Tr. 172;] [*M] *see also Hills Pharmacy, L.L.C.,* 81 FR at 49841 n.45; *Samuel Mintlow, M.D.,* 80 FR 3630, 3650 (2015) (applying the distance factor to a physician case and reasoning that a doctor should be suspicious when a patient travels a long distance and ''bypass[es] numerous other potential treating physicians''). This is not a new consideration. Medical and pharmacy experts have testified in DEA cases for at least the past eight years that traveling long distances to obtain or fill controlled substance prescriptions is a red flag indicative of diversion and abuse.[42] Although there is no ''categorical rule'' dictating the precise number of miles that raise a red flag, a pharmacist must nevertheless take the distance traveled into account when deciding whether to dispense controlled substances. *Hills Pharmacy,* 81 FR at 49841 n.45. [] [*N]

Additionally, Texas regulations include the distance a patient traveled as one factor pharmacists should be aware of before dispensing a controlled substance. The Texas State Board of Pharmacy, echoing the federal standard, requires pharmacists to ''exercise sound professional judgment with respect to'' the legitimacy of a prescription. 22 Tex. Admin. Code § 291.29(a); *see also* 21 CFR 1306.04(a), 1306.06. The Board then goes on to provide a non-exhaustive list of circumstances a pharmacist should weigh when evaluating a prescription's legitimacy, including ''the geographical distance between the practitioner and the patient or between the pharmacy and the patient.'' 22 Tex. Admin. Code § 291.29(c)(4).

As Dr. Witte noted, seeing a doctor in south Dallas and filling a prescription in Plano (north of Dallas) when the patient lives in Fort Worth raises a concern Tr. 189–93, 281, 321. While testifying, Dr. Witte asked an appropriate rhetorical question, ''Why did these patients feel the need to drive clear across Dallas, all the way up to Plano, north of the city, to fill these prescriptions?'' *Id.* at 281. Nothing in the Administrative Record provides an answer to that question. Dr. Witte further opined that, ''more than likely, there are many pharmacies located between . . . where the patient lives and where the clinic is.'' [43] *Id.* at 263; *see also id.* at 323. Certainly there could have been valid reasons for the distances and routes traveled, but the minimum standards in Texas obligate a pharmacist to at least raise this concern with the provider to determine the prescription's legitimacy, and then document the explanation. [FF 63–64, 79, 90].[*O] This was not done here. FF 79, 88, 90; GE–2; RE–E. Dr. Witte's testimony is consistent with DEA precedent and Texas law. Further, while Ms. Igwe did not seem to have the slightest concern about the distance her customers were traveling to obtain their prescriptions and get them filled, she also apparently had not the slightest curiosity as to why this small group of prescribers had referred so many patients to her relatively small and out of the way Pharmacy. While nothing in the Administrative Record directly answers that question, that facts alone should have raised a question about the legitimacy of the prescriptions.

The Respondent's expert witness, Mr. Litman, however, minimized the significance of distance, noting that we live ''in a very mobile society now, and people are on the go all the time.'' Tr. 730. Mr. Litman added that on some days he commutes 80 miles. *Id.* As a pharmacist, who at times works in a retail pharmacy in Miami, Florida, Mr. Litman would be concerned with a patient traveling from South Carolina to fill a prescription. *Id.* at 695. Mr. Litman, however, was not aware of DEA cases that deal with pharmacy customers who had driven long distances to obtain their prescriptions and have them filled. *Id.* at 727. And as previously noted, the DEA has considered distance to be a red flag of diversion for at least the past 8 years. *See supra* note 42 and accompanying text. Further, Mr. Litman was apparently unaware of the Texas requirement to at least consider the distance a customer has traveled to fill a prescription. Tr. 739; *see* 22 Tex. Admin. Code § 291.29(c)(4). [His testimony concerning distance contradicts cases based on credible expert testimony that distance is a red flag under the usual course of professional practice of pharmacy. *Morning Star Pharmacy and Medical Supply 1,* 85 FR at 51052; *Hills Pharmacy, L.L.C.,* 81 FR at 49841 n.45 (2016); *Jones Total Health Care Pharmacy, L.L.C. & SND Healthcare, L.L.C.,* 81 FR at 79194–95; 21 CFR 1306.04(a) (creating the pharmacist's corresponding responsibility). It also contradicts Dr. Witte's credible testimony that the distances the patients traveled to fill the subject prescriptions were red flags that a pharmacist following the minimum standards of practice in Texas should have investigated, resolved, and documented before filling the prescriptions. *E.g.,* Tr. 401–404.] [*P] Accordingly, I give no weight to Mr. Litman's testimony that distance is not a red flag. Tr. 726–27.

Cash Payments

Dr. Witte testified that paying cash for prescriptions was a red flag. *See, e.g.,* Tr. 172–73, 229–30, 263. She also testified that the average cash price for 90 tablets of hydrocodone was about $70.00 and the average price for 60 tablets of alprazolam was about $35.00 *Id.* at 223, 229. Here, the Pharmacy's customers were routinely paying $179.99 and $59.99, respectively. FF 167, 173. When a customer purchased prescriptions for both hydrocodone and alprazolam at the same visit to the Pharmacy, the customer would pay $239.98. *Id.* Even Mr. Litman expressed concern for cash payments in excess of $200.00. Tr. 692, 753. Mr. Litman also downplayed the significance of cash payments because many individuals do not have medical insurance and ''cash payments are much more common these days.'' *Id.* Ms. Igwe testified, however, that a majority of customers used insurance to pay for their prescriptions. *Id.* at 496. If that is the case, it is more concerning that all of the customers from Government Exhibit 2 paid cash when filling prescriptions for hydrocodone and/or alprazolam. FF 111, 165, 171, 176.

Paying cash for controlled substances, rather than billing insurance, is a red flag that the patient is seeking the substances for illicit purposes. '''[A]ny reasonable pharmacist knows that a patient that (sic) wants to pay cash for a large quantity of controlled substances is immediately suspect.'" *Jones Total Health Care Pharmacy,* 81 FR at 79194 (quoting *E. Main St. Pharmacy,* 75 FR at 66158). Paying for a prescription in cash is ''the preferred payment method for

[*M] Citation added.

[42] *Marcia L. Sills, M.D.,* 82 FR 36423, 36434 (2017); *Jones Total Health Care Pharmacy, L.L.C.,* 81 FR 79188, 79188 (2016); *Edge Pharmacy,* 81 FR 72092, 72103 (2016); *Hills Pharmacy, L.L.C.,* 81 FR 49816, 49820, 49822 (2016); *Superior Pharmacy I & Superior Pharmacy II,* 81 FR 31310, 31323 (2016); *Grider Drug #1 & Grider Drug #2,* 77 FR 44070, 44083 (2012), *Holiday CVS, L.L.C.,* 77 FR 62316, 62319 (2012); *Jacobo Dreszer, M.D.,* 76 FR 19836, 19393 (2011); *E. Main St. Pharmacy,* 75 FR 66149, 66150 (2010); *George C. Aycock, M.D.,* 71 FR 17529, 17539 (2009).

[*N] Text removed for brevity.

[43] Dr. Witte was accepted as an expert in the field of pharmacy in the state of Texas, not geography. Tr. 169. Thus, I do not credit her testimony concerning distances, routes, and general availability of pharmacies as that of an expert. I do credit it, however, as a reasonable observation based upon common experience. Certainly one is more likely to pass by a location to fill prescriptions in an urban area than a rural one. Common experience also suggests that, in general, it is more time consuming to travel even a short distance in an urban area than a rural one.

[*O] Text removed and citation corrected.

[*P] Text adjusted for clarity and additional citations.

illegitimate prescriptions,'' because it is not traceable. *Masters Pharmaceutical, Inc.* v. *DEA,* 861 F.3d 206, 220 (DC Cir. 2017). Like all red flags, paying in cash for controlled substances, or cash equivalent, such as credit card or check, is viewed in combination with other evidence of diversion. *See Edge Pharmacy, L.L.C.,* 81 FR 72092, 72103, 72111–12 (2016) (concluding substantial distances, large quantities of highly-abused controlled substances, and cash payments indicated the prescriptions lacked a legitimate medical purpose).

In the absence of other signs of diversion, prices in the range of $25 to $220 may be insufficient to prove that a pharmacist violated his or her corresponding responsibility. *Hills Pharmacy, L.L.C.,* 81 FR at 49839 n.39. DEA cases relying on expert testimony instruct, however, that not all red flags ''have the same hue.'' *Superior Pharmacy I & Superior Pharmacy II,* 81 FR at 31335 n.54. ''[W]here there are multiple red flags, none of which alone would establish the requisite scienter, the combination of red flags may well create a subjective belief that there is a high probability that a prescription lacks a legitimate medical purpose.'' *Id.* Thus, as in this case, cash payments, combined with other red flags, can be enough to find a pharmacist violated 21 CFR 1306.04(a). *Edge Pharmacy, L.L.C.,* 81 FR at 72111–12; *Superior Pharmacy I & Superior Pharmacy II,* 81 FR at 31335 n.54.

The Allegations

The Prescriptions

1. Initially, the Government alleged that between August 2014 and May 2015 the Pharmacy filled 75 controlled substance prescriptions outside the usual course of pharmacy practice, in violation of 21 CFR 1306.06, and in contravention of the Pharmacy's ''corresponding responsibility'' under 21 CFR 1306.04(a). ALJ–1, at 2, para. 3. The Pharmacy did so by repeatedly filling controlled substance prescriptions that contained red flags of diversion and/or abuse without addressing or resolving those red flags. The Pharmacy's conduct in doing so violated 21 U.S.C. 823(f)(4); Tex. Health & Safety Code § 481.070-.075; Tex. Health & Safety Code § 481.128; 22 Tex. Admin. Code § 291.22(c)(2); and 22 Tex. Admin. Code § 291.33. Additionally, the Pharmacy engaged in conduct that demonstrated negative experience in its dispensing of controlled substances, in violation of 21 U.S.C. 823(f)(2). ALJ–1, at 2–3, para. 3, 6–8.

The regulation concerning the usual course of pharmacy practice provides that, ''[a] prescription for a controlled substance may only be filled by a pharmacist, acting in the usual course of his professional practice . . . .'' 21 CFR 1306.06. The DEA has also promulgated regulations concerning a pharmacist's corresponding responsibility. That regulation provides:

> A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment . . . is not a prescription within the meaning of section 309 of the [Controlled Substances] Act (21 U.S.C. 829) and the person knowingly filling such purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

21 CFR 1306.04(a). Texas regulations require that ''[u]pon identifying any clinically significant conditions, [or] situations . . . the pharmacist shall take appropriate steps to avoid or resolve the problem including consultation with the prescribing practitioner.'' 22 Tex. Admin. Code § 291.33(c)(2)(A)(ii). That resolution must be documented [on the prescription itself or ''in the pharmacy's data processing system associated with the prescription.'' *Id.* at §§ 291.33(c)(2)(A)(iv) and 291.33(c)(2)(C). The minimum documentation requirements include] [*Q] recording the date the pharmacist discussed the matter with the prescriber, recording the name of the person with whom the pharmacist discussed the matter, and any applicable information pertaining to the discussion. *Id.* [ ] [*R]

The Government's first allegation asserts that the Pharmacy violated its corresponding responsibility in filling the prescriptions contained in Government Exhibit 2, which were all filled between August 2014 and May 2015. ALJ–1, at 2, para. 3. The testimony of Dr. Witte, supported by DEA cases, makes clear that pattern prescribing cannot be established by only a few prescriptions. Tr. 332–33. At first blush, the allegation seems inconsistent with DEA precedent and Dr. Witte's testimony that pattern prescribing cannot be established by only a few prescriptions.[44] The Pharmacy, however, did not start filling prescriptions for the ''Prescribers'' in August 2014.

The Pharmacy started receiving prescriptions from Redbird in January or February 2014. FF 11; Tr. 475. In fact, prior to filling the cocktail prescriptions for J.S. on August 6, 2014, the Pharmacy had filled at least 104 prescriptions for hydrocodone written by the same small group of prescribers.[45] FF 155. In addition, the Pharmacy had filled at least 11 prescriptions written by this small group of prescribers for cocktails of hydrocodone and alprazolam prior to August 2014, for patients who had to travel a significant distance to fill those prescriptions. FF 140, 142–45. In each case the prescriptions raised numerous red flags: The patient was receiving a large quantity of controlled substances; the controlled substances constituted a drug cocktail; the prescription was written by one of a small number of prescribers of hydrocodone and alprazolam whose prescriptions the Pharmacy filled for those controlled

[*Q] Text adjusted in response to Respondent's Exceptions.

[*R] Text removed in response to Respondent's Exceptions.

[44] The inconsistency results because the number of prescriptions issued by each individual prescriber in Government Exhibit 2 might be insufficient by itself to establish a pattern that the Pharmacy should have been reasonably expected to notice. Looking solely at the hard-copy prescriptions in Government Exhibit 2, and not the patient profiles, reveals the following breakdown of the number of prescriptions issued by each practitioner. Nurse J.W. issued 1 prescription. GE–2, at 67. Dr. A.Q. issued 5 prescriptions. *Id.* at 18, 20, 64, 66, 68. Nurse L.R. issued 7 prescriptions. *Id.* at 1, 3, 24, 37, 96, 119. Nurse Practitioner I.I. issued 10 prescriptions. *Id.* at 8, 10, 12, 14, 16. Nurse S.G. issued 10 prescriptions. *Id.* at 5, 6, 34, 77, 81, 91, 111, 124. C.Z., PA, issued 8 prescriptions. *Id.* at 25, 30, 41, 46, 52, 100, 115, 122. Dr. C.V. issued 12 prescriptions. *Id.* at 28, 35, 39, 44, 47, 50, 83, 94, 98, 113, 117, 130. Dr. NE issued 23 prescriptions. *Id.* at 22, 26, 49, 56, 58, 60, 62, 71, 73, 75, 79, 86, 88, 89, 102, 104, 105, 107, 109, 120, 125, 127, 132. When written over the course of 10 months, from August 2014 to May 2015, the volume of prescriptions issued by each practitioner might not be suspicious. Thus, in determining whether the Pharmacy filled pattern-style prescriptions, consideration is also given to additional documentary evidence in the Administrative Record beyond the 10 month period in the allegation. For example, consideration has been given to Government Exhibit 6 and Respondent Exhibit C. Consideration is also given to the fact that all the prescribers were associated with the same medical clinics.

[45] Actually, if Respondent's Exhibit C is taken into consideration, the Pharmacy filled far more than 104 prescriptions for hydrocodone written by the same small group of Prescribers prior to filling the hydrocodone prescription for J.S. in August 2014. The 104 figure only takes into account those prescriptions documented by Government Exhibit 6. A review of Respondent's Exhibit C, which the Pharmacy claims to be its complete dispensing history of hydrocodone from the date the Pharmacy opened until the date of the DEA inspection, Tr. 470–71, reveals that the overwhelming majority of prescriptions the Pharmacy filled for hydrocodone were written by one of the Prescribers identified in Findings of Fact 118–121, 155.

substances; the prescriber was located a significant distance from the Pharmacy; and the round-trip distance for the patient to obtain the prescription and have it filled at the Pharmacy was also significant. *Id.*[*S]

Here, Government Exhibit 2 documents that the Pharmacy filled more than 75 controlled substance prescriptions between August 2014 and May 2015 for 27 different customers. FF 140. Those prescriptions contain many of the same red flags as are contained in the prescriptions the Pharmacy filled prior to August 2014 that were written by the same small group of Prescribers.[46] Furthermore, there is no credible evidence that the Pharmacy ever took any steps to resolve any of these red flags, either before or after August 2014. Tr. 216–17, 227, 236.

Accordingly, the allegations contained in paragraphs [3, 6, and 8] [*T] of the OSC asserting that between August 2014 and May 2015 the Pharmacy filled 75 controlled substance prescriptions outside the usual course of pharmacy practice, in violation of 21 CFR 1306.06, and in contravention of the Pharmacy's ''corresponding responsibility'' under 21 CFR 1306.04(a), as well as 21 U.S.C.§ 823(f)(2) and (4); Tex. Health & Safety Code § 481.070-.075; Tex. Health & Safety Code § 481.128; 22 Tex. Admin. Code § 291.22(c)(2) [ ],[*U] are sustained, and weigh in favor of revoking the Pharmacy's DEA registration.

2. The Government next alleged four situations in which the Pharmacy filled prescriptions that contained one or more red flags that the Pharmacy did not resolve prior to filling the prescriptions. The Government listed the following as examples of red flags the Pharmacy did not resolve: (a) Prescriptions for highly-abused controlled substances such as hydrocodone, alprazolam, and promethazine with codeine; (b) prescriptions written to individuals traveling long and/or unusual distances to obtain their prescriptions and/or fill their prescriptions at the Pharmacy; (c) prescriptions for individuals obtaining the same or similar combinations of controlled substances from the same small number of providers; (d) prescriptions for highly-abused drug cocktails, such as hydrocodone and alprazolam; (e) prescriptions containing inappropriate and/or unusual directions for use; and (f) prescriptions for controlled substances purchased with cash. ALJ–1, at 3–5, paras. 10, 10(a)-(d).

Ms. Igwe testified that she did not see any red flags in the prescriptions introduced by the Government because they came from clinics with which she was familiar.[47] Tr. 512–13. Also, the types of controlled substances in these prescriptions were consistent with the clinics' specialty, chronic pain management. *Id.* at 512. Additionally, some of the controlled substances were prescribed with appropriate non-controlled substances. *Id.* at 514, 663–65. For example, some of the prescriptions, such as the M.W. prescription, contained Mobic, an anti-inflammatory that can reduce the need for an opioid. *Id.* at 513, 663–64; GE–2, at 1. Some prescriptions, as in the case of M.W. prescription, also contained Robaxin, which is a muscle relaxant. Tr. 513, 664–65; GE–2, at 1. Mobic and Robaxin are relevant treatment options involving non-scheduled drugs for a patient suffering from chronic pain. Tr. 513, 663–65. Ms. Igwe found it common that different doctors practicing in the same specialty prescribed the same or similar types of controlled substances. *Id.* at 519; *see also id.* at 658.

Ms. Igwe also testified that customers would come into the Pharmacy wearing braces or other ''mobilization'' (sic) devices, consistent with the patient needing a controlled substance to treat pain. *Id.* at 516. Sometimes a customer would say something that indicated to Ms. Igwe the customer needed the medications to treat pain. *Id.* at 516.

In addition, Ms. Igwe was not concerned with patients coming from Fort Worth. FF 138. Ms. Igwe testified that it was not unusual to see patients with a Fort Worth address.[48] *Id.* at 494. The Pharmacy had patients from towns surrounding the Plano area, such as Lavon, Princeton, Farmersville, Gladewater, DeSoto, and Lancaster. *Id.* at 494, 584. The Pharmacy had patients who came from throughout the Dallas-Fort Worth metroplex. *Id.* at 495, 584.

Although Ms. Igwe testified that she was not concerned about red flags, in part, because she was familiar with the clinics the customers were coming from, Ms. Igwe also testified that she never checked to see if the Prescribers' clinics were registered with the State of Texas as pain management clinics. FF 99. Thus, her belief that she was receiving prescriptions from pain management specialists was, at best, uninformed. While it is true that many of the prescriptions in Government Exhibit 6 also included non-controlled substances that could also be used to treat pain symptoms, it is possible that the Prescribers were simply ''masking'' the fact that they were issuing prescriptions for illegitimate reasons. Even the Respondent's own expert, Mr. Litman, concluded that he thought the Prescribers were engaged in masking. Tr. 713. Mr. Litman further testified that the only way to sniff out masking, or at least to ''reduce the suspicions,'' is to ''call the physician.'' *Id.* at 687, 727. The Administrative Record contains no evidence documenting such calls being made to the Prescribers.

With respect to distance, Ms. Igwe, as well as Mr. Litman, apparently had no concerns about the distances the Pharmacy's customers were driving to obtain their prescriptions and have them filled at the Pharmacy. *Id.* at 492–95, 542–43, 695–96, 727. Contributing to Ms. Igwe's lack of concern about distance was the fact that she believed the customers were coming from pain management clinics. *Id.* at 512–13. Further, both Ms. Igwe and Mr. Litman seemed oblivious to the Texas requirement that a pharmacist should consider ''the geographical distance between the practitioner and the patient or between the pharmacy and the patient'' when evaluating a

[*S] The OSC did not allege that Respondent unlawfully dispensed any prescriptions prior to August 2014. Accordingly, while Respondent's dispensing history prior to August 2014 is relevant to establishing patterns in the subject prescriptions, any deficiencies in Respondent's prescription dispensing practices outside of the subject prescriptions do not weigh for or against Respondent retaining its registration.

[46] Government Exhibit 6 is the Pharmacy's dispensing log for hydrocodone. FF 24. The stated date range on Government Exhibit 6 is October 23, 2013 to June 18, 2015. FF 25. The earliest date recorded on Government Exhibit 6, however, is July 7, 2014. GE–6, at 1. The actual hard-copy prescriptions for most of the prescriptions recorded on the dispensing log are not contained in the Administrative Record. Nevertheless, the dispensing log identifies the prescriber, the prescriber's address, the patient, the patient's address, the quantity of hydrocodone tablets dispensed, and amount the customer paid for the prescription. Thus, Government Exhibit 6 documents that most of the prescriptions would have contained the following red flags: Pattern prescribing; a highly abused controlled substance; unusual routes of travel and/or long distances to obtain the prescriptions and have them filled at the Pharmacy; and cash payments.

[*T] Text adjusted in response to Respondent's Exceptions.

[*U] Text adjusted in response to Respondent's Exceptions.

[47] A former Administrator overruled a similar argument in the past. *See Ralph J. Bertolino, d/b/a Ralph J. Bertolino Pharmacy,* 55 FR 4729, 4729–4730 (1990) (deciding that the ''sheer quantity and frequency of [Preludin] prescriptions'' should have tipped off the pharmacy that the prescriptions lacked a legitimate medical purpose even though the pharmacy argued that the prescriptions were ''not surprising'' given the provider's medical specialty).

[48] In fact, there are numerous Fort Worth addresses for the Pharmacy's customers listed in Government Exhibit 6. Most of those customers, however, also received their prescriptions for hydrocodone from the same small group of Prescribers.

prescription's legitimacy. 22 Tex. Admin. Code § 291.29(c)(4).

Finally, there is no documentation in the Administrative Record of the Pharmacy ever: Resolving any red flags; consulting with providers about red flags; checking the Texas PMP; or having discussions with customers to resolve missing addresses on prescriptions. Tr. 216–17, 227, 236. In fact, although Ms. Igwe testified that she had such documentation, she did not believe she needed to present it.[49] *Id.* at 547. This belief is unreasonable given the allegations contained in the OSC and because Ms. Igwe was asked to produce any notes she had concerning the resolution of red flags during the AIW. FF 18–19.

A. The M.W. Prescription

The Government alleged that on August 1, 2014, the Pharmacy filed a prescription for 120, 10 mg tablets of hydrocodone presented by an undercover agent without resolving the red flags presented by the prescription. The agent obtained the prescription from a practitioner in a clinic in south Dallas, more than 30 miles from the Pharmacy, which is located north of Dallas. There was no legitimate medical purpose for the prescription and the agent used a fictitious address. The agent also sought to purchase the prescription with cash. ALJ–1, at 3–4, paras. 10, 10(a).

The basic facts that support this allegation are contained in the sworn declaration of the undercover investigator, UC 1. GE–11. During his undercover investigation, UC 1 used the name M.W. FF 124. On July 29, 2014, M.W. went to the Redbird Medical Clinic, where Nurse Practitioner L.R. conducted a cursory examination. FF 126–27. L.R. then issued M.W. a prescription for 120, 10 mg tablets of hydrocodone, as well as prescriptions for Robaxin (methocarbamol) and Mobic (meloxicam). FF 127; GE–2, at 1; GE–10, at 5. Instead of simply giving M.W. his prescription so that he could have it filled at the pharmacy of his choice, Redbird informed M.W. that they were sending his prescription to the Pharmacy. FF 127. The Pharmacy, however, did not receive the prescription until August 1, 2014. FF 129. In spite of the fact that the prescription was written for pain, M.W. did not pick up his prescriptions until August 4, 2014. FF 132. Based on the addresses contained in the Pharmacy's records, M.W. would have needed to travel almost 100 miles to obtain his prescriptions from Redbird, have them filled at the Pharmacy, and return to his recorded, though fictitious, address. GE–12. M.W. paid the Pharmacy $206.00 for his three prescriptions, to include $150.00 for the hydrocodone. GE–2, at 1; GE–11, at 3.

In the three weeks before the Pharmacy filled M.W.'s prescription for hydrocodone on August 1, 2014,[50] the Pharmacy had already filled 83 prescriptions for hydrocodone, and L.R. had written 27 of those prescriptions. GE–6, at 1–8. In addition, every one of those prescriptions had been written by one of the Prescribers. *Id., see also* FF 118–21.

The prescription that L.R. wrote for M.W. raises the following red flags: No patient address; no provider DEA number; [ ] *[V] the prescription was written on July 29, 2014, but not faxed to the Pharmacy until August 1, 2014, and not picked up until August 4, 2014; [51] and an unusual path and distance to obtain the prescription and get it filled. FF 47, 63, 69, 75, 135. In addition, M.W. paid over $200 cash to pick up his three prescriptions.[52] FF 65; GE–2, at 1; GE–11, at 3.

There are no notations on the M.W. prescription or on M.W.'s patient profile, maintained by the Pharmacy, to suggest that any of the above noted red flags were resolved either before or after Ms. Igwe filled the prescription for hydrocodone. Tr. 194–95; GE–2, at 1; GE–10, at 4–5. Accordingly, the M.W. prescription for hydrocodone was not dispensed in the usual course of pharmacy practice. Tr. 195. In addition, the pharmacist who filled these prescriptions did not follow the minimum standard of the practice of pharmacy in the State of Texas, and did not satisfy the pharmacist's corresponding responsibility to ensure that prescriptions are issued for legitimate medical purposes. *Id.*

The allegation concerning the M.W. prescription is also included in the allegation contained in paragraphs 3–7 of the OSC that between August 2014 and May 2015 the Pharmacy filled 75 controlled substance prescriptions outside the usual course of pharmacy practice and in contravention of the Pharmacy's corresponding responsibility to ensure that prescriptions are dispensed for legitimate medical purposes. ALJ–1, at 2–3, paras. 3–7. The Government has not advanced any theory as to why this same allegation should be considered twice. *See* ALJ–35. Therefore, the allegations contained in paragraphs 10 and 10(a) of the OSC, that the Pharmacy filled the M.W. prescription for 120, 10 mg tablets of hydrocodone on August 1, 2014, without resolving red flags presented by the prescription, are sustained, and weighs in favor of revoking the Respondent's DEA registration. The substance of these allegations, however, will only be considered once.

B. Prescription Cocktails, Distance, Cash Payments, and Facially Invalid Prescriptions

(i.) Next, the Government alleged that from August 2014 to May 2015, the Pharmacy dispensed prescription cocktails (hydrocodone and alprazolam) to 25 different individuals, all of whom traveled unusual paths and distances to obtain their prescriptions for these controlled substances and to have them filled at the Pharmacy. ALJ–1, at 3–4, paras. 10, 10(b).

Government Exhibit 2 reveals that between August 8, 2014, and May 18, 2015, the Pharmacy filled prescriptions for hydrocodone and alprazolam on the same day for 25 different customers. GE–2, at 3–81, 86–132. Of the 27 customers identified in Government Exhibit 2, only patients M.W. and G.B. did not have prescriptions for both hydrocodone and alprazolam filled by the Pharmacy on the same day. *See id.* at 1, and 83–84.

(ii.) The Government also alleged that six individuals, J.W., H.J., M.H., A.S., K.S., and M.A., traveled more than 100 miles to obtain their prescriptions, have them filled at the Pharmacy, and return home. ALJ–1, at 3–4, para. 10, 10(b).

Based upon round-trip distance calculations, each of these Pharmacy customers, J.W., H.J., M.H., A.S., K.S., and M.A., traveled more than 100 miles to obtain their prescriptions and have them filled at the Pharmacy. FF 162, 167, 173. Of these six customers, K.S.

[49] In this regard the Respondent is like the student who neglected to turn in his homework. They both get no credit.

[50] The allegation alleges that this prescription was filled on August 1, 2014, which corresponds to the date on the fill sticker. *See* GE–2, at 1. Ms. Igwe acknowledged that the date on the fill sticker is not necessarily the date the customer picked up his or her prescription. FF 117. Ms. Igwe also testified that she had no reason to dispute that M.W. prescription was picked up on August 4, 2014. Tr. 576.

[*V] Text adjusted in response to Respondent's Exceptions.

[51] While Ms. Igwe was not concerned about the delay between the date M.W.'s prescription was written for pain and when it was picked up six days later, her reasoning was based on pure speculation that M.W. could have had other medication left over. Tr. 564–65. Had Ms. Igwe checked the PMP she would have learned that not to be the case. Further, Dr. Witte credibly testified that such a delay would call into question whether the patient needed pain medication and whether the prescription was for a legitimate medical purpose. *Id.* 192–93, 397.

[52] Even the Respondent's expert expressed some concern for cash payments in excess of $200. Tr. 692, 753.

had the shortest round trip of 101 miles, which would have taken 1 hour and 51 minutes to travel during light traffic. GE–3, at 128. Customer M.H. had the longest round-trip distance of 121 miles, which would have taken 2 hours and 19 minutes to travel with heavy traffic. GE–3, at 54.

(iii.) The Government next alleged that 17 individuals, J.S., C.J., SW, J.W.2, S.H., R.E., R.N., R.H., B.B., S.N., I.B., M.W.2, Y.S., R.H.2, C.D., A.K., and S.B., traveled between 70–100 miles to obtain their prescriptions, have them filled at the Pharmacy, and return home. ALJ–1, at 3–4, para. 10, 10(b).

Based upon round-trip distance calculations, each of these Pharmacy customers, J.S., C.J., SW, J.W.2, S.H., R.E., R.N., R.H., B.B., S.N., I.B., M.W.2, Y.S., R.H.2, C.D., A.K., and S.B., traveled between 70 to 100 miles to obtain their prescriptions and have them filled at the Pharmacy. FF 47, 151, 162, 167, 173. Of these 17 customers, K.S. had the shortest round trip of 76.6 miles, which would have taken 1 hour and 27 minutes to travel during light traffic. GE–3, at 74. Customer SW had the longest round-trip distance of 99.7 miles, which would have taken 1 hour and 54 minutes to travel in moderate traffic. GE–3, at 167.

(iv.) The Government alleged that four individuals, R.N., E.H., B.B., and T.H.,[53] traveled between 60–70 miles to obtain their prescriptions, have them filled at the Pharmacy, and return home. ALJ–1, at 3–4, para 10, 10(b).

Based upon round-trip distance calculations for Pharmacy customers R.N., E.H., B.B., and T.W., they each traveled between 60 to 70 miles to obtain their prescriptions and have them filled at the Pharmacy. FF 167, 173; GE–2, at 71–73; GE–3, at 45–48, 177–181. Of these four customers, R.N. had the shortest round trip of 64.8 miles, which would have taken 1 hour and 33 minutes to travel during heavy traffic. GE–3, at 104. Customer E.H. had the longest round-trip distance of 68.1 miles, which would have taken 1 hour and 22 minutes to travel in moderate traffic. GE–3, at 45.

(v.) Next, the Government alleged that all of the above customers sought to purchase their prescriptions with cash. ALJ–1, at 3–4, para. 10, 10(b).

Each of the Pharmacy's fill stickers shows a dollar amount preceded by the abbreviation ''Cpy''. *See, e.g.,* GE–2, at 1. That dollar amount is the amount the customer paid the Pharmacy for the prescription. FF 111. Thus, each prescription in Government Exhibit 2 was purchased with cash. In addition, when prescriptions of hydrocodone and alprazolam were purchased on the same day, as they frequently were, a customer would normally pay $179.99 for the hydrocodone and $59.99 for the alprazolam, for a total of $239.98 for the two prescriptions. FF 167, 173, 176; *see, e.g.,* GE–2, at 80–81.

(vi.) The Government also alleged that the prescriptions issued to M.W., J.S., J.W., C.J., S.N., J.W.2, S.H., H.J., E.H., A.S., R.E., K.S., S.B., R.H., T.W., I.B., M.W.2, Y.S., M.A., R.H.2, B.B., C.D., A.K., and R.N., were facially invalid and in violation of federal and state law because they lacked the patient's address and the practitioner's DEA number. ALJ–1, at 3–4, para. 10, 10(b).

Federal regulations require that, among other information, a prescription must contain the patient's address and the registration number of the prescriber. FF 68, 77; 21 CFR 1306.05(a). Texas law also requires that prescriptions contain the patient's address and the prescriber's DEA number. FF 68, 77; Tex. Health & Safety Code § 481.074(k). The prescriptions issued to M.W., J.S., J.W., C.J., S.N., J.W.2, S.H., H.J., E.H., A.S., R.E., K.S., S.B., R.H., T.W., I.B., M.W.2, Y.S., M.A., R.H.2, B.B., C.D., A.K., and R.N., did not contain the patient's address. GE–2, at 1, 3, 5, 6, 8, 12, 14, 16, 20, 24, 25, 30, 34, 37, 41, 46, 49, 52, 58, 62, 66, 67, 73, 77, 81, 88, 91, 96, 100, 104, 107, 111, 115, 119, 122, 124, 127. In addition, all of these prescriptions, except those issued to S.N. and S.B., and one of the prescriptions issued to B.B., did not contain the prescriber's DEA registration number. *See* GE–2, at 58, 62, 104. Therefore, all of these prescriptions were facially invalid under federal and Texas law.

It is also noted that Nurse Practitioner S.G. wrote cocktail prescriptions of hydrocodone and alprazolam for J.W. on August 29, 2014. *Id.* at 6. The prescription for alprazolam indicated that J.W. was to take one tablet twice a day. *Id.* Alprazolam, however, is normally taken more frequently than twice a day. Tr. 177. In addition, J.W. waited 14 days before filling these prescriptions. GE–2, at 6. Such a delay raises a question of whether the prescription is legitimate. Tr. 193. In addition to these two red flags, the two prescriptions combined constituted a drug cocktail. FF 54. The prescription was also written by one of the Prescribers, calling into question pattern prescribing, and J.W. paid $219.99 for the two prescriptions. GE–2, at 6. The Administrative Record does not document that Ms. Igwe resolved any of these issues before filling these two prescriptions for J.W. on September 12, 2014. FF 177.

The allegations addressed in subparagraphs (i.)–(vi.), discussed above, concern: Dispensing drug cocktails; the long and unusual routes that the Pharmacy customers traveled to obtain their prescriptions and have them filled; paying cash for prescriptions; and prescriptions that were facially invalid. Each of these concerns is a red flag. FF 63, 65, 68, 69, 70, 77; Tr. 391–92. When a prescription presents a red flag, a Texas pharmacist must resolve that red flag [and document the resolution] *W prior to filling the prescription. FF 77, 79. [ ] *X Neither the hard-copy prescriptions nor the patient profiles maintained by the Pharmacy contain any documentation showing that the Pharmacy resolved the above-noted red flags. GE–2; *see also* Tr. 216–17, 227, 236. Accordingly, the prescriptions addressed in subparagraph (i.)–(vi.) above were not dispensed in the usual course of the professional practice of pharmacy in the State of Texas. *Id.* at 217, 227, 236. Furthermore, the pharmacist who filled these prescriptions did not follow the minimum standard of the practice of pharmacy in the State of Texas, and did not satisfy the pharmacist's corresponding responsibility to ensure that prescriptions are issued for legitimate medical purposes. Tr. 217, 227–28, 236–37; *see* 21 CFR 1306.04(a).

The allegations contained in paragraphs 10 and 10(b) of the OSC are also included in the allegation that between August 2014 and May 2015 the Pharmacy filled 75 controlled substance prescriptions outside the usual course of pharmacy practice and in contravention of the pharmacist's corresponding responsibility to ensure that prescriptions are dispensed for legitimate medical purposes. ALJ–1, at 2–3, paras. 3–7. The Government has not advanced any theory as to why this same allegation should be considered twice. *See* ALJ–35. Therefore, the allegations contained in paragraphs 10 and 10(b) of the OSC, that the Pharmacy filled numerous prescriptions without resolving red flags concerning drug cocktails, distance traveled, cash payments, and facially invalid prescriptions, are sustained, and weigh in favor of revoking the Respondent's

[53] The OSC alleged that ''T.H.'' had a round-trip distance of between 60–70 miles. ALJ–1, at 4, para. 10(b). There is no patient T.H. in Government Exhibit 2. There is, however, a patient T.W. addressed in Government Exhibit 2. GE–2, at 71–74. The round-trip distance for T.W. was 66.9 miles. GE–3, at 177.

*W Text adjusted in response to Respondent's Exceptions.

*X Text removed in response to Respondent's Exceptions.

registration. The substance of these allegations, however, will only be considered once.

C. Pattern Prescribing

The Government next alleged that many of the individuals mentioned in paragraph B, above, obtained their prescriptions from physicians who were engaged in pattern prescribing. ALJ–1, at 3–4, paras. 10, 10(c).

(i.) The Government alleged that between August 19, 2014 [54] and October 2, 2014, patients C.J., SW, J.W.2, S.H., and H.J. all received prescriptions for hydrocodone and alprazolam from Nurse Practitioner I.I., and they traveled long and unusual paths to obtain their prescriptions and have them filled at the Pharmacy. ALJ–1, at 3–4, paras. 10, 10(c).

In the month and a half between August 19, 2014, and October 2, 2014, the Pharmacy filled five identical cocktail prescriptions for customers, C.J., SW, J.W.2, S.H., and H.J. FF 162. The Pharmacy provided each of these customers with 90, 10 mg tablets of hydrocodone, and 60, 2 mg tablets of alprazolam based upon prescriptions they had received from I.I. FF 162. Of the 5 customers, S.H. traveled the shortest round-trip distance of 76 miles, taking 1 hour and 27 minutes in light traffic. GE–3, at 74. H.J. had the longest round trip of 105 miles, taking 1 hour and 56 minutes in light traffic. GE–3, at 84.

Further, by the time the Pharmacy filled the first of I.I.'s prescriptions for hydrocodone for 1 of these 5 customers, the Pharmacy had already filled 149 prescriptions for hydrocodone since July 7, 2014, and I.I. had written 43 of those prescriptions. GE–6, at 1–14. In addition, every one of those prescriptions had been written by one of the Prescribers. *Id.; see also* FF 118–21. Thus, by the time Ms. Igwe filled the prescription for hydrocodone for C.J. on August 19, 2014, a prescription written by I.I., Ms. Igwe would have had ample time to have identified the pattern of I.I.'s prescribing, and that of I.I.'s fellow Prescribers. FF 80–82, 84. Pattern prescribing is a red flag. FF 61. When presented with evidence of pattern prescribing, a Texas pharmacist should contact the prescriber, ask about the prescription's medical purpose, and then document that discussion. FF 80, 85 [ ].[*Y] While Ms. Igwe testified that she had discussions with providers whenever a new patient presented a prescription, those discussions are not documented as required by [the minimum standards of professional practice in Texas].[*Z]

In addition, prescribing hydrocodone and alprazolam together constitutes a cocktail of high-alert drugs. FF 55. When taken together, these two controlled substances can create a euphoric and addictive effect similar to a heroin high. FF 55. A drug cocktail is a red flag. FF 70. Here, on August 19, 2014, the Pharmacy was filling drug cocktail prescriptions written by I.I., but as noted earlier in this Recommended Decision, the Pharmacy had already been filling drug cocktails of hydrocodone and alprazolam, written by the same small group of Prescribers to which I.I. belonged. *See* FF 130, 140, 142–45, 155.

This allegation is also included in the allegation that between August 2014 and May 2015, the Pharmacy filled prescription cocktails of hydrocodone and alprazolam to 25 different individuals. ALJ–1, at 4, para. 10(b). The Government has not advanced any theory as to why this same allegation should be considered twice. *See* ALJ–35. Thus, while this allegation is *sustained,* and weighs in favor of revoking the Respondent's registration, its substance will only be considered once.

(ii.) The Government alleged that between November 14, 2014, and May 1, 2015, the Pharmacy filled 12 prescriptions for hydrocodone written by Dr. C.V. for patients A.S., R.E., K.S., G.B., R.H.2, A.K., R.N., and M.H.[55] All of these patients traveled long and unusual paths to obtain their prescriptions and have them filled. ALJ–1, at 3–4, paras. 10, 10(c).

The Pharmacy filled prescriptions for customers A.S., R.E., K.S., G.B., R.H.2, A.K., R.N., and M.H., all written by Dr. C.V. for 90, 10 mg tablets of hydrocodone. FF 167. Significantly, at the same time the Pharmacy filled these prescriptions, it also filled a prescription for 60, 2 mg tablets of alprazolam for each of these customers, written by one of the Prescribers other than Dr. C.V. FF 167. Of these 8 customers, G.B. traveled the shortest round-trip distance of 55.8 miles, taking 1 hour and 31 minutes in heavy traffic. GE–3, at 16. A.S. had the longest round trip of 111 miles, taking 2 hours in light traffic. GE–3, at 118.

Further, by the time the Pharmacy filled the first of Dr. C.V.'s prescriptions for hydrocodone for 1 of these 8 customers on November 14, 2014, the Pharmacy had already filled 379 prescriptions for hydrocodone since July 7, 2014, and Dr. C.V. had written 60 of those prescriptions. GE–6, at 1–14. Of the prescriptions Dr. C.V. wrote, the Pharmacy received 28 consecutive prescriptions from Dr. C.V. for hydrocodone between October 9 and October 23, 2014, and it had received 19 in the week before it received the prescription for patient R.E. on November 14, 2014. GE–6, at 29–31, 33–35. In addition, all but 11 of the 379 prescriptions had been written by one of the Prescribers. GE–6, at 1–35; *see also* FF 118–21. Thus, by the time Ms. Igwe filled the prescription for hydrocodone for R.E. on November 14, 2014, a prescription written by Dr. C.V., Ms. Igwe would have had ample time to identify the pattern of Dr. C.V.'s prescribing, and that of his fellow Prescribers. FF 80–82, 84. Pattern prescribing is a red flag. FF 61. When presented with evidence of pattern prescribing, a Texas pharmacist should contact the prescriber, ask about the prescription's medical purpose, and then document that discussion. FF 80, 85. While Ms. Igwe testified that she had discussions with providers whenever a new patient presented a prescription, those discussions are not documented as required by [the minimum standards of practice in Texas].[*AA]

With the exception of G.B.'s hydrocodone prescription,[56] filled by the Pharmacy on April 17, 2015, this allegation is included in the allegation that between August 2014 and May 2015 the Pharmacy filled prescription cocktails of hydrocodone and alprazolam to 25 different individuals who had to travel long and/or unusual routes to obtain and fill their prescriptions. ALJ–1, at 4, para. 10(b). It is also included in the allegation that the Pharmacy filled 75 controlled substance prescriptions outside the usual course of pharmacy practice, in violation of 21 CFR 1306.06, and in contravention of the Pharmacy's ''corresponding responsibility'' under 21 CFR 1306.04(a). ALJ–1, at 2, para. 3. The Government has not advanced any theory as to why this same allegation should be considered three times. *See* ALJ–35. Thus, while this allegation is *sustained,* and weighs in favor of

[54] The first two prescriptions written by Nurse Practitioner I.I. were written on August 18, 2014, rather than August 19. GE–2, at 8, 12.

[*Y] Text removed in response to Respondent's Exceptions.

[*Z] Text adjusted in response to Respondent's Exceptions.

[55] Actually, the Pharmacy filled 13 prescriptions for these 8 customers, plus a prescription for an additional customer, M.A., all of which were written by Dr. C.V. FF 167.

[*AA] Text adjusted in response to Respondent's Exceptions.

[56] G.B. is not mentioned in paragraph 10(b) of the OSC. ALJ–1, at 4.

revoking the Respondent's registration, its substance will only be considered once. The portion of this allegation that alleges that the Pharmacy filled a hydrocodone prescription for G.B., written by Dr. C.V., is included in the allegation that the Pharmacy filled 75 controlled substance prescriptions outside the usual course of pharmacy practice, in violation of 21 CFR 1306.06, and in contravention of the Pharmacy's ''corresponding responsibility'' under 21 CFR 1306.04(a). ALJ–1, at 2, para. 3. The Government has not advanced any theory as to why this same allegation should be considered twice. *See* ALJ–35. Thus, while the allegation concerning the hydrocodone prescription for G.B. is *sustained,* and weighs in favor of revoking the Respondent's registration, its substance will only be considered once.

(iii.) Next, the Government alleged that the Pharmacy also filled prescription cocktails (hydrocodone and alprazolam), written by Dr. C.V., for patients M.A., R.H.2, and A.K. on April 17, 2015, and May 1, 2015, respectively. ALJ–1, at 3–4, paras. 10, 10(c).

As noted above, Dr. C.V. wrote prescriptions for 90, 10 mg tablets of hydrocodone for M.A., R.H.2, and A.K. FF 167. The Pharmacy also filled prescriptions of 60, 2 mg tablets of alprazolam for these three customers. *See supra* notes 21–23. Dr. C.V., however, did not write prescriptions for alprazolam for those three customers. While the Pharmacy's fill stickers for the alprazolam that those three customers received indicates that Dr. C.V. was the prescribing doctor, the prescriptions themselves clearly show that Dr. C.V. did not write those prescriptions. FF 167; *see supra* notes 21–23; GE–2, at 96, 100, 115. Nurse Practitioner L.R. wrote the prescription for alprazolam for M.A. GE–2, at 96. Physician's Assistant C.Z. wrote the prescriptions for alprazolam for R.H.2 and A.K.[57]

The significance of the alprazolam prescriptions, however, does not depend on the prescriber. Rather, the significance is that the Pharmacy filled the alprazolam prescriptions for M.A., R.H.2, and A.K., as well as for all the other customers who received prescriptions for hydrocodone from Dr. C.V., at the same time that it also filled hydrocodone prescriptions for them. In addition, the Pharmacy filled all of these prescriptions even though the customers presented prescriptions for hydrocodone written by Dr. C.V. at the same time that they presented prescriptions for alprazolam written by another one of the other Prescribers. FF 167.

This allegation is included in the allegation that between August 2014 and May 2015, the Pharmacy filled prescription cocktails of hydrocodone and alprazolam to 25 different individuals. ALJ–1, at 4, para. 10(b). The Government has not advanced any theory as to why this same allegation should be considered twice. *See* ALJ–35. Thus, to the extent that this allegation asserts that the Pharmacy filled prescription cocktails for these three identified patients, though the hydrocodone was written by Dr. C.V. and the alprazolam was written by another Prescriber, it is *sustained,* and weighs in favor of revoking the Respondent's registration. The allegation's substance, however, will only be considered once.

(iv.) The Government alleged that between January 13, 2015, and May 11, 2015, the Pharmacy dispensed controlled substances pursuant to ''pattern-style'' prescriptions issued by Dr. NE On 14 different occasions, the Pharmacy dispensed 90, 10 mg tablets of hydrocodone to 11 different customers. ALJ–1, at 3–4, para 10, 10(c).

The Pharmacy filled 15 prescriptions for 11 customers, A.S., R.N., R.E., B.B., S.B., S.N., T.W., I.B., M.W.2, Y.S., and C.D., between January 24, 2015 and May 18, 2015. FF 173; GE–2, at 22–23, 89–90. These prescriptions were written by Dr. NE for 90, 10 mg tablets of hydrocodone. FF 173. Significantly, at the same time the Pharmacy filled these prescriptions, it also filled a prescription for 60, 2 mg tablets of alprazolam for each of these customers, written by either Dr. NE or one of the other Prescribers. FF 173. Of the 11 customers, T.W. traveled the shortest round-trip distance of 66.9 miles, taking 1 hour and 23 minutes in moderate traffic. GE–3, at 177. A.S. had the longest round trip of 104 miles, taking 1 hour and 54 minutes in light traffic. GE–3, at 113. Every prescription was purchased with cash. FF 173. The price for hydrocodone and alprazolam together totaled $239.98. *Id.*

Further, by the time the Pharmacy filled the first of Dr. NE's prescriptions for hydrocodone for 1 of these 11 customers, which was A.S. on January 26, 2015, GE–6, at 52, the Pharmacy had already filled 563 prescriptions for hydrocodone since July 7, 2014, and Dr. NE had written 60 of those prescriptions. GE–6, at 1–52. Of the prescriptions Dr. NE wrote, the Pharmacy received seven consecutive prescriptions from Dr. NE for hydrocodone on November 5, 2014, four consecutive prescriptions from Dr. NE for hydrocodone on November 23, 2014, and six consecutive prescriptions from Dr. NE for hydrocodone on December 30, 2014. GE–6, at 32–33, 37, 44. In addition, all but 18 of the 563 prescriptions had been written by one of the Prescribers. GE–6, at 1–52; *see also* FF 118–21. Thus, by the time Ms. Igwe filled the prescription for hydrocodone for A.S. on January 26, 2015, a prescription written by Dr. NE, Ms. Igwe would have had ample time to identify the pattern of Dr. NE's prescribing, and that of her fellow Prescribers. FF 80–82, 84. Pattern prescribing is a red flag. FF 61. When presented with evidence of pattern prescribing, a Texas pharmacist should contact the prescriber, ask about the prescription's medical purpose, and then document that discussion. FF 80, 85. While Ms. Igwe testified that she had discussions with providers whenever a new patient presented a prescription, those discussions are not documented as required by [the minimum standards of practice in Texas.] [*BB]

This allegation is included in the allegation that between August 2014 and May 2015 the Pharmacy filled prescription cocktails of hydrocodone and alprazolam to 25 different individuals. ALJ–1, at 4, para. 10(b). The Government has not advanced any theory as to why this same allegation should be considered twice. *See* ALJ–35. Thus, while this allegation is *sustained,* and weighs in favor of revoking the Respondent's registration, its substance will only be considered once.

(v.) The Government next alleged that on 8 different occasions, the Pharmacy filled identical prescription cocktails written by Dr. NE consisting of 90, 10 mg tablets of hydrocodone and 60, 2 mg tablets of alprazolam. Identical prescription cocktails were dispensed to both I.B. and T.W. on April 10, 2015, and to B.B. and C.D. on April 23, 2015. ALJ–1, at 3–4, para. 10, 10(c).

The Pharmacy filled drug cocktail prescriptions of 90, 10 mg tablets of hydrocodone and 60, 2 mg tablets of alprazolam written by Dr. NE seven different times. FF 173. These prescriptions were filled for customers B.B., S.B., S.N., T.W., Y.S., R.N., and again for B.B. FF 173; GE–2, at 56–58, 60–62, 71–73, 86–88, 102–04, 105–07, 125–27. While the Pharmacy also filled identical cocktail prescriptions for I.B. and T.W. on April 10, 2015, and again for B.B. and C.D. on April 23, 2015, Dr.

[57] *Compare* known C.Z. signatures at GE–2, at 52, 122–23, *with* signatures on the R.H.2 and A.K. prescriptions at GE–2, at 100, 115.

[*BB] Text adjusted in response to Respondent's Exceptions.

NE did not write all of the prescriptions for alprazolam. Nurse Practitioner S.G. wrote the prescriptions for alprazolam for I.B. and C.D. GE–2, at 77, 111. The Pharmacy fill labels for those prescriptions improperly indicate, however, that those prescriptions were written by Dr. NE *Id.*

As noted earlier, the significance of the Pharmacy filling prescriptions for alprazolam, however, does not depend on the prescriber. Rather, the significance is that the Pharmacy filled a prescription cocktail of alprazolam and hydrocodone for I.B., T.W., B.B., and C.D., as well as for all the other customers above who received prescriptions for hydrocodone from Dr. NE In addition, the Pharmacy filled all of these prescriptions even though the customers presented prescriptions for hydrocodone written by Dr. NE, while the prescriptions for alprazolam were written by a different one of the Prescribers. Further, as noted above, all of these prescriptions exhibited the red flags of pattern prescribing, the customers all traveled long or unusual routes to obtain their prescriptions and have them filled, and all of the prescriptions were purchased with cash.

This allegation is included in the allegation that between August 2014 and May 2015, the Pharmacy filled prescription cocktails of hydrocodone and alprazolam to 25 different individuals. ALJ–1, at 4, para. 10(b). The Government has not advanced any theory as to why this same allegation should be considered twice. *See* ALJ–35. Thus, to the extent that Dr. NE only wrote seven prescription cocktails of hydrocodone and alprazolam, and wrote only one such cocktail prescription on April 10, 2015, and one on April 23, 2015, this allegation is *sustained,* and weighs in favor of revoking the Respondent's registration. The substance of the allegation, however, will only be considered once.

Therefore, the allegations contained in paragraphs 10 and 10(c) of the OSC, that the Pharmacy filled numerous prescriptions without resolving red flags concerning drug cocktails, distance traveled, cash payments, and facially invalid prescriptions, are *sustained,* and weigh in favor of revoking the Respondent's registration. With one exception, these sustained allegations are all included in the allegations contained in paragraphs 10 and 10(b) of the OSC, and with that one exception will not be considered as separate allegations in determining whether the Respondent's registration should be revoked. The portion of this allegation that alleged, in paragraph 10(c) of the OSC, that the Pharmacy filled a prescription for G.B. for hydrocodone, written by Dr. C.V., is *sustained,* but it is included in the allegation that the Pharmacy filled 75 controlled substance prescriptions outside the usual course of pharmacy practice, in violation of 21 CFR 1306.06, and in contravention of the Pharmacy's ''corresponding responsibility'' under 21 CFR 1306.04(a), ALJ–1, at 2, para. 3, and it will not be considered twice.

(vi.) The Government's next allegation is that on April 17, 2015, the Pharmacy filled a hydrocodone prescription for G.B., who had traveled an unusual path and distance of more than 75 miles to obtain her prescription and have it filled at the Pharmacy, and then return home. ALJ–1, at 5, para. 10, 10(d).

Government Exhibit 2 documents that the Pharmacy filled a prescription for G.B. for 90, 10 mg tablets of hydrocodone on April 17, 2015. GE–2, at 84. The prescription was written by Dr. C.V. one day earlier. GE–2, at 83. This allegation is included in the allegation that the Pharmacy filled 75 controlled substance prescriptions outside the usual course of pharmacy practice, in violation of 21 CFR 1306.06, and in contravention of the Pharmacy's ''corresponding responsibility'' under 21 CFR 1306.04(a). ALJ–1, at 2, para. 3. It is also included in the allegation that between November 14, 2014 and May 1, 2015, the Pharmacy filled 12 [58] prescriptions for hydrocodone written by Dr. C.V. ALJ–1, at 4, para. 10(c). Again, the Government has not advanced any theory as to why this same allegation should be considered three times. *See* ALJ–35. Thus, while the allegation contained in paragraph 10(d) of the OSC is *sustained,* and weighs in favor of revoking the Respondent's registration, the allegation's substance will only be considered once.

Recordkeeping Violation

Finally, the Government alleged that a DEA audit of the Pharmacy's 10 mg hydrocodone, covering the period of September 25, 2013, through June 18, 2015, revealed a shortage of 47,183 dosage units. Because the Controlled Substances Act requires the maintenance of ''complete and accurate'' inventories, as well as a ''complete accurate record of each substance . . . received, sold, delivered or otherwise disposed of,'' this shortage violated 21 U.S.C. 827(a). ALJ–1, at 5, para. 13.

As noted above, the CSA mandates that ''[e]very registrant . . . shall maintain, on a current basis, a complete and accurate record of each [ ] substance manufactured, received, sold, delivered, or otherwise disposed of . . . .'' 21 U.S.C. 827(a)(3). On June 18, 2015, DEA investigators conducted an inspection of the Pharmacy, and asked Ms. Igwe to produce a copy of the Pharmacy's dispensing history of hydrocodone. FF 15, 23. In response, Ms. Igwe gave the inspectors a report of the Pharmacy's hydrocodone dispensing history, contained in Government Exhibit 6, with a date range of October 23, 2013 to June 18, 2015. FF 24–25. Following the inspection, and using the report provided by Ms. Igwe, DI 1 conducted an audit of the Pharmacy's hydrocodone. FF 36; Tr. 47–48. DI 1's audit revealed that the Pharmacy was short 47,183 tablets of hydrocodone. FF 37.

Government Exhibit 6 clearly does not report all of the hydrocodone that the Pharmacy dispensed. FF 41. After the inspection, Ms. Igwe discovered that she had not provided the DEA inspectors with a complete listing of the hydrocodone the Pharmacy had dispensed. FF 26–27. At the hearing, the Respondent produced Respondent's Exhibit C for the first time, which Ms. Igwe claimed is the complete dispensing report. FF 27, 43–44. Although Ms. Igwe testified that she had provided Respondent's Exhibit C to an attorney so that he might provide it to the DEA, there is no evidence the DEA ever received it. FF 27, 43–44. At the hearing, both Ms. Igwe and Mr. Litman testified that if Respondent's Exhibit C was considered during the audits of the Pharmacy's hydrocodone, there would have been no shortage. Tr. 472–73, 730. Ms. Igwe, however, did not know if her own audit showed an overage. *Id.* at 605.

The Administrative Record reveals several deficiencies concerning the Respondent's records. First, the Respondent's hydrocodone dispensing log was not ''readily retrievable'' as is required under 21 U.S.C. 827. Second, the ''complete'' dispensing log which Ms. Igwe allegedly gave to DEA sometime after the inspection does not comply with DEA regulations. Lastly, even a manual count of the Respondent's ''complete'' dispensing log reveals a substantial overage.

Although the Pharmacy takes the position that it produced ''complete and accurate'' records after the inspection, these records were not ''readily retrievable'' as is required by the CSA and DEA regulations. [The regulatory definition of ''readily retrievable'' calls for locating the records ''in a reasonable time.'' 21 CFR 1300.01(b). In *Edmund Chein, M.D.,* the Agency stated ''what

[58] *See supra* notes 45 and 56.

constitutes 'a reasonable time' necessarily depends on the circumstances'' but that ''under normal circumstances if a practice is open for business, it should be capable of producing a complete set of records within several hours of the request.'' 72 FR 6580, 6593 (2007), *pet. for rev. denied, Chein* v. *Drug Enforcement Admin.,* 533 F.3d 828, 832 n.6 (D.C. Cir 2008), *cert. denied,* 555 U.S. 1139 (2009). During the hearing, Ms. Igwe was unable to specify the date on which she gave the ''complete'' dispensing log to her then-attorney to forward to DEA, but it is safe to say it was at least several days after the inspection. *See* Tr. 466–69. Moreover, there is nothing in the record establishing that DEA ever received the log until it was exchanged in the course of these proceedings.[59] Tr. 549–50. For these reasons, the Respondent violated its duty to maintain records that were ''readily retrievable.'' 21 U.S.C. 827(b); 21 CFR 1304.04(a), 1304.04(h)(1), (3); *see Pharmacy Doctors Enterprises d/b/a Zion Clinic Pharmacy,* 83 FR at 10901, *aff'd Pharmacy Doctors Enterprises, Inc.* v. *Drug Enf't Admin.,* 789 F. App'x 724, 730 (2019) (finding that producing records as an exhibit for the hearing did not comply with the ''readily retrievable'' requirement of the regulation).] [*CC]

Additionally, not only were the Pharmacy's dispensing records produced significantly late, but they also failed to include required information. This was the situation in *Chein,* where the registrant's dispensing records, produced after a delay of several hours, lacked information required by DEA regulations. 72 FR at 6593. The same has occurred here to the extent that Respondent Exhibit C, the Pharmacy's ''complete'' hydrocodone dispensing report, is missing the patient's addresses and the dispensing pharmacist's initials, in violation of 21 CFR 1304.22(c). Significantly, the dispensing log Ms. Igwe gave to investigators at the time of the inspection *does contain* this required information. 21 CFR 1304.22(c); GE–6; RE–G. It is also noteworthy that the ''complete'' dispensing log's format is strikingly different than the original dispensing log printed during the inspection. *Compare* RE–C *with* GE–6 and RE–G. Additionally, the lack of any date or date range on the ''complete'' dispensing log makes it difficult, if not impossible, to ascertain whether the document is ''complete and accurate.'' 21 U.S.C. 827(a)(3); RE–C; Tr. 551.

Further, a manual count of the quantities listed in the ''complete'' dispensing log revealed an overage, itself a violation of the CSA and DEA regulations, albeit different than that alleged in the OSC. Respondent Exhibit C is broken into four sections separated by green pages. RE–C, at 1, 2, 3–30, 31–43; Tr. 470–71, 603; FF 27–28. The third section represents the same information in Government Exhibit 6 that Ms. Igwe gave to investigators during the inspection and that DI 1 used to conduct an audit. RE–C, at 3–30; GE–6, at 1–85; Tr. 47–48. The first, second, and fourth sections contain additional dispensing information not contained in the report that DI 1 used to conduct his audit. RE–C, at 1–2, 31–43. The information in the third column from the left is the quantity of hydrocodone dispensed. *Id.* A manual count of the quantity dispensed in the first, second, and fourth sections of Respondent Exhibit C revealed a total of 48,288 dosage units of hydrocodone. *Id.* The Government alleged that the Respondent's hydrocodone shortage was 47,183. ALJ–1, at 5, para. 13.

Applying the 48,288 units counted in Respondent Exhibit C to DI 1's audit computation produces an overage of 1,105 units. GE–7, at 1. The computation report shows that DI 1 reached the 47,183 figure by subtracting ''distributions in period'' (90,209) and ''closing inventory'' (3,908) from ''purchases in period'' (141,300). GE–7, at 1. The difference between the shortage calculated by DI 1 (47,183) and the total derived from a count of Respondent Exhibit C (48,288) is +1,105.[60] If DI 1 had the information in Respondent Exhibit C when he conducted the audit, he would have found an overage of hydrocodone instead of a shortage. *Cf.* Tr. 76. An overage of a thousand tablets of hydrocodone, however, is still sufficient circumstantial evidence that the Pharmacy failed to maintain complete and accurate records. *See Superior Pharmacy I & Superior Pharmacy II,* 81 FR at 31,337 (finding recordkeeping violation where audit revealed overage of about 4,000 dosage units).

Accordingly, the Government's allegation contained in paragraph 13 of the OSC that the Pharmacy failed to maintain ''complete and accurate'' records in violation of 21 U.S.C. 827(a)(3) is *sustained,* and weighs in favor of revoking the Pharmacy's registration.

Discussion and Conclusions of Law

I have sustained, with minor variations, [the overwhelming majority][*DD] of the Government's allegations contained in the OSC. Specifically, I find that between August 2014 and May 2015, the Pharmacy filled 75 controlled substance prescriptions outside the usual course of pharmacy practice, in violation of 21 CFR 1306.06, and in contravention of the Pharmacy's ''corresponding responsibility'' under 21 CFR 1306.04(a). The Pharmacy did so by repeatedly filling controlled substance prescriptions that contained red flags of diversion and/or abuse without addressing or resolving those red flags. The Pharmacy's conduct in doing so violated 21 U.S.C. 823(f)(4); Tex. Health & Safety Code § 481.070-.075; and Tex. Health & Safety Code § 481.128; [ ] [*EE]. These allegations are contained in paragraphs [3 and 6] [*FF] of the OSC. ALJ–1, at 2–3.[*GG]

I also find that all of the specific allegations contained in paragraphs 10 and 10(a)–(d) of the OSC are included in the general allegation that the Pharmacy violated 21 CFR 1306.04(a) and 21 CFR 1306.06 when it filled 75 prescriptions between August 2014 and May 2015. ALJ–1, at 2, para. 3. Thus, while the allegations contained in paragraphs 10 and 10(a)–(d) of the OSC are sustained, the substance of those allegations will not be considered more than once in assessing whether the

[59] *See supra* note 50.

[*CC] Text adjusted for clarity.

[60] This overage amount would be different, or reduced entirely, if the on-hand quantity was closer to 1,200 tablets as Ms. Igwe claimed at one point in the hearing. Tr. 602–03. At first, Ms. Igwe was unable to recall the quantity on the shelf: ''I don't remember what it [was] without looking.'' Tr. 602. When I asked if the on-hand quantity was 1,200, as stated in her Prehearing Statement, she agreed that was the correct figure. Tr. 602. She also stated early in her testimony that Respondent Exhibit C showed that her inventory was accurate in that all the hydrocodone she purchased and dispensed was accounted for. Tr. 472. When pressed further regarding the accuracy of her hydrocodone records, her testimony waivered. Tr. 605. I asked if there was an overage and she stated, ''I can't really say yes or no to that . . . .'' Tr. 605. Overall, this part of Ms. Igwe's testimony created the impression that she was unsure about the on-hand quantity of hydrocodone on the day of the inspection and whether her inventory was in fact completely accurate. Further, Mr. Litman testified that there was no way of knowing whether the information contained in Respondent's Exhibit C was created prior to the DEA audit. Tr. 723–25. For that reason, I give more weight to the on-hand quantity counted on the day of the inspection contained in Government Exhibit 7—3,908 tablets of hydrocodone on-hand—than I do to Ms. Igwe's testimony that the Pharmacy had 1,200 hydrocodone pills on the shelves. GE–7, at 1.

[*DD] Text adjusted in response to Respondent's Exceptions.

[*EE] Text removed in response to Respondent's Exceptions.

[*FF] Text removed in response to Respondent's Exceptions.

[*GG] For the reasons given, *supra,* in the section on Respondent's Exceptions, the Government's allegation from paragraph 7 of the OSC that Respondent violation 22 Tex. Admin. Code § 291.33(c)(2) is not sustained.

Government has presented a *prima facie* case for revocation of the Pharmacy's COR. Stated differently, the prescriptions discussed in paragraphs 10 and 10(a)–(d) are subsumed within the allegation in paragraph 3.

Lastly, I have sustained the allegation contained in paragraph 13 of the OSC, alleging that the Pharmacy violated 21 U.S.C. 827(a) by failing to maintain accurate records. The records in question in this case were the Pharmacy's receipt and dispensing records for hydrocodone. An audit of the records the Pharmacy produced in response to a DEA inspection warrant revealed that the Pharmacy could not account for a significant portion of the hydrocodone it had received when called upon to do so.

The preponderance of evidence clearly establishes that the Pharmacy violated its corresponding responsibility by dispensing controlled substances outside the normal course of professional practice. Beginning in August 2014 and continuing into May 2015, the Pharmacy repeatedly filled 75 prescriptions from the Prescribers, who over and over again prescribed the same medications and usually in the same dosages, strengths, and quantities. Frequently, too, the patients would present with prescriptions for drug cocktails, where the hydrocodone prescription was written by one of the Prescribers and the alprazolam was written by a different Prescriber. This is a well-known behavior of those seeking to hide the true reason they are obtaining drug cocktails. Most of the prescriptions were issued in a manner that should have given rise to concerns of the therapeutic value of the prescription. [The minimum standard of the practice of pharmacy in Texas requires pharmacists to have consultations with prescribers when there are concerns about the medical legitimacy of a prescription and then to document that consultation. FF 90.] [*HH] In this case there are no records that document any such consultations. FF 177.

The Government's expert testified that an overriding concern she had concerning the prescriptions at issue in this case was that of pattern prescribing and the lack of individualization of treatment. Tr. 171, 244, 260, 296, 317, 333, 335, 358–59; FF 61–62. Unquestionably, it is easier to identify patterns in retrospect. In addition, DEA has stated that ''two prescriptions do not establish pattern prescribing.'' *Superior Pharmacy,* 81 FR at 31325 n.27. But this is not a case of only two similar prescriptions. This is a case of the Prescribers writing essentially the same prescriptions to various patients who had their prescriptions filled by the same pharmacist, Ms. Igwe, over an extended period of time. In fact, apparently out of the blue, the Pharmacy, a small pharmacy north of Dallas, started receiving prescriptions written by the Prescribers at the Redbird clinic in January or February of 2014. FF 11. The Redbird clinic was located 31 miles from the Pharmacy. GE–12, at 3. In addition, many of the prescriptions were sent directly to the Pharmacy by the Prescribers, rather than giving the patient the option of going to a pharmacy possibly more convenient for the patient. FF 10, 127.

The Respondent has attempted to make much out of the fact that Government Exhibit 2 contains prescriptions of less than 30 patients, while the Prescribers wrote ''over a thousand scripts.'' Tr. 368; *see also* Tr. 289. While true that less than 30 patients is a small percentage of the prescriptions written by the Prescribers, I concur with Dr. Witte's assessment that ''if [she] reviewed a thousand [prescriptions], more than likely there would be more than 26 that had some of the same similarities'' based on the patterns she observed. Tr. 370–71. Indeed, a review of Government Exhibit 6 reveals many of the same similarities. That exhibit shows that of the 927 prescriptions for hydrocodone the Pharmacy filled between July 7, 2014 and May 21, 2015, all but 25 were written by one of the Prescribers. Respondent Exhibit C reveals even more prescriptions for hydrocodone written by one of the Prescribers. *See supra* note 46. In fact, at one point Ms. Igwe filled 28 consecutive prescriptions for hydrocodone written by Dr. C.V. and at another time she filled 23 consecutive prescriptions for hydrocodone written by Dr. NE GE–6, at 29–31, 83–85. In the face of such repetitive prescriptions, Ms. Igwe simply assumed ''that that's what the doctor preferred . . . .'' Tr. 595. While she did testify that she would call the prescriber the first time a patient presented with a prescription for a controlled substance ''if [she] was concerned,'' she provided no documentation of those calls. Tr. 546–47, 595; FF 177. With close to the thousand prescriptions, documented in Government Exhibit 6, written by the Prescribers, beginning in January or February 2014, and extending until May 2015, Ms. Igwe should have easily recognized pattern prescribing.[*II] Her failure to do so, her unwillingness to acknowledge the pattern, [demonstrates willful blindness to the high probability] [*JJ] that many of the prescriptions she filled lacked a legitimate medical purpose.

Dr. Witte also addressed the red flag of cash payments with respect to many of the prescriptions involved in this case. *See, e.g.,* Tr. 172, 223, 238. Here, the Administrative Record supports a finding that most of the prescriptions involved a large quantity of controlled substances of both hydrocodone and alprazolam. FF 47, 50. A reasonable pharmacist should know paying cash for a large quantity of controlled substances raises a red flag, *see Jones Total Health Care Pharmacy,* 81 FR at 79194; however, there is no evidence that the Pharmacy's customers were paying exorbitant prices for their prescriptions. Nevertheless, paying for a prescription in cash is ''the preferred payment method for illegitimate prescriptions,'' because it is not traceable. *Masters Pharm.,* 861 F.3d at 220. DEA has noted, however, that absent other signs of diversion, prices in the range of $25 to $220 may be insufficient to prove that a pharmacist violated his or her corresponding responsibility. *Hills Pharmacy,* 81 FR at 49839 n.39.

Here, numerous patients paid $239.98 upon picking up prescriptions for both alprazolam and hydrocodone at the same time. Tr. 498; FF 167, 173. While these fees were not exorbitant, the Pharmacy made between $154.00 and $161.00 profit when a customer paid $179.99 for an order of hydrocodone. Tr. 498; GE–6, at 45, 54. Furthermore, most insurance plans cover hydrocodone. FF 39. Such a heavy profit margin per sale could certainly be an incentive to turn a blind eye to illegitimate prescriptions, particularly when they were so numerous. Nevertheless, were cash payments the only red flag involved in the prescriptions in this case, I would not sustain a violation of the Pharmacy's duty to resolve that red flag. As noted, however, cash purchases were not the only red flags that Ms. Igwe should have readily identified.

Dr. Witte also testified that the distance and route that several

[*HH] Text adjusted in response to Respondent's Exceptions.

[*II] The Government's allegations of unlawful dispensing were limited to the prescriptions listed in the OSC that Respondent dispensed between August 2014 and May 2015. Evidence of additional prescriptions Respondent dispensed is relevant in this matter only to the extent that it supports findings of violations in the subject prescriptions or rebuts Respondent's Exceptions. I have not considered the evidence of additional prescriptions from the Prescribers as evidence of further violations for consideration under Factors 2 and 4.

[*JJ] Text adjusted clarity.

customers took to obtain and then fill their prescriptions created a red flag. FF 62, 63. Additionally, even Texas regulations include the distance a patient traveled as one factor pharmacists should be aware of before dispensing a controlled substance. 22 Tex. Admin. Code § 291.29(c)(4). The distances that most of the Pharmacy customers traveled are detailed in Government Exhibit 3, and range from 64 miles to 121 miles. GE–3, at 54, 104. More telling than the miles, however, are the routes these customers would have traveled.[61] While Ms. Igwe might not have known the actual routes a customer took to arrive at the Pharmacy, from having been in the Dallas/Fort Worth area since at least 2006, Tr. 445–46, she should have had an appreciation for the distances and traffic involved. Even a short distance, such as 30–40 miles, may be a concern where the route involves ''a lot of stop lights'' and traffic, making a relatively short distance appear suspicious given the added inconvenience. *Hills Pharmacy,* 81 FR at 49826. Given the facts in this case, particularly the paths the customers would have taken in a metropolitan environment, at a minimum, Ms. Igwe should have made inquiry of the six customers whose round trip distances exceeded 100 miles, J.W., H.J., M.H., A.S., K.S., and M.A. Ms. Igwe's failure to do so, and her failure during these proceedings to acknowledge that she should have, demonstrates willful blindness to the [high probability] *KK that many of the prescriptions she filled lacked a legitimate medical purpose.

With respect to the Pharmacy's recordkeeping violations, the Government has established by a preponderance of the evidence that the Pharmacy failed to produce a complete dispensing log for the hydrocodone it dispensed between the date the Pharmacy opened and June 18, 2015. FF 22, 24–28, 44. As a result of this poor recordkeeping, when the DEA conducted an audit of the Pharmacy's hydrocodone, the Pharmacy had a shortage of over 47,000 tablets of hydrocodone. FF 37. Although the Respondent eventually produced Respondent Exhibit C, which Ms. Igwe testified was the Pharmacy's complete dispensing log, Tr. 467–71, it does not comply with DEA's requirements for a dispensing log. 21 CFR 1304.22(c); *Chein,* 72 FR at 6593. Further, even using the data contained in Respondent Exhibit C, the Pharmacy's inventory of hydrocodone does not balance out. The Pharmacy's recordkeeping shortcomings reinforce the DEA's position that strict adherence to inventory requirements is crucial so that DEA can ''closely monitor the flow of controlled substances'' and effectively combat diversion. *United States* v. *Blanton,* 730 F.2d 1425, 1428 (11th Cir. 1984).

Prima Facie Showing and Balancing

Factors Two and Four strongly weigh in favor of revoking the Pharmacy's COR. Considering the public interest factors in their totality, I find that the Government has made a *prima facie* case showing that the Pharmacy's registration is inconsistent with the public interest.

After the Government presents a *prima facie* case for revocation, the Respondent has the burden of production to present ''sufficient mitigating evidence'' to show why it can be entrusted with a DEA registration. *See Medicine Shoppe—Jonesborough,* 73 FR 364, 387 (2008) (quoting *Samuel S. Jackson, D.D.S.,* 72 FR 23848, 23853 (2007)). To rebut the Government's *prima facie* case, the Respondent must both accept responsibility for its actions and demonstrate that it will not engage in future misconduct. *Patrick W. Stodola, M.D.,* 74 FR 20,727, 20,734–35 (2009).

The Respondent may accept responsibility by providing evidence of its remorse, its efforts at rehabilitation, and its recognition of the severity of its misconduct. *See Robert A. Leslie, M.D.,* 68 FR 15227, 15228 (2003). To accept responsibility, a respondent must show ''true remorse'' for wrongful conduct. *Michael S. Moore, M.D.,* 76 FR 45867, 45877 (2011). An expression of remorse includes acknowledgment of wrongdoing. *Wesley G. Harline, M.D.,* 65 FR 5665, 5671 (2000). A respondent must express remorse for all acts of documented misconduct, *Jeffrey Patrick Gunderson, M.D.,* 61 FR 26208, 26211 (1996), and may be required to acknowledge the scope of its misconduct. *Arvinder Singh, M.D.,* 81 FR 8247, 8250–51 (2016). Acceptance of responsibility and remedial measures are assessed in the context of the ''egregiousness of the violations and the [DEA's] interest in deterring similar misconduct by [the] Respondent in the future as well as on the part of others.'' *David A. Ruben, M.D.,* 78 FR 38,363, 38,364 (2013) (citation omitted).

There is nothing in the Administrative Record that suggests the Pharmacy has accepted responsibility for its actions. During her testimony, Ms. Igwe took no responsibility. Tr. 567. Further, a review of the Respondent's Proposed Findings and the Respondent's Brief gives no hint of acceptance of responsibility. *See* ALJ–36–37.

Because I have determined that the Government has met its *prima facie* burden, and that the Pharmacy has not accepted responsibility, I must next determine whether it is consistent with the public interest for the Pharmacy to maintain its DEA registration. When considering whether a registrant's continued registration is consistent with the public interest, the ALJ must consider both the egregiousness of the registrant's violations and the DEA's interest in deterring future misconduct by both the registrant as well as other registrants. *Ruben,* 78 FR at 38364; *see also Richard J. Settles, D.O.,* 81 FR 64940, 64,945 n.17 (2016) (''In short, this is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest; what matters is the seriousness of the registrant's misconduct.'' (quoting *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 462 (2009))).

Here, I find that both aspects of the misconduct proven in the Administrative Record are egregious and support the revocation of the Pharmacy's registration. First, time and again, Ms. Igwe filled prescriptions that ought not have been filled without the resolution of red flags. Significantly, this case started with the DEA investigating a pill mill. Tr. 31. Over a period of eight to nine months, Ms. Igwe filled prescriptions for a small group of medical practitioners, who wrote essentially identical prescriptions, including drug cocktail prescriptions involving hydrocodone and alprazolam, in such a manner that a preponderance of evidence establishes that those practitioners were engaged in pattern prescribing. Such lack of individualized dosing of these two highly-abused controlled substances [should have indicated to a pharmacist following the minimum standards of practice in Texas that there was a high probability that the medical practitioners were operating a controlled substance pill mill. Tr. 258–261;] *LL *Jones Total Healthcare Pharmacy,* 81 FR at 79195. This evidence of pattern prescribing by the Prescribers circumstantially establishes

[61] While Respondent's counsel argued at the hearing that the customers might not live where the addresses on the fill stickers say they do, those are the addresses the Pharmacy was on notice of concerning where those customers lived. Tr. 377–79.

*KK Text adjusted for clarity.

*LL Text adjusted to add references and citations to Dr. Witte's testimony.

that the Pharmacy knew, or should have known, that many of the Prescribers' prescriptions lacked a legitimate medical purpose. In addition to the pattern prescribing, the prescriptions raised other numerous red flags, to include: distance and route traveled; drug cocktails; multiple prescribers for controlled substances; suboptimal dosing; filling prescriptions on consecutive days to avoid filling drug cocktails on the same day; as well as some concern about cash payments.

Second, I find that the Pharmacy did not take its recordkeeping responsibilities seriously. The Pharmacy's failure to produce a complete dispensing record clearly prevented the DEA from being able to ''closely monitor the flow of controlled substances'' flowing in and out of the Pharmacy and to effectively combat diversion. *See United States* v. *Blanton,* 730 F.2d at 1428. In response, the Pharmacy subsequently produced a document that did not meet the requirements of a dispensing log, and asserted that all was well. Such a feeble response exacerbates the Pharmacy's recordkeeping failure.

I further find that the DEA's interest in deterring future misconduct by the Pharmacy, as well as by other pharmacies, supports revocation of the Pharmacy's registration.

Recommendation

In this case, the Government has established a *prima facie* case for revocation of the Pharmacy's Certificate of Registration. It did so by proving by a preponderance of the evidence that the Pharmacy: Repeatedly violated its corresponding responsibility [and acted outside the usual course of professional practice between August 2014 and May 2015 by filling 75 prescriptions that contained red flags of diversion and/or abuse, without addressing or resolving those red flags; and by failing to properly produce and maintain records of the controlled substances for which the Pharmacy was accountable.] *MM

*MM Text adjusted for clarity.

The evidence is clear in this case that the Pharmacy has taken no responsibility for its egregious and repeated failure to fulfill its corresponding responsibility to ensure the proper prescribing and dispensing of controlled substances, and other responsibilities of a registrant. In addition, the Pharmacy presented no evidence of mitigation or remediation.

Therefore, based upon my review of the entire Administrative Record, I recommend that the Certificate of Registration of The Pharmacy Place, Certificate of Registration Number FT4134805, be *revoked*. I further recommend that any pending application for renewal or modification of the Certificate of Registration of The Pharmacy Place be *denied*.

Dated: February 13, 2018.

Charles Wm. Dorman,

U.S. Administrative Law Judge

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Part IV

Securities and Exchange Commission

Joint Industry Plan; Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail by BOX Exchange LLC; Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc. and Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, Long-Term Stock Exchange, Inc., Miami International Securities Exchange LLC, MEMX, LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, Nasdaq PHLX LLC, The NASDAQ Stock Market LLC; and New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc.; Notice

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91555; File No. 4–698]

Joint Industry Plan; Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail by BOX Exchange LLC; Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc. and Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, Long-Term Stock Exchange, Inc., Miami International Securities Exchange LLC, MEMX, LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, Nasdaq PHLX LLC, The NASDAQ Stock Market LLC; and New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc.

April 14, 2021.

I. Introduction

On March 31, 2021, the Operating Committee for Consolidated Audit Trail, LLC (''CAT LLC''), on behalf of the following parties to the National Market System Plan Governing the Consolidated Audit Trail (the ''CAT NMS Plan'' or ''Plan''): [1] BOX Exchange LLC; Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, Long-Term Stock Exchange, Inc., MEMX, LLC, Miami International Securities Exchange LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, Nasdaq PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (collectively, the ''Participants,'' ''self-regulatory organizations,'' or ''SROs'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') pursuant to Section 11A(a)(3) of the Securities Exchange Act of 1934 (''Exchange Act''),[2] and Rule 608 thereunder,[3] a proposed amendment to the CAT NMS Plan to implement a revised funding model (''Proposed Funding Model'') for the consolidated audit trail (''CAT'') and to establish a fee schedule for Participant CAT fees in accordance with the Proposed Funding Model.[4] *Exhibit A,* attached hereto, contains proposed revisions to Articles I and XI of the CAT NMS Plan as well as proposed Appendix B to the Plan containing the fee schedule setting forth the CAT fees to be paid by the Participants. In addition, the Operating Committee provided an example of how the Proposed Funding Model would operate for illustrative purposes only, as attached hereto as *Exhibit B.* The example is provided in three charts setting forth illustrative CAT fees for each Participant and Industry Member CAT Reporter. The Commission is publishing this notice to solicit comments from interested persons on the amendment.[5]

II. Description of the Plan

Set forth in this Section II is the statement of the purpose and summary of the amendment, along with information required by Rule 608(a) under the Exchange Act,[6] substantially as prepared and submitted by the Participants to the Commission.[7]

A. Description of the Amendments to the CAT NMS Plan

The Operating Committee proposes to revise certain aspects of the funding model set forth in Article XI of the CAT NMS Plan (the ''Original Funding Model''). The Original Funding Model requires a bifurcated funding model, where costs associated with building and operating the CAT would be borne by (1) Industry Members (other than alternative trading systems (''ATSs'') that execute transactions in Eligible Securities (''Execution Venue ATSs'')) through fixed tiered fees based on message traffic for Eligible Securities, and (2) Participants and Industry Members that are Execution Venue ATSs for Eligible Securities through fixed tiered fees based on market share. The Operating Committee proposes to amend the CAT NMS Plan to adopt the Proposed Funding Model. The Proposed Funding Model would continue to require many of the same elements as the Original Funding Model, including the bifurcated funding approach, and the use of market share and message traffic for allocating costs. The Proposed Funding Model, however, would revise the Original Funding Model in certain ways, including (1) dividing the CAT costs between Participants and Industry Members, rather than between Execution Venues and Industry Members (other than Execution Venue ATSs); (2) eliminating the use of tiers in calculating CAT fees for Participants and Industry Members; (3) adopting certain minimum and maximum CAT fees for Industry Members and Participants; and (4) imposing certain discounts for market making activity when calculating Industry Member CAT fees. The Operating Committee also proposes to adopt a fee schedule to establish the CAT fees applicable to Participants based on the Proposed Funding Model. The fee schedule would establish the allocation percentages and other variables for calculating the CAT fees under the Proposed Funding Model.

1. Executive Summary of the Proposed Funding Model

Under the Proposed Funding Model, the CAT fees for the relevant period would be designed to cover the total CAT costs associated with developing, implementing and operating the CAT for the relevant period (''Total CAT Costs'').[8] The Proposed Funding Model would implement a bifurcated funding model, where these costs would be borne by both Participants and Industry Members. Industry Members as a group would pay 75% of the Total CAT Costs (the ''Industry Member Allocation''), and Participants as a group would pay 25% of the Total CAT Costs (the ''Participant Allocation'').[9]

The Industry Member Allocation would be allocated to each Industry Member based on message traffic. This is similar to the Original Funding Model, which allocated the Industry Member Allocation among Industry Members (other than Execution Venue ATSs) based on message traffic. The Proposed Funding Model would differ from the Original Funding Model because it would eliminate tiering, and it would include certain market maker discounts and a minimum and

[1] The CAT NMS Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Exchange Act and the rules and regulations thereunder. *See* Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016).

[2] 15 U.S.C 78k–1(a)(3).

[3] 17 CFR 242.608.

[4] *See* Letter from Michael Simon, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, Commission, dated March 31, 2021 (''Transmittal Letter'').

[5] 17 CFR 242.608.

[6] *See* 17 CFR 242.608(a).

[7] *See* Transmittal Letter, *supra* note 4. Unless otherwise defined herein, capitalized terms used herein are defined as set forth in the CAT NMS Plan.

[8] Note that certain costs would be excluded from the Historical CAT Assessment Costs, as discussed in more detail below.

[9] Each Industry Member and Participant CAT Reporter would be required to pay CAT fees as established via the Proposed Funding Model. CAT Reporting Agents acting in their role as such would not have an obligation to pay CAT fees.

maximum CAT fee for Industry Members. Under the Proposed Funding Model, each Industry Member would pay a CAT fee that is calculated by multiplying each Industry Member's percentage of the total message traffic of all Industry Members each quarter by the Industry Member Allocation, subject to certain market making discounts, a minimum fee and a maximum fee. Each Industry Member that is an Options Market Maker [10] would have a discount based on the options trade-to-quote ratio applied to its options market making message traffic when calculating that Industry Member's message traffic to prevent a potentially disproportionate effect on options market making due to such message traffic. Similarly, to prevent a potentially disproportionate effect on market making in NMS Stocks, each Industry Member that is an equity market maker in NMS Stocks (''Equity Market Maker'') would have a discount based on the NMS Stock trade-to-quote ratio applied to its market making message traffic in NMS Stocks when calculating that Industry Member's message traffic.[11] In addition, each Industry Member CAT Reporter would pay a minimum CAT fee (''Minimum Industry Member CAT Fee'') of $125 per quarter if its CAT fee would be less than $125 per quarter when calculated based on message traffic. Furthermore, an Industry Member's CAT fee would be subject to a maximum fee (''Maximum Industry Member CAT Fee''). The Maximum Industry Member CAT Fee would be the fee calculated based on 8% of the total message traffic for all Industry Members. If an Industry Member's fee is limited to the Maximum Industry Member CAT Fee, any excess amount which the Industry Member would have paid as a fee above such Maximum Industry Member CAT Fee will be re-allocated among all Industry Members (including any Industry Members subject to the Maximum Industry Member CAT Fee and any Industry Members subject to the Minimum Industry Member CAT Fee) in accordance with each Industry Member's percentage of total message traffic.

As for the Participant Allocation, each Participant would pay a minimum CAT fee of 0.75% of the Participant Allocation (the ''Minimum Participant Fee''). The Participant Allocation minus the total Minimum Participant Fees required to be paid by all Participants (the ''Adjusted Participant Allocation'') would be divided between Participants that execute transactions in, or in the case of a national securities association, has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange, in Eligible Securities that are NMS Stocks (''Equities Participants'') and Participants that execute transactions in Listed Options (''Options Participants''). Equities Participants as a group would pay 60% of the Adjusted Participant Allocation (''Equities Participant Allocation'') and Options Participants as a group would pay 40% of the Adjusted Participant Allocation (''Options Participant Allocation'').[12]

The Equities Participant Allocation would be divided among Equities Participants based on each Equities Participant's market share in NMS Stocks. Each Equities Participant would pay a CAT fee that is calculated by multiplying its percentage of the total market share of NMS Stock for all Equities Participants during the relevant time period by the Equities Participant Allocation, subject to a maximum Equities Participant fee. Total market share in NMS Stocks would be determined by calculating the total volume in NMS Stocks reported by all Equities Participants during the relevant time period. A national securities association (currently, only FINRA) would pay its respective share of the Equities Participant Allocation calculated based on market share, provided that the national securities association would not pay more than a maximum Equities Participant fee, which would be the greater of (x) 20% of the Equities Participant Allocation or (y) the highest CAT fee required to be paid by any other Equities Participant plus 5% of such highest CAT fee (''Maximum Equities Participant Fee''), plus any additional fee required by the re-allocation of any excess amount which such Participant otherwise would have paid if not subject to the Maximum Equities Participant Fee. Specifically, if any Participant's fee is limited to the Maximum Equities Participant Fee, any excess amount which such Participant otherwise would have paid as a fee above such Maximum Equities Participant Fee will be re-allocated among all Equities Participants (including any Equities Participant subject to the Maximum Equities Participant Fee) in accordance with their market share.

The Options Participant Allocation would be divided among Options Participants based on each Options Participant's market share in Listed Options. Each Options Participant would pay a CAT fee that is calculated by multiplying its percentage of the total market share in Listed Options during the relevant time period by the Options Participant Allocation. Total market share in Listed Options would be determined by calculating the total volume of Listed Options contracts reported by all Options Participants during the relevant time period.

The following chart summarizes certain similarities and differences between the Original Funding Model [13] (as well as certain aspects that were proposed in the Prior Fee Proposal [14]) and the Proposed Funding Model:

Original funding model (as proposed in prior fee proposal)	Proposed funding model
Bifurcated Cost Allocation:	
75% Industry Member Allocation	75% Industry Member Allocation.
25% Execution Venue Allocation	25% Participant Allocation.
Execution Venues include Participants and Execution Venue ATSs	All ATSs would be included as Industry Members.

[10] Section 1.1 of the CAT NMS Plan defines an ''Options Market Maker'' as ''a broker-dealer registered with an exchange for the purpose of making markets in options contracts traded on the exchange.''

[11] The proposed market making discounts are consistent with a prior CAT fee proposal filed with the SEC (''Prior Fee Proposal''). For a description of the Prior Fee Proposal, *see* Securities Exchange Act Rel. No. 82451 (Jan. 5, 2018), 83 FR 1399 (Jan. 11, 2018) (''Prior Fee Proposal Release''). The Participants later withdrew this proposed amendment. Securities Exchange Act Rel. No. 82892 (Mar. 16, 2018), 83 FR 12633 (Mar. 22, 2018) (''Withdrawal Release'').

[12] For the avoidance of doubt, the Equities Participant Allocation would be divided among Equities Participants based only on each Participant's market share in NMS Stocks. Unlike the Original Funding Model, the allocation of the Equities Participant Allocation among Equities Participants under the Proposed Funding Model will not take into consideration market share associated with OTC Equity Securities for which FINRA facilitates trade reporting.

[13] The Original Funding Model is set forth in the CAT NMS Plan, which was approved in 2016. *See* CAT NMS Plan Approval Order at 84793–84798.

[14] *See generally* Prior Fee Proposal Release.

Original funding model (as proposed in prior fee proposal)	Proposed funding model
Note that the bifurcated model to allocate costs among Industry Members (other than Execution Venue ATSs) and Execution Venues is part of the Original Funding Model; the 75%–25% allocation had been proposed in the Prior Fee Proposal.	
75% Industry Member Allocation:	
Message Traffic Approach with Tiering:	*Message Traffic Approach:*
Count each Industry Member's messages so the Industry Member can be assigned to a tier and allocated a proportionate share of cost for that tier.	Count each Industry Member's messages so the Industry Member can be allocated a proportionate share of cost compared to total Industry Member messages, subject to certain discounts for market making, a minimum fee, and a maximum fee.
Note that the discounts for market making had been proposed in the Prior Fee Proposal.	
25% Participant Allocation:	
Market Share Approach with Tiering:	*Market Share Approach:*
No Minimum Participant Fee.	*Minimum Participant Fee:* 0.75% of the Participant Allocation allocated to each Participant.
Market Group Split:	*Market Group Split:*
• 67% of costs allocated to NMS Stock and OTC Equities Execution Venues.	• 60% of costs allocated to NMS Stock Participants.
• 33% of costs allocated to Listed Options Execution Venues.	• 40% of costs allocated Listed Options Participants.
Note that the split between NMS Stock and OTC Equities Execution Venues and Listed Options Execution Venues is part of the Original Funding Model; the 67%–33% allocation had been proposed in the Prior Fee Proposal.	Note OTC Equity Security market share would not be considered.
Market Share-Based Tier Allocation:	*Market Share-Based Allocation:*
• Within NMS Stock and OTC Equities market group, determine each Execution Venue's market share so the Execution Venue can be assigned to a tier and allocated a proportionate share of cost for that tier.	• Within NMS Stock market group, determine each Participant's market share, subject to a FINRA-related cap allocation/reallocation, so the Participant can be allocated a proportionate share of cost.
• Within Listed Options market group, determine each Execution Venue's market share so the Execution Venue can be assigned to a tier and allocated a proportionate share of cost for that tier.	• Within Listed Options market group, determine each Participant's market share so it can be allocated a proportionate share of cost.

As discussed in detail below, the Operating Committee believes that the Proposed Funding Model satisfies the applicable requirements of the Exchange Act as well as the funding principles and other requirements of the CAT NMS Plan, as proposed to be revised herein. For example, the Operating Committee believes that the Proposed Funding Model provides for the ''equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities necessary or appropriate in furtherance of the purposes of this chapter.'' [15] The Operating Committee also believes that the Proposed Funding Model is ''not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.'' [16] Furthermore, the Operating Committee believes that the Proposed Funding Model does ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.'' [17] Accordingly, the Operating Committee believes that the Proposed Funding Model satisfies the requirements of the Exchange Act. The Participants also believe that the Proposed Funding Model satisfies the funding principles set forth in Section 11.2 of the CAT NMS Plan, as proposed to be modified herein, as well as the requirements in Section 11.1(c) of the CAT NMS Plan. The Operating Committee therefore believes that the Commission should approve the Proposed Funding Model as it ''is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.'' [18]

2. Allocation of CAT Costs Between Industry Members and Participants

a. CAT Fees for Both Industry Members and Participants

Under the Proposed Funding Model, both Participants and Industry Members would contribute to the funding of the CAT by paying a CAT fee. As permitted by Rule 613, the CAT NMS Plan requires Industry Members to pay a CAT fee. Nevertheless, the Participants have paid the full cost of the creation, implementation and maintenance of the CAT since 2012, pending Commission approval of a fee program. The continued funding of the CAT solely by the Participants was and is not contemplated by the CAT NMS Plan, nor is it a financially sustainable approach.

Rule 613(a)(1)(vii)(D) contemplates Industry Members contributing to the payment of CAT costs. Specifically, this provision requires the CAT NMS Plan to address ''[h]ow the plan sponsors propose to fund the creation, implementation, and maintenance of the consolidated audit trail, including the proposed allocation of such estimated costs among the plan sponsors, and between the plan sponsors and members of the plan sponsors.''

In addition, as approved by the SEC, the CAT NMS Plan specifically contemplates CAT fees to be paid by both Industry Members and Participants. Section 11.1(b) states that ''the Operating Committee shall have discretion to establish funding for the Company,[19] including: (i) Establishing

[15] Sections 6(b)(4) and 15A(b)(5) of the Exchange Act.

[16] Sections 6(b)(5) and 15A(b)(6) of the Exchange Act.

[17] Sections 6(b)(8) and 15A(b)(9) of the Exchange Act.

[18] Rule 608(b)(2) of Regulation NMS under the Exchange Act.

[19] As defined in the CAT NMS Plan, the Company is the Consolidated Audit Trail, LLC.

fees that the Participants shall pay; and (ii) establishing fees for Industry Members that shall be implemented by the Participants.'' [20] The Commission stated in approving the CAT NMS Plan the following:

The Commission believes that the proposed funding model reflects a reasonable exercise of the Participants' funding authority to recover the Participants' costs related to the CAT. The CAT is a regulatory facility jointly owned by the Participants and, as noted above, the Exchange Act specifically permits the Participants to charge members fees to fund their self-regulatory obligations. The Commission further believes that the proposed funding model is designed to impose fees reasonably related to the Participants' self-regulatory obligations because the fees would be directly associated with the costs of establishing and maintaining the CAT, and not unrelated SRO services.[21]

In its recent amendments to the CAT NMS Plan, the SEC reaffirmed the ability for the Participants to charge Industry Members a CAT fee. Specifically, the SEC noted that the amendments were not intended to change the basic funding structure for the CAT, which may include fees established by the Operating Committee, and implemented by the Participants, to recover from Industry Members the costs and expenses incurred by the Participants in connection with the development and implementation of the CAT.[22]

Finally, as noted by the SEC, the CAT ''substantially enhance[s] the ability of the SROs and the Commission to oversee today's securities markets,'' [23] thereby benefitting all market participants. As such, both Participants and Industry Members should contribute to covering the cost of the CAT.

b. Categorization of Alternative Trading Systems

The Original Funding Model employs a bifurcated approach in which costs associated with building and operating the CAT would be borne by (1) Participants and Industry Members that are Execution Venue ATSs for Eligible Securities, and (2) Industry Members (other than Execution Venue ATSs). Under the Proposed Funding Model, the concept of an Execution Venue would be eliminated, and CAT costs would be divided between Participants as a group and Industry Members as a group; Execution Venue ATSs would be treated like other Industry Members, not Participants. Accordingly, the Operating Committee proposes to delete the definition of the term ''Execution Venue'' and related provisions from the CAT NMS Plan.

The Operating Committee believes that this change would address prior comments regarding the inclusion of ATSs in the Execution Venue category with Participants. First, this proposed change would simplify the model by requiring all Industry Members to pay a fee based on message traffic, rather than treating certain Industry Members—Execution Venue ATSs—in the same manner as Participants, which would pay a fee based on market share. Second, this proposed change would address comments that treating Execution Venue ATSs like Participants would act as a barrier to entry for smaller ATSs.[24] Whether or not such a potential would exist, under the Proposed Funding Model, smaller ATSs would be treated like any other smaller Industry Member when calculating their CAT fee, thereby rendering comments regarding potential barriers to entry for smaller ATSs moot.

Section 1.1 of the CAT NMS Plan defines the term ''Execution Venue'' to mean ''a Participant or an alternative trading system ('ATS') (as defined in Rule 300 of Regulation ATS) that operates pursuant to Rule 301 of Regulation ATS (excluding any such ATS that does not execute orders).'' The Operating Committee proposes to delete this term and its definition from Section 1.1 of the CAT NMS Plan as the concept will no longer be necessary for the Proposed Funding Model.

The Operating Committee also proposes to amend Section 11.2(c)(i) and (ii) of the CAT NMS Plan to reflect the new approach of the Proposed Funding Model. Section 11.2(c)(i) of the CAT NMS Plan states that the fees charged to ''CAT Reporters that are Execution Venues, including ATSs, are based upon the level of market share.'' Under the Proposed Funding Model, fees charged to Participants only would be based on market share; fees charged to all Industry Members, including ATSs, will be based on message traffic. Accordingly, the Operating Committee proposes to replace the phrase ''CAT Reporters that are Execution Venues, including ATSs'' with the term ''Participants.''

Section 11.2(c)(ii) of the CAT NMS Plan states that the fees charged to ''Industry Members' non-ATS activities are based upon message traffic.'' Under the Proposed Funding Model, both the ATS and non-ATS activity of Industry Members will be used as the basis for the fees charged to Industry Members. Accordingly, the Operating Committee proposes to delete the phrase ''non-ATS activities'' from Section 11.2(c)(ii) of the CAT NMS Plan.

Section 11.3(a) describes the CAT fees to be paid by Execution Venues. Because these fees would be limited to Participants, not to Execution Venues more broadly, the Operating Committee proposes to replace the references to ''Execution Venues'' with ''Participants'' in Section 11.3(a) of the CAT NMS Plan. The Operating Committee proposes to replace the reference to ''Execution Venues'' with ''Participants'' in Section 11.3(a) of the CAT NMS Plan, which currently states that ''[t]he Operating Committee will establish fixed fees to be payable by Execution Venues as provided in this Section 11.3(a).''

The Operating Committee also proposes to replace the references to ''Execution Venue'' with ''Participants'' in Section 11.3(a)(i) of the CAT NMS Plan,[25] which currently states:

(i) Each Execution Venue that: (A) Executes transactions; or (B) in the case of a national securities association, has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange, in NMS Stocks or OTC Equity Securities will pay a fixed fee depending on the market share of that Execution Venue in NMS Stocks and OTC Equity Securities, with the Operating Committee establishing at least two and no more than five tiers of fixed fees, based on an Execution Venue's NMS Stocks and OTC Equity Securities market share. For these purposes, market share for Execution Venues that execute transactions will be calculated by share volume, and market share for a national securities association that has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange in NMS Stocks or OTC Equity Securities will be calculated based on share volume of trades reported, provided, however, that the share volume reported to such national

[20] *See also* Sections 11.1(c), 11.2(c), and 11.3(a) and (b) of the CAT NMS Plan.

[21] CAT NMS Plan Approval Order at 84794.

[22] Securities Exchange Act Rel. No. 88890 (May 15, 2020), 85 FR 31322, 31329 (May 22, 2020) (''Financial Accountability Milestone Release'').

[23] Securities Exchange Act Rel. No. 67457 (Jul. 18, 2012), 77 FR 45722, 45726 (Aug. 1, 2012) (''Rule 613 Adopting Release'').

[24] *See, e.g.,* Securities Exchange Act Rel. No. 81067 (June 30, 2017), 82 FR 31656, 31664 (July 7, 2017) (''Suspension Order'').

[25] Note that, as discussed below, references to tiers and OTC Equity Securities in this provision will be deleted as well.

securities association by an Execution Venue shall not be included in the calculation of such national security association's market share.

In addition, the Operating Committee proposes to delete the final clause in Section 11.3(a)(i), which states ''provided, however, that the share volume reported to such national securities association by an Execution Venue shall not be included in the calculation of the such national security association's market share.'' This proviso was included to clarify how the share volume of an Execution Venue ATS was treated in the context of calculating a national security association's market share when Execution Venue ATSs and Participants were in the same fee category. As Execution Venue ATSs would be treated as Industry Members under the Proposed Funding Model, the Operating Committee proposes to delete this proviso from Section 11.3(a)(i) of the CAT NMS Plan.

Similarly, Section 11.3(a)(ii) of the CAT NMS Plan states that ''[e]ach Execution Venue that executes transactions in Listed Options will pay a fixed fee depending on the Listed Options market share of that Execution Venue.'' The Operating Committee proposes to replace both references to ''Execution Venue'' with ''Participant.''

Section 11.3(b) of the CAT NMS Plan provides guidance as to how the message traffic for certain ATS activity would be included in the Industry Member message traffic calculations. Specifically, Section 11.3(b) of the CAT NMS Plan, in part, states, the following:

For the avoidance of doubt, the fixed fees payable by Industry Members pursuant to this paragraph shall, in addition to any other applicable message traffic, include message traffic generated by: (i) An ATS that does not execute orders that is sponsored by such Industry Member; and (ii) routing orders to and from any ATS sponsored by such Industry Member.

Under the Original Funding Model, Execution Venue ATSs were treated as Execution Venues, but other ATSs were treated as Industry Members. Accordingly, this statement clarified how message traffic would be counted for ATSs that were not Execution Venue ATSs and for routing to and from ATSs. Under the Proposed Funding Model, however, all ATS activity would be treated as Industry Member activity for purposes of calculating the Industry Member CAT fees. Therefore, because this clarifying statement is unnecessary under the Proposed Funding Model, the Operating Committee proposes to delete this sentence from Section 11.3(b) of the CAT NMS Plan.

c. 75%–25% Allocation Between Industry Members and Participants

As discussed above, the CAT NMS Plan as approved by the Commission provides the Operating Committee with discretion to establish CAT fees to be paid by Participants and Industry Members. The Proposed Funding Model contemplates allocating CAT costs between Participants and Industry Members to permit the calculation of CAT fees based on market share for Participants and based on message traffic for Industry Members.[26] The Operating Committee proposes to implement this allocation through a 75%–25% allocation between Industry Members and Participants. Specifically, in calculating CAT fees for the relevant period under the Proposed Funding Model, Industry Members as a group would pay 75% of the Total CAT Costs for the relevant period (''Industry Member Allocation''), and Participants as a group would pay 25% of the Total CAT Costs for the relevant period (''Participant Allocation'').

In proposing a 75%–25% allocation between Industry Members and Participants, Participants considered a variety of different potential allocations between Industry Members and Participants. After analyzing the various alternatives, the Participants determined that the 75%–25% allocation continues to be an equitable allocation of reasonable CAT fees between Industry Members and Participants that balances the costs paid by each CAT Reporter and the regulatory benefits each receives.

The Operating Committee notes that the 75%–25% allocation would have the effect of increasing the cost allocation to Participants by approximately 8% of the total CAT costs in comparison to the Prior Fee Proposal.[27] The Prior Fee Proposal also relied upon a 75%–25% allocation between CAT Reporters, but the allocation was structured differently than in the Proposed Funding Model. In the Prior Fee Proposal, Industry Members (other than Execution Venue ATSs) would have paid 75% of the total CAT costs, and Participants and Execution Venue ATSs would have paid 25% of the total CAT costs.[28] Most ATSs were included in the 25% allocation for Execution Venues. ATSs accounted for approximately 8% of the total CAT costs in the Prior Fee Proposal, and approximately 32% of the Execution Venue allocation. By moving ATSs to the Industry Member Allocation, Participants would pay the full 25% of the total CAT costs allocated to Participants rather than approximately 68% of the 25% of Total CAT costs allocated to Execution Venues under the Prior Fee Proposal. Using total CAT cost data for 2020, 8% of total CAT costs would be approximately $6.8 million for 2020. The Operating Committee believes that this substantial increase in the Participant share of the total CAT costs addresses comments suggesting that Execution Venue ATSs should be treated like other Industry Members (rather than as Execution Venues) and indicating that the size of the percentage of total CAT costs to be paid by Industry Members as a group was too large.[29] Correspondingly, the 75% Industry Member Allocation would be shared among more Industry Members under the Proposed Funding Model as all ATSs will be Industry Members for purposes of CAT fees, not just ATSs other than Execution Venue ATSs.

The Operating Committee also considered alternatives to the Participant contribution besides the proposed 25% in which Participants paid larger contributions than 25% of the total CAT costs (*e.g.,* a 50%–50% allocation between Industry Members and Participants) and Participants paid smaller contributions than 25% of the total CAT costs.[30] In considering these alternative allocations with percentages greater than 25% of total CAT costs allocated to Participants, the Participants noted that there are far more Industry Members than Participants. There are only 25 Participants and approximately 1237 Industry Members, as of December 2020. Moreover, based upon an analysis of available CAT Reporter revenue, Participants only represented

[26] *See, e.g.,* Sections 11.2(b)–(c) and 11.3(a)–(b) of the CAT NMS Plan. In the Original Funding Model, costs were allocated between Execution Venues and certain Industry Members, whereas the Proposed Funding Model proposes to allocate costs between Participants and Industry Members.

[27] For a description of the Prior Fee Proposal, *see generally* Prior Fee Proposal Release. The Participants later withdrew this amendment. *See* Withdrawal Release.

[28] Prior Fee Proposal Release at 1408.

[29] *See* Suspension Order at 31662–3.

[30] In the development of the Prior Fee Proposal and the Proposed Funding Model, the Participants explored a variety of other possible allocations. For example, in determining the cost allocation between Industry Members (other than Execution Venue ATSs) and Execution Venues for the Prior Fee Proposal, the Participants analyzed a range of possible splits for revenue recovery from such Industry Members and Execution Venues, including 80%–20%, 75%–25%, 70%–30% and 65%–35% allocations between Industry Members and Execution Venues. *See, e.g.,* Prior Fee Proposal Release at 1408.

approximately 4% of the total CAT Reporter revenue; Industry Members represented 96% of the total CAT Reporter revenue.[31] In addition, various Industry Members have revenue in excess of some or all of the Participants. Accordingly, the Operating Committee determined that allocating more than 25% of the total CAT costs to the Participants was not a fair and equitable approach. Furthermore, with this allocation, the Industry Members with the most message traffic and the Participant complexes with the most market share would pay comparable CAT fees. For example, based on the data from the fourth quarter of 2020, the three Industry Members with the most message traffic would be subject to an annual CAT fee in the range of $5 to $6 million, and the Participant complexes with the highest CAT fees would pay an annual CAT fee in a similar range.

The Operating Committee also analyzed the possibility of allocating CAT costs among CAT Reporters—both Participants and Industry Members—based on revenue. Such a revenue-based allocation would impose a more significant portion of the CAT costs on Industry Members. Industry Members would pay approximately 96% of the CAT costs and Participants would pay approximately 4% of the CAT costs. Because the revenue-based allocation would impose such a significant percentage of CAT costs on Industry Members, the Operating Committee determined not to pursue that approach. The Operating Committee also recognized the practical difficulties with determining the appropriate revenue figures for all CAT Reporters.

The Industry Member Allocation of 75% of Total CAT Costs and the Participant Allocation of 25% of Total CAT Costs would be included in the fee schedule for the Consolidated Audit Trail Funding Fees in the CAT NMS Plan. Because the Participant CAT fees would be charged on a quarterly basis, this provision would indicate that the Industry Member Allocation and the Participant Allocation would be calculated based on 1/4th of the Total CAT Costs for the relevant year. Specifically, proposed paragraph (b)(1) of Appendix B of the CAT NMS Plan would state that ''The Industry Member Allocation for each quarter shall be 75% of 1/4th of the Total CAT Costs for the relevant year. The Participant Allocation for each quarter shall be 25% of 1/4th of the Total CAT Costs for the relevant year.''

3. Industry Member CAT Fee

Under the Proposed Funding Model, each Industry Member will pay a CAT fee that is calculated by multiplying each Industry Member's message traffic percentage of the total message traffic of all Industry Members during the relevant time period by the Industry Member Allocation, subject to certain market maker message traffic discounts, a Minimum Industry Member CAT Fee and a Maximum Industry Member CAT Fee. Each Industry Member that is an Options Market Maker will have a discount based on the options trade-to-quote ratio applied to its Options Market Maker message traffic when calculating that Industry Member's message traffic, and each Industry Member that is an Equity Market Maker will have a discount based on the NMS Stock trade-to-quote ratio applied to its Equity Market Maker message traffic when calculating that Industry Member's message traffic. In addition, each Industry Member CAT Reporter will pay a Minimum Industry Member CAT Fee of $125 per quarter if its CAT fee would be less than $125 per quarter when calculated based on message traffic. Furthermore, an Industry Member's CAT fee would be subject to the Maximum Industry Member CAT Fee. The Maximum Industry Member CAT Fee would be the fee calculated based on 8% of the total message traffic for all Industry Members. If an Industry Member's CAT fee is limited to the Maximum Industry Member CAT Fee, any excess amount which the Industry Member would have paid as a fee above such Maximum Industry Member CAT Fee will be re-allocated among all Industry Members (including any Industry Members subject to the Maximum Industry Member CAT Fee and any Industry Members subject to the Minimum Industry Member CAT Fee) in accordance with each Industry Member's percentage of total message traffic. Each of these aspects of the Industry Member CAT fee are discussed in more detail below.

a. Use of Message Traffic

Consistent with the Original Funding Model, the Industry Member Allocation would be allocated among Industry Members based on message traffic. The CAT NMS Plan, as approved by the SEC, contemplates the use of message traffic to apportion the Industry Member Allocation among Industry Members.[32] Although the Operating Committee analyzed various alternative methods for allocating costs among Industry Members, the Operating Committee continued to conclude that using message traffic would equitably allocate CAT fees among Industry Members. This approach is consistent with the approach set forth in Section 11.3(b) of the CAT NMS Plan, which states that ''[t]he Operating Committee will establish fixed fees to be payable by Industry Members, based on the message traffic generated by such Industry Member.'' [33] Accordingly, the use of message traffic for allocating CAT costs among Industry Members is consistent with the CAT NMS Plan as approved by the Commission.

The Operating Committee also analyzed the possibility of allocating the Industry Member Allocation among Industry Members based on revenue related to activities in Eligible Securities, which would have been derived from Industry Member revenue reported on FOCUS reports.[34] The Operating Committee concluded that it may be difficult to determine which types of Industry Member revenue should be included in the calculation for a CAT fee under such an approach.

b. Calculating Industry Member CAT Fees

i. No Tiered Fees for Industry Members

While continuing to utilize a message traffic-based model for Industry Members, the Operating Committee proposes to eliminate the use of tiered fees for Industry Members in the Proposed Funding Model. Instead, under the Proposed Funding Model, each Industry Member would pay a fee based solely on its percentage of total Industry Member message traffic (subject to the market maker message traffic discounts, the Minimum Industry Member CAT Fee and the Maximum Industry Member CAT Fee).[35] The Operating Committee therefore proposes to amend Sections 11.1(d), 11.2(c), 11.3(a) and 11.3(b) to eliminate the

[31] Industry Member revenue was calculated based on the total revenue reported in the Industry Member's FOCUS reports. Participant revenue was calculated based on revenue information provided in Form 1 amendments and/or publicly reported figures. Participants are not required to file uniform FOCUS-type reports regarding revenue like Industry Members. Accordingly, the revenue calculation for Participants is not as straightforward as for Industry Members.

[32] *See, e.g.,* Sections 11.2(c) and 11.3(b) of the CAT NMS Plan.

[33] *See also* Section 11.2(c) of the CAT NMS Plan.

[34] This approach would have been similar to FINRA's imposition of the Gross Income Assessment, which is based on FOCUS report revenue. *See* Section 1(c) and (d) of Schedule A of FINRA By-Laws.

[35] Similarly, as discussed further below, the Operating Committee proposes to allocate the Participant Allocation among Participants based on the Participant's market share, consistent with the Original Funding Model, except it too would be calculated without relying on tiered fees.

concept of tiered fees from the CAT NMS Plan.

(a) Advantages of No Tiered Fees

By removing the concept of fee tiering for both Industry Members and Participant Allocations, the Proposed Funding Model addresses various comments regarding the use of tiering.[36] Utilizing a tiered fee structure, by its nature, would create certain inequities among the CAT fees paid by Industry Members. For example, two Industry Members with similar levels of message traffic may pay notably different fees if one falls in a higher tier and the other falls within a lower tier. Correspondingly, a tiered fee structure generally reduces fees for Industry Members with higher message traffic in one tier, while increasing fees for Industry Members with lower levels of message traffic in the same tier, as compared to a non-tiered fee. Furthermore, Industry Members in lower tiers potentially pay more than they would without the use of tiers. While tiering exists in various other fee programs and generally itself may not be an unfairly discriminatory practice, in response to feedback on the Prior Fee Proposal, the Participants are proposing to eliminate the tiering concept, rendering past comments about potential inequities that may exist using a tiering model moot.

By charging each Industry Member a CAT fee directly based on its own message traffic, rather than charging a tiered fee, the Proposed Funding Model will result in an Industry Member's CAT fee being tied more directly to the Industry Member's message traffic in the CAT. In contrast, with a tiered fee, Industry Members with different levels of message traffic that are placed in the same tier would all pay the same CAT fee, thereby limiting the correlation between an Industry Member's message traffic in the CAT and its CAT fee.

The proposed non-tiering approach is, arguably, more simplistic and objective to administer than the tiering approach. With a tiering approach, the number of tiers for Industry Members, the boundaries for each tier and the fees assigned to each tier must be established. In the absence of clear groupings of Industry Members by message traffic, selecting the number of, boundaries, and the fees associated with each tier would be subject to some level of subjectivity. Furthermore, the establishment of tiers would need to be continually reassessed based on changes in message traffic, thereby requiring regular subjective assessments. Accordingly, the removal of tiering from the funding model eliminates a variety of subjective analyses and judgments from the model, and simplifies the determination of Industry Member CAT fees.

(2) Proposed Amendments to the CAT NMS Plan

The Operating Committee proposes to amend Sections 11.1(d), 11.2(c), 11.3(a) and 11.3(b) of the CAT NMS Plan to eliminate references to the use of tiered fees and related concepts.

Section 11.1(d) of the CAT NMS Plan states that ''[c]onsistent with this Article XI, the Operating Committee shall adopt policies, procedures, and practices regarding the budget and budgeting process, assignment of tiers, resolution of disputes, billing and collection of fees, and other related matters.'' With the elimination of tiered fees, the reference to the ''assignment of tiers'' would no longer be applicable for the Proposed Funding Model. Therefore, the Operating Committee proposes to delete the reference to ''assignment of tiers'' from Section 11.1(d).

Section 11.1(d) of the CAT NMS Plan also states that:

> For the avoidance of doubt, as part of its regular review of fees for the CAT, the Operating Committee shall have the right to change the tier assigned to any particular Person in accordance with fee schedules previously filed with the Commission that are reasonable, equitable and not unfairly discriminatory and subject to public notice and comment, pursuant to this Article XI. Any such changes will be effective upon reasonable notice to such Person.

As noted above, unlike the Original Funding Model, the Proposed Funding Model would not utilize tiered fees. Accordingly, these two sentences would no longer be applicable to the Proposed Funding Model. Therefore, the Operating Committee proposes to delete these two sentences from Section 11.1(d) of the CAT NMS Plan.

The Operating Committee proposes to delete the reference to ''tiered'' fees from Section 11.2(c) of the CAT NMS Plan. Section 11.2(c) of the CAT NMS Plan states that ''[i]n establishing the funding of the Company, the Operating Committee shall seek: . . . (c) to establish a tiered fee structure . . .'' The Participants propose to delete the word ''tiered'' from this provision as the CAT fees would not be tiered under the Proposed Funding Model.

The Operating Committee also proposes to delete paragraph (iii) of Section 11.2(c) of the CAT NMS Plan. Paragraph (iii) of Section 11.2(c) of the CAT NMS Plan states that the Operating Committee shall seek to establish a tiered fee structure in which fees charged to:

> the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) be generally comparable (where for these comparability purposes, the tiered fee structures takes into consideration affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members).

Under the Original Funding Model, the comparability provision was an important factor in determining the tiers for Industry Members and Execution Venues. Under the Proposed Funding Model, however, the comparability provision is no longer relevant, as a tiered fee structure would not be used for Industry Members or Participants.[37]

The Operating Committee further proposes to delete the references to tiers in Sections 11.3(a)(i) and (ii) and 11.3(b) of the CAT NMS Plan. Specifically, Section 11.3(a)(i) of the CAT NMS Plan states that the Operating Committee, when establishing fees for Execution Venues for NMS Stocks and OTC Equity Securities, will establish ''at least two and no more than five tiers of fixed fees, based on an Execution Venue's NMS Stocks and OTC Equity Securities market share.'' [38] Similarly, Section 11.3(a)(ii) of the CAT NMS Plan states that the Operating Committee, when establishing fees for Execution Venues that execute transactions in Listed Options, will establish ''at least two and no more than five tiers of fixed fees, based on an Execution Venue's Listed Options market share.'' Section 11.3(b) of the CAT NMS Plan states that the Operating Committee, when establishing fees to be payable by Industry Members, will establish ''at least five and no more than nine tiers of fixed fees, based on message traffic.'' The Operating Committee proposes to delete each of these references to tiers from the CAT NMS Plan.

ii Definition of Message Traffic

Message traffic will be calculated based on Industry Members' Reportable Events reported to the CAT as defined in the CAT Reporting Technical Specifications for Industry Members (''IM Reporting Tech Specs'') as amended from time to time.[39] The Reportable Events may vary over time if the IM Reporting Tech Specs are

[36] *See, e.g.,* Suspension Order at 31667.

[37] This change also would address the comments regarding the use of comparability in the Original Funding Model. *See* Suspension Order at 31662–3.

[38] Note that, as discussed below, the Operating Committee also proposes to delete the reference to OTC Equity Securities.

[39] The CAT Reporting Technical Specifications for Industry Members are available at *www.catnmsplan.com.*

amended.[40] However, Reportable Events in the current IM Reporting Tech Specs that will be counted as message traffic include, but are not limited to, such events as the New Order Event, the Order Route Event and Trade Event. In addition, under the Proposed Funding Model, message traffic will not include reporting activity related to Customer information as set forth in the CAT Reporting Customer and Account Technical Specifications for Industry Members.[41]

iii. Market Maker Discounts

In the Original Funding Model, Options Market Maker message traffic and Equity Market Maker message traffic would have been treated the same as other message traffic for purposes of calculating Industry Member CAT fees.[42] The Commission and commenters raised questions as to whether this treatment of market maker quotes may result in an undue or inappropriate burden on competition or may lead to a reduction in market quality.[43] For example, commenters noted that charging Industry Members on the basis of message traffic would impact market makers disproportionately because of their continuous quoting obligations. Moreover, in the context of Options Market Makers, message traffic would include bids and offers for every Listed Options strikes and series.[44] To address these issues, the Operating Committee proposes to discount Options Market Maker message traffic by the trade-to-quote ratio for Listed Options when calculating message traffic for Options Market Makers, and to discount Equity Market Maker message traffic by the trade-to-quote ratio for NMS Stocks when calculating message traffic for Equity Market Makers. The message traffic of Options Market Makers and Equity Market Makers, as discounted, would be counted as part of the total message traffic for all Industry Members. The practical effect of applying such discounts for market making activity would be to lower the CAT fees for Options Market Makers and Equity Market Makers.

By imposing a discount on Options Market Makers and Equity Market Makers' message traffic for the calculation of message traffic, the Operating Committee believes that the proposed CAT fees for market makers would satisfy the requirements of the funding principles set forth in Section 11.2 of the CAT NMS Plan as well as the requirements of the Exchange Act. First, the proposed market maker discounts are designed to address comments that the Original Funding Model could disproportionately affect market makers, thereby leading to a reduction in liquidity and market quality. Commenters noted that charging Industry Members on the basis of message traffic will impact market makers disproportionately because of their continuous quoting obligations. With their continuous quoting obligations, market makers would have higher levels of message traffic, and the type of message traffic (bids and offers rather than transactions) are not necessarily related to higher revenue. The SEC repeatedly has recognized the value of protecting the provision of market liquidity, and afforded market makers favorable regulatory treatment by virtue of their role as liquidity providers. For example, market makers receive favorable treatment under short sale rules,[45] margin rules,[46] pursuant to exchange fee schedules,[47] and under the Volcker Rule.[48] The proposed discounts are designed to put market makers and other market participants on a level playing field in the Proposed Funding Model, thereby preserving and incentivizing the ability of market makers to provide liquidity to the market, which liquidity ultimately benefits all market participants. Market makers' primary role is to provide the markets with competitive prices and quotes against which others may execute their orders. Market makers update their quotes continuously throughout each trading day to reflect changes in the market, and each update is additional message traffic that will be reported to CAT. If CAT fees made it unduly costly for market makers to provide this competitive liquidity, it could reduce the available liquidity against which customers could execute orders and create worse pricing for customers that do receive executions.

Second, although the proposed discounts would provide market makers with a benefit not provided to other market participants, such discounts would not amount to unfair discrimination or an unnecessary or inappropriate burden on competition. As discussed above, the SEC has recognized repeatedly that such favorable treatment for market makers in other contexts was not unfairly discriminatory or a burden on competition in light of its positive effects on market quality, nor was it considered to involve an inequitable allocation of fees among members.

Third, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Industry Members, and avoid disincentives, such as a reduction in market quality, as required under the funding principles of the CAT NMS Plan.[49] The proposed discounts recognize the different types of trading operations presented by Options Market Makers and Equity Market Makers, as well as the value of the market makers' quoting activity to the markets as a whole. Accordingly, the Operating Committee believes that the proposed discounts will not impact the ability of Options Market Makers or Equity Market Makers to provide liquidity.

Finally, the Operating Committee believes that the trade-to-quote ratio is an appropriate method for discounting market maker message traffic, including because of the relatively few quotes that ultimately execute. As discussed above, the vast majority of quotes market makers submit are intended to price the market and provide liquidity against which orders may execute. The Operating Committee proposes to use the trade-to-quote ratio for calculating the discount because it directly relates to the issue regarding the quoting requirement (*i.e.,* fewer trades per quote

[40] The Operating Committee recognizes that, due to the Phased Reporting approach, all Reportable Events will not be reported until all Industry Members are reporting all Reportable Events to the CAT. For example, Phase 2d CAT reporting is scheduled for December 2021, and Small Industry Non-OATS Reporters are not required to report until December 2021. In addition, certain Reportable Events, such as simple options manual orders and OTC link messages, are not required to be reported until later in the Phased Reporting. For a detailed description of such Reportable Events, *see* CAT Reporting Technical Specifications for Industry Members (available at *www.catnmsplan.com*). For the Industry Member CAT reporting timeline, *see, e.g.,* FINRA Rule 6895(c). The Operating Committee proposes to allocate costs based on the Reportable Events reported to the CAT in any relevant quarter, regardless of whether all Industry Members are reporting to the CAT or all Reportable Events are required to be reported to the CAT for the relevant quarter.

[41] The CAT Reporting Customer and Account Technical Specifications for Industry Members are available at *www.catnmsplan.com.*

[42] Note, however, that market maker discounts were included in the Prior Fee Proposal. *See* Prior Fee Proposal Release at 1418–9.

[43] *See* Suspension Order at 31663–4.

[44] *Id.* at 31664.

[45] *See, e.g.,* Rule 203(b)(2)(iii) of Regulation SHO under the Exchange Act (market maker exception for short sale locate requirement).

[46] *See, e.g.,* Section 7(c)(3) of the Exchange Act (market maker exception regarding margin requirements).

[47] *See, e.g.,* NYSE Arca Rule 8.800–E and Market Maker Fees and Credits, NYSE Arca Fees and Charges (incentive programs for market makers).

[48] *See* Section __.4(b) (market making exemption from the proprietary trading prohibition).

[49] Section 11.2(b) of the CAT NMS Plan.

for market makers due to their quoting activity) and it is an objective discounting method.

(a) Options Market Maker Discount

To address issues regarding the potential burdens on competition and market quality of including Options Market Maker message traffic in the calculation of message traffic, the Operating Committee proposes to discount Options Market Maker message traffic based on the trade-to-quote ratio for options when calculating the message traffic for Options Market Makers.[50] Specifically, for each Options Market Maker, a discount would be applied to (1) all message traffic reported to the CAT by the Options Market Maker related to an order originated by a market maker in its market making account for a security in which it is registered, regardless of where the order is ultimately routed or executed; [51] and (2) all message traffic for which a ''quote sent time'' is reported by an Options Exchange on behalf of the given Options Market Maker.

The relevant trade-to-quote ratio for the Options Market Maker discount would be calculated each quarter based on the prior quarter's CAT data. The discount is calculated by dividing the adjusted trade count (that is, the total number of trades for the quarter minus the total number of trade busts) by the total number of quotes received by the securities information processors (''SIP'') from an exchange. As an example, the trade-to-quote ratio for Listed Options for the fourth quarter of 2020 was 0.01%.

Accordingly, each Options Market Maker's discounted message traffic count would be calculated by multiplying its message traffic by the options trade-to-quote ratio. The Options Market Maker's CAT fee then would be calculated by multiplying its discounted percentage of the total message traffic of all Industry Members during the relevant time [52] period by the Industry Member Allocation, subject to the Minimum Industry Member CAT Fee and the Maximum Industry Member CAT Fee.

(b) Equity Market Maker Discount

Similar to the treatment of Options Market Maker message traffic, the Operating Committee proposes to discount Equity Market Maker message traffic based on the trade-to-quote ratio for NMS Stocks when calculating the message traffic for Equity Market Makers. Specifically, for each Equities Market Maker, a discount would be applied to all message traffic reported to the CAT by the Equities Market Maker related to an order originated by a market maker in its market making account for a security in which it is registered,[53] regardless of where the order is ultimately routed or executed.[54]

The relevant trade-to-quote ratio for the Equity Market Maker discount would be calculated each quarter based on the prior quarter's CAT data. The discount is calculated by dividing the adjusted trade count (that is, the total number of trades for the quarter minus the total number of trade busts) by the total number of quotes received by the SIP from an exchange. As an example, the trade-to-quote ratio for NMS Stocks for the fourth quarter of 2020 was 4.77%.

The Equity Market Maker CAT fee would be calculated in the same manner as the Options Market Maker CAT fee. Each Equity Market Maker's discounted message traffic count would be calculated by multiplying its message traffic by the NMS Stock trade-to-quote ratio. The Equity Market Maker CAT fee then would be calculated by multiplying its discounted percentage of the total message traffic of all Industry Members during the relevant time period [55] by the Industry Member Allocation, subject to the Minimum Industry Member CAT Fee and the Maximum Industry Member CAT Fee.

(c) Proposed Amendments

To implement the proposed market maker discounts, the Operating Committee proposes to revise Section 11.3(b) of the CAT NMS Plan to reflect the application of such discounts. Specifically, the Operating Committee proposes to amend the statement in Section 11.3(b) that ''[t]he Operating Committee will establish fixed fees to be payable by Industry Members, based on the message traffic generated by such Industry Members'' to add the concept of the market maker discounts. Specifically, the Operating Committee proposes to qualify this statement by the phrase ''subject to . . . discounts for market maker message traffic.''

iv. Minimum Industry Member CAT Fee

The Operating Committee proposes to require all Industry Members to pay at least a minimum fee for each relevant period. Specifically, the Operating Committee proposes to impose a Minimum Industry Member CAT Fee of $125 per quarter on an Industry Member if its CAT fee would be less than $125 per quarter when calculated based on message traffic. All Industry Members required to report to the CAT, including those that have not yet begun to report to the CAT due to the phased implementation schedule for the CAT, would be subject to the Minimum Industry Member CAT Fee. If any Industry Member is required to pay the Minimum Industry Member CAT Fee, the total additional amount paid by all such Industry Members over the amount they otherwise would have paid as a result of their message traffic calculation would be discounted from all Industry Members other than those that were subject to a Minimum Industry Member CAT Fee in accordance with their message traffic percentage.[56] Such a minimum fee satisfies the purposes of the CAT as well as the funding principles of the CAT NMS Plan.

A minimum fee of $125 per quarter ensures that all Industry Members

[50] The SEC approved exemptive relief permitting Options Market Maker quotes to be reported to the Central Repository by the relevant Options Exchange in lieu of requiring that such reporting be done by both the Options Exchange and the Options Market Maker, as required by Rule 613 of Regulation NMS. *See* Securities Exchange Act Rel. No. 77265 (Mar. 1, 2016), 81 FR 11856 (Mar. 7, 2016). This exemption applies to Options Market Maker quotes for CAT reporting purposes only. Therefore, notwithstanding the reporting exemption provided for Options Market Maker quotes, Options Market Maker quote messages that are reported to the CAT by Options Exchanges will be included in the calculation of total message traffic and for the calculation of individual Options Market Makers message traffic, subject to the proposed discounts.

[51] Under the current version of the IM Reporting Tech Specs, the discount would apply to new order messages and all related messages reported to the CAT by an Options Market Maker with an accountHolderType = O. *See* CAT FAQ C5 (available at *www.catnmsplan.com*). The discount would not apply to messages by an Industry Member that are associated with any other accountHolderType. The IM Reporting Tech Specs may be amended from time to time and this designation could be changed.

[52] Note that the total message traffic of all Industry Members during the relevant time period will be calculated using the discounted total for all Options Market Makers.

[53] Note that Equity Market Makers do not have a quote sent time exemption comparable to the Options Market Maker quote sent time exemption, as discussed above.

[54] Under the current version of the IM Reporting Tech Specs, the discount would apply to new order messages and all related messages reported to the CAT by an Equities Market Maker with an accountHolderType = O. *See* CAT FAQ C5 (available at *www.catnmsplan.com*). The discount would not apply to messages by the Industry Member that are associated with any other accountHolderType. The IM Reporting Tech Specs may be amended from time to time and this designation could be changed.

[55] Note that the total message traffic of all Industry Members during the relevant time period will be calculated using the discounted total for all Equity Market Makers.

[56] Options Market Makers and Equity Market Makers will be required to pay the Minimum Industry CAT Member Fee if their quarterly CAT fee calculated with the market maker discounts is less than $125 per quarter.

provide a meaningful contribution to the funding of the CAT, as the CAT is intended to assist all market participants by creating enhanced oversight of the markets, and thus benefits all Industry Members, including those with small levels of message traffic.[57] Because some Industry Members may have very small levels of message traffic, their proposed CAT fee may be commensurately very small (*e.g.,* they could pay a CAT fee of pennies). However, the size of the $125 minimum quarterly fee is not so large as to be overly burdensome to Industry Members with small levels of message traffic. Accordingly, the minimum fee would be in keeping with the funding principle requiring the funding model to ''avoid disincentives such as placing an inappropriate burden on competition and a reduction in market quality.'' [58]

Such a minimum fee also would contribute to the ease of billing and other administrative functions, in accordance with the funding principle set forth in Section 11.2(d) of the CAT NMS Plan.[59] Without such a minimum fee, the Participants would be required to oversee the payment of fees as little as pennies for certain Industry Members given their limited message traffic.

To implement the Minimum Industry Member CAT Fee, the Operating Committee proposes to revise Section 11.3(b) of the CAT NMS Plan to reflect the imposition of a minimum fee. Specifically, the Operating Committee proposes to amend the statement in Section 11.3(b) that ''[t]he Operating Committee will establish fixed fees [60] to be payable by Industry Members, based on the message traffic generated by such Industry Members'' to add the concept of the minimum fee. Specifically, the Operating Committee proposes to qualify this statement with the phrase ''subject to a base minimum fee.''

v. Maximum Industry Member CAT Fee

The Operating Committee proposes to establish a maximum fee to be paid by Industry Members. Under the Proposed Funding Model, Industry Members would pay a CAT fee based on their proportionate message traffic in NMS Stocks, subject to a maximum fee. The maximum fee for Industry Members would be the fee calculated based on 8% of the total message traffic for Industry Members. If an Industry Member's fee is limited to the Maximum Industry Member CAT Fee, any excess amount which the Industry Member otherwise would have paid as a fee above such Maximum Industry Member CAT Fee would be re-allocated among all Industry Members including any Industry Members subject to the Maximum Industry Member CAT Fee and any Industry Members subject to the Minimum Industry Member CAT Fee in accordance with its message traffic.

The imposition of the Maximum Industry Member CAT Fee serves as a method to institute a cap on fees in order to fairly allocate costs to Industry Members as using message traffic alone potentially may result in certain Industry Members paying a significant allocation of Total CAT Costs. In this way, the proposed Maximum Industry Member CAT Fee would address the potential for outsized fees that were previously addressed via the tiering and comparability provisions set forth in the Original Funding Model and the Prior Fee Proposal. These provisions sought to impose similar levels of fees on comparable CAT Reporters.[61] Specifically, the Operating Committee proposes to limit the Industry Member CAT fee to 8% of the total message traffic as 8% would limit Industry Members to paying a fee comparable to the highest fee for Participant complexes. For example, using the CAT Data from the fourth quarter of 2020, the top three Industry Members would be subject to the Maximum Industry Member CAT Fee, as their message traffic exceeds 8% of the total Industry Member message traffic. These three Industry Members would be subject to annual CAT fees in the range of $5 to 6 million. Similarly, the Participant complexes with the highest CAT fees would pay an annual CAT fee in a similar range. Without the imposition of the Maximum Industry Member CAT Fee, the Industry Member with the highest CAT fee would pay almost $10 million for its annual CAT fee.

The Operating Committee proposes to revise Section 11.3(b) of the CAT NMS Plan to implement the proposed Maximum Industry Member CAT Fee. Specifically, the Operating Committee proposes to amend Section 11.3(b) of the CAT NMS Plan to state that

> any Industry Member shall pay a maximum fee established by the Operating Committee instead of the higher fee calculated based on such Industry Member's message traffic. If an Industry Member's fee is limited to such maximum fee, any excess amount which the Industry Member otherwise would have paid as a fee above such maximum fee will be re-allocated among all Industry Members, including any Industry Member that is subject to the maximum fee or subject to the base minimum fee, in accordance with their message traffic.

vi. No Fixed Fees

The Operating Committee proposes to eliminate references in the CAT NMS Plan to ''fixed fees'' used with regard to the CAT fees to be paid by Industry Members. The CAT fees to be paid by Industry Members may vary from time to time in accordance with their message traffic. Accordingly, the Operating Committee proposes to replace the reference to ''fixed fees'' for Industry Members in Section 11.3(b) with references to ''fees.''

4. Participant CAT Fee

Like Industry Members, Participants would also be required to pay a CAT fee. The total CAT fees to be paid by Participants as a group would be designed to cover the Participant Allocation. Each Participant would pay a minimum CAT fee of 0.75% of the Participant Allocation, referred to as the ''Minimum Participant Fee.'' The Participant Allocation minus the total Minimum Participant Fees required to be paid by each Participant (the ''Adjusted Participant Allocation'') would be divided between Equities Participants and Options Participants. Equities Participants as a group would pay 60% of the Adjusted Participant Allocation (''Equities Participant Allocation'') and Options Participants as a group would pay 40% of the Adjusted Participant Allocation (the ''Options Participant Allocation''). The Equities Participant Allocation would be divided among Equities Participants based on market share of NMS Stocks, although FINRA would not pay more than the Maximum Equities Participant Fee (plus any additional re-allocation of costs above the fee cap). The Options Participant Allocation would be divided among Options Participants based on market share in Listed Options.

The Operating Committee notes that allocating the Participant Allocation among the Participants is different from allocating the Industry Member Allocation among Industry Members. Unlike Industry Members, the Participants are each parties to the CAT NMS Plan and, therefore, have been engaged in negotiations among themselves regarding the allocation of CAT costs among Participants and the amendment of the CAT NMS Plan to address the CAT funding model. Accordingly, the Participants believe that the proposed method for allocating

[57] *See, e.g.,* CAT NMS Plan Approval Order at 84698.

[58] Section 11.2(e) of the CAT NMS Plan.

[59] Section 11.2(d) of the CAT NMS Plan.

[60] As noted below, the Operating Committee also proposes to delete the term ''fixed'' from this provision.

[61] The proposed deletion of the tiering and comparability provisions are discussed above.

the costs among Participants should be afforded some deference, provided the proposed fees satisfy the requirements of the Exchange Act and the CAT NMS Plan, which are discussed in detail in Section A.8 below.

a. Minimum Participant Fee

The Operating Committee proposes to require each Participant to pay at least a minimum CAT fee, regardless of its market share. Specifically, the Operating Committee proposes to require each Participant to pay a minimum CAT fee of 0.75% of the Participant Allocation, referred to as the Minimum Participant Fee. The Minimum Participant Fee will be paid by each registered national securities exchange that is a Participant and each registered national securities association that is a Participant, not by each market operated by the Participants. This Minimum Participant Fee is intended to ensure that all Participants provide a meaningful contribution to the funding of the CAT, as the CAT is intended to assist all market participants by creating enhanced oversight of the markets.[62] All Participants, regardless of their market share, are required to regulate their markets and members, and they may do so using the CAT. Therefore, all Participants receive benefits from the CAT and should pay a meaningful portion of the CAT costs. However, the size of the minimum fee is not so large as to be overly burdensome to Participants with a smaller market share.

The Operating Committee proposes to revise Section 11.3(a) of the CAT NMS Plan to reflect the imposition of the Minimum Participant Fee. Specifically, the Operating Committee proposes to amend Section 11.3(a) of the CAT NMS Plan to state that ''[t]he Operating Committee will establish a minimum fee to be payable by each Participant'' in addition to fees based on market share.

In addition, as discussed below, the Minimum Participant Fee would be included in the fee schedule for the Consolidated Audit Trail Funding Fees set forth in Appendix B of the CAT NMS Plan. Proposed paragraph (a)(1)(A) of Appendix B of the CAT NMS Plan would state that each Participant would pay a CAT fee that includes the Minimum Participant Fee. Paragraph (b)(2) of Appendix B would state that ''[t]he Minimum Participant Fee is 0.75% of the Participant Allocation.'' Paragraph (b)(2) of Appendix B would further clarify how the Minimum Participant Fee would be imposed by stating that ''[f]or avoidance of doubt, the Minimum Participant Fee will be paid by each registered national securities exchange that is a Participant and each registered national securities association that is a Participant.''

b. Allocation of Adjusted Participant Allocation Among Participants

The Participant Allocation minus the total Minimum Participant Fees required to be paid by each Participant, referred to as the ''Adjusted Participant Allocation,'' will be divided among the Participants as described below. The Operating Committee proposes to include this definition of ''Adjusted Participant Allocation'' in proposed paragraph (b)(3) of the Appendix B. Specifically, proposed paragraph (b)(3) of Appendix B would state that ''[t]he Adjusted Participant Allocation is the Participant Allocation minus the sum of all Minimum Participant Fees required to be paid by each Participant.''

i. Use of Market Share

Under the Proposed Funding Model, the Adjusted Participant Allocation would be allocated among Participants based on market share. The use of market share for this purpose is in accordance with the CAT NMS Plan as adopted by the SEC. Specifically, the CAT NMS Plan contemplates Participants paying a CAT fee based upon market share.[63] The Operating Committee analyzed various alternative methods for allocating costs among Participants other than market share and continued to determine that using market share would equitably allocate CAT fees among Participants. In contrast to Industry Members, which determine the degree to which they produce message traffic that constitutes Reportable Events, the Reportable Events of Participants are largely derivative of quotations and orders received from Industry Members that they are required to display. The business models for Participants, however, generally are focused on executions and/or trade reporting in their marketplaces. As a result, the Operating Committee believes that it is more equitable to charge Participants based on their market share rather than their message traffic. Moreover, relying on market share would provide the Participants with a straightforward calculation using readily available market data. Such a basic calculation would be consistent with the CAT funding principle, which requires the model to ''provide for ease of billing and other administrative functions.'' [64] Finally, the Participants have been voluntarily allocating CAT costs based on market share for the past eight years and are comfortable that allocating CAT cost based on market share is an appropriate way to allocate CAT costs, as it is consistent with the CAT NMS Plan.

The Operating Committee proposes to amend Section 11.3(a) of the CAT NMS Plan to clarify that the Participants will pay a fee based on market share. Specifically, the Operating Committee proposes to add the phrase ''based on market share'' to Section 11.3(a) of the CAT NMS Plan. With this change and the changes discussed above, Section 11.3(a) of the CAT NMS Plan would state that ''[t]he Operating Committee will establish a minimum fee to be payable by each Participant in addition to fees based on market share to be payable by Participants as provided in this Section 11.3(a).''

ii. No Tiered Fees for Participants

The Operating Committee proposes to eliminate the use of tiered fees for Participants in the Proposed Funding Model. The Operating Committee proposes to allocate the Adjusted Participant Allocation among Participants based on the Participant's market share without relying on tiered fees for the reasons discussed above with regard to Industry Members. As discussed above, the Operating Committee proposes to amend Sections 11.1(d), 11.2(c), 11.3(a) and 11.3(b) to eliminate the concept of tiered fees from the CAT NMS Plan.

iii. 60%–40% Allocation Between Equities Participants and Options Participants

The Operating Committee proposes to divide the Adjusted Participant Allocation between Equities Participants and Options Participants because it is difficult to compare market share between asset classes (*i.e.,* equity shares versus options contracts). This bifurcated approach to allocating costs among Equities Participants and Options Participants is consistent with the CAT NMS Plan, which specifically contemplates allocating Participant CAT fees based on options and equity activity.[65] Note that, unlike the Original Funding Model, the Operating Committee has determined not to allocate any portion of the Adjusted Participant Allocation based on OTC Equity Securities market share.

[62] CAT NMS Plan Approval Order at 84698.

[63] *See* Sections 11.2(c), 11.3(a)(i) and 11.3(a)(ii) of the CAT NMS Plan.

[64] Section 11.2(d) of the CAT NMS Plan.

[65] *See* Section 11.3(a) of the CAT NMS Plan.

Under the Proposed Funding Model, the Equities Participant Allocation would be 60% of the Adjusted Participant Allocation and, correspondingly, the Options Participants Allocation would be 40% of the Adjusted Participant Allocation. If a Participant has both options and equities market share, then such Participant will be treated as both an Equities Participant and an Options Participant.[66]

The Operating Committee believes that the proposed 60%–40% allocation between Equities Participants and Options Participants is an appropriate allocation among Participants. The allocation among the Equities and Options Participants has been the subject of negotiations among the Participants. In addition, in the Prior Fee Proposal, the Operating Committee proposed a 67%/33% allocation between Equity Execution Venues and Options Execution Venues based on the comparability concept.[67]

As discussed below, the 60%–40% allocation of the Adjusted Participant Allocation between Equities Participants and Options Participants would be included in the fee schedule for the Consolidated Audit Trail Funding Fees in the CAT NMS Plan. Proposed paragraph (b)(4) of Appendix B of the CAT NMS Plan would state that ''[t]he Equities Participant Allocation is 60% of the Adjusted Participant Allocation,'' and proposed paragraph (b)(5) of Appendix B of the CAT NMS Plan would state that ''[t]he Options Participant Allocation is 40% of the Adjusted Participant Allocation.''

iv. Equities Participant Allocation

The Equities Participant Allocation would be divided among Equities Participants based on market share of NMS Stocks in accordance with Section 11.3(a)(i) of the CAT NMS Plan. An Equities Participant's market share in NMS Stocks would be determined by calculating each Equities Participant's proportion of the total volume of NMS Stock shares reported by all Equities Participants during the relevant time period. Accordingly, in addition to the Minimum Participant Fee, each Equities Participant will pay a CAT fee that is calculated by multiplying (x) each Equities Participant's percentage of the total volume of NMS Stock shares during the relevant time period by (y) the Equities Participant Allocation, subject to the Maximum Equities Participant Fee.

As discussed below, the Operating Committee proposes to include the allocation of the Equities Participant Allocation in the fee schedule for the Consolidated Audit Trail Funding Fees in the CAT NMS Plan. Proposed paragraph (a)(1)(B) of Appendix B of the CAT NMS Plan would state that Equities Participants would pay a CAT fee calculated by adding the sum of the Minimum Participant Fee and the lesser of ''the product of multiplying the Equities Participant's percentage of total market share of NMS Stocks for all Equities Participants against the Equities Participant Allocation; or (ii) the Maximum Equities Participant Fee, if applicable.''

(a) Treatment of OTC Equity Securities

Under the Original Funding Model, market share for a national securities association was calculated based on the share volume of trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange in NMS Stocks or OTC Equity Securities. Under the Proposed Funding Model, the Operating Committee proposes to calculate market share for national securities associations solely based on share volume of trades reported in NMS Stocks. Correspondingly. [sic] the calculation of total market share and market share for each Equities Participant would not include reported share volume in OTC Equity Securities.

The Operating Committee proposes to calculate market share for national securities associations without reference to trades reported in OTC Equity Securities. Many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—per share and low-priced shares tend to trade in larger quantities. Accordingly, a large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks. Because the proposed CAT fees for Equities Participants are based on market share calculated by share volume, FINRA would likely be subject to higher fees if OTC Equity Securities were included in the calculation of market share.

The Operating Committee proposes to exclude OTC Equity Securities share volume in the calculation of market share, rather than to use a discounting approach proposed in the Prior Fee Proposal. In the Prior Fee Proposal, the Operating Committee proposed to discount the share volume of trades reported in OTC Equity Securities when calculating the market share for national securities associations and Execution Venue ATSs.[68] At this time, the Operating Committee has determined that excluding OTC Equity Share volume entirely would be a more simple and straightforward approach from an administrative perspective. The Operating Committee believes that this approach to OTC Equity Share volume addresses comments about prior fee proposals regarding the different trading characteristics of NMS Stocks and OTC Equity Securities.[69]

To implement this proposed change, the Operating Committee proposes to delete the references to OTC Equity Securities from Section 11.3(a)(i) of the CAT NMS Plan. Specifically, the Operating Committee proposes to delete the phrase ''or OTC Equity Securities'' from Section 11.3(a)(i)(B) of the CAT NMS Plan, which states in relevant part ''in the case of a national securities association, has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange, in NMS Stocks or OTC Equity Securities.'' Similarly, the Operating Committee proposes to delete the phrase to ''or OTC Equity Securities'' in the statement in Section 11.3(a)(i) of the CAT NMS Plan that ''market share for a national securities association that has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange in NMS Stocks or OTC Equity Securities will be calculated based on share volume of trades reported.''

(b) Maximum Equities Participant Fee

The Operating Committee proposes to establish a maximum fee to be paid by a national securities association that is a Participant. Currently, FINRA is the only national securities association that is a Participant in the CAT NMS Plan. Under the Proposed Funding Model, FINRA would pay a CAT fee based on its proportionate market share in NMS Stocks, subject to a maximum fee. The maximum fee allocated to FINRA would be the greater of (x) 20% of the Equities Participant Allocation or (y) the highest CAT fee required to be paid by any other Equities Participant plus 5% of such highest CAT fee (the ''Maximum Equities Participant Fee''). If FINRA's fee is limited to the Maximum Equities Participant Fee, any excess amount which FINRA otherwise would have

[66] The Operating Committee proposes to clarify this point in the CAT NMS Plan by including the following statement in proposed paragraph (a)(1) of Appendix B of the CAT NMS Plan: ''For the avoidance of doubt, Participants with both options and equities market share shall be considered both Equities Participants and Options Participants.''

[67] *See* Prior Fee Proposal at 1408.

[68] Prior Fee Proposal at 1406.

[69] Suspension Order at 31664–5.

paid as a fee above such Maximum Equities Participant Fee would be re-allocated among all Equities Participants including FINRA in accordance with their market share.

The imposition of the Maximum Equities Participant Fee serves as a method to institute a cap on fees in order to fairly allocate costs to FINRA given that a market share approach potentially may result in FINRA having a significant allocation given the large volume of NMS Stock activity that is subject to trading reporting on FINRA facilities, and potentially may not accurately reflect a fair allocation of costs to FINRA. In this way, the proposed Maximum Equities Participant Fee would address the potential for outsized fees that were previously addressed via the tiering and comparability provisions set forth in the Original Funding Model and the Prior Fee Proposal. These provisions sought to impose similar levels of fees on comparable CAT Reporters.[70] Finally, along with the other components of the calculation of the Participant CAT fee, the Operating Committee believes the use of market share is a fair and reasonable basis for assessing regulatory usage, expense and burden among the Participants. FINRA is expected to be one of the largest regulatory users of the CAT and it would be fair and reasonable for the FINRA to pay a proportionate percentage of the CAT fees commensurate with FINRA's comparable market share, which is subject to the Maximum Equities Participant Fee and also not subject to any fee for OTC Equity Security market share.

The Operating Committee proposes to revise Section 11.3(a)(i) of the CAT NMS Plan to implement the proposed Maximum Equities Participant Fee. Specifically, the Operating Committee proposes to amend Section 11.3(a)(i) of the CAT NMS Plan to state that

> any Participant that is a national securities association shall pay a maximum fee established by the Operating Committee instead of the higher fee calculated based on such Participant's market share. If a Participant's fee is limited to such maximum fee, any excess amount which the Participant otherwise would have paid as a fee above such maximum fee will be re-allocated among all Equities Participants (including any Equities Participant subject to the maximum fee) in accordance with their market share.

In addition, as discussed below, the Operating Committee proposes to include the Maximum Equities Participant Fee in the fee schedule for the Consolidated Audit Trail Funding Fees in the CAT NMS Plan. Proposed paragraph (a)(1)(B)(ii) of Appendix B of the CAT NMS Plan would describe the application of the Maximum Equities Participant Fee. Specifically, proposed paragraph (a)(1)(B) would state that Equities Participants would pay a CAT fee calculated by adding the sum of the Minimum Participant Fee and the following:

> (B) For Equities Participants, the lesser of:
> (i) the product of multiplying the Equities Participant's percentage of total market share of NMS Stocks for all Equities Participants against the Equities Participant Allocation; or
> (ii) the Maximum Equities Participant Fee, if applicable; and
> If any Participant's fee is limited to the Maximum Equities Participant Fee, any excess amount which such Participant otherwise would have paid as a fee above such Maximum Equities Participant Fee will be re-allocated among all Equities Participants (including any Equities Participant subject to the Maximum Equities Participant Fee) in accordance with their market share.

Furthermore, proposed paragraph (b)(6) of Appendix B of the CAT NMS Plan would state:

> The Maximum Equities Participant Fee is the greater of (x) 20% of the Equities Participant Allocation or (y) the highest CAT fee required to be paid by any other Equities Participant plus 5% of such highest CAT fee. The Maximum Equities Participant Fee only applies to a Participant that is a national securities association.

v. Options Participant Allocation

The Options Participant Allocation would be divided among Options Participants based on market share in Listed Options in accordance with Section 11.3(a)(ii) of the CAT NMS Plan. An Options Participant's market share in Listed Options would be determined by calculating the total volume of Listed Options contracts reported by all Options Participants during the relevant time period. Accordingly, each Options Participant would pay a CAT fee that is calculated by multiplying (x) each Options Participant's percentage of the total market share in Listed Options during the relevant time period by (y) the Options Participant Allocation.

As discussed below, the Operating Committee proposes to include the allocation of the Options Participant Allocation in the fee schedule for the Consolidated Audit Trail Funding Fees in the CAT NMS Plan. Proposed paragraph (a)(1)(C) of Appendix B of the CAT NMS Plan would state that Options Participants would pay a CAT fee calculated by adding the sum of the Minimum Participant Fee and ''the product of multiplying the Participant's percentage of total market share of Listed Options contracts for all Options Participants against the Options Participant Allocation.''

vi. No Fixed Fees

The Operating Committee proposes to eliminate references to ''fixed fees'' used with regard to the CAT fees to be paid by Participants. As discussed above with regard to Industry Member CAT fees, the CAT fees to be paid by Participants may vary from time to time in accordance with their market share. Accordingly, the Operating Committee proposes to replace the references to ''fixed fees'' for Participants in Sections 11.3(a), 11.3(a)(i) and 11.3(a)(ii) with references to ''fees.''

5. Proposed CAT Fees

a. Participant CAT Fee

To recover the costs of the CAT going forward, the Operating Committee proposes to charge Participants a quarterly CAT fee calculated based on the allocation of Total CAT Costs pursuant to the Proposed Funding Model. The Operating Committee will use the costs set forth in the annual operating budget as the Total CAT Costs in the calculation of the Participant CAT Fee.[71] Specifically, the Total CAT Costs budgeted for the upcoming year will be the costs set forth in the annual operating budget for the Company required pursuant to Section 11.1(a) of the CAT NMS Plan. Section 11.1(a) states that ''[o]n an annual basis the Operating Committee shall approve an operating budget for the Company. The budget shall include the projected costs of the Company, including the costs of developing and operating the CAT for the upcoming year, and the sources of all revenue to cover such costs, as well as the funding of any reserve that the Operating Committee reasonably deems appropriate for prudent operation of the Company.'' In addition, to address potential changes in the budget during the year, the total budgeted costs for the CAT for the relevant year may be adjusted on a quarterly basis as the Operating Committee reasonably deems appropriate for the prudent operation of the Company. To the extent that the Operating Committee adjusts the total

[70] The proposed deletion of the tiering and comparability provisions are discussed above.

[71] Note that all Participant CAT fees would be paid prospectively based on budgeted Total CAT Costs. This contrasts with the Historical CAT Assessment, the Period 3 CAT Fee and the Period 4 CAT Fee for the Industry Members which would be paid based on actual past costs incurred due to the application of the Financial Accountability Milestones. The Quarterly CAT Fee for Industry Members also would be paid prospectively based on budgeted Total CAT Costs.

budgeted costs for the CAT for the relevant year during its quarterly budget review, the adjusted total budgeted costs for the CAT will be used in calculating the remaining quarterly CAT fees for that year. Using budgeted CAT costs, rather than CAT costs already incurred, allows the Consolidated Audit Trail, LLC to collect fees prior to when bills become payable.

The Total CAT Costs budgeted for the year would be comprised of all fees, costs and expenses estimated to be incurred by or for the Company in connection with the development, implementation and operation of the CAT during this period. These CAT costs would include, but not be limited to, Plan Processor costs, insurance costs, third-party support costs and an operational reserve. The Plan Processor costs would consist of the Plan Processor's ongoing costs, including development costs. This amount would be based upon the fees due to the Plan Processor pursuant to the Company's agreement with the Plan Processor. Insurance costs would include cyber insurance and director liability insurance. The third-party support costs would include legal fees, consulting fees, vendor fees and audit fees. In addition, the Operating Committee aims to accumulate the necessary funds to establish an operating reserve for the Company through the CAT fees charged to CAT Reporters. As set forth in Section 11.1(a) of the CAT NMS Plan, the Operating Committee may include in the budget ''funding of any reserve that the Operating Committee reasonably deems appropriate for prudent operation of the Company.'' [72] As required by Section 11.1(c) of the CAT NMS Plan, any surpluses collected will be treated as an operational reserve to offset future fees and will not be distributed to the Participants as profits.[73] Using these budgeted Total CAT Costs, the Operating Committee will calculate the quarterly CAT fee owed by each Participant in accordance with the Proposed Funding Model.

To implement the Participant CAT fees, the Exchange proposes to add a fee schedule, entitled ''Consolidated Audit Trail Funding Fees,'' to Exhibit [sic] B of the CAT NMS Plan. As discussed above, proposed paragraph (a) states the following:

Each Participant shall pay to Consolidated Audit Trail, LLC in the manner prescribed by the Consolidated Audit Trail, LLC a CAT fee calculated as follows:

(1) Commencing upon SEC approval of the CAT fee, each Participant shall pay a quarterly CAT fee based on market share from the prior quarter calculated by adding the sum of the following:

(A) For all Participants, the Minimum Participant Fee;

(B) For Equities Participants, the lesser of:

(i) the product of multiplying the Equities Participant's percentage of total market share of NMS Stocks for all Equities Participants against the Equities Participant Allocation; or

(ii) the Maximum Equities Participant Fee, if applicable; and

If any Participant's fee is limited to the Maximum Equities Participant Fee, any excess amount which such Participant otherwise would have paid as a fee above such Maximum Equities Participant Fee will be re-allocated among all Equities Participants (including any Equities Participant that is subject to the Maximum Equities Participant Fee) in accordance with their market share.

(C) For Options Participants, the product of multiplying the Participant's percentage of total market share of Listed Options contracts for all Options Participants against the Options Participant Allocation;

For the avoidance of doubt, Participants with both options and equities market share shall be considered both Equities Participants and Options Participants.

As described above, proposed paragraph (b) of Appendix B of the CAT NMS Plan would provide the variables necessary to calculate Participant CAT fees in accordance with paragraph (a). Specifically, paragraph (b) would state that ''[t]he CAT fees set forth in paragraph (a) will be calculated based on the following.'' Proposed paragraph (b)(1) of the fee schedule would state that ''[t]he Industry Member Allocation for each quarter shall be 75% of 1/4th of the Total CAT Costs for the relevant year. The Participant Allocation for each quarter shall be 25% of 1/4th of the Total CAT Costs for the relevant year.'' Proposed paragraph (b)(2) of the fee schedule would state that ''[t]he Minimum Participant Fee is 0.75% of the Participant Allocation. For avoidance of doubt, the Minimum Participant Fee will be paid by each registered national securities exchange that is a Participant and each registered national securities association that is a Participant.'' Proposed paragraph (b)(3) of the fee schedule would state that ''[t]he Adjusted Participant Allocation is the Participant Allocation minus the sum of all Minimum Participant Fees required to be paid by each Participant.'' Proposed paragraph (b)(4) of the fee schedule would state that ''[t]he Equities Participant Allocation is 60% of the Adjusted Participant Allocation.'' Proposed paragraph (b)(5) of the fee schedule would state that ''[t]he Options Participant Allocation is 40% of the Adjusted Participant Allocation.'' Proposed paragraph (b)(6) of the fee schedule would state that the ''[t]he Maximum Equities Participant Fee is the greater of (x) 20% of the Equities Participant Allocation or (y) the highest CAT fee required to be paid by any other Equities Participant plus 5% of such second highest CAT fee. The Maximum Equities Participant Fee only applies to a Participant that is a national securities association.''

Finally, proposed paragraph (b)(7) of the fee schedule would state that ''[t]he Total CAT Costs shall be the total annual budgeted costs for the CAT for the relevant year.'' Proposed paragraph (b)(7) of the fee schedule would further state that ''[t]he total budgeted costs for the CAT for the relevant year may be adjusted on a quarterly basis as the Operating Committee reasonably deems appropriate for the prudent operation of the Company. To the extent that the Operating Committee adjusts the total budgeted costs for the CAT for the relevant year during its quarterly budget review, the adjusted total budgeted costs for the CAT will be used in calculating the remaining quarterly CAT fees for that year.''

The following chart summarizes the imposition of the Quarterly CAT Fee for Participants each year commencing upon approval by the SEC and continuing each year thereafter.

Quarterly CAT fee	Quarterly participant allocation	CAT data used for market share calculation	Payment due
Quarterly CAT Fee #1	1/4th of 25% of the budgeted annual CAT costs for the relevant year.	CAT Data from first quarter of the relevant year.	2nd quarter of the relevant year.
Quarterly CAT Fee #2	1/4th of 25% of the budgeted annual CAT costs for the relevant year.	CAT Data from second quarter of the relevant year.	3rd quarter of the relevant year.
Quarterly CAT Fee #3	1/4th of 25% of the budgeted annual CAT costs for the relevant year.	CAT Data from third quarter of the relevant year.	4th quarter of the relevant year.

[72] Although the Operating Committee may determine at its discretion that a different level of reserves is appropriate in the future, the Operating Committee proposes to include in the budget an operational reserve comprised of three months of ongoing CAT costs, such as Plan Processor costs, third party support costs and insurance costs.

[73] CAT NMS Plan Approval Order at 84792.

Quarterly CAT fee	Quarterly participant allocation	CAT data used for market share calculation	Payment due
Quarterly CAT Fee #4	1/4th of 25% of the budgeted annual CAT costs for the relevant year.	CAT Data from fourth quarter of the relevant year.	1st quarter of year following the relevant year.

Note that, if the SEC approves the proposed CAT fees mid-year, the Operating Committee proposes to require Participants to commence payment of the Participant CAT Fee in the first quarter after the quarter in which the SEC approves the fee. Participants will be required to pay a quarterly fee for the remaining quarter(s) of the year based on CAT Data from the prior quarter, using the portion of the annual budget for those remaining quarter(s) of the year. For example, if the SEC approves the CAT fees in the third quarter of 2021, then the Participants would be required to pay their first quarterly CAT fee during the fourth quarter of 2021 based on the market share calculation using CAT Data from the third quarter of 2021 and one quarter of the budgeted annual CAT costs for 2021.

b. Industry Member CAT Fees

The Operating Committee has determined to charge Industry Members fees related to CAT costs in accordance with the Proposed Funding Model. To implement these CAT fees, each Participant would submit a fee filing pursuant to Section 19(b) of the Exchange Act to propose to add a section entitled ''Consolidated Audit Trail Funding Fees'' to its fee schedule, and to describe the following CAT fees in that section. Because the Participants have funded the CAT to date and CAT fees imposed on Industry Members are guided by the Financial Accountability Milestones, the Operating Committee proposes four categories of CAT fees: the Historical CAT Assessment (for pre-Period 1, Period 1 and Period 2), Period 3 CAT Fee, Period 4 CAT Fee, and the Quarterly CAT Fee.

i. Historical CAT Assessment (for Pre-Period 1, Period 1 and Period 2)

The Operating Committee determined to charge Industry Members a historical assessment (''Historical CAT Assessment'') to recover certain CAT costs incurred prior to January 1, 2021 (''Historical CAT Assessment Costs''). Specifically, the Historical CAT Assessment is intended to collect from Industry Members 75% of certain costs incurred through June 22, 2020, the effective date for the Financial Accountability Milestones,[74] certain costs from Period 1 of the Financial Accountability Milestones (which covered the period from June 22, 2020–July 31, 2020) and certain costs from Period 2 of the Financial Accountability Milestones (which covered the period from August 1, 2020–December 31, 2020). The Total CAT Costs for these periods, excluding Excluded Costs (as defined below) and certain costs related to the conclusion of the relationship with Thesys CAT, LLC is $193,273,342. The Historical CAT Assessment is designed to recover 75% of these CAT costs. Accordingly, the Historical CAT Assessment Costs would be $144,955,006.

The Participants have already funded all CAT costs incurred prior to January 1, 2021. Accordingly, only Industry Members would be required to pay the Historical CAT Assessment. To implement the Historical CAT Assessment, each Participant would submit a fee filing pursuant to Section 19(b) of the Exchange Act describing the Historical CAT Assessment.

The following describes the Historical CAT Assessment Costs for the period prior to June 22, 2020 and the period from June 22, 2020 through December 31, 2020 in more detail. The Total CAT Costs incurred prior to June 22, 2020 (other than Excluded Costs and certain costs related to the conclusion of the relationship with Thesys CAT, LLC) is $153,268,597. The Historical CAT Assessment to be paid by Industry Members would be designed to recover 75% of these total costs, which is $114,951,448. These cost figures are further described below.

- In accordance with Section 11.1(c) of the CAT NMS Plan, the Historical CAT Assessment Costs would include ''fees, costs and expenses (including legal and consulting fees and expenses) incurred by the Participants on behalf of the Company prior to the Effective Date in connection with the creation and implementation of the CAT.'' Specifically, the Historical CAT Assessment Costs include costs incurred from 2012 through November 20, 2016 related to the development of the National Market System Plan Governing the Process of Selecting a Plan Processor and Developing a Plan for the Consolidated Audit Trail[75] (''Selection Plan'') and the CAT NMS Plan as well as the Plan Processor selection process pursuant to the Selection Plan. The Total CAT Costs incurred during this period are $13,842,881. The Historical CAT Assessment would be designed to recover 75% of these total costs, which is $10,382,161.

- The Historical CAT Assessment Costs would include costs incurred after the formation of the CAT NMS Plan and prior to the selection of Thesys CAT, LLC as the Plan Processor for the CAT, which covers the period from November 21, 2016 through April 5, 2017. The total cost for this period is $2,933,869. The Historical CAT Assessment would be designed to recover 75% of these total costs, which is $2,200,402.

- The Historical CAT Assessment Costs would include costs incurred during the period in which Thesys CAT, LLC was the Plan Processor for the CAT, which was April 6, 2017 through March 28, 2019. The total costs for this period are $106,256,258. The Participants, however, have determined to exclude from the Historical CAT Assessment Costs all costs incurred from November 15, 2017 through November 15, 2018 (''Excluded Costs'') due to the delay in the reporting to the CAT. The Excluded Costs are $48,874,937. Accordingly, the total costs for this period are $57,381,321. The Historical CAT Assessment would be designed to recover 75% of these total costs, which is $43,035,991.

- The Historical CAT Assessment Costs would include the Total CAT Costs from the date of FINRA CAT's selection as the Plan Processor on March 29, 2019 through June 21, 2020. The total costs for this period are $79,110,525.[76] The Historical CAT Assessment would be designed to recover 75% of these total costs, which is $59,332,894.

The Historical CAT Assessment Costs also would include the certain CAT costs incurred from June 22, 2020 through July 31, 2020, which is Period 1 of the Financial Accountability Milestones, as well as the Total CAT Costs incurred from August 1, 2020 through December 31, 2020, which is Period 2 of the Financial Accountability Milestones, subject to certain

[74] *See generally* Financial Accountability Milestone Release.

[75] *See, e.g.,* Securities Exchange Act Rel. No. 71596, 79 FR 11152 (Feb. 27, 2014).

[76] These costs do not include costs incurred in relation to the conclusion of the relationship with Thesys CAT, LLC.

exceptions.[77] The total costs incurred from June 22, 2020 through December 31, 2020 are $40,004,745. The Historical CAT Assessment to be paid by the Industry Members would be designed to recover 75% of these total costs, which is $30,003,559.

Using the Historical CAT Assessment Costs, the Operating Committee would calculate the Historical CAT Assessment owed by each Industry Member in accordance with the Proposed Funding Model. The Operating Committee proposes to seek to recover the Historical CAT Assessment Costs over a period of four calendar quarters, commencing upon the SEC's approval of the Historical CAT Assessment. Each quarter, each Industry Member would pay the greater of the minimum fee of $125 or the Industry Member's fee calculated based on message traffic (subject to the market making discounts and the maximum fee). The message traffic fee would be calculated by multiplying the percentage of the Industry Member's message traffic of the total Industry Member message traffic (subject to applicable discounts for Options and Equity Market Maker message traffic and the Maximum Industry Member CAT Fee) by $36,238,752, which is 1/4th of the Historical CAT Assessment Costs. Each Industry Member's message traffic would be calculated using CAT Data from the prior quarter. The Operating Committee proposes to commence charging the Historical CAT Assessment in the first quarter after SEC approval of the Historical CAT Assessment, based on CAT Data from the quarter in which the SEC approved the CAT fees. The following chart summarizes the imposition of the Historical CAT Assessment:

Quarterly CAT fee	Quarterly industry member allocation	CAT data used for message traffic calculation	Payment due
Quarterly CAT Fee #1	$36,238,752	Quarter of SEC approval of Historical CAT Assessment.	1st quarter after SEC approval of Industry Member CAT Fees set forth in this Proposed Plan Amendment.
Quarterly CAT Fee #2	36,238,752	1st quarter after SEC approval of Historical CAT Assessment.	2nd quarter after SEC approval of Industry Member CAT Fees set forth in this Proposed Plan Amendment.
Quarterly CAT Fee #3	36,238,752	2nd quarter after SEC approval of Historical CAT Assessment.	3rd quarter after SEC approval of Industry Member CAT Fees set forth in this Proposed Plan Amendment.
Quarterly CAT Fee #4	36,238,752	3rd quarter after SEC approval of Historical CAT Assessment.	4th quarter after SEC approval of Industry Member CAT Fees set forth in this Proposed Plan Amendment.

In accordance with Section 11.6(b) of the CAT NMS Plan, the Operating Committee indicates that the proposed Historical CAT Assessment seeks to recover costs that are related to Post-Amendment Expenses incurred during Period 1. Period 1 began on June 22, 2020, the effective date of Section 11.6 of the CAT NMS Plan, and concluded on July 31, 2020, the date of Initial Industry Member Core Equity and Options Reporting. As indicated by the Participants' Quarterly Progress Report,[78] Initial Industry Member Core Equity and Option Reporting was completed on schedule by July 31, 2020. As discussed above, the Historical CAT Assessment Costs to be recovered via the Historical CAT Assessment would include fees, costs and expenses incurred by or for the Company in connection with the development, implementation and operation of the CAT during the period from June 22, 2020 through July 31, 2020.

The Operating Committee also indicates that the proposed Historical CAT Assessment seeks to recover costs that are related to Post-Amendment Expenses incurred during Period 2. Period 2 began on August 1, 2020, and concluded on December 31, 2020, the date of the Full Implementation of Core Equity Reporting. As indicated by the Participants' Quarterly Progress Report,[79] Full Implementation of Core Equity Reporting was completed on schedule by December 31, 2020. As discussed above, the Historical CAT Assessment Costs to be recovered via the Historical CAT Assessment would include fees, costs and expenses incurred by or for the Company in connection with the development, implementation and operation of the CAT during the period from August 1, 2020 through December 31, 2020.

ii. Period 3 CAT Fee

The Operating Committee also determined to charge Industry Members a quarterly fee to recover the Total CAT Costs incurred from January 1, 2021 through December 31, 2021, referred to as the Period 3 CAT Fee. The Total CAT Costs incurred from January 1, 2021 through December 31, 2021 (''Period 3 CAT Costs'') will be calculated at the completion of 2021. Specifically, the Period 3 CAT Costs will be the total actual costs incurred for the CAT for 2021 as set forth in the 2021 financial statements for the Company. Using the Period 3 CAT Costs, the Operating Committee will calculate the Period 3 CAT Fee owed by each Industry Member in accordance with the Proposed Funding Model. The Operating Committee proposes to seek to recover Period 3 CAT Costs over a period of four calendar quarters, commencing in 2022.[80] Each quarter, each Industry Member will pay the greater of the minimum fee of $125 or the Industry Member's fee calculated based on message traffic. The message traffic fee would be calculated by multiplying the percentage of the Industry Member's message traffic of the total Industry Member message traffic (subject to applicable discounts for Options Market Maker message traffic and Equity Market Maker message traffic, and the Maximum Industry Member CAT Fee) by 1/4th of 75% of the Period 3 CAT Costs. Each Industry Member's message traffic would be calculated using CAT Data from the prior quarter. The Operating Committee proposes to commence charging the Period 3 CAT Fee in the second quarter of 2022, based on CAT Data from the first quarter of 2022. The following chart summarizes the imposition of the Period 3 CAT Fee:

[77] These costs do not include costs incurred in relation to the conclusion of the relationship with Thesys CAT, LLC.

[78] Q3 2020 Quarterly Progress Report (Oct. 30, 2020) (available at *www.catnmsplan.com*).

[79] Q4 2020 Quarterly Progress Report (Jan. 29, 2021) (available at *www.catnmsplan.com*).

[80] Because the Period 3 CAT Fee is subject to the requirements of the Financial Accountability Milestones, the Period 3 CAT Fee will be imposed at the end of this time period. In contrast, because the Participant CAT fee for this time period is not subject to the requirements of the Financial Accountability Milestones, the Participant CAT fee for this period will be imposed prospectively.

Quarterly CAT fee	Quarterly industry member allocation	CAT data used for message traffic calculation	Payment due
Quarterly CAT Fee #1	1/4th of 75% of the Period 3 CAT Costs[81].	CAT Data from first quarter of 2022	2nd quarter of 2022.
Quarterly CAT Fee #2	1/4th of 75% of the Period 3 CAT Costs	CAT Data from second quarter of 2022	3rd quarter of 2022.
Quarterly CAT Fee #3	1/4th of 75% of the Period 3 CAT Costs	CAT Data from third quarter of 2022	4th quarter of 2022.
Quarterly CAT Fee #4	1/4th of 75% of the Period 3 CAT Costs	CAT Data from fourth quarter of 2022	1st quarter of 2023.

To implement the Period 3 CAT Fee, each Participant would submit a fee filing pursuant to Section 19(b) of the Exchange Act describing the Period 3 CAT Fee. The Operating Committee will announce via a CAT alert after the end of 2021 the Total CAT Costs for 2021 to be used in calculating the quarterly Period 3 CAT Fees.[82] Such Total CAT Costs will be set forth in the year-end financial statements of the Consolidated Audit Trail, LLC. Such financial statements are required to be prepared in accordance Section 9.2 of the CAT NMS Plan, including requirements related to compliance with GAAP, auditing by an independent public accounting firm and making the statements publicly available.

The Operating Committee indicates that the proposed Period 3 CAT Fee seeks to recover costs that will be related to Post-Amendment Expenses incurred during Period 3. Period 3 began on January 1, 2021 and is expected to conclude on December 31, 2021, the date of Full Availability and Regulatory Utilization of Transactional Database Functionality. As discussed above, the Period 3 CAT Costs to be recovered via the Period 3 CAT Fee would include fees, costs and expenses incurred by or for the Company in connection with the development, implementation and operation of the CAT during the period from January 1, 2020 through December 31, 2021. The Participants' collection of the full amount of the Period 3 CAT Fee will depend upon the achievement of Full Availability and Regulatory Utilization of Transaction Database Functionality by December 31, 2021; if not, the amount of the Period 3 CAT Fee that may be collected from the Industry Members will depend upon the fee limitations set forth in Section 11.6 of the CAT NMS Plan.

iii. Period 4 CAT Fee

The Operating Committee also determined to charge Industry Members a quarterly fee to recover the Total CAT Costs incurred from January 1, 2022 through December 31, 2022, referred to as the Period 4 CAT Fee. The Total CAT Costs incurred from January 1, 2022 through December 31, 2022 (''Period 4 CAT Costs'') will be calculated at the completion of 2022. Specifically, the Period 4 CAT Costs will be the total actual costs incurred for the CAT for 2022 as set forth in the 2022 financial statements for the Company. Using the Period 4 CAT Costs, the Operating Committee will calculate the Period 4 CAT Fee owed by each Industry Member in accordance with the Proposed Funding Model. The Operating Committee proposes to seek to recover Period 4 CAT Costs over a period of four calendar quarters, commencing in 2023.[83] Each quarter, each Industry Member will pay the greater of the minimum fee of $125 or the Industry Member's fee calculated based on message traffic. The message traffic fee would be calculated by multiplying the percentage of the Industry Member's message traffic of the total Industry Member message traffic (subject to applicable discounts for Options Market Maker message traffic and Equity Market Maker message traffic, and the Maximum Industry Member CAT Fee) by 1/4th of 75% of the Period 4 CAT Costs. Each Industry Member's message traffic would be calculated using CAT Data from the prior quarter. The Operating Committee proposes to commence charging the Period 4 CAT fee in the second quarter of 2023, based on data from the first quarter of 2023. The following chart summarizes the imposition of the Period 4 CAT Fee:

Quarterly CAT fee	Quarterly industry member allocation	CAT data used for message traffic calculation	Payment due
Quarterly CAT Fee #1	1/4th of 75% of the Period 4 CAT Costs[84].	CAT Data from first quarter of 2023	2nd quarter of 2023.
Quarterly CAT Fee #2	1/4th of 75% of the Period 4 CAT Costs	CAT Data from second quarter of 2023	3rd quarter of 2023.
Quarterly CAT Fee #3	1/4th of 75% of the Period 4 CAT Costs	CAT Data from third quarter of 2023	4th quarter of 2023.
Quarterly CAT Fee #4	1/4th of 75% of the Period 4 CAT Costs	CAT Data from fourth quarter of 2023	1st quarter of 2024.

To implement the Period 4 CAT Fee, each Participant would submit a fee filing pursuant to Section 19(b) of the Exchange Act describing the method for calculating the Period 4 CAT Fee. The Operating Committee will announce via a CAT alert after the end of 2022 the Total CAT Costs for 2022 to be used in calculating the quarterly Period 4 CAT Fees.[85] Such Total CAT Costs will be set forth in the year-end financial statements of the Consolidated Audit Trail, LLC. As noted above, such financial statements are required to be prepared in accordance with the requirements set forth in Section 9.2 of the CAT NMS Plan.

The Operating Committee indicates that the proposed Period 4 CAT Fee seeks to recover costs that will be related to Post-Amendment Expenses incurred during Period 4. Period 4 is expected to begin on January 1, 2022

[81] The Period 3 CAT Costs will be the total actual costs incurred for the CAT for 2021 as set forth in the 2021 financial statements for the Company.

[82] The Participants intend to file a fee filing under Section 19(b) of the Exchange Act describing the calculation method for the Period 3 CAT Fee, and then announce via CAT alert the Total CAT Costs to be used in calculating the CAT fees via the method described in the fee filing. The Participants do not intend to file a separate fee filing setting forth the Total CAT Costs relevant for the Period 3 CAT Fee.

[83] Because the Period 4 CAT Fee is subject to the requirements of the Financial Accountability Milestones, the Period 4 CAT Fee will be imposed at the end of this time period. In contrast, because the Participant CAT Fee for this time period is not subject to the requirements of the Financial Accountability Milestones, the Participant CAT Fee for this period will be imposed prospectively.

[84] The Period 4 CAT Costs will be the total actual costs incurred for the CAT for 2022 as set forth in the 2022 financial statements for the Company.

[85] The Participants intend to file one fee filing under Section 19(b) of the Exchange describing the calculation method for the Period 4 CAT Fee, and announce via CAT alert the Total CAT Costs to be used in calculating the CAT fees via the method described in the fee filing. The Participants do not intend to file a separate fee filing setting forth the Total CAT Costs relevant for the Period 4 CAT Fee.

and conclude on December 31, 2022, the date of Full Implementation of CAT NMS Plan Requirements. As discussed above, the Period 4 CAT Costs to be recovered via the Period 4 CAT Fee would include fees, costs and expenses incurred by or for the Company in connection with the development, implementation and operation of the CAT during the period from January 1, 2022 through December 31, 2022. The Participants' collection of the full amount of the Period 4 CAT Fee will depend upon the achievement of Full Implementation of CAT NMS Plan Requirements by December 31, 2022; if not, the amount of the Period 4 CAT Fee that may be collected from the Industry Members will depend upon the fee limitations set forth in Section 11.6 of the CAT NMS Plan.

iv. Quarterly CAT Fee—Beginning 2023

To recover the costs of the CAT going forward beginning in 2023, the Operating Committee determined to charge Industry Members an ongoing quarterly CAT fee calculated based on the allocation of Total CAT Costs pursuant to the Proposed Funding Model (''Quarterly CAT Fee''). The Operating Committee will use the costs set forth in the annual operating budget as the Total CAT Costs in the calculation of the Quarterly CAT Fee. Specifically, the Total CAT Costs budgeted for the upcoming year will be the costs set forth in the annual operating budget for the Company required pursuant to Section 11.1(a) of the CAT NMS Plan. As discussed above with regard to the Participant CAT fee, CAT costs would include, but not be limited to, Plan Processor costs, insurance costs, third-party support costs and an operational reserve.[86] As required by Section 11.1(c) of the CAT NMS Plan, any surpluses collected will be treated as an operational reserve to offset future fees and will not be distributed to the Participants as profits.[87] In addition, to address potential changes in the budget during the year, the total budgeted costs for the CAT for the relevant year may be adjusted on a quarterly basis as the Operating Committee reasonably deems appropriate for the prudent operation of the Company. To the extent that the Operating Committee adjusts the total budgeted costs for the CAT for the relevant year during its quarterly budget review, the adjusted total budgeted costs for the CAT will be used in calculating the remaining quarterly CAT fees for that year. Using these budgeted Total CAT Costs, the Operating Committee will calculate the Quarterly CAT Fee owed by each Industry Member in accordance with the Proposed Funding Model.

The Operating Committee proposes to seek to recover the budgeted Total CAT Costs over the course of the year. Each quarter, each Industry Member will pay the greater of the minimum fee of $125 or the Industry Member's fee calculated based on message traffic.[88] The message traffic fee would be calculated by multiplying the percentage of the Industry Member's message traffic of the total Industry Member message traffic (subject to applicable discounts for Options Market Maker message traffic and Equity Market Maker message traffic, and the Maximum Industry Member CAT Fee) by 1/4th of 75% of the budgeted Total CAT Costs for the year. Each Industry Member's message traffic would be calculated using data from the prior calendar quarter. The Operating Committee proposes to commence charging this CAT fee in the second quarter of 2023, based on CAT Data from the first quarter of 2023. The following chart summarizes the imposition of the Quarterly CAT Fee for Industry Members each year commencing in 2023 and continuing each year thereafter:

Quarterly CAT fee	Quarterly industry member allocation	CAT data used for message traffic calculation	Payment due
Quarterly CAT Fee #1	1/4th of 75% of the budgeted annual CAT costs for the relevant year.	CAT Data from first quarter of the relevant year.	2nd quarter of the relevant year.
Quarterly CAT Fee #2	1/4th of 75% of the budgeted annual CAT costs for the relevant year.	CAT Data from second quarter of the relevant year.	3rd quarter of the relevant year.
Quarterly CAT Fee #3	1/4th of 75% of the budgeted annual CAT costs for the relevant year.	CAT Data from third quarter of the relevant year.	4th quarter of the relevant year.
Quarterly CAT Fee #4	1/4th of 75% of the budgeted annual CAT costs for the relevant year.	CAT Data from fourth quarter of the relevant year.	1st quarter of year following the relevant year.

To implement the Quarterly CAT Fee, each Participant would submit a fee filing pursuant to Section 19(b) of the Exchange Act describing the method for calculating the Quarterly CAT Fee. The Operating Committee will announce at the beginning of the relevant year via a CAT alert the budgeted Total CAT Costs to be used in calculating the Quarterly CAT Fees for that year.[89] The budgeted Total CAT Costs will be the costs set forth in the annual operating budget for the Company required pursuant to Section 11.1(a) of the CAT NMS Plan. Section 11.1(a) states that ''[o]n an annual basis the Operating Committee shall approve an operating budget for the Company. The budget shall include the projected costs of the Company, including the costs of developing and operating the CAT for the upcoming year, and the sources of all revenues to cover such costs, as well as the funding of any reserve that the Operating Committee reasonably deems appropriate for prudent operation of the Company.'' To the extent that the Operating Committee adjusts the budgeted Total CAT Costs for the year during its quarterly budget review, the

[86] As set forth in Section 11.1(a) of the CAT NMS Plan, the Operating Committee may include in the budget ''the funding of any reserve that the Operating Committee reasonably deems appropriate for prudent operation of the Company.'' Although the Operating Committee may determine at its discretion that a different level of reserves is appropriate in the future, the Operating Committee proposes to include in the budget an operational reserve comprised of three months of ongoing CAT costs, such as Plan Processor costs, third party support costs and insurance costs.

[87] CAT NMS Plan Approval Order at 84792.

[88] To the extent that any two or more of the four categories of Industry Member CAT fees (*i.e.,* the Historical CAT Assessment, Period 3 CAT Fee, Period 4 CAT Fee and the Quarterly CAT Fee) are due during the same quarter, any Industry Member obligated to pay one or more categories of fees is required to pay each category of fee for that quarter. For example, if an Industry Member would be subject to the Minimum Industry Member CAT Fee for the Period 4 CAT Fee and the Minimum Industry Member CAT Fee for Quarterly CAT Fee during the same quarter, the Industry Member would be required to pay two minimum $125 fee that quarter for a total of $250. As another example, suppose that an Industry Member owed a CAT fee (other than the minimum fee of $125) for both the Historical CAT Assessment and the Period 3 CAT Fee, the Industry Member would be required to pay both fees that quarter.

[89] The Participants intend to file one fee filing under Section 19(b) of the Exchange Act describing the calculation method for the Quarterly CAT Fee, and then announce via CAT alert the budgeted Total CAT Costs to be used in calculating the CAT fees each year via the method described in the fee filing. The Participants do not intend to file a separate fee filing each year setting forth the budgeted Total CAT Costs relevant for the Quarterly CAT Fee.

Operating Committee will announce any such quarterly budget adjustments to be used in calculating the remaining Quarterly CAT Fees for that year via a CAT alert.

6. Collection of Fees

Pursuant to Section 11.4 of the CAT NMS Plan, the Operating Committee proposes to establish a system for the collection of CAT fees. The Consolidated Audit Trail, LLC will provide each Participant with an invoice setting forth the Participants' quarterly CAT fee for each payment period. Each Participant will pay its CAT fees to the Consolidated Audit Trail, LLC via the centralized system for the collection of CAT fees established by the Consolidated Audit Trail, LLC in the manner prescribed by the Consolidated Audit Trail, LLC. As set forth in Section 11.4 of the CAT NMS Plan, each Participant shall pay all its CAT fees authorized under the CAT NMS Plan as required by Section 3.7(b) of the CAT NMS Plan.

The Operating Committee also determined the time and manner in which Industry Member CAT fees will be paid. The Operating Committee determined that the Consolidated Audit Trail, LLC will provide each Industry Member with an invoice setting forth the Industry Member's Historical CAT Assessment, Period 3 CAT Fee, Period 4 CAT Fee and/or Quarterly CAT Fee (as applicable) for each payment period. Consolidated Audit Trail, LLC will provide each Industry Member with one invoice each payment period for its CAT fees, regardless of whether the Industry Member is a member of multiple self-regulatory organizations. Each Industry Member will pay its CAT fees to the Consolidated Audit Trail, LLC via the centralized system for the collection of CAT fees established by the Consolidated Audit Trail, LLC in the manner prescribed by the Consolidated Audit Trail, LLC. Finally, as set forth in Section 11.4 of the CAT NMS Plan, Industry Members would be required to pay their CAT fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). If an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of (i) the Prime Rate plus 300 basis points, or (ii) the maximum rate permitted by applicable law.[90] To implement the requirements related to the timing and manner of payment of the CAT fees for Industry Members, each Participant would submit a fee filing pursuant to Section 19(b) of the Exchange Act describing such requirements as discussed above.

7. Example of Application of Proposed Funding Model

The Operating Committee has prepared an example of how the Proposed Funding Model would operate for illustrative purposes only. Specifically, the Operating Committee has prepared an example of CAT fees calculated under the Proposed Funding Model based on budgeted Total CAT Costs for 2021 as well as message traffic and market share data for the fourth quarter of 2020. Set forth in *Exhibit B* to this letter are three charts setting forth illustrative CAT fees for each Equities Participant, Options Participant and Industry Member CAT Reporter. Note *Exhibit B* only provides an illustrative example of how the Proposed Funding Model would operate; the calculation of actual fees will differ from this example in various ways. For example, the Participants have paid or will have paid 100% of these costs up to the time of the SEC approval of the Proposed Funding Model, and, as a result, Participants would not be obligated to pay CAT fees related to 2021 CAT costs to the extent the Participants have already paid such costs. Furthermore, Period 3 CAT Fees for Industry Members will be calculated based on actual Total CAT Costs for 2021, not budgeted CAT Costs for 2021, and based on CAT Data from 2022, not from 2020.

8. Satisfaction of Exchange Act and CAT NMS Plan Requirements

The Operating Committee believes that the Proposed Funding Model offers a variety of benefits and satisfies the funding principles and other requirements of the CAT NMS Plan, as proposed to be revised herein, as well as the applicable requirements of the Exchange Act.

a. Funding Principle: Section 11.2(a) of the CAT NMS Plan

The Participants believe that the Proposed Funding Model satisfies the funding principles set forth in Section 11.2(a) of the CAT NMS Plan, as proposed to be modified herein. Section 11.2(a) requires the Operating Committee, in establishing the funding of the Company, to seek ''to create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and the other costs of the Company.''

First, by adopting a CAT-specific fee tied to Total CAT Costs, the Operating Committee will be fully transparent regarding the costs of the CAT and how those costs will be allocated among CAT Reporters. In contrast, charging a general regulatory fee, which might otherwise be used to cover CAT costs as well as other regulatory costs, would be less transparent than the selected approach of charging a fee designated to cover CAT-related costs only.

Second, the Proposed Funding Model would provide a predictable revenue stream for the Company. The Proposed Funding Model provides for a predictable revenue stream as the Proposed Funding Model is designed to divide the Total CAT Costs among the CAT Reporters. In addition, to address the possibility of some variability in the collected CAT fees or an unexpected increase in costs, the Total CAT Costs covered by the Proposed Funding Model include an operational reserve. The operational reserve could be used in the event that the total fees are not collected from the CAT Reporters, or costs increase due to outside events.

Third, the Proposed Funding Model provides for a revenue stream for the Company that is aligned with the anticipated costs to build, operate and administer the CAT and the other costs of the Company. The total fees to be collected from Participants and Industry Members are designed to cover the Total CAT Costs. Any surpluses collected will be treated as an operational reserve to offset future fees and will not be distributed to the Participants as profits.[91]

b. Funding Principle: Section 11.2(b) of the CAT NMS Plan

The Operating Committee also believes that the Proposed Funding Model satisfies the funding principle set forth in Section 11.2(b) of the CAT NMS Plan, which requires the Operating Committee to seek ''to establish an allocation of the Company's related costs among Participants and Industry Members that is consistent with the Exchange Act, taking into account the timeline for implementation of the CAT and distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon Company resources and operations.'' As

[90] CAT Reporters will be responsible for each quarterly fee in which they are a CAT Reporter. If a CAT Reporter ceases to the meet the definition of a CAT Reporter during a quarter, the CAT Reporter will still be responsible for CAT fees attributable to its message traffic (or, the minimum fee in the alternative) during that quarter.

[91] CAT NMS Plan Approval Order at 84792.

discussed above, the Proposed Funding Model allocation between Participants and Industry Members takes into account the timeline for implementation, as the Company has been incurring CAT costs with the development and implementation of the CAT, and Participants and certain Industry Members have been reporting to the CAT.

The Proposed Funding Model also recognizes the ''distinctions in the securities trading operations of Participants and Industry Members'' in various ways. In light of their different roles, Participants will pay a fee based on market share and Industry Members will pay a fee based on message traffic, as approved by the Commission in the CAT NMS Plan. The Proposed Funding Model also recognizes the different trading characteristics of the equities and options markets by allocating the Adjusted Participant Allocation to Equities Participants and Options Participants separately. Furthermore, the Operating Committee proposes to discount Options Market Maker message traffic and Equity Market Maker message traffic in recognition of their distinct roles as liquidity providers in the securities markets and to avoid potentially and inadvertently affecting market quality. The Proposed Funding Model also recognizes the different trading characteristics of OTC Equity Securities by not including them in the market share calculation for Participants. The Proposed Funding Model also is designed to take into account Participants and Industry Members' relative impact upon Company resources and operations through the use of message traffic and market share in calculating CAT fees.

c. Funding Principle: Section 11.2(c) of the CAT NMS Plan

The Operating Committee also believes that the Proposed Funding Model satisfies the funding principle set forth in Section 11.2(c) of the CAT NMS Plan, as proposed to be modified herein. Section 11.2(c), as proposed to be modified herein, requires the Operating Committee to seek ''to establish a fee structure in which the fees charged to: (i) Participants are based upon the level of market share; and (ii) Industry Members are based upon message traffic.'' The Proposed Funding Model requires Participants to pay a fee based on market share, and Industry Members to pay a fee based on message traffic.

d. Funding Principle: Section 11.2(d) of the CAT NMS Plan

The Operating Committee also believes that the Proposed Funding Model satisfies the funding principle set forth in Section 11.2(d) of the CAT NMS Plan, which requires the Operating Committee to seek ''to provide for ease of billing and other administrative functions.'' The Operating Committee believes that calculating CAT fees under the Proposed Funding Model will be manageable as the message traffic and market share data will be readily available. In addition, the elimination of tiers simplifies the billing process as it removes the subjective determination of the tier levels. In addition, the Operating Committee proposes a Minimum Industry Member CAT Fee to ease the administrative burden associated with very small payments.

e. Funding Principle: Section 11.2(e) of the CAT NMS Plan

The Operating Committee also believes that the Proposed Funding Model satisfies the funding principle set forth in Section 11.2(e) of the CAT NMS Plan, which requires the Operating Committee to seek ''to avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality.'' As discussed above, the Operating Committee has proposed various measures to address potential disincentives, including the market maker message traffic discounts, the Maximum Industry Member CAT Fee, the Maximum Equities Participant Fee and the treatment of OTC Equity Securities for the market share calculation for Participants. The Proposed Funding Model also is structured to avoid a reduction in market quality because it discounts Options Market Maker message traffic and Equity Market Maker message traffic when calculating message traffic for Options Market Makers and Equity Market Makers, respectively. The proposed discounts recognize the value of the market making activity to the market as a whole.

f. Funding Principle: Section 11.2(f) of the CAT NMS Plan

The Operating Committee also believes that the Proposed Funding Model satisfies the funding principle set forth in Section 11.2(f) of the CAT NMS Plan, which requires the Operating Committee to seek ''to build financial stability to support the Company as a going concern.'' The Operating Committee believes that the Proposed Funding Model is structured to collect sufficient funds to pay the Total CAT Costs. In addition, the Proposed Funding Model would collect an operational reserve for the CAT. This operational reserve is intended to address potential shortfalls in collected CAT fees versus actual CAT costs.

g. Section 11.1(c) of the CAT NMS Plan

The Operating Committee also believes that the Proposed Funding Model would satisfy the requirements in Section 11.1(c) of the CAT NMS Plan. Section 11.1(c) of the CAT NMS Plan states that ''[t]o fund the development and implementation of the CAT, the Company shall time the imposition and collection of all fees on Participants and Industry Members in a manner reasonably related to the timing when the Company expects to incur such development and implementation costs.'' The Company has been and continues to incur development and implementation costs for the CAT, and the Operating Committee intends for the fees to help cover these costs. In addition, the CAT fees going forward are proposed to be imposed close in time to when costs are incurred.

Section 11.1(c) of the CAT NMS Plan also requires that ''[a]ny surplus of the Company's resources over its expenses shall be treated as an operational reserve to offset future fees.'' The Company will operate on a ''break-even'' basis, with fees imposed to cover costs and an appropriate reserve. Any surpluses will be treated as an operational reserve to offset future fees and will not be distributed to the Participants as profits.[92] To ensure that the Participants' operation of the CAT will not contribute to the funding of their other operations, Section 11.1(c) of the CAT NMS Plan specifically states that ''[a]ny surplus of the Company's revenues over its expenses shall be treated as an operational reserve to offset future fees.'' In addition, as set forth in Article VIII of the CAT NMS Plan, the Company ''intends to operate in a manner such that it qualifies as a 'business league' within the meaning of Section 501(c)(6) of the [Internal Revenue] Code.'' To qualify as a business league, an organization must ''not [be] organized for profit and no part of the net earnings of [the organization can] inure[ ] to the benefit of any private shareholder or individual.'' [93] As the SEC stated when approving the CAT NMS Plan, ''the Commission believes that the Company's application for Section 501(c)(6) business league status addresses issues raised by commenters about the Plan's proposed allocation of profit and loss by mitigating concerns that the Company's earnings could be used to benefit individual

[92] CAT NMS Plan Approval Order at 84792.

[93] 26 U.S.C. 501(c)(6).

Participants.'' [94] The Internal Revenue Service has determined that the Company is exempt from federal income tax under Section 501(c)(6) of the Internal Revenue Code.

h. Equitable Allocation of Reasonable Fees

The Operating Committee believes that the proposed CAT fees provide for the ''equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities necessary or appropriate in furtherance of the purposes of this chapter,'' [95] as required by the Exchange Act. The Operating Committee believes that the CAT fees equitably allocate CAT costs between and among Participants and Industry Members, as discussed in detailed above. For the reasons discussed above, the Operating Committee believes that the allocation percentages in the Proposed Funding Model as well as the use of message traffic for allocating costs among Industry Members and the use of market share for allocating costs among Participants provide for an equitable allocation of CAT costs among CAT Reporters. In addition, as discussed above, the Operating Committee believes that the imposition of minimum and maximum fees and market maker discounts as well as the treatment of OTC Equity Securities for the market share calculation for Participants would operate to provide for an equitable allocation of CAT costs among CAT Reporters.

i. No Unfair Discrimination

The Operating Committee believes that the Proposed Funding Model is ''not designed to permit unfair discrimination between customers, issuers, brokers, or dealers,'' [96] as required by the Exchange Act. In addition, the Proposed Funding Model does not unfairly discriminate between Industry Members and Participants, among Industry Members or among Participants. All Industry Members are grouped together for the purpose of determining CAT fees, and all Participants are grouped together for the purpose of determining CAT fees. CAT Reporters with similar levels of activity will pay similar fees. For example, Industry Members with higher levels of message traffic will pay higher fees, and those with lower levels of message traffic will pay lower fees. Similarly, Participants with larger market share will pay higher fees, and those with lower levels of market share will pay lower fees. With the elimination of tiers, fees for Industry Members and Participants are directly related to their message traffic and market share, respectively. With tiers, the relationship between message traffic or market share and the CAT fee would not have been as direct.

In addition, where the method of fee calculation may potentially affect certain groups of CAT Reporters adversely, the Operating Committee has sought to limit such adverse effects. For example, the Operating Committee has proposed market maker discounts to address the high levels of message traffic generally exhibited by market makers. As discussed above, the SEC has recognized repeatedly that such favorable treatment for market makers in other contexts was not unfairly discriminatory or a burden on competition in light of its positive effects on market quality, nor was it considered to involve an inequitable allocation of fees among members.

The Operating Committee also has proposed the Maximum Equities Participant Fee to address the potential for higher market share for FINRA due to the trade reporting to FINRA. The Maximum Equities Participant Fee serves as a method to institute a cap on fees to fairly allocate costs to FINRA given that a market share approach may result in FINRA having a significant allocation given the large volume of NMS Stock activity that is subject to trade reporting to FINRA.

Similarly, the Operating Committee also has proposed the Maximum Industry Member CAT Fee to address the potential for significant fees based on outsized message traffic for certain Industry Members. The Maximum Industry Member CAT Fee serves as a method to institute a cap on fees to fairly allocate costs to Industry Members. Such a fee would prevent Industry Members from paying significantly larger CAT fees than Participant complexes.

The Operating Committee also proposes to calculate market share for national securities associations without reference to trades reported in OTC Equity Securities in light of the differences in the markets for NMS Stocks and OTC Equity Securities. Because the proposed CAT fees for Equities Participants are based on market share calculated by share volume, FINRA would likely be subject to higher fees if OTC Equity Securities were included in the calculation of market share.

j. No Burden on Competition

The Operating Committee believes that the Proposed Funding Model does ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter,'' [97] as required by the Exchange Act. Moreover, the Operating Committee believes that the proposed fee schedule fairly and equitably allocates costs among CAT Reporters. In particular, as described above, the cost allocation between Participants and Industry Members recognizes the greater number of Industry Members as compared to the Participants and the greater collective revenue of Industry Members as compared to Participants. In addition, cost allocations among Industry Members based on message traffic and cost allocations among Participants based on market share fairly and equitably distributes CAT costs. Furthermore, the market maker discounts, Maximum Industry Member CAT Fee and Maximum Equities Participant Fee address the potential for burdens on market makers, Industry Members with outsized message traffic and FINRA potentially resulting from the proposed fee calculations. Moreover, the Operating Committee does not believe that the Minimum Industry Member CAT Fee or the Minimum Participant Fee would act as barriers to entry for smaller CAT Reporters.

9. Alternative Models Considered

The Operating Committee has determined to propose the Proposed Funding Model to fund the CAT for the reasons discussed above. In reaching this conclusion, the Operating Committee considered the advantages and disadvantages of a variety of possible alternative funding and cost allocations models for the CAT in detail. After analyzing the various alternatives, the Operating Committee determined that the Proposed Funding Model provides a variety of advantages in comparison to the alternatives. In addition, although various funding models may be appropriate, the Proposed Funding Model provides for an equitable allocation of reasonable fees among CAT Reporters.

The Operating Committee previously filed a fee proposal in line with the CAT NMS Plan—the Prior Fee Proposal. Under that model, the Operating Committee, among other things, proposed a 75%–25% allocation between Execution Venues (which included Participants and Execution Venue ATSs) and Industry Members

[94] CAT NMS Plan Approval Order at 84793.

[95] Sections 6(b)(4) and 15A(b)(5) of the Exchange Act.

[96] Sections 6(b)(5) and 15A(b)(6) of the Exchange Act.

[97] Sections 6(b)(8) and 15A(b)(9) of the Exchange Act.

(other than Execution Venue ATSs), and required Execution Venues to pay fees based on market share, and Industry Members (other than Execution Venue ATSs) to pay fees based on message traffic. This Prior Fee Proposal was a very complex model with many interrelated parts, including allocation percentages, discounts for certain market behavior, and multiple tiered fees, and the complexity raised concerns from the Commission regarding its use as the CAT funding model. In addition, in response to the proposal, the industry raised a number of other issues related to the proposal, including issues regarding the proposed allocation of CAT costs between Participants and Industry Members, and the ability of certain market segments to afford the proposed CAT fee.[98] Accordingly, the Operating Committee determined to revise various aspects of the Prior Fee Proposal, thereby developing the Proposed Funding Model.

In developing the Prior Fee Proposal, the Operating Committee considered many variations of different aspects of that model. For example, the Operating Committee evaluated different cost allocations between Industry Members (other than Execution Venue ATSs) and Execution Venues, including 80%–20%, 75%–25%, 70%–30% and 65%–35% allocations, and different cost allocations between Equity and Options Execution Venues.[99] The Operating Committee also considered different discounts for equities and options market makers, different numbers of tiers of Industry Members and Execution Venues, different fee levels for each tier, and other aspects of the model.

Furthermore, the Operating Committee considered a model in which all CAT Reporters, including both Industry Members and Participants, would pay based solely on revenue. The concept underlying this proposal is that CAT costs would be borne by CAT Reporters based on the ability to pay. Industry Member revenue would be calculated based on revenue reported in FOCUS reports, and Participant revenue would have been calculated based on revenue information in Form 1 amendments and other publicly reported figures. The Operating Committee did not select this model for various reasons. As discussed above, under this approach, Participants as a group would only pay approximately 4% of the total CAT costs. Given their role as self-regulatory organizations and their use of the CAT, the Operating Committee did not believe that such a small allocation of the CAT costs to the Participants was appropriate. Using revenue also raised a variety of practical issues. For example, questions were raised as to what revenue was appropriate to include in the calculation of revenue for Industry Members. The gross revenue set forth on FOCUS reports was proposed, as it was similar to an existing FINRA regulatory fee.[100] However, questions were raised as to whether revenue unrelated to NMS Securities or OTC Equity Securities, or otherwise unrelated to the CAT, should be included for calculation of the CAT fee. Eliminating revenue unrelated to CAT-related activity would have been difficult or impossible. In addition, the lack of a uniform approach to calculating revenue for the Participants could raise inequities in the imposition of a CAT fee.

To address the issues regarding the 96%–4% allocation and the calculation of the Participant revenue in the straight revenue model described above, the Operating Committee considered an alternative version of the revenue model in which the CAT costs would be allocated between Industry Members and Participants based on a set percentage (*e.g.,* 75%–25%) and the Industry Member allocation would be allocated among Industry Members based on revenue and the Participant allocation would be allocated among Participants based on market share. However, this alternative revenue model failed to address the issues regarding the appropriate revenue calculations for Industry Members.

The Operating Committee considered a funding model in which CAT costs were allocated across all CAT Reporters—both Industry Members and Participants—based on message traffic. Specifically, the Operating Committee considered eliminating the concepts of the Participant Allocation and the Industry Member Allocation entirely, and treating Participants and Industry Members the same under the model. The Operating Committee, however, determined that the bifurcated approach set forth in the CAT NMS Plan continued to be a fair and reasonable approach.

The Operating Committee also considered other possible funding models. For example, the Participants considered allocating the CAT costs equally among each of the Participants, and then permitting each Participant to charge its own members as it deems appropriate. The Operating Committee determined that such an approach raised a variety of issues, including the likely inconsistency of the ensuing charges, potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges. The Operating Committee also discussed the advantages and disadvantages of various alternative models during development of the CAT NMS Plan, such as a cost allocation based on a strict pro-rata distribution, regardless of the type or size of the CAT Reporters, or a cost allocation based on trades.[101] The Operating Committee believes that the Proposed Funding Model provides advantages over each of these previously considered models and provides an equitable allocation of reasonable fees among CAT Reporters.

B. Governing or Constituent Documents

Not applicable.

C. Implementation of Amendment

The Participants are filing this proposed amendment pursuant to Rule 608(b)(1) of Regulation NMS under the Exchange Act.[102]

D. Development and Implementation Phases

The Participants expect to implement the proposed Participant CAT fees upon approval by the SEC.

E. Analysis of Impact on Competition

The Operating Committee does not believe that the proposed amendment will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Operating Committee notes that the proposed amendment implements provisions of the CAT NMS Plan approved by the Commission, subject to proposed revisions to the CAT NMS Plan described above, and is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan. Because all Participants are subject to the Proposed Funding Model set forth in the proposed amendment, this is not a competitive filing that raises competition issues between and among the Participants. Furthermore, for the reasons discussed above, including in Section A.8 above, the Operating Committee does not believe that the Proposed Funding Model will result in any burden on competition that

[98] For a discussion of comments made regarding the Original Funding Model and the Prior Fee Proposal, *see generally* Prior Fee Proposal Release.

[99] *See* Prior Fee Proposal Release at 1408.

[100] *See* paragraph (c) and (d) of Section 1 of Schedule A of FINRA's Bylaws regarding FINRA's annual Gross Income Assessment.

[101] For a discussion of alternatives considered in the drafting of the CAT NMS Plan, *see* Appendix C of the CAT NMS Plan at C–88—C–89.

[102] 17 CFR 242.608(b)(1).

is not necessary or appropriate in furtherance of the purpose of the Exchange Act.

F. Written Understanding or Agreements Relating to Interpretation of, or Participation in, Plan

Not applicable.

G. Approval by Plan Sponsors in Accordance With Plan

Section 12.3 of the CAT NMS Plan states that, subject to certain exceptions, the CAT NMS Plan may be amended from time to time only by a written amendment, authorized by the affirmative vote of not less than two-thirds of all of the Participants, that has been approved by the SEC pursuant to Rule 608 of Regulation NMS under the Exchange Act or has otherwise become effective under Rule 608 of Regulation NMS under the Exchange Act. In addition, Section 4.3(a)(vi) of the Plan requires the Operating Committee, by Majority Vote, to authorize action to determine the appropriate funding-related policies, procedures and practices-consistent with Article XI. The Operating Committee has satisfied both of these requirements. In addition, the Proposed Funding Model was discussed and voted on during a general session of the Operating Committee.

H. Description of Operation of Facility Contemplated by the Proposed Amendment

Not applicable.

I. Terms and Conditions of Access

Not applicable.

I. Method of Determination and Imposition, and Amount of, Fees and Charges

Section A of this letter describes in detail how the Participants developed the Proposed Funding Model for the CAT.

J. Method and Frequency of Processor Evaluation

Not applicable.

K. Dispute Resolution

Section 11.5 of the CAT NMS Plan addresses the resolution of disputes regarding CAT fees charged to Participants and Industry Members. Specifically, Section 11.5 of the CAT NMS Plan states that disputes with respect to fees the Company charges Participants pursuant to Article XI of the CAT NMS Plan shall be determined by the Operating Committee or a Subcommittee designated by the Operating Committee. Decisions by the Operating Committee or such designated Subcommittee on such matters shall be binding on Participants, without prejudice to the rights of any Participant to seek redress from the SEC pursuant to Rule 608 of Regulation NMS under the Exchange Act or in any other appropriate forum. In addition, the Participants adopted rules to establish the procedures for resolving potential disputes related to CAT fees charged to Industry Members.[103]

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the amendment is consistent with the Exchange 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 4–698 on the subject line.

Paper Comments

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number 4–698. 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 plan amendment that are filed with the Commission, and all written communications relating to the amendment between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the Participants' offices. 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 4–698 and should be submitted on or before May 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[104]

J. Matthew DeLesDernier,

Assistant Secretary.

Exhibit A

Additions *italicized;* deletions [bracketed]

* * * * *

Article I

Definitions

* * * * *

[''Execution Venue'' means a Participant or an alternative trading system (''ATS'') (as defined in Rule 300 of Regulation ATS) that operates pursuant to Rule 301 of Regulation ATS (excluding any such ATS that does not execute orders).]

* * * * *

Article XI

Funding of the Company

Section 11.1. Funding Authority.

(a) On an annual basis the Operating Committee shall approve an operating budget for the Company. The budget shall include the projected costs of the Company, including the costs of developing and operating the CAT for the upcoming year, and the sources of all revenues to cover such costs, as well as the funding of any reserve that the Operating Committee reasonably deems appropriate for prudent operation of the Company.

(b) Subject to Section 11.2, the Operating Committee shall have discretion to establish funding for the Company, including: (i) Establishing fees that the Participants shall pay; and (ii) establishing fees for Industry Members that shall be implemented by Participants. The Participants shall file with the SEC under Section 19(b) of the Exchange Act any such fees on Industry Members that the Operating Committee approves, and such fees shall be labeled as ''Consolidated Audit Trail Funding Fees.''

(c) To fund the development and implementation of the CAT, the Company shall time the imposition and collection of all fees on Participants and Industry Members in a manner reasonably related to the timing when the Company expects to incur such development and implementation costs.

[103] *See* Securities Exchange Act Rel. No. 81500 (Aug. 30, 2017), 82 FR 42143 (Sept. 6, 2017).

[104] 17 CFR 200.30–3(a)(85).

In determining fees on Participants and Industry Members the Operating Committee shall take into account fees, costs and expenses (including legal and consulting fees and expenses) incurred by the Participants on behalf of the Company prior to the Effective Date in connection with the creation and implementation of the CAT, and such fees, costs and expenses shall be fairly and reasonably shared among the Participants and Industry Members. Any surplus of the Company's revenues over its expenses shall be treated as an operational reserve to offset future fees.

(d) Consistent with this Article XI, the Operating Committee shall adopt policies, procedures, and practices regarding the budget and budgeting process, [assignment of tiers,] resolution of disputes, billing and collection of fees, and other related matters. [For the avoidance of doubt, as part of its regular review of fees for the CAT, the Operating Committee shall have the right to change the tier assigned to any particular Person in accordance with fee schedules previously filed with the Commission that are reasonable, equitable and not unfairly discriminatory and subject to public notice and comment, pursuant to this Article XI. Any such changes will be effective upon reasonable notice to such Person.]

Section 11.2. Funding Principles. In establishing the funding of the Company, the Operating Committee shall seek:

(a) To create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and the other costs of the Company;

(b) to establish an allocation of the Company's related costs among Participants and Industry Members that is consistent with the Exchange Act, taking into account the timeline for implementation of the CAT and distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon Company resources and operations;

(c) to establish a [tiered] fee structure in which the fees charged to: (i) *Participants* [CAT Reporters that are Execution Venues, including ATSs,] are based upon the level of market share; *and* (ii) Industry Members[' non-ATS activities] are based upon message traffic[; and (iii) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members)].

(d) to provide for ease of billing and other administrative functions;

(e) to avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality; and

(f) to build financial stability to support the Company as a going concern.

Section 11.3. Recovery.

(a) The Operating Committee will establish *a minimum fee to be payable by each Participant in addition to* [fixed] fees *based on market share* to be payable by *Participants* [Execution Venues] as provided in this Section 11.3(a):

(i) Each *Participant* [Execution Venue] that: (A) Executes transactions; or (B) in the case of a national securities association, has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange, in NMS Stocks [or OTC Equity Securities] will pay a [fixed] fee depending on the market share of that *Participant* [Execution Venue] in NMS Stocks *(''Equities Participant'')* [and OTC Equity Securities, with the Operating Committee establishing at least two and no more than five tiers of fixed fees, based on an Execution Venue's NMS Stocks and OTC Equity Securities market share]. For these purposes, market share for *Participants* [Execution Venues] that execute transactions will be calculated by share volume, and market share for a national securities association that has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange in NMS Stocks [or OTC Equity Securities] will be calculated based on share volume of trades reported, provided, however, that *any Participant that is a national securities association shall pay a maximum fee established by the Operating Committee instead of the higher fee calculated based on such Participant's market share. If a Participant's fee is limited to such maximum fee, any excess amount which the Participant otherwise would have paid as a fee above such maximum fee will be re4allocated among all Equities Participants, including any Equities Participant that is subject to the maximum fee, in accordance with their market share* [the share volume reported to such national securities association by an Execution Venue shall not be included in the calculation of such national security association's market share].

(ii) Each *Participant* [Execution Venue] that executes transactions in Listed Options *(''Options Participant'')* will pay a [fixed] fee depending on the Listed Options market share of that *Participant*[, Execution Venue, with the Operating Committee establishing at least two and no more than five tiers of fixed fees, based on an Execution Venue's Listed Options market share]. For these purposes, market share will be calculated by contract volume.

(b) The Operating Committee will establish [fixed] fees to be payable by Industry Members, based on the message traffic generated by such Industry Member *subject to a base minimum fee and discounts for market maker message traffic* [, with the Operating Committee establishing at least five and no more than nine tiers of fixed fees, based on message traffic. For the avoidance of doubt, the fixed fees payable by Industry Members pursuant to this paragraph shall, in addition to any other applicable message traffic, include message traffic generated by: (i) An ATS that does not execute orders that is sponsored by such Industry Member; and (ii) routing orders to and from any ATS sponsored by such Industry Member.]*, provided, however, that any Industry Member shall pay a maximum fee established by the Operating Committee instead of the higher fee calculated based on such Industry Member's message traffic. If an Industry Member's fee is limited to such maximum fee, any excess amount which the Industry Member otherwise would have paid as a fee above such maximum fee will be re-allocated among all Industry Members, including any Industry Member that is subject to the maximum fee or subject to the base minimum fee, in accordance with their message traffic.*

(c) The Operating Committee may establish any other fees ancillary to the operation of the CAT that it reasonably determines appropriate, including fees: (i) For the late or inaccurate reporting of information to the CAT; (ii) for correcting submitted information; and (iii) based on access and use of the CAT for regulatory and oversight purposes (and not including any reporting obligations).

(d) The Company shall make publicly available a schedule of effective fees and charges adopted pursuant to this Agreement as in effect from time to time. The Operating Committee shall review such fee schedule on at least an annual basis and shall make any changes to such fee schedule that it deems appropriate. The Operating Committee is authorized to review such fee schedule on a more regular basis, but

shall not make any changes on more than a semiannual basis unless, pursuant to a Supermajority Vote, the Operating Committee concludes that such change is necessary for the adequate funding of the Company.

* * * * *

Appendix B

Fee Schedule

Consolidated Audit Trail Funding Fees

(a) Each Participant shall pay to Consolidated Audit Trail, LLC in the manner prescribed by the Consolidated Audit Trail, LLC a CAT fee calculated as follows:

(1) Commencing upon SEC approval of the CAT fee, each Participant shall pay a quarterly CAT fee calculated based on market share from the prior quarter by adding the sum of the following:

(A) For all Participants, the Minimum Participant Fee;

(B) For Equities Participants, the lesser of:

(i) The product of multiplying the Equities Participant's percentage of total market share of NMS Stocks for all Equities Participants against the Equities Participant Allocation; or

(ii) the Maximum Equities Participant Fee, if applicable; and

If any Participant's fee is limited to the Maximum Equities Participant Fee, any excess amount which such Participant otherwise would have paid as a fee above such Maximum Equities Participant Fee will be re-allocated among all Equities Participants (including any Equities Participant subject to the Maximum Equities Participant Fee) in accordance with their market share.

(C) For Options Participants, the product of multiplying the Participant's percentage of total market share of Listed Options contracts for all Options Participants against the Options Participant Allocation;

For the avoidance of doubt, Participants with both options and equities market share shall be considered both Equities Participants and Options Participants.

(b) The CAT fees set forth in paragraph (a) will be calculated based on the following:

(1) Industry Member/Participant Allocation. The Industry Member Allocation for each quarter shall be 75% of 1/4th of the Total CAT Costs for the relevant year. The Participant Allocation for each quarter shall be 25% of 1/4th of the Total CAT Costs for the relevant year.

(2) Minimum Participant Fee. The Minimum Participant Fee is 0.75% of the Participant Allocation. For avoidance of doubt, the Minimum Participant Fee will be paid by each registered national securities exchange that is a Participant and each registered national securities association that is a Participant.

(3) Adjusted Participant Allocation. The Adjusted Participant Allocation is the Participant Allocation minus the sum of all Minimum Participant Fees required to be paid by each Participant.

(4) Equities Participant Allocation. The Equities Participant Allocation is 60% of the Adjusted Participant Allocation.

(5) Options Participant Allocations. The Options Participant Allocation is 40% of the Adjusted Participant Allocation.

(6) Maximum Equities Participant Fee. The Maximum Equities Participant Fee is the greater of (x) 20% of the Equities Participant Allocation or (y) the highest CAT fee required to be paid by any other Equities Participant plus 5% of such highest CAT fee. The Maximum Equities Participant Fee only applies to a Participant that is a national securities association.

(7) Total CAT Costs. The Total CAT Costs shall be the total budgeted costs for the CAT for the relevant year. The total budgeted costs for the CAT for the relevant year shall be the total CAT costs set forth in the annual operating budget approved by the Operating Committee pursuant to Section 11.1(a) of the CAT NMS Plan. The total budgeted costs for the CAT for the relevant year may be adjusted on a quarterly basis as the Operating Committee reasonably deems appropriate for the prudent operation of the Company. To the extent that the Operating Committee adjusts the total budgeted costs for the CAT for the relevant year during its quarterly budget review, the adjusted budgeted costs for the CAT will be used in calculating the remaining CAT fees for that year.

* * * * *

Exhibit B

The following sets forth an illustrative example of CAT fees calculated under the Proposed Funding Model based on budgeted Total CAT Costs for 2021 and message traffic and market share data for the fourth quarter of 2020. Note *Exhibit B* only provides an illustrative example of how the Proposed Funding Model would operate; the calculation of actual fees will differ from this example in various ways. For example, the Participants have paid or will have paid 100% of these costs up to the time of the SEC approval of the Proposed Funding Model, and, as a result, Participants would not be obligated to pay CAT fees related to 2021 CAT costs to the extent the Participants have already paid such costs. Furthermore, Period 3 CAT Fees for Industry Members will be calculated based on actual Total CAT Costs for 2021, not budgeted CAT Costs for 2021, and based on CAT Data from 2022, not from 2020.

CAT Fee Example for Illustrative Purposes Only

Budgeted Total CAT Costs for 2021: $132,522,082

Budgeted Quarterly Total CAT Costs: $33,130,502.50

Quarterly Participant CAT Fees

Participant Allocation (25% of Total CAT Costs): $8,282,625.62

Minimum Participant Fee (0.75% of Participant Allocation): $62,119.73

Equities Participant Allocation (60% of Adjusted Participant Allocation with Minimum Participant Fee): $4,845,413.60

Options Participant Allocation (40% of Adjusted Participant Allocation with Minimum Participant Fee): $3,437,291.50

Maximum Equities Participant Fee (with Minimum Participant Fee): $904,261.77

EQUITIES PARTICIPANTS

Equities participant	% of total market share	Quarterly CAT fee [105]
1	44.036	$1,316,397.13
2	15.857	819,716.78
3	10.311	574,962.49
4	8.465	452,089.70
5	7.276	392,929.38
6	4.823	270,943.47
7	2.404	181,695.58
8	1.572	140,305.36
9	1.439	133,707.03
10	1.105	117,096.53
11	0.732	67,479.86
12	0.658	63,773.04
13	0.562	90,079.89
14	0.464	54,132.27
15	0.244	74,252.16
16	0.052	33,652.74
17	0.000	62,125.23

OPTIONS PARTICIPANTS

Options participant	% of total market share	Quarterly CAT fee [106]
1	15.832	$488,295.85
2	12.919	378,833.92
3	9.424	284,742.41
4	8.742	266,385.07
5	8.640	263,642.40
6	8.586	262,187.01
7	7.327	259,360.77

[105] These fees reflect the Minimum Participant Fee, the Maximum Equities Participant Fee and the re-allocation related to the Maximum Equities Participant Fee.

OPTIONS PARTICIPANTS—Continued

Options participant	% of total market share	Quarterly CAT fee [106]
8	6.048	224,933.08
9	3.147	115,761.83
10	4.246	176,402.53
11	3.873	135,311.97
12	3.267	150,063.18
13	3.304	151,047.18
14	3.404	153,759.91
15	1.020	89,566.40
16	0.221	36,997.99

Quarterly Industry Member CAT Fees

Industry Member Allocation (75% of Total CAT Costs): $24,847,876.90

Minimum Industry Member CAT Fee: $125 per quarter

Maximum Industry Member CAT Fee: 8% of message traffic

Industry member	% of total message traffic [107]	Quarterly CAT fee [108]
1	15.942715	$2,508,235.23
2	12.3469	2,390,859.99
3	8.5412389	2,266,635.37
4	8.4307566	2,263,028.99
5	8.1484697	2,253,814.54
6	6.881969	1,925,916.13
7	3.33	931,352.41
8	3.07	859,935.74
9	2.87	803,898.93
10	2.7555	771,124.66
11	2.66620	746,134.09
12	2.635884	737,650.94
13	2.4252220	678,697.33
14	2.131963	596,628.96
15	1.4843	415,367.88
16	1.3483314	377,329.97
17	1.335250	373,669.04
18	1.18	329,495.95
19	1.1051530	309,276.58
20	1.05683181	295,753.93
21	1.0187078	285,084.95
22	0.8705377	243,619.61
23	0.65176922	182,397.33
24	0.603158	168,793.42
25	0.596133	166,827.49
26	0.487318	136,375.85
27	0.44	123,953.82
28	0.308189	86,246.66
29	0.2935546	82,151.14
30	0.2874546	80,444.05
31	0.284763	79,690.93
32	0.2556	71,535.07
33	0.253008	70,804.09
34	0.24849056	69,539.98
35	0.1988107	55,637.08
36	0.1869246	52,310.76
37	0.163770	45,831.09
38	0.1572621	44,009.72
39	0.1417	39,645.51
40	0.1408842	39,426.37
41	0.1297568	36,312.38
42	0.1270	35,540.69
43	0.121951	34,127.81
44	0.11747991	32,876.70
45	0.1144613	32,031.93
46	0.1057779	29,601.89
47	0.105	29,271.83
48	0.1021931	28,598.71
49	0.0978121	27,372.66
50	0.096430	26,985.90
51	0.0928221	25,976.22
52	0.0859471	24,052.25
53	0.084735	23,713.00
54	0.081	22,774.83
55	0.0759906	21,265.93
56	0.0738346	20,662.59
57	0.066684	18,661.49
58	0.065941	18,453.43
59	0.063723	17,832.74
60	0.05392	15,090.39
61	0.0483078	13,518.91
62	0.043817	12,262.25
63	0.0384240	10,752.94
64	0.0370	10,361.23
65	0.031046	8,688.22
66	0.029490	8,252.77
67	0.03	8,112.33
68	0.0269	7,514.14
69	0.02450	6,855.05
70	0.02444676	6,841.42
71	0.02095646	5,864.66
72	0.0191560	5,360.79
73	0.0175190	4,902.68
74	0.0164131	4,593.20
75	0.015561	4,354.73
76	0.0148	4,140.50
77	0.014	3,978.17
78	0.01402	3,924.60
79	0.0136249	3,812.92
80	0.01284773	3,595.43
81	0.0127	3,544.27
82	0.011465	3,208.47
83	0.0112806	3,156.88
84	0.0108896	3,047.45
85	0.010741	3,005.74
86	0.01029	2,879.17
87	0.010275	2,875.50
88	0.0092574	2,590.67
89	0.008569	2,398.10
90	0.0085212	2,384.65
91	0.01	2,347.27
92	0.01	2,178.96
93	0.00758	2,120.87
94	0.007202	2,015.48
95	0.007065	1,977.19
96	0.0068586	1,919.37
97	0.00651944	1,824.46
98	0.0064808	1,813.64
99	0.006361	1,780.09
100	0.005749	1,608.74
101	0.005305	1,484.62
102	0.0048870	1,367.64
103	0.00	1,332.74
104	0.0047449	1,327.84
105	0.00469	1,311.81
106	0.004674	1,308.08
107	0.0046547	1,302.63
108	0.0045685	1,278.49
109	0.0044112	1,234.47
110	0.00	1,194.19
111	0.004164	1,165.41
112	0.004	1,156.57
113	0.0041	1,154.93
114	0.00	1,150.64
115	0.004090	1,144.70
116	0.0040070	1,121.35
117	0.0039591	1,107.96
118	0.003438	962.16
119	0.0033477	936.85
120	0.003321	929.46
121	0.0031118	870.83
122	0.00310	867.51
123	0.003082	862.46
124	0.00302	845.50
125	0.0029780	833.40
126	0.0027976	782.91
127	0.002709	758.12
128	0.00269	752.67
129	0.0025567	715.50
130	0.0024297	679.96
131	0.0024	671.83
132	0.00210	586.75
133	0.002030	568.06
134	0.001970	551.19
135	0.0018979	531.14
136	0.001826	510.99
137	0.0018040	504.85
138	0.0017908	501.14
139	0.001777	497.38
140	0.0017672	494.54
141	0.0015795	442.02
142	0.0014790	413.90
143	0.00	411.74
144	0.0014253	398.86
145	0.0014101	394.62
146	0.001353	378.77
147	0.0013274	371.48
148	0.0013061	365.52
149	0.0013	359.89
150	0.0012558	351.44
151	0.0012482	349.31
152	0.001206	337.46
153	0.0011434	319.97
154	0.0011142	311.81
155	0.0011093	310.45
156	0.001090	305.14
157	0.00108	301.72
158	0.001	299.87
159	0.001	294.94
160	0.001	292.03
161	0.0010354	289.75
162	0.0010202	285.52
163	0.000943	263.95
164	0.001	257.53
165	0.000860	240.72
166	0.0008519	238.39
167	0.0008308	232.51
168	0.0008213	229.84
169	0.0006737	188.53
170	0.00067	187.07
171	0.0006423	179.74
172	0.00	178.92
173	0.00063	176.72
174	0.0006153	172.18
175	0.0006146	171.99
176	0.000544	152.35
177	0.0005437	152.15
178	0.000540	151.07
179	0.00053041	148.44
180	0.0005058	141.55
181	0.000505	141.40
182	0.00	140.96
183	0.00	140.81
184	0.00	139.48
185	0.000	139.15
186	0.000414	138.52
187	0.0003662	136.95
188	0.00036	136.85
189	0.0003474	136.34
190	0.00034	136.20
191	0.00	135.29
192	0.000312	135.19
193	0.00	134.40
194	0.000285	134.32
195	0.00	134.11
196	0.0002626	133.57
197	0.0002624	133.56
198	0.0002623	133.56
199	0.00	133.51
200	0.0002550	133.33
201	0.00025	133.12
202	0.000244	132.98
203	0.0002442	132.97
204	0.000	132.78
205	0.0002311	132.54
206	0.0002145	132.00
207	0.0002	131.99
208	0.00021241	131.93
209	0.00020	131.57
210	0.0002	131.55
211	0.000193	131.30
212	0.00019	131.07
213	0.0001839	131.00
214	0.000179	130.84
215	0.00017	130.63
216	0.000172	130.62

[106] These fees reflect the Minimum Participant Fee.

Industry member	% of total message traffic [107]	Quarterly CAT fee [108]
217	0.00017	130.50
218	0.000167	130.44
219	0.000164	130.35
220	0.0002	130.20
221	0.00015	129.86
222	0.0001459	129.76
223	0.00015	129.74
224	0.00	129.57
225	0.0001399	129.57
226	0.0001348	129.40
227	0.0001338	129.37
228	0.00	129.31
229	0.00	129.25
230	0.000	129.23
231	0.0001229	129.01
232	0.0001	128.97
233	0.0001	128.95
234	0.0001194	128.90
235	0.0001174	128.83
236	0.0001166	128.81
237	0.00	128.81
238	0.0001156	128.77
239	0.0001	128.65
240	0.00	128.60
241	0.0000969	128.16
242	0.0000959	128.13
243	0.0000949	128.10
244	0.0000938	128.06
245	0.00009	128.04
246	0.000091	127.97
247	0.0000904	127.95
248	0.000090	127.93
249	0.0001	127.92
250	0.00009	127.90
251	0.00008765	127.86
252	0.000087	127.86
253	0.000083	127.70
254	0.00008	127.52
255	0.0000768	127.51
256	0.00	127.39
257	0.0001	127.33
258	0.00	127.28
259	0.0001	127.24
260	0.0000685	127.24
261	0.00006850	127.24
262	0.0001	127.20
263	0.0001	127.20
264	0.000067	127.18
265	0.000066	127.16
266	0.000063	127.05
267	0.000062	127.02
268	0.000061	126.98
269	0.0001	126.96
270	0.000060	126.96
271	0.000060	126.95
272	0.000	126.92
273	0.000057	126.86
274	0.000057	126.85
275	0.0001	126.83
276	0.0000560	126.83
277	0.0000539	126.76
278	0.0000525	126.71
279	0.000051	126.66
280	0.0001	126.64
281	0.000048	126.56
282	0.00	126.54
283	0.00	126.53
284	0.0000	126.51
285	0.000044	126.45
286	0.0000438	126.43
287	0.000044	126.43
288	0.0000437	126.43
289	0.00	126.43
290	0.000042	126.38
291	0.00004	126.36
292	0.00	126.35
293	0.000041	126.33
294	0.0000403	126.32
295	0.0000	126.31
296	0.000040	126.31
297	0.00004	126.28
298	0.000037	126.22
299	0.00	126.22
300	0.000037	126.21
301	0.0000363	126.18
302	0.000035	126.13
303	0.00	126.10
304	0.0000331	126.08
305	0.00003294	126.08
306	0.00	126.07
307	0.000033	126.07
308	0.00003	126.01
309	0.00003	126.01
310	0.0000306	126.00
311	0.00003	125.99
312	0.0000302	125.99
313	0.000030	125.98
314	0.00003	125.98
315	0.00	125.94
316	0.0000276	125.90
317	0.00	125.90
318	0.0000	125.90
319	0.0000270	125.88
320	0.000	125.88
321	0.000	125.83
322	0.0000	125.82
323	0.000025	125.82
324	0.0000250	125.81
325	0.0000245	125.80
326	0.000024	125.80
327	0.000024	125.79
328	0.00002295	125.75
329	0.00002	125.72
330	0.00002	125.71
331	0.0000212	125.69
332	0.00	125.66
333	0.00001998	125.65
334	0.00001941	125.63
335	0.00	125.63
336	0.0000194	125.63
337	0.00	125.63
338	0.00	125.63
339	0.0000189	125.62
340	0.00	125.60
341	0.00	125.60
342	0.00	125.60
343	0.00002	125.58
344	0.0000176	125.57
345	0.0000174	125.57
346	0.0000172	125.56
347	0.0000164	125.54
348	0.000016	125.53
349	0.00002	125.52
350	0.00	125.51
351	0.000015	125.49
352	0.000	125.49
353	0.00001	125.49
354	0.00001	125.49
355	0.00001	125.48
356	0.000015	125.47
357	0.00	125.47
358	0.00001	125.47
359	0.00	125.45
360	0.0000137	125.45
361	0.00	125.45
362	0.000014	125.44
363	0.000014	125.44
364	0.000014	125.44
365	0.00001	125.44
366	0.000013	125.44
367	0.00001	125.43
368	0.000	125.43
369	0.0000127	125.41
370	0.0000	125.39
371	0.0000119	125.39
372	0.000011	125.37
373	0.0000113	125.37
374	0.000011	125.37
375	0.000011	125.36
376	0.0000107	125.35
377	0.00	125.34
378	0.0000103	125.34
379	0.000010	125.33
380	0.00001	125.33
381	0.00001	125.33
382	0.0000	125.32
383	0.000010	125.32
384	0.000010	125.32
385	0.0000	125.31
386	0.00	125.31
387	0.000009	125.31
388	0.000009	125.30
389	0.00001	125.29
390	0.00001	125.29
391	0.000	125.28
392	0.0000087	125.28
393	0.00	125.28
394	0.0000086	125.28
395	0.00	125.28
396	0.00001	125.28
397	0.00001	125.28
398	0.000008	125.28
399	0.0000	125.27
400	0.0000084	125.27
401	0.0000083	125.27
402	0.0000	125.27
403	0.00001	125.26
404	0.000	125.26
405	0.0000079	125.26
406	0.000008	125.25
407	0.0000	125.25
408	0.000008	125.25
409	0.00001	125.25
410	0.000007	125.24
411	0.00001	125.24
412	0.000007	125.24
413	0.00001	125.24
414	0.0000073	125.24
415	0.000	125.24
416	0.000	125.23
417	0.0000069	125.23
418	0.00001	125.22
419	0.0000068	125.22
420	0.000007	125.22
421	0.0000068	125.22
422	0.00	125.22
423	0.000007	125.22
424	0.000007	125.22
425	0.00001	125.22
426	0.00001	125.22
427	0.000007	125.22
428	0.000	125.22
429	0.000006	125.21
430	0.0000	125.21
431	0.00001	125.21
432	0.000006	125.21
433	0.00001	125.20
434	0.0000061	125.20
435	0.0000	125.20
436	0.00001	125.20
437	0.0000060	125.20
438	0.00	125.20
439	0.0000060	125.20
440	0.0000060	125.19
441	0.00001	125.19
442	0.0000	125.19
443	0.000006	125.19
444	0.000006	125.19
445	0.0000057	125.19
446	0.0000057	125.19
447	0.00001	125.19
448	0.00001	125.18
449	0.000	125.18
450	0.000006	125.18
451	0.0000	125.18
452	0.000006	125.18
453	0.00	125.18
454	0.00	125.18
455	0.0000053	125.17
456	0.0000	125.17
457	0.000005	125.17
458	0.00	125.17
459	0.000005	125.17
460	0.00	125.17
461	0.000005	125.16
462	0.000005	125.16

Industry member	% of total message traffic [107]	Quarterly CAT fee [108]
463	0.0000048	125.16
464	0.00000	125.16
465	0.00000	125.16
466	0.00000	125.15
467	0.000005	125.15
468	0.0000047	125.15
469	0.0000046	125.15
470	0.000005	125.15
471	0.000004	125.15
472	0.0000044	125.15
473	0.00000	125.14
474	0.0000044	125.14
475	0.00000	125.14
476	0.0000043	125.14
477	0.00000	125.14
478	0.000004	125.14
479	0.000004	125.14
480	0.000004	125.14
481	0.00	125.14
482	0.000004	125.14
483	0.0000041	125.14
484	0.0000041	125.13
485	0.00	125.13
486	0.000004	125.13
487	0.00000	125.13
488	0.0000039	125.13
489	0.000004	125.12
490	0.0000038	125.12
491	0.0000038	125.12
492	0.000004	125.12
493	0.000004	125.12
494	0.000004	125.12
495	0.00000	125.11
496	0.000003	125.11
497	0.000003	125.11
498	0.000003	125.11
499	0.00000	125.11
500	0.000003	125.11
501	0.0000033	125.11
502	0.0000032	125.11
503	0.0000	125.10
504	0.000	125.10
505	0.000003	125.10
506	0.000003	125.10
507	0.000003	125.10
508	0.00000	125.10
509	0.00000	125.10
510	0.000003	125.10
511	0.0000031	125.10
512	0.0000031	125.10
513	0.00000	125.10
514	0.000003	125.10
515	0.000003	125.10
516	0.000003	125.10
517	0.00000	125.10
518	0.00000	125.10
519	0.000003	125.10
520	0.00000	125.10
521	0.000003	125.10
522	0.000003	125.09
523	0.000003	125.09
524	0.0000	125.09
525	0.0000029	125.09
526	0.0000028	125.09
527	0.00	125.09
528	0.00000	125.09
529	0.00000	125.09
530	0.00	125.09
531	0.0000027	125.09
532	0.000003	125.09
533	0.00000	125.09
534	0.00000	125.09
535	0.0000027	125.09
536	0.000003	125.09
537	0.000003	125.09
538	0.0000027	125.09
539	0.0000027	125.09
540	0.00000	125.09
541	0.0000	125.09
542	0.000003	125.09
543	0.000003	125.09
544	0.0000026	125.09
545	0.0000026	125.09
546	0.0000026	125.08
547	0.00000258	125.08
548	0.000003	125.08
549	0.00000	125.08
550	0.0000025	125.08
551	0.00	125.08
552	0.000002	125.08
553	0.00	125.08
554	0.000	125.08
555	0.00000	125.08
556	0.000002	125.08
557	0.00	125.08
558	0.000002	125.08
559	0.00000	125.08
560	0.000002	125.08
561	0.000002	125.08
562	0.00000	125.08
563	0.00000	125.07
564	0.00000	125.07
565	0.00	125.07
566	0.0000022	125.07
567	0.0000022	125.07
568	0.00	125.07
569	0.0000022	125.07
570	0.0000022	125.07
571	0.000002	125.07
572	0.000002	125.07
573	0.0000022	125.07
574	0.00	125.07
575	0.00000	125.07
576	0.000	125.07
577	0.000002	125.07
578	0.000002	125.07
579	0.0000021	125.07
580	0.000002	125.07
581	0.000002	125.07
582	0.00000	125.07
583	0.000002	125.07
584	0.00	125.07
585	0.0000020	125.07
586	0.0000020	125.07
587	0.000002	125.07
588	0.00000	125.07
589	0.000002	125.07
590	0.000002	125.06
591	0.000002	125.06
592	0.0000	125.06
593	0.000002	125.06
594	0.00000	125.06
595	0.0000	125.06
596	0.000002	125.06
597	0.0000	125.06
598	0.000002	125.06
599	0.00000185	125.06
600	0.000002	125.06
601	0.0000018	125.06
602	0.000002	125.06
603	0.0000018	125.06
604	0.00	125.06
605	0.00000	125.06
606	0.0000018	125.06
607	0.000002	125.06
608	0.000002	125.06
609	0.0000017	125.06
610	0.000	125.06
611	0.0000017	125.06
612	0.0000017	125.06
613	0.0000017	125.06
614	0.00	125.06
615	0.00	125.06
616	0.000	125.05
617	0.0000017	125.05
618	0.0000017	125.05
619	0.0000017	125.05
620	0.000002	125.05
621	0.000002	125.05
622	0.0000016	125.05
623	0.000	125.05
624	0.0000	125.05
625	0.0000016	125.05
626	0.000002	125.05
627	0.00000	125.05
628	0.0000016	125.05
629	0.00000	125.05
630	0.000002	125.05
631	0.00	125.05
632	0.000002	125.05
633	0.0000015	125.05
634	0.0000015	125.05
635	0.0000015	125.05
636	0.0000015	125.05
637	0.000001	125.05
638	0.00	125.05
639	0.00000	125.05
640	0.00	125.05
641	0.0000	125.05
642	0.000001	125.05
643	0.000001	125.05
644	0.000001	125.05
645	0.000001	125.05
646	0.00000	125.05
647	0.0000014	125.05
648	0.000001	125.05
649	0.0000014	125.05
650	0.0000	125.04
651	0.0000	125.04
652	0.000001	125.04
653	0.00000	125.04
654	0.0000	125.04
655	0.0000013	125.04
656	0.000001	125.04
657	0.00000	125.04
658	0.000001	125.04
659	0.000001	125.04
660	0.0000013	125.04
661	0.0000013	125.04
662	0.000001	125.04
663	0.00000	125.04
664	0.0000013	125.04
665	0.000001	125.04
666	0.000001	125.04
667	0.0000013	125.04
668	0.000001	125.04
669	0.00	125.04
670	0.000	125.04
671	0.00	125.04
672	0.0000012	125.04
673	0.00	125.04
674	0.000001	125.04
675	0.000001	125.04
676	0.000001	125.04
677	0.0000012	125.04
678	0.0000012	125.04
679	0.00000	125.04
680	0.000001	125.04
681	0.000001	125.04
682	0.000001	125.04
683	0.0000012	125.04
684	0.00000	125.04
685	0.0000011	125.04
686	0.00000	125.04
687	0.000001	125.04
688	0.0000011	125.04
689	0.000001	125.04
690	0.0000011	125.04
691	0.000001	125.04
692	0.00000	125.04
693	0.000001	125.04
694	0.0000011	125.04
695	0.0000011	125.04
696	0.0000011	125.04
697	0.00	125.03
698	0.000001	125.03
699	0.000001	125.03
700	0.00	125.03
701	0.000001	125.03
702	0.00	125.03
703	0.00000104	125.03
704	0.00000	125.03
705	0.00000101	125.03
706	0.000001	125.03
707	0.00000	125.03
708	0.000	125.03

Industry member	% of total message traffic [107]	Quarterly CAT fee [108]
709	0.000001	125.03
710	0.0000010	125.03
711	0.000001	125.03
712	0.000001	125.03
713	0.000001	125.03
714	0.0000010	125.03
715	0.000001	125.03
716	0.00	125.03
717	0.00	125.03
718	0.000001	125.03
719	0.000001	125.03
720	0.0000009	125.03
721	0.000001	125.03
722	0.00	125.03
723	0.00	125.03
724	0.0000	125.03
725	0.00	125.03
726	0.00000	125.03
727	0.000001	125.03
728	0.0000	125.03
729	0.000001	125.03
730	0.00	125.03
731	0.0000009	125.03
732	0.00	125.03
733	0.000001	125.03
734	0.0000009	125.03
735	0.000001	125.03
736	0.0000	125.03
737	0.000001	125.03
738	0.000001	125.03
739	0.0000008	125.03
740	0.0000008	125.03
741	0.000001	125.03
742	0.0000008	125.03
743	0.000001	125.03
744	0.00000	125.03
745	0.00000	125.03
746	0.00	125.03
747	0.00	125.03
748	0.00000	125.03
749	0.000001	125.03
750	0.000001	125.03
751	0.000001	125.03
752	0.0000008	125.03
753	0.0000008	125.03
754	0.00	125.03
755	0.0000	125.03
756	0.0000008	125.03
757	0.00000	125.03
758	0.000001	125.03
759	0.0000	125.03
760	0.000	125.02
761	0.00000	125.02
762	0.00	125.02
763	0.00000	125.02
764	0.0000008	125.02
765	0.000	125.02
766	0.0000007	125.02
767	0.00	125.02
768	0.00000	125.02
769	0.0000007	125.02
770	0.0000007	125.02
771	0.0000	125.02
772	0.0000007	125.02
773	0.000001	125.02
774	0.000001	125.02
775	0.0000007	125.02
776	0.0000007	125.02
777	0.000001	125.02
778	0.000001	125.02
779	0.000001	125.02
780	0.00	125.02
781	0.000001	125.02
782	0.0000	125.02
783	0.000001	125.02
784	0.000001	125.02
785	0.0000007	125.02
786	0.0000007	125.02
787	0.0000007	125.02
788	0.0000007	125.02
789	0.0000007	125.02
790	0.0000	125.02
791	0.000001	125.02
792	0.0000006	125.02
793	0.000001	125.02
794	0.00000	125.02
795	0.000	125.02
796	0.000001	125.02
797	0.0000006	125.02
798	0.0000	125.02
799	0.00000	125.02
800	0.0000006	125.02
801	0.0000006	125.02
802	0.00000	125.02
803	0.00	125.02
804	0.000	125.02
805	0.0000006	125.02
806	0.00000	125.02
807	0.0000	125.02
808	0.00000058	125.02
809	0.000001	125.02
810	0.00000057	125.02
811	0.000001	125.02
812	0.00000	125.02
813	0.00000	125.02
814	0.00	125.02
815	0.00000	125.02
816	0.0000005	125.02
817	0.0000	125.02
818	0.0000005	125.02
819	0.000	125.02
820	0.000001	125.02
821	0.00000	125.02
822	0.000001	125.02
823	0.000001	125.02
824	0.00	125.02
825	0.00000	125.02
826	0.0000	125.02
827	0.00000	125.02
828	0.000000	125.02
829	0.0000005	125.02
830	0.00000	125.02
831	0.000	125.02
832	0.000000	125.02
833	0.00	125.02
834	0.0000005	125.02
835	0.00	125.02
836	0.000000	125.02
837	0.00000047	125.02
838	0.0000005	125.02
839	0.00000	125.02
840	0.0000005	125.01
841	0.000000	125.01
842	0.0000005	125.01
843	0.00000	125.01
844	0.0000004	125.01
845	0.000000	125.01
846	0.000000	125.01
847	0.00000	125.01
848	0.000000	125.01
849	0.0000	125.01
850	0.000000	125.01
851	0.000000	125.01
852	0.000000	125.01
853	0.00000	125.01
854	0.000000	125.01
855	0.00	125.01
856	0.000000	125.01
857	0.0000004	125.01
858	0.000000	125.01
859	0.0000004	125.01
860	0.00	125.01
861	0.00000	125.01
862	0.000000	125.01
863	0.0000	125.01
864	0.000	125.01
865	0.0000004	125.01
866	0.0000004	125.01
867	0.00	125.01
868	0.0000	125.01
869	0.00000037	125.01
870	0.000000	125.01
871	0.000000	125.01
872	0.000000	125.01
873	0.000	125.01
874	0.0000004	125.01
875	0.000000	125.01
876	0.0000	125.01
877	0.000000	125.01
878	0.000000	125.01
879	0.00000034	125.01
880	0.00000034	125.01
881	0.000000	125.01
882	0.00000	125.01
883	0.000000	125.01
884	0.000000	125.01
885	0.0000003	125.01
886	0.00000	125.01
887	0.000000	125.01
888	0.0000003	125.01
889	0.000000	125.01
890	0.000000	125.01
891	0.000000	125.01
892	0.000000	125.01
893	0.000	125.01
894	0.00000	125.01
895	0.0000	125.01
896	0.000	125.01
897	0.00	125.01
898	0.000000	125.01
899	0.000000	125.01
900	0.000000	125.01
901	0.0000003	125.01
902	0.000	125.01
903	0.00000	125.01
904	0.0000003	125.01
905	0.000	125.01
906	0.000000	125.01
907	0.000000	125.01
908	0.0000003	125.01
909	0.0000003	125.01
910	0.00000029	125.01
911	0.0000003	125.01
912	0.0000	125.01
913	0.000000	125.01
914	0.000000	125.01
915	0.00	125.01
916	0.00	125.01
917	0.000000	125.01
918	0.00000028	125.01
919	0.000000	125.01
920	0.000000	125.01
921	0.000000	125.01
922	0.0000003	125.01
923	0.0000003	125.01
924	0.00000	125.01
925	0.000000	125.01
926	0.0000003	125.01
927	0.00000	125.01
928	0.000	125.01
929	0.0000003	125.01
930	0.0000003	125.01
931	0.000000	125.01
932	0.0000003	125.01
933	0.0000	125.01
934	0.00	125.01
935	0.0000002	125.01
936	0.0000002	125.01
937	0.0000002	125.01
938	0.0000002	125.01
939	0.000000	125.01
940	0.00	125.01
941	0.00000	125.01
942	0.00	125.01
943	0.000000	125.01
944	0.00000	125.01
945	0.000000	125.01
946	0.000000	125.01
947	0.0000002	125.01
948	0.0000002	125.01
949	0.000000	125.01
950	0.0000002	125.01
951	0.0000002	125.01
952	0.00000	125.01
953	0.000000	125.01
954	0.0000	125.01

Industry member	% of total message traffic [107]	Quarterly CAT fee [108]
955	0.0000002	125.01
956	0.0000	125.01
957	0.000000	125.01
958	0.00	125.01
959	0.00000	125.01
960	0.0000002	125.01
961	0.000	125.01
962	0.0000002	125.01
963	0.0000	125.01
964	0.00000	125.01
965	0.0000002	125.01
966	0.000000	125.01
967	0.0000	125.01
968	0.0000002	125.01
969	0.00	125.01
970	0.0000	125.01
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[107] These percentages reflect the market maker discounts.

[108] These fees reflect the Maximum Industry Member CAT Fee, the Minimum Industry CAT Fee, and re-allocations related to the applications of the Minimum Industry Member CAT Fee and the Maximum Industry Member CAT Fee.



FEDERAL REGISTER

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No. 75 April 21, 2021

Part V

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Parts 223, 224, and 226
Endangered and Threatened Wildlife and Plants: Designating Critical Habitat for the Central America, Mexico, and Western North Pacific Distinct Population Segments of Humpback Whales; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223, 224, and 226

[Docket No. 210415–0080]

RIN 0648–BI06

Endangered and Threatened Wildlife and Plants: Designating Critical Habitat for the Central America, Mexico, and Western North Pacific Distinct Population Segments of Humpback Whales

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

ACTION: Final rule.

SUMMARY: We, the NMFS, issue this final rule to designate critical habitat for the endangered Western North Pacific distinct population segment (DPS), the endangered Central America DPS, and the threatened Mexico DPS of humpback whales (*Megaptera novaeangliae*) pursuant to section 4 of the Endangered Species Act (ESA). Specific areas designated as critical habitat for the Western North Pacific DPS of humpback whales contain approximately 59,411 square nautical miles (nmi²) of marine habitat in the North Pacific Ocean, including areas within the eastern Bering Sea and Gulf of Alaska. Specific areas designated as critical habitat for the Central America DPS of humpback whales contain approximately 48,521 nmi² of marine habitat in the North Pacific Ocean within the portions of the California Current Ecosystem off the coasts of Washington, Oregon, and California. Specific areas designated as critical habitat for the Mexico DPS of humpback whales contain approximately 116,098 nmi² of marine habitat in the North Pacific Ocean, including areas within portions of the eastern Bering Sea, Gulf of Alaska, and California Current Ecosystem.

DATES: This rule becomes effective on May 21, 2021.

ADDRESSES: This final rule, critical habitat maps, as well as documents supporting this final rule are available on our website (*www.fisheries.noaa.gov/species/humpback-whale#conservation-management*), or may be obtained by contacting Lisa Manning, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

FOR FURTHER INFORMATION CONTACT: Lisa Manning, NMFS, Office of Protected Resources, 301–427–8466.

SUPPLEMENTARY INFORMATION:

Background

Under the ESA, we are responsible for determining whether certain species are threatened or endangered, and, to the maximum extent prudent and determinable, designating critical habitat for endangered and threatened species at the time of listing (16 U.S.C. 1533(a)(3)(A)(i)). On September 8, 2016, we published a final rule that revised the listing of humpback whales under the ESA by removing the original, taxonomic-level species listing, and in its place listing four DPSs as endangered and one DPS as threatened (81 FR 62260). We also determined that nine additional DPSs did not warrant listing. Prior to this revision, the humpback whale had been listed as an endangered species in 1970 under the precursor to the ESA (the Endangered Species Conservation Act of 1969), and then transferred to the list of endangered species under the ESA. Although the ESA was later amended to require the designation of critical habitat for listed species, when humpback whales were originally listed, there was no statutory requirement to designate critical habitat for this species. Section 4(a)(3)(A)(i) of the ESA now requires that, to the maximum extent prudent and determinable, critical habitat be designated at the time of listing (16 U.S.C. 1533(a)(3)(A)(i)). Pursuant to implementing regulations at 50 CFR 424.12(g), critical habitat is not designated within foreign countries or in areas outside the jurisdiction of the United States. Thus, the listing of DPSs of humpback whales under the ESA in 2016 triggered the requirement to designate critical habitat, to the maximum extent prudent and determinable, for those DPSs occurring in areas under U.S. jurisdiction—specifically, the Central America (CAM), Mexico (MX), and Western North Pacific (WNP) DPSs. The statute and our regulations presume that designation is prudent except in relatively rare circumstances where a finding that it is not prudent may be appropriate (see 50 CFR 424.12(a)(1)).

In the final rule to list five DPSs of humpback whales, we concluded that critical habitat was not yet determinable, which had the effect of extending by one year the statutory deadline for designating critical habitat (16 U.S.C. 1533(b)(6)(C)(ii)). On March 15, 2018, the Center for Biological Diversity, Turtle Island Restoration Network, and the Wishtoyo Foundation filed a complaint seeking court-ordered deadlines for the issuance of proposed and final rules to designate critical habitat for the CAM, MX, and WNP DPSs of humpback whales. *See Center for Biological Diversity et al.* v. *National Marine Fisheries Service, et al.,* No. 3:18–cv–01628–EDL (N.D. Cal.). The parties entered into a settlement agreement with the approval and oversight of the court, and subsequently amended the dates specified in the original order. The amended settlement agreement stipulated that NMFS submit a proposed determination concerning the designation of critical habitat for these three DPSs to the **Federal Register** by September 26, 2019. This deadline was met and a proposed rule was published on October 9, 2019 (84 FR 54354). The parties recently agreed to extend the date for submission of the final rule to the **Federal Register** to April 15, 2021.

In 2018, a critical habitat review team (CHRT), consisting of biologists from NMFS and NOS, was convened to assess and evaluate information in support of a critical habitat designation for the CAM, MX, and WNP DPSs of humpback whales. Based on the Draft Biological Report (NMFS 2019a), the Draft Economic Analysis (IEc 2019), and the initial Draft Section 4(b)(2) Report (NMFS 2019b), we published a proposed rule (84 FR 54354, October 9, 2019) to designate critical habitat for all three DPSs. All of the areas proposed for designation serve as feeding habitat for the relevant listed DPSs and contain the essential biological feature of humpback whale prey. Approximately 78,690 nmi² of marine habitat within the eastern Bering Sea, around the eastern Aleutian Islands, and in the western Gulf of Alaska were proposed for designation for the WNP DPS. Approximately 48,459 nmi² of marine habitat within portions of the California Current Ecosystem (CCE) off the coasts of Washington, Oregon, and California were proposed for designation for the CAM DPS. Approximately 175,812 nmi² of marine habitat within eastern Bering Sea, around the eastern Aleutian Islands, in the Gulf of Alaska, and within CCE were proposed for the MX DPS. Based on consideration of economic impacts under section 4(b)(2) of the ESA, we proposed to exclude approximately 44,119 nmi² of marine habitat from the designation for the WNP DPS, approximately 12,966 nmi² of marine habitat from the designation for the CAM DPS, and approximately 30,527 nmi² of marine habitat from the designation for the MX DPS. Based on

consideration of national security impacts under section 4(b)(2) of the ESA, we also proposed to exclude approximately 48 nmi² of marine habitat from the critical habitat designation for the MX DPS in Southeast Alaska and about 1,522 nmi² of marine habitat off the coast of Washington from the designations for the CAM and MX DPSs.

We requested public comment on the proposed designations and supporting reports (*i.e.,* Draft Biological Report (NMFS 2019a), Draft Economic Analysis (IEc 2019a), and Draft Section 4(b)(2) Report (NMFS 2019b)) through December 9, 2019, and held five public hearings (84 FR 55530, October 17, 2019). In response to requests, we extended the public comment period through January 31, 2020 (84 FR 65346, November 27, 2019) and held a sixth public hearing (84 FR 65346, November 27, 2019). For a complete description of our proposed action, we refer the reader to the proposed rule (84 FR 54354, October 9, 2019).

This final rule describes the critical habitats for the CAM, MX, and WNP DPSs of humpback whales and the basis for the designations, including a summary of, and responses to, the significant public comments received. The following supporting documents provide detailed discussions of information and analyses that contributed to the conclusions presented in this final rule: Final Biological Report (NMFS 2020a), Final Economic Analysis (FEA; IEc 2020), and Final Section 4(b)(2) Report (NMFS 2020b). The Final Biological Report is a compilation of the best available scientific information as gathered and reviewed by the CHRT, and the FEA is the analysis of probable economic impacts associated with the critical habitat areas as conducted by economists contracted by NMFS (*i.e.,* Industrial Economics, Inc.). These reports, drafts of which were subjected to public and peer review, inform the final designation decision we, NMFS, set out here. The Final Section 4(b)(2) Report, prepared by NMFS, describes our analysis of the eligibility of areas for designation (under section 4(a)(3)(B)(i) of the ESA) as well the analysis of particular areas for exclusion from the designations (under section 4(b)(2) of the ESA). These supporting documents are referenced throughout this final rule.

Critical Habitat Definition and Process

Section 3(5)(A) of the ESA defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species (16 U.S.C. 1532(5)(A)). Certain areas owned or controlled by the Department of Defense are ineligible for designation (16 U.S.C. 1533(a)(3)(B)(i). Section 3(5)(C) of the ESA provides that, except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species. Under our implementing regulations, we may consider designating unoccupied areas that are essential for the conservation of the species only where a designation limited to occupied areas would be inadequate to ensure the conservation of the species (50 CFR 424.12(b)(2)).

''Conservation'' is defined in section 3(3) of the ESA as the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the ESA are no longer necessary (16 U.S.C. 1532(3)). Therefore, a critical habitat designation is not limited to the areas necessary for the survival of the species, but rather includes areas necessary for supporting the species' recovery. (*See Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F.3d 1059, 1070 (9th Cir. 2004) (''Clearly, then, the purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery.''), *amended on other grounds,* 387 F.3d 968 (9th Cir. 2004); *Alaska Oil and Gas Ass'n* v. *Jewell,* 815 F.3d 544, 555–56 (9th Cir. 2016).)

The United States Supreme Court has recently held that ''critical habitat'' must logically be a subset of the species' ''habitat'' that is ''critical.'' *Weyerhaeuser Co.* v. *U.S. Fish and Wildlife Service,* 139 S. Ct. 361, 368 (U.S. 2018). That issue arose in the context of a critical habitat designation by the U.S. Fish and Wildlife Service (USFWS) that included an area that was not currently occupied by the species. For areas within the occupied range of the species, such questions do not arise, because by definition if an area is occupied by the species at the time of listing, then it can be occupied as habitat by that species. The criteria in the ESA's definition of occupied critical habitat serve to validate that any area meeting that statutory definition is in fact habitat.

In determining whether the essential physical or biological features ''may require'' special management considerations or protection, it is necessary only to find that there is a possibility that the features may require special management considerations or protection in the future; it is not necessary to find that such management is presently or immediately required. *Home Builders Ass'n of N. California* v. *U.S. Fish and Wildlife Serv.,* 268 F. Supp. 2d 1197, 1218 (E.D. Cal. 2003). The relevant management need may be ''in the future based on possibility.'' *Bear Valley Mut. Water Co.* v. *Salazar,* No. SACV 11–01263–JVS, 2012 WL 5353353, at *25 (C.D. Cal. Oct. 17, 2012). *See also Cape Hatteras Access Pres. Alliance* v. *U.S. Dept. of Interior,* 731 F. Supp. 2d 15, 24 (D.D.C. 2010) (''The Court explained in CHAPA I that 'the word ''may'' indicates that the requirement for special considerations or protections need not be immediate' but must require special consideration or protection 'in the future.' '') (citing *Cape Hatteras Access Pres. Alliance* v. *U.S. Dept. of Interior,* 344 F. Supp. 2d 108, 123–24 (D.D.C. 2004)).

Section 4(b)(2) of the ESA requires the Secretary to designate critical habitat for threatened and endangered species on the basis of the best scientific data available and after taking into consideration various impacts of the designation (16 U.S.C. 1533(b)(2)). The first sentence of section 4(b)(2) requires the Secretary to take into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat (16 U.S.C. 1533(b)(2)). Regulations at 50 CFR 424.19(b) specify that, in carrying out this mandatory consideration, the Secretary will consider the ''probable'' impacts of the designation at a scale that the Secretary determines to be appropriate, and that such impacts may be qualitatively or quantitatively described. The Secretary will compare impacts with and without the designation (50 CFR 424.19(b)). This requires that we assess the incremental impacts attributable to the critical habitat designation relative to a baseline that reflects regulatory impacts that already exist in the absence of the critical habitat due to the protections afforded to the listed humpback whales under the ESA and from other statutes.

The second sentence of section 4(b)(2) describes a further process by which the Secretary may go beyond the mandatory consideration of impacts and weigh the benefits of excluding any particular area

(*i.e.,* avoiding the economic, national security, or other relevant impacts) against the benefits of designating it (primarily, the conservation value of the area). If the Secretary concludes that the benefits of excluding particular areas outweigh the benefits of designation, he may exclude the particular area(s), so long as he concludes on the basis of the best scientific and commercial data available that the exclusion will not result in extinction of the species (16 U.S.C. 1533(b)(2); 50 CFR 424.19(c)). NMFS and the USFWS have adopted a joint policy setting out non-binding guidance explaining generally how we exercise our discretion under section 4(b)(2) (see Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (''4(b)(2) Policy,'' 81 FR 7226, February 11, 2016)).

Critical habitat designations must be based on the best scientific data available, rather than the best scientific data *possible. Bldg. Indus. Ass'n. of Superior Cal.* v. *Norton,* 247 F.3d 1241, 1246–47 (D.C. Cir. 2001). *See also Alaska Oil & Gas Ass'n* v. *Jewell,* 815 F.3d 544, 555 (9th Cir. 2016) (The ESA ''requires use of the best available technology, not perfection.'') Provided that the best available information is sufficient to enable us to make a determination as required under the ESA, we must rely on it even though there is some degree of imperfection or uncertainty. *See Alaska* v. *Lubchenco,* 825 F. Supp. 2d 209, 223 (D.D.C. 2011) (''[E]ven if plaintiffs can poke some holes in the agency's models, that does not necessarily preclude a conclusion that these models are the best available science. Some degree of predictive error is inherent in the nature of mathematical modeling.''); *Oceana, Inc.* v. *Ross,* 321 F. Supp. 3d 128, 142 (D.D.C. 2018) (''[E]ven where data may be inconclusive, an agency must rely on the best available scientific information.''). There is no obligation to conduct independent studies and tests to acquire the best possible data. *Ross,* 321 F. Supp. 2d at 142 (citations omitted). *See also San Luis & Delta-Mendota Water Auth.* v. *Locke,* 776 F.3d 971, 995 (9th Cir. 2014) (holding that the best available science standard ''does not require an agency to conduct new tests or make decisions on data that does not yet exist.''); *Am. Wildlands* v. *Kempthorne,* 530 F.3d 991, 999 (D.C. Cir. 2008); *Southwest Ctr. for Biological Diversity* v. *Babbitt,* 215 F.3d 58, 60 (D.C. Cir. 2000) (''The 'best available data' requirement makes it clear that the Secretary has no obligation to conduct independent studies.'')

Once critical habitat is designated, section 7(a)(2) of the ESA requires Federal agencies to ensure that actions they authorize, fund, or carry out are not likely to destroy or adversely modify that habitat (16 U.S.C. 1536(a)(2)). This requirement is additional to the section 7(a)(2) requirement that Federal agencies ensure their actions are not likely to jeopardize the continued existence of ESA-listed species (sometimes referred to as the ''jeopardy'' standard). Specifying the geographic location of critical habitat also facilitates implementation of section 7(a)(1) of the ESA by identifying areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the ESA (16 U.S.C. 1536(a)(1)). Critical habitat requirements do not apply to citizens engaged in actions on private land that do not involve a Federal agency.

Summary of Changes From the Proposed Designations

We evaluated the comments and information received from the public during the public comment period and at public hearings. Based on our consideration of these comments and information and our reconsideration of issues discussed in the proposed rule, we have made several changes from the proposed designations. Below we briefly summarize these changes, which are discussed in further detail in the relevant responses to comment and other sections of this final rule.

(1) *Revised the essential feature.* In response to public comments requesting that we add specificity to the regulatory definition of the essential feature, we have revised the description of the prey essential feature, which as proposed read: ''Prey species, primarily euphausiids and small pelagic schooling fishes of sufficient quality, abundance, and accessibility within humpback whale feeding areas to support feeding and population growth.'' Multiple commenters expressed concerns that the proposed prey feature was too broad or vague, and requested that additional specificity be added to the description, including identifying particular prey species for each DPS as well as the relevant age-classes of those prey species. After thorough review of the best available scientific information, we have determined that it would be most consistent with the purposes of the ESA to add specific examples to the descriptions of the prey feature for each DPS. This will enable the public to have notice of primary prey species that are relied upon by each DPS. We have therefore revised the prey feature by including explicit references to certain prey species that have been recognized and documented as key prey species within the diet of humpback whales and that occur within the specific critical habitat areas of the listed DPSs. Because these species occur commonly and consistently in the whales' diets, we conclude that they are essential to the conservation of the particular DPS. The revised prey essential features that we adopt in this final rule are as follows:

CAM DPS: Prey species, primarily euphausiids (*Thysanoessa, Euphausia, Nyctiphanes,* and *Nematoscelis*) and small pelagic schooling fishes, such as Pacific sardine (*Sardinops sagax*), northern anchovy (*Engraulis mordax*), and Pacific herring (*Clupea pallasii*), of sufficient quality, abundance, and accessibility within humpback whale feeding areas to support feeding and population growth.

WNP DPS: Prey species, primarily euphausiids (*Thysanoessa and Euphausia*) and small pelagic schooling fishes, such as Pacific herring (*Clupea pallasii*), capelin (*Mallotus villosus*), juvenile walleye pollock (*Gadus chalcogrammus)* and Pacific sand lance (*Ammodytes personatus*) of sufficient quality, abundance, and accessibility within humpback whale feeding areas to support feeding and population growth.

MX DPS: Prey species, primarily euphausiids (*Thysanoessa, Euphausia, Nyctiphanes,* and *Nematoscelis*) and small pelagic schooling fishes, such as Pacific sardine (*Sardinops sagax*), northern anchovy (*Engraulis mordax*), Pacific herring (*Clupea pallasii*), capelin (*Mallotus villosus*), juvenile walleye pollock (*Gadus chalcogrammus*), and Pacific sand lance (*Ammodytes personatus*) of sufficient quality, abundance, and accessibility within humpback whale feeding areas to support feeding and population growth.

(2) *Excluded Unit 1, Bristol Bay Area, from the final designations for the WNP DPS.* In response to public comments regarding the data that were considered in our initial assessment of the relative conservation value of specific areas and how we considered those data (*e.g.,* that we had considered data that was not specific to the particular DPS), we reconvened a CHRT, refined the set of data considered and applied in the analysis for each DPS, and conducted a fresh assessment of the conservation value of each specific critical habitat area and for all three DPSs. In response to public comments, the CHRT placed greater emphasis during this reassessment on data regarding the distribution of whales from the particular listed DPSs (versus humpback whales generally). As a consequence of this additional review of the best

scientific data available, the CHRT concluded that there is insufficient information to evaluate the relative conservation value of Unit 1 specifically for the whales in the WNP DPS. The CHRT found that the available information for this specific area (which does not include any photo-identification or genetic data) is insufficient to permit reliable evaluation of the relative proportions of whales from the WNP or MX DPSs and the non-listed Hawaii population in Unit 1 or the predicted use of this area by WNP DPS whales. Therefore, the CHRT concluded that this area is ''data deficient'' with regard to its value for the WNP DPS whales. We agree with the conclusion that the available data do not permit a determination regarding the extent to which whales from the WNP DPS are relying on this particular area, their predicted use of this area, or the importance of this area to their conservation. Based on our consideration of the benefits of designating this area versus the estimated economic impacts associated with designating this area pursuant to section 4(b)(2) of the ESA, we conclude that the benefits of including this particular area are outweighed by the benefits of excluding this area from the designation for the WNP DPS. Therefore, Unit 1 is not included in the final critical habitat designation for this DPS.

(3) *Excluded Units 1, 4, 6, and 10 from the final designations for the MX DPS.* As discussed in the preceding paragraph, we received public comments expressing concerns regarding the data considered in our initial assessment of the relative conservation value of specific areas and how we considered that data. We also received extensive public comments and supporting information asserting that we had underestimated the economic impacts of the proposed designation and overestimated the conservation value of specific areas. Many of these comments were specific to Alaska, and in particular to Southeast Alaska (Unit 10). In response to public comments and new information received, we revised the economic analysis (see IEc 2020), and the relative conservation value of all specific areas were reassessed for each DPS by the CHRT (see NMFS 2020a).

As previously described, the CHRT's reassessment of the relative conservation value of the specific areas placed greater emphasis on the relative distribution of the listed whales (versus humpback whales generally) within each of the specific areas proposed for designation. As a result of this reassessment, and for the same reasons as described for the WNP DPS, the CHRT concluded that Unit 1 was ''data deficient;'' currently available data are not sufficient to reliably determine the relative proportions of humpback whales from different populations in Unit 1. In other words, the CHRT could not determine the extent to which MX DPS whales rely on this particular area, their predicted use of this area, or the importance of this area to the conservation of the MX DPS. Based on our consideration of the benefits of designating this area versus the estimated economic impacts associated with designating this area, we conclude that the benefits of designating this area for the MX DPS are outweighed by the benefits of excluding this particular area. Therefore, Unit 1 is not included in the final critical habitat designation for this DPS.

Based on the CHRT's reassessment of the relative conservation values of several specific areas occupied by the MX DPS, the qualitative conservation ratings (*i.e.,* ''very high,'' ''high,'' ''medium,'' and ''low'') were revised for several specific areas. As presented in detail in the Final Biological Report (NMFS 2020a), the conservation rating remained the same for eight habitat units, went down for seven habitat units, and increased for three habitat units. The conservation ratings for Units 4 (Central Peninsula Area), 6 (Cook Inlet Area), and 10 (Southeast Alaska) were revised from medium to low conservation value. As discussed in the Final Section 4(b)(2) Report (NMFS 2020b), based on a weighing of the benefits of designating these particular areas against the annualized estimated economic impacts resulting from designation for each particular area (which have been revised upwards by about $2,000 for Units 4 and 6 and by about $14,000 for Unit 10; see IEc 2020), we conclude that the benefits of including these particular areas in the designation are outweighed by the benefits of excluding the particular areas. Thus, Units 4, 6, and 10 are not included in the final critical habitat designation for the MX DPS of humpback whales.

(4) *Reduced the area excluded for the Quinault Range Site.* In response to public comments expressing opposition to the proposed exclusion of the Department of the Navy's (''Navy'') requested exclusion of the Quinault Range Site (QRS), a Naval training and testing area off the coast of Washington, and a 10-km buffer around the QRS, we reviewed and reconsidered the information supporting this proposed national security exclusion. Following thorough consideration of the public comments and additional information submitted by the Navy in support of their requested exclusion, we have reduced the extent of the 10-km buffer where the QRS overlaps with the Olympic Coast National Marine Sanctuary (OCNMS). As detailed in the Section 4(b)(2) Report (NMFS 2020b), the benefits of designating critical habitat for the MX and CAM DPSs within this portion of the buffer was not found to be outweighed by national security impacts of including that portion. This change represents a reduction in the size of the area being excluded from critical habitat—from a proposed exclusion of about 1,522 nmi^2 to 1,461 nmi^2 for the QRS and associated, reduced buffer.

(5) Added regulatory language to clarify that the critical habitat does not include manmade structures (e.g., ferry docks, seaplane facilities). In response to a request for clarification of the extent of the critical habitat, we have added language to the final regulation to clarify that the critical habitat designations do not include manmade structures that are within the areas being designated. Specifically, we have added the following regulatory text: ''Critical habitat does not include manmade structures (*e.g.,* ferry docks, sea plane facilities) and the land on which they rest within the critical habitat boundaries and that were in existence as of May 21, 2021.''

Summary of Public Comments and Responses

We requested public comments on the proposed rule to designate critical habitat for the Western North Pacific, Central America, and Mexico DPSs of humpback whales, and on the supporting documents (*i.e.,* the draft Biological Report (NMFS 2019a), draft Economic Analysis (IEc 2019a), and draft ESA Section 4(b)(2) Report (NMFS 2019b)), which were made available on the Federal eRulemaking Portal (*www.regulations.gov*) and the NOAA Fisheries website (*www.fisheries.noaa.gov*). Public comments were received over a 115-day period ending on January 31, 2020, via standard mail, email, the Federal eRulemaking Portal, and at six public hearings. Public comments are posted on the Federal eRulemaking Portal (docket number: NOAA–NMFS–2019–0066). All public comments and significant new information received through the comment and hearings period have been reviewed and fully considered in developing the final critical habitat designation.

We received over 180 public comment submissions through *www.regulations.gov* and over a dozen comment submissions during the public hearings. Comments were received from a range of sources that included individual members of the public, a federally recognized Indian Tribe and tribal organizations, state and local officials, foreign governments, state natural resources agencies, other Federal agencies (*e.g.,* the Marine Mammal Commission, NOAA's National Ocean Service National Marine Sanctuaries Program), commercial fishing and other professional trade associations, seafood companies, the North Pacific Fishery Management Council, scientific organizations, and environmental organizations. One comment letter included signatures of 17,675 people in support of the proposed designations, and another submission included a spreadsheet with similar written comments from 16,554 individuals, most of whom expressed concerns regarding entanglement and ship strikes and urged us to quickly designate all areas considered and add a sound-related essential feature. In general, comments expressed support for the designations, requested some changes to the proposed designations, or expressed opposition to the designation of one or more specific areas. A large majority of the comment submissions that expressed concern or opposition to the proposed designations pertained to proposed critical habitat areas in Alaska.

Summaries of the substantive public comments received and our responses are provided below by topic. Similar comments are combined where appropriate. We did not consider, and do not include below, comments that were not germane to the proposed critical habitat rule. Such unrelated comments addressed issues other than critical habitat designation, such as the 2016 revision of the listing of humpback whales under the ESA, delisting of humpback whale DPSs, funding for humpback whale monitoring, development of recovery plans for the listed humpback whale DPSs, and expansion of critical habitat for North Pacific right whales.

Economic Impacts of Critical Habitat Designation

Comment 1: Multiple commenters stated that the 2019 draft economic analysis (DEA) underestimated the impacts of the proposed critical habitat designation because it only quantifies the incremental administrative costs associated with interagency consultations on Federal actions pursuant to section 7(a)(2) of the ESA (16 U.S.C. 1536(a)(2)). Several of these commenters also suggested that the economic analysis only quantified costs to NMFS and other governmental agencies and does not include costs to local residents, stakeholders, and governments that undertake activities with a Federal nexus. These commenters requested an expanded economic analysis that would take into account impacts to small communities, industries, and state/local governments. One commenter suggested discussion of qualitative economic metrics including indirect costs, risks, and economic vulnerability.

Response: As described in Section 1.3.3 of the FEA, the economic analysis considers multiple potential categories of impacts that may result from the critical habitat designation. In addition to administrative costs of section 7 consultations, the analysis evaluates the potential for costs resulting from additional conservation efforts for the humpback whales that may be recommended through consultation, as well as the potential for indirect impacts (not related to section 7 outcomes), such as project delays or regulatory uncertainty. (Note: The term ''conservation efforts'' is used throughout the FEA and in this final rule as a generic term to refer to efforts that NMFS may identify through formal consultation to avoid destruction and adverse modification of critical habitat (*i.e.,* reasonable and prudent alternatives), measures that NMFS may suggest through formal or informal consultation to avoid adverse effects of an action (*i.e.,* conservation recommendations), and efforts that action agencies or other entities may otherwise undertake to avoid adverse effects of projects or activities on the humpback whale and/or its habitat.) As summarized in Section 2.2, the economic analysis finds that it is most likely that the costs resulting from critical habitat designation will be largely limited to the administrative costs of consultation, with the potential for some additional costs to result from in-water construction and dam-related project delays that may occur following designation. However, the best available data provide no basis to identify whether and for how long project delays may occur. Therefore, the potential for time delays and associated costs are described qualitatively in the report.

The costs of the designation are largely administrative because we do not presently anticipate recommending incremental changes to agency actions as a result of the designation of critical habitat for the majority of forecasted activities. For most of the activities for which we can project the likelihood of a consultation, consultation would have already been required in order to ensure the action would not jeopardize the continued existence of the listed whales, due to the presence of the whales, and the newly arising obligation to also consider potential destruction or adverse modification of critical habitat is not expected generally to change the outcomes of such consultations. For certain activities (*e.g.,* the Coastal Pelagic Species (CPS) commercial fishery), previous consultations on the activity have not analyzed the impacts of removal of prey species on humpback whales due to lack of quantitative tools necessary to assess the biomass requirements to support humpback whales and other predators under varying ecosystem conditions and specify the indirect impacts of removal of biomass of a particular prey species. Future consultations on the CPS fisheries are likely to consider potential effects of prey removal on humpback whales and their habitat to the extent possible on the basis of the best information available at such time. The analysis of whether a project or activity is likely to result in adverse modification of critical habitat, and the specific recommendations we may make through section 7 consultation to avoid destruction or adverse modification, are project specific. We cannot speculate about the outcome of future consultations, but rather must base both our designation and the future consultations on the best available data at the time our agency decisions are undertaken. At present, we are not able to identify a circumstance under which it is likely that the conservation efforts recommended for the humpback whales would be greater or different due to the designation of critical habitat.

The revised economic analysis highlights key areas of uncertainty associated with this conclusion and presents that information alongside the quantified impacts. In particular, public comments from the State of Alaska and other entities identified the potential for project delays related to in-water construction and dam relicensing to result from the critical habitat designation. Public comments did not identify any particular instances of critical habitat designations across the region specifically resulting in a project delay, and we were not able to find such examples through additional outreach to state agencies (*e.g.,* Alaska Department of Environmental Conservation, Alaska Department of Transportation and Public Facilities). We agree with the

commenters that, if likely to occur, the costs of time delays specifically tied to the designation would be considered costs of the rule. However, the best available data provide no basis to identify whether and for how long project delays may occur. Therefore, we conclude that such impacts are not probable impacts of the designation (see 50 CFR 424.19(b)). Nevertheless, to the extent possible, the potential for time delays and associated costs are described qualitatively in the report. We considered both the quantitative results and qualitative discussion of potential unquantified impacts and the associated uncertainty when weighing the benefits of excluding particular areas from the critical habitat designation against the benefits of including those areas.

The administrative costs quantified in the economic analysis are not limited to the costs of consultation that would be borne by NMFS and other governmental agencies. As shown in Exhibit 1–3 of the FEA, the analysis estimates administrative costs for each forecasted consultation to NMFS, a hypothetical Federal action agency, and a hypothetical third party. A third party having an interest in a section 7 consultation could be a private company (*e.g.,* an applicant for a Federal permit), a local or state government, or some other entity. The FEA clarifies that third-party administrative costs are quantified, and expands on the potential for other impacts to non-Federal entities as a result of critical habitat designation. Based on information provided during the public comment period, the FEA includes more detailed discussion of concerns related to the potential, unquantified economic impacts of the designation in Alaska. Although the FEA finds that the quantified costs of designation are limited to the administrative costs of section 7 analysis incurred by NMFS, Federal action agencies, and third parties, the FEA highlights in Section 2.2 the State of Alaska's concerns related to potential unquantified costs, and discusses the potential for indirect or unquantified direct impacts related to certain activities throughout Chapter 2.

Comment 2: Multiple commenters expressed concern that the critical habitat designation will place a disproportionate burden on rural Alaskan communities. One commenter noted that rural Alaskan communities already face economic threats including recent ferry reductions, cuts to municipal revenues, and reductions in Chinook salmon harvests. Several commenters noted that commercial fishing is the most important industry in many Alaskan communities and any impacts to fishing would have broad effects on the economy. One local government noted that it is dependent on fish tax revenue. Another commenter noted that harbor construction and hydropower projects are already difficult for small communities to afford. Multiple commenters requested that we expand on baseline socioeconomic conditions in rural Alaskan communities and further assess potential adverse impacts to coastal economies. Multiple commenters requested that we exclude Southeast Alaska (Unit 10) due to the economic reliance of small coastal communities on the commercial fishing industry.

Response: Given the importance of marine resource-based industries to rural Alaskan communities and that alternative economic opportunities are more limited in these areas, we agree that these communities would be more vulnerable to any additional costs of consultation or required conservation efforts resulting from the designation of humpback whale critical habitat. In response to this comment, the FEA includes additional discussion in Sections 2.3.1 and 2.6.1 highlighting the value of fisheries and in-water construction and port infrastructure to these communities. The FEA highlights that added costs to these activities may affect these communities more than other, more populated and economically diverse communities. However, as described in Sections 2.3.1 and 2.6.1., the analysis finds that the only direct incremental costs of the critical habitat designations relative to these activities will be administrative costs associated with participation in section 7 consultation. This is primarily because Federal agency actions in or near the proposed critical habitat areas, including federally managed fisheries, predominantly involve activities for which consultations under section 7 of the ESA already consider effects to listed humpback whales via effects on the whales' prey. Additionally, Alaska fisheries that target the primary prey species for humpback whales that are not federally managed are not subject to section 7 consultation (*e.g.,* the state-managed herring fishery). Thus, the critical habitat designation is not expected to change the viability or management of development projects of small Alaskan communities or commercial fishing activities. The analysis does, however, identify the potential for some costs to be incurred as a result of delays in in-water construction activities and dam relicensing, though the potential for these costs is uncertain. To the extent that these costs are incurred, they would be an incremental impact of the rule. As noted in response to Comment 1, this impact is highlighted as a key uncertainty of the analysis.

As discussed in more detail later, in response to Comment 43, and in the Final Section 4(b)(2) Report, Southeast Alaska (Unit 10) is excluded from the final critical habitat designation for the MX DPS. This particular area is forecasted to have disproportionately high estimated administrative costs relative to other areas and was rated as having a low conservation value for the MX DPS whales. Thus, we concluded that the benefits of excluding this area outweigh the benefits of including this particular area in the designation of critical habitat for the MX DPS.

Comment 3: Multiple commenters stated that the DEA underestimated the costs of the proposed critical habitat designation on Alaskan fisheries. Commenters requested that the economic analysis assess the costs associated with potential changes to fisheries management actions, including gear restrictions and time and area closures and restrictions, for both commercial and recreational fisheries. Commenters requested an analysis of direct costs of such management actions (*e.g.,* loss of revenues) as well as broader impacts on coastal communities dependent on the seafood industry. Several commenters acknowledged that we do not presently anticipate any additional conservation efforts as a result of critical habitat designation, but noted that if this assumption proves false or changes in the future then there could be significant economic impacts in Alaska.

Response: The economic analysis recognizes the importance of fisheries to Alaskan communities and economies. In response to these comments, Section 2.3.1 of the FEA includes an expanded description of the importance of the fishing industry to Alaska, and to small, rural communities in particular, including information on the value of fisheries in each of the proposed critical habitat units. It further discusses the state's concerns related to the potential for fishery management actions to be required through future consultations, such as fishery closures or limiting the harvest of humpback whale prey species. The FEA quantifies costs of consultations on fishery management plans in Alaska, including a total of four anticipated consultations on the Fishery Management Plans for the Bering Sea/Aleutian Island and Gulf of Alaska groundfish fisheries and the Pacific halibut fishery over the next ten years.

However, as described in Section 2.3.1 of the FEA, we do not presently anticipate the critical habitat designations for humpback whales will require changes to management of these fisheries because humpback whale prey species are either not targeted by those fisheries or are not taken in significant amounts overall.

In developing the final economic analysis and in order to respond to the comments received, we sought relevant information from the State of Alaska to understand how the state-managed herring fishery, which does target humpback whale prey, may be affected by the designations. Absent a Federal nexus requiring consultation, any conservation efforts undertaken to change practices in the state-managed fishery in response to the rule would be the state's decision, and communications with the state did not indicate that the state expects to take any such actions absent a regulatory requirement from NMFS to do so. Because we are not proposing any such regulations, the FEA's quantified costs are limited to those administrative costs incurred as a result of section 7 consultation on Federal actions including Federal fishery management plans. We conclude that it would be erroneous to quantify costs associated with hypothetical management actions that are not anticipated outcomes of this critical habitat rule.

Comment 4: Several commenters based in Alaska noted that prior to the designation of critical habitat for Steller sea lions (*Eumetopias jubatus*), NMFS did not predict that changes to fisheries management would be required. However, subsequent to the designation, NMFS has closed multiple fisheries to protect Steller sea lions. Commenters are concerned that we may not anticipate management actions in the short-term, but closures could occur in the future as happened with Steller sea lions.

Response: In response to public comments received and communications with the State of Alaska, Section 2.3.1.3 of the FEA includes a discussion of fisheries closures for Steller sea lions and their critical habitat, and the potential relevance to the designation of critical habitat for humpback whales. As noted in the discussion, we do not currently anticipate any restrictions of Federal fisheries for humpback whale prey species to result from the critical habitat. In addition, the State of Alaska, which manages a fishery for a primary prey species for humpback whales in Alaska (Pacific herring), has not indicated any intent to limit the geographic extent or level of harvest in that fishery as a result of critical habitat designation absent a regulatory requirement from NMFS to do so.

Comment 5: Multiple commenters from Alaska expressed concern that the critical habitat designation could result in changes to the management of humpback prey species, including herring. One local government added that herring fisheries are important to the local economy as well as subsistence harvesters and that the impacts of any changes to herring fishery management were not adequately considered.

Response: In response to this comment, the FEA includes a more detailed discussion of the economic importance of the herring fishery to the state and in particular, to Southeast Alaska. However, there is no Federal nexus with the Alaska commercial and subsistence Pacific herring fisheries, which are managed by the State of Alaska, and therefore there is no requirement for the state to engage in section 7 consultation with NMFS regarding humpback whale critical habitat. Any restriction of these herring fisheries in Alaska would be at the state's discretion. This is discussed in Section 2.3.1.3 and Section 3.2.4 of the FEA. Subsistence harvest for humpback whale prey species (*e.g.,* herring and capelin) occurs within some Federal waters off Alaska and is regulated through the Federal Subsistence Management Program. According to information from the Office of Subsistence Management at the USFWS and the Alaska Region of the U.S. Forest Service, overall participation is low and harvest levels of humpback whale prey species are low across all areas covered in this program, especially relative to harvest in the state managed fisheries. Given the nature of these activities and the limited harvest, we do not anticipate any additional management measures would likely be required for these activities as a result of the critical habitat designations.

Comment 6: Several commenters requested that the economic analysis present data on the economic importance of the seafood industry to Alaskan communities. Two commenters referenced economic information on Alaska's seafood industry available from the Alaska Seafood Marketing Institute.

Response: Section 2.3.1 of the FEA incorporates information provided by the commenters on the economic importance of the seafood industry to describe employment in the industry and tax contributions to the state and local governments made by related businesses. However, because we do not anticipate any changes to fisheries management due to the critical habitat designations (see responses to previous comments), the FEA does not anticipate impacts to the seafood industry.

Comment 7: Multiple commenters requested that we clarify which Alaskan fisheries will be affected by the proposed critical habitat designation, including state-managed fisheries and federally managed fisheries.

Response: The FEA provides a discussion of the relevant Federal fisheries in Alaska that are subject to the requirements of section 7 of the ESA and thus could be affected by this rule. NMFS' authority to prescribe alternatives to an agency action or to recommend conservation efforts to avoid destruction or adverse modification of critical habitat as a result of a designation is through section 7 consultation, which applies only to fisheries with a Federal nexus. Because prey are identified as the essential biological feature for humpback whales, the fisheries of greatest relevance to this analysis are those Federal fisheries that harvest prey species used by humpback whales such as Pacific sardine (*Sardinops sagax*), northern anchovy (*Engraulis mordax*), capelin (*Mallotus villosus*), and juvenile pollock (*Gadus chalcogrammus*). Thus, theoretically, fishing activities that adversely affect these species would have the greatest potential to result in destruction or adverse modification of critical habitat. However, because prey species are also important to ensuring Federal agencies avoid jeopardizing the listed whales and to protecting these whales under the Marine Mammal Protection Act (MMPA), NMFS already considers how fisheries for the prey species may affect whales and provides recommendations via section 7 consultation, even without any critical habitat designation. We do not expect particular changes in the management of these fisheries to result specifically from the critical habitat designation.

Geographic overlap with the critical habitat designation alone is not indicative of the potential for the critical habitat designation to affect a fishery. Absent a Federal nexus, incremental impacts of this critical habitat rule may also occur if a state elects to change the management of its own fisheries as a result of the critical habitat designation. As discussed in the FEA, the State of Alaska, which manages the fishery for one of the whales' primary prey species in Alaska (herring), has not indicated an intent to limit the geographic extent or level of harvest in that fishery as a result of critical habitat designation absent a regulatory requirement from NMFS to do so.

Comment 8: Numerous commenters stressed the need for the economic analysis to consider the value of and potential impacts to fisheries and associated communities in California, Oregon, and Washington. Several commenters noted that closing areas in California to fishing would have a substantial impact on communities and families. Another commenter added that any restrictions on fishing could harm the livelihoods of thousands of fishermen and coastal communities all along the U.S. West Coast. This commenter noted that the Dungeness crab fishery is particularly economically valuable and requested that we exclude all Dungeness crab fishing areas from the designation to avoid catastrophic economic impacts. Another commenter noted that the critical habitat overlaps with many fisheries in Washington State, including Dungeness crab, albacore tuna, whiting/pollock, pink shrimp, groundfish, hagfish, and other fin and shellfish. The commenter stated that the combined ex-vessel value of these fisheries was over $75 million in 2019, and that many Washington coastal communities are dependent on these fisheries. Another commenter noted that commercial fisheries in Oregon landed over $150 million in ex-vessel value in 2019. This commenter added that any restrictions on Oregon fisheries as a result of the critical habitat designations could have a significant economic impact on Oregon. Another commenter stated that if NMFS anticipates any commercial fisheries closures as a result of critical habitat, the costs of those closures must be analyzed.

Response: The FEA recognizes the economic value of fisheries to communities in Washington, Oregon, and California (see Section 2.3.2 of the FEA). We note that most of the commercially-harvested species referenced in the comments are managed by the states (*e.g.,* Dungeness crab) and/or are not humpback whale prey species (*e.g.,* crab, tuna, shrimp, hagfish). Therefore, we do not anticipate that any additional conservation efforts, including closing areas to fishing, will be required as a result of the designations of critical habitat. However, as discussed in Section 2.3 of the FEA, the CPS fishery is a federally managed fishery that does directly target primary prey species for humpback whales. Thus, this particular fishery may affect the identified essential feature of the designated critical habitats. The FEA discusses and we acknowledge that while additional conservation efforts, such as stock assessments or changes in restrictions to the annual catch limits in the CPS fishery are theoretically possible, it is unlikely that the need to consider adverse modification would trigger different conservation efforts than would already result from such consultations due to the need to consider the potential for this fishery to take or jeopardize the species even without a critical habitat designation.

The Dungeness crab fishery occurs within important humpback whale feeding areas for the MX DPS and within the only documented feeding habitat for the CAM DPS of humpback whales. Because there are no anticipated economic impacts on the Dungeness crab fishery stemming from the critical habitat designations, there is no basis to exclude this area from the designations.

Comment 9: One commenter expressed concern about the potential impacts of critical habitat designation on the CPS fishery. In particular, the commenter was concerned that the prey element of critical habitat could lead to lawsuits aimed at imposing additional management restrictions on the CPS fishery. Additionally, the commenter stated that the economic analysis failed to consider potential negative impacts to local fishing communities and families, and did not capture the full economic contribution of the CPS fishery, including the role of the CPS fishery as live bait for recreational fisheries along the entire U.S. West Coast.

Response: Any new conservation efforts in the CPS fishery resulting from the critical habitat designation would have the potential to impact the fishing industry and fishing-dependent communities. However, as described in Section 2.3.2.1 of the FEA, we do not anticipate that any additional conservation efforts, including closing areas to fishing, will be required solely as a result of the designation of critical habitat, and any further conservation measures that could potentially be required in the future for this fishery are not expected to differ from those that would already be required to avoid jeopardizing the listed whales. Previous consultations on the fishery have considered but not included a quantitative analysis of the impacts of removal of prey species on humpback whales due to lack of data and the necessary analytical tools. Future consultations on the CPS fisheries are likely to consider potential effects on humpback whales and their habitat to the extent possible on the basis of the best information available at such time. However, as previously stated, critical habitat is not expected to affect conservation efforts recommended as part of these consultations, because of the importance of prey availability when considering potential for jeopardy to the whales.

Comment 10: Several commenters expressed concern that critical habitat designation could result in added costs for in-water construction projects through delays, additional staff time, the hiring of consultants and attorneys, and compliance with conditions set forth in the Federal permitting process. Commenters noted that construction projects are already subject to significant delays and permitting costs due to the MMPA, critical habitat for other species (including Steller sea lions), and other Federal and state laws. One commenter noted that regulatory costs for waterfront projects can already run into the hundreds of thousands of dollars without critical habitat in place. As a result, the commenter expressed skepticism that the comparatively minor administrative costs included in the economic analysis reflect a full accounting of the potential costs of critical habitat designation on in-water projects.

Response: Section 2.6.1 of the FEA acknowledges the concern that additional regulatory burden introduced through the critical habitat designations may generate project delays, and identifies this as an uncertain and potential unquantified cost of the rule. The FEA does quantify some additional time required to consider adverse modification as part of the section 7 consultation process. This additional time, as reflected in the incremental administrative costs, is most likely minor as it is unlikely that the proposed critical habitat designation will result in changes in the outcome of future section 7 consultations on in-water construction activities. As indicated in the discussions in section 2.6 of the FEA, existing baseline protections for the whales, other marine mammals, and water quality, are likely to confer a high level of protection for humpback whale prey species and humpback whale feeding activity. However, the costs related to permitting and delays for in-water construction described in this comment are attributable to preexisting protections such as the MMPA or existing critical habitat designations for other species and are therefore part of the baseline of the economic analysis. That is, they are costs associated with species protection that would be incurred regardless of whether humpback whale critical habitat is designated and are therefore not included as incremental costs of this rule. The fact that requirements for in-water construction relative to the MMPA are already in place, and that

these costs are already incurred, supports the FEA finding that substantial baseline protections exist for the humpback whales.

Comment 11: The Alaska Department of Transportation and Public Facilities (DOT&PF) noted that as early as May 2020 they could have four projects start in-water construction, and that they have six planned projects that could enter section 7 consultation this year. Alaska DOT&PF expressed concern that critical habitat designation could require consultations on these projects to be reinitiated and that in-water work could be shut down during the reinitiation process. Alaska DOT&PF noted that stopping or delaying projects would result in significant economic impacts.

Response: Section 2.6.1 of the FEA discusses the potential costs that could be incurred should the critical habitat designation result in project delays. Regulations at 50 CFR 402.16(a) require Federal agencies that have retained discretionary involvement or control over an action, or where such discretionary involvement or control is authorized by law, to reinitiate consultation on previously reviewed actions in instances where: (1) New information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (2) the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or (3) a new species is listed or critical habitat designated that may be affected by the identified action (50 CFR 402.16(a)(2)–(4)). Consequently, some Federal agencies may request (or we may recommend) reinitiation of consultation on actions for which consultation has been completed, if those actions may affect designated critical habitat for the humpback whales. However, we do not anticipate that any such projects would experience significant delays due to reinitiation of consultation to take into account impacts on critical habitat, because adverse effects to prey species for humpback whales are generally already considered as part of the analysis of the proposed action's impacts to the species as part of the jeopardy analysis. Even if consultation is reinitiated for such projects, this would not necessarily require in-water work to be shut down during consultation, which would need to be assessed in the context of each situation and taking into account the requirements of section 7(d).

Comment 12: Numerous comments stated that the DEA did not adequately evaluate the potential for economic impacts to hatchery operations in Alaska. One commenter expressed concern that critical habitat designation could adversely impact operations at existing hatcheries and delay or prevent the permitting of new facilities. Another commenter added that the guided recreational fishing industry in Alaska relies on salmon hatcheries to subsidize wild stocks, thus any impacts to hatcheries would also impact the charter fishing industry.

Response: Section 2.8 of the FEA has been expanded to include a more specific discussion of salmon hatcheries as an industry with the potential to be affected by the critical habitat designation, and notes the concerns expressed in the comments regarding potential economic impacts. However, as noted in the report, the analysis finds that the anticipated costs associated with this industry are minimal. The Alaska Region of NMFS has received only infrequent consultation requests related to salmon hatchery operations; in certain limited cases, informal section 7 consultations have been requested (Letters of Concurrence), resulting in some administrative costs, which are captured in the analysis. Follow-up conversations with the Alaska Department of Fish and Game (ADF&G) confirmed that no specific type or extent of costs are missing from the analysis as it relates to this activity.

Comment 13: Multiple commenters stated that the DEA did not consider the potential impact of critical habitat designation on mariculture activities, including the shellfish and seaweed industries, in Alaska, particularly Southeast Alaska. Commenters stated that both of these industries are expected to grow substantially in the near future. One commenter specified that the seaweed industry in Alaska is still in its infancy and that any additional impacts due to critical habitat could be particularly damaging. The commenter noted that the existing state and Federal permitting process already takes upwards of two years.

Response: In response to this comment and based on information provided by ADF&G in response to outreach from the contracted economic firm (Industrial Economics, Inc.), the FEA estimates 12 consultations per year will occur for these federally permitted activities, which increases the anticipated economic impacts on this activity from what was presented in the DEA. Section 2.8 of the FEA includes an expanded discussion of the multiple types of aquaculture activities in Alaska that are carried out within the proposed critical habitat, the role of the state in managing these activities, and the status of the industry and predicted future trajectory. It discusses state-level initiatives promoting and seeking to expand the growth of aquaculture in the state, resulting in an anticipated increase in activity levels in the future, but explains that the state is not able at this time to anticipate the future levels of activity. The DEA relied upon the history of consultations for these activities in Alaska to estimate the number and location of future activities to develop an estimate of the administrative costs that would likely result from the designation. Prior to 2014, an Aquaculture General Permit issued by the U.S. Army Corps of Engineers (Corps) covered most aquatic farm permits, limiting the need for individual consultations. This General Permit expired in 2014. As described in Section 2.8, the expiration of the General Permit and the recognition by the Corps of a broader array of potential impacts on listed species from these activities is expected to increase the number of consultations in the future. These developments have resulted in an increased anticipated number of consultations, which is now reflected in the FEA.

Comment 14: One commenter stated that the impacts assessment only considers present conditions and expressed concern regarding implications for future activities.

Response: The FEA acknowledges that the level and locations of many activities change over time. This fact is particularly relevant in the case of emerging activities such as renewable energy development. To the extent possible, given available supporting data, the analysis relies upon planning documents and information from Federal action and state agencies to project the best possible forecast of the future rate, location, and types of activities that are likely to be subject to section 7 consultation over the next ten years. For example, in the case of aquaculture and hatcheries, the State of Alaska informed us that they expect the level of activity to increase over the next ten years from current levels. In response to this information, the FEA now reflects a higher rate of activity (12 consultations per year) in Alaska than the level estimated in the DEA.

Comment 15: The Alaska Department of Environmental Conservation (ADEC) stated that the economic analysis did not include certain costs to state agencies. They stated that the economic analysis did not acknowledge that pursuant to the Clean Water Act (CWA),

the State of Alaska has had primacy over the Alaska Pollutant Discharge Elimination System (APDES) since 2012. ADEC requested that the economic analysis include costs to the Alaska state government for consideration of critical habitat during consultation on individual and general permits under the CWA and provided information on the number and nature of these consultations. They also specified that the cost estimates in the report for consultations with the Corps on CWA section 404 permits should include the cost to ADEC for issuing a Section 401 Certificate of Reasonable Assurance (''401 Certification'') confirming that state water quality standards are being met. ADEC stated that economic impacts are underestimated without including these state permitting actions.

Response: In response to this comment and based on information provided by ADEC with their comment and in response to outreach, Section 2.12 of the FEA clarifies Alaska's role in National Pollutant Discharge Elimination System (NPDES) permitting and development of water quality standards, including administration of General Permits for seafood discharges and cruise ship discharges, through the APDES program. It further describes that the state presently devotes substantial effort and resources to ensuring that its water quality management activities are protective of listed species and their habitat, even absent designated critical habitat for humpback whales. However, the state agency is not required to consult with NMFS on individual discharge permits under section 7 and, according to information provided by ADEC, the state agency incurs minimal costs during permit development associated with demonstrating a discharge will not adversely affect an endangered species. As such, designation of critical habitat is unlikely to result in any incremental costs to the state outside of the administrative costs that would already be associated with regular re-issuance of the two general permits, which are reflected in the FEA.

Comment 16: One local government in Southeast Alaska expressed concern that critical habitat designation could add delays and costs to the Federal Energy Regulatory Commission's (FERC) licensing and oversight process for power plants. The commenter also stated that any changes to the NPDES discharge permit for a local wastewater treatment plant due to the critical habitat designation would negatively affect citizen rate payers who fund the operation of the plant.

Response: The additional time, cost, and effort associated with consultations subsequent to critical habitat designation is included in the administrative costs captured in the analysis. Specifically, the analysis assumes these costs would be incurred for consultations on three dam-related activities in Unit 10 (Southeast Alaska) over the next 10 years. Delays in FERC dam relicensing resulting from the critical habitat designation, to the extent any are likely to occur, that are not already captured by those costs would be an incremental impact of the rule. Consultations between NMFS and FERC during the past 10 years on dam-related activities in Southeast Alaska have been completed through informal consultations that considered impacts to listed humpback whales as well as Steller sea lions. Based on our consultation record on such projects in Southeast Alaska, we do not anticipate that the additional consideration of impacts to critical habitat would affect the outcome of consultations on these projects, and thus the potential for delays of these projects that would occur due to the critical habitat is low. However, the analysis highlights the potential for the critical habitat rule to generate project delays as an uncertain impact that is too speculative to quantify.

In communications with ADEC, the agency confirmed that it does not consult with NMFS on individual discharge permits, including for activities occurring within critical habitat, and that only minimal incremental costs are incurred considering potential effects on threatened and endangered species pursuant to state regulations, regardless of the critical habitat designation. As a result, it is unlikely that additional costs would be incurred related to issuance of individual NPDES permits (as the State of Alaska has primacy for issuing these permits, the state refers to them as ''APDES permits''). (See also the response to Comment 15 above.)

Comment 17: One commenter stated that the analysis may overlook oil and gas activity in state waters in Cook Inlet.

Response: The analysis presented in the DEA included consideration of oil and gas activities in both state and Federal waters, and quantified the incremental administrative costs associated with those activities. Section 2.4.1 of the FEA includes a more detailed description of the extent and geographic distribution of oil and gas activities in state waters, including a map of existing oil and gas activities in state waters and the state's role in managing those activities. The analysis estimates a total of approximately five consultations between 2020 and 2029 in this area (Unit 6), and total costs of $17,700 costs over the next ten years (Total Present Value, 7 percent Discount Rate).

Comment 18: Several commenters requested that the economic analysis provide additional information on the economic benefits of humpback whale conservation. These commenters cited reports by the International Monetary Fund (IMF), the University of Alaska's Center for Economic Development, and the U.S. Department of Commerce Bureau of Economic Analysis with information on the value of wildlife viewing to Alaska's economy and the ecosystem service value of great whales.

Response: NMFS appreciates receiving these additional references. Additional information regarding benefits of humpback whale conservation has been incorporated into Section 4.1.2 and 4.1.3 of the FEA as appropriate. In addition, we note here, that the recent IMF report (Chami *et al.* 2019) attempted to quantify the economic value of a large whale over its lifetime by considering the value of carbon sequestration by a large whale as well as the value of other contributions, such as fishery enhancement and ecotourism. While we cannot identify the values estimated in this report as specific economic benefits resulting directly from this rule, we do agree that, as a general matter and as discussed in ecological literature cited in the report, certain benefits, including multiple ecosystem services, can be derived from conservation of large whales.

Comment 19: Two commenters stated that the economic analysis overestimates the value of whale watching activities in Alaska. One commenter stated that the regional expenditure estimates are misleading since the bulk of the expenditures are not actually spent within Alaska. Another commenter expressed concern that the economic values presented are not exclusive to whale watching.

Response: As described in Section 4.1 of the FEA, the analysis does not attempt to quantify the incremental economic benefits resulting from critical habitat designation (including those related to whale watching) because of the difficulty of isolating the effect of the designation on humpback whale populations separately from all other ongoing and planned conservation efforts for the species. The studies presented in Chapter 4 of the DEA were intended only to provide evidence that the public holds a positive value for efforts that either increase humpback whale populations, or increase the

probability of recovery for the species. They are not intended to specifically quantify the economic benefit of the critical habitat designation.

The whale watching expenditure statistics presented in Exhibit 4–2 of the FEA represent both direct spending on whale watching tickets as well as estimated spending in the local economy by whale watch participants. For example, in Alaska, the $540 million in estimated expenditures represents $480 million in whale watching ticket sales and $60 million in additional spending in the local economy attributable to whale watching participants.

Comment 20: Multiple commenters stated that administrative costs to small entities are underestimated. One local government stated that the estimated cost of $4,900 per year to small entities is significantly underestimated, as the local government said they already pay more than that in direct expenses and delay costs for in-water construction projects permitted under the MMPA.

Response: The costs to small entities identified in the comment represent an incremental administrative cost of participation in section 7 consultations borne by a third-party engaged in section 7 consultation (*e.g.,* local governments or private businesses). The economic impacts identified in Chapter 3 of the FEA represent the total economic impacts that would be anticipated to be incurred as a result of designating all specific areas meeting the definition of critical habitat (*i.e.,* not factoring in any exclusions of areas). Of those costs, only a portion of that total cost would potentially be incurred by third parties, and of those third parties, only a portion would be considered small entities. Chapter 5 of the FEA identifies the potential impacts of critical habitat designation on small entities.

Chapter 5 begins by identifying the universe of activities in which third parties are likely to be party to a section 7 consultation, and for which there is more than one consultation anticipated per year across all critical habitat areas. ''In-Water Construction'' and ''Aquaculture'' are identified as the only activities for which it is likely that a small entity may be party to a consultation (*e.g.,* as a permit applicant), and where more than one consultation is anticipated annually across the critical habitat area. Based on the revised analysis presented in Chapter 5 of the FEA, we estimate that $5,200 per year may be borne by small entities involved with in-water construction, while $5,300 per year may be borne by small entities engaged in aquaculture. However, as indicated in this chapter, the estimated costs for in-water construction activities are based on projects occurring in Unit 10. Because Unit 10 is excluded from the final designation for the MX DPS, the estimated $5,200 per year for small entities would not be incurred. The analysis estimates that 12 aquaculture consultations per year are distributed across the critical habitat units in Alaska, with six occurring in Unit 10, and six occurring in southcentral (Units 6–9) and southwestern Alaska (Units 1–5). Again, because several of these areas are excluded from the final designations (Unit 10 in particular), the estimated $5,300 per year expected to be borne by small entities is an overestimate, and costs to small entities is estimated to be half of that amount.

The direct expenses and delay costs currently incurred by third parties for in-water construction permitted under the MMPA are not costs resulting from the critical habitat designation and thus are not appropriate to include in the cost estimate for this rule. That the existing administrative costs resulting from requirements that predate and are unrelated to the critical habitat designation are high does not indicate that costs are underestimated for this rule.

Comment 21: One commenter noted that the IRFA lists the Wrangell-Petersburg Census Area as a small government jurisdiction adjacent to critical habitat that may be involved in future consultations. The commenter stated that the Wrangell-Petersburg Census Area no longer exists and that it should be replaced in the IRFA with Petersburg Borough and the City and Borough of Wrangell.

Response: NMFS appreciates this comment and has updated Chapter 5 of the FEA accordingly.

Comment 22: Several commenters expressed concern about potential changes to vessel traffic management in response to the designation of critical habitat. Two Alaskan communities noted that they are reliant on ship traffic, including commercial and sport fishing fleets and the cruise ship industry. One commenter noted that vessel traffic regulations in the Traffic Separation Scheme (TSS) areas of California and Washington already result in economic costs to the maritime industry, and expressed concern about additional conservation efforts in critical habitat. The commenter also noted that ships traveling along the West Coast off the United States, including Alaska, follow recommended routes developed by the U.S. Coast Guard (USCG) that overlap with the proposed critical habitat. The commenter requested that the economic analysis consider potential impacts to vessel traffic not just for TSS areas but along the entire coastal area proposed for designation.

Response: As described in Section 2.7 of the FEA, we do not anticipate that the critical habitat designation will generate additional conservation efforts for humpback whales associated with vessel traffic management. As such, the FEA estimates that incremental costs will be limited to the additional administrative costs of consultation. The FEA assumes that, based on the best available information, the past rate of consultation on vessel traffic management is reflective of the future rate of consultation. From 2007 to 2017, the USCG consulted with NMFS on three projects related to vessel traffic management, including one formal consultation regarding a TSS modification and two informal consultations related to aids to navigation (replacement of existing structures). Current economic costs resulting from vessel traffic re-routing and voluntary vessel speed restrictions that have already been implemented in the TSS area would not be considered incremental impacts of the critical habitat designation because they predate and are completely separate from the designation and thus are not quantified in the FEA.

Comment 23: Two commenters stated that scientific research should be included in the economic analysis as an activity that may be affected by critical habitat designation. The commenters specifically referenced field operations within National Marine Sanctuaries and basic marine research supported by the National Science Foundation (NSF) (*e.g.,* NSF Ocean Observatories Initiative). One commenter recommended that we list this category of activity as part of our summary of activities that may adversely modify the critical habitat or be affected by the designation per section 4(b)(8) of the ESA.

Response: The DEA previously included scientific research activities under the Oil and Gas and Seismic Surveys activity category, as the consultation history related to that activity indicated that scientific research activities consisted exclusively of seismic research. In response to this comment, the FEA has been revised so that it now groups scientific research as a separate activity category and also considers a more complete suite of scientific research activities taking place within the proposed critical habitat (see Section 2.4 of the FEA). Both the DEA

and FEA assume, based on the best available information, that the past rate of consultation on scientific research is reflective of the future rate of consultation. To further address this comment, we have also added research activities to the discussion in this rule regarding activities that may adversely affect the critical habitat or be affected by the critical habitat designations (see section on Activities That May Be Affected).

Comment 24: Several commenters expressed concerns regarding the consideration of in-land activities in the economic impact analysis, stating that the regulation appears to overreach by extending to upland areas that are not even inhabited by the whales. One commenter also stated that references to ''timber'' are not explained in light of the recreational, silviculture, habitat restoration, mineral exploration and extraction, road construction and maintenance, and many other activities that routinely occur on national forest lands.

Response: The scope of the impact analysis includes Federal actions that ''may affect'' the critical habitat and that will therefore require section 7 consultation. Thus, the universe of relevant Federal actions is not limited to projects and activities located within the critical habitat, but also includes actions with effects that may extend into and potentially affect the critical habitat. The vast majority of Federal actions considered in the FEA would, however, take place within the boundaries of the critical habitat. We have made revisions to the FEA to separately identify the costs associated with U.S. Forest Service activities, and in Section 2.14 of the FEA, we explain the nature and type of timber-related activities that have been subject to section 7 consultation. Much of the Forest Service-related activities described in the comments occur in terrestrial habitat and do not pose a threat to humpback whales or their habitat (and as a result, would not be subject to section 7 consultation to consider effects on the humpback whale or its habitat and therefore would not experience any associated costs resulting from the critical habitat designation). However, past consultations on Forest Service activities do identify a limited number of potential impacts to marine species and/or their habitats (particularly from timber activities in Alaska), including impacts from the transportation of timber on barging routes used for log transport, and impacts on water quality related to log transport facilities (LTFs). The FEA quantifies the administrative costs to these activities that may result from critical habitat designation.

Comment 25: One commenter stated that the economic analysis was arbitrarily truncated at ten years.

Response: As described in Section 1.3.3.7, for regulations with a predetermined duration, the time frame of the economic analysis would ideally be based on the time period over which the regulation is expected to be in place. However, guidance from the Office of Management and Budget (OMB) indicates that ''if a regulation has no predetermined sunset provision, the agency will need to choose the endpoint of its analysis on the basis of a judgment about the foreseeable future.'' (U.S. Office and Management and Budget, Circular A–4). Because critical habitat designation rules have no pre-determined sunset, we had to determine the endpoint for the analysis based on a judgment as to the ''foreseeable future'' as supported by the best available information. The information on which this analysis is based includes, but is not limited to, information regarding activities that are currently authorized, permitted, or funded, or for which proposed plans are currently available to the public. Forecasted impacts are based on the planning periods for potentially affected projects and look out over a ten-year time horizon. The time frame we have adopted is consistent with OMB guidance stating that ''for most agencies, a standard time period of analysis is ten to 20 years, and rarely exceeds 50 years'' (OMB, February 7, 2011, Regulatory Impact Analysis: Frequently Asked Questions). The time frame selected in this case is consistent with long-standing NMFS practice, Executive Order (E.O.) 12866, OMB Circular A–4 and the cited implementing guidance.

Comment 26: One commenter stated that even if NMFS does not currently anticipate significant economic consequences of critical habitat designation, the designation could lead to lawsuits from advocacy groups aimed at imposing additional conservation efforts. As an example, the commenter cited recent legal notice from the Wild Fish Conservancy that they will sue NMFS if actions are not taken to stop recreational and commercial fisheries from intercepting Chinook salmon stocks that serve as prey for Southern Resident Killer Whales. Another commenter noted that critical habitat would make the permitting process less predictable and would open up reviews of infrastructure projects to court challenges.

Response: While the potential exists for third party lawsuits involving designated critical habitat, the likelihood, timing, and outcome of such lawsuits are uncertain. Data do not exist to reliably estimate the potential impacts of such legal actions. Any attempt to estimate the number, scope, and timing of potential legal challenges would entail significant speculation. Furthermore, such litigation risk already exists in light of existing protections already afforded the whales under the MMPA and by virtue of their listing under the ESA. In response to this comment, Section 2.3.1.3 of the FEA now describes the concern and potential for this type of impact; however, it concludes that determining the outcomes of such lawsuits would be speculative.

Benefits of Critical Habitat Designation

Comment 27: Numerous commenters stated that critical habitat is crucial to supporting the recovery of humpback whales and will result in additional ecological, educational, and economic benefits. Commenters specifically noted the significant economic benefits that could extend to the whale-watching, outdoor recreation, and tourism industries, especially in Alaska, and how these activities can in turn provide public education and increased public support for whale conservation. Multiple commenters stated that improved conservation of the humpback whales and their habitats would have multiple ecosystem and environmental benefits, for example through enhancing phytoplankton productivity and sequestering carbon, as well as scientific benefits. Commenters also noted that protecting humpback whale prey, such as krill and herring, through the critical habitat designations will benefit the many other marine predators that rely on these species and is thus an economically and ecologically sound decision. Some commenters stated that with the rapidly changing marine food webs, as evidenced by the collapse of multiple fisheries and sea-bird die offs in Alaska, critical habitat protection for humpback whales is all the more important for the positive benefits it could have on the larger ecosystem. Commenters noted that due to their various ecosystem, fisheries, and economic contributions, individual large whales have recently been valued at $2 million per whale in a recent study released by the International Monetary Fund, and that this economic value for the larger community should therefore be considered alongside concerns about potential economic costs.

Response: We appreciate these comments and the associated references provided by the commenters. We agree

that the critical habitat designations for the WNP, MX, and CAM DPSs of humpback whales can have multiple ancillary and indirect benefits, such as those identified by the commenters. Such benefits are discussed in Section 4(b)(2) Report (NMFS 2020b), and the additional information regarding potential economic benefits has been incorporated as appropriate into Sections 4.1.2 and 4.1.3 of the FEA. However, as we discuss in the Section 4(b)(2) Report, the existing data are not sufficient to allow us to monetize all of these benefits and distinguish the extent to which they would be attributable to the critical habitat designations (over and above the benefits of protections already afforded through the ESA listings and other ongoing conservation efforts).

Comment 28: The ADF&G stated that designating very large areas as critical habitat dilutes the conservation benefits of the critical habitat and recommended that, as a general matter, the size of the critical habitat be considered when determining areas to include in a designation. They stated that this 'dilution effect' occurs from our approach to designations because the evaluation of adverse modification under section 7 of the ESA is based on impacts to the whole of the designated critical habitat; therefore, the larger the area designated as critical habitat, the less likely a proposed activity will result in a ''may negatively affect'' (in an informal consultation) or a ''destruction or adverse modification'' finding (in a formal consultation). They stated we need to explain that critical habitat provides conservation through examination of impacts to the ''whole'' of critical habitat so the public understands the likelihood of a conservation action. They provided their analysis of the conservation benefits of increasingly large areas to demonstrate this effect. They asserted that large critical habitat designations mask negative effects in truly essential habitats, undermining the education value of critical habitat and by assigning a single value (*i.e.,* ''critical'') to all areas, and hiding important heterogeneity in conservation value. They concluded that designating very large areas as critical habitat results in more complex consultations and more costs without providing corresponding conservation benefits. Based on the results of their analysis, ADF&G also concluded that the critical habitat designation that would provide the greatest conservation value would be one that was limited to the existing Biologically Important Areas (BIAs) off the west coast of the contiguous states and the northern side of the Eastern Aleutians BIA for the MX DPS and limited to the northern side of the Eastern Aleutians BIA for the WNP DPS. They therefore recommended the final designations for the WNP and MX DPSs be limited to those specific areas.

Response: We reviewed the comments and the State's analysis, but did not adopt the particular recommendations for several reasons. First, the conceptual approach proposed by the State finds no legal basis in the text of the ESA or in caselaw. The ESA directs us to designate critical habitat to the maximum extent prudent and determinable, and we have implemented that requirement through our joint implementing regulations with the USFWS (see 50 CFR 424.12). The regulations set out a series of stepwise analytical steps for developing a critical habitat designation. The statute, implementing regulations, and caselaw guide us in our evaluation of areas that meet the definition of critical habitat, and none of these sources provide support for the new analytical approach advocated by the commenter. Application of the State's proposed approach would seem to require that once the cumulative area meeting the definition of critical habitat reaches a certain (unspecified) size, then particular areas meeting the definition of critical habitat would be automatically excluded from the designation on the assumption that the benefit of their designation would be presumed to be outweighed by any costs associated with designating those areas.

Under the ESA and our regulations, areas meeting the definition of critical habitat are to be designated as critical habitat unless the Secretary elects to exercise his discretion to consider exclusion of particular areas under section 4(b)(2) of the ESA. Where the Secretary enters into such an analysis, he has discretion to exclude particular areas from a designation if the benefits of excluding that particular area outweigh the benefits of its designation. His discretion is not unlimited. He may not exclude an area if failure to include that area in the designation will result in extinction of the species. Further, the Secretary's analysis must reflect consideration of the specific information in the record for each particular area. The statute does not mandate exclusions of areas, and individual determinations must be made on the basis of the best available information to support each particular area that is ultimately excluded.

Secondly, the State's proposed approach does not appear to account for the particular species and its life history needs. Stated generally, critical habitat as defined in section 3 of the ESA includes areas and habitat features that are essential to or for the conservation of the listed species (16 U.S.C. 1532(5)(A)). The term ''conservation'' is further defined in section 3 of the ESA as using and the use of all methods and procedures necessary to bring any endangered or threatened species to the point at which their protection under the ESA is no longer necessary (16 U.S.C. 1532(3) (defining ''conserve,'' ''conserving,'' and ''conservation'')). Therefore, critical habitat is expressly defined so as to include not just areas necessary to support the continued survival of the species, but also those that further its recovery and removal from the list of threatened and endangered species. *See Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Serv.,* 378 F.3d 1059, 1070 (9th Cir. 2004) (''Clearly, then, the purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery.''); *Sierra Club* v. *U.S. Fish and Wildlife Serv.,* 245 F.3d 434, 442 (5th Cir. 2001) (noting that the ESA's definition of critical habitat ''is grounded in the concept of 'conservation' ''); *Center for Biological Diversity, Defenders of Wildlife* v. *Kelly,* 93 F. Supp. 3d 1193, 1201 (D. Idaho 2015) (noting that critical habitat is ''defined and designated 'in relation to areas necessary for the conservation of the species, not merely to ensure its survival.' '') (quoting *Arizona Cattle Growers' Ass'n* v. *Salazar,* 606 F.3d 1160, 1166 (9th Cir. 2010)). Thus, courts have recognized that the ''whole point behind designating critical habitat is to identify those physical and biological features of the occupied area and/or those unoccupied areas that are essential to the conservation of a species with the aim of arriving at the point where the species is recovered, *i.e.,* no longer in need of the measures provided for in the ESA.'' *Kelly,* 93 F. Supp. 3d at 1201.

A critical habitat designation therefore must be developed based on consideration of the type and nature of the habitat needed by the particular species to support its recovery. Humpback whales are large, highly migratory marine species that use vast areas of oceanic habitat to carry out their normal life functions and behaviors. Individual humpback whales feed over thousands of square kilometers (*e.g.,* Mate *et al.* 2018, Palacios *et al.* 2020) and target prey that

vary spatially and temporally in terms of their distribution, availability, and energy content in response to changes in ocean and climate conditions (*e.g.,* NOAA 2020). The size of the habitat that is essential to support the recovery of the listed humpback whales should, and does, reflect these factors. The feeding areas being designated as critical habitat for each DPS reflect the life history needs of the whales, represent only a portion of their total occupied ranges, and represent a fraction of the U.S. Exclusive Economic Zone (EEZ) where humpback whales are known to occur (*e.g.,* roughly 15 percent for the MX DPS). Thus, the final critical habitat designations, though large, correspond to the needs of the species as reflected in the best available science and consistent with the requirements for and the purpose of critical habitat under the ESA.

Third, in asserting that there should be an upper limit on the appropriate size for a critical habitat designation, the State's analysis presumes that there is a theoretical tipping point at which ''adverse modification'' outcomes in future section 7 consultations would become unlikely. Beyond this point, once a certain amount of high-conservation areas are identified for inclusion in the designation, the State asserts there is categorically no conservation benefit of including additional, relatively lower-value critical habitat areas in the designation. Thus, they conclude, these lower-value areas should be excluded under section 4(b)(2) of the ESA, because the economic impact of designating these areas should be thought of as categorically outweighed by the benefits of designating them (which they assert are non-existent or even negative). We fundamentally disagree with this conceptual approach to determining the appropriate extent of critical habitat designations and how to evaluate areas for exclusion under section 4(b)(2). There are several errors in the State's approach, including reliance on an assumption that critical habitat only provides conservation benefits to the listed species when there is an adverse modification outcome of a consultation under section 7 of the ESA. This is inconsistent with our experience. Where a consultation does not result in a finding that an action would be likely to cause destruction or adverse modification of the habitat such that major changes would be required to the proposed action, the process of consultation can, and often does, lead to conscious structuring by Federal agencies of their actions to minimize impacts to habitat at the outset. Thus, the benefits of a critical habitat designation cannot be measured simply by the number of ''destruction or adverse modification'' determinations that may or may not be the outcome of future section 7 consultations. Although the State acknowledges some of these benefits in their comments, such as project design changes and adoption of mitigation and minimization measures during informal consultations, these types of positive conservation outcomes are not factored into their analysis.

Further, we disagree with the State's assumption that larger critical habitat designations necessarily result in more complex section 7 analyses or result in more costs without a conservation benefit. The complexity and cost of a consultation are a function of the scope and nature of the particular Federal action, as well as the *number* of listed species and designated critical habitats—not the size of the overall designations—that are affected by the Federal action. The large majority of the consultations completed in Alaska are in fact informal consultations (that conclude with a letter of concurrence that the action is not likely to adversely affect the habitat rather than with a biological opinion), and this pattern is not expected to change based on the types of Federal projects that are forecasted to occur over the next 10 years in Alaska.

In their proposed approach, the State stated that the most important habitat areas should be prioritized for designation. Although, as indicated above, we did not adopt the State's proposed method for assessing the conservation value of areas or making decisions regarding exclusions under section 4(b)(2), we do agree that areas found to have greater importance to the species' conservation on the basis of the best available scientific data should receive greater weight, relative to less biologically important areas, when comparing the benefits and impacts of designating particular areas in a section 4(b)(2) analysis. As we have done in the course of many previous designations, this was achieved in our analysis by assigning relative conservation values to specific areas for each DPS and in how we weighed these values against the forecasted impacts of designation. Through our approach, areas considered to have greater importance to the conservation of each DPS were in effect prioritized for designation above areas that are considered to be less important. This is appropriate under the statute and our regulations because, in the 4(b)(2) process, we must determine which factors are relevant and how much weight to assign each factor (see 50 CFR 424.19(c)). In light of the purpose of critical habitat under the ESA (to support the conservation, or recovery, of the species) and the statutory mandate to designate critical habitat to the maximum extent prudent and determinable, it is reasonable to give great weight to the conservation value of the habitat, and greatest weight to areas with the highest conservation value.

Lastly, we do not agree that large critical habitat designations undermine conservation because they provide a single value, *i.e.,* ''critical,'' to all areas, hide important heterogeneity in conservation value, and mask impacts on truly important habitats. The Secretary has the authority to map critical habitats at a scale the Secretary deems appropriate (50 CFR 424.12(b)(1)) and, when several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, the Secretary has the authority to designate an inclusive area as critical habitat (50 CFR 424.12 (d)). The ESA also establishes and defines the concept of ''critical habitat,'' without distinction for different degrees of ''criticalness.'' In implementing the ESA, we must apply the statutory definition and regulatory provisions on the basis of the best available scientific information. We see no legal basis for recognizing novel tiers of habitat not recognized in the ESA, and the State points to none; nor is it necessary to do so. Furthermore, section 7 consultations evaluating impacts of an action on designated critical habitat take into consideration the best available data for the given species and its habitat, including relevant data regarding habitat heterogeneity as well as distribution patterns of the listed species across the critical habitat. When evaluating impacts to large critical habitats in the context of a consultation, we consider how the particular Federal action would affect the relevant area, features, and function of the designated habitat and how that in turn affects the overall conservation value of the critical habitat for the listed species. In other words, designating large areas as critical habitat does not remove the requirement that we rely on the best available science when conducting section 7 analyses, does not interfere with our ability to understand the nature and magnitude of particular impacts on the critical habitat, and does not undermine conservation.

Overall, we find that the analysis provided by the State does not support restricting the critical habitat designation to the areas suggested by the

State—*i.e.,* to the northern portion of the BIA in the Aleutian Islands Area (Unit 2) and the seven BIAs off the coasts of Washington, Oregon, and California. (BIAs, which were discussed in the proposed rule (84 FR 54354, 54366, October 9, 2019) are discussed in more detail in response to other comments specific to the BIAs in the next subsection.) We also note that such a designation would eliminate from the critical habitat known feeding destinations for WNP DPS and MX DPS whales, and particularly for MX DPS whales that breed off the Revillagigedo Islands, which preferentially feed in areas off Alaska.

In the proposed rule, we described the effects of critical habitat designations, and consistent with the requirements of section 4(b)(8) of the ESA, we provided a brief discussion of those activities (whether public or private) that may adversely modify the proposed critical habitat or that may be affected by such designation. Such information is also provided in this final rule. The regulatory definition of ''destruction or adverse modification'' has been added to that discussion to provide additional information regarding the effect of critical habitat designations.

Comment 29: ADF&G stated that we inappropriately conflated the conservation value of specific areas with the incremental benefits a critical habitat designation would provide. They stated that the Draft Section 4(b)(2) Report inaccurately concludes that it is not possible to isolate and quantify the effect that a critical habitat designation would have on recovery of a humpback whale DPS. They state that our use of a conservation value assessment of specific areas to represent the benefit of designation is inappropriate because the evaluation of the economic costs already provides considerable assessment on the potential benefits of a designation, which could be used to provide a qualitative assessment of the benefits of the designation. They also state our assessment was inappropriate because the conservation value assessment is not likely to be a good predictor of the potential benefits of designating a specific area. Instead, they posit that we should use a qualitative assessment of the incremental benefit, based on whether additional conservation measures from the designation are likely in addition to the value of specific areas to the conservation of each listed DPS.

Response: As noted above (in our response to Comment 28), we disagree with the assertion that the incremental benefit of a critical habitat designation is equal to the number of likely additional conservation measures that may result from section 7 consultations. As discussed in the proposed rule and Section 4(b)(2) Report, while it is true that the primary, regulatory benefit of critical habitat designation stems from the ESA section 7(a)(2) requirement that all Federal agencies ensure that their actions are not likely to destroy or adversely modify the designated habitat, several non-regulatory benefits of designation are also recognized. For example, critical habitat provides notice to other Federal agencies of areas and features important to species conservation; provides information about the types of activities that may reduce the conservation value of the habitat; and may stimulate research, voluntary conservation actions, and outreach and education activities. Although the critical habitat is not expected to change NMFS' identification of conservation efforts for humpback whales through section 7 consultations, the adverse modification analysis conducted as part of section 7 consultations can provide useful scientific information to build upon NMFS' and other Federal agencies' understanding of the biological needs of, and threats to, the humpback whales and their habitat. The draft and final economic analyses (Chapter 4, IEc 2019 and 2020) also discuss the use, non-use, and ecosystem benefits of conservation of the whales in general (*e.g.,* whale-watching, water quality improvements, enhanced habitat conditions for other marine and coastal species). Other indicators that critical habitat may have benefits that extend beyond the protections of section 7(a)(a) have been reported in the literature and include findings that species with designated critical habitat are more likely to have increased and less likely to have declined, are more likely to have a revised recovery plan, and are more likely to have these plans implemented (Harvey *et al.* 2002; Lundquist *et al.* 2002, Taylor *et al.* 2005).

Further, the State's implicit assumption that benefits of designation can accurately be assessed only to the extent they are quantified or monetized is also unfounded. We agree it would be useful and informative if available data allowed us to monetize the benefits of critical habitat designation to enable a direct comparison with the estimated economic benefits of excluding particular areas from the designation. However, as discussed in the Section 4(b)(2) Report and proposed rule, data to monetize these benefits are not available and is not required. Because the ESA requires designation of critical habitat to further the conservation of listed species, an area meeting the definition of critical habitat draws inherent but unquantifiable value from fulfilling that statutory mandate. In considering potential exclusions under section 4(b)(2) and its implementing regulations, moreover, the Secretary has discretion to determine the factors to be considered and what weight to assign them in comparing the benefits of exclusion with the benefits of inclusion (50 CFR 424.19(c)). In carrying out our analyses, it is not possible using the best available scientific tools to quantify the effect that a critical habitat designation would have on recovery of humpback whales over and above other separate, preexisting protections, including those that extend from listing under the ESA.

In our analysis, we used the CHRT's relative conservation value ratings to represent the relative conservation benefits of designating specific areas identified as critical habitat for each DPS. The CHRT's ratings of the relative conservation value of the critical habitat were based on relevant biological considerations (*e.g.,* distribution of whales from the DPS across the areas, prey availability or evidence of consistent feeding). This approach relied on the best available information and employed a structured, systematic method for applying expert judgement. The approach taken in our analysis is consistent with the purpose and requirements of the ESA and our implementing regulations at 50 CFR 424.19, which provides the Secretary discretion to consider any relevant benefits and assign the weight given to those benefits. Our approach is also consistent with multiple, other critical habitat designations that employed a biological approach to assessing the conservation value of particular areas—an approach that has been recognized as an appropriate alternative where data are not available to monetize the benefits of designation (*e.g.,* loggerhead sea turtles (79 FR 39856, July 10, 2014); black abalone (76 FR 66806, October 27, 2011); green sturgeon (74 FR 52300, October 9, 2009)).

Comment 30: ADF&G stated that we made substantive mistakes in rating the relative conservation value of the specific areas and provided a series of specific comments regarding the application of the available data. They requested that we re-do the analysis to correct various mistakes they state were made by the CHRT and provide a more detailed discussion of how data were applied in the assessment.

In terms of specific assertions regarding misuse of data, ADF&G stated that in using data from Wade (2017) regarding predicted movement

probabilities of humpback whales into the feeding areas, we should have taken into account the size of our specific areas and the relative size of the areas used in the Wade (2017) analysis. Rather than using the estimated movement probabilities, ADF&G stated that the appropriate metric to use in our comparisons would have been the estimated density of humpback whales of the particular DPS in each specific unit. They also suggest that, in delineating our specific areas, it would have been appropriate to align the boundaries of our specific areas to those used in the Wade (2017) analysis, because those are in turn aligned with genetic and spatial breaks in humpback whale distributions. They also state that we used the wrong movement probability for the Shumagin Islands Area (Unit 3) for both the MX and WNP DPSs.

ADF&G also stated that we did not indicate that the CHRT recognized that the humpback whale density data used in our assessment conflates the abundance of various DPSs, and that this density information could be misleading. They also expressed concern regarding the use of results of the ''SPLASH'' study and stated that our application of these sightings data conflated the use of habitat units by other DPSs with that of the DPS being assessed. They stated that the SPLASH mark-resight data could be useful, but that we should include the unmatched sightings in the assessment in order to understand population size and account for differing survey effort.

Response: We appreciate the thorough and specific comments regarding our assessment of the relative conservation value of each specific area to the MX and WNP DPSs. To address and respond to these comments, we: Reconvened a CHRT; discussed and agreed to make certain modifications to the datasets used to support the CHRT's assessment; and then repeated the structured decision-making process to rate the relative conservation value of each critical habitat unit for the MX, CAM, and WNP DPSs, taking care to account for the limitations of the available data noted by the State. While we do not agree that the CHRT's analysis or our proposed rule was founded on misuse of the data, we do agree after considering the comments that it is more transparent and informative to refine our use of the best available scientific data. Further explanation is provided here, and a detailed discussion of this process, the datasets, and results are also provided the Final Biological Report (NMFS 2020).

A significant and unique challenge in developing these particular critical habitat designations is the fact that each of the DPSs of interest co-occur with multiple, other DPSs of the same taxonomic species in the areas meeting the statutory definition of critical habitat. Relevant data available to the CHRT that allow for an assessment of the relative use of particular areas by each DPS include photo-identification data, genetic data, and to a more limited extent, telemetry data. The ocean basin-wide study referred to as the ''Structure of Populations, Levels of Abundance, and Status of Humpbacks'' or the ''SPLASH study'' was a significant effort undertaken in coordination with 10 countries that involved the collection of both photo-identification and genetic data during three breeding seasons (2004, 2005, and 2006) and over two feeding seasons (2004, 2005) in known breeding and feeding areas. The SPLASH study informs and supports much of the current scientific understanding of the structure of humpback whale populations in the North Pacific, and the results of this study as well as subsequent analyses of data obtained in this study (*e.g.,* Calambokidis *et al.* 2008, Barlow *et al.* 2011, Baker *et al.* 2013, Wade 2017) were critical to informing the CHRT's analysis. We address each of the several concerns raised by the State with respect to how the CHRT applied these results in their assessment in turn here.

First, in response to the concern regarding the application of results from Wade (2017) regarding predicted movement probabilities of humpback whales into the feeding areas, we considered the State's suggestion of using densities of whales rather than the predicted movement probabilities from the Wade (2017) analysis; however, we did not find this to be a useful or appropriate modification. Analytical results presented in Wade (2017), which relied on the photo-identification data from the SPLASH study (Calambokidis *et al.* 2008, Barlow *et al.* 2011), include estimates of the proportion of whales from a breeding area (and hence a given DPS, since the DPSs are described based on the breeding area of origin of the member whales) occurring in the six major feeding regions. Thus, these estimated movement probabilities, which correct for sampling effort, provide an indication of the distribution of whales of the particular DPS across the feeding regions, and this information was very important to the CHRT's assessment of relative value of the specific critical habitat areas to each of the DPS. We continue find that this information—*i.e.,* the estimated number or proportion of whales from the listed DPS within a feeding region—to be an appropriate indicator of the relative value of the areas to the DPS and part of the best available data regarding habitat use by the listed DPSs. We do not find that the alternative metric suggested by ADF&G—*i.e.,* density of whales from the listed DPS within a feeding region—is a more appropriate or more informative metric. While our critical habitat units are generally aligned with the major regional breaks applied in the Wade (2017) analysis, they are not fully consistent with all of the boundaries, which were determined based on several other factors (*e.g.,* BIA boundaries), and were broken into smaller geographic units to facilitate an analysis of habitat areas on a smaller spatial scale. Thus, it would not be appropriate to calculate densities of whales for our particular habitat units based on the estimated probabilities provided in Wade (2017). The suggested density metric may also artificially deflate the value of larger feeding areas or artificially inflate the value of smaller feeding regions, because the delineation of the feeding regions and habitat units themselves (and thus their size) is partially a function of the particular marine ecosystem and its associated geology and oceanography. We find that using the estimated proportion or number of whales of a given DPS rather than their density is preferable because it avoids this potential bias.

With respect to how the critical habitat areas were delineated, we note that these areas should be identified at a scale determined by the Secretary to be appropriate (50 CFR 424.12(b)(1)). Data and information applied by the CHRT to systematically delineate boundaries for the specific critical habitat areas is discussed in detail in the Final Biological Report (NMFS 2020a). However, in response to comments, we reviewed the regional boundaries applied in Wade (2017) as well as survey effort and locations from the SPLASH study, and made several changes to improve or correct the data tables used to inform the CHRT's assessment. Specifically, we agree with ADF&G that we applied the incorrect movement probability for the Shumagin Islands Area (Unit 3), which is more appropriately assigned to the Gulf of Alaska Region as delineated in Wade (2017), and we corrected this for the relevant data tables (*i.e.,* for the WNP and MX DPSs). We also removed the estimated movement probability developed by Wade (2017) from the dataset considered in the CHRT's

assessment of Bristol Bay area (Unit 1), because SPLASH surveys did not extend into Unit 1. We concluded that extrapolating the results of Wade (2017) into an area that was beyond the SPLASH survey areas was not appropriate. The CHRT, however, noted that given the lack of photo-identification studies and data for Unit 1, and because humpback whales currently use and historically occurred in this area, future scientific survey effort should be directed at this particular area to better evaluate use of this area by humpback whales and by ESA-listed humpback whales in particular. Lastly, and without changing the actual data used in the tables (provided as Appendix C in the Final Biological Report), we modified how the estimated probabilities from Wade (2017) are displayed (using merged cells) to help clarify that the CHRT was aware that those probabilities do not apply independently to our particular, smaller habitat units but apply to broader regions.

In response to the concerns regarding how photo-identification match percentages from the SPLASH study were applied by the CHRT, we modified the data tables to avoid the perception that the CHRT had conflated the use of habitat units by other DPSs with that of the DPS being assessed. In our initial analysis, and as a means of examining relative distributions of whales of a given DPS across habitat units, we calculated the percent of unique sightings of whales of the given DPS out of all matched sightings (for all DPSs) that had occurred in that particular area. This column of data was changed to instead show the percent unique sightings of whales of the given DPS in the particular area out of the total number of matched sightings of whales of that same DPS. Thus, match data for whales from other DPSs were removed from the calculation, and information to help assess the relative distribution of whales of the given DPSs across the habitat units was retained. To provide further context for these percentages, we also included general information with respect to the SPLASH survey effort, including the number of vessel days, whether small boat surveys had been conducted in that area, and the total number of unique humpback whales sighted in that area. Although this information was not detailed or precise enough to be particularly informative, the CHRT felt it was relevant and helpful to include as it stimulated and facilitated discussions regarding survey effort across the areas.

In response to the concerns that the CHRT had been biased or inappropriately influenced by humpback whale density data that was not specific to a particular ESA-listed DPS, we also removed the general humpback whale density data from the data tables used by the CHRT. The CHRT agreed this was an appropriate simplification for several reasons. First, with the exception of the CAM DPS, for which we have a consistent set of density estimates for all critical habitat units occupied by that DPS, the estimated and observed density data that are currently available come from multiple studies with differing methodological approaches and for different time periods, and consequently, these data had not allowed the CHRT to make strong inferences with respect to the habitat units during their initial assessment. In addition, and as noted by the commenters, these general density data are affected to differing degrees across the habitat units by the presence of the non-listed Hawaiian whales. The CHRT had acknowledged the multiple limitations with applying these data in their original review and discussions, and was aware these issues were more acute for Alaska where scientific surveys have been more limited (both geographically and temporally) but included them because they comprise part of the best available data. Overall, the CHRT decided these data could be removed from consideration without limiting or undermining their ability to understand the relative conservation value of each habitat unit by the listed DPSs.

Comment 31: With respect to data considered during the assessment of the conservation value of particular areas, ADF&G expressed several concerns regarding the consideration of the proportion of a habitat unit that is covered by a BIA as a metric of conservation value of a particular area for a listed DPS. First, they state the size of the BIAs is not necessarily indicative of the value of the BIAs to humpback whales because the BIAs were drawn mainly as a function of the amount and type of data and information available. Secondly, they state that using a general humpback whale BIA conflates the use of an area by the listed DPS of interest with that of other DPSs. ADF&G stated that we should consider the BIAs within the context of the number of whales from a listed DPS using each summer foraging region (*i.e.,* the movement probabilities).

Response: As part of their reassessment of the relative conservation value of all habitat units, the CHRT discussed the concerns expressed by ADF&G regarding how presence and proportional size of BIAs were considered in the CHRT's assessment; however, we did not made any corresponding changes to how this information was considered. Information regarding the BIAs constitutes an important part of the best available scientific data, and is just one part of the range of information upon which the designations are based. The CHRT was aware of the differences in the approaches taken by the two separate teams that defined and drew the BIAs in Alaska versus the BIAs in the California Current system. This had been discussed and acknowledged by the CHRT, who had also discussed the BIAs and their development with the primary authors of the respective papers describing the BIAs (Ferguson *et al.* 2015a and 2015c, Calambokidis *et al.* 2015) prior to their initial assessment. We had also purposefully displayed those data in the tables in such a way as to clearly distinguish between the sources for the BIAs. Thus, all CHRT members were aware of the distinction in how the BIAs were created and what these data represent. The size of a BIA relative to the particular critical habitat unit was considered and discussed by CHRT members in a general and non-quantitative sense, and was not used independent of other information (*e.g.,* movement probabilities for a given DPS) for the particular habitat units. The information regarding the BIAs was considered useful and relevant to assessing relative conservation value of areas for a given DPS, and was thus retained as information considered by the CHRT during their reassessment of the relative conservation value of particular areas.

Comment 32: With respect to data considered during the assessment of the conservation value of particular areas, ADF&G also stated that consideration of confirmed sightings of whales of the listed DPSs within an area is difficult to interpret and should not be used as an indication of use of that area by the DPS. They assert such data could be misapplied in such a way as to exaggerate the value of an area. They state that a more appropriate metric would be multiple confirmed sightings that demonstrate regular use by the DPS.

Response: Information regarding whether confirmed sightings of whales of the listed DPSs were documented within each particular critical habitat unit was retained in the set of data considered by the CHRT during their reassessment of the relative conservation value of particular areas. While we agree with ADF&G that this information does not provide an indication of relative use of an area or

relative importance of a particular area to a given DPS, the CHRT considered it useful and more transparent to include this information to make it clear which areas had no confirmed sightings of whales of a given DPS and thus where presence of the DPS has instead been assumed given other available data for a larger or less precise geographic area. These data still constitute an important part of the best available data, which need not be perfect. Moreover, as stated previously, individual types or sources of data were not applied independently of the other available information for a particular are or DPS, which addresses the State's concern that taken alone the data could be misleading. To help eliminate the perception that the CHRT misinterpreted or misapplied data (see also Comments 30 and 31), we expanded the relevant discussions in the Final Biological Report (NMFS 2020a) to explain the data considered by the CHRT, the purpose of the data tables, and the approach used by the CHRT in conducting the structured decision-making process. The added discussion helps to further clarify that the CHRT did not limit their analysis to any one piece of data or the data presented directly in the data tables, but that the team also considered the expert knowledge and insights shared among team members during the structured decision-making process itself. In sum, the CHRT considered all of the available, relevant scientific information and appropriately took into account data limitations and uncertainty, where they existed, in determining which data comprised the best available data upon which to rely for the final determination. The determination of what constitutes the ''best scientific data available'' belongs to the agency's ''special expertise. . . .'' *San Luis & Delta-Mendota Water Authority* v. *Jewell,* 747 F.3d 581, 602 (9th Cir. 2014) (quoting *Baltimore Gas & Elec. Co.* v. *Natural Resources Def. Council,* 462 U.S. 87, 103(1983)).

Size of Critical Habitat and Consideration of Biologically Important Areas (BIAs)

Comment 33: Multiple commenters expressed concern about the expansive area proposed for designation in Southeast Alaska. Several of the commenters stated that it would not be credible to assert that every square mile of this area is essential to the conservation of the MX DPS, and multiple commenters requested that critical habitat in Southeast Alaska be limited to areas already designated by NMFS as a BIA. Another commenter requested that we exclude Southeast Alaska/Region 10, because it was designated as BIA area based on use of this area by the healthy Hawaii DPS of humpback whales.

Response: As discussed in the draft and final Biological Reports (NMFS 2019a, NMFS 2020a), BIAs were considered, along with other information, in the delineation of boundaries of our critical habitat areas as well as in our assessment of the relative conservation value of those areas. BIAs, which have no regulatory effect, were developed to supplement the quantitative habitat-density modelling efforts of the Cetacean Density and Distribution Mapping (''CetMap'') Working Group (*http://cetsound.noaa.gov*) and assist resource managers by providing additional context for marine mammal impact analyses (*https://cetsound.noaa.gov/cetsound*). BIAs are not synonymous with critical habitat under the ESA; and, as explained by the CetMap group, not everything identified as critical habitat will meet the BIA criteria and vice versa (Ferguson *et al.* 2015b). In determining which areas qualify as critical habitat under the ESA, we are required to apply the statutory definition of critical habitat and adhere to the statute's requirements and standards for designating critical habitat. Therefore, as a general matter, we are not required to restrict the critical habitat designations to areas previously recognized by NMFS as BIAs. In this particular case, this issue is no longer relevant because Southeast Alaska (Unit 10) is excluded from the critical habitat designation for the MX DPS (see response to Comment 43).

Comment 34: Several commenters stated the proposed critical habitat is overly broad because it includes areas that are merely ''habitat'' (*i.e.,* areas where the animals may be found). The commenters referred to the recent Supreme Court ruling in *Weyerhaeuser Co.* v. *U.S. Fish & Wildlife Serv.,* 139 S. Ct. 361, 368 (2018), in which the court stated that critical habitat is a subset of habitat, and stated that this indicates we cannot designate areas that are merely occupied by the species and do not contain elements required for survival. ADF&G stated that the proposed designations are inconsistent with Congressional intent and a supposed statutory requirement that the smallest possible area that contains the habitat with the highest conservation value habitat is what should be designated as critical habitat. ADF&G pointed to the critical habitat designation for North Pacific right whales as an example of a designation that they believe more closely follows the regulatory requirements for critical habitat because it was limited to specific areas where the available data indicated the presence of the essential feature. Commenters also referred to the BIAs and asserted that these smaller, specific areas meet the ESA standards for the designation of critical habitat or at least indicate that there are smaller areas that could qualify as critical habitat. In contrast, a large number of other commenters stated they supported the designation of all of the proposed areas, and one commenter asserted that the proposed critical habitats appear to be the minimum that should be considered and that science suggests the areas should be much bigger.

Response: Neither the statutory definition of critical habitat nor our implementing regulations (50 CFR 424.12) require that critical habitat be designated only within the smallest possible area that meets this statutory definition. There is simply no legal basis to support that position. We do acknowledge that critical habitat must logically be a subset of what more broadly qualifies as ''habitat'' for these particular species. *See Weyerhaeuser* v. *U.S. Fish and Wildlife Serv.,* 139 S. Ct. 361 (2018). The best available data here support that the areas being designated as critical for each of the DPSs of humpback whales at issue (the WNP, CAM, and MX DPSs) meet the elements of the definition of ''critical habitat'' and are a subset of the habitats they occupy and use, which for each DPS includes large areas outside U.S. jurisdiction. Because each of these areas meets the definition of occupied ''critical habitat'' under the ESA, the kinds of issues that arose in the matter before the Supreme Court in *Weyerhaeuser* v. *U.S. Fish and Wildlife Serv.* (139 S. Ct. 361 (2018)—which involved unoccupied habitat—are simply not presented. Areas meeting the definition for occupied critical habitat are inherently validated by the definition itself as being ''habitat,'' because the species have in fact occupied them and they contain the essential feature. Humpback whales occur widely throughout the North Pacific Ocean and occur throughout their historical range. As discussed in the proposed rule and Biological Report (NMFS 2020), humpback whales breed in tropical and semi-tropical waters and undertake long distance migrations to access highly productive feeding grounds that extend across the rim of the North Pacific Ocean, from the coast of Russia (*e.g.,* Sea of Okhotsk and Kamchatka Peninsula), to the Bering Sea, Aleutian Islands, Gulf of Alaska, Southeast Alaska, Canada (British

Columbia), and off the U.S. West Coast to southern California. The critical habitat designations thus represent only fractions of the total combined ocean habitats used by each humpback whale DPS to migrate, breed, calve, and feed.

Humpback whale feeding areas of the North Pacific have typically been divided into five or six general regions based on genetic and sightings data that indicate population structuring across these areas. NMFS, as well as the International Whaling Commission (IWC) are currently investigating stock structure and associated feeding groups of humpback whales, which may lead to some adjustments to the currently recognized stocks and feeding group boundaries (*e.g.,* Clapham *et al.* 2020). For purposes of designating critical habitat, we delineated more specific feeding areas relative to the generally recognized, broader, feeding regions in order to facilitate an assessment on a more precise spatial scale and conduct an analysis under section 4(b)(2) of the ESA to examine the benefits of designating or excluding particular areas. Specifically, we divided what are typically delineated as five to eight feeding regions within U.S. waters, into 19 specific areas or habitat ''units.'' As described in detail in the Biological Report (NMFS 2020a), we subsequently used available data, including data regarding the distribution of each DPS and quality of the prey feature, to assess the relative conservation value of each habitat unit for each particular DPS of humpback whales. The areas included in the final designations for each DPS are areas that are occupied by the particular DPS and contain humpback whale prey species, which are necessary to support the energetic needs of the whales as well as population growth and recovery of the DPSs.

As discussed previously in response to Comment 33, BIAs are not synonymous with critical habitat under the ESA; not everything identified as critical habitat will meet the BIA criteria and vice versa (Ferguson *et al.* 2015b). In determining which areas qualify as critical habitat under the ESA, we are required to apply the statutory definition of critical habitat, which states that an area qualifies as critical habitat if it is occupied by the listed species and contains one or more physical or biological feature that is essential to the conservation of the species and that may require special management considerations or protection. Specific areas are eligible for designation as critical habitat if they meet these criteria. Thus, while we agree that the BIAs identify important feeding areas for humpback whales, we do not find that it is appropriate or consistent with the ESA to restrict the critical habitat designations to these areas.

We acknowledge that the critical habitat designations for the WNP DPS, and particularly for the CAM and MX DPSs are each larger than the two discrete areas designated as critical habitat for the North Pacific right whale. However, the humpback whale designations and that for the North Pacific right whale are not directly comparable, and it is misleading to simply compare their relative sizes without putting them in context. The different designations are a reflection of the best scientific data available regarding each species and their habitats rather than an indication that the humpback whale designations do not adhere to the statutory requirements for designation of critical habitat. At the time critical habitat for North Pacific right whales was designated in 2008 (73 FR 19000, April 8, 2008), abundance of those whales in the eastern North Pacific was unknown, but was considered by most biologists to be fewer than 100 whales, and sightings were rare. The North Pacific right whale species remains extremely rare, with an estimated effective population size for the eastern North Pacific of 11.6 whales (95 percent CI: 2.9–75.0, LeDuc *et al.* 2012) and an estimated population abundance of 31 whales (95 percent CL: 23–54, Wade *et al.* 2011). Critical habitat areas were identified in 2008 for North Pacific right whales based on the available sightings data, which were used as a proxy indicator for the presence of the identified copepod essential feature. Significantly more data are available regarding the distributions and habitat uses of humpback whales within the North Pacific, and although data specific to each DPS are relatively more limited compared to humpback whales generally, the available data clearly indicate a broader distribution for humpbacks than what was documented for North Pacific right whales.

Comment 35: Multiple commenters stated that because the BIAs identify the most critical feeding areas for humpback whales (Calambokidis *et al.* 2015) and have been determined to be biologically important under a separate, thorough scientific review (Ferguson *et al.* 2015), it is illogical to expand the critical habitat beyond the BIAs. Commenters stated that while the proposed critical habitat areas may be habitat for the whales, they are not all critical habitat because they do not necessarily contain a sufficient quality or quantity of prey or are unlikely to contain the essential prey feature given the large size of the proposed critical habitat. Several commenters specifically disagreed with the use of habitat modeling results from Becker *et al* (2016) to define critical habitat boundaries, because this model does not measure or identify areas where prey may be located, or predict presence of prey, and only predicts presence of whales with in a given area (as opposed to feeding whales).

Response: In designating occupied critical habitat, we are required to apply the best scientific data available to identify specific areas within the geographical area occupied by the species on which are found (1) physical or biological features essential to the conservation of the species and (2) which may require special management considerations or protection (16 U.S.C. 1532(5)(A)). Specific areas are eligible for designation as critical habitat for the humpback whales if they meet this definition. Delineation of specific areas is done at a scale determined by the Secretary [of Commerce] to be appropriate (50 CFR 424.12(b)(1) and (2)). Regulations at 50 CFR 424.12(c) also require that each critical habitat area be shown on a map. In making decisions about the scale and boundaries for the specific areas, we considered various factors such as the scales at which biological data are available and the availability of standardized geographical data necessary to map boundaries. The ESA does not require that we identify with specificity the exact locations within each unit where the feature occurs. *See Alaska Oil and Gas Ass'n* v. *Jewell,* 815 F.3d 544, 555 (9th Cir. 2016) (district court erred in holding FWS to ''a standard of specificity that the ESA does not require''). Further, our implementing regulations allow for flexibility in determining the appropriate scale at which specific areas are drawn. Here, we have identified where the dynamic prey feature occurs with as much specificity as the best available data allows.

To determine which areas meet the statutory definition of critical habitat and delineate biologically appropriate boundaries for the specific areas of humpback whale critical habitat, we relied on multiple types of data, including humpback whale sightings data, habitat modelling, location of BIAs, and prey species distributions (NMFS 2020a). Each type of data may have relative strengths and limitations as compared to other types of data for particular uses, which we identify and discuss in these various responses to comments and the Biological Report (NMFS 2020a). Although not perfect or

free from uncertainty, taken together they form the best available scientific data, upon which we must base these designations.

Habitat model results of Becker *et al.* (2016), and to a lesser extent Becker *et al.* (2017), which apply only to areas within the CCE, were primarily used to determine an appropriate offshore boundary for specific critical habitat areas within the CCE (*i.e.,* Units 11–19). Commenters are correct that the habitat model results of Becker *et al.* (2016 and 2017) provide information on predicted occurrences of humpback whales within the CCE and do not provide information regarding predicted occurrences of humpback whale prey species. However, as indicated by the ESA definition of occupied critical habitat, both types of information are relevant—information on occupancy by the listed species and information on presence of the prey feature. Furthermore, while these models result were used to help delineate the specific critical habitat areas, they were not the exclusive determinant of whether the areas qualified as critical habitat.

Humpback whale prey species are distributed throughout the feeding grounds and the specific areas identified as critical habitat. Due to the considerable importance of euphausiids and other forage fish species to commercial fisheries and to other marine predators, as well as their role as ecosystem indicator species, extensive scientific surveys have been conducted within all marine ecosystems of the U.S. EEZ to monitor abundances, distributions, trends, as well as factors that affect these species (*e.g.,* Santora *et al.* 2018, Sigler *et al.* 2012, McGown *et al.* 2016, Simonsen *et al.* 2016, Zwolinski *et al.* 2017; See also: *www.fisheries.noaa.gov/topic/population-assessments#fish-stocks* and *www.integratedecosystemassessment.noaa.gov*). These surveys as well as other targeted research efforts, including studies examining humpback whale diet and distributions in association with prey availability, were considered when developing the critical habitat designations because such studies provide information on distributions and abundances of humpback whale prey as well as information about variations in prey targeted by the whales across and within regions (NMFS 2020). Where available, and as discussed in the Biological Report (NMFS 2020a), we also considered observational and satellite-tag derived data indicating feeding behavior of humpback whales while on the feeding grounds (*e.g.,* Wynne and Witteveen 2013, Kennedy *et al.* 2014, Mate *et al.* 2018). Given the wide distributions of the prey species for each DPS, and the spatial and temporal variability in the abundances and distributions of these prey species, we relied on information regarding the distribution of humpback whales on the feeding grounds to determine biologically appropriate boundaries of the specific critical habitat areas (*e.g.,* Becker *et al.* 2016).

Comment 36: A commenter stated that we inappropriately expanded the critical habitat areas beyond the BIAs in part by considering the area-restricted searching (''ARS'') data reported by Mate *et al.* (2018). The commenter discussed that the relevant Mate *et al.* (2018) data involves tagging results for only seven whales, and that most of those whales exhibited ARS in small, discrete areas that largely correspond to the existing BIAs. The commenter noted that only one whale was tracked across a significantly broader range.

Response: As discussed in the Biological Report (NMFS 2020a), multiple types of information were used to delineate boundaries for the occupied critical habitat areas. Each type of data may have relative strengths and limitations for particular uses as compared to other types of data, which we discuss in these various responses to comments, but taken together they form the best available scientific information. In addition to habitat modelling results, which predict expected distributions of humpback whales in the CCE (Becker *et al.* 2016 and Becker *et al.* 2017), we considered the location of BIAs, sightings data, and to a lesser extent, satellite telemetry data. This latter category of data was not a determinant of the boundaries of the specific areas but was mainly used as additional support for the selection of appropriate boundaries of applicable specific areas because it provides very explicit information on where and the areas over which humpback whales are feeding. We agree that the available telemetry data, and specifically the ARS-mode location data (which is indicative of feeding), are limited in terms of the total number of humpback whales that have been tagged. However, these data are still relevant and important to consider and constitute a part of the best available information, and they were not used to expand the specific critical habitat areas beyond areas known or predicted to be used by humpback whales. We also note that results that have since become available from satellite tagging of four additional humpback whales off the Oregon coast in 2018 indicate that the whales spent 2.0 to 49.6 percent of their time (as a percentage of days) within a BIA (Palacios *et al.* 2020), indicating that for more than half of the time they were tracked they were outside of a BIA.

Available sightings and habitat modelling data indicate that humpback whales occur more widely throughout the U.S. EEZ and in areas outside of the recognized BIAs (*e.g.,* Hamilton *et al.* 2009, Becker *et al.* 2016). Within the CCE, BIAs were delineated based predominantly on coastal (<50 nmi offshore), non-systematic small boat surveys designed to maximize whale sightings, and the areas ultimately identified as BIAs were restricted to those areas where the highest concentrations of sightings were documented in multiple years. As the BIA authors note, both sightings and annual habitat model results indicate a high degree of variation in some areas of humpback whale concentration across years (Calambokidis *et al.* 2015). Under the statutory definition, an area qualifies as critical habitat if it is occupied by the listed species and contains one or more physical or biological that is essential to the conservation of the species and that may require special management considerations or protection. Thus, specific areas are eligible for designation as critical habitat if they meet these criteria. Neither the ESA definition of critical habitat nor the joint NMFS/USFWS implementing regulations (at 50 CFR 424.12) limit critical habitat designations to only those areas of greatest concentration of the listed species or the most frequently used areas. Thus, while we agree that the BIAs identify important feeding areas for humpback whales, we do not find that it is appropriate to restrict the critical habitat designations to these areas.

Comment 37: A commenter stated that should the agency insist on expanding critical habitat beyond the boundaries of the BIAs, that the outer limits for all units other than Unit 1 be drawn along the 1,000 m isobath. The commenter noted that, as proposed, the outer limits of Unit 2 (Aleutian Islands Area) and Unit 10 (Southeastern Alaska) are drawn along the 2,000 m isobath, while the outer limits of other units (other than Unit 1, Bristol Bay) are drawn along the 1,000 m isobath. The commenter stated that given the coastal nature of humpback whale prey species, and understanding of normal dive depths, the 2,000 m isobath boundary appears to be excessive.

Response: When selecting the boundaries for the 19 critical habitat units, the CHRT adopted several decision rules to help ensure that the

areas were drawn in a reasonable and systematic fashion, grounded in the best available data, across marine regions and for each of the three DPSs. One decision rule was that the existing BIAs would remain intact unless there was a compelling reason to change or divide it because the BIAs are well described, discrete delineations of habitat based on thorough review of existing data that generally fall within larger delineations of humpback whale feeding regions. This decision rule is what led the CHRT to draw the seaward boundaries for Unit 2 (Aleutian Islands area) and Unit 10 (Southeast Alaska) along the 2,000m isobath. This isobath line corresponds most closely with the seaward edge or outermost edge of the respective BIAs in those critical habitat units. Adjusting the critical habitat boundaries shoreward to the 1,000m isobath, as recommended by the commenter, would result in removing portions of each of the BIAs from the critical habitat. Thus, we decline to make the requested change. (We also note that because Unit 10 is excluded from the final critical habitat designation for the MX DPS, the requested change to Unit 10 is no longer relevant.)

The isobath data used to delineate seaward boundary lines on the maps correspond to the aerial extent of humpback feeding habitat, which is considered to be primarily shelf and shelf-edge habitat. Per our implementing regulations at 50 CFR 424.18(a)(1), we are required to provide maps of critical habitats and provide the coordinates and/or plot points on which the map is based available to the public on our website, and per additional requirements under 50 CFR 424.12(c), ephemeral reference points are not to be used to clarify area boundaries. For marine habitats, bathymetry data are often readily available and reliable source data from which we can create maps and share the underlying spatial data in an electronic format. For the humpback whale critical habitat maps, the bathymetry data were thus not selected to correspond to humpback whale dive depths but to capture and map the seaward extent of the feeding areas.

Requests Regarding Exclusions of Particular Areas

Comment 38: A large number of commenters requested that no areas be excluded from the critical habitat designations. Some commenters noted that climate change is causing shifts in prey and may dramatically alter humpbacks whales' habitat use and thus the conservation value of specific areas as well. Commenters also expressed concerns about the ongoing threats of ship strikes and entanglement to humpback whales in the excluded areas. A group of commenters specifically stated that NMFS should include Units 7 (Kenai Fiords), 8 (Prince William Sound), 9 (Northeastern Gulf of Alaska), and 19 (California South Coast) in the final critical habitat designations or provide an adequate justification for these proposed exclusions. The commenters stated we did not individually weigh the conservation benefit of designating Units 7, 8, and 9 as required under section 4(b)(2) of the ESA. The commenters stated that these areas, which we described as ''low conservation value,'' still confer direct benefits to the species as well as indirect benefits which could outweigh a small economic impact.

Response: As discussed in the Draft Biological Report (NMFS 2019a) and the proposed critical habitat rule (84 FR 54354, October 9, 2019), climate change is expected to affect the abundance, quality, and distributions of humpback whale prey species. Ocean warming has already been documented as having significant effects on prey availability and on higher-level predators within North Pacific marine ecosystems (*e.g.,* Coyle *et al.* 2011, Brodeur *et al.* 2018, Jones *et al.* 2018, Santora *et al.* 2020), and recent analysis of humpback whales' responses to the North Pacific marine heat wave of 2014–2016 also provide clear insights into short-term response of the whales within the CCE to marine heat waves (Santora *et al.* 2020), which are predicted to increase in frequency and duration. However, the best currently available information is insufficient to allow us to determine how diet and habitat use of humpback whales may be affected over the longer-term and across all of the North Pacific feeding grounds. Thus, although we considered this available information, the CHRT's assessment of the relative conservation value of the habitat units in critical habitat designation was driven more by an understanding of the whales' current distributions and habitat use. While we agree it would be informative to have specific habitat suitability or risk exposure models to further inform this rule, we are required to complete the designations based on the best available scientific information. We are not required to develop new studies in order to complete the critical habitat designations. We also note that we have the authority to revise critical habitat designations as appropriate and in light of new information, which provides a mechanism for addressing and incorporating changing understandings of the species' use of new areas over time (16 U.S.C. 1533(a)(3)(A)(ii)).

With respect to critical habitat Unit 7 (Kenai Peninsula Area), Unit 8 (Prince William Sound), and Unit 9 (Northeastern Gulf of Alaska), we assessed the benefits of including those areas in the designation and the benefits of exclusion for each of these particular areas with respect to each relevant DPS of humpback whales. As discussed in our Final Biological Report (NMFS 2020a) and Final Economic Analysis (FEA), these assessments were revised and updated in response to public comments and new information received following publication of the proposed rule. In both the initial and final conservation rating assessments conducted by the CHRT, Units 7, 8 and 9 were rated as having low conservation value for the WNP DPS. In both the initial and final conservation rating assessments, Units 7 and 9 were rated as having low conservation value for the MX DPS; and Unit 8, which was previously rated as having high conservation value, was changed to medium conservation value (see NMFS 2020a). The estimated annualized economic impact of designating each of these three areas increased (by $1,600) based on new information regarding the rate of consultations on aquaculture and water quality management related activities, an update to 2020 dollars (from 2018 dollars), and an update of the timeframe of the analysis to 2020–2029 (previously 2019–2028). Overall, the updated assessments provided no basis to revise our previous conclusions regarding the relative weighing of the economic costs of designating these areas against the benefits of designating these areas. The benefits of designating the low value areas were still found to be outweighed by the associated economic impacts; and, for the MX DPS, the benefit of designating the medium value area of Prince William Sound was still not outweighed by the associated economic impact of designating this particular area. Thus, Units 7, 8, and 9 are excluded from the final critical habitat designation for the WNP DPS, and Units 7 and 9 are excluded from the final critical habitat designation for the MX DPS.

In conducting the weighing of benefits under section 4(b)(2), we assessed the benefits of designation and exclusion for each particular area (see NMFS 2020b). Given the relatively low forecasted costs and potential economic impacts associated with designating each of the 19 units under consideration, we determined that the benefits of designating medium, high, and very

high value areas were not outweighed by the economic benefits of exclusion. We did, however, conclude for each of the low conservation value areas that the limited benefits of designation were outweighed by the benefits of avoiding the forecasted costs and potential economic impacts of the designation. We also concluded for each of these areas that the exclusion from the designation would not result in the extinction of the particular DPS. Although the conclusion is the same for all low conservation value areas (*i.e.,* to exclude), a separate determination was made regarding each exclusion and whether such exclusion would result in the extinction of the relevant DPS. We have revised the Final Section 4(b)(2) Report to further clarify that the exclusion of each particular area was based on an assessment of that particular area.

Finally, we acknowledge that humpback whales face ongoing threats, particularly from ship strikes and entanglement, even within the areas excluded from the critical habitat designations. However, these threats, which directly impact the whales, will continue to be addressed under both the ESA and MMPA wherever applicable, regardless of whether the particular area has been designated as critical habitat under the ESA. In particular, when section 7 consultations are undertaken for Federal agency actions that may have impacts in the areas where whales or their prey are present, impacts that affect the whales will be considered as part of the analysis of whether the action is likely to jeopardize the continued existence of the listed species.

Comment 39: Multiple commenters requested that Unit 19 be included in the final critical habitat designations. Commenters expressed concerns regarding the significant threats of ship strikes and oils spills in Unit 19. Commenters also referred to the relative proportions of humpback whales as indicated by Steiger *et al.* (2017), high predicted occurrence of humpback whales as indicated by Becker *et al.* (2017), and krill hot spots as indicated by Santora *et al.* (2011) in this area, and stated that Unit 19 is therefore important to the conservation of the endangered CAM DPS of humpback whales. These commenters stated that exclusion of Unit 19 is not justified unless we analyze habitat preferences and distribution of the whales in relation to shifting environmental conditions and help identify the spatial and temporal dynamics of the species' risk exposure.

Response: We appreciate the concerns raised by the commenters regarding threats to humpback whales within Unit 19, California South Coast. However, these threats (*e.g.,* ship strikes, oil spills) do not provide sufficient justification for inclusion of this particular area in the critical habitat designation for either the CAM or the MX DPs of humpback whales. As discussed elsewhere in this final rule, the designation of critical habitat in areas within the species' occupied range is based on the presence of physical or biological features essential to their conservation of the species that may require special management considerations or protection. The existence of threats to the species, while informative, is not an appropriate basis upon which to build a designation of critical habitat under the ESA. Further, NMFS does not entirely agree with the characterization by the commenters of this particular area based on sightings, modeling, and prey distribution data. Unit 19 alone does not contain the highest 90 percent of the study area abundance predicted by the Becker *et al.* (2017) habitat model as implied by the commenters; rather it was added to capture the southernmost portion of the predicted abundances. As illustrated in Figure 18B in the Biological Report (NMFS 2020a), the highest 90 percent of predicted abundances based on the results of Becker *et al.* (2017) extend over most of Unit 16 and all of Units 17, 18, and 19. Sightings data reported in Calambokidis *et al.* (2017, Figure 5) and used in the poster by Steiger *et al.* (2017), which was referenced by the commenters, were considered and weighed heavily in our assessment of relative conservation value of critical habitat units along the coasts of Washington, Oregon, and California for the CAM and MX DPSs. These sightings data indicate that the largest proportions of CAM DPS whales do occur off of Southern California, while the largest proportions of MX DPS whales occur farther north along the coast. In terms of distribution of whales off of Southern California in particular, most of the sightings occur from Monterey Bay south to the northern Channel Islands and the Santa Barbara Chanel, and relatively few sightings occur farther south (J. Calambokidis, Cascadia Research Collective, pers. comm., May 12, 2020). This is consistent with the predicted abundances from Becker *et al.* (2016 and 2017), which indicate that the waters off southernmost portion of the California coast (*i.e.,* Unit 19) have the lowest predicted abundances of humpback whales during summer months as well as during cooler months (see Figure 17, Final Biological Report). Based on the locations of 10 krill hot spots reported in Santora *et al.* (2011), which we overlaid onto a map of the critical habitat units, only one of the 10 hotspots occurs within Unit 19, and no humpback whale BIA has been identified in Unit 19. Overall, we find that the best available data support the rating of Unit 19 as having relatively low conservation value for both the CAM and MX DPSs.

Comment 40: Multiple commenters, including the Washington Department of Fish and Wildlife, expressed opposition to the proposed exclusions of the Quinault Range Site (QRS) off the coast of Washington and the associated 10 km buffer around this area. Several commenters stated that the proposed exclusion was overly broad and not adequately justified. Several commenters stated that planned activities, such as use of sonar and explosives, can impact the whales and their prey and additional mitigation measures or restrictions on the Department of the Navy's (''Navy'') activities within the QRS should be implemented. One commenter noted that the QRS overlaps with the Olympic Coast National Marine Sanctuary, an area that requires a higher standard of resource protection. Many commenters noted that the QRS area was within a critical habitat area rated as having high conservation value for the CAM and MX DPS whales. Commenters requested we reconsider the Navy's request for this exclusion given the increased numbers of humpback whales using and moving through this area.

Response: As discussed in the Final Section 4(b)(2) Report (NMFS 2020b), to weigh the national security impacts against conservation benefits of a potential critical habitat designation, we considered the size of the requested exclusion and the amount of overlap with the specific critical habitat area; the relative conservation value of the specific area for each particular humpback whale DPS; the likelihood that the Navy's activities would destroy or adversely modify critical habitat; the likelihood that NMFS would require new or additional project modifications to reduce or avoid these impacts; and the likelihood that other Federal actions may occur in the site that would not be subject to the critical habitat provision if the particular area were excluded from the designation. In response to the public comments, we reconsidered these factors, information provided by the Navy, and also requested additional information from the Navy regarding their activities in the portion of the QRS

that also falls within the Olympic Coast National Marine Sanctuary (OCNMS).

In making our decision with respect to this particular area, we did so within the framework of our joint NMFS/USFWS policy on implementation of Section 4(b)(2) (81 FR 7226, February 11, 2016) (''Section 4(b)(2) Policy''). Specifically, when a Department of Defense (DOD) agency requests an exclusion the basis of national-security or homeland security impacts, it must provide a ''reasonably specific justification'' of a probable incremental impact on national security that would result from the designation of that specific area as critical habitat (81 FR at 7231, February 11, 2016). Where the request is substantiated with such a reasonably specific justification, we give ''great weight'' to those concerns in analyzing the benefits of exclusion. *Id.*

The proposed exclusion of the QRS and 10-km buffer comprise about 44 percent of Unit 11 (Coastal Washington), but represents only a very small portion of the total critical habitat designations for the CAM DPS (about 3 percent) and the MX DPS (about 1 percent). The QRS and associated buffer also have a significant degree of overlap with the OCNMS, where certain activities are prohibited, including oil, gas, or mineral exploration, development, or production; discharging or depositing any material or other matter; drilling into, dredging, or otherwise altering the seabed, with some exceptions (15 CFR 922.152). Because of these prohibitions, the likelihood of other Federal activities being proposed in this area of the QRS may be limited.

In response to public comments, and as described in the Final Biological Report, the CHRT completed a reassessment of the relative conservation value of each particular area under consideration for designation for each DPS. This reassessment was conducted to address multiple concerns that were raised in the comments regarding the data considered by the CHRT in rating the relative conservation of specific areas, and particularly that this initial analysis was confounded by data on non-listed humpback whales from the Hawaii breeding population (the ''Hawaii DPS''). The primary consideration in the CHRT's re-analysis of relative conservation value was the degree to which whales of a given DPS rely on each particular area for feeding. To evaluate this, the CHRT considered the best available data on migratory destinations, distribution patterns, and proportions of the DPSs using or estimated to use different feeding areas (*e.g.,* Barlow *et al.* 2011, Wade 2017, Calambokidis *et al.* 2017). Secondary considerations in assessing the relative conservation value of particular areas included the habitat quality or the consistency with which prey or high quality prey are abundant (which can be indicated by, among other data, presence of a BIA), and connectivity between feeding areas (generally as indicated by photo-identification and/or genetic data). Based on this reassessment, Unit 11 is rated as having medium conservation value for the CAM and MX DPSs. Available data from satellite-tagged humpback whales indicate the highest use areas within Unit 11 occur within the BIA as well as within the western edge of the Strait of Juan de Fuca (Mate *et al.* 2018, Palacios *et al.* 2020), which do not overlap with the QRS or associated buffer. Comparisons of the requested exclusion area with the predicted humpback whale densities from Becker *et al.* (2016, who modeled predicted densities in approximately 10 km by 10 km grid cells) also indicates that the requested exclusion area (meaning the QRS and buffer) is largely south of, but overlaps partially with, the area where the highest densities of humpback whales are predicted to occur within Unit 11.

In support of their request for exclusion of the QRS and buffer area, the Navy pointed to the extensive range of planned activities, which are described in their Final Northwest Training and Testing (NWTT) Supplemental Environmental Impact Statement (SEIS) published on September 18, 2020, and stated that any additional, future modifications to these activities to minimize impacts on humpback whale critical habitat would impact the Navy's ability to meet mission requirements. The Navy pointed to the use of explosives, in particular, as being likely to have adverse effects on humpback prey species, although not likely at the population level of the prey species. In their initial request, dated December 5, 2018, the Navy stated that if additional mitigation requirements were to result from a designation of critical habitat, they would likely need to halt, reduce in scope, or geographically or seasonally constrain testing activities to prevent adverse effects to critical habitat, and this would in turn impact their ability to test and field new systems and platforms. To avoid potential, additional, spatial restrictions on their activities within the QRS, the Navy also requested exclusion of an additional 10-km buffer around the QRS from the critical habitat designation. The Navy determined the size for this buffer using sound attenuation modeling to calculate the farthest distance at which fish would be expected to be injured from the largest explosive the Navy can reasonably foresee testing in the QRS; and, in subsequent communications, the Navy further clarified that the size of the buffer also incorporated uncertainty for updates in resource-related science, changes in oceanographic conditions that could reduce attenuation, and the evolution of military technologies that may behave differently in the environment.

We continue to conclude that the Navy has provided a reasonably specific justification to support the requested exclusion of the QRS, and consistent with our Section 4(b)(2) Policy, we gave great weight to these concerns when analyzing the benefits of exclusion. Our consideration of the multiple factors discussed, coupled with the potential delay in critical missions in order to complete adverse modification analyses, cause us to continue to find that the benefits of excluding the QRS due to national security impacts outweigh the benefits of designating this portion of Unit 11 as critical habitat for the MX and CAM DPSs. However, we are modifying our proposed exclusion of the buffer area. Specifically, we are not excluding a portion of the 10-km buffer area extending from the northeast corner of the QRS where it overlaps with the OCNMS. As discussed in the Section 4(b)(2) Report, we concluded the benefits of designating critical habitat for the MX and CAM DPSs within this portion of the buffer are not outweighed by national security impacts of including that portion at this time.

We acknowledge the concerns raised by the commenters regarding potential impacts to the whales and their prey because of certain Navy activities, such as sonar and explosives. The Biological and Conference Opinion on the Navy's Northwest Training and Testing Activities, issued by NMFS on October 19, 2020, addresses activities within the QRS and analyzed the effects of the Navy's planned activities on humpback whales as well as their prey. As discussed in that consultation, the Navy has adopted certain mitigation measures within the QRS, including the portion of the QRS that overlaps with the OCNMS, to avoid or minimize adverse impacts on marine mammals and other marine resources in this area. Exclusion of the QRS area will not impact our ability to continue to work closely with the Navy through the section 7 consultation process to minimize and mitigate impacts to the humpback whales as a result of the Navy's testing and training activities.

Comment 41: A few commenters expressed opposition to the proposed exclusion of the Navy's Southeast Alaska Acoustic Measurement Facility within Unit 10 and the Southern California Range Complex within Unit 19. One commenter stated these proposed exclusions pose too great a risk to the whales given the Navy's planned activities within these areas which have the potential to increase the risk of vessels strikes, disrupt foraging, and affect prey species. One commenter noted that the Integrated Natural Resource Management Plan (INRMP) for the Southeast Alaska Acoustic Measurement Facility (SEAFAC) had not yet been finalized and requested that NMFS revisit its decision to exclude this area once the INRMP is completed. The commenter stated we must also weigh the conservation benefit of designating this area.

Response: The SEAFAC is located in the Western Behm Canal near the city of Ketchikan and covers an area of 48 nmi^2 (164 km^2), which equates to 0.22 percent of the total area of Unit 10. We originally proposed to exclude SEAFAC under section 4(b)(2) of the ESA on the basis of substantiated national security impacts. We did not rely on any determination that the area was ineligible for designation under section 4(a)(3)(B)(i) of the ESA, which provides that certain areas cannot meet the definition of ''critical habitat'' if they are covered by a relevant INRMP that has been determined in writing to provide a benefit to the species (16 U.S.C. 1533(a)(3)(B)(i)). SEAFAC lies fully within Unit 10, which as discussed in detail in the Final Section 4(b)(2) Report (see also response to Comment 43), is excluded from the final critical habitat designation for the MX DPS under section 4(b)(2) of the ESA. (No other listed DPSs of humpback whales occur in this Unit). Therefore, because the larger area (Unit 10) is excluded on other grounds, it is not necessary for us to specifically exclude SEAFAC on either the original grounds or the alternative basis suggested in the comment. The status of the INRMP is not relevant to this determination.

The Southern California Range Complex (SOCAL), which is a portion of the Navy's Hawaii-Southern California Training and Testing Study Area (HSTT), overlaps with approximately 83 percent of critical habitat Unit 19. We agree that the activities that occur in the SOCAL range complex (*e.g.,* anti-submarine warfare, torpedo, mine countermeasure, gun, missile and rocket, and propulsion testing) have the potential to impact humpback whales, their feeding behaviors, and their prey species. The degree of any such impact depends upon the nature, timing, location, etc. of the particular activity. The Navy has concluded, and we agree, that designation of this portion of Unit 19 as critical habitat could potentially lead to requirements for additional mitigations (avoidance, area or time limitations, etc.) that could hinder Navy testing and training activities, and thereby impact military readiness and thus national security. Section 4(b)(2) requires us to consider impacts to national security, and our Section 4(b)(2) Policy directs that we accord great weight to the Navy's concern because they have provided a reasonably specific justification regarding these potential impacts. (81 FR 7226, February 11, 2016). Therefore, we stated in our proposed rule that this area should be excluded under section 4(b)(2) of the ESA. No new information was provided during the comment period to alter this conclusion, which we reaffirm in light of the great weight we assign the national security impacts consistent with our policy, and so we here affirm the exclusion of this area on the basis of national security impacts. We also note that the entire broader area of Unit 19, most of which overlaps with the SOCAL range, is excluded from the critical habitat designation based on consideration of economic impacts (see Final Section 4(b)(2) Report).

Comment 42: Several commenters expressed concern regarding the significant threat of ship strikes to humpback whales and requested that shipping lanes not be excluded from the critical habitat designation. One commenter noted that humpback whale BIAs overlap the San Francisco and Santa Barbara Channel shipping lanes, and stated that although ship strikes can be managed under existing mechanisms, ship traffic can compromise the benefit of critical habitat through disruption of surface availability, potentially resulting in physiological impacts to the whales. This commenter requested that the final rule acknowledge shipping as a potential impact to habitat quality. Another commenter requested that the shipping lanes of San Francisco or Long Beach/Los Angeles harbors not be excluded from the critical habitat designations given the extensive, cooperative efforts to address the threat of ship strikes in and around the traffic separation schemes (TSSs).

Response: We appreciate the concerns expressed by this commenter and the continued efforts being made to reduce ship strikes of humpback and other large whale species. We are not excluding any particular shipping lanes from the critical habitat designations for any of the three DPSs of humpback whales. We note, however, that the ports of Los Angeles and Long Beach lie within critical habitat Unit 19, which is excluded from the critical habitat designations for both the MX and CAM DPSs of humpback whales under section 4(b)(2) of the ESA. That particular exclusion was based on a conclusion that the relatively low conservation value of the particular area for each DPS was outweighed by national security and economic impacts and a determination that the exclusion will not result in the extinction of either DPS.

Comment 43: A large number of commenters opposed designation of Unit 10 (Southeast Alaska), and requested that NMFS remove this area from the critical habitat designation for Mexico DPS. The commenters stated that the economic impacts on Southeast Alaska were underestimated, while the conservation value was overestimated. Multiple commenters stated that economic impacts to the commercial fishing and related industry and infrastructure projects would be greater than anticipated and would impact the roughly 30 communities within this area. Some commenters noted that Southeast Alaska had the highest estimated administrative costs among all areas considered for designation. Numerous commenters also stated that Unit 10 is peripheral habitat for the threatened MX DPS of humpback whales, supporting only an estimated 2 to 4 percent of the MX DPS, and that designation of this area will provide minimal conservation benefit for this DPS while having a disproportionate and significant economic impact on Southeast Alaska. Many commenters also noted that most of the whales in this area are from the non-listed Hawaii population of humpback whales, and stated that Unit 10 should not be considered critical habitat for the listed MX DPS simply because it is biologically important feeding habitat for another population of humpback whales.

Response: As discussed previously in responses to comments on the economic analysis (see *Economic Impacts*), the FEA has been revised in response to public comments, which reflects increases in the anticipated economic impacts over what was presented in the DEA. For Unit 10 in particular, the costs have been revised upwards as a result of the information we received on the increased rate of consultations on aquaculture projects and water-quality management projects that is anticipated (as well as adjustments to the dollar-year and the timeframe applied in the

analysis). Specifically, the estimated, annualized, economic impacts to Southeast Alaska are estimated to be $26,000–$32,000, whereas the DEA had estimated an annualized impact of $12,000–$18,000. The estimated annualized cost for Unit 10 is more than double the cost estimate for any other particular area, and on average is roughly 10 times greater than the cost estimate for other particular areas within Alaska. Chapter 2 of the FEA also highlights the State of Alaska's concerns related to potential unquantified costs (*e.g.,* project delays) and discusses the potential for indirect or unquantified direct impacts related to certain activities. This discussion highlights that these added costs may affect communities such as those in Southeast Alaska more than other, more populated and economically diverse communities. Although most of the forecasted consultations for Southeast Alaska are expected to be informal consultations, the fact that the number of forecasted consultations in this particular area are an order of magnitude greater relative to other areas in Alaska indicates the potential for such impacts to result is much greater within this particular area.

Also, as discussed previously in response to Comment 30 and in further detail in the Final Biological Report, we reassessed the relative conservation value of each particular area under consideration for designation for each DPS in light of issues and concerns raised in public comments, particularly the assertion that our initial analysis was confounded by consideration of non-listed humpback whales from the Hawaii breeding population. In conducting the reassessment, the CHRT's primary consideration when rating the relative conservation value of each particular area was the degree to which whales of a specific DPS rely on each particular area for feeding. In conducting this analysis, the CHRT reviewed the best available scientific data on migratory destinations, distribution patterns, and proportions of the DPSs using or estimated to use different feeding areas (*e.g.,* Barlow *et al.* 2011, Wade 2017, Calambokidis *et al.* 2017). The CHRT did not rate the relative conservation value of areas based on whether the particular areas were important for non-listed humpback whales. In other words, whether a particular feeding area serves as important feeding habitat for the non-listed Hawaii population of whales was not used by the CHRT as a proxy indicator that the area has the same biological importance to whales of a listed DPS. Secondary considerations in assessing the relative conservation value of particular areas included indicators of habitat quality and connectivity between feeding areas that would confer conservation value in the face of environmental variability or threats (see NMFS 2020a). Based on this reassessment, Unit 10 is rated as having low conservation value for the MX DPS.

Given the results of the economic analysis that indicate Unit 10 is projected to experience the greatest probable economic impact, coupled with the relative low conservation rating of this particular area, we find that the benefits of excluding this particular area outweigh the benefits of designating it as critical habitat. We are therefore excluding this particular area from the final critical habitat designation for the MX DPS pursuant to the authority of section 4(b)(2) of the ESA.

Comment 44: A commenter stated that critical habitat will benefit the humpback whales in Southeast Alaska (Unit 10), even though only 6–8 percent of the whales using this area are known to be from the threatened MX DPS, and that the proposed critical habitat should be designated. The commenter stated that if the several hundred MX DPS whales in this area do not warrant ESA protection, then NMFS should state what number of listed whales does merit protection. The commenter also stated that the number of whales estimated to use this area is likely an underestimate.

Response: We appreciate the commenter's concern regarding designating critical habitat in areas where even a small proportion of the listed DPS is known to occur or has been estimated to occur. However, we cannot, nor are we required to, specify a threshold number of listed whales within a specific area that would warrant or not warrant a critical habitat designation. In designating critical habitat, we must first identify areas that meet the statutory definition of critical habitat based on the best scientific information available, and must then consider the economic, national security, and other relevant impacts of that designation pursuant to the first sentence of section 4(b)(2) of the ESA. When entering into an exclusion analysis, under the second sentence of section 4(b)(2), we evaluate each particular area on the basis of the set of data relevant to that particular area. In this case, after considering the best available data regarding the use and value of this area to the conservation of the MX DPS and the estimated economic impacts of including Unit 10 in the designation of critical habitat for that DPS, we determined that the benefits of designating this area are outweighed by the benefits of excluding (or, the impacts of designating) this particular area. Thus, although we determined that Southeast Alaska (Unit 10) meets the definition of critical habitat for the threatened MX DPS of humpback whales, as outlined more fully in our response to the previous comment, we are excluding this area from the final critical habitat designation for the MX DPS under the authority of section 4(b)(2) in order to ensure that the areas included in the final designation provide the most meaningful benefit to the species while minimizing undue or disproportionate costs and other impacts.

Comment 45: One commenter stated that the proposed critical habitat around the Shumagin Islands and the Stepovak Bay area is not needed, and that it will hamper local communities that are already under extreme pressure from regulatory bodies. The commenter recommend we not designate these areas as critical habitat as members of the local community very rarely or never have negative contact with the whales.

Response: The locations referred to by the commenter are within and adjacent to a Biologically Important Feeding Area (BIA, Ferguson *et al.* 2015c) for humpback whales, and a substantial amount of data from scientific surveys indicate that this area consistently serves as an important feeding habitat for humpback whales (Witteveen *et al.* 2004, Witteveen and Wynne 2013, Witteveen and Wynne 2016a). This feeding area is used by both the MX and WNP DPSs (Witteveen *et al.* 2004; Calambokidis *et al.* 2008, Barlow *et al.* 2011), where the whales target and consume krill and fish species (Nemoto 1957, 1959; Wynne and Witteveen 2013). The estimated economic impacts forecasted to occur in the particular area (Unit 3), where the Shumagin Islands and Stepovak Bay are located, are among the lowest when compared to the other nine critical habitat units in Alaska. Based on the high-end estimates of future activity in the unit and associated section 7 consultations, fewer than 10 section 7 consultations are forecasted to occur within Unit 3 over the next 10-years, and 7.5 of those consultations are expected to be informal consultations, which carry fewer costs generally (IEc 2020). Unit 3 was assessed by the CHRT as having high conservation value for the MX DPS and medium conservation value for the WNP DPS. This latter rating was associated with greater uncertainty due to almost 40 percent of the CHRT's votes

being assigned to the high conservation value category.

The ESA requires that we designate critical habitat for listed species to the maximum extent prudent and determinable, and it allows the Secretary to exclude particular areas after conducting an exclusion analysis if the benefits of including the area in the designation are outweighed by the impacts (*e.g.,* economic impacts, national security) of including the area in the designation. In this process, we must determine which factors are relevant and how much weight to assign each factor (50 CFR 424.19(c)). Here, we assign great weight to the assessment that the area provides at least medium conservation value habitat for the endangered WNP DPS and high conservation value habitat for the threatened MX DPS to support the conservation of these species, which is a significant and important benefit of including the area in the designations. It is reasonable to give great weight to this factor in light of the purpose of critical habitat under the Act (to support the conservation, or recovery, of the species) and the statutory mandate to designate critical habitat to the maximum extent prudent and determinable. After thoroughly considering the available information regarding the benefits of designation and impacts of designation, we find the benefits of including the area in the designations are not outweighed by the probable benefits of excluding the area from the designations. Thus, the standard for excluding the area under 4(b)(2) is not met, and this particular area is not excluded from the final designations.

Comment 46: A commenter requested exclusion of the Prince William Sound (Unit 8) and the Northern Gulf of Alaska (Unit 9) habitat units from the critical habitat designations. The commenter expressed concerns that the economic impacts were underestimated for Prince William Sound in particular, stating the economic analysis focused on expenses to NMFS and did not fully consider the potential economic impacts to local residents, stakeholders, and municipal governments from additional expenses and delays associated with additional regulatory requirements for hatcheries and port, harbor, and seafood processing infrastructure projects as well as direct economic impacts on the commercial fishing fleet. The commenter stated that Unit 8 is not the most biologically important area for the MX DPS and its designation is not necessary to meet the requirements of the ESA.

Response: Unit 9, which was assessed as having relatively low conservation value for both the WNP and MX DPSs was not proposed for designation, nor is it included in the final designations for either DPS. Unit 8, which was assessed as having low conservation value for the WNP DPS whales, was not proposed for designation for that DPS, nor is it included in the final designation for that DPS. Thus, we focus our response on Unit 8, the Prince William Sound area, which we proposed to include in the critical habitat designation for the MX DPS.

As discussed previously (see response to Comment 1), the costs estimated in the analysis are not exclusive to NMFS, and as shown in Exhibit 1–3 of the FEA, for each forecasted consultation, the analysis estimates administrative costs to NMFS, a Federal action agency, and a third party. A third party can be a private company (*e.g.,* an applicant for a Federal permit), a local or state government, or some other entity. In addition, the analysis also evaluates the potential for costs resulting from additional conservation efforts for the humpback whales that may be recommended through consultation, as well as the potential for indirect impacts (not related to section 7), such as project delays or regulatory uncertainty. Under our implementing regulations, we must take into account the *probable* economic, national security, and other relevant impacts (50 CFR 424.19(b)). Based on information provided during the public comment period, the FEA includes more detailed discussion of concerns related to these potential economic impacts of the designation in Alaska and discusses the likelihood of these materializing. As summarized in Section 2.2 of the FEA, the economic analysis indicates that it is most likely that the costs resulting from critical habitat designation will be largely limited to administrative costs of consultation, with the potential for some additional, unquantifiable costs to result from in-water construction and dam-related project delays that may occur following designation, which are unquantified in the analysis but presented qualitatively. Additional discussion regarding in-water construction costs is provided in response to Comment 10. Lastly, as described in the FEA and as discussed in response to Comment 3, the FEA quantifies costs of consultations on fishery management plans in Alaska, including a total of four anticipated consultations on the Fishery Management Plans for the Bering Sea/Aleutian Island groundfish fishery and Pacific halibut fishery over the next ten years. However, as described in Section 2.3.1 of the FEA, we do not presently anticipate critical habitat designation for humpback whales to generate changes to fisheries management in Alaska because the fisheries either do not target humpback whale prey species or do not take significant amounts of humpback whale prey species overall. Thus, there is no indication that the commercial fleet in this region will experience probable economic impacts as suggested by the commenter. In response to public comments and new information provided, the quantified annualized economic impact for Unit 8 was increased from $1,800 to $3,400. However, this cost estimate remains among the lowest when compared to all critical habitat units under consideration for designation for the MX DPS (Exhibit 3–3, FEA).

The relative conservation value of Unit 8 was reassessed by the CHRT in response to public comments and through this reassessment, the relative conservation value for Unit 8 was changed from high to medium. This rating was largely based on the relative level of use of this area by whales from the MX DPS and the presence of a feeding BIA. We also considered the recent information indicating that this area likely has a strong connection to Kodiak Island (Unit 5), which is considered to have very high conservation value for the MX DPS (NMFS 2020a). While we agree with the commenter that this is not the most biologically important area for the MX DPS, as reflected in the final medium conservation value rating for this area, this area meets the ESA's definition of critical habitat and is considered important to the conservation and recovery of the MX DPS. It is considered more important than the areas assessed as having ''low'' conservation value. Further, the ESA does not direct that a designation must be limited to only the ''most important'' areas. An area that meets the definition of ''critical habitat'' on the basis of the best available information is presumptively included in the designation, subject to the exclusions process of section 4(b)(2), which allows for exclusion only in particular circumstances.

Specifically, the second sentence of section 4(b)(2) of the ESA provides that the Secretary may exclude particular areas from a designation only if the Secretary finds that the benefits of excluding that particular area from the designation outweigh the benefits of including that particular area in the designation, and failure to include the area in the designation will not result in the extinction of the species (50 CFR 424.19(c)). As we explained in the

response to Comment 45, we must determine which factors are relevant and how much weight to assign each factor in carrying out the analysis (*see id.).* Here, we assign great weight to the CHRT's assessment that area provides a medium level of value to support the conservation of the MX DPS, which is a significant and important benefit of including the area in the designation. It is reasonable to give great weight to this factor in light of the purpose of critical habitat under the ESA (to support the conservation, or recovery, of the species) and the statutory mandate to designate critical habitat to the maximum extent prudent and determinable. After thoroughly considering the available information regarding the benefits of designation and impacts of designation, we find that the benefits of designating the Prince William Sound area as critical habitat are not outweighed by the relatively low forecasted, potential economic impacts. Unit 8 will therefore not be excluded from the designation for the MX DPS.

Comment 47: The Aleutians Island East Borough expressed concerns regarding how the critical habitat designation for the WNP and MX DPSs of humpback whales could inhibit project development, such as proposed kelp farms, within their jurisdiction. The comment also expressed concerns about restrictions on fishing opportunities, because the Borough is dependent upon fish tax revenue to provide important services and infrastructure. The Borough requested the exclusion of seven municipal areas: Zachary Bay on Unga Island, the city of Sand Point, the city of King Cove, the city of False Pass, the city of Akutan, and the city of Cold Bay, and waters surrounding the Community of Nelson Lagoon.

Response: In considering this request, we first evaluated the degree of spatial overlap of the seven areas identified by the Borough with areas proposed for designation as critical habitat using GIS data provided by the Borough. King Cove and Nelson Lagoon are located fully outside of the critical habitat boundaries and thus are not included in the critical habitat designation. Cold Bay and False Pass are almost entirely outside the critical habitat boundaries, with areas of overlap measuring only 0.79 nmi^2 (2.70 km^2) and 0.22 nmi^2 (0.77 km^2), respectively. The remaining areas, Akutan, Sand Point, and Zachary Bay lie within or almost entirely within the proposed critical habitat. Sand Point and Zachary Bay lie within Unit 3 of the proposed critical habitat, which was rated by the CHRT as having medium conservation value to the WNP DPS and high conservation value to the MX DPS. Akutan is located within Unit 2 of the proposed critical habitat, which was rated as having very high conservation value to both the WNP and MX DPSs. In terms of the quantified economic impacts, both Units 2 and 3 had estimated costs that were among the lowest of the Alaska units as well as overall. Based on the number of forecasted section 7 consultations for these areas, which are relatively low and are largely expected to be informal consultations, future impacts on these communities as a result of the critical habitat are expected to be limited. In addition, and as discussed previously in response to Comment 3 and in Section 2.3.1 of the FEA, we do not currently anticipate changes to fisheries management because the fisheries either do not target humpback whale prey or take significant amounts of humpback whale prey species overall. Thus, overall, we conclude that impacts on the overlapping communities as a result of the critical habitat designation will be limited and do not outweigh the conservation benefit of the critical habitat designations. After engaging in the consideration of impacts as discussed in the response to Comments 45 and 47, we therefore conclude that the standard under section 4(b)(2) is not met; the benefits of designating these areas are not outweighed by the probable benefits of exclusion of these areas, and we decline to exclude them from the final designations.

Comment 48: A commenter requested that we exclude Unit 12 and 13 from the designation for the CAM DPS, because presence of CAM DPS whales in these areas has merely been inferred, no BIA has been identified in Unit 12, and the lack of interchange of humpbacks in these units strongly suggests these units do not contain prey in sufficient quantities to be considered essential to the conservation of the species. The commenter also noted there is a strong basis to exclude these areas under section 4(b)(2).

Response: Unit 12 (Columbia River Area), which is located around the Columbia River plume system and extends from the southern Washington to northern Oregon coast, and Unit 13 (Coastal Oregon), which includes the remainder of the Oregon coast, were rated as having medium/low conservation value and medium conservation value, respectively, for the CAM DPS through both the initial and final assessments conducted by the CHRT. These relative conservation ratings were driven largely by the available data showing declining proportions of CAM DPS whales within the more northern feeding areas within the CCE (Calambokidis *et al.* 2017). (With the exception of Unit 19, all other habitat units to the south were assigned higher conservation values for this DPS.) Our understanding of distribution of CAM DPS whales is based on extensive photo-identification data as well as available genetic data. Analysis of 23,277 identifications of 3,484 humpback whales sighted in the CCE (from southern British Columbia to southern California) from 1986–2014 indicates that a low proportion of whales occurring off the coast of Washington belong to the CAM DPS, and a relatively higher proportion of CAM DPS whales occurs off the coast of Oregon (Calambokidis *et al.* 2017). Over 70 percent of the photo-identified whales from the CAM DPS matched to the Oregon-California region (Calambokidis *et al.* 2017). Consistent with this finding, is the very high estimated probability (0.926, Wade 2017) of whales from the CAM DPS moving into the larger Oregon-California feeding region, which extends into Unit 13 and a significant portion of Unit 12. Photo-identified CAM DPS whales have also been observed in feeding areas adjacent to and directly to the north and south of the area covered by Units 12 and 13.

While two feeding groups of whales are currently recognized along this portion of the CCE (*i.e.,* Southern British Columbia/Northern Washington and Oregon/California; Carretta *et al.* 2017 and 2020), analysis of available satellite tracks indicates overlap in the movements and feeding ranges of whales from Washington and Oregon, and from Oregon and California (but not between Washington and California; Palacios *et al.* 2020). Preliminary results from an ongoing, large-scale assessment of photo-identification data also suggest potentially significant rates of movement of humpback whales between the southern British Columbia/Washington and Oregon/northern California regions and the Oregon/northern California and southern California regions (Clapham *et al.* 2020). Individual assignment tests have indicated that two whales (of nine) sampled in 2016 and 2017 and one (of six) sampled in 2018 off the coast of Oregon (Unit 13) have the highest likelihood of being assigned to the CAM DPS (Mate *et al.* 2018, Palacios *et al.* 2020). Overall, these available data provide strong support for CAM DPS whales' use of both Units 12 and 13 as well as interchange with adjacent feeding areas.

Multiple krill hotspots in association with submarine canyons have been

identified in Units 12 and 13 (Santora *et al.* 2018), across which variable abundances and distributions of northern anchovy, Pacific herring, and Pacific sardine have also been documented (*e.g.,* Litz *et al.* 2008, Zwolinski *et al.* 2012, Hill *et al.* 2019). The best available data indicate that these areas contain sufficient abundances of prey to support humpback whale feeding. Area-restricted search data (ARS, indicative of feeding behavior) derived from satellite tracks for 19 humpbacks tagged in 2004–2005 and in 2017 indicate that whales were feeding within Units 12 and 13 (Mate *et al.* 2018). Satellite-monitored tracks for 11 humpback whales tagged off the coast of Oregon in 2015–2018 also indicate that the area off the Columbia River mouth was one of the highest use areas (Palacios *et al.* 2020). In addition, a comprehensive analysis of a total of 56 tracks from humpback whales tagged during 2004–2018 off California, Oregon, and Washington indicates that of two behavioral modes, ''transiting'' or ''ARS,'' about 60–75 percent of the location data within the areas of Unit 12 and 13 were in the ARS behavioral mode, while less than 25 percent of the location data were classified as transiting and remaining data classified as ''uncertain'' (Palacios *et al.* 2020).

The annualized economic impact of designating these areas was estimated to be $6,900 for Unit 12 and $9,500 to $10,000 for Unit 13, which are not considered particularly high or significant costs. The whales in the DPS for which these units would be designated are endangered and considered to have relatively low abundance, and we find that the habitat in both Units 12 and 13 is important to support the recovery of this DPS. After engaging in the consideration of impacts as discussed in the response to Comments 45 and 47, we therefore conclude that the standard under section 4(b)(2) is not met; the benefits of designating these areas is not outweighed by the estimated probable economic impacts associated with each of these habitat units. Therefore, we are not excluding these specific areas from the final critical habitat designation for the CAM DPS.

Comment 49: A commenter requested we exclude Unit 6 (Cook Inlet Area) from the final critical habitat designation for the MX DPS. The commenter stated that fewer humpback whales have been observed during monitoring surveys in lower Cook Inlet in recent years (Kendall *et al.* 2015, Lomac-McNair *et al.* 2014) than during the SPLASH surveys, and asserted that because this area does not contain a BIA, it cannot logically contain the essential feature. The commenter also stated that whales using lower Cook Inlet have always been considered part of the Central North Pacific Stock, which is considered to be part of the non-listed ''Hawaii DPS.'' Lastly, the commenter asserts that designation of Cook Inlet as critical habitat would create a regulatory burden with very little conservation value to the listed DPS, and that if Unit 6 is considered to contain the essential feature for the MX DPS, NMFS should exclude this area from the designation pursuant to section 4(b)(2) of the ESA.

Response: Unit 6, which consist of the lower portion of Cook Inlet north to Kalgin Island, was proposed for designation as critical habitat for the MX DPS. Humpback whales are routinely sighted in the lower portions of the inlet but in fairly low numbers within a given year (National Marine Mammal Laboratory (NMML), unpubl. data, 1994–2016). Inter-annual movements of whales between lower Cook Inlet, the Barren Islands, and waters adjacent to northeast Kodiak Island (Witteveen *et al.* 2011) strongly suggest this is not a discrete feeding area. Photo-identification data collected during the SPLASH study demonstrates that MX DPS whales occur in this particular area, but the level of site fidelity of humpback whales to this feeding area has not been established.

As discussed previously (see response to Comment 33), BIAs, are not necessarily synonymous with critical habitat and vice versa, and while BIAs were an important consideration in the CHRT's assessments, lack of a BIA does not disqualify areas from consideration as critical habitat under the ESA. While non-listed humpback whales from the Hawaii breeding population are more abundant within the larger Gulf of Alaska region relative to whales from the threatened MX DPS, this region is part of the occupied range of the MX DPS. Humpback whale ''stocks'' identified under the MMPA are not synonymous with DPSs under the ESA, and the currently recognized MMPA stocks, which consist of multiple DPSs, are currently being reviewed by NMFS (Muto *et al.* 2020, Carretta *et al.* 2020). Both the estimated proportion of MX DPS whales using Unit 6 as well as the lack of a BIA in this particular area were among the relevant factors considered by the CHRT in assessing the relative conservation value of this area.

Based on the CHRT's reassessment of the relative conservation values of all specific areas, the conservation value of Unit 6 to the MX DPS was changed from the initial medium rating to low conservation value (NMFS 2020a). This rating was largely influenced by the low percentage of MX DPS whales identified in this area during the SPLASH study (5 of 301 MX DPS whales), the low to moderate predicted movement probability of MX DPS whales into the larger Gulf of Alaska region (*i.e.,* 0.111; Wade 2017), and the lack of a BIA in this Unit. Available sightings data, which indicate that only about 103 humpback whales have been observed within Unit 6 during beluga whale aerial surveys conducted in 17 summers during 1994–2016 (NMML, unpubl. data, 1994–2016; Sheldon *et al.* 2017), suggest that the number of humpback whales using this area is low.

Based on the analysis in the FEA, the estimated annualized economic impacts of designating Unit 6 as critical habitat was increased to $5,200–$5,600 from the previous estimate in the draft analysis of $3,400–$3,700 (IEc 2020). This increase was the result of new information regarding the increased rate of consultation on aquaculture and hatchery projects in future years per data from ADF&G, the increased rate of consultations on water quality management activities per data from ADEC, an update to 2020 dollars (from 2018 dollars), and an update to the analysis timeframe to 2020–2029 (previously, 2019–2029). Although the estimated economic impacts are still considered relatively low, we conclude that the benefits of excluding Unit 6 outweigh the relatively low conservation value of including Unit 6 in the critical habitat designation for the threatened MX DPS. We also conclude that this exclusion will not result in the extinction of the MX DPS. Thus, Unit 6 is excluded from the final critical habitat designation (NMFS 2020b).

Comment 50: The Alaska Department of Transportation and Public Facilities (DOT&PF) requested that we exclude developed areas from the critical habitat designations for the WNP and MX DPSs because such areas do not contain high quality habitat. The DOT&PF specifically requested exclusion of existing and planned ferry terminals in the Alaska Marine Highway System, harbors, seaplane facilities, ports, and harbor facilities under the control of local governments. The DOT&PF referenced the critical habitat designations for the Southwest Alaska DPS of the northern sea otter and Cook Inlet beluga whales as examples where similar provisions were included in the critical habitat rules. The DOT&PF also requested exclusion of a 500 foot zone around ferry, harbor and seaplane facilities or structures because such

areas receive the most intense use as boats and seaplanes enter and exit the facilities, and routine maintenance and facility upgrades frequently require large barges and boats to maneuver in and around these structures.

Response: The Southwest Alaska northern sea otter and Cook Inlet Beluga whale critical habitat designations (74 FR 51988, October 8, 2009; 76 FR 20180, April 11, 2011) include regulatory language indicating that manmade structures are not included in the critical habitat. For instance, the sea otter designation states: Critical habitat does not include manmade structures (including, but not limited to, docks, seawalls, pipelines, or other structures) and the land on which they are located existing within the boundaries on the effective date of this rule (50 CFR 17.95(a)(3)). The Cook Inlet beluga whale critical habitat regulation contains the following, similar, regulatory language: Critical habitat does not include manmade structures and the land on which they rest within the designated boundaries that were in existence as of May 11, 2011 (50 CFR 226.220). NMFS has also included similar regulatory language in other previous critical habitat designations (*e.g.,* Northwest Atlantic Ocean DPS of loggerhead sea turtle (50 CFR 226.223(c)(2)), Atlantic sturgeon DPSs (50 CFR 226.225(a)(6)), Hawaiian monk seal (50 CFR 226.201(c)(1))). In these previous cases, the rationale for this regulatory language was that the manmade structures themselves do not contain or provide the essential physical or biological features identified as being essential to the listed species. Although we are not required to establish with perfect specificity exactly where the essential feature is located within the specific areas, we find that here it is also appropriate to denote that structures are not included within the designation because they do not, by definition, have the essential feature. We therefore agree with the commenter that the inclusion of such language in the critical habitat designations for the WNP, MX, and CAM DPSs of humpback whales is an appropriate clarification. Therefore, we have added regulatory language that is applicable to all three of the critical habitat designations that indicates that existing manmade structures (*e.g.,* docks, sea plane facilities) are not part of the critical habitat because they do not contain the essential prey feature for any of the DPSs.

Similar to previous critical habitat designations, this clarification regarding manmade structures will apply only to those structures in place by the effective date of this rule. We conclude that it would be an unwarranted departure from agency practice and inappropriate to include planned or future facilities in this clarification. The construction of facilities in the future within the critical habitat may pose adverse effects to the physical or biological feature or to the area, and there would be a benefit to review of such projects through interagency consultation applying the requirements of section 7 of the ESA. In such cases, we find it appropriate that those construction activities be carried out in a manner that is required to consider and avoid adverse destruction or modification of the critical habitat. We also note that this clarification in the critical habitat regulatory language does not constitute an exclusion to the critical habitat designations under section 4(b)(2) of the ESA, but rather it is a clarification regarding what is considered critical habitat to ensure consistency with the standards of the statutory definition.

However, we note that the commenter appeared to go further than previous practice to include harbors and ports in this exclusion request. Such areas are not generally excluded from the referenced critical habitat designations that the commenter cited in support. Rather, the regulatory clarification in both the sea otter and Cook Inlet beluga whale critical habitat designations is specific to manmade structures. The Cook Inlet beluga whale critical habitat designation's exclusion of the Port of Anchorage is inapposite. There, the exclusion of the port was not limited to the manmade structures within the port and was not for the purpose of mere clarification. Rather, that particular port, which is designated by the Department of Defense (DOD) as a Strategic Port, was excluded from Cook Inlet beluga whale critical habitat under section 4(b)(2) based on consideration of national security impacts. No information regarding impacts to national security were provided by the commenter, and we have received no such exclusion request from DOD. Thus, the ports will not be excluded from this final designation.

Consistent with the critical habitat designations cited by the commenter, we are also not excluding an additional 500 foot zone or buffer around manmade structures. The justification put forward by the commenter to support the requested 500 foot buffer is the high degree of vessel and seaplane presence and traffic around the ferry, harbor, and seaplane structure and facilities. While it is clear these are areas have a relatively high level of routine vessel and plane activity, this does not necessarily indicate that there would be significant costs from including the area in the designation. There is no obvious Federal nexus with many of these identified activities, and likely only a small subset of these activities would be subject to the requirements of section 7 of the ESA. In addition, the impact of these types of activities will largely be direct impacts on the whales themselves (*e.g.,* vessel strikes, harassment), potential adverse effects that would independently trigger the need for section 7 consultation to consider impacts to the species. Thus, in the subset of cases where there is a Federal nexus—for example, in instances where the vessel activity is associated with construction or maintenance of a ferry terminal—the requirement to consult under section 7 of the ESA would be triggered even in the absence of humpback whale critical habitat and would likely be focused on direct impacts to the ESA-listed whales. Furthermore, the protections for humpback whales and other marine mammals under the MMPA would also apply within this buffer area. As indicated in the FEA (IEc 2020), no additional conservation measures are likely to result from the forecasted consultations on in-water construction activities, largely due to the existing baseline protections in place; and, the associated administrative costs for the relevant areas of Alaska are relatively low, especially relative to Unit 10 (Southeast Alaska). In addition, non-quantified economic impacts, such as project delays, are also unlikely (and therefore do not constitute probable impacts) because, as confirmed by the State of Alaska, there are no specific examples of such in-water construction projects having been halted or delayed due to a new critical habitat designation and resulting need for reinitiation of an existing consultation in Alaska.

In conclusion, after engaging in the consideration of impacts under section 4(b)(2), we find there is no clear basis to establish a meaningful benefit from excluding a 500 foot buffer around these structures from the critical habitat designations. We therefore conclude that the standard under section 4(b)(2) is not met; the benefits of including the buffer area in the designation are not outweighed by any benefit of exclusion. Therefore, we are not making this additional exclusion.

Comment 51: A commenter requested that we focus the critical habitat designation within Southeast Alaska on waters that have been routinely shown to be highly important for humpback whale feeding. The comment states that it is common knowledge that humpback whales only rarely traverse through

Wrangell Narrows and Duncan Canal, both of which they state contain developed areas and do not contain the essential prey feature. Thus, the commenter concludes, it is reasonable to exclude these areas from the critical designation. Other areas were identified as supporting high densities of feeding humpback whales at certain times of year—specifically Sitka Sound, Seymour Canal, the Petersburg area, and Frederick Sound north of Kupreanof Island to Stephens Passage and west past Big Creek. The commenter also requested a certain distance buffer of communities and other human development in general, or a buffer of non-Federal lands to allay concerns of the public.

Response: We appreciate the commenter providing this information regarding seasonal use patterns of humpback whales within Southeast Alaska. However, as discussed previously in our response to Comment 43, based on our analysis of the benefits of excluding this area as compared to the benefits of including the area, Southeast Alaska (Unit 10) is excluded from the final critical habitat designation for the MX DPS. The exclusion of this particular area was based on the finding that the economic impacts of designation outweigh the benefits of designation, and the conclusion that this exclusion will not result in the extinction of the species.

Requests To Designate Particular Areas

Comment 52: A commenter provided information and results of recent studies regarding the abundance, identity, and spatial and temporal use patterns of humpback whales in San Francisco Bay. The commenter stated that these data indicate a recent influx of humpback whales into the bay, where they feed on northern anchovy. The commenter specifically noted that peak daily numbers reached 24 whales in the outer strait west of the Golden Gate Bridge, and 15 whales inside the bay east of the bridge. The commenter stated that whale presence and locations was correlated with tidal state, with whales moving inshore with the rising tide and offshore with the ebbing tide. Based on a total of 502 photo-documented sightings, the commenter stated that 61 individual whales have been cataloged, of which 18 have visited the bay in multiple years, and 44 percent (n=27) of which have been matched to whales on the breeding grounds on the West Coast of Mexico. To promote the recovery and conservation of the Mexico DPS, the commenter recommended that the inshore boundary of Unit 16 within San Francisco Bay be set as a northsouth line running from Bluff Point in Marin County through Angel Island and Alcatraz Island to San Francisco's Aquatic Park Pier, which would extend the current boundary approximately 5.25 km east of the Golden Gate Bridge. The commenter stated that whales in the bay face increased exposure to the threat of ship strike, harassment (through vessel noise), and entanglement, and noted the lack of vessel speed restrictions within the bay.

Response: We appreciate the detailed information provided by this commenter. The proposed inshore boundary of Unit 16 was delineated by the 15-m isobath except where it was drawn farther inshore into San Francisco Bay east to the Golden Gate Bridge. The boundary was extended into the mouth of the San Francisco Bay to capture what had recently been recognized as important foraging habitat for humpback whales (Calambokidis *et al.* 2017), but only up to where the highest numbers of whales had been observed (*i.e.,* near the entrance to San Francisco Bay; J. Calambokidis, Cascadia Research Collective, pers. comm., May 23, 2018). Both sightings and telemetry data indicate that humpback whales are concentrated and mainly forage outside the bay on the shelf and especially within the area encompassed by the nearby BIA (Calambokidis *et al.* 2015, Mate *et al.* 2018). Study results provided by the commenters support a hypothesis that the whales' presence in the bay is tidally-influenced, with the whales following prey into the bay on rising tide, and departing on falling tide. Specifically, the results provided by the commenter demonstrate the shift in sightings from Point Bonita (outside the bay) eastward to and under the Golden Gate Bridge over the course of rising tides. Because the majority of these sightings did not extend farther into the bay, we find that the boundary, as initially proposed, appropriately captures the general distribution of humpback whales and the vast majority of whale sightings within this portion of their feeding habitat. Therefore, we conclude on the basis of the best available scientific data that the boundary as proposed remains the appropriate boundary for critical habitat for both the CAM and MX DPSs.

Although we are not extending the critical habitat boundary as recommended by this commenter, we will continue to address the threats raised by this commenter as being particular concerns in this area. Specifically, ''take'' of these listed whales as a result of ship strikes, harassment, and entanglement will continue to be addressed as appropriate under sections 7, 9, and 10 of the ESA and under the MMPA. We also look forward to continued results from this study, including information on future trends in humpback whale occurrences within the bay and the DPS identity of whales in this area.

Comment 53: Multiple commenters requested that the critical habitat designations be expanded to include the Salish Sea, including areas around the San Juan Islands, Admiralty Inlet, and Puget Sound. Several of these commenters noted their personal observations of humpback whales in Puget Sound. Another commenter referred to the Center for Whale Research, Humpbacks of the Salish Sea catalogue, and the Orca Network's Whale Sighting Network data and stated that over 400 individual humpback whales have been documented in the Salish Sea, including individuals from both the threatened Mexico DPS and endangered Central America DPS. This commenter stated that these waters are becoming increasingly important to humpback whales and should be designated as critical habitat.

Response: We agree with these commenters that available data clearly indicate humpback whales are increasingly being observed within the Salish Sea. However, data referenced by the commenter in support of extending critical habitat into the Salish Sea are photographs that are not associated with location data (Center for Whale Research catalogue and Humpbacks of the Salish Sea catalogue), and public reports of humpback whale sightings that cannot be attributed to unique whales (Orca Network's database). Sightings data without corresponding location data or a means of determining counts of individual whales prevents us from applying these data to determine habitat use patterns or determine the extent to which the sightings may be biased by areas of greater human concentrations.

Within the Salish Sea, scientific survey data indicate that the highest densities of humpback whales occur within the Strait of Juan de Fuca up to Port Angeles, especially on the British Columbia side of the strait, with only intermittent use of the waters deeper within Puget Sound (pers. comm., John Calambokidis, Cascadia Research Collective, February 26, 2020). Satellite tagging data for 42 humpback whales that were tagged off the coast of Washington and tracked during mid-summer and early fall of 2018 and 2019 indicate a consistent habitat use pattern, with whales showing a preference for continental shelf and shelf-edge habitat

and use of the western portion of the Salish Sea (Mate *et al.* 2020, Palacios *et al.* 2020). Within the Salish Sea, whale tracks generally extended as far east as Pillar Point; however, three whales travelled into Canadian waters off Vancouver Island. No whales were tracked into Puget Sound (Mate *et al.* 2020, Palacios *et al.* 2020). Overall, we find that the proposed boundary at Port Angeles is an appropriate boundary and captures the portion of U.S. waters known to be occupied and consistently used by whales from the MX and CAM DPSs. Ongoing research efforts will continue to provide information regarding trends in humpback whale use of the Salish Sea as well information regarding the extent to which ESA-listed humpback whales are using this area as feeding habitat. We will follow those results as they will inform our management efforts under the ESA and could inform future revision to the critical habitat designations.

Comment 54: A group of organizations stated that the critical habitat designation should include confirmed breeding areas for the WNP DPS. The commenters assert that we overlooked research in the Draft Biological Report that shows humpback breeding locations near Guam and the Northern Mariana Islands. These commenters stated that we provided an inadequate explanation for excluding the WNP breeding areas in the Northern Mariana Islands/Guam from critical habitat consideration and must correct this error.

Response: In developing the proposed rule, we considered all available data regarding the occupied range of the WNP DPS, including the location of confirmed breeding areas. At the time of listing, the WNP DPS was described as those humpback whales that that breed or winter in the area of Okinawa and the Philippines in the Kuroshio Current (as well as unknown breeding grounds in the Western North Pacific Ocean), transit the Ogasawara area, or feed in the North Pacific Ocean, primarily in the West Bering Sea and off the Russian coast and the Aleutian Islands (50 CFR 224.101(h)). WNP DPS humpback whales breed in waters around southern Japan from about December to June (Darling and Mori 1993), off the Philippines in the Kuroshio Current from about November to May (Acebes *et al.* 2007), and in an additional unknown breeding ground in the Western North Pacific (Bettridge *et al.*2015). Both the Draft Biological Report (NMFS 2019a) and proposed critical habitat rule (84 FR 54354, October 9, 2019) discuss the unresolved breeding range of this DPS as well as ongoing research suggesting that some WNP DPS whales may be using areas around the Mariana Islands as a breeding ground. As discussed in the Draft Biological Report and summarized in the proposed rule, we concluded that while this work suggests that an area off Saipan may be part of the hypothesized ''missing'' breeding area for the WNP DPS, additional data would be needed to fully resolve the extent to which whales from the WNP DPS are using areas around the Mariana Islands as a breeding/calving habitat and to determine the essential physical and/or biological features of these areas. Although the results of that research have since been published (*i.e.,* Hill *et al.* 2020), we find that it does not resolve the questions we would need to answer in order to include this area in the critical habitat designation. We continue to find available data insufficient to determine the physical or biological features essential to support breeding and that may require special management considerations or protection, as required to meet the statutory definition of critical habitat within the species' occupied range (16 U.S.C. 1532(5)(A)(i)). The commenters did not provide any relevant literature or data regarding essential features of breeding habitat or the spatial extent of the specific areas containing essential features around the Mariana Islands or Guam.

The commenter points to Figure 2 in the Draft Biological Report to support their assertion that the proposed rule overlooked research that shows humpback breeding locations near Guam and the Northern Mariana Islands. This particular figure was taken from a 2015 IWC report (Ivashchenko *et al.* 2015) regarding the status and pre-exploitation abundance of humpback whales in the North Pacific. This IWC report does not describe research on breeding areas. The report authors discuss how, for purposes of their analysis, they adopted the locations of humpback whale breeding and feeding areas that were used during the SPLASH study (*e.g.,* Barlow *et al.* 2011), and they specifically state: ''Currently four breeding populations have been identified: the Western NP (Okinawa and Philippines), Hawai'i, Mexico (mainland and the offshore waters of the Revillagigedo Islands), and Central America. Relatively low match rates between whales feeding in the Aleutian Islands and these four breeding areas indicate the likely existence of a fifth breeding population whose location is presently unknown; for the purpose of management, the U.S. National Marine Fisheries Service recently lumped this unidentified stock with the Western North Pacific'' (Ivashchenko *et al.* 2015). Therefore, this particular figure does not refer to or provide information to support the designation of breeding habitat for the WNP DPS of humpback whales.

Because endangered WNP DPS whales have been documented to occur off some of the Mariana Islands, we have assessed the impacts of Federal actions in this area on the WNP DPS in relevant ESA section 7 consultations. Thus, despite the lack of sufficient data to support the designation of breeding areas as critical habitat, we will continue to address potential impacts from Federal actions on these whales through section 7 of the ESA. We will also continue to monitor results of humpback whale research being conducted in waters off the Mariana Islands and other hypothesized breeding areas (*e.g.,* Northwest Hawaiian Islands) to determine the extent to which WNP DPS whales are using these areas as breeding habitat and whether and when it may be appropriate to revise critical habitat for the WNP DPS.

Essential Features

Comment 55: Multiple commenters agreed with the identification of the single, ''prey'' essential feature but requested that the regulatory definition of this feature be modified. A few commenters stated that the proposed prey feature is too vague and requested that we identify specific species and life stages that fall under the definition of prey species. The commenters noted that the proposed rule discusses how, in addition to euphausiids, northern anchovy, Pacific herring, Pacific sardine, and capelin, humpback whales also consume other fish species in Alaska, including Atka mackerel, and juvenile walleye pollock, and expressed concern that NMFS may subsequently interpret the definition to include these other fish species. The commenters stated additional clarification on species and life stages of prey is necessary to inform future section 7 consultations. Another commenter stated that the essential feature was not defined with the required specificity for each unique DPS, and that we must perform an assessment of the specific prey features applicable to each of the unique DPSs. ADF&G requested that we include the concept of ''regular aggregations of prey'' in the definition of the prey feature if that is an ''essential'' aspect of the prey feature as was discussed in the Draft Biological Report.

Response: Humpback whales are generalists, consuming a variety of prey while foraging. To meet their energetic

requirements, humpback whales can shift their diet during the feeding season to target prey that happens at that time to be of greater abundance or higher quality (Witteveen *et al.* 2012 and 2015, Fleming *et al.* 2016, Moran and Straley 2018). Humpback whale prey species are also dynamic in terms of their relative distributions and abundances and are influenced by ecological (*e.g.,* spawning seasonality) and environmental factors (*e.g.,* ocean conditions, climate change), and potentially by anthropogenic factors (*e.g.,* commercial fisheries). As a result of these multiple variables, the precise array of prey species targeted and consumed by the whales of each DPS varies both spatially and temporally. Despite this variability, however, substantial data indicate that the humpback whales' diet commonly includes euphausiid species (*e.g.,* of genera *Euphausia, Thysanoessa, Nyctiphanes,* and *Nematoscelis*) and small pelagic fishes, such as northern anchovy (*Engraulis mordax*), Pacific sardine (*Sardinops sagax*), Pacific herring (*Clupea pallasii*), sand lance (*Ammodytes personatus*), juvenile walleye pollock (*Gadus chalcogrammus*), and capelin (*Mallotus villosus;* Nemoto 1957 and 1959, Rice 1963, Klumov 1965, Krieger and Wing 1984, Baker *et al.* 1985, Kieckhefer 1992, Clapham *et al.* 1997, Witteveen *et al.* 2012, Neilson *et al.* 2013).

The diet of humpback whales has been studied and described using multiple techniques, including examination of stomach contents (typically for commercially harvested whales), stable isotope analyses, and direct observations of feeding whales. The Biological Report (NMFS 2020) contains a discussion of humpback whale diet information by geographic region and includes appended tables listing prey items, locations and methods of the study, and associated references. We are not aware of any additional diet information not already reviewed in the Biological Report that is specific to any DPS (nor was any provided by the commenter).

These diet studies were used to identify the prey species that are common or most prevalent in the diet of humpback whales within the relevant geographic regions. In response to the public comments, these prey (at the genus or species level) have been expressly incorporated into the essential feature description for each humpback whale DPS. We relied on information regarding the distribution of the prey species as well as location of the various diet studies to identify appropriate prey items specific to each DPS of humpback whales. Specifically, we identified euphausiids from genus *Thysanoessa, Euphausia, Nyctiphanes,* and *Nematoscelis*), as well as Pacific sardine (*Sardinops sagax*), northern anchovy (*Engraulis mordax*), and Pacific herring (*Clupea pallasii*) as primary prey species for the CAM DPS. We identified euphausiids of genus *Thysanoessa and Euphuasia,* Pacific herring (*Clupea pallasii*), capelin (*Mallotus villosus*), juvenile walleye pollock (*Gadus chalcogrammus*), and sand lance (*Ammodytes personatus*) as primary prey species for the WNP DPS. Lastly, the primary prey identified for the MX DPS include all of the prey identified for the CAM and WNP DPSs, because the MX DPS whales feed in areas that overlap with both of the other DPSs.

We also examined the available diet information to identify what specific age-classes of prey species consumed by humpback whales have been reported. For example, humpback whales have been reported to consume all age classes of Pacific herring (Moran and Straley 2018), and post-larval euphausiids (Nemoto 1957, 1959). Studies focusing around Kodiak Island indicate that humpback whales consume juvenile walleye pollock (*i.e.,* age-0, young-of-year, and age-1) and capelin age-0 and older (Witteveen *et al.* 2008 and 2012, Witteveen and Wynne 2016, Wright *et al.* 2016). Therefore, in response to the comment received, where the available data indicate that only certain age-classes of fish species are consumed (rather than all age classes), we have also provided the relevant age-class information as part of the prey feature definition (*i.e.,* juvenile walleye pollock).

Although many other prey items have been reported as being taken by humpback whales, these reports are rare, spatially or temporally limited, or are historical observations that have not been further substantiated with more recent evidence. For example, copepods were often reported by Nemoto (1957, 1959, 1977) in the stomachs of humpback whales taken during whaling, but characterized as ''incidental'' given their low number in the stomach relative to their abundance in the sea and the distribution of the whales relative to the more offshore distributions of copepods. Kieckhefer (1992) observed surface-feeding humpback whales at Cordell Bank feeding on schooling fish that were ''tentatively identified'' as juvenile rockfish (*Sebastes* spp.). A few studies report that salmon were observed near foraging humpback whales (*e.g.,* Moran and Straley 2018 in Prince William Sound, and Neilson *et al.* 2013 in southeast Alaska). Other anecdotal reports as well as evidence from studies conducted during hatchery release of salmon (Chenoweth *et al.* 2017, Kosma *et al.* 2019), indicate that humpback whales will consume salmon; however, evidence of predation on wild salmon is limited, especially given their abundance in the inshore and coastal waters of southeast Alaska. Nemoto (1957 and 1959) reported Atka mackerel in 58 of 392 humpback whale stomachs examined; however, the whales were reported to feed on Atka mackerel in waters west of Attu and south of Amchitka, locations that are well west of the critical habitat boundaries for the MX and WNP DPSs. Pacific eulachon has been reported as a prey item, but results from a stable isotope analysis found that in no summer of a three-summer study conducted off Kodiak Island were contributions of eulachon significant in the humpback whale diet, while both euphausiids and pollock were found to be predominant prey sources (Witteveen *et al.* 2012). Overall, the available data regarding occurrence of other potential prey species such as these in the humpback whale diet are not sufficient to support a conclusion that they are essential components of the humpback whale diet such that they should be considered part of the essential biological feature within the specific feeding areas identified as critical habitat for the listed humpback whale DPSs.

Because there are limitations to the available studies and data, including seasonal, spatial, and temporal limitations that affect the resulting diet information, and because changes in ocean conditions can alter the relative importance of some prey species within the humpback whale diet at a particular point in time, it is not possible to identify an exhaustive list of prey species as part of the essential feature for each DPS. We therefore applied the best available scientific data to identify a non-exhaustive list of the predominant prey species for each DPS. We find that this is the level of specificity supported by the best available data, which provides adequate notice to the public of the species that are most likely to constitute prey for each DPS, and is appropriate for defining the essential feature. As more data become available regarding the particular diets of each DPS, that data should be considered as part of the best available scientific and commercial information to inform particular section 7 consultations.

We further find that the essential prey feature may require special management considerations or protection either now or in the future. Most of the prey

identified in the revised essential feature are also defined as ''forage fish'' in several Federal regional Fisheries Management Plans (FMPs) as well as state management plans. These FMPs specifically acknowledge the importance of the primary prey species we have identified as essential for the conservation of humpback whale by including an objective of preserving the food web and/or providing adequate forage for dependent species along with identifying regulations to conserve these essential forage fish species. For example, Amendment 36 to the Bering Sea/Aleutian Islands Groundfish FMP and Amendment 39 to the Gulf of Alaska Groundfish FMP enacted by the North Pacific Fishery Management Council in 1998 created a forage fish species category (50 CFR 679.2) and associated regulations prohibiting directed fishing for forage fish at all times, as well as the sale, barter, trade and processing of forage fish (50 CFR 679.20). These forage fish are noted to be a critical food source for many marine mammal, seabird and fish species. These FMPs also set fishery limits on herring and walleye pollock and describe essential fish habitat (EFH)—those waters and substrate necessary for spawning, breeding, feeding or maturity—for 5 age-classes of walleye pollock (eggs, larvae, early juvenile, late juvenile and adults). This EFH designation ensures fishing and non-fishing impacts to these habitats are periodically reviewed. The Coastal Pelagic Species (CPS) FMP, enacted by the Pacific Fishery Management Council (PFMC), includes similar recognition and various restrictions on harvest for important ecosystem component species and forage fishes. Most significantly, in 2006, the PFMC adopted CPS FMP Amendment 12, which prohibited harvest of all species of krill throughout the entire U.S. West Coast EEZ (50 CFR 660.505). The PFMC also adopted an EFH designation for all species of krill that extends the length of the U.S. West Coast from the shoreline to the 1,000 fathom isobath and to a depth of 400 meters.

As we discussed in the proposed rule (84 FR 54354, October 9, 2019), humpback whales within the North Pacific feeding areas are usually observed in association with, or specifically targeting, dense aggregations of prey (*e.g.,* Bryant *et al.* 1981, Krieger and Wing 1986, Goldbogen *et al.* 2008, Sigler *et al.* 2012, Witteveen *et al.* 2015). Threshold levels of prey required to support feeding have been investigated for humpback whales, but the best available scientific data do not provide a precise understanding of the foraging behavior of humpback whales relative to multiple relevant variables such as prey densities, patch size, and biomass (Piatt and Methven 1992, Burrows *et al.* 2016, Walder 2018). Humpback whales are also known to use a variety of feeding techniques, many of which are intended to aggregate or concentrate prey (*e.g.,* herding, bubble net feeding, trap feeding), and different techniques are likely used with different prey species, prey densities, and prey depth. Thus, although humpback whale prey may not be present in ''regular aggregations'' in a particular feeding area, they may still support feeding. Overall, we find it more appropriate to focus the description of the prey feature on whether prey are available in sufficient quality, abundance, and accessibility to support feeding, rather than also including the concept of prey aggregations or a temporal aspect of ''regular aggregations.'' We can discern, based on the best available data regarding humpback whale feeding grounds, that these areas host a sufficient quantity, quality, and accessibility of prey at various times to support feeding. Lastly, we note that the ESA contains ''no statutory command that the Service provide exhaustive notice to the public concerning all'' of the essential features. *Arizona Cattle Growers' Ass'n* v. *Kempthorne,* 534 F.Supp.2d 1013, 1025 n. 2 (D. Ariz. 2008).

In conclusion, we find that the essential prey feature as revised for each DPS is described at an appropriate level of specificity in light of the best available scientific data about the humpback whale diet and prey species. We also note that section 7 consultations must be based on the best, currently available scientific and commercial data at the time of consultation and should address the particular set of facts relevant to that consultation (the nature of the project and its effects on the critical habitat; the location, timing, and duration of the effects, etc.).

Comment 56: One commenter expressed the belief and concerns that the prey feature is overly broad and will result in litigation. They requested that NMFS make a definitive statement that existing management measures are sufficient. The commenter referred to the existing prohibition on krill harvest put in place through the Coastal Pelagic Species Fishery Management Plan and noted that NMFS data indicate the CAM DPS has increased in abundance in the presence of an active CPS fishery.

Response: As discussed in response to Comment 55, we have added additional specificity to the definition of the prey feature for each DPS to address comments regarding the vagueness of the proposed feature. Our final rule and FEA reiterate statements made in the proposed rule and DEA that the existing baseline protections are relatively high with respect to humpback whale prey species. We decline, however, to make more definitive statements as suggested by the commenter with respect to this issue. The directed commercial Pacific sardine fishery has been closed for the past three years and will remain closed for the upcoming July 1, 2020–June 30, 2021 season. NMFS has not completed a section 7 consultation on the effects of the anchovy harvest on listed humpback whales, so any statements in this rule as to the existence or absence of a need for changes in management practice would be predecisional. Rather, each action must be reviewed on the basis of the best available scientific and commercial data at the time it is undertaken. Therefore, while we continue to find that baseline protections are high, we cannot prejudge the outcome of a section 7 analysis.

Comment 57: Numerous commenters requested that a sound or soundscape essential feature be included in the critical habitat designations to provide for the protection of their habitat from noise degradation that would interfere with their use and occupancy of these areas, as well as communication and other behaviors. A group of commenters provided multiple references on ocean noise and impacts of noise on marine mammals, and asserted that we had ignored studies that indicate impacts of sound on humpback whales. These commenters stated that the ESA requires the agency to view scientific uncertainty in favor of conservation of the endangered species, and that we should apply the precautionary principle in the face of inadequate or conflicting data to treat this feature as essential to support the life needs of the species. One commenter stated that if a specific numeric standard cannot be determined, we should still include a noise-related essential feature in the critical habitat designation and make it clear that critical habitat for humpback whales must not contain levels of noise that impede or prevent the whales use of this important habitat. The commenter noted that such a qualitative sound feature has been included in other critical habitat designations for whales, such as the Main Hawaiian Islands insular false killer whale. Several other commenters, however, agreed with our determination

not to include a sound-related essential feature. One commenter referred to ongoing research being conducted by NOAA, in collaboration with several partners, to monitor ''soundscapes'' within national marine sanctuaries, and noted this work could be considered in any future revisions to critical habitat for humpback whales. The Marine Mammal Commission stated that they supported the proposed determination based on available information, but stated that we should review and reconsider this conclusion periodically as better scientific data become available concerning the acoustic ecology of humpback whales.

Response: As discussed in the Biological Report (NMFS 2020a) and proposed critical habitat rule, the CHRT thoroughly considered the best available scientific information on humpback whales' use of sound and impacts of anthropogenic noise on humpback whales and concluded that the best available scientific data do not support identifying a sound-related essential habitat feature. After considering the comments and information received, we continue to find that identification of a sound-related habitat feature as an ''essential feature'' for humpback whales, whether such feature would be specifically and quantitatively described or only generally and qualitatively described, is not supported by the best available science. We will, however, consider results of ongoing and future studies and will review and reconsider this conclusion as our scientific understanding of the acoustic ecology of humpback whales advances.

Although anthropogenic noise was rated as posing a low level threat to the humpback whales at the time of listing (Bettridge *et al.* 2015), we acknowledge that noise can have impacts on the whales and that these impacts are likely to increase in the future due to increases in commercial shipping and other human activities within marine environments. Most of the available studies regarding noise impacts on humpback and other baleen whales provide evidence of direct responses by the whales, such as changes in acoustic communications or changes in signaling strategies. Effects of anthropogenic noise that result in ''take'' or harm to individual whales can be addressed under section 7 of the ESA (pursuant to the standard for considering whether a proposed Federal action would jeopardize the continued existence of the species) for listed humpback whales and under the MMPA for all humpback whales. If data indicate that anthropogenic noise from a particular Federal action is preventing or impeding access to prey or preventing or impeding successful feeding within designated critical habitat, then such effects would likely constitute an adverse effect on the prey essential feature as well as the designated area of critical habitat itself and for that reason should likely also be addressed under section 7 of the ESA (pursuant to the standard for considering whether an action poses destruction or adverse modification to critical habitat). Thus, the critical habitat as defined in this rule will provide a measure of protection from noise degradation to the extent that an action might cause such noise that would interfere with the whales' ability to use and successfully feed within the critical habitat. Furthermore, and of potentially greater conservation benefit, the critical habitat designations as finalized in this rule will result in the added requirement that Federal agencies explicitly analyze any relevant impacts of noise on humpback whale prey species (which previously could only be analyzed as an indirect effect on the listed whales).

It is correct that a qualitatively defined sound feature has been included in two previous critical habitat designations for whale species, Main Hawaiian Islands insular false killer whales (83 FR 35062, July 24, 2018) and Cook Inlet beluga whales (76 FR 20180, April 11, 2011). However, those species differ in material ways from the humpback whale. Both of those species are toothed whale species (not baleen) and rely on sound to navigate and locate prey and have limited ranges or areas of occupancy. The occupied range of insular false killer whales is restricted to the waters surrounding the main Hawaiian Islands, and like other odontocetes, they rely on their ability to send and receive sounds to navigate, communicate, and detect predators and prey within their environment. The listed beluga whales have a restricted range in the highly turbid waters of Cook Inlet and rely on sound rather than sight for many important functions. In contrast, no qualitative sound-related feature has been identified for the more migratory Southern Resident killer whales (71 FR 69054, November 29, 2006) or for any baleen whales (*i.e.,* North Atlantic right whales (81 FR 4838, January 27, 2016) and North Pacific right whales (68 FR 19000, April 8, 2008)). Additionally, for Southern Resident killer whales, in part due to their more migratory behavior and broader range (unlike insular false killer whales and Cook Inlet beluga whales), effects of sound on navigation, communication, and foraging of Southern Residents are assessed through a prey essential feature similar to humpback whales, as well as a passage essential feature.

We must base our designations of critical habitat on the best available science for a particular species. What is considered ''essential to conservation'' and thus qualifies as an essential feature necessarily depends on the particular species' biology and the available science regarding that species' habitat needs. Thus, habitat features that are considered essential to conservation of one species may not necessarily be essential to a different species. Few studies have examined the effects of noise, especially ship noise, on habitat use and feeding behavior of baleen whales. At this time, given the current limited scientific understanding and because humpback whales occupy a wide range of soundscapes, use highly diverse and spatially broad areas, and demonstrate mixed responses to noise, we do not find that identification of a sound-related habitat feature as an ''essential'' habitat feature is appropriate in this case.

We disagree with the commenter that the ESA requires that we apply a ''precautionary principle'' at the stage of determining critical habitat such that we must resolve scientific uncertainty in favor of conserving listed species. Although it is appropriate to give the species the ''benefit of the doubt'' of significant uncertainty in the context of a section 7 consultation, that concept does not generally apply to determinations under section 4 of the ESA. *Trout Unlimited* v. *Lohn,* 645 F. Supp. 2d 929, 946 (D. Or. 2007). There is no basis in the statute to require that we identify a noise or sound-related essential feature where it is not supported by our review of the best available information for these particular species and their habitat. Rather, section 4 of the ESA requires that we designate critical habitat on the basis of the best scientific data available, and we do not agree that ''essential features'' must be identified to correspond to every possible threat to the listed species. In addition, as discussed previously, we will continue to address the effects of noise on humpback whales and their habitat under section 7 of the ESA (pursuant to the requirement that a proposed action must not be likely to jeopardize the continued existence of a listed species) and under the MMPA.

Comment 58: A group of commenters stated that pollution in different forms threatens all three humpback whale DPSs. The commenters identified toxic pollution and forms of marine debris,

including derelict fishing gear, plastic, and any solid material from man-made origin, as types of pollution that can degrade humpback whale habitat. The commenters requested that, similar to the Main Hawaiian Islands insular false killer whale critical habitat, we include an essential feature like ''waters free of pollution of a type and amount harmful to humpback whales'' and that would also interfere with whales' use and occupancy of the habitat. Another group of commenters requested that we include a water quality or water free of toxins as an essential feature.

Response: We acknowledge the concerns raised by the commenters and the fact that various forms of marine pollution may pose threats to the listed humpback whales. However, as noted previously, the ESA does not require that we identify all potential threats or issues that may be addressed through section 7 consultations as ''essential features'' of critical habitat. Rather, the definition and process established under the ESA require that we affirmatively identify the physical or biological features of the habitat that occur in specific areas and that are essential to support the life-history needs of a particular species based on the best available scientific information for that species. We also note that the concerns raised by the commenters can continue to be addressed, as appropriate, through existing protections afforded through the listing of the three DPSs of humpback whales under the ESA.

Specifically, entanglement of whales in marine debris, which is a direct impact on the whales and constitutes ''take,'' is already prohibited under section 9 of the ESA for endangered whales and by the rule issued under section 4(d) (50 CFR 223.213) for threatened whales. Such impacts can already be addressed through section 7 consultations on the listed whales (when relevant). In addition, when pollution in the form of plastics is associated with a Federal action and is degrading the quality of the prey feature or harming the whales, we will address these impacts through section 7 consultations.

With respect to water contaminants and toxins, which we acknowledged is a management concern for the identified prey essential feature (84 FR 54354, October 9, 2019), we will address this threat through consideration of prey ''quality'' during consultations on the critical habitat. Humpback whales can bioaccumulate organic contaminants, and elevated levels of certain contaminants have been observed in humpback whales feeding off southern California (Elfes *et al.* 2010). However, the levels observed are not expected to have a significant effect on population growth (Elfes *et al.* 2010), and this was not identified as a significant threat at the time of listing (Bettridge *et al.* 2015). We note that in contrast, bioaccumulation of contaminants was identified as a particular concern for certain listed Odontocetes (toothed whales; *e.g.,* Southern resident killer whales, Main Hawaiian Islands insular false killer whales), which consume higher-trophic level fishes and may bioaccumulate significant contaminant loads that can impair the whales' health and reproduction. In contrast to humpback whales, these other cetacean species also have restricted ranges that include nearshore areas adjacent to urban centers where contaminant exposure is increased. Given the elevated concerns regarding contaminants for those species, we did identify a separate water quality feature of the critical habitats.

Comment 59: Several groups of commenters stated that the critical habitat should also provide for safe passage and an ocean freer from potential entanglement, which has been on the rise in recent years. The commenters specifically pointed to entanglement in trap lines or other gear as well as ship strikes as limiting the whales' ability to have safe passage between feeding and breeding grounds. Another group of commenters stated we overlooked the precedent of the Southern Resident killer whale proposed critical habitat revision, which identifies passage conditions to allow for migration, resting, and foraging as an essential feature in waters off the U.S. West Coast. These commenters stated that the final critical habitat rule for humpback whales must include migratory corridors and passage free of entanglement as a physical or biological feature or provide adequate justification if not including it in the final rule. The Marine Mammal Commission, as well as several other commenters, stated they supported our proposed determination to not include a passage or migration-related feature in the critical habitat designations.

Response: We agree with the commenters that both ship strikes and entanglement are significant threats to humpback whales. However, as discussed in our responses to Comments 57 and 58, the ESA does not require us to identify an essential physical or biological feature of critical habitat to correspond to all management concerns or threats to the listed species. We did not overlook these management concerns or the fact that a ''safe passage'' feature has been included in previous critical habitat designations for other listed cetaceans. Rather, we carefully considered the available data regarding a potential passage feature or migratory corridor for the three DPSs of humpback whales and concluded that identification of such a feature was not supported in this case on the basis of the best available scientific data. The limited, available data do not allow us to spatially identify any consistently used or specific migratory corridors or define any physical, essential migratory or passage conditions for whales transiting between or within habitats used by the humpback whale DPSs. Unlike previous critical habitat designations for listed cetaceans that include a type of passage or space feature (*i.e.,* Southern resident killer whales (71 FR 69054, November 29, 2006), Main Hawaiian Islands insular false killer whales (83 FR 35062, July 24, 2018), and Cook Inlet beluga whales (76 FR 20180, April 11, 2011)), humpback whales do not occupy a geographically constricted area or have a restricted range in which blockage of passage from in-water structures or vessels has been identified as a significant management concern. Our conclusion in this case is more appropriately compared to our previous critical habitat designations for other large, migratory species, such as Pacific leatherback sea turtles (77 FR 4170, January 26, 2012) and North Atlantic right whales (81 FR 4837, January 27, 2016), which do not include migratory corridors or passage-related features.

Entanglements and ship strikes are direct effects on humpback whales, and they will continue to be managed to the extent possible under the ESA and MMPA. Take of humpback whales in particular by either of these threats is prohibited under section 9 of the ESA (as to the endangered DPSs) and the rule at 50 CFR 223.213 issued under section 4(d) (as to threatened DPSs), and when relevant to particular Federal actions, they are considered in section 7 consultations on the listed whales (under the jeopardy standard). In addition, in cases where a Federal action has the potential to obstruct the whales' movement and thereby prevent or impede the whales' ability to access prey, we would consider that as constituting a negative impact on the area of designated habitat itself in addition to the defined prey feature, which expressly incorporates consideration of ''accessibility.'' In other words, the whales' ability to move freely to access their prey while on the feeding grounds is inherent in the prey essential

feature. Given this and our consideration of the best available data, we disagree that the critical habitat designations for the humpback whale DPSs must include a physical or biological feature describing migratory corridors or passage conditions as a feature essential to the conservation of the species. Rather, we find that designations built around the prey feature we have identified for each DPS is a more appropriate fulfillment of our statutory duty to identify areas that contain the essential physical or biological feature to support the conservation of each DPS and will result in robust designations of habitat that will support the recovery of these humpback whales.

Coordination and Input on the Proposed Rule

Comment 60: Multiple commenters expressed concerns that NMFS had not sought sufficient input from communities or local experts in Alaska or from ADF&G. ADF&G expressed concerns about the limited degree of communication, coordination, and cooperation with the State by NMFS during the rulemaking process. ADF&G as well as other several other commenters asserted that NMFS had violated section 6 of the ESA and the Revised Policy on Interagency Cooperation by failing to ''cooperate to the maximum extent practicable'' with the State of Alaska in the development of the proposed rule and by denying ADF&G's request to conduct an inter-agency partner review of the Draft Biological Report, which they indicated would be similar to reviews they regularly conduct for the USFWS. ADEC expressed concerns about the lack of outreach to ADEC regarding potential economic impacts despite outreach to agencies with similar roles in other states.

Response: We recognize that State agencies often possess relevant scientific data and valuable expertise on endangered and threatened species and their habitats, and we often coordinate and consult with our state partners when compiling and reviewing scientific data to inform a critical habitat rule, particularly when the state has an active program for the relevant listed species. The Revised Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities Policy discusses such coordination in terms of developing the scientific foundation upon which we base our determinations for proposed and final critical habitat designations (81 FR 8663, 8664, February 22, 2016). Consistent with our standard practice and this policy, we reached out to ADF&G during July and August of 2018 to inquire whether the State could provide relevant scientific data on humpback whales and appropriate contacts who could assist us. Throughout September and October 2018, our consulting economists at IEc also reached out to the State to request appropriate contacts and to discuss the potential economic impacts to the State. Although the State was not able to provide scientific data on humpback whales or their habitat use in Alaska, they provided contact information for other researchers within Alaska who could potentially assist us. ADF&G also provided information regarding types of economic impacts to the State, and this information was considered in the development of the DEA (IEc 2019). Additional information regarding aquatic farming and hatcheries in Alaska was also provided by ADF&G in June 2019. However, given that the proposed rule had already been completed and was undergoing internal review and clearance by NMFS, and the need to publish the rule by a court-ordered deadline, we were unable to incorporate this information into the draft economic report. As discussed in the FEA (IEc 2020), additional information provided by the State has now been incorporated into the final analysis.

We did not contact ADEC directly in the course of gathering information to inform our economic impact analysis. Based on communications with ADF&G, it was our understanding that comments from all state agencies would be coordinated and provided through ADF&G. In response to this concern and to ensure relevant data and information from ADEC were considered in the final economic impact analysis, we had subsequent discussions directly with representatives from ADEC (see FEA, IEc 2020).

We understand the concerns expressed by ADF&G regarding communication and coordination with respect to the humpback whale critical habitat designation and have endeavored to improve communications with ADF&G as we have moved forward on other ESA actions. However, there is no basis for the assertion that we have violated section 6 of the ESA or the terms of the Section 6 Agreement with the State of Alaska. Section 6 of the ESA acknowledges the important role of States in furthering the purpose of the ESA and specifically addresses State programs that have been established for the conservation of endangered and threatened species (16 U.S.C. 1535). If the State's program meets the criteria set forth in section 6(c) of the ESA, then the State and NMFS may enter into a cooperative agreement (a ''Section 6 Agreement''). Under Alaska's Section 6 Agreement with NMFS, both parties have agreed to ''cooperate for the common purpose of planning, developing, and conducting programs to protect, manage, and enhance populations of all resident endangered and threatened species'' covered by the agreement. Through this agreement, NMFS is also authorized to assist in, and provide Federal funding for, implementation of the State's conservation program. Since Alaska entered into a Section 6 Agreement with NMFS on December 3, 2009, the State has received funding from NMFS to support work on Steller sea lions, ringed seals, bearded seals, and Cook Inlet beluga whales. The designation of critical habitat is not considered a ''program'' under section 6 of the ESA or the Section 6 Agreement and is instead a rulemaking under section 4 of the ESA, the authority for which is specifically delegated to the Secretaries of Commerce and Interior. Neither section 6 nor any other section of the ESA provides any basis to share decision-making authority with a state entity.

Section 4(b)(2) requires that critical habitat be designated on the basis of the best scientific data available. As is our consistent practice, the best available data in support of the critical habitat designations for humpback whales was summarized in a draft supporting report—the Draft Biological Report (NMFS 2019a). Because the Draft Biological Report was developed specifically to inform a rulemaking, it was categorized as ''influential scientific information'' (ISI) under the Information Quality Act (IQA) (Pub. L. 106–554, Section 515) and subject to the peer review requirements outlined in OMB's Final Information Quality Bulletin for Peer Review (''Bulletin,'' December 16, 2004). Therefore, in accordance with the IQA, the Bulletin, and NOAA Information Quality Guidelines (*www.noaa.gov/organization/information-technology/information-quality*), the Draft Biological Report was subjected to peer review in accordance with our peer review plan. We invited ADF&G to nominate an appropriate biologist to peer review this report. In addition to the State's biologist, the report was also independently peer-reviewed by four other scientists with relevant expertise and experience with humpback whales. Prior to publication of the proposed rule, we reviewed the peer reviewer comments and made

certain revisions to the Draft Biological Report as appropriate in response. The peer review plan, charge statement to reviewers, and peer review report were also made publicly available (see: *www.noaa.gov/organization/information-technology/peer-review-plans*). It would not be consistent with the guidance on the application of the IQA, and is not our practice, to invite peer reviewers to provide advice on policy or the application of the standards and requirements of the ESA. *See* NMFS Policy Directive PD 04–108–4, ''OMB Peer Review Bulletin Guidance,'' App. A, section II.1 (June 2012). Per the Peer Review Bulletin, with the exception of the National Academy of Sciences or other alternative procedures approved by OMB, we also do not invite agency-wide reviews by external agencies prior to dissemination by NMFS of ISI products.

In developing the proposed rule, we gathered and reviewed the best available scientific literature and reports, and we engaged the expertise of a team of scientists and managers from across NOAA as members of the CHRT. During the course of compiling data and information, we consulted with numerous scientists from Federal, academic, and non-academic organizations in Alaska and elsewhere (*e.g.,* National Marine Mammal Laboratory, Glacier Bay National Park and Preserve, University of Alaska Southeast, University of Alaska Fairbanks, Oregon State University, Moss Landing Marine Laboratories, LGL Alaska Research Associates, Cascadia Research Collective) who have expertise in humpback whale biology, ecology, behavior, acoustics, or genetics. We also reached out to local communities and Alaska native organizations before and throughout the public comment period. We extended the public comment period from the typical 60 days to 115 days, and held six public hearings—three of which were in Alaska. Through these efforts, we are confident that we have been able to compile the best available scientific data and provide for a rigorous public comment process.

Comment 61: The North Pacific Fishery Management Council requested that we specify that any additional section 7 consultations following designation of critical habitat be conducted in accordance with NOAA Fisheries Policy 01–117, which suggests collaboration with the fishery management councils. The Council, as well as several other commenters, expressed concern about the lack of engagement with the Council prior to publication of the proposed rule. They requested that in the future we consult with and include the Council in discussions prior to publication of a proposed rule to designate critical habitat for ESA listed species (*e.g.,* bearded seals, ringed seals), and they requested that the NOAA Fisheries Policy 01–117 be revised to include ''section 4 consultations.''

Response: The NMFS Alaska Region works closely with the North Pacific Fishery Management Council. When ESA section 7 consultation is required for fishery management actions, NMFS will keep the Council informed regarding the consultation and provide opportunities for Council input in accordance with NMFS Policy 01–117, Integration of Endangered Species Act Section 7 with Magnuson-Stevens Act Processes.

Section 4(b)(2) of the ESA authorizes the Secretary of Commerce to designate critical habitat on the basis of the best available scientific data after taking into consideration the economic, national security, and other relevant impacts of the designation. The ESA, implementing regulations in 50 CFR part 424, and existing agency policy do not establish a consultation process or role for other entities (with the exception of federally recognized tribes) in the development of regulations under section 4 of the ESA. While we do coordinate with other organizations when gathering the best available scientific data relevant to a particular rulemaking under section 4 and solicit input from other organizations and partners on proposed rules during public comment periods, we do not consult on the development of the proposed rule itself, as this role is reserved for the Secretary of Commerce and his designees. NOAA Fisheries Policy 01–117 applies to ESA section 7 consultations that are conducted on fishery management activities governed by fishery management plans developed by the Councils pursuant to the Magnuson-Stevens Act; therefore, this policy is directly relevant to Council actions and authorities but does not apply to NMFS' decisions to implement section 4 of the ESA. Although we regret that the Council feels there was a lack of coordination prior to the publication of the proposed critical habitat rule for humpback whales, we do not find it appropriate or necessary to revise Policy 01–117 to establish a consultation process regarding ESA section 4 rulemaking.

Sufficiency and Application of the Available Data

Comment 62: Several commenters stated that we inappropriately used data that are mainly applicable to the non-listed ''Hawaii DPS'' of humpback whales when identifying critical habitat for the listed DPSs. The commenters asserted that, as a result, we proposed to designate areas that are minimally occupied by and not essential to each of the listed DPSs, in particular Southeast Alaska and the Gulf of Alaska, where they assert the SPLASH data are almost entirely relevant to the ''Hawaii DPS.'' One commenter stated that this flaw has resulted in a particularly erroneous designation of critical habitat for the Mexico DPS, which includes substantial areas in which animals from the Mexico DPS have never been observed (and should therefore be deemed unoccupied by that DPS) or minimally occupied but lacking features essential to this DPS.

Response: We acknowledge that many of the humpback whales observed on the feeding grounds, particularly within Alaska, are from the non-listed Hawaii breeding population (*e.g.,* Barlow *et al.* 2011). With an estimated abundance of over 11,000 whales (Wade *et al.* 2017), those non-listed whales are far more abundant than whales of the ESA-listed DPSs. However, in determining which specific areas are occupied by whales of the listed DPSs, the CHRT relied on the best available scientific data regarding the distribution of the particular DPS, taking into account the relative strengths and limitations of each of the different sources of data available. In assessing the relative conservation value of each specific area, the CHRT also relied heavily on data that is specifically applicable to the particular DPS. During both the initial and second assessment, when considering and applying data that apply to humpback whales generally (*e.g.,* the BIAs, unmatched sightings), the CHRT did so in light of the available data regarding the distribution of the particular DPS. During their second assessment, in response to comments and as discussed previously, the CHRT placed greater emphasis on data that are specific to the particular DPS (versus humpback whales generally). We acknowledge that available data regarding which feeding areas are used by each listed DPS are limited, and for areas in Alaska in particular, are largely limited to the SPLASH study, which was conducted in 2004–2006. However, we are required to designate critical habitat based on the best scientific data available even if those data are not perfect or contain some uncertainty (as discussed previously in in section, Critical Habitat Definition and Process).

Comment 63: Several commenters stated that our rule was confusing because it applied different data than what NMFS has been using in its ESA

section 7 consultations with respect to the distribution of listed humpback whales in U.S. waters. These commenters requested that we make consistent use of the best available data. ADF&G stated that NMFS had failed to explain or provide clear information that its view of the distribution of ESA-listed DPSs had changed dramatically from the analysis used in the 2016 status review and listing revision. They stated that this appears to be a failure to adequately inform those who may wish to comment on the proposed rule as to what NMFS considers the best available scientific information and raises questions about compliance with the Administrative Procedure Act (APA) and the ESA. ADF&G also stated that, since neither the 2016 report used to inform section 7 consultations nor the subsequent 2017 analysis by Wade (2017) is cited in the draft economic report prepared for the proposed rule, it is unclear which analysis serves as the basis for the economic report.

Response: Section 4(b)(2) of the ESA requires that critical habitat designations be based on the best scientific data available. The results presented in Wade (2017), a report submitted to the IWC Scientific Committee, presents a corrected analysis of the SPLASH study data and provides abundance estimates for humpback whales in the sampled areas and estimated movement probabilities between seasonal habitats. As stated in that 2017 report, the results presented are an update and revision to a previous version of this analysis that was presented in an earlier report to the IWC (*i.e.,* Wade *et al.* 2016). Because the ESA requires us to rely on the best available scientific data, we considered the Wade (2017) results when evaluating areas and making our critical habitat determinations. Because those results are updated and revised as compared to the earlier Wade *et al.* (2016) data, we find that they are part of the best available scientific data. Therefore, relying on the results presented in Wade (2017) to inform certain aspects of our analysis fulfills the requirements in the ESA.

The results presented in Wade (2017) are significant data that informed the biologically based aspects of our critical habitat determinations. They were not relevant to, and therefore not used to evaluate, the economic impacts of designating critical habitat; thus, neither the 2016 nor the 2017 report were cited in the Draft Economic Analysis (IEc 2019a). The Wade (2017) report was discussed and cited in the proposed rule (84 FR 54354, October 9, 2019) and the Draft Biological Report (NMFS 2019a), and was included in the separate list of references that was also made publicly available on *www.regulations.gov* and as part of the 2019 Draft Biological Report. Thus, the public was given express notice of our consideration of these data. To the extent the commenter intends to suggest that we are required to notify the public *prior to* publication of a proposed rule that a more recent or a revised scientific paper or report has become available, we disagree. We are aware of no such requirement under the ESA, the APA, or other law. Scientific understanding is continually evolving as new information becomes available, and the ESA requires that each agency decision be based on the best information available at that time and for that particular purpose.

The 2017 IWC report was not available at the time the humpback whale status review was completed in 2015 (Bettridge *et al.* 2015) or when the humpback whale listing was revised in 2016 (81 FR 62260, September 8, 2016). The report was also not available at the time the NMFS Alaska Regional Office and the West Coast Regional Office developed section 7 guidance in 2016 regarding the distributions of listed humpback whale DPSs. Since release of the 2017 report, NMFS has been aware that further work was planned that could result in a further update of this analysis. As a result, both NMFS Regional Offices decided to await those results before updating their related section 7 guidance documents. However, the additional analysis, which was to be completed through an IWC working group, has since been delayed. Because of the change in timing of this effort, the regional offices are likely to move ahead with updating their consultation guidance to reflect the analytical results provided in Wade (2017). In any event, that is a separate issue that is beyond the scope of these designations which are based on the best scientific information available to us now.

Comment 64: A few commenters stated that the SPLASH study referred to in the supporting documents indicates that less than two percent of the Mexican DPS uses the proposed critical habitat in Southeast Alaska (Unit 10). One commenter stated that the data used to designate this area actually applies to a larger area that extends beyond Unit 10 and includes data from Northern Vancouver Island to Yakutat, Alaska. The commenters stated that Unit 10 represents only 60 percent of the area over which the data were collected, and yet the entire numerical data set has been attributed to Unit 10. The commenters stated this is misleading and constitutes an improper use of data.

Response: This comment refers to results presented in a report to the IWC by Wade (2017). The report presents an analysis of data collected during the SPLASH study and provides estimated probabilities of movements of whales from breeding areas into feeding areas, and vice versa. The analysis groups the SPLASH data (matches of photo-identified humpback whales) by the four breeding (or wintering) areas (*i.e.,* Asia, Hawaii, Mexico, and Central America), and by six feeding (or summer) areas (Kamchatka, Aleutian Islands/Bering Sea, Gulf of Alaska, Southeast Alaska/Northern British Columbia, Southern British Columbia/Washington, Oregon/California). The CHRT was aware that these estimated movement probabilities apply to the particular geographic units used in the analysis (*e.g.,* Southeast Alaska/Northern British Columbia). In other words, the CHRT was aware that the 0.020 movement probability estimate provided in Wade (2017) represents the probability of a whale from the Mexico region moving into the Southeast Alaska/Northern British Columbia region. The CHRT discussed both the SPLASH survey areas as well as the geographic regions applied in the analysis presented in Wade (2017). As mentioned previously (see response to Comment 30), to help clarify that these probabilities extend over certain regions, the CHRT reformatted the relevant data tables presented in the updated Biological Report (see Appendix C, NMFS 2020a). In addition, we note that Unit 10 (Southeast Alaska) is excluded from the final designation for the MX DPS under section 4(b)(2) of the ESA based on consideration of economic impacts.

Comment 65: Several commenters stated that the available data are too old and requested that additional research be completed before we finalize the critical habitat designations. One commenter requested that NMFS not complete the final rule until migration tracks and whale presence of the three DPS units in Southwest Alaska are gathered using satellite and other sophisticated tracking methods. Another stated that more research is needed to better understand the health, feeding habitats, and migration paths of the humpbacks that spend their summers in Alaska before NMFS issues a critical habitat designation. One commenter stated that long-term monitoring data are essential in understanding and identifying appropriate critical habitat, and another commenter stated more data are needed before we designate

critical habitat because a regime change is taking place in the North Pacific Ocean and is affecting prey distributions.

Response: The ESA generally requires that we designate critical habitat for species at the time they are listed on the basis of the best scientific data available. Section 4(b)(6)(C)(ii) allowed us to extend the statutory deadline for publishing a final critical habitat regulation by one year because critical habitat was found to be not determinable at the time of listing of the three DPSs. A lawsuit was filed in Federal court because we did not meet that statutory deadline, and our designation is now governed by court order (as discussed previously, see Background). We are not authorized to further delay the statutory requirement to designate critical habitat so that additional research may be completed.

Moreover, as explained previously (in section, Critical Habitat Definition and Process), the ESA expressly requires that we base our critical habitat determination on the best scientific data available, not the best scientific data possible. We must proceed with a designation where the best available scientific data provides a sufficient basis to determine that the ESA's standards are met for the specific areas proposed. The standard requires ''not only that data be attainable, but that researchers in fact have conducted the tests;'' we are not required to conduct new research or studies. *Am. Wildlands* v. *Kempthorne,* 530 F.3d 991, 999 (D.C. Cir. 2008). *See also San Luis & Delta-Mendota Water Auth.* v. *Locke,* 776 F.3d 971, 995 (9th Cir. 2014); *Southwest Ctr. for Biological Diversity* v. *Babbitt,* 215 F.3d 58, 60 (D.C. Cir. 2000); *Oceana, Inc.* v. *Ross,* 321 F. Supp. 3d 128, 142 (D.D.C. 2018). Thus, although we agree that additional research and long-term monitoring would be beneficial, in that it would continue to contribute to scientific understanding of these whales, there is neither a need nor the authority under the ESA to delay the designation process to await further data.

General Comments

Comment 66: ADF&G requested a 6-month extension for completion of the final critical habitat rule to allow time for NMFS to redo the analyses to rectify what they perceived to be informational and analytical flaws. They state that these multiple flaws constitute ''substantial disagreement regarding the sufficiency or accuracy of the available data.''

Response: The ESA provides that if, after publishing a proposed rule to revise a critical habitat designation, we find that there is ''substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination,'' we may extend the statutory one-year period to develop and publish the final rule (that runs from publication of a proposed rule) for 6 months to solicit additional data (see 16 U.S.C. 1533(b)(6)(B)(i), referencing proposed rules described in 1533(b)(6)(A)(i) only, whereas initial designations of critical habitat are described in (b)(6)(A)(ii)). Because we are not revising critical habitat in this instance, this particular provision of the ESA does not apply. There is also no other provision in the ESA that would allow us to further delay this final rule.

Comment 67: A commenter stated that the critical habitat designation was primarily being compelled by crab pot gear entanglement and ship strikes and expressed concern regarding the inability to attribute the original source of gear entanglements of the whales. The commenter pointed out that, in the Southwest Region of Alaska, the pot gear fisheries is prosecuted in the late fall and winter months, when the whales are not in Alaska.

Response: The ESA requires we designate critical habitat for species at the time of listing. We determine which specific areas qualify as critical habitat by applying the best available scientific data. The ESA defines occupied critical habitat as the specific areas within the geographical area occupied by the species at the time it is listed, on which are found those physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. While we acknowledge that entanglement and ship strikes are ongoing threats to humpback whales, identifying threats to the species is not an appropriate approach to identifying areas that meet the statutory standards for designation as critical habitat. We have followed the correct procedure under the ESA and our regulations, by identifying areas within the geographical area occupied by the species that contain the essential feature, which we have determined may require special management considerations or protection.

Comment 68: Numerous commenters stated that humpback whales do not need critical habitat in Alaska because the whales are already flourishing in Alaska. Many of these commenters provided personal accounts of having witnessed a steady increase in the number of whales observed over decades as commercial fishermen, and some stated that current abundances exceed pre-whaling abundance estimates according to NMFS's own estimates. Most of these commenters referred to Southeast Alaska in particular, and pointed to the return of the whales as well as other marine mammals, and the removal of the Southeast Alaskan population of humpback whales from the ESA as evidence that existing regulations and protections are working well in the absence of critical habitat and that this rule is not necessary. Another commenter stated that while most of the observed whales seen in Southeast Alaska waters are part of the non-listed Hawaiian sub-populations, numbers and calving rates of humpback whales in this group have been in a drastic decline in recent years, possibly as the result of climate driven disruptions of food available in Alaska waters, particularly in the years following the strong El Nino event in 2016. The commenter noted that many whales observed in the 2016–2018 seasons were in poor body condition. The commenter stated that the proposed critical habitat designations protect Alaska waters for those populations that are already listed as endangered and threatened, and that recent fluctuations already documented in the more abundant Hawaii stock will affect the listed whales to the same extent, if they are using the same resources.

Response: The abundance of humpback whales in the North Pacific has increased over the past several decades, largely as a result of prohibitions on commercial whaling but also as a result of conservation efforts and protection of the whales under the ESA and MMPA. In part, the increased abundance of whales in the ''Hawaii DPS'' led to the removal of ESA protections for this population of humpback whales in 2016 and replacement of the former, global listing with the current DPS listings (81 FR 62260, September 8, 2016). The recovery of the Hawaii population is particularly apparent in areas of Alaska, especially Southeast Alaska, where the majority of humpback whales are from the Hawaii population (Barlow *et al.* 2011, Wade 2017). We also agree that this non-listed Hawaii population has experienced significant declines in recent years and that a possible contributor to this decline was the poor ocean conditions and resulting reduction in prey resources for humpback whales during the marine heat wave of 2014–2016 (Cartwright *et al.* 2019, Neilson and Gabriele 2019).

We are required to designate critical habitat to the maximum extent prudent and determinable at the time a species is listed under the ESA. The fact that

another DPS of humpback whales was found to not warrant listing under the ESA (*i.e.,* the ''Hawaii DPS''), or that humpback whale stocks in Alaska may be increasing (Muto *et al.* 2020) does not affect the requirement under the ESA to designate critical habitat for the listed DPSs of humpback whales. Because whales from the endangered WNP DPS and the threatened Mexico DPS use areas off the coast of Alaska area as feeding habitat, those areas were considered for critical habitat designation and several of these areas are included in the critical habitat designations with this final rule.

Comment 69: One commenter expressed concern that more area was proposed for exclusion from the proposed critical habitat designation for the endangered WNP DPS relative to the area proposed for exclusion from the designation for the threatened and much larger MX DPS. The commenter suggested that the critical habitat determinations be subjected to peer review.

Response: We acknowledge that a larger area was proposed for exclusion from the critical habitat designation for the WNP DPS relative the area proposed for exclusion for the MX DPS (44,119 nmi^2 versus 30,527 nmi^2). However, the total areas proposed for designation and proposed for exclusion for each of these DPSs has changed in this final rule in response to public comments as reflected in the revised section 4(b)(2) analysis. Specifically, the final designation for the WNP DPS covers about 59,411 nmi^2 of marine habitat following the decision to exclude about 63,398 nmi^2 of marine habitat under section 4(b)(2) of the ESA. The final designation for the MX DPS includes about 116,098 nmi^2 and excludes a total of about 91,811 nmi^2 under section 4(b)(2) of the ESA.

The smaller size of the critical habitat designation for the WNP DPS is largely a reflection of the distribution of these whales, which primarily use feeding areas outside of U.S. waters, which cannot be included in a designation (50 CFR 424.12(g)). Whales from the MX DPS are more broadly distributed within U.S. waters and feed in more regions within U.S. waters than whales from the WNP DPS. Therefore, more areas met the definition of critical habitat for the MX DPS, and a larger total area is included in the critical habitat designation for this DPS.

The Biological Report, which summarizes relevant scientific information that informed the identification of critical habitat areas and the assessment of the relative conservation value of these areas, was subjected to peer review per requirements outlined in OMB's Final Information Quality Bulletin for Peer Review (''Bulletin,'' December 16, 2004) and NOAA Information Quality Guidelines (*www.noaa.gov/organization/information-technology/information-quality*). In addition, we solicited comment on the proposed rule through a 115-day public comment period and at six public hearings. The process applied in this rulemaking thus complies with or exceeds the requirements for review by the public and scientific peers.

Comment 70: One commenter stated that ocean commercial fisheries are already tightly controlled by the Fishery Management Councils under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*) and by various states, and that humpback whales are already well protected against adverse fishery impacts under the various Pacific Fishery Management Council (PFMC)-adopted Fishery Management Plans (FMPs) for which NMFS provides Biological Opinions to the PFMC. The commenter stated that fishery impacts on humpback whales are best controlled through the PFMC's existing FMP process by way of NMFS Biological Opinions that provide specific and detailed mitigation measures to minimize potential impacts on humpback whales from fisheries. The commenter recommended that the final critical habitat rule state clearly that properly controlled ocean commercial fisheries pursued in accordance with the PFMC's FMP as approved by the most recent NMFS Biological Opinion are not actions that destroy or adversely modify critical habitat in that they do not directly or indirectly alter critical habitat such that the value of the critical habitat for either the survival or the recovery of humpback whales is appreciably diminished.

Response: We agree with the commenter that the appropriate mechanism for addressing impacts of federally managed fisheries on humpback whales is through the FMP process and the associated section 7 consultations under the ESA and that existing management measures provide strong protections for humpback whales and their prey. Once the humpback whale critical habitat designations becomes effective, any future section 7 consultations on relevant FMPs will be required to assess the effects of the particular fishery actions on the humpback whale critical habitat to ensure that those actions do not adversely modify or destroy the humpback whale critical habitat. Because critical habitat has not previously been designated for humpback whales, completed section 7 consultations do not include such an analysis. While we acknowledge that there are strong protections for humpback whale prey species through the existing PFMC's Coastal Pelagic Species (CPS) FMP and the associated regulations, these existing management measures do not remove the requirement to consult under section 7(a)(2) of the ESA. We cannot circumvent this responsibility by making conclusions in this rule regarding previously completed section 7 consultation, nor can we prejudge the outcome of potential future consultations on the CPS or any other FMP. Therefore, we decline to include a statement in this final rule such as the one requested by the commenter.

Comment 71: A commenter requested that we indicate in the final rule that the absence of a migratory corridor or passage feature in the critical habitat precludes the consideration of fishing activity or the use of fishing gear as an adverse modification of the physical attributes of the critical habitat. The commenter recommended that the proposed rule be amended to explicitly state that fixed-gear fisheries will not be considered as actions that destroy or adversely modify humpback whale critical habitat.

Response: Lack of a specific passage or migratory essential feature in the critical habitat designations does not preclude consideration of effects of fishing gear within or upon the critical habitat. Entanglement of humpback whales is a significant and ongoing management concern, and we will continue to manage this threat wherever it has impacts on individual whales, which may rise to a form of ''take'' of the individual whales. Moreover, as we discussed in the proposed rule, access to the prey and the whales' ability to move freely to successfully feed while on the feeding grounds are inherent in the definition of the prey essential feature. Humpback whales feed using a variety of behaviors, which requires a high degree of maneuverability. Where the use of fishing gear or other physical alterations of the critical habitat (*e.g.,* large-scale aquaculture), either independently or in combination, prevent or impede the whales' ability to undertake their normal feeding behaviors and access their prey, that may constitute a negative impact on the defined prey feature. Such determination cannot be made in advance, however, as each consultation must be based on the best available

scientific and commercial information for the particular Federal agency action.

Comment 72: The Oregon Department of Fish and Wildlife (ODFW) noted how the marine environment off the U.S. West Coast has been experiencing unprecedented changes, affecting both humpback whale prey species and humpback whale behaviors—*e.g.,* the timing of migration patterns from breeding grounds to the feeding grounds, foraging in rarely or never-before used locations, and switching targeted prey species. ODFW stated that as a result, information underlying the critical habitat designation is likely changing even as it is being applied, and may continue to change in new and potentially unexpected ways in the decades to come. As a consequence, ODFW urged that during implementation of this critical habitat rule, that NMFS allocate resources to conduct surveys of humpback whale DPS distributions, conduct spatially-explicit stock assessment surveys for finfish forage species (*e.g.,* anchovy, sardine, and herring), and review the critical habitat location and the assumptions underlying its spatial location on a frequent basis.

Response: We agree with the points and recommendations from ODFW. Understanding how changing ocean conditions are affecting humpback whale prey species and humpback whales is critical to effectively carrying-out our management responsibilities under the ESA and the MMPA and to the overall goal of recovering the listed humpback whales. NMFS is currently engaged in multiple research efforts, including planning a ''SPLASH–2'' study, which is a collaborative effort that will take advantage of automated photo-identification matching capabilities to examine photo-identification data collected since the original SPLASH study. Goals of ''SPLASH-2'' include, for example, estimating current abundances, estimating growth rates, and examining any changes in migration patterns since SPLASH. NMFS has also been involved in the development of habitat models and exploring their use in forecasting the distributions of humpback whales and other cetaceans (see Becket *et al.* 2019), and NMFS is participating in the comprehensive assessment being conducted by the IWC to better understand the effect of whaling on current and historical humpback whale populations in the North Pacific Ocean. We will continue to engage in and/or support these and other efforts to the maximum extent possible in light of available annual appropriations. In addition, although we are required to designate critical habitat based on the best, currently available, scientific data, if additional data become available to support a revision to these critical habitat designations, we can consider using the authority provided under section 4(a)(3)(A) of the ESA to revise the designations.

Comment 73: A commenter encouraged us to expand our discussion in the Biological Report to include more relevant studies about ocean acidification, deoxygenation, and both humpback whale and prey movement as a result of climate change. The commenter cited multiple references regarding changes in the North Pacific as a result of climate changes and noted how these changes are likely to affect availability of prey species, type of prey targeted by the whales, and the distribution of the whales. The commenter stated that we should include climate change and environmental variation as part of the special management considerations for humpback prey.

Response: We appreciate the comments and references provided by the commenter. We have considered this information and have added some additional information to the Biological Report where applicable and relevant to this designation. Both the Draft Biological Report and proposed rule presented climate change as a special management consideration that may affect the identified essential prey feature. The information provided by the commenter does not alter our previous conclusion that climate change poses a management concern for the prey essential features identified in this rule.

Humpback Whale Distribution and Habitat Use in the North Pacific

Humpback whales breed and calve in tropical and subtropical waters in the winter months, typically during January–May in the Northern hemisphere. They exhibit a high degree of fidelity to particular breeding areas, a pattern which contributed to how DPSs were delineated and listed under the ESA (Bettridge *et al.* 2015). While on their breeding grounds, humpback whales rarely feed (Baraff *et al.* 1991, Rasmussen *et al.* 2012). Around springtime, the whales typically migrate to temperate, higher latitude regions to feed and build up fat and energy reserves for the return migration, lactation, and breeding. Humpback whales primarily feed on euphausiids (krill) and small pelagic fishes (Nemoto 1957, 1959; Klumov 1963; Rice 1963; Krieger and Wing 1984; Baker 1985; Kieckhefer 1992; Clapham *et al.* 1997).

In the North Pacific Ocean, humpback whales feed in biologically productive waters along the coasts of California, Oregon, Washington, and Alaska; British Columbia, Canada; and in waters off of Russia (*e.g.,* Kamchatka, Commander Islands). Although these feeding areas are broadly distributed and range widely in terms of latitude, they are usually over the continental shelf or near the shelf edge at shallow (~10 m) to moderate water depths (~50–200 m) and in cooler waters (Zerbini *et al.* 2016, Becker *et al.* 2016 and 2017). Often, feeding areas are associated with oceanographic (*e.g.,* upwelling, fronts), bathymetric (*e.g.,* submarine canyons, banks), and/or biological features (*e.g.,* spawning areas for fish) that serve to concentrate or aggregate prey (*e.g.,* Tynan *et al.* 2005, Dalla Rosa *et al.* 2012, Thompson *et al.* 2012, Friday *et al.* 2013, Chenoweth *et al.* 2017, Straley *et al.* 2018, Santora *et al.* 2018). Distributions and abundances of prey species are also influenced by other physical oceanographic and biological mechanisms that can result in significant variations in prey availability on seasonal (*e.g.,* spawning periods), inter-annual (*e.g.,* El Niño), and decadal time-scales (*e.g.,* Pacific Decadal Oscillation cycles; Barber and Chavez 1983, McGowan *et al.* 1998, 2003, Chavez *et al.* 2003, Fleming *et al.* 2016, Moran and Straley 2018). Given the complexity and variability in the multiple physical and biological drivers of prey species abundance across the occupied ranges of each DPS, and the anticipation of continued climate change-induced changes in oceanographic processes and food web dynamics within North Pacific marine ecosystems, we concluded it was not possible to pinpoint or reliably describe which of these other factors are essential to the conservation of the humpback whale DPSs based on the best available scientific data.

Although these feeding areas have an almost continuous distribution around the North Pacific basin, multiple studies have indicated fairly high levels of fidelity of humpback whales to particular areas and limited movements of whales among the broader feeding regions (*e.g.,* Waite *et al.* 1999, Calambokidis *et al.* 2001, Calambokidis *et al.* 2008, Witteveen *et al.* 2011, Witteveen and Wynne 2016a, Gabriele *et al.* 2017). Our understanding of how humpback whale populations are spatially structured while in these feeding areas has been informed by numerous studies, and probably most notably by the results of the SPLASH study. As noted previously, this study

was a significant effort undertaken across the North Pacific and involved the collection of both photographic and genetic data over three breeding seasons (2004, 2005, and 2006) and over two feeding seasons (2004, 2005) in known breeding and feeding areas (Calambokidis *et al.* 2008). Through this effort, a total of 7,971 unique whales were photo-identified (Calambokidis *et al.* 2008). For most analyses, photo-identification data were grouped into six broad feeding regions: Kamchatka (Russia), Aleutian Islands/Bering Sea, Gulf of Alaska, Southeast Alaska/Northern British Columbia, Southern British Columbia/Northern Washington, and California/Oregon (Calambokidis *et al.* 2008, Barlow *et al.* 2011, Wade *et al.* 2016). Analysis of the photo-identification data indicated that both within-season and between-season movements of whales between these six feeding areas were infrequent and any such exchanges were mainly to adjacent areas (Calambokidis *et al.* 2008), which is consistent with previous findings from earlier region-wide studies (*e.g.,* Calambokidis *et al.* 1996, Calambokidis *et al.* 2001).

Genetic analyses of skin samples collected during the SPLASH study provide additional insight into the structuring of humpback whale populations across the feeding areas (Baker *et al.* 2013). Analysis of maternally inherited mitochondrial DNA (mtDNA) from 1,010 unique whales indicated highly significant differences in mtDNA haplotype frequencies among the feeding regions overall (overall F_{ST} = 0.121, Φ_{ST} = 0.178, p <0.0001), and pairwise comparisons were also significant (at p <0.05) for 32 of 36 possible comparisons (excluding the western Aleutians due to low sample size, Baker *et al.* 2013). Comparisons of bi-parentally inherited microsatellite DNA indicated very weak but significant differentiation of microsatellite allele frequencies among feeding areas, suggesting male-biased gene flow (overall F_{ST} = 0.0034, p <0.001, Baker *et al.* 2013). The high degree of differentiation in mtDNA among feeding areas reflects the influence of maternal fidelity to feeding areas. This result is consistent with findings of previous but more spatially-limited studies (*e.g.,* Baker *et al.* 1998, Witteveen *et al.* 2004). This effect likely stems from the close dependency of calves on their mothers during their first year of life, during which they travel with their mothers and thereby inherit information from their mothers about feeding destinations (Baker *et al.* 1987, Pierszalowski *et al.* 2016).

Overall, while the available photo-identification data indicate varying degrees of mixing of populations across the feeding areas, the overall pattern of structuring of populations among the feeding areas, as well as the pattern of migratory connections between particular feeding areas and breeding areas, contributed to how the various DPSs are described in the listing rule (81 FR 62260, September 8, 2016). In particular, the threatened MX DPS, which has previously been estimated to include about 2,806 whales (CV = 0.055, Wade 2017), is described as including whales that feed primarily off California-Oregon, northern Washington-southern British Columbia, in the Gulf of Alaska and East Bering Sea (50 CFR 223.102). The endangered CAM DPS, which has previously been estimated to include about 783 whales (CV = 0.170, Wade 2017), is described as including whales that feed along the West Coast of the United States and southern British Columbia (50 CFR 224.101) and thus individuals from that DPS co-occur with MX DPS whales while in their feeding areas. The endangered WNP DPS, which has been estimated as including about 1,066 whales (CV = 0.079, Wade 2017), is described as including whales that feed primarily in the West Bering Sea and off the Russian coast and the Aleutian Islands (50 CFR 224.101) and thus individuals from this DPS also co-occur with MX DPS whales while in their feeding areas. Our understanding of these patterns may change as new data become available, and the patterns themselves may changes if the whales shift their distributions in response to changing ocean conditions, or as the listed DPSs undergo recovery and expand their feeding ranges.

All three of these listed DPSs overlap spatially to varying degrees with the ''Hawaii DPS'' of humpback whales, which was found to not warrant listing under the ESA in 2016 (81 FR 62260, September 8, 2016). The ''Hawaii DPS,'' which has an estimated abundance of about 11,571 whales (Wade 2017), breeds in waters around the Hawaiian Islands and has been observed on most of the known feeding grounds within the North Pacific (Bettridge *et al.* 2015). While these whales are no longer protected under the ESA (and critical habitat is not being designated for them), they continue to be managed under the MMPA.

Diet and Feeding Behaviors

Humpback whales are filter feeders, gulping large volumes of prey and water during discrete lunges (Goldbogen *et al.* 2015). In general, humpback whales will lunge feed, both towards the surface and at depths, and can execute multiple lunges in one dive (Goldbogen *et al.* 2008, Simon *et al.* 2012). Humpback whales are also capable of employing multiple techniques to herd or aggregate their prey while feeding, including the use of bubble structures, such as bubble nets, columns, clouds, and curtains (Jurasz and Jurasz 1979, Hain *et al.*1982). Other techniques include pectoral herding (Kosma *et al.* 2019), ''blaze feeding'' (flashing the white side of pectoral flipper at prey; Tomilin 1957 cited in Brodie 1977, Sharpe 2001), flick feeding (lashing tail at the surface, Jurasz and Jurasz 1979), vertical rise and subsidence (creates a reduced pressure zone in the water column, Hays *et al.* 1985), ''roiling'' the surface with flippers and flukes (Hain *et al.* 1982), and trap-feeding (McMillan *et al.* 2019). Humpback whales may also work cooperatively in groups to herd and capture prey (Jurasz and Jurasz 1979, Baker 1985, D'Vincent *et al.* 1985). Foraging behaviors of the whales and use of various feeding strategies may vary depending on multiple factors, such as the particular target prey species, prey density, prey depth, and whether other whales are present (*e.g.,* Simon *et al.* 2012, Witteveen *et al.* 2015, Szesciorka 2015, Burrows *et al.* 2016, Akiyama *et al.* 2019).

Satellite tagging efforts have provided some insights into the fine-scale movements of the whales while on the foraging grounds, indicating the duration, area, and variability in the areas over which the whales feed. For instance, in the summers of 2007 to 2011, Kennedy *et al.* (2014) deployed satellite tags on eight adult humpback whales in Unalaska Bay, Alaska, and tracked the whales for an average of 28 days (range = 8–67 days). Position data were then analyzed and categorized into one of three possible behavioral modes: Transiting; area-restricted searching (ARS), or unclassified. The slower speeds and higher turning angles during ARS behavior are considered to be indicative of active foraging (Kennedy *et al.* 2014, citing Kareiva and Odell 1987, Mayo and Marx 1990). Results indicated that whales mainly stayed over shelf and slope habitat (1,000 m or shallower) while in ARS mode, and all but one whale remained relatively close to Unalaska Bay during the tracking period. One whale, however, left Unalaska Bay 3 days after being tagged, traveling along the Bering Sea shelf towards Russia and covering almost 3,000 km in 26 days, indicating that the whales may in fact travel long distances during the feeding season (Kennedy *et*

al. 2014). Satellite tags deployed on whales tagged off central California in the summer/fall of 2004–2005 and in summer of 2017 and that were tracked for a minimum of 30 days, exhibited feeding behavior (as detected by ARS data) over an area that averaged 20,435.6 km² (n=8, SE = 7322.8) and 17,684.4 km² (n=7, SE = 13,927.6 km²), respectively (Mate *et al.* 2018). In the latter case, this average area extended from the Channel Islands in southern California to central Oregon. Similar tagging work off the Oregon coast in September/October in 2017 indicated the whales actively fed over areas of comparable size (average area = 17,215.6 km²; n=4; SE = 8,430.6), and for the few whales tagged, the feeding area extended from Point Arena, central California, to the southwest corner of Vancouver Island, British Columbia (Mate *et al.* 2018). The area over which whales actively feed (as indicated by ARS data over a minimum of 30-days) appears to be somewhat smaller in Southeast Alaska, where the average ARS area for whales tagged in summer of 1997 and in fall of 2014–2015 was 4,904.3 km² (n=3, SE = 1,728.8) and 2,862.7 km² (n=4, SE = 1,834.2), respectively (Mate *et al.* 2018). Differences in the area over which the whales feed between years likely reflects a seasonal shift in target prey and prey distributions (Mate *et al.* 2018, Straley *et al.* 2018).

Geographical Area Occupied by the Species

The phrase ''geographical area occupied by the species,'' which appears in the statutory definition of critical habitat, is defined by regulation as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range) (50 CFR 424.02). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals) (*Id.*). Below, we summarize information regarding the geographical area occupied by each of the three DPSs of humpback whales, each of which is a ''species'' as defined in the ESA. *See* 16 U.S.C. 1532(16) (defining ''species'' to include any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature). Additional details on the range of each DPS are provided in the Final Biological Report (NMFS 2020a).

Central America DPS

The endangered CAM DPS is described as humpback whales that breed in waters off Central America in the North Pacific Ocean and feed along the West Coast of the United States and southern British Columbia (50 CFR 224.101(h)). The breeding range of this DPS includes waters off the Pacific coast of Central America, from Panama north to Guatemala, and possibly into southern Mexico (Bettridge *et al.* 2015, Calambokidis *et al.* 2017). Whales from this DPS have been observed within foraging grounds along the coasts of California, Oregon, and Washington (Barlow *et al.* 2011).

In terms of distribution across their foraging range, CAM DPS whales are significantly more common in waters of southern California and occur in progressively decreasing numbers up the coast towards Washington and Southern British Columbia (Steiger *et al.* 1991; Rasmussen *et al.* 2001; Calambokidis *et al.* 2000, 2008, 2017). Of the humpback whales identified off the coast of Central America (n=31) in a photo-identification study conducted between 1981 and 1992, 84 percent were re-sighted off California (Calambokidis *et al.* 2000). This distribution pattern was also confirmed by the results of the SPLASH study, which indicated that out of 29 between-season photo-identification matches of whales from the Central America breeding areas, 26 occurred within the California/Oregon feeding region and 3 occurred within the northern Washington/southern British Columbia region (Barlow *et al.* 2011). Use of the Salish Sea by this DPS may be extremely limited, as suggested by the single re-sighting reported in Calambokidis *et al.* (2017), and no observations of these whales have been reported for waters off Alaska or in the Bering Sea.

Mexico DPS

The threatened MX DPS of humpback whales is defined as humpback whales that breed or winter in the area of mainland Mexico and the Revillagigedo Islands, transit Baja California, or feed in the North Pacific Ocean, primarily off California-Oregon, northern Washington/southern British Columbia, northern and western Gulf of Alaska, and East Bering Sea (50 CFR 223.102(e)). Of the three DPSs addressed in this proposed rule, the MX DPS has the broadest distribution within the U.S. portion of their range. Through the SPLASH study, photo-identified MX DPS whales were matched in all five of the major feeding areas in, or partially in, U.S. waters—*i.e.,* California/Oregon (n=105 whales), northern Washington/southern British Columbia (n=27 whales), southeast Alaska/northern British Columbia (n=35 whales), the Gulf of Alaska (n=97 whales), and the Aleutian Islands/Bering Sea (n=27 whales, Barlow *et al.* 2011).

In terms of their distribution across this range, whales using different portions of the MX DPS breeding area appear to target different feeding destinations. During SPLASH surveys, whales that had been photo-identified along the Pacific coast of mainland Mexico were sighted in highest numbers off the coast of California and Oregon (97 of 164 total matches), suggesting that this is their primary foraging destination (Calambokidis *et al.* 2008, Barlow *et al.* 2011). Although whales sighted off mainland Mexico also travel to the more northern latitude feeding areas, the MX DPS whales sighted around the Revillagigedo Archipeligo had more matches overall to Alaska feeding areas and had higher match rates to the northern Gulf of Alaska feeding area in particular (44 of 87 matches; Calambokidis *et al.* 2008).

Multiple studies have reported sightings of a small number of whales in both the Mexico and Hawaii breeding areas (*e.g.,* n=1, Darling and McSweeney 1985; n=5, Calambokidis *et al.* 2001; n=17, Calambokidis *et al.* 2008). Detections of shared song composition among whales from different breeding locations along with presence of whales in mid-ocean tropical waters during the breeding season also suggest some form of contact between whales from different breeding populations (Darling *et al.* 2019a and 2019b). Overall, interchange among breeding areas appears to be rare, and remains poorly understood in terms of its biological significance.

Western North Pacific DPS

Humpback whales of the endangered WNP DPS are listed as humpback whales that breed or winter in the area of Okinawa and the Philippines in the Kuroshio Current (as well as unknown breeding grounds in the Western North Pacific Ocean), transit the Ogasawara area, or feed in the North Pacific Ocean, primarily in the West Bering Sea and off the Russian coast and the Aleutian Islands (50 CFR 224.101(h)). Whales from this DPS have been sighted in foraging areas off the coast of Russia, primarily Kamchatka, the Aleutian Islands, as well as in the Bering Sea and Gulf of Alaska, and off northern and southern British Columbia (Darling *et al.* 1996, Calambokidis *et al.* 2001, Barlow *et al.* 2011). Although some

genetic data suggest WNP DPS whales may infrequently occur off the coast of Washington (Palacios *et al.* 2020), this DPS is generally not thought to use the feeding areas off Washington, Oregon, and California.

Several studies have reported sightings of a small number of photo-identified whales in both the Asia (off Japan or the Philippines) and Hawaii breeding areas (*e.g.,* n=1, Darling and Cerchio 1993; n=3, Salden *et al.* 1999; n=4, Calambokidis *et al.* 2001; n=2, Calambokidis *et al.* 2008); however, the significance of these movement to either the WNP DPS or the non-listed population of humpback whales that breed around Hawaii has not been established.

In terms of their distribution across the U.S. portion of their range, whales of the WNP DPS are most likely to be found off the Aleutian Islands and in the Bering Sea (Wade *et al.* 2016, Wade 2017). Although very limited in number, photo-identified whales from the breeding areas of this DPS have also been sighted in the Kodiak and Shumagin Island regions of Alaska (Calambokidis *et al.* 2001, Witteveen *et al.* 2004, Calambokidis *et al.* 2008). During the SPLASH study (2004–2006), photo-identified individuals from this DPS were matched to the Gulf of Alaska (n=3), the Aleutian Islands/Bering Sea (n=7), and the Russia feeding regions (n=25, Calambokidis *et al.* 2008). The WNP DPS whales had the lowest match rates during the SPLASH study, with less than 10 percent of whales from the sampled Asian breeding locations observed in a feeding area (Calambokidis *et al.* 2008). Likely explanations for the low proportion of matches of whales from the WNP DPS include under-sampling of their feeding destinations (*e.g.,* western Aleutian Islands, Bering Sea) and the existence of unknown, unsampled breeding grounds (Calambokidis *et al.* 2008, Barlow *et al.* 2011).

The regulatory definition of the WNP DPS reflects that the breeding range of the WNP DPS is not yet fully resolved. At the time of listing, the breeding range of this DPS was known to include the waters off Okinawa and the Philippines in the area of the Babuyan Islands (Barlow *et al.* 2011, Bettridge *et al.* 2015, Wade *et al.* 2016), but additional breeding areas were suspected due to the very low percentage of matches for whales from feeding areas used by this DPS (Calambokidis *et al.* 2008). Recent evidence suggests that an additional breeding area for the WNP DPS is located off the Mariana Islands. Humpback whale song has been detected on passive acoustic recorders within the Mariana Archipelago in winter months (December–April; Fulling *et al.* 2011, Oleson *et al.* 2015). Humpback whales have also been infrequently sighted near the Mariana Islands, mainly off of Saipan (Fulling *et al.* 2011; Hill *et al.* 2016, 2017); and, although no humpback whales were sighted in this area between 2009–2013 (Fulling *et al.* 2011, Hill *et al.* 2014, Ligon *et al.* 2013), a total of 14 mother-calf pairs and 27 non-calf whales were observed in the southern portion of the archipelago during February and March of 2015–2018 (Hill *et al.* 2020). Photo-identification and genetic data for whales sampled off Saipan within the Mariana Archipelago in February–March 2015–2018, provide evidence that some of these whales belong to the WNP DPS (Hill *et al.* 2020). Specifically, comparisons with existing WNP humpback whale photo-identification catalogs showed that 11 of 43 (26 percent) whales within the Mariana Archipelago humpback whale catalog were previously sighted in WNP breeding areas (Japan and Philippines) and/or in a WNP feeding area (Commander Islands; Hill *et al.* 2020). Mitochondrial DNA analyses comparing 24 individual humpback whales sampled within the Mariana Archipelago to ones sampled in known breeding areas throughout the Pacific demonstrated significant differentiation from the Philippines, Okinawa, Hawai'i, and Central America (Hill *et al.* 2020). No population structure was demonstrated between the Mariana Archipelago and Ogasawara or Mexico breeding areas (Hill *et al.* 2020). Comparisons of samples from the Mariana Archipelago to known foraging areas demonstrated significant differentiation from foraging areas in Northern British Columbia, the Bering Sea, California/Oregon, Southeast Alaska, and the Northern Gulf of Alaska; no population structure was demonstrated between the Mariana Archipelago and foraging areas in Russia, the Aleutian Islands, Western Gulf of Alaska, and Southern British Columbia/Washington (Hill *et al.* 2020). While the available data suggest that the Mariana Archipelago may serve as humpback whale breeding habitat, and that at least some of these whales likely belong to the endangered WNP DPS, additional data are needed to fully resolve the extent to which WNP DPS whales are relying on areas around the Mariana Islands as a breeding/calving habitat and the essential features of the specific area(s) being used for breeding and calving. Thus, at this time, the best available scientific information does not support designating these areas as critical habitat for the WNP DPS.

Physical and Biological Features Essential to the Conservation of the Species

The statutory definition of occupied critical habitat refers to ''physical or biological features essential to the conservation of the species,'' but the ESA does not specifically define or further describe these features. ESA-implementing regulations, however, define such features as the features that occur in specific areas and that are essential to support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity (50 CFR 424.02).

To assess habitat features that may qualify as ''essential to the conservation'' of humpback whales, the CHRT discussed physical and biological features that are essential to support the life history needs of humpback whales within the areas they occupy within U.S. waters (see 50 CFR 424.02 (defining ''physical or biological features essential to the conservation of the species'')). The CHRT considered and evaluated various features of humpback whale habitat, such as prey, migratory corridors or conditions, and sound/soundscape. Significant considerations, CHRT discussions, and conclusions are summarized in the proposed rule (84 FR 54354, October 9, 2019) and the Final Biological Report. Ultimately, as discussed in the following paragraphs, the CHRT identified humpback whale prey as an essential biological feature of the occupied critical habitat and found that the best available scientific information does not currently support recognizing additional essential features. In our responses to comments, above, we explained our reasoning in greater detail. In response to public comments requesting that additional specificity be added to the proposed prey feature, we reviewed and reconsidered the available literature regarding humpback whale prey and, as discussed in the following section, have revised the single, general prey feature that was originally proposed so that a tailored essential feature is presented

separately for each humpback whale DPS to include a non-exhaustive list of key prey species for each DPS.

Prey as an Essential Feature

Although written for the taxonomic species and thus now outdated, the 1991 NMFS Recovery Plan for humpback whales identified four major recovery objectives, the first of which was, ''maintain and enhance habitats used by humpback whales currently or historically'' (NMFS 1991). As part of that objective, we had identified multiple recommended actions to further the species' recovery, including ''providing adequate nutrition'' and ''monitoring levels of prey abundance'' (NMFS 1991). The Recovery Plan stated that adequate nutrition is needed for the recovery of the species, and emphasized the need to maintain and optimize levels of, and access to, prey (NMFS 1991). The Recovery Plan also noted that humpback whales require access to prey over a sufficiently widespread feeding range to buffer them from local fluctuations in productivity or fisheries removals (NMFS 1991). These considerations regarding adequate nutrition and prey abundance and availability are still relevant today for the MX, CAM, and WNP DPSs of humpback whales.

Whales from each of these three DPSs travel to U.S. coastal waters specifically to access energy-rich feeding areas, and the high degree of loyalty to specific locations indicates the importance of these feeding areas. Because humpback whales only rarely feed on breeding grounds and during migrations, humpback whales must have access to adequate prey resources within their feeding areas to build up their fat stores and meet the nutritional and energy demands associated with individual survival, growth, reproduction, lactation, seasonal migrations, and other normal life functions. Essentially, while on feeding grounds, the whales must finance the energetic costs associated with migration to breeding areas, reproductive activities, as well as the energetic costs associated with their return migration to high-latitude feeding areas. Fat storage has been linked to reproductive efficiency in other species of large, migratory, baleen whales (Lockyer 2007), and some evidence suggests that variation in prey availability during summer is directly connected to variation in annual reproductive rates for humpback whales in the following year (Clapham 1993). Calf condition has also been significantly correlated with female body condition (low calf body condition with lower female condition) for humpback whales in Australia (Christiansen *et al.* 2016), and, of all life stages, lactating females have the highest energy demands (McMillan 2014). Thus, it is essential that the whales have reliable access to quality prey within their feeding areas, and that prey are sufficiently abundant to support feeding and ultimately, population growth.

Humpback whales are generalists, consuming a variety of prey while foraging and also switching between target prey depending on what is most abundant or, potentially, of highest quality in the system (Witteveen *et al.* 2008, Witteveen *et al.* 2015, Fleming *et al.* 2016, Moran and Straley 2018). Relative abundance and distribution of humpback whale prey species are also temporally and spatially dynamic on multiple scales due to the influences of various ecological (*e.g.,* spawning seasonality), physical (*e.g.,* upwelling), environmental (*e.g.,* ocean conditions, climate change), and, potentially, anthropogenic factors (*e.g.,* commercial fisheries). Despite these sources of variability, substantial data indicate that the humpback whales' diet is consistently dominated by euphausiids and small pelagic fishes (Nemoto 1957, Nemoto 1959, Klumov 1963, Rice Krieger and Wing 1984, Baker 1985, Kieckhefer 1992, Clapham *et al.* 1997, Witteveen *et al.* 2011, Neilson *et al.* 2015).

Within CCE, the highly productive coastal system that extends from British Columbia, Canada to the southern Baja California Peninsula, humpback whales feed on euphausiids (specifically *Thysanoessa, Euphausia, Nyctiphanes,* and *Nematoscelis*), Pacific sardine (*Sardinops sagax*), northern anchovy (*Engraulis mordax*), and Pacific herring (*Clupea pallasii;* Rice 1963, Kieckhefer 1992, Clapham *et al.* 1997; Fleming *et al.* 2016). That these species consistently occur in the humpback whale diet and are targeted by humpback whales in this region is supported by stomach content analyses, fecal sample analyses, direct observations, and stable isotope analyses (NMFS 2020a). Significant fluctuations in the abundances of these prey species in the CCE has also been reflected in their relative contributions to the humpback whale diet over time (*e.g.,* Clapham *et al.* 1997, Fleming *et al.* 2016).

Other diet items reported for humpback whales in the CCE include copepods (species not indicated), sand lance (*Ammodytes hexapterus*), and juvenile rockfish (*Sebastes;* Kieckhefer 1992). Copepods and squid were identified in only a small number of stomachs (12 and 1, respectively, out of 287 total), from whales captured off of British Columbia, Canada, during 1949-1965; whereas, euphausiids occurred in 263 (of 287) stomachs, (Ford *et al.* 2009). Ford *et al.* (2009) also report observing humpback whales consuming sand lance (along with euphausiids, herring, and sardine) during studies conducted off British Columbia in 2002–2007, but data are not provided to further evaluate this statement. (The researchers also state that their observations and prey sampling indicated that euphausiids were the primary prey of the humpback whales (Ford *et al.* 2009).) Information on juvenile rockfish as prey is similarly limited. Specifically, Kieckhefer (1992) reported that, on one occasion, surface-feeding humpback whales were observed feeding on what was tentatively identified as juvenile rockfish (*Sebastes* spp.). Overall, the available data are not sufficient to indicate these other species are essential prey for humpback whales, especially within the U.S. portion of the CCE.

In the waters off Alaska, including in the Gulf of Alaska, around the eastern Aleutian Islands, and in the eastern Bering Sea, humpback whales feed primarily on euphausiids (*Thysanoessa* and *Euphausia*) and small fishes, including capelin (*Mallotus villosus*), Pacific herring (*Clupea pallasii),* juvenile walleye pollock (*Gadus chalcogrammus;* formerly, *Theragra chalcogramm*a), and Pacific sand lance (*Ammodytes personatus)* (*e.g.,* Nemoto 1959, Klumov 1965, Jurasz and Jurasz 1979, Kawamura 1980, Krieger and Wing 1984, Witteveen *et al.* 2008, Witteveen *et al.* 2012, Neilson *et al.* 2015, Wright *et al.* 2016, Moran and Straley 2018). Evidence indicating that these species regularly occur in the humpback whale diet comes from stomach content analyses, stable isotope analyses, and direct observations coupled with prey sampling (NMFS 2020a). These species are broadly distributed within the Gulf of Alaska and eastern Bering Sea systems (*e.g.,* Simonsen *et al.* 2016, Ormseth 2014, Ormseth *et al.* 2016, Ormseth 2017), and serve as important prey for other upper-trophic level predators including sea birds, seals, other whales, and commercially valuable fishes.

Other fish species that have been reported as part of the humpback whale diet for the Gulf of Alaska and/or Bering Sea regions but not ultimately determined to be significant or essential prey include eulachon (*Thaleichthys pacificus*), Pacific sandfish (*Trichodon trichodon*), surf smelt (*Hypomesus pretious*), Atka mackerel (*Pleurogrammus monopterygius*),

Pacific cod (*Gadus macrocephalus*), saffron cod (*Eleginus gracilis*), Arctic cod (*Boreogadus saida*), rockfish (*Sebastes*), juvenile salmon (SPP), and myctophids (primarily *Stenobrachius leucopsarus;* Thompson 1940, Nemoto 1959, Klumov 1965, Tomilin 1967, Neilson and Gabriele 2008, Witteveen *et al.* 2008, Wright *et al.* 2016, Moran and Straley 2018). The available data regarding the occurrence of these species in the diet are limited however. For instance, most observations of humpback whales feeding on salmon are anecdotal or unquantified (Klumov 1967, Neilson *et al.* 2013); and where quantitative information is available, predation on salmon appears to be rare (Moran and Straley 2018). Anecdotal observations of humpback whales feeding on hatchery released salmon have also been reported, but results of a study at five release sites in Southeast Alaska over a 6-year period (2010-2015), indicated that in the majority of instances where humpback whale were observed near release sites (100 of 124 sightings), only a single whale was sighted (Chenoweth *et al.* 2017). In many cases, quantitative data on consumption of certain fish species, such as eulachon and sand fish, are lacking or do not otherwise indicate that the particular species are important in the diet. For example, stable isotope analyses for samples collected from humpback whales in the Kodiak region during summers from 2004- 2013 indicate that sand fish and eulachon were among the least important prey sources or made insignificant contributions to the diet, which results indicated was mainly comprised of krill, capelin, and age-0 pollock (Witteveen *et al.* 2012, Wright *et al.* 2016). Other data substantiating the importance or prevalence of sandfish and eulachon in the humpback whale diet are not available. Based on analysis of stomach contents of whales taken by Japanese whaling expeditions from 1952–1958, Nemoto (1957, 1959) reported that humpback whales preferentially fed on Atka mackerel in waters west of Attu Island and south of Amchitka Island, in the western Aleutians and far to the west of the areas proposed as critical habitat. We are not aware of other data or records of Atka mackerel being taken by humpback whales within U.S. waters or in any areas that were proposed for designation as critical habitat. Thompson (1940) reported that a high percentage of stomachs from whales harvested in 1937 from waters southeast of Kodiak contained surf smelt (78 percent, 21 of 27 stomachs), but occurrence of surf smelt in the diet has not been supported by other studies. Possible explanations for the lack of surf smelt in more recent diet studies include a dramatic change in relative abundance of surf smelt, species misidentification, or inadvertent omission of species in the stomach samples examined by Thompson (1940) (Witteveen *et al.* 2006).

Data are even more limited for other reported diet items, such as rockfish, cod species, and various invertebrates (*e.g.,* copepods, mysids, amphipods, pteropods, shrimps; NMFS 2020a). Many of these diet items were recorded in older studies based on observations or evaluation of stomach contents, and in many instances for whales taken in Russian waters (*e.g.,* Klumov 1965). In some cases, available information suggests that these other species are unimportant in the humpback whale diet (NMFS 2020a). For example, copepods were often reported by Nemoto (1957, 1959, 1977) in the stomachs of humpback but were not considered intentional targets given the distribution of humpback whales relative to copepods and their low number in the stomachs relative to their abundance (Nemoto 1959). In other cases, the prey have very limited or non-quantified occurrence in the diet, so conclusions regarding their importance as prey are not possible (*e.g.,* cods, Thompson 1940, Nemoto 1957, Klumov 1965). The Final Biological Report (NMFS 202a) provides additional information and references for other documented and possible prey species of humpback whales in different feeding regions. Overall, there is insufficient information to clearly establish that each of these previously documented or reported prey species is important to the humpback whale diet in U.S. waters, and that each of these species can therefore be considered essential the conservation of the listed DPSs.

Humpback whales are not known to limit their selection of prey to particular age classes of the majority of their prey species; however, humpback whales have been documented to consume fish ≤30 cm in length (Nemoto 1959). Available data also suggest that humpback whales consume age-0, young-of-year, and age-1 walleye pollock (Krieger and Wing 1986, Witteveen *et al.* 2008 and 2012, Wright *et al.* 2016). Therefore, we have specified ''juvenile'' walleye pollock in the revised prey feature description for the two DPSs occurring in waters off Alaska where walleye pollock occur within the humpback whale diet.

Based on the best scientific data available, we have now identified the following biological features essential to the conservation of each particular DPS.

CAM DPS: Prey species, primarily euphausiids (*Thysanoessa, Euphausia, Nyctiphanes,* and *Nematoscelis*) and small pelagic schooling fishes, such as Pacific sardine (*Sardinops sagax*), northern anchovy (*Engraulis mordax*), and Pacific herring (*Clupea pallasii*), of sufficient quality, abundance, and accessibility within humpback whale feeding areas to support feeding and population growth.

WNP DPS: Prey species, primarily euphausiids (*Thysanoessa and Euphausia*) and small pelagic schooling fishes, such as Pacific herring (*Clupea pallasii*), capelin (*Mallotus villosus*), juvenile walleye pollock (*Gadus chalcogrammus)* and Pacific sand lance (*Ammodytes personatus*) of sufficient quality, abundance, and accessibility within humpback whale feeding areas to support feeding and population growth.

MX DPS: Prey species, primarily euphausiids (*Thysanoessa, Euphausia, Nyctiphanes,* and *Nematoscelis*) and small pelagic schooling fishes, such as Pacific sardine (*Sardinops sagax*), northern anchovy (*Engraulis mordax*), Pacific herring (*Clupea pallasii*), capelin (*Mallotus villosus*), juvenile walleye pollock (*Gadus chalcogrammus*), and Pacific sand lance (*Ammodytes personatus*) of sufficient quality, abundance, and accessibility within humpback whale feeding areas to support feeding and population growth.

As generalist predators that may opportunistically switch which prey they are targeting, humpback whales will consume other prey in addition to those we identify here in the description of the essential biological features, and those other prey species may in fact be essential to the conservation of the listed humpback whales. However, the best available data do not allow us to provide an exhaustive list of all prey species that may be essential to the whales' conservation. Given the dynamic nature of the prey populations, it is also not possible to specify which of the identified common prey species will form the majority of the humpback whale diet at a particular location or point in time. However, to provide the most possible notice to the public of the features that are essential to the conservation of humpback whales, we are providing the most detailed description that current data allow. The three essential prey features identify those prey species that commonly occur within the humpback whale diet and that are known to occur within the feeding areas of the listed humpback whale DPSs. These species are thus examples of prey that can be essential

to the conservation of the particular DPS within the specific areas of U.S. waters where the DPS occurs. Because the feeding ranges and primary prey within those feeding ranges are not the same for each of the DPSs, a separate prey essential feature is described for each humpback whale DPS. We note, however, that there is considerable overlap in terms of the prey species identified for each DPS, which is a reflection of the fact that the feeding ranges of the DPSs also overlap to varying extents. Specifically, both the MX and CAM DPSs feed within the CCE on euphausiids, anchovy, sardine, and herring; and within feeding areas off of Alaska, both the WNP and MX DPSs feed on euphausiids, herring, capelin, juvenile walleye pollock, and sand lance. When Federal agency actions undergo section 7 consultation, the analysis will be based on the best available scientific and commercial data at that time.

Special Management Considerations or Protection

A specific area within the geographic area occupied by a species may only be designated as critical habitat if the areas contains one or more essential physical or biological features that ''may require special management considerations or protection'' (16 U.S.C. 1532(5)(A)(ii); 50 CFR 424.12(b)(iv)). ''Special management considerations or protection'' is defined as methods or procedures useful in protecting the physical or biological features essential to the conservation of listed species (50 CFR 424.02). As discussed previously, courts have made clear that the ''may require'' standard requires that NMFS determine that special management considerations or protection of the features might be required either now or in the future; such considerations or protection need not be immediately required (see Critical Habitat Definition and Process). Four broad categories of actions, or threats, were identified as having the potential to negatively impact the essential prey features and the ability of feeding areas to support the conservation of listed humpback whales in the North Pacific: Climate change, direct harvest of the prey by fisheries, marine pollution, and underwater noise. Each of these threats could independently or in combination result in the need for special management or protections of the essential prey feature. The ''may require'' standard is met or exceeded with respect to management of the essential prey feature. We do not speculate as to what specific conservation measures might be required in the future through section 7 consultations on particular proposed Federal actions. However, we can point, for example, to our authorities to manage Federal fisheries under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801, *et seq.*) to demonstrate that management of the prey feature is not only possible but is ongoing. We find that many of the other threats identified are of a type that could also be ameliorated through specific measures now or in the future. We therefore conclude that the prey feature may require special management considerations or protection. These threat categories are summarized here and discussed in more detail in the Final Biological Report.

Climate Change

Multiple studies have detected changes in the abundance, quality, and distribution of species that serve as prey for humpback whales in association with climate shifts, particularly with ocean warming. The nature and extent of impacts have varied across study areas and species; however, in many cases, ocean warming has led to negative impacts on humpback whale prey species. For instance, in the CCE, during the anomalous warming of the upper ocean and weak upwelling from 2013—2016, often referred to as the ''blob'' or the ''warm blob,'' sharp decreases in euphausiid biomass were observed, as evidenced by declines in both abundance and body length (Harvey *et al.* 2017, Peterson *et al.* 2017). Comparisons of samples collected in the Northern California Current region during years of cool (2011, 2012), average (2000, 2002), and warm (2015, 2016) conditions, also indicated that body condition of northern anchovy, Pacific herring, and Pacific sardine were better in cool years compared to warm years, and significantly so for anchovy and herring (Brodeur *et al.* 2018). Climate change may also alter the spatial and temporal distributions of humpback prey species (Bakun *et al.* 2015, Auth *et al.* 2018), which may lead to corresponding shifts in marine mammal distributions as well as other changes in the ecology of the whales (King *et al.* 2011, Moore *et al.* 2019).

Consequences of climate-driven and climate-related reductions in the quality and abundance of prey species can cascade upwardly through ecosystems by decreasing energy transfers to higher trophic levels and potentially causing reproductive failures and die-offs of some predators (Coyle *et al.* 2011, Woodworth-Jefcoats *et al.* 2017, Zador and Yasumiishi 2017 and 2018, Bordeur *et al.* 2018, Jones *et al.* 2018). Observations of whales with poor body condition, called ''skinny whales'' due to their emaciated appearance, have been reported in recent years in Prince William Sound and Glacier Bay, Alaska (Straley *et al.* 2018; and see *https://irma.nps.gov/DataStore/DownloadFile/620535*). The lowest calving rates on record (since 1985) have also been observed in recent years (2016–2018, *https://irma.nps.gov/DataStore/DownloadFile/620535*) in Southeast Alaska, and juvenile return rates to the area are also low (Gabriele and Neilson 2018; see also Cartwright *et al.* 2019). It is not yet clear whether nutritional stress or some other factor (*e.g.,* parasites, disease) is the cause of the poor body condition and observed low calving rates of these whales, but some researchers hypothesize that reduced prey availability and/or quality driven by the marine heat wave of 2013–2016 and other climate factors is the likely cause (Gabriele and Neilson 2018).

Additional discussion on the potential impacts of climate change on humpback whale prey, including the related effects of eutrophication, harmful algal blooms, and ocean acidification is provided in the Final Biological Report (NMFS 2020a).

Direct Harvest

Within the areas under consideration for designation, a few fisheries directly target prey species that form a major part of the humpback whale diet (*e.g.,* Pacific herring, Pacific sardine, northern anchovy), and other fisheries can incidentally capture important prey species. This creates the potential for direct competition between humpback whales and certain fisheries (Trites *et al.* 1997). In fact, current management of key forage species like Pacific sardine and northern anchovy under their associated Federal fishery management plan includes a specific objective of providing adequate forage for dependent species, like whales and other higher trophic level species (PFMC 2019). Consequences of prey depletion as a result of fishing activities are also likely to be exacerbated in years when alternative humpback whale prey species are naturally low in abundance due to climate or environmental factors. Sufficient depletion of prey on the feeding grounds can lead to nutritional stress, which in turn can lead to decreases in body condition, size, reproductive output, and survival (as in Steller sea lions, Trites and Donnelly 2003; gray whales, Bradford *et al.* 2012; right whales, Seyboth *et al.* 2016). For humpback whales in the Atlantic

Ocean, there is some evidence that variation in prey availability during the summer may be connected to variation in annual reproductive rates in the following year (Clapham 1993).

Marine Pollution

Although pollution was not identified as a significant threat to any of the North Pacific DPSs of humpback whales in the recent status review (Bettridge *et al.* 2015), consumption of contaminated or low quality prey may negatively affect the health, population growth, and ultimately the recovery of listed humpback whales. Humpback whales are susceptible to bioaccumulation of lipophilic contaminants because they have long lifespans and large fat deposits in their tissues. Some contaminants may also be passed to young whales during gestation and lactation (as in fin whales, Aguilar and Borrell 1994). In comparisons of samples collected from Northern Hemisphere feeding grounds, Elfes *et al.* (2010) reported that concentrations of contaminants within humpback whale blubber were high in southern California and in the Northern Gulf of Maine. Marine pollution in the form of plastics is also a concern for marine systems worldwide, and microplastics in particular have entered into marine systems and food webs. Microplastics could be consumed via contaminated prey or ingested directly by whales when microplastics co-occur in the water column with target prey.

Marine pollution may also lead to secondary impacts on the whales' habitat. For instance, pollution from untreated industrial and domestic wastewater may be contributing to the occurrences of algal blooms. During some algal blooms, toxins (*e.g.,* saxitoxin, domoic acid) can become increasingly concentrated as they move up the food chain. Although much of the humpback whales' prey are lower trophic-level species, several unusual mortality events have been documented in the Atlantic Ocean, indicating that such toxins can pose a concern for humpback whales (Geraci *et al.* 1989, Gulland 2006).

Ocean Noise

Effects of noise on fish and zooplankton species, which is a topic of increasing research attention, may range from health and fitness consequences to mortality and reductions in abundance (Popper and Hastings 2009, Kight and Swaddle 2011, Radford *et al.* 2014). For instance, there is evidence that marine seismic surveys can result in behavioral effects as well as significant injury and mortality of fishes and zooplankton (McCauley *et al.* 2017, Carroll *et al.* 2017); however, such impacts may be relatively short in duration and spatially limited (to within the survey footprint and extending out ~15 km) and may be minimized by ocean circulation (Richardson *et al.* 2017). Available research also suggests that other noises in the marine environment from sources such as impact pile driving and underwater explosives may have negative consequences on certain species of fish and invertebrates such as trauma or tissue damage, mortality (of various life stages), stress, disruptions of schooling, or reduced foraging success (Popper and Hastings 2009, Weilgart 2017). Whether and how specific humpback whale prey are currently being impacted by various noise sources and levels is not yet clear, but the available information is sufficient to indicate that ocean noise poses a management concern for many fish and invertebrate species such that they may require management considerations or protection (Hawkins and Popper 2017).

Unoccupied Areas

Section 3(5)(A)(ii) of the ESA authorizes the designation of specific areas outside the geographical area occupied by the species if those areas are determined to be essential for the conservation of the species. Implementing regulations require that we first evaluate areas occupied by the species and only consider unoccupied areas where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species (50 CFR 424.12(b)(2)). An occupied area can only be considered essential if there is a reasonable certainty both that it contains one or more of the essential physical or biological features and that it will in fact contribute to the conservation of the species (*Id.*).

Although humpback whale abundances were greatly reduced throughout their range by commercial whaling (Rice 1978, Rice and Wolman 1982, Johnson and Wolman 1984), they still occur in areas where they were once targeted by commercial whaling operations (*e.g.,* Zerbini *et al.* 2006), and the NMFS 2017 Marine Mammal Stock Assessments for the Western and Central North Pacific regions concluded that humpback whales are currently found throughout their historical feeding range (Muto *et al.* 2018). As indicated in the proposed rule (84 FR 54354, October 9, 2019), we find that a designation limited to geographical areas occupied by humpback whales at the time of listing would be adequate to conserve the three listed DPSs and that there are no unoccupied areas that are essential to the recovery of the listed humpback whale DPSs.

Specific Areas Containing the Essential Feature

To determine what areas qualify as critical habitat within the geographical area occupied by the species, we are required to identify ''specific areas'' that contain the physical or biological features essential to the conservation of the species (50 CFR 424.12(b)(1)(iii)). Delineation of the specific areas is done ''at a scale determined by the Secretary [of Commerce] to be appropriate'' (50 CFR 424.12(b)(1)). Regulations at 50 CFR 424.12(c) also require that each critical habitat area be shown on a map. To create maps of the specific areas meeting the definition of critical habitat for each DPS, the CHRT considered, among other things, the scales at which biological data are available and the availability of standardized geographical data necessary to map boundaries. As noted previously, the ESA implementing regulations allow for flexibility in determining the appropriate scale at which specific areas are drawn (50 CFR 424.12(b)(1)).

Based on a review of the best available data, the CHRT delineated specific areas along the coasts of Alaska, Washington, Oregon, and California that meet the definition of critical habitat for one or more of the three DPSs of whales (Figure 1). Specific areas were also further delineated into 19 particular areas or units to facilitate subsequent analyses for each humpback whale DPS under section 4(b)(2) of the ESA (*e.g.,* consideration of economic impacts). *See* 16 U.S.C. 1533(b)(2). Each of these areas meets the definition of ''critical habitat'' because the best available scientific data indicate that the area is occupied by the particular DPS and the essential feature is present, as evidenced by documented feeding behavior of the whales in these areas, humpback whale sightings data, and/or presence of humpback whale prey.

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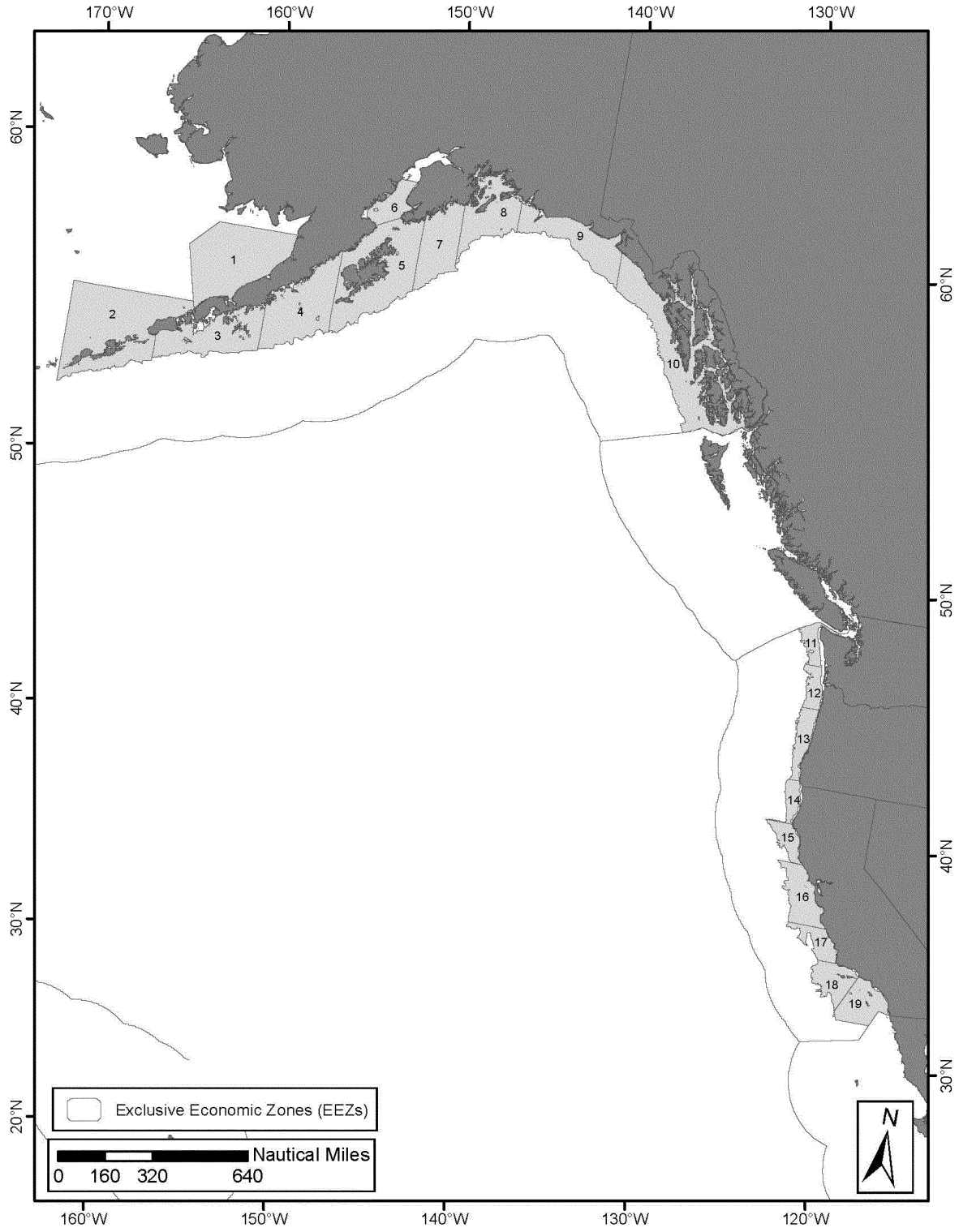


Figure 1. Specific areas (Units 1-19) occupied by one or more of the listed humpback whales DPSs. Units 1-9 are occupied by the WNP DPS; Units 1-19 are occupied by the MX DPSs; and Units 11-19 are occupied by the CAM DPS.

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In delineating and mapping the specific areas, the CHRT applied identified datasets in a systematic way across regions and DPSs to ensure consistency in how boundaries were determined. The approach and data used by the CHRT, which we summarize here, were described in the proposed rule (84 FR 54354, October 9, 2019) and are also discussed in further detail in the Final Biological Report (NMFS 2020a), which describes their updated assessment in response to public comments.

Although the humpback whale feeding BIAs as delineated by Ferguson *et al.* (2015a and 2015c) and

Calambokidis *et al.* (2015) were not intended to be synonymous with critical habitat under the ESA, they were regarded by the CHRT as an important source of information and very informative to their review of areas that meet the definition of critical habitat for humpback whales. In delineating the specific critical habitat areas, the CHRT considered the humpback whale BIAs and the underlying sources used to help delineate the BIAs. In some instances, BIA boundaries were used to determine the boundaries for critical habitat areas. The CHRT also decided that the BIAs should remain intact within a given specific critical habitat area unless there was a compelling reason to change or divide it, because the BIAs are well described, discrete delineations of habitat based on thorough review of existing data that generally fall within larger delineations of humpback whale feeding regions.

For U.S. West Coast areas (Washington, Oregon, and California), the CHRT applied the results of a habitat model for the CCE that incorporated 275 humpback whale sightings from seven systematic line-transect cetacean surveys conducted in summer and fall (July–December) between 1991–2009 (Becker *et al.* 2016) and a habitat model for southern California (*i.e.,* Units 16–19) that incorporated 53 humpback whale sightings from 20 surveys conducted between 2005 and 2015 during winter and spring (January–April, Becker *et al.* 2017). Predictions from the summer/fall models were made for the entire U.S. West Coast from the coast to 300 nmi offshore (the study area was approximately 1,141,800 km^2). Predictions from the winter/spring models were made in a subset of this region: South of 38° N and east of 125° W (the study areas was approximately 385,460 km^2). The Becker *et al.* 2016 and 2017 models summarize expected humpback whale distributions in the CCE over a long time-period and incorporate oceanographic variability observed during the surveys.

The Becker *et al.* (2016 and 2017) models predicted humpback whale abundance in approximately 10 by 10 km grid cells. Cells containing the highest 90 percent of the predicted study area abundance were used to help delineate the offshore extent of the specific areas. (All or 100 percent of the predicted abundance had a distribution that extended out to and even beyond the U.S. EEZ.) The Becker *et al.* (2016 and 2017) predictions also contributed to delineating the north/south boundaries between particular habitat units. As no such coast-wide habitat model is available for Alaska, the CHRT relied on published surveys and available sightings data. Where available, humpback whale sightings data were mapped and overlaid with the BIAs to inform selection of boundaries between specific areas.

For applicable habitat units, the CHRT also considered the polygons derived from ARS data from satellite-tagged whales (Mate *et al.* 2018). These polygons provided information regarding where and the area over which the whales may feed, and thus these data provided additional support for the delineation of relevant specific critical habitat areas.

To determine appropriate nearshore boundaries for the specific areas, the CHRT used humpback whale sightings data from multiple studies (*e.g.,* Calambokidis *et al.* 2008, Zerbini *et al.* 2006, Baker *et al.* 2016). Collectively, the sightings datasets represent results of different types of sampling efforts (*e.g.,* targeted small boat surveys, systematic line-transect surveys), different time-periods (2001–2003, 2004, 2005), and different study locations. The CHRT generated depth frequency histograms from all these sightings in Alaska and for all sightings off of Washington, Oregon, and California to delineate the shoreward boundary for critical habitat units in each of those respective regions. Based on these data, the 1-m depth contour (relative to mean lower low water (MLLW)) or a BIA boundary, whichever was closer to shore, was selected as the nearshore boundary for the habitat units in Alaska. Humpback whales in Alaska have frequently been observed feeding extremely close to shore during high tide (J. Moran, AFSC, pers. comm., May 23, 2018), which comports with the CHRT's selection of the 1-m depth contour (or isobath). Based on the available data for the U.S. West Coast, the CHRT selected the 50-m isobaths as the shoreward boundary for each specific area except in cases where doing so would clip out a portion of a BIA. Cases where this occurred (*i.e.,* Units 16 and 17) and how it was addressed are discussed in more detail in the descriptions of each specific area below and in the Final Biological Report.

In the following sections, we provide additional details regarding the boundaries of each of the 19 specific areas and briefly describe humpback whales' use of the specific area. We note that these delineations of specific units of habitat do not necessarily represent discrete feeding aggregations or populations of humpback whales—individual whales generally move across many of these boundaries. More detailed information regarding whale and prey distributions is provided in the Final Biological Report (NMFS 2020a).

Unit 1—Bristol Bay

This unit is bounded along the northern edge by a line extending due west from Egegik (at 58°14′ N, 157°28′ W) to encompass the humpback whale BIA within Bristol Bay. The boundary then extends southwest and then southward tangentially along the BIA to the coastline at Moffet Point (55°27′ N, 162°35′ W). The nearshore boundary of this unit follows the 1-m isobath (relative to MLLW). This unit covers about 19,279 nmi^2 and includes waters off Bristol Bay and Lake and Peninsula Boroughs, and a small portion of Aleutians East Borough.

Unit 1 boundaries were drawn based largely on the location of a humpback whale feeding BIA (see Ferguson *et al.* 2015c), which was in turn identified largely based on results of systematic surveys reported in Clapham *et al.* (2012), Friday *et al.* (2012), and Friday *et al.* (2013). Unit 1 was also extended farther into Bristol Bay relative to the BIA to reflect sightings from 1999 aerial surveys of Bristol Bay (Friday *et al.* 2012) and sightings from the 2017 IWC Pacific Ocean Whale and Ecosystem Research Program (POWER) survey (Matsuoka *et al.* 2018) indicating that humpback whales may also be common in these waters. The southern, nearshore boundary was drawn to accommodate the nearshore areas (around the 50 m isobath) indicated by sightings reported in Friday *et al.* (2013).

Surveys conducted during 2004 and 2006–2010 within the eastern Bering Sea and that overlapped with a portion of Unit 1, indicated widespread and persistent concentrations of euphausiids in the survey area (Sigler *et al.* 2012). Humpback whales may also feed on various species of schooling fish, such as juvenile pollock, capelin, herring, and sand lance that occur in this region (Nemoto 1959, Nemoto 1970, Sigler *et al.* 2012, Ormseth 2015, Andrews *et al.* 2016).

Photo-identification data are not available to validate occurrences of particular DPSs within this unit; however, the available data suggest this area is a destination for whales from the Hawaii (HI, which are not listed), WNP, and MX DPSs (Baker *et al.* 2013). Five marked whales are also documented to have moved between the WNP breeding grounds and the broader eastern Bering Sea region (Omura and Ohsumi 1964).

Unit 2—Aleutian Island Area

This unit includes waters along the northern side of Unimak Island, waters around Umnak and Unalaska Islands, and waters within Umnak and Unimak Pass. At its eastern edge, the northern boundary of this area extends from 55°41′ N/162°41′ W, tangentially along the northern edge of a humpback whale BIA west out to 169°30′ W. The western boundary extends southward through Samalga Pass to the BIA boundary on the south side of the islands, which corresponds closely to a line drawn along the 2,000-m isobath. This southern boundary follows the edge of the BIA and extends eastward to 164°25′ W. The nearshore boundary of this unit is the 1-m isobath (relative to MLLW). This unit includes waters off the Aleutian East and Aleutian West Boroughs. Unit 2 covers about 28,829 nmi² of marine habitat.

This area encompasses a humpback whale feeding BIA, which was drawn to include high density sightings of humpback whales as reported in Zerbini *et al.* (2006), Clapham *et al.* (2012), Friday *et al.* (2012), and Friday *et al.* (2013; see Ferguson *et al.* 2015c). Telemetry and sightings data indicate that humpback whales use the coastal waters to the north and south of the islands as well as within the passes (Zerbini *et al.* 2006, Sigler *et al.* 2012, Kennedy *et al.* 2014). The western edge of Unit 2, however, does not include the small portion of the BIA that extends west of Samalga Pass. This pass coincides with an abrupt oceanographic break, west of which the frequency of humpback whale sightings have been very low or absent (Zerbini *et al.* 2006; P. Wade, pers. comm., May 23, 2018). The northwestern edge of Unit 2 also extends slightly north of the BIA, because available sightings data indicate humpback whales use waters north of Unimak Pass and along the middle and outer Bering Sea shelf and slope (Calambokidis *et al.* 2008, Friday *et al.* 2012, Friday *et al.* 2013, Matsuoka *et al.* 2018).

Surveys conducted during 2004 and 2006–2010 within the eastern Bering Sea indicated widespread and persistent concentrations of euphausiids in this area (Sigler *et al.* 2012), and general additive models using environmental datasets from summers 2008–2010 for the Eastern Bering Sea also predict relatively high levels of euphausiid biomass occurring within this area (Zerbini *et al.* 2016). In addition to targeting euphausiids, humpback whales may also consume multiple fish species occurring in this region such as herring, capelin, and juvenile walleye pollock (Nemoto 1959, Nemoto 1970, Andrews *et al.* 2016, Ormseth 2015, 2017).

Photo-identification data indicate this area is a destination for whales from the HI, WNP, and MX DPSs (Calambokidis *et al.* 2008).

Unit 3—Shumagin Islands Area

This area extends from 164°25′ W eastward to 158°39′ W and encompasses the feeding BIA around the Shumagin Islands. The area is bounded on its southern (offshore) edge by a line drawn along the 1,000-m isobath, which also runs along the southern boundary of the BIA. The nearshore boundary of this unit follows the 1-m isobath (relative to MLLW). This unit is mainly within the Aleutians East Borough but includes a small portion of the Lake and Peninsula Borough. Unit 3 covers about 13,162 nmi² of marine habitat.

This area was drawn from the boundary of Unit 2 eastward and encompasses an identified BIA (Ferguson *et al.* 2015a). This BIA is within the 1,000-m isobath, which was selected as the offshore boundary for this unit. As evidenced by acoustic trawl surveys, krill occur in high abundance in this area (Simonsen *et al.* 2016). Surveys conducted within this area also indicate that feeding aggregations of humpback whales consistently occur in coastal areas south of these islands and around the Shumagin Islands (Waite *et al.* 1999, Witteveen *et al.* 2004, Zerbini *et al.* 2006, Wynne and Witteveen 2013), where the whales have been observed targeting dense schools of krill (Wynne and Witteveen 2013). During the University of Alaska's Gulf Apex Predator-Prey (GAP) Study surveys within this area, conducted across 14 feeding seasons, 654 individual humpback whales were identified out of 1,437 total sightings. Analyses of these sightings indicate a fairly high degree of site fidelity to this area, with an average annual rate of return of 37 percent (SD = 11.8 percent; Witteveen and Wynne 2016a). Surveys conducted in 1985 indicated that humpback whales were widely distributed throughout this area but were typically observed near island complexes, the shelf break, and banks, such as Sanak Bank, Shumagin Bank, and an additional unnamed bank, with repeated observations of whales at both Shumagin Bank and the unnamed bank (Brueggeman *et al.* 1987).

Photo-identification data indicate this area is a destination for whales from the HI, MX, and WNP DPSs (Witteveen *et al.* 2004, Calambokidis *et al.* 2008).

Unit 4—Central Peninsula Area

The western edge of this area extends along 158°39′ out to a line corresponding to the 1,000-m isobath, which marks the offshore boundary. The eastern boundary is at 154°54′ W, just east of the Shumagin Islands. The nearshore boundary of this unit follows the 1-m isobath (relative to MLLW). This unit is within the Lake and Peninsula Borough. Unit 4 covers about 15,026 nmi² of marine habitat.

This area captures the waters between two identified feeding BIAs. Survey data indicate that humpback whales are consistently found in these waters (Brueggeman *et al.* 1989, Zerbini *et al.* 2006) and at least occasionally transit between the Shumagin Island area and Kodiak Island (5 of 171 whales; Witteveen *et al.* 2004). Results of systematic surveys conducted in the summers of 2001, 2002, and 2003, indicate that fin whales occurred in high densities in Unit 4, and in particular around the Semidi Islands, relative to the adjacent areas (Units 3 and 5); while humpback whales had the opposite distribution pattern (Zerbini *et al.* 2006). Brueggeman *et al.* (1989) report a fairly similar pattern based on their aerial and shipboard surveys conducted in 1985 and 1987, respectively. Although these two whale species are often sympatric and have overlapping diets, previous surveys and isotope analyses have provided evidence of trophic niche partitioning between fin and humpback whales, with the latter being more piscivorous (Wynne and Witteveen 2013, Gavrilchuk *et al.* 2014, Witteveen *et al.* 2015, Witteveen *et al.* 2016). Various fish prey species as well as high abundances of euphausiids occur in this area (Ormseth 2014, Simonsen *et al.* 2016).

Photo-identification data demonstrate that this area is a destination for whales from the HI and MX DPSs (Calambokidis *et al.* 2008). WNP DPSs whales have not been photo-identified in this area but their presence has been inferred based on documented occurrences in both of the adjacent units (*i.e.,* Units 3 and 5).

Unit 5—Kodiak Island Area

This area includes the waters around Kodiak Island and the Barren Islands. The western boundary runs southward along 154°54′ W to a line that follows the 1,000-m isobath, and then extends eastward to a boundary at 150°40′ W. The area also extends northward to the inner mouth of Cook Inlet where it is bounded by a line that extends from Cape Douglas across the inlet to Cape

Adam. The nearshore boundary of this unit follows the 1-m isobath (relative to MLLW). This unit is within the Kodiak Island Borough but includes a small portion of the Kenai Peninsula Borough. Unit 5 covers about 17,420 nmi² of marine habitat.

This area was drawn to capture the Kodiak Island BIA, as well as documented aggregations of humpback whales around the Barren Islands and in waters to the east of Kodiak (Rice and Wolman 1982, Zerbini *et al.* 2006, Ferguson *et al.* 2015a, Rone *et al.* 2017). Waters around Kodiak Islands have been surveyed extensively since 1999 as part of the GAP study. Over 17 years of GAP surveys in this area, 1,187 unique humpback whales were identified in the Kodiak region (out of 2,173 total sightings), with an average annual rate of return of 35 percent (SD = 15.2 percent, Witteveen and Wynn 2016), indicating a high degree of site fidelity to this area. Some inter-annual movement of whales has also been observed between this area and lower Cook Inlet and Prince William Sound (Waite *et al.* 1999, Witteveen *et al.* 2011). Waite *et al.* (1999) estimated that only 3 to 6 percent of the Kodiak whales also visit Prince William Sound, and the two areas have been viewed as supporting largely separate feeding groups (Waite *et al.* 1999, Witteveen *et al.* 2011); however, new, preliminary analyses of photo-identification data suggest a strong connection between the two areas (Moran and Straley 2019). Humpback whales were also historically common in this area and were taken in a commercial whale fishery that operated out of Port Hobron, off the southeastern coast of Kodiak Island (Witteveen *et al.* 2007). Relative proportions of prey items within the humpback diet have been shown to vary between years, but key prey targeted by the whales within this unit include krill, capelin, juvenile pollock, and sand lance (Witteveen *et al.* 2012, Wright *et al.* 2016), which occur in high abundances in this area (Simonsen *et al.* 2016, Ormseth 2014, 2016).

Photo-identification data demonstrate this area is a destination for whales from the HI, MX, and WNP DPSs (Calambokidis *et al.* 2008).

Unit 6—Cook Inlet

This area extends from the mouth of Cook Inlet where it is bounded by a line that extends from Cape Douglas across the inlet to Cape Adam. The northern boundary is the 60°20′ N latitude line, just south of Kalgin Island. The nearshore boundary of this unit is the 1-m isobath (relative to MLLW). This area borders the Kenai Peninsula Borough. This unit covers about 3,366 nmi² of marine habitat.

The southern boundary of this area approximates the ecological shift between the Kodiak Island Area (Unit 5) and Cook Inlet. Unit 6 does not include the upper portions of Cook Inlet, because humpback sightings are rare north of Kalgin Island despite extensive, routine aerial surveys of this area for Cook Inlet beluga whales (K. Sheldon, NMML, pers. comm., August 2, 2018). North of the Forelands, the inlet becomes shallow and highly turbid due to deposition of glacial silt. With its extreme tidal range and mudflats, the upper inlet does not provide suitable feeding habitat for humpback whales despite the presence of prey species (*e.g.,* eulachon). Humpback whales are routinely sighted in the lower portions of the inlet (NMML, unpubl. data, 1994–2018), but given the limited survey data, the density of whales and level of site fidelity of humpback whales to this feeding area has not been established. Inter-annual movements of humpback whales between lower Cook Inlet and the Kodiak Island area (Unit 5) have been observed (Witteveen *et al.* 2011), indicating that the whales feeding in this area do not comprise a completely distinct feeding aggregation. Based on stable isotope analyses of pooled skin samples collected from whales found during the feeding season (May–December) in lower Cook Inlet, Kenai Fjords, and Prince William Sound region, humpback whales in this area appear to primarily consume fish species (Witteveen *et al.* 2011).

Photo-identification data demonstrate that HI and MX DPS whales occur in this area (Calambokidis *et al.* 2008). WNP DPS whales have not been photo-identified in this specific area; however, their presence in this area has been inferred based on available data indicating that humpback whales from WNP wintering areas occur in this general region of Alaska (NMFS 2020a, Table C5).

Unit 7—Kenai Peninsula Area

This area extends eastward from 150°40′ W at the boundary with Unit 5 (Kodiak Island Area) to 148°31′ W, and extends offshore to a boundary marked by the 1,000-m isobath. The nearshore boundary of this unit is the 1-m isobath (relative to MLLW). This unit measures approximately 8,496 nmi² and is within the Kenai Peninsula Borough.

This area captures the region separating the Kodiak Island and Prince William Sound BIAs and includes feeding areas around the Kenai Fjords. Estimated densities of humpback whales within the shelf portion of the Navy Temporary Maritime Activities Area, which overlaps with a portion of Unit 7, has ranged from 0.0930 in 2013 (CV = 0.74) to 0.0050 in 2015 (CV = 0.32, Rone *et al.* 2017). Based on results reported in Witteveen *et al.* 2011, site fidelity of humpback whales to this area can be inferred to be fairly high. Inter-annual movement of whales has also been observed between this area and the coastal waters around Kodiak Island (Witteveen *et al.* 2011). As noted previously for Unit 6, stable isotope analyses of pooled skin samples collected from whales found during the feeding season (May–December) in Kenai Fjords, lower Cook Inlet, and Prince William Sound region, suggest that humpback whales in this area primarily consume fish species (Witteveen *et al.* 2011). High abundance of euphausiids and variable abundances of forage fishes, such as capelin and juvenile pollock, occur in this area (Simonsen *et al.* 2016, Ormseth 2014, 2016, McGown *et al.* 2019).

Photo-identification data demonstrate this area is a destination for whales from the HI and MX DPSs (Calambokidis *et al.* 2008). Limited satellite telemetry data also indicate this is a destination for MX DPS whales (Lagerquist *et al.* 2008). WNP DPS whales have not been photo-identified in this specific area, but presence of WNP DPS whales has been inferred based on available data indicating that humpback whales from WNP wintering areas occur within the Gulf of Alaska (NMFS 2020a, Table C5).

Unit 8—Prince William Sound Area

This area extends from 148°31′ W eastward to 145°27′ W, and extends offshore to a boundary drawn along the 1,000-m isobath. The nearshore boundary of this unit is the 1-m isobath (relative to MLLW). This unit is within the Valdez-Cordova Borough and covers about 8,166 nmi² of marine habitat.

This area was drawn to encompass the Prince William Sound feeding BIA (Ferguson *et al.* 2015a), which was identified based on studies conducted mainly in the western and southern portions of the sound (*e.g.,* von Ziegesar *et al.* 2001, Rice *et al.* 2011). This unit was drawn to include waters beyond the boundaries of the BIA based on the additional sightings reported in Witteveen *et al.* (2011, and as detected during SPLASH surveys) and observations reported by von Ziegesar (2013) indicating that humpback whales move between the sound and the fiords along the coast. Minor aggregations of humpback whales (8–13 whales) were also observed near Middleton Island during systematic surveys conducted in summer 1980 in the Gulf of Alaska (Rice

and Wolman 1982). Presence of humpback whales in the sound is strongly associated with the seasonal formation of Pacific herring aggregations (Rice *et al.* 2011, Straley *et al.* 2018, Moran and Straley 2018). Results of surveys conducted during fall/winter of 2007–2009 indicated that a small percentage of photo-identified whales (under 2 percent, n=4) overwintered in the sound (Rice *et al.* 2011). As noted for Unit 5 (Kodiak Island Area), the limited inter-annual movements of whales have been interpreted to mean the two areas support largely separate feeding groups (Waite *et al.* 1999, Witteveen *et al.* 2011); however, new, preliminary analysis of photo-identification data suggests a strong connection between the two areas (Moran and Straley 2019).

Photo-identification data confirm this area is a destination for whales from the HI and MX DPSs (Baker *et al.* 1986, Calambokidis *et al.* 2008). WNP DPS whales have not been photo-identified in this specific area; however, presence has been inferred based on available data indicating that humpback whales from WNP wintering areas occur in the Gulf of Alaska (NMFS 2020a, Table C5).

Unit 9—Northeastern Gulf of Alaska

This area extends from 145°27′ W to 139°24′ W and to an offshore drawn along the 1,000-m isobath. The nearshore boundary of this unit is the 1-m isobath (relative to MLLW). This unit mainly borders Yakutat Borough, but also borders a small portion of Valdez-Cordova. Unit 9 covers about 9,065 nmi^2 of marine habitat.

This area was drawn to capture a section of the Gulf of Alaska between two feeding BIAs (in Units 8 and 10). Surveys within this unit have been relatively limited. Surveys conducted in June–August of 1980 by Rice and Wolman (1982) indicated that humpback whales were sparsely distributed in the Gulf of Alaska (populations were still depleted), but they noted minor aggregations of humpback whales in Yakutat Bay (13 whales). More recently, 21 groups (33 individuals) of humpbacks were sighted in this area during an IWC–POWER survey in July/August of 2012 (Matsuoka *et al.* 2013). Sightings of humpback whales were also recorded in this area by the NMFS Southwest Fisheries Science Center (SWFSC) as part of the SPLASH surveys in 2004 and 2005 (Calambokidis *et al.* 2008; see also Witteveen *et al.* 2011). Based on limited sampling, results of stable isotope analyses suggest that whales in this area have a mixed diet of fish and zooplankton (Witteveen *et al.* 2011). Surveys indicate high abundances of euphausiids and various forage fish species, such as capelin and herring, occur in this area (Simonsen *et al.* 2016, Ormseth 2014).

Photo-identification data confirm this area is a destination for whales from the non-listed HI DPS (Baker *et al.* 1986, Calambokidis *et al.* 2008; and SPLASH data courtesy of C. Gabriele, NPS), and limited satellite telemetry data indicate the presence of MX DPS whales (Lagerquist *et al.* 2008). Photo-identified MX DPS whales have also been sighted in both of the adjacent areas (Units 8 and 10). There are no reported sightings of photo-identified whales of the WNP DPS in this specific area; however, presence of these whales has been inferred based on available data suggesting that humpback whales from WNP wintering areas occur in this general region (NMFS 2020a, Table C8). Given the increased distance of this unit from other confirmed sighting of whales from the WNP DPS, there is uncertainty regarding whether WNP DPS whales occur in this unit.

Unit 10—Southeastern Alaska

This area extends from 139°24′ W, southeastward to the U.S. border with Canada and encompasses a humpback whale BIA. The area also extends offshore to a boundary drawn along the 2,000-m isobath, which corresponds to the offshore boundary of the BIA. The nearshore boundary of this unit also corresponds to the BIA boundary. This unit borders unorganized boroughs, but includes water off of Skagway-Hoonah-Angoon, Haines, Juneau, Sitka, Petersburg, Wrangell, and Ketchikan Gateway. Unit 10 covers approximately 22,152 nmi^2 of marine habitat.

This area was drawn to encompass well established feeding grounds in southeast Alaska and an identified feeding BIA (Andrews 1909, Baker *et al.* 1985, Straley 1990, Dahlheim *et al.* 2009, Ferguson *et al.* 2015a). Humpback whales occur year-round in this unit, with highest densities occurring in summer and fall (Baker *et al.* 1985, 1986). Periods of occupancy of over 100 days have been reported for a significant portion of the whales using this area (Baker *et al.* 1985). Based on sighting data for summer months during 1985–2014 in Glacier Bay and Icy Strait, over 60 percent of the adult whales remained in this area to feed for more than 20 days, and average residency time for whales seen on more than 1 day within a season was 67 days (SD = 38.3; Gabriele *et al.* 2017). Photo-identification data collected in Southeast Alaska from 1979 to 1983 indicate a high degree of site fidelity to this area, with 47.2 percent of whales being sighted in more than one year (154 whales out of 326 unique individuals; Baker *et al.* 1986). Sightings histories for three female humpback whales in particular indicate these whales returned in each of 12 or 13 years during 1977–1992 (Straley *et al.* 1994). Evaluation of sighting histories in Glacier Bay and portions of Icy Strait from 1985 to 2013 also indicate a high degree of site fidelity with 63 percent (244 of 386 total whales identified) of non-calves returning to the survey area in more than 1-year, 17 percent (n=66) returning every year, and an additional 10 percent (n=39) returning in all but 1 year (Gabriele *et al.* 2017). Humpback whales are known to feed on krill, herring, capelin, sand lance, myctophids, and juvenile pollock within Southeast Alaska, but dominant prey within the diet vary among the specific locations and seasons (Bryant *et al.* 1981, Straley *et al.* 2018).

Photo-identification data confirm this area is a destination for whales from the HI and MX DPSs (Baker *et al.* 1985, 1986; Calambokidis *et al.* 2008). Although sightings of WNP DPS whales are reported for general areas to either side of this unit (Kodiak, Alaska and Vancouver Island, British Columbia, *e.g.,* Calambokidis *et al.* 2001), portions of Unit 10 have been surveyed extensively, and those survey data do not indicate that the WNP DPS occurs in Unit 10.

Unit 11—Coastal Washington

This area extends southward from the U.S. EEZ to 46°50′ N, just north of Willapa Bay, WA. The unit extends offshore to a boundary corresponding to the 1,200-m isobath, which also aligns with the seaward extent of a BIA. The unit includes waters within the U.S. portion of the Strait of Juan de Fuca to an eastern boundary line at Angeles Point (123°33′ W). The 50-m isobath forms the shoreward boundary. The unit includes waters off Clallam and Jefferson Counties, and a portion of Grays Harbor County. Unit 11 covers about 3,441 nmi^2 of marine habitat.

This area was drawn to encompass the Northern Washington BIA (Calambokidis *et al.* 2015), located at the northern edge of this unit, and cells containing the highest 90 percent of the study area abundance predicted by the Becker *et al.* (2016) habitat model. In addition to the habitat model results, clusters of humpback whale sightings just off Grays Harbor area (see Calambokidis *et al.* 2015), movement data collected from five humpback whales with LIMPET satellite tags (Schorr *et al.* 2013), and telemetry-

derived ARS data for whales tagged off of Oregon in 2017 (n=4) and Washington (n=9, Palacios *et al.* 2020) support inclusion of waters beyond the BIA in this unit. The unit also includes waters within the Strait of Juan de Fuca where whales have been observed foraging in recent years (and which falls outside of the area covered by surveys used to generate the habitat model predictions) (see also Palacios *et al.* 2020). Although humpback whales have been increasingly observed within the Salish Sea (*i.e.,* the waters of the Strait of Georgia, the Strait of Juan de Fuca, Puget Sound, and around the San Juan Islands, Calambokidis *et al.* 2017), Unit 11 does not extend beyond the strait farther into the Salish Sea. High reporting rates from areas within the Salish Sea have likely resulted in a biased understanding of humpback whale abundance in these waters; however, hundreds of whales appear to be using the strait (J. Calambokidis, CRC, pers. comm., May 23, 2018; see also Palacios et al. 2020). The offshore boundary for Unit 11 was selected to follow the contour of cells containing the highest 90 percent of the study area abundance predicted by the Becker *et al.* (2016) habitat model, which generally coincided with the 1,200-m isobath. Multiple, persistent, dense aggregations of krill occur near the Juan de Fuca canyon in this area, likely due to the canyon feature (Santora *et al.* 2018). Various forage-fish species also occur within this unit, with Pacific herring being one of the most prevalent forage fish off Washington and Northern Oregon (Brodeur *et al.* 2005, Zwolinski *et al.* 2012).

Photo-identification data confirm this area is a destination for whales from the HI, MX, and CAM DPSs (Calambokidis *et al.* 2008).

Unit 12—Columbia River Area

This area extends southward from 46°50′ N to 45°10′ N and extends out to a seaward boundary corresponding to the 1,200-m isobath. The 50-m isobath forms the shoreward boundary. This area includes waters off of Pacific County, WA and Clatsop County, OR. This unit covers about 3,636 nmi^2 of marine habitat.

This unit was drawn to capture the Columbia River plume system, which supports foraging by many predators, including concentrations of humpback whales. Hotspots with persistent, heightened abundance of krill (Santora *et al.* 2018), and seasonally and annually variable assemblages of forage fishes, including anchovy, sardine, and herring, occur in this unit (Demer *et al.* 2012, Zwolinski *et al.* 2012). The area extends out to the 1,200-m isobath to capture the outer edge of cells containing the highest 90 percent of the study area abundance predicted by the Becker *et al.* (2016) habitat model. The area also encompasses areas over which humpback whales have been observed to feed based on ARS data from satellite tagged whales (Mate *et al.* 2018, Palacios *et al.* 2020). The southern boundary at 45°10′ N was drawn to encompass the available ARS areas and to reflect where the habitat model predictions begin to shift farther offshore.

Photo-identification data are not available to validate occurrences of particular DPSs within this precise unit; however, the available photo-identification data do support a conclusion that this area is a destination for whales from the MX and CAM DPSs (Green *et al.* 1992, Calambokidis *et al.* 2000, Calambokidis *et al.* 2017). Some available genetic data also suggest that HI DPS whales may occur in this unit (Mate *et al.* 2018).

Unit 13—Coastal Oregon

This area extends southward from 45°10′ latitude to 42°10′, and extends offshore to a boundary at the 1,200-m isobath. The 50-m isobath forms the shoreward boundary. This area includes the BIA at Stonewall and Heceta Bay, and includes waters off of Tillamook, Lincoln, Lane, Douglas, Coos, and Curry Counties. Unit 13 covers about 5,750 nmi^2 of marine habitat.

This unit includes the Stonewall and Heceta Bank BIA, which supports humpback whale feeding aggregations from May to November (Calambokidis *et al.* 2015). The northern and offshore boundaries of this unit correspond to cells containing the highest 90 percent of the study area abundance predicted by the Becker *et al.* (2016) habitat model. The southern boundary of this unit was drawn just north of another BIA. Based on surveys conducted in spring and summer of 2000 as part of the US Global Ocean Ecosystem Dynamics (GLOBEC) Northeast Pacific program, concentrations of humpback whales on Heceta Bank were shown to correspond to high densities of fish (Pacific sardine and juvenile salmon) and large, high density patches of krill (Tynan *et al.* 2005, Ressler *et al.* 2005). Within this unit, large, persistent aggregations of krill have been observed inshore of Heceta Bank, off Cape Blanco, and in association with submarine canyons (Ressler *et al.* 2005, Santora *et al.* 2018).

Photo-identification data confirm this area is a destination for whales from the MX DPS (Green *et al.* 1992, Calambokidis *et al.* 2008). Presence of CAM DPS whales in this area is indicated by genetic data as well as modelling of sightings data (Wade 2017, Mate *et al.* 2018).

Unit 14—Southern Oregon/Northern California

This area is bounded in the north at 42°10′ and extends south to the Mendocino escarpment at 40°20′. The area extends offshore to a boundary drawn along the 2,000-m isobath. The 50-m isobath forms the shoreward boundary. The area includes the marine waters off Del Norte County, CA, and most of Humboldt County, CA, and borders a small portion of Curry County, OR. Unit 14 covers about 3,412 nmi^2 of marine habitat.

This unit includes the Point St. George BIA, which typically supports whale feeding aggregations during July–November (Calambokidis *et al.* 2015). The northern boundary of this unit corresponds to the boundary of this BIA. The southern boundary corresponds with the Cape Mendocino/the Mendocino escarpment, where the predicted abundance from the habitat model shows a somewhat abrupt shift offshore (Becker *et al.* 2016). The seaward boundary for this unit extends out to the 2,000-m isobath to capture the habitat model predictions. ARS areas derived from satellite tracking data (n=26 whales, Mate *et al.* 2018) indicate that feeding behavior occurs throughout this unit, and although some ARS data indicate whales feed seaward of the 2,000-m isobath, the majority of the ARS behavior is captured within the boundaries of this unit. Multiple, recurring, high density aggregations (hotspots) of krill occur off of Cape Mendocino and elsewhere in this unit, in association with submarine canyons (Santora *et al.* 2018). Within this unit and southward along the coast to Southern California (*i.e.,* Unit 19), Fleming *et al.* (2016) collected 259 skin samples from humpback whales during 1993–2012 and used stable carbon and nitrogen isotope analyses to evaluate the relative contribution of euphausiids versus fish to the diet. Shifts over the 20-year study period in isotope signatures in whale skin samples observed by Fleming *et al.* (2016) indicate trophic-level shifts in the humpback whale diet, and these shifts corresponded to shifts in relative prey abundance (krill versus anchovy and sardine) and changing oceanographic conditions within the CCE. These results suggest that the dominant prey in humpback whale diet switched from krill to fish, and back to krill during the 20-year period, depending on the relative abundance of each prey.

Temporal shifts in diet composition (*e.g.,* from euphausiids and sardine in the 1920s to mainly anchovy in the 1950s and 1960s) are also reflected in historical whaling data and stomach content data from harvested whales (Rice 1963, Clapham *et al.* 1997).

Photo-identification data confirm this area is a destination for whales from the MX and CAM DPSs (Calambokidis *et al.* 2008).

Unit 15–California North Coast Area

This unit is bounded along its northern edge by the Mendocino escarpment at approximately 40°20′ N and extends southward to 38°40′ N, which corresponds to the approximate southern boundary of an identified BIA. The area extends offshore to a boundary drawn at the 3,000-m isobath. The 50-m isobath forms the shoreward boundary. This area includes marine waters off the coasts of Humboldt and Mendocino counties, CA, and covers about 4,898 nmi² of marine habitat.

The northern boundary of this unit corresponds to the Mendocino escarpment and a shift farther offshore in the habitat model predictions (Becker *et al.* 2016). The offshore boundary of this unit extends out to the 3,000-m isobath to more closely correspond to cells containing the highest 90 percent of the study area abundance predicted by the Becker *et al.* (2016) habitat model. This boundary is also supported by ARS data indicating that whales are feeding farther from shore in this area (Mate *et al.* 2018). Encompassed within this unit is a BIA that extends from Fort Bragg to Point Arena and that typically supports feeding aggregations of humpback whales from July to November (Calambokidis *et al.* 2015). The southern boundary of the unit corresponds to the northern boundary of another BIA. High-density, persistent aggregations of krill occur off Cape Mendocino and in association with canyon features within this unit (Santora *et al.* 2018). Krill hotspots, measuring about 216–320 km², have also been documented offshore of Point Arena near the 2,000-m isobath (Santora *et al.* 2011, Dorman *et al.* 2015).

Photo-identification data are not available to validate occurrences of particular DPSs within this unit; however, the available data strongly support the conclusion that this area is a destination for whales from the MX and CAM DPSs (Calambokidis *et al.* 2000, Calambokidis *et al.* 2017). For example, photo-identification data indicate that the percent of humpback whale encounters off northern California that correspond to the non-listed ''Hawaii DPS'' is extremely low, compared to about 10 and 25 percent, respectively, for the CAM and MX DPSs (Calambokidis *et al.* 2017).

Unit 16—San Francisco and Monterey Bay Area

This area extends from 38°40′ N southward to 36°00′ N to encompass a BIA. The seaward boundary is drawn along the 3,700-m isobath. The inshore boundary is mainly defined by the 15-m isobath, but also extends up to the Golden Gate Bridge within San Francisco Bay. This area includes waters off of the southern edge of Mendocino County, and Sonoma, Marin, San Francisco, San Mateo, Santa Cruz, and Monterey counties. Unit 16 covers approximately 12,349 nmi² of marine habitat.

This unit encompasses the Gulf of the Farallones-Monterey Bay BIA (Calambokidis *et al.* 2015) as well as cells containing the highest 90 percent of the study area abundance predicted by the Becker *et al.* (2016) habitat model. In this unit, the habitat model predictions extend farther offshore relative to the more northern west coast units, and extend even farther offshore based on modeled whale distributions in colder months (January–April, see Becker *et al.* 2017). Therefore, the offshore boundary was placed at the 3,700-m isobath to capture areas of higher predicted abundances in both summer and winter. (The area covered by the Becker *et al.* (2017) winter model starts at 38°00′, and we are not aware of any other models based on winter distributions for areas north of this unit.) This area also extends into the mouth of the San Francisco Bay to capture a recently recognized important foraging area for humpback whales (Calambokidis *et al.* 2017) as well as ARS data indicating that whales are feeding in and around the mouth of the bay (Mate *et al.* 2018). The highest densities of whales are seen at the entrance to San Francisco Bay, with a few extending into the Bay (J. Calambokidis pers. comm., May 23, 2018). Based on data from hydroacoustic surveys spanning multiple years between 2000–2009, persistent and recurring, high-density aggregations of krill ranging in size from about 578 km² to 950 km² have been shown to occur in multiple areas within this unit, including Bodega Head, Cordell Bank, Gulf of the Farallones, Pescadora, and Monterey Bay (Santora *et al.* 2011, Dorman *et al.* 2015, Santora *et al.* 2018).

Photo-identification data confirm this area is a destination for whales from the MX and CAM DPSs (Baker *et al.* 1986, Calambokidis *et al.* 2008).

Unit 17—Central California Coast Area

This area extends from 36°00′ N to a southern boundary at 34°30′ N, just south of an identified BIA. The nearshore boundary is defined by the 30-m isobath, and the seaward boundary is drawn along the 3,700-m isobath. This unit includes waters off of southern Monterey county, and San Luis Obispo and Santa Barbara counties. Unit 17 covers about 6,697 nmi² of marine habitat.

This unit encompasses a BIA that extends from Morro Bay to Point Sal and typically supports high density feeding aggregations of humpback whales from April to November (Calambokidis *et al.* 2015). In this area, as with Unit 16, the predicted abundance extends farther offshore in the warmer months (July–December) and even more so in cooler months (January–April) relative to the northern units (Becker *et al.* 2016 and 2017). Therefore, the offshore boundary was placed at the 3,700-m isobath to capture areas of higher predicted abundance in both summer and winter. The southern boundary for this area was drawn just south of the BIA. Based on acoustic survey data collected during 2004–2009, large krill hotspots, ranging from 700 km² to 2,100 km², occur off Big Sur, San Luis Obispo, and Point Sal (Santora *et al.* 2011). Hotspots with persistent, heightened abundance of krill were also reported in this unit in association with bathymetric submarine canyons (Santora *et al.* 2018).

Photo-identification data confirm this area is a destination for whales from the MX and CAM DPSs (Calambokidis *et al.* 2008).

Unit 18—Channel Islands Area

This area extends from a northern boundary at 34°30′ N to a boundary line that extends from Oxnard, CA seaward to the 3,700-m isobath, along which the offshore boundary is drawn. The 50-m isobath forms the shoreward boundary. This unit includes waters off of Santa Barbara and Ventura counties. This unit covers about 9,799 nmi² of marine habitat.

This unit encompasses the Santa Barbara Channel-San Miguel BIA, which supports high density feeding aggregations of humpback whales during March through September (Calambokidis *et al.* 2015). The seaward boundary at the 3,700-m isobath encompasses cells containing the highest 90 percent of the study area abundance predicted by both the summer and winter habitat models (Becker *et al.* 2016 and 2017). The southern boundary of this unit was

selected to correspond to where the habitat model predictions for both models show a clear decline in predicted humpback whale densities. The area to the south (*i.e.,* Unit 19) is predicted to have much lower summer densities of whales. Based on acoustic survey data collected during 2004–2009, a krill hotspot of about 780 km² has been documented off Point Conception (Santora *et al.* 2011). Some additional krill hotspots have also been observed in this unit in association with bathymetric submarine canyons (Santora *et al.* 2018).

Photo-identification data confirm this area is a destination for whales from the MX and CAM DPSs (Calambokidis *et al.* 2008).

Unit 19—California South Coast Area

The northern boundary for this unit extends southwest from Oxnard, CA through the Santa Cruz Basin and out to a seaward boundary along the 3,700-m isobath. The unit is also bounded in the south by the U.S. EEZ. The 50-m isobath forms the shoreward boundary. This unit includes waters off of Los Angeles, Orange, and San Diego counties, and covers about 12,966 nmi² of marine habitat.

This area does not contain a BIA but was drawn to capture the southern extent of the cells containing the highest 90 percent of humpback whale abundance predicted by the Becker *et al.* (2017) habitat model. This area has the lowest predicted humpback whale densities in the summer/fall months relative to all other units, but is predicted to support higher densities of whales in the winter/spring months relative to the summer/fall predictions for this area (Becker *et al.* 2016, Becker *et al.* 2017). The higher densities of humpback whales in winter/spring may stem from the fact that some of the whales sighted in this area are likely transiting through the area, rather than occupying the area as a feeding destination. Within this unit, krill hotspots ranging in size from about 210 km²–430 km² have been observed off San Nicolas and Santa Barbara Islands (Santora *et al.* 2011), and additional hotspots have been observed in association with submarine canyons (Santora *et al.* 2018).

Photo-identification data are not available to validate occurrences of particular DPSs within this unit; however, the available data support the conclusion that whales from the MX and CAM DPSs occur in this area (Calambokidis *et al.* 2000, Rasmussen *et al.* 2012).

Application of ESA Section 4(a)(3)(B)(i) (Military Lands)

Section 4(a)(3)(B)(i) of the ESA precludes designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DOD) or designated for its use, that are subject to an Integrated Natural Resources Management Plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. *See* 16 U.S.C. 1533(a)(3)(B)(i); 50 CFR 424.12(h). Where these standards are met, the relevant area is ineligible for consideration as potential critical habitat. The regulations implementing the ESA set forth a number of factors to guide consideration of whether this standard is met, including the degree to which the plan will protect the habitat of the species (50 CFR 424.12(h)(4)). This process is separate and distinct from the analysis governed by section 4(b)(2) of the ESA, which directs us to consider the economic impact, the impact on national security, and any other relevant impact of designation and affords the Secretary discretion to exclude particular areas if the benefits of exclusion outweigh the benefits of inclusion of such areas. *See* 16 U.S.C. 1533(b)(2).

After we had identified specific areas that would potentially meet the definition of critical habitat for humpback whales, but prior to publishing the proposed rule, we contacted DOD representatives and requested information regarding relevant INRMPs. In response, the U.S. Navy (Navy) provided descriptions and locations of four areas adjacent to the humpback whale specific areas and that are managed under Sikes Act-compliant INRMPs: (1) Pacific Beach Annex, WA; (2) Naval Base Ventura County, Point Mugu, CA; (3) Naval Outlying Field, San Nicolas Island, CA; and (4) Naval Auxiliary Landing Field, San Clemente Island, CA. The Navy also provided information regarding how in their view, each of their approved INRMPs provides a conservation benefit to humpback whales and their habitat. An additional fifth INRMP, associated with the Navy's Southeast Alaska Acoustic Measurement Facility, AK (SEAFAC), was also noted as being under development, and that a draft was expected to be completed in December 2019. After reviewing the information and maps provided, we found that the Pacific Beach Annex INRMP addresses an entirely upland property and does not overlap with the areas under consideration for designation as critical habitat. Therefore, that INRMP was not considered further.

As described in the proposed rule (84 FR 54354, October 9, 2019), following completion of analyses under section 4(b)(2) of the ESA and resulting decisions regarding exclusions, only two INRMPs—the Naval Outlying Field San Nicolas Island (SNI) and Naval Base Ventura County (NBVC), Point Mugu—spatially overlapped with areas under consideration for designation as critical habitat and thus warranted further review during development of the proposed designations.

The NBVC Point Mugu INRMP addresses submerged lands and resources 3 nmi out from Point Mugu (relative to MLLW) and a zone that extends 0.25 nmi offshore around San Miguel and Prince Islands. This INRMP thus includes areas that overlapped with Unit 18 (*i.e.,* the area around San Miguel and Prince Islands). Relevant areas within the footprint of the SNI INRMP are the waters surrounding SNI and Begg Rock within the 300-foot (91-m) isobath or 1 nmi from shore, whichever is greater. This area around Begg Rock extended into Unit 18. Management efforts described within both of these INRMPs, which are discussed in detail in the Section 4(b)(2) Report (NMFS 2020b), include actions such as water quality monitoring within nearshore waters and storm-water management; surveys of intertidal, subtidal, and deep water habitats; and area closures to minimize impacts of noise or other disturbances on marine mammals. Based on our consideration of the activities listed in the INRMPs and their relevance to humpback whales and their habitat, the certainty that the relevant management actions would be implemented, the frequency of use of the areas by humpback whales, and the extent of humpback prey occurrences within the areas, we concluded that the areas covered by the applicable INRMPs provide a conservation benefit to humpback whales. Thus, we determined during the development of the proposed designations that the areas covered by the INRMPs are not eligible for designation as critical habitat and removed them from Unit 18. Consequently, the final designations do not include these areas.

Analysis of Impacts Under Section 4(b)(2) of the ESA

We considered the impacts of designating particular areas under section 4(b)(2) of the ESA, and weighed the benefits of excluding each area against the benefits of including the

area. While section 3(5) of the ESA defines critical habitat as ''specific areas,'' section 4(b)(2) requires the agency to consider the impacts of designating any ''particular area.'' Depending on the biology of the species, the characteristics of its habitat, and the nature of the impacts of designation, ''particular'' areas evaluated for potential exclusion may be—but need not necessarily be—delineated so that they are the same as the already identified ''specific'' areas of potential critical habitat. For this designation, we analyzed two types of particular areas. When we considered economic impacts, we used the same biologically-based ''specific areas'' we had identified under section 3(5)(A) (*i.e.,* Units 1–19, Figure 1). This delineation allowed us to most effectively compare the biologically-based conservation benefits of designation against economic benefits of exclusion, which we undertook for this designation, and led us to exclude some units. For our consideration of impacts on national security, however, we instead delineated particular areas based on DOD control or designated use of the area or as otherwise specified by DOD in an exclusion request. As discussed below, the consideration of national security impacts led to the exclusion of a portion of a larger, specific area (Unit 11). Similarly, for our consideration of other relevant impacts, such as the impacts designation of a particular area would have on Tribes, we considered particular areas that corresponded to tribal lands, associated treaty rights, and/or relevant resources.

Below, we summarize the economic, national security, and other relevant impacts of designating the areas identified as meeting the definition of critical habitat for the three DPSs of humpback whales. Additional detail is provided in the final Economic Analysis (IEc 2020) and Section 4(b)(2) Report (NMFS 2020b).

National Security Impacts

To gather information on potential national security impacts of our proposed designation, we contacted representatives from DOD and the Department of Homeland Security (DHS) by letter dated October 9, 2018. We asked for information regarding impacts of a potential critical habitat designation for humpback whales on military operations and national security. Under the 4(b)(2) Policy, a requesting agency must provide a reasonably specific justification for the assertion that there is an incremental impact on national security that would result from the designation of that specific area as critical habitat (81 FR 7226, 7231, February 11, 2016).

Requests for exclusion due to national security impacts were initially received from the both the Navy and the U.S. Air force (USAF); however, following subsequent discussions with USAF representatives, the USAF withdrew their requests for exclusions. On December 5, 2018, the Navy requested exclusion of the following three range areas from the humpback whale critical habitat designation:

(1) Southeast Alaska Acoustic Measurement Facility (SEAFAC), which lies within critical habitat Unit 10;

(2) Quinault Range Site (QRS; a component of the Naval Undersea Warfare Center Division Keyport Range Complex), which overlaps with a portion of Unit 11; and

(3) Southern California Range Complex (SOCAL) portion of the Hawaii-Southern California Training and Testing Study Area, which overlaps with Unit 19.

The Navy also provided a written assessment of the potential national security impacts and detailed descriptions of training and testing operations occurring at each of these ranges.

The area that pertains to the first requested exclusion, SEAFAC, is small area, covering 48 nmi^2 (164 km^2) in the Western Behm Canal near the city of Ketchikan, Alaska, and serves as the Navy's primary acoustic engineering measurement facility in the Pacific. Additional details regarding this facility, which was proposed for exclusion from the critical habitat designation for the MX DPS based on national security impacts, are provided in the proposed rule (54 FR 54354, October 9, 2019). Because the larger specific area (*i.e.,* Unit 10, Southeast Alaska) within which SEAFAC is located is excluded from the final critical habitat designation for the MX DPS (see Exclusions Based on Economic Impacts), further discussion of SEAFAC is not included here.

The area that pertains to the second requested exclusion, QRS, is a defined space off the coast of Washington that encompasses air, surface (~5,228 nmi^2 (6,924 km^2)) and subsurface space (with variable depths up to 1.8 km), as well as a surf zone area off the coast of Pacific Beach, Washington. The QRS overlaps with approximately 44 percent of Unit 11 and also overlaps with the southern portion of the Olympic Coast National Marine Sanctuary (OCNMS). The Navy does not own or directly control the sea space of QRS, which is largely defined by the boundaries of the special use airspace, known as W–237A, above it. The Navy has internal control of subareas for scheduling purposes only. The Navy issues notices to mariners (NOTMARs) when the Navy engages in activities that may be hazardous to vessels engaged in innocent passage, and/or recreational and commercial activities. Compliance with NOTMARS is voluntary, but helps to protect public safety and prevent damage to test equipment. Activities planned in the QRS to the year 2020 and beyond include activities such as at-sea sonar testing, anti-submarine warfare testing, acoustic and oceanographic research, countermeasure testing, torpedo testing, undersea warfare testing, etc. The Navy stated that use of explosives within the QRS is likely to have adverse effects on humpback prey species, although in their view these would not have effects at the population level. The Navy concluded that designation of humpback whale critical habitat would impact the ability of the Navy to test and field new systems and platforms and thus impact national security if ESA section 7 consultations resulted in additional mitigation requirements or restrictions on testing activities in the QRS.

Subsequent to their initial request for exclusion of QRS, the Navy conducted further analysis and, in September 2019, submitted additional information relative to this particular national security exclusion. Specifically, the Navy requested that an additional 5.4-nmi (10-km) buffer around QRS be excluded from the designation in order to avoid impacts to ongoing and future testing activities that would result in the event that Naval Sea Systems Command must halt, reduce in scope, or geographically or seasonally constrain testing activities to prevent adverse effects or adverse modification of critical habitat. The Navy determined that sound and energy levels that may cause injuries to humpback whale prey species within critical habitat from the largest explosives that could be used on the range could extend beyond the QRS boundaries, and that excluding a buffer of 10-km around QRS from the critical habitat designation would avoid additional mitigation requirements. The Navy indicated that they determined this specific buffer distance after taking into account the site specific oceanographic conditions and the best available science establishing fish injury thresholds (which the Navy cited as Popper *et al.* 2014).

The area that pertains to the third requested exclusion, SOCAL, is located between Dana Point and San Diego, California, and extends more than 600

nmi (1,111 km) southwest into the Pacific Ocean. Most activities occur within the eastern portion of SOCAL, closer to shore. The spatial extent of overlap between SOCAL and Unit 19 is 10,731.5 nmi² (36,808 km²), which is approximately 54 percent of the Navy's core training area within SOCAL and approximately 83 percent of Unit 19, which measures 12,966 nmi² (44,472.1 km²). A wide variety of training and testing activities occur within the SOCAL range complex on a routine and sometimes fairly frequent basis. A few types of Navy testing activities in this area are those related to anti-submarine warfare, torpedo, mine countermeasure, gun, missile and rocket, and propulsion testing. The activities that occur in SOCAL have the potential to impact the water surface or water column, with the degree of impact depending on the nature of the particular activity. The Navy referred to the detailed discussions on particular impacts provided in the Navy's 2018 Final Environmental Impact Statement for Hawaii-Southern California Training and Testing. Ultimately, the Navy concluded that designation of Unit 19 as critical habitat could lead to requirements for additional mitigations (avoidance, limitations, etc.) that could hinder Navy testing and training activities, and thereby impact military readiness and national security. Therefore, Navy requested that we exclude Unit 19 from any critical habitat designation.

Economic Impacts

The primary impact of a critical habitat designation stems from the ESA section 7(a)(2) requirement that Federal agencies ensure their actions are not likely to result in the destruction or adverse modification of critical habitat. Determining the extent of this impact in practical terms is complicated by the fact that section 7(a)(2) contains the associated but distinct requirement that Federal agencies must also ensure their actions are not likely to jeopardize the species' continued existence. The incremental economic impacts of a critical habitat designation stem from the additional effort to engage in consultation regarding potential adverse effects to the critical habitat as part of section 7 consultations (often referred to as administrative costs), and any conservation measures that may be necessary to avoid adverse modification and that would not otherwise be implemented (often referred to as project modification costs). Thus, the incremental impacts attributable to critical habitat stem from conservation efforts that would not already be required due to the need to avoid jeopardy to humpback whales or due to other existing protections (*e.g.,* for other listed species, other Federal, state, or local regulations). Additional economic impacts of designation would include any state and local protections that are likely to be triggered as a result of designation. However, as discussed in chapter 3 of the FEA, we did not identify state or local protections that are likely to be triggered by a proposed humpback whale critical habitat designation (IEc 2020).

The analysis methods for estimating the incremental, economic impacts stemming from designation of the identified specific critical habitat areas for the WNP, MX, and CAM DPSs of humpback whales are described in the proposed rule and in detail in the FEA prepared by Industrial Economics, Inc. (IEc 2020). The economic analysis was also revised based on new information and public comments received on the Draft Economic Analysis (IEc 2019a). As detailed in the FEA, modifications made to the analysis resulted in an increase in the anticipated total present value and annualized costs of the rule, especially in Alaska, and in Unit 10 particularly. Increases in the anticipated costs of the rule reflect some changes in anticipated levels of certain activities (*e.g.,* aquaculture) as well as a shift in the timeframe of the analysis and update of the results from 2018 dollars to 2020 dollars to adjust for inflation.

The following categories of activities with a Federal nexus were identified as having the potential to affect the essential prey feature and as being expected to occur within one or more of the specific critical habitat areas under consideration: (1) Commercial fishing, (2) oil and gas activities (including seismic surveys, and oil spill planning and response), (3) alternative energy development, (4) in-water construction (including dredging and offshore mining), (5) vessel traffic (specifically, activities related to establishment of the shipping lanes by the USCG, and other USCG activities, including maintenance, repair, and replacement of aids to navigation), (6) aquaculture and hatcheries, (7) scientific research, (8) water quality management and inland activities (*e.g.,* pesticide registration, establishment of water quality standards, Clean Water Act (CWA) general permits, power plant operations, land management pesticide/herbicide application, and National Pollutant Discharge Elimination System (NPDES) permitting), (9) military activities, (10) liquefied natural gas (LNG) facilities and activities, (11) space vehicle and missile launches, and (12) U.S. Forest Service activities (activities related to timber and forest management). These activities have the potential to affect the essential feature by altering or reducing the quantity, quality, or the accessibility of the prey feature essential to the conservation of one or more of the listed DPSs of humpback whales.

Our regulations recognize that impacts of designation may be quantitatively or qualitatively described (50 CFR 424.19(b)). As discussed in chapter 2 of the FEA, the costs stemming from critical habitat designation will be largely limited to administrative costs of consultation, which are the only costs monetized in the analysis (IEc 2020). No project modifications or additional conservation measures were identified as likely to result for the majority of the forecasted consultations, largely due to the baseline protections in place. Depending on the specific area at issue and the Federal action, relevant baseline protections include, for example, protections for co-occurring listed species such as North Pacific right whales, Southern Resident killer whales, salmon, Southern DPS of Pacific eulachon, and the Southern DPS of green sturgeon; designated critical habitat for listed species; as well as protections for humpback whales under both the ESA and the MMPA. The number, location, and/or effects on prey of a few forecasted activities, particularly seismic surveys and alternative energy activities, cannot be determined at this time and would require speculation. Therefore, we did not identify any probable conservation efforts that would likely be recommended specifically to avoid adverse modification of the humpback whale critical habitat as a result of these activities, nor was it possible to estimate the cost of any such probable project modifications.

The FEA indicates that, if all 19 units were designated, the critical habitat would increase administrative costs of consultations involving humpback whales by an estimated $930,000 to $1,000,000 over the next ten years, assuming a seven percent discount rate (IEc 2020). This equates to an annualized cost of $110,000 to $120,000 over the next ten years (IEc 2020). The largest portion of the projected administrative costs are attributed to Unit 10 (25 to 27 percent of total costs), followed by Unit 13 (9 percent) and Unit 17 (7 to 8 percent). Unit 10 is also associated with the greatest level of uncertainty and potential for unquantified impacts (IEc 2020). The largest portions of the estimated costs are associated with in-water

construction and dredging activities (25 to 33 percent of the total costs), aquaculture activities (27 to 30 percent), and commercial fisheries (14 to 15 percent, IEc 2020). Estimated costs for each of the 19 habitat units and by each of the 12 categories of Federal activities can be found in Exhibits 3–3 and 3–5 in the FEA (IEc 2020).

Parties that may incur the administrative costs estimated in the analysis include NMFS, the Federal action agency (*e.g.,* the agency undertaking or permitting the activity), and in some cases, a third-party applicant, which may be a municipality, a private party, etc. Because section 7 consultations regarding impacts to species or critical habitats under the jurisdiction of NMFS are primarily between NMFS and Federal action agencies, the administrative costs of consultation are largely borne by NMFS and other Federal agencies and not, for example, by private entities or small governmental jurisdictions. However, some consultations may include third parties (*e.g.,* project proponents or landowners) that may be small entities, and in some instances these third parties may bear some portion of the administrative consultation costs. Ultimately, the economic analysis found that consultations on in-water and coastal construction and aquaculture activities may generate costs borne by small entities. All other activities are either not expected to involve small entities or are associated with no more than one consultation per year spread across the entire critical habitat. As described in chapter 5 of the FEA, the analysis anticipates approximately eight consultations on in-water and coastal construction activities per year, six of which are concentrated in critical habitat Unit 10 in Alaska. This analysis estimates that the small entities involved in these consultations will incur $5,200 in annualized administrative costs (IEc 2020). Additionally, the analysis projects 12 consultations per year on aquaculture activities in Alaska, and estimates that third parties involved in these consultations will incur $5,300 in annualized administrative costs (IEc 2020). (See ''Initial Regulatory Flexibility Act'' section of this document for information regarding impacts on small entities.)

Tribal Impacts

Section 4(b)(2) of the ESA and our regulations also provide for the consideration of other relevant impacts associated with the designation of critical habitat (16 U.S.C. 1533(b)(2); 50 CFR 424.19(b)). We identified potential impacts on federally recognized tribes and Alaska Native corporations as a possible source of other impacts relevant to the humpback whale critical habitat designation. A broad array of activities that occur on Indian lands may trigger ESA section 7 consultations. Indian lands are those defined in Secretarial Order 3206, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'' (June 5, 1997), and include: (1) Lands held in trust by the United States for the benefit of any Indian tribe; (2) land held in trust by the United States for any Indian tribe or individual subject to restrictions by the United States against alienation; (3) fee lands, either within or outside the reservation boundaries, owned by the tribal government; and (4) fee lands within the reservation boundaries owned by individual Indians.

In developing the proposed rule, we did not find any overlap between the areas under consideration as critical habitat and Indian lands, and thus preliminarily found that there were no Indian lands subject to consideration for possible exclusion. In the proposed rule we also indicated that it was not clear whether there may be some nearshore areas that could be considered for possible exclusion on the basis of tribal impacts, and that we lacked information regarding where boundaries of tribal-owned lands lie in relation to shoreward boundary of the specific critical habitat areas in Alaska, which are generally bounded by the 1-m isobath (relative to MLLW). We indicated that there are Indian tribes and Alaska Native corporations that have lands that are in close proximity to areas under consideration for designation as critical habitat for humpback whales, have usual and accustomed areas that overlap with critical habitat areas, or may otherwise be affected in coastal Alaska, Washington, Oregon, and California. Thus, as described more fully in the proposed rule, we reached out to 27 tribes located in Washington, Oregon, and California, and 149 tribes and tribal organizations located within Alaska to offer the opportunity to consult on critical habitat for humpback whales and discuss any concerns regarding the potential designations. In the proposed rule, we requested information regarding tribal impacts as a result of the designations (54 FR 54354, October 9, 2019), and following publication of the proposed rule, we contacted the potentially affected tribes and Native corporations to solicit their input on the proposed designations.

As discussed in the proposed rule, we received requests for meetings from two tribes in Washington, the Quinault Indian Nation and the Quileute Tribe, in response to our initial outreach efforts. Both tribes expressed concern regarding the potential impact of the critical habitat designation on tribal fisheries, particularly within usual and accustomed fishing areas located in coastal marine waters. We had multiple follow-up communications with these tribes; however, neither tribe elected to submit formal comment or information regarding impacts on tribal resources or treaty rights, nor did they request additional meetings or consultation.

Following publication of the proposed rule, we received several comments from tribes and requests for meetings. Specifically, we received a letter from the Sun'Aq Tribe of Kodiak, stating that, based on the available information, they did not believe the humpback whale critical habitat designation would adversely impact the Kodiak Archipelago economy. They also stated that if the designations are finalized, annual consultations should be conducted to provide opportunities to present any new information about subsistence or economic impacts. We received separate requests for meetings from the Bristol Bay Marine Mammal Council, the Aleut Marine Mammal Commission, and the Indigenous People's Council for Marine Mammals, and we subsequently participated in meetings with each organization to provide an overview of the proposed designations and discuss particular concerns regarding potential effects of the designations on subsistence as well as commercial fishing. Lastly, we received a letter, dated January 13, 202, from Shaan-Seet, Inc., the Alaska Native Village Corporation for Craig, Alaska, indicating that they had not been directly contacted about the proposed rule, and that they opposed the designation of critical habitat in Southeast Alaska. In February 2020, we contacted Shaan-Seet, Inc. to correct this oversight, and acknowledged that, while the Craig Tribal Association was on our contact list, Shaan-Seet, Inc. had been inadvertently omitted from our list of contacts and was thus not contacted directly about publication of the proposed rule. The Shaan-Seet, Inc. president indicated that we should contact the Craig Tribal Association to discuss any potential concerns further, which we subsequently did.

Ultimately, through our additional outreach efforts following publication of the proposed rule, we did not identify any specific tribal impacts that are likely to result from the designation of critical habitat for humpback whales, nor did we receive any information

indicating that the designations were likely to result in impacts to tribal interests. Given the outcome of other aspects of our 4(b)(2) analysis and the decision to exclude Unit 10 (Southeast Alaska) from the final critical habitat designation, the humpback whale critical habitat will also not affect tribes or Native corporations in Southeast Alaska. Thus, this rule does not contain any exclusions of particular areas under section 4(b)(2) of the ESA based on impacts to tribes or Alaska Native corporations.

Analysis of the Benefits of Designation

The primary benefit of critical habitat designation—and the only regulatory consequence—stems from the ESA section 7(a)(2) requirement that all Federal agencies ensure that their actions are not likely to destroy or adversely modify the designated habitat (16 U.S.C. 1536(a)(2)). This benefit is in addition to the section 7(a)(2) requirement that all Federal agencies ensure their actions are not likely to jeopardize the species' continued existence. Another benefit of designation is that it provides the public, states, and others notice of areas and features important to species conservation, and information about the types of activities that may reduce the conservation value of or otherwise affect the habitat. Critical habitat designation may also lead to additional protections under state or local regulations.

In addition to the benefits of critical habitat designation to the whales, there may be ancillary benefits. These other benefits may be economic in nature, or they may result in improvement of the ecological functioning of the designated areas. Chapter 4 of the FEA (IEc 2020) discusses other forms of benefits that may be attributed to the conservation and recovery of humpback whales (although not specifically attributed to the designation of critical habitat), including use benefits (*e.g.,* for wildlife viewing), non-use benefits (*e.g.,* existence values), and ancillary ecosystem service benefits (*e.g.,* water quality improvements and enhanced habitat conditions for other marine and coastal species). Humpback whales are also valued in terms of the utility gained from whale watching experiences. In Washington, Oregon, California, and Alaska, humpback whales are sought by whale watchers (IEc 2020). Whale watch participants in these states generate tens of millions of dollars in economic activity annually (Pendelton 2006). Although humpback whales clearly have significant value to people nationally and have economic value regionally, we are unable to (and are not required to) quantify or monetize associated use and non-use economic benefits that would be attributable to a critical habitat designation. Available literature and data do not permit such precise valuation. More information about these types of benefits and values may be found in chapter 4 of the FEA (IEc 2020).

It would be useful and informative if the best available information allowed the benefits of designation to be monetized so they could be directly compared to the economic benefits of excluding a particular area. However, sufficient and relevant data are not available to monetize the benefits of designation (*e.g.,* estimates of the monetary value of the protecting the feature within areas designated as critical habitat, or the monetary value of education and outreach benefits). Nor are some of the key values served by a designation (fulfilling the statutory mandate, supporting the conservation of the species) susceptible to direct quantification. For this reason, the ESA regulations recognize that benefits may be quantitatively or qualitatively described (50 CFR 424.19(b)). In addition, we cannot isolate and quantify the effect that a critical habitat designation would have on recovery of humpback whales separate from other ongoing or planned conservation actions. It is also not possible to accurately predict the future harm to the habitat that would otherwise have been realized in the absence of a critical habitat designation. Ultimately, given these challenges and lack of sufficient information, the associated incremental use and non-use economic benefits of designating particular areas of the potential designation cannot be quantified. Therefore, we assessed the benefits of designation using a biologically-based analysis of the specific areas. In this particular case, the CHRT considered relevant humpback whale datasets to qualitatively rate the conservation impact or value for the DPSs if a particular area is designated as critical habitat. These qualitative conservation value ratings were then used to represent the benefits of designation. As presented in the Final Biological Report (NMFS 2020a), several changes were made to the datasets considered by the CHRT in response to public comments, and the CHRT then repeated its analysis to systematically assign a qualitative conservation value rating to each of the specific habitat units for each DPS.

In general, the multiple datasets considered by the CHRT provided information about the importance of a given area for humpback whale feeding and the level of use of the units by whales of each particular DPS (see Appendix C, NMFS 2020a). The first dataset contained information about the feeding BIAs that have been identified for humpback whales (see Ferguson *et al.* 2015a, c and Calambokidis *et al.* 2015). Rather than simply considering presence/absence of a BIA, and to make this information more comparable across units, the CHRT considered the size of the BIAs relative to the size of the particular critical habitat unit. Specifically, the CHRT calculated the percent of total area (km^2) of a unit that was covered by the BIA within that unit (Table C4, NMFS 2020a). The CHRT members considered this information in light of the underlying data and approaches taken in delineating the BIAs in different geographic regions.

A second dataset addressed the presence of whales from each particular DPSs within each critical habitat unit. Several different pieces of information were presented in this dataset. First, information regarding the level of survey effort (*i.e.,* vessel days and whether small boat surveys were conducted) and the total number of unique humpback whales sighted during the SPLASH study were presented for each habitat unit. Secondly, we calculated the percentage of whales identified as belonging to a specific DPS within each specific habitat unit, out of the total number of matched sightings of that DPS. (Matched sightings are the total number of whales photo-identified in both breeding area and the critical habitat unit. Note that most whales sighted in feeding areas have not been matched to a particular DPS.) Third, we provided the probabilities of whales from a particular DPS moving from their winter, breeding area to a feeding area (critical habitat unit) as calculated by Wade (2017). These movement probabilities were derived from associated SPLASH data. The feeding areas from the SPLASH study and from Wade (2017) represent larger geographic areas than the critical habitat units, so in many cases a given movement probability applied to multiple, adjacent critical habitat units. Lastly, we compiled available documentation of whales from a specific DPS occurring in each unit (*i.e.,* confirmed presence). These data came from both the SPLASH study as well as other references, a complete list of which is provided in the Final Biological Report (see Table C5).

These compiled datasets, available literature summarized in the Final Biological Report, as well as the CHRT's individual expert opinions informed the structured decision-making process that

the CHRT applied in assessing the relative conservation value of each specific area and for each DPS. As discussed in more detail in the Final Biological Report, before conducting the updated analysis, the CHRT discussed the various datasets to ensure consistent interpretation of the data, and discussed other references and studies beyond SPLASH that should be brought to bear in their assessment. The CHRT also discussed how to prioritize the relevant information, to help ensure greater consistency in terms of how each CHRT member weighed the various data in their assessment. For example, the primary consideration of the CHRT members in determining the relative conservation value of a given habitat unit to a given DPS was the degree to which whales of that DPS rely on that area for feeding. After reviewing the data and process as a group, each member of the CHRT independently rated each habitat unit for each relevant DPS by distributing four ''points'' across the following four conservation value categories for each of the critical habitat units:

(1) Very high—meaning areas where the available data indicate the area is very important to the conservation of the DPS;

(2) high—meaning areas where the available data indicate the area is important to the conservation of the DPS;

(3) medium—meaning the available data indicate the area is moderately important to the conservation of the DPS; and

(4) low conservation value—meaning the available data suggest the DPS does not rely on this area for feeding.

CHRT members could place all four points for a given habitat unit and DPS in one of these qualitative categories or spread those four points across any or all of the four categories. The degree to which votes were spread across the conservation value categories thus served as a measure of uncertainty in the conservation value of a particular unit. However, CHRT members were permitted to forego assigning their four votes for a specific critical habitat unit if they concluded the available data were either too limited or there was too much uncertainty associated with the available data to make an assessment of the conservation value of a particular area for the given DPS. In these instances the CHRT members were allowed to instead categorize the unit as ''data deficient.''

Following an initial round of scoring, the CHRT met to discuss their assessments of the data and results. Following that team discussion, CHRT members were given the opportunity to independently re-evaluate their own point distributions and make any changes (*if* they elected to do so). The results of the CHRT's assessment for each of the habitat units are provided in Tables 1–3 of the Final Biological Report; complete results are also presented and discussed within the Final Biological Report (NMFS 2020).

We reviewed and agree with the conclusions of the CHRT as presented in the Final Biological Report and used their conservation ratings of the specific areas to inform our section 4(b)(2) analysis, as described in this rule as well as in the Final Section 4(b)(2) Report (NMFS 2020b).

Exclusions Based on Economic Impacts

As is clear from the preceding discussion, the conservation benefits to the humpback whale DPSs that would result from the designation of any particular critical habitat unit, expressed as a qualitative rating, are not directly comparable to the economic benefits that would result from exclusion of the particular unit from designation, which is expressed as a quantified cost. However, to weigh the benefits of designation against the economic benefits of exclusion, we have to compare these two types of information. As noted previously, the Secretary has discretion to determine the weight to assign to the relevant factors and may exclude any particular area from the critical habitat designation upon a determination that the benefits of such exclusion outweigh the benefits of specifying the particular area as part of the critical habitat (50 CFR 424.19(c)). The Secretary, however, cannot exclude any particular area if, based on the best scientific and commercial data available, the Secretary determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned (50 CFR 424.19(c)). For this analysis, we note that each of the units identified for potential designation meet the definition of critical habitat because they are in the occupied range of the species and contain the identified physical or biological feature for which we have determined that special management considerations or protection may be required; however, the areas vary as to the level of their conservation value for the species. We (exercising the delegated authority of the Secretary) determined that the conservation benefits of including areas with medium, high, or very high conservation ratings should have significant weight in this analysis. It is reasonable to give great weight to the conservation value of the habitat, in light of the purpose of critical habitat under the Act (to support the conservation, or recovery, of the species) and the statutory mandate to designate critical habitat to the maximum extent prudent and determinable.

Overall, the projected economic impacts to Federal agencies and non-Federal entities of designating each of the 19 habitat units are considered low, with annualized impacts ranging from $1,700–$32,000 per habitat unit (IEc 2020). If all 19 units were designated, the total annualized impact is estimated to range from $110,000 to $120,000 over the next 10 years (IEc 2020).

WNP DPS

Results of the biological and economic analyses (see Table 1) indicate that for the WNP DPS, habitat units rated as having very high or medium conservation value are associated with annualized impacts ranging from $2,300–$2,700 (Unit 3, Shumagin Islands Area) to $4,600–$5,400 (Unit 5, Kodiak Island Area). (Note there were no high conservation values for the WNP DPS). Specific areas rated as having low conservation value for the WNP DPS were associated with annualized impacts ranging from $2,600 (Units 7, Kenai Peninsula Area and 9, Northeastern Gulf of Alaska) to $5,600 (Unit 6, Cook Inlet Area). After reviewing the updated costs and the CHRT's revised conservation values for each specific area, we concluded that the economic impacts for the habitat units with very high and medium conservation ratings are not outweighed by the relatively low costs attributed to any of those units. We have confidence in the data-driven process by which the CHRT carefully evaluated and then re-evaluated the relative conservation value of each critical habitat unit, and we therefore find that areas receiving these rating classifications are all of moderate to very high importance to the conservation of the WNP DPS. In other words, these higher value feeding areas are expected to support the life history needs and recovery of these whales. The benefit of designating these important feeding areas as critical habitat is not outweighed by the relatively low economic impacts projected to occur as a result of their designation. For areas rated as having a low conservation value, however, we continue to find that the economic impacts, though still objectively low, outweigh the benefits of including them in the designation. By definition, these low value habitat units, based on the CHRT's assessment of the best available data, are areas the WNP

DPS whales are not expected to rely on as extensively for feeding given the very low occurrence or predicted occurrence of WNP DPS whales in the area relative to other areas with higher conservation value. Even though the estimated annualized impacts only ranged from $2,600–$5,600 across all of the low conservation value areas for the WNP DPS, we find that these costs outweigh the minimal conservation benefits to the WNP DPS whales of designating these areas. Because this DPS does not rely as extensively on these areas for feeding, or in the case of Unit 1, is not known to rely on the area for feeding, we continue to find that exclusion of these areas will not result in the extinction of this DPS (see Section 4(b)(2) Report). Therefore, consistent with the exclusions identified in the proposed rule, the final critical habitat designation for the WNP DPS excludes the following areas: Unit 4—Central Peninsula Area, Unit 6—Cook Inlet, Unit 7—Kenai Peninsula Area, Unit 8—Prince William Sound Area, and Unit 9—Northeastern Gulf of Alaska.

Based on the CHRT's reassessment of relative conservation values of the specific areas for the WNP DPS, Unit 1 (Bristol Bay Area) was rated as being ''data deficient.'' This outcome was the result of the careful review of the available data and refinement of the underlying dataset used during the CHRT's reassessment, which are provided in the Final Biological Report (NMFS 2020a; see also response to Comment 30. Specifically, the available data regarding predicted movement probabilities (*i.e.,* Wade 2017), which were derived from SPLASH data, were found to not be applicable to Unit 1. While the available data indicate the eastern Bering Sea is part of the occupied range of WNP DPS whales, this area was not sampled during the SPLASH study, and no other photo-identification data are available to determine relative use of this particular area by this DPS (versus other humpback whales). Refining the interpretation of data in this way led the CHRT to conclude that it was not possible on the basis of the best available information to assess the relative conservation value of this area, which had previously been assigned a rating of high conservation value for the WNP DPS (based largely on the extrapolation of results of Wade (2017) to this area and the presence of a BIA). Ultimately, the majority of the CHRT concluded that, based on the very limited data, the extent to which WNP DPS whales rely on this area for feeding could not be reliably assessed. After considering the outcome of the CHRT's assessment and the available information regarding the documented distribution of WNP DPS whales as summarized in the Final Biological Report, we conclude that the conservation benefit of designating Unit 1 for the WNP DPS is outweighed by the economic impact of designating this area, although it is relatively low (annualized impact of $2,300). Given the available data indicating that WNP DPS whales primarily use other feeding areas, including areas outside U.S. waters, we also conclude that exclusion of this particular area will not result in extinction of this DPS. Therefore, the final critical habitat designation for the WNP DPS does not include Unit 1—Bristol Bay Area.

We note, however, that historical whaling data as well as more recent survey data indicate that humpback whales use this area, which may become increasingly important feeding habitat for humpback whales as changing ocean conditions alter the distributions and abundances of important or quality prey or as the DPSs recover. Because most of this area has been poorly surveyed, and because we have an inadequate understanding of the importance of this area to ESA-listed humpback whales, the CHRT recommended that research efforts should be directed towards surveying humpback whales in this particular portion of the range.

CAM DPS

Results of the biological and economic analyses (see Table 2) indicate that for the CAM DPS, habitat units rated as having very high, high, and medium conservation value are associated with annualized impacts ranging from $1,700 (Unit 15, California North Coast) to $10,000 (Unit 13, Coastal Oregon). Consistent with our conclusions in the proposed rule, we do not find that the relatively low estimated economic impacts outweigh the benefits of designating these higher conservation value areas for the CAM DPS. These feeding areas are expected to contribute to supporting the overall life history and conservation of these endangered whales. We do not find that the benefits of designating these areas as critical habitat are outweighed by the relatively low economic impacts projected to occur as a result of their designation. One area was rated as medium/low (Unit 12, Columbia River Area) as a result of a tie in the votes from the CHRT (*i.e.,* half of the votes were cast for low and the other half were cast for medium conservation value), and is associated with an estimated annualized cost of $6,900. This medium/low area does not contain a BIA and the documented occurrence of whales from the CAM DPS in this area is lower relative to habitat units farther south in the CCE. However, as discussed previously, the predicted movement probabilities for whales of the CAM DPS whales to this general area are high (Wade 2017), and recent evidence from satellite-tagged whales indicate this is an important feeding area for humpback whales (Palacios *et al.* 2020). Overall, the CHRT concluded that the conservation value of this unit for the endangered CAM DPS is not outweighed by the low estimated economic impacts ($6,900, Table 2).

Consistent with the proposed rule, we continue to find that the benefits of designating the habitat unit rated as having low conservation value for the CAM DPS (*i.e.,* Unit 19, California South Coast), are outweighed by the estimated economic impacts of designation, which are estimated to range from $5,500–$5,700 (annualized). Unit 19 is not recognized as important feeding habitat for humpback whales and does not contain a feeding BIA. Waters off the southernmost portion of the California coast (*i.e.,* Unit 19) also have the lowest predicted abundance of humpback whales during summer months as well as during cooler months (Becker *et al.* 2016 and 2017; see Figure 17, NMFS 2020a). Because this area, which comprises 12,966 nmi^2 of marine habitat, is small relative to the overall designation, which extends over 48,521 nmi^2 of marine waters off of Washington, Oregon, and California, we find that exclusion of this habitat unit from the critical habitat designation for the CAM DPS will not result in extinction of this DPS.; Therefore, this unit is excluded from the final critical habitat designation for the CAM DPS.

MX DPS

Results of the biological and economic analyses (see Table 3) indicate that for the MX DPS, habitat units rated as having very high and high conservation value are associated with annualized impacts ranging from $1,700 (Unit 15, California North Coast) to $10,000 (Unit 13, Coastal Oregon). Areas rated as having medium conservation value are associated with annualized costs ranging from $3,400 (Unit 8, Prince William Sound) to $8,200 (Unit 11, Coastal Washington). In no instance were these estimated economic impacts found to outweigh the value of these areas to the conservation of the MX DPS. These higher conservation value areas, which are located within all of the regions known to be used as feeding habitat by the MX DPS (*i.e.,* Aleutian

Islands/Bering Sea, Gulf of Alaska, CCE) are expected to play an important role in supporting the life history needs and conservation of this DPS.

Areas rated as having low conservation value for the MX DPS also occur within all of the regions used by this DPS and are associated with estimated annualized impacts ranging from $2,600 (Units 7 and 9) to $32,000 (Unit 10). Consistent with the proposed rule and conclusions for other DPSs, we find that the benefits of designating the habitat units rated as having low conservation value are outweighed by the forecasted economic impacts associated with their designation. These low conservation value areas are areas that whales of this DPS are not expected to rely on as extensively for feeding, as indicated by their very low occurrence or predicted occurrence in these areas. Thus, based on the currently available information for the MX DPS, these areas likely have minimal conservation value for this DPS, which we find is outweighed by the projected economic impacts, although they are low. For Units 7, 9, and 19, this finding is consistent with our conclusions in the proposed rule, which includes addition discussion regarding exclusion of these particular areas.

Based on the results of the CHRT's reassessment of relative conservation value, three additional habitat units now fall into this low conservation value category for the MX DPS—Unit 4 (Central Peninsula Area), Unit 6 (Cook Inlet Area), and Unit 10 (Southeast Alaska). Each of these three areas, all of which are located in waters off Alaska, were rated as medium conservation value based on the CHRT's initial assessment leading to the proposed rule. As noted previously, and as presented in detail in the Final Biological Report and Summary of Changes (see also response to Comment 30), we revised the datasets applied by the CHRT during their reassessment of relative conservation value and placed greater emphasis on the degree to which whales of each specific DPS are relying on each area for feeding. Each of these three areas has low documented occurrences and/or low predicted occurrences of MX DPS, and two of these areas (Units 4 and 6) do not include a feeding BIA. Unit 10 (Southeast Alaska), however, contains a large BIA and supports feeding by a large number of humpback whales, which influenced the CHRT's initial assessment. The CHRT's reassessment placed less weight on presence of the BIA, and placed greater emphasis on the data indicating that the large majority of whales using this BIA are from the non-listed Hawaiian population, while only a small percentage of MX DPS whales use or are predicted to use this general area (Barlow *et al.* 2011, Wade 2017). In addition, the revised economic analysis indicates that the largest portion of the quantified, annualized impacts ($26,000–$32,000) as well as the potential, non-quantified economic impacts (*e.g.,* project delays) are associated with this Unit.

Based on the best available data and the revised analyses, for each of these three, additional low conservation value areas (Units 4, 6, and 10) and the other three low conservation value areas (Units 7, 9, and 19), we conclude that the benefits of designating the area are outweighed by the estimated economic impacts associated with their designation. Given the large area included in the designation, the documented distribution of MX DPS whales, and the current status of this threatened DPS, we also conclude that exclusion of the low conservation value areas from critical habitat will not result in extinction of the MX DPS. Therefore, we are excluding the following six areas from the final critical habitat designation for the MX DPS: Unit 4—Central Peninsula Area, Unit 6—Cook Inlet Area, Unit 7—Kenai Peninsula Area, Unit 9—Northeastern Gulf of Alaska, Unit 10—Southeast Alaska, and Unit 19—California South Coast.

Based on the CHRT's reassessment of relative conservation values of the specific areas for the MX DPS, Unit 1 (Bristol Bay Area) was rated as being ''data deficient.'' As discussed previously for the WNP DPS, the basis for this outcome was the revision to the data and approach used by the CHRT in their reassessment of the relative conservation value of each specific area, which is discussed in more detail in the Final Biological Report (NMFS 2020a). In particular, while the available data indicate the eastern Bering Sea is part of the occupied range of MX DPS whales, this area was not sampled during the SPLASH study, and no other photo-identification data are available to determine relative use of this particular area by whales from this DPS (versus other humpback whales). Although this area had previously been assigned a rating of high conservation value for the MX DPS (based largely on the extrapolation of results of Wade (2017) to this area and the presence of a BIA), ultimately, the majority of the CHRT concluded that, based on the very limited data, the extent to which MX DPS whales are relying on this area for feeding could not be reliably assessed. After considering the outcome of the CHRT's assessment and the available information regarding the documented distribution of MX DPS whales as summarized in the Final Biological Report, we conclude that the conservation benefit of designating Unit 1 for the MX DPS is outweighed by the economic impact of designating this area, although low (annualized impact of $2,300). Given the available data indicating that MX DPS whales primarily use other feeding areas and the status of this DPS as threatened rather than endangered, we also conclude that exclusion of this particular area will not result in extinction of this DPS. Therefore, the final critical habitat designation for the MX DPS does not include Unit 1—Bristol Bay Area. As noted previously, the CHRT recommended that future research effort be directed at improving our understanding of this potentially important habitat for humpback whales generally and for ESA-listed humpback whales in particular.

TABLE 1—CONSERVATION RATINGS AND ESTIMATED, INCREMENTAL, ANNUALIZED ECONOMIC IMPACTS ASSOCIATED WITH SECTION 7 CONSULTATIONS OVER THE NEXT 10 YEARS FOR THE SPECIFIC AREAS OF CRITICAL HABITAT CONSIDERED FOR THE WNP DPS OF HUMPBACK WHALES

Unit No.	Area	Conservation rating	Annualized impacts
1	Bristol Bay Area	data deficient	$2,300
2	Aleutian Islands Area	very high	2,600–4,400
3	Shumagin Islands Area	Medium	2,300–2,700
4	Central Peninsula Area	Low	2,600–2,800
5	Kodiak Island Area	Medium	4,600–5,400
6	Cook Inlet Area	Low	5,200–5,600
7	Kenai Peninsula Area	Low	2,600

TABLE 1—CONSERVATION RATINGS AND ESTIMATED, INCREMENTAL, ANNUALIZED ECONOMIC IMPACTS ASSOCIATED WITH SECTION 7 CONSULTATIONS OVER THE NEXT 10 YEARS FOR THE SPECIFIC AREAS OF CRITICAL HABITAT CONSIDERED FOR THE WNP DPS OF HUMPBACK WHALES—Continued

Unit No.	Area	Conservation rating	Annualized impacts
8	Prince William Sound Area	Low	3,400
9	Northeastern Gulf of Alaska	Low	2,600

TABLE 2—CONSERVATION RATINGS AND ESTIMATED, INCREMENTAL, ANNUALIZED ECONOMIC IMPACTS ASSOCIATED WITH SECTION 7 CONSULTATIONS OVER THE NEXT 10 YEARS FOR THE SPECIFIC AREAS OF CRITICAL HABITAT CONSIDERED FOR THE CAM DPS OF HUMPBACK WHALES

Unit No.	Unit name	Conservation rating	Annualized impacts
11	Coastal Washington	Medium	$7,500–$8,200
12	Columbia River Area	medium/low	6,900
13	Coastal Oregon	Medium	9,500–10,000
14	Southern Oregon/Northern California	High	2,600
15	California North Coast	High	1,700
16	San Francisco/Monterey Bay Area	very high	3,000
17	California Central Coast	very high	7,900
18	Channel Islands Area	very high	3,900
19	California South Coast	Low	5,500–5,700

TABLE 3—CONSERVATION RATINGS AND ESTIMATED, INCREMENTAL, ANNUALIZED ECONOMIC IMPACTS ASSOCIATED WITH SECTION 7 CONSULTATIONS OVER THE NEXT 10 YEARS FOR THE SPECIFIC AREAS OF CRITICAL HABITAT CONSIDERED FOR THE MX DPS OF HUMPBACK WHALES

Unit No.	Area	Conservation rating	Annualized impacts
1	Bristol Bay Area	data deficient	$2,300
2	Aleutian Islands Area	very high	2,600–4,400
3	Shumagin Islands Area	High	2,300–2,700
4	Central Peninsula Area	Low	2,600–2,800
5	Kodiak Island Area	very high	4,600–5,400
6	Cook Inlet Area	Low	5,200–5,600
7	Kenai Peninsula Area	Low	2,600
8	Prince William Sound Area	Medium	3,400
9	Northeastern Gulf of Alaska	Low	2,600
10	Southeastern Alaska	Low	26,000–32,000
11	Coastal Washington	Medium	7,500–8,200
12	Columbia River Area	Medium	6,900
13	Coastal Oregon	High	9,500–10,000
14	Southern Oregon/Northern California	High	2,600
15	California North Coast	High	1,700
16	San Francisco/Monterey Bay Area	very high	3,000
17	California Central Coast	High	7,900
18	Channel Islands Area	High	3,900
19	California South Coast Area	Low	5,500–5,700

Exclusions Based on National Security Impacts

Based on the written information provided by the Navy in December 2018 and information provided through subsequent discussions with Navy representatives, we evaluated whether there was a reasonably specific justification indicating that designating certain areas as critical habitat would have a probable incremental impact on national security. In accordance with our 4(b)(2) Policy (81 FR 7226, 7231 February 11, 2016), in instances where the Navy provided a reasonably specific justification, we deferred to their expert judgement as to: (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national security or homeland-security implications; (2) the importance of those implications; and (3) the degree to which the cited implications would be adversely affected by the critical habitat designation. In conducting a review of these exclusion requests under section 4(b)(2) of the ESA, we also gave great weight to the Navy's national-security concerns. To weigh the national security impacts against conservation benefits of a potential critical habitat designation, we also considered the following: (1) The size of the requested exclusion and the percentage of the specific critical habitat area(s) that overlaps with the Navy area; (2) the relative conservation value of the specific area for each particular humpback whale DPS; (3) the likelihood that the Navy's activities would destroy or adversely modify critical habitat, and the likelihood that NMFS would require project modifications to reduce or avoid these impacts; and (4) the likelihood that other Federal actions may occur in the

site that would not be subject to the critical habitat provision if the particular area were excluded from the designation.

After considering the information provided by the Navy regarding potential impacts on national security stemming from the designation of a portion of Unit 11 as critical habitat, we found that the Navy had provided a reasonably specific justification for their requested exclusion of the area overlapping with the QRS as well the 10-km buffer surrounding the QRS. The requested exclusion comprises about 44 percent of the area of Unit 11, which was rated as having a medium conservation value for the CAM DPS and a medium conservation value for the MX DPS. The requested exclusion comprises a very small portion of the total critical habitat designations for the CAM DPS (about 3 percent) and the MX DPS (about 1.3 percent). To more precisely gauge the value of the specific QRS area (including the buffer) to the whales, we reviewed the overlap of the QRS with the location of the BIA and the predicted whale densities from Becker *et al.* (2016), which modeled predicted densities in approximately 10 km by 10 km grid cells. Those comparisons indicated that the QRS is entirely outside of, and south of, the BIA, and overlaps only partially with the area where the highest densities of humpback whales are predicted to occur within Unit 11. In other words, an exclusion of the QRS and buffer area would remove from the designation only a small amount of the comparatively high use locations within Unit 11. The Navy also indicated that while they do not control access to this area, they do exert significant influence in terms of limiting other Federal activities within the QRS. The QRS and associated buffer also have a significant degree of overlap with the OCNMS, where certain activities are prohibited, including oil, gas, or mineral exploration, development, or production; discharging or depositing any material or other matter; drilling into, dredging, or otherwise altering the seabed, with some exceptions (15 CFR 922.152). Because of these prohibitions, we find that the likelihood of other Federal activities being proposed in this area of the QRS is low.

Overall, in light of the Navy's substantial and specific concerns regarding the potential impact of a critical habitat designation on their unique testing and training activities that occur within the QRS and the potential delay in critical missions in order to complete adverse modification analyses, we determined that the benefits of excluding the QRS due to national security impacts outweighs the benefits of designating this portion of Unit 11 as critical habitat for the MX and CAM DPSs. Upon further review of the requested buffer exclusion, however, and as discussed previously (see response to Comment 40), we determined the benefit of excluding this area on the basis of a national security impact does not outweigh the benefit of designating critical habitat in a portion of the 10-km buffer extending from the northeast corner of the QRS where it overlaps with the OCNMS. The Navy does not currently use or currently plan to use explosives in the northeast corner of the QRS; therefore, potential impacts to the humpback whale critical habitat are unlikely to extend into the OCNMS. The Navy provided additional information to NMFS clarifying the impact to national security should the full 10-km buffer around the QRS not be excluded from designation as critical habitat. The Navy noted that the current limitation on conducting underwater explosives in this portion of the QRS is based on mitigation measures the Navy proposed in its NWTT SEIS (September 2020) and associated ESA and MMPA compliance documentation, which preclude the use of all underwater explosives for training and testing within 50 nmi from shore, with the exception of mine countermeasures neutralization activities, which occur in the QRS where it does not overlap with the OCNMS. Navy concluded it was practicable to implement this restriction; however, all Navy mitigation measures allow for deviations (in consultation with NMFS) if driven by new and immediate national security requirements. Further, the Navy reviews its mitigation measures annually and can modify those mitigation measures as driven by evolving military readiness requirements, also in consultation with NMFS. The Navy stated that because techniques and tactics needed for national security can rapidly evolve, it is possible that modifications to current activities and the development of new technologies will require testing in areas that may not be currently utilized for underwater explosives. Thus, we find that, while there are national security impacts as described by the Navy, benefits of excluding this area do not outweigh the conservation benefits of designating this particular area as critical habitat for both the MX and CAM DPSs. Given the small size of this particular area relative to the overall designations and the medium conservation value of this area for both DPSs, we conclude that excluding this area (*i.e.,* QRS with the modified buffer)) from the designations will not result in extinction of either the CAM or MX DPS. We note that should the Navy's requirements change in such a manner that materially affects how it will conduct activities within the QRS, the Navy will provide NMFS with an updated explanation of impacts to national security, and we will reconsider whether those impacts outweigh the benefits of designating a small portion of the 10-km buffer as critical habitat.

We considered the information provided by the Navy concerning potential impacts on national security stemming from the designation of Unit 19 as critical habitat, and found that the Navy had provided a reasonably specific justification for the requested exclusion. We considered the information provided by the Navy regarding the nature and types of training and testing activities that occur within SOCAL (*e.g.,* anti-submarine warfare, torpedo, mine countermeasure, gun, missile and rocket, and propulsion testing) to evaluate their potential to affect humpback whale critical habitat. We also reviewed the discussions about particular impacts provided in the Navy's 2018 Final Environmental Impact Statement for Hawaii-Southern California Training and Testing (*e.g.,* impacts to fish and invertebrates). We agree with the Navy's assessment that the activities that occur in SOCAL, many of which occur with high frequency, have the potential to impact humpback whale prey species, with the degree of impact depending on the nature of the particular activity. We also considered that Unit 19, about 83 percent of which overlaps with the SOCAL range complex, had been assessed as having low conservation value to both the MX and CAM DPSs of humpback whales. Given the low conservation value rating this area received for each DPS, we conclude that the benefits of excluding SOCAL outweigh the benefits of including it in either designation. Overall, we concur with the Navy that designation of this portion of Unit 19 would likely have national security impacts that outweigh the benefits of designating this low conservation value area. Further, as indicated previously, we also conclude that exclusion of all of Unit 19 from the critical habitat designations will not result in the extinction of either the CAM or MX DPS. Thus, even though we have separately determined to exclude all of Unit 19 based on economic impacts, we are also making an independent determination to exclude

the subset of this area that the DOD requested be excluded on the basis of national security impacts.

Final Critical Habitat Designations

We find that designation of critical habitat for these DPSs of humpback whales is both determinable and prudent. For the reasons discussed in our proposed rule and the foregoing sections of this final rule, we determine the critical habitat for each DPS on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and other relevant impacts, as follows:

For the endangered WNP DPS of humpback whales, we designate approximately 59,411 nmi² of marine habitat off the coast of Alaska as occupied critical habitat. The designation encompasses Units 2, 3, and 5 as shown in Figure 1. The specific areas included in the designation are seasonal feeding habitat that is occupied by the WNP DPS whales and contain the biological prey feature that is essential to their conservation and that we find may require special management considerations or protection. We have excluded 6 particular areas from this designation pursuant to ESA section 4(b)(2) based on our finding that the benefits of exclusion (*i.e.,* avoiding the probable economic impacts) outweigh the benefits of specifying these areas as part of the critical habitat, and we find on the basis of the best scientific and commercial data available that these exclusions will not result in the extinction of the species, because the excluded areas are not known to serve as important feeding habitat for this DPS. We are not designating any unoccupied areas for the WNP DPS.

For the endangered CAM DPS of humpback whales, we designate approximately 48,521 nmi² of marine habitat off the coasts of Washington, Oregon, and California as occupied critical habitat. The designation encompasses part of Unit 11 and Units 12–18 as shown in Figure 1. The areas being designated are seasonal feeding habitat that is occupied by the CAM DPS and contain the biological prey feature that is essential to their conservation and that may require special management considerations or protection. We exclude from the designation approximately 12,966 nmi² off the coast of southern California (*i.e.,* Unit 19) pursuant to ESA section 4(b)(2) based on our finding that the benefits of exclusion (*i.e.,* avoiding the probable economic and national security impacts) outweigh the benefits of specifying this area as part of the critical habitat, and we exclude the QRS and its associated 10-km buffer (which does not extend beyond 10-km into the OCNMS) off the coast of Washington based on our finding that the benefits of exclusion (*i.e.,* avoiding the probable national security impacts) outweigh the benefits of specifying this area as part of the critical habitat. We find on the basis of the best scientific and commercial data available that these exclusions will not result in the extinction of this DPS because these areas are small relative to the overall designation and current extinction risk for this DPS is largely driven by other threats (*e.g.,* ship strikes). The designation does not include areas within the footprint of the SNI INRMP (around Begg Rock) and of the NBVC Point Mugu INRMP (*i.e.,* waters around San Miguel and Prince Islands), as these areas are ineligible for designation as critical habitat under section 4(a)(3)(B)(i) of the ESA. We are not designating any unoccupied areas for the CAM DPS.

For the threated MX DPS of humpback whales, we designate 116,098 nmi² of marine habitat off the coasts of Alaska, Washington, Oregon, and California as occupied critical habitat. The designation encompasses Units 2, 3, 5, 8, part of Unit 11, and Units 12–18 as shown in Figure 1. The areas being designated are seasonal feeding areas that are occupied by the MX DPS and contain the biological prey feature that is essential to their conservation and that we find may require special management considerations or protection. We exclude from the designation 6 areas off the coast of Alaska based on our finding that the benefits of exclusion (*i.e.,* avoiding the probable economic impacts) outweigh the benefits of specifying these areas as part of the critical habitat, and we exclude one area off the coast of southern California based on our finding that the benefits of exclusion (*i.e.,* avoiding both the probable economic and national security impacts) outweigh the benefits of specifying this area as part of the critical habitat. We also exclude the QRS and its associated 10-km buffer (which does not extend beyond 10-km into the OCNMS) off the coast of Washington based on our finding that the benefits of exclusion (*i.e.,* avoiding the probable national security impacts) outweigh the benefits of specifying this area as part of the critical habitat. We find on the basis of the best scientific and commercial data available that these exclusions will not result in the extinction of this DPS given the large area included in the designation, the documented distribution of MX DPS whales, and the current status of this threatened DPS. The designation does not include areas within the footprint of the SNI INRMP (around Begg Rock) and of the NBVC Point Mugu INRMP (*i.e.,* waters around San Miguel and Prince Islands), as these areas are ineligible for designation as critical habitat under section 4(a)(3)(B)(i) of the ESA. We are not designating any unoccupied areas for the MX DPS.

None of the designations in this rule include manmade structures (*e.g.,* ferry docks, sea plane facilities) or the land on which they rest and that are in existences as of the effective date of this rule.

Effects of Critical Habitat Designations

Section 7(a)(2) of the ESA requires Federal agencies, including NMFS, to ensure that any action authorized, funded or carried out by the agency (agency action) is not likely to jeopardize the continued existence of any threatened or endangered species or destroy or adversely modify designated critical habitat. Federal agencies must consult with us on any proposed agency action that may affect the listed species or its critical habitat. During interagency consultation, we evaluate the agency action to determine whether the action may adversely affect listed species or critical habitat and, where there is likely to be an adverse effect, we issue our finding in a biological opinion. The potential effects of a proposed action may depend on, among other factors, the specific timing and location of the action relative to seasonal presence of essential features or seasonal use of critical habitat by the listed species for essential life history functions. While the requirement to consult on an action that may affect critical habitat applies regardless of the season, NMFS addresses the varying spatial and temporal considerations when evaluating the potential impacts of a proposed action during consultation using the best available scientific and commercial information. If we conclude in the biological opinion that the agency action would likely result in the destruction or adverse modification of critical habitat, we would also recommend any reasonable and prudent alternatives to the action that would avoid destruction or adverse modification.

Reasonable and prudent alternatives are defined in 50 CFR 402.02 as alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the

Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid the destruction or adverse modification of critical habitat. The Service may also provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

Regulations at 50 CFR 402.16 require Federal agencies that have retained discretionary involvement or control over an action, or where such discretionary involvement or control is authorized by law, to reinitiate consultation on previously reviewed actions in instances where, among other situations: (1) New information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (2) the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or (3) a new species is listed or critical habitat designated that may be affected by the identified action (50 CFR 402.16(a)(2)–(4)). Consequently, some Federal agencies may request reinitiation of consultation with NMFS on actions for which formal consultation has been completed, if those actions may affect designated critical habitat for the WNP, CAM, or MX DPSs of humpback whales.

Activities subject to the ESA section 7 consultation process include activities on Federal lands, as well as activities requiring a permit or other authorization from a Federal agency (*e.g.,* a section 10(a)(1)(B) permit from NMFS), or another Federal action, including funding (*e.g.,* Federal Emergency Management Agency funding). ESA section 7 consultation would not be required for Federal actions that would not affect listed species or critical habitat, and would not be required for actions on non-Federal and private lands that are not carried out, funded, or authorized by a Federal agency.

Activities That May Be Affected

ESA section 4(b)(8) requires, to the maximum extent practicable, in any final regulation to designate critical habitat, an evaluation and brief description of those activities (whether public or private) that may adversely modify such habitat or that may be affected by such designation. (The term ''destruction or adverse modification'' of critical habitat is defined in 50 CFR 402.02, and means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.) A wide variety of activities may affect the critical habitats and may be subject to the ESA section 7 consultation processes when carried out, funded, or authorized by a Federal agency. These include: (1) Federal fisheries, (2) oil and gas activities (including seismic surveys, and oil spill planning and response), (3) alternative energy development, (4) in-water construction (including dredging and offshore mining), (5) vessel traffic activities (largely, the establishment of the shipping lanes by the USCG, and maintenance and replacement of aids to navigation by the USCG), (6) aquaculture and hatcheries, (7) military activities, (8) LNG terminal activities, (9) space vehicle and missile launches, (10) water quality management and in-land activities (including pesticide registration, establishment of water quality standards, and Clean Water Act general permits), (11) U.S. Forest Service activities (related to timber and forest management), and (12) scientific research. Section 7 consultations must be based on the best scientific and commercial information available when they are undertaken, and outcomes are case-specific. Inclusion (or exclusion) from this list, therefore, does not predetermine the occurrence or outcome of any consultation.

Private or non-Federal entities may also be affected by the critical habitat designations if there is a Federal nexus in that, for example, a Federal permit is required, Federal funding is received, or the entity is involved in or receives benefits from a Federal project. These activities would need to be evaluated with respect to their potential to destroy or adversely modify humpback whale critical habitat.

The critical habitats for humpback whales do not include any manmade structures and the land on which they rest within the described boundaries that were in existence by the effective date of this rule. While these structures/areas would not be directly affected by designation, they may be affected if a Federal action associated with the structure/area (*e.g.,* a discharge permit from the Environmental Protection Agency) may impact the critical habitat.

For ongoing activities, these designations of critical habitat may trigger reinitiation of past consultations. Although we cannot predetermine the outcome of section 7 consultations, we do not anticipate at this time that the outcome of reinitiated consultations would likely require additional conservation measures, because effects to habitat and to humpback whale prey species would in most instances have been assessed in the original consultation. We are committed to working closely with other Federal agencies to conduct any reinitiated consultations in an efficient and streamlined manner to the maximum extent possible and consistent with our statutory and regulatory requirements.

References Cited

A complete list of all references cited in this proposed rule can be found on our website (*www.fisheries.noaa.gov/species/humpback-whale;* click on ''see regulatory actions''), and is available upon request from the NMFS Office of Protected Resources (see **FOR FURTHER INFORMATION CONTACT**).

Classifications

National Environmental Policy Act

We have determined that an environmental analysis as provided for under the National Environmental Policy Act of 1969 for critical habitat designations made pursuant to the ESA is not required. See *Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), *cert. denied,* 116 S. Ct. 698 (1996).

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, whenever an agency publishes a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). We have prepared a final regulatory flexibility analysis (FRFA), which is provided in chapter 5 of the FEA (IEc 2020). Responses to comments on this document are provided earlier in the preamble to the rule, and any necessary changes were made to the FRFA. Results of the FRFA are summarized below.

As discussed previously in this preamble and in our FRFA (see chapter 5 of IEc 2020), the designation of critical habitat is required under the ESA to the maximum extent prudent and determinable. This critical habitat rule does not directly apply to any particular entity, small or large. The rule will operate and have regulatory effect only in conjunction with ESA section 7(a)(2), which requires that Federal agencies ensure, in consultation with NMFS, that any action they authorize, fund, or carry out is not likely to jeopardize the

continued existence of listed species or destroy or adversely modify designated critical habitat. Consultations may result in economic impacts to Federal agencies and proponents of proposed actions (*e.g.,* permittees, applicants, grantees). Those economic impacts may be in the form of administrative costs of participating in a section 7 consultation and, if the consultation results in required measures to protect critical habitat, project modification costs. As discussed previously and as detailed in chapters 2 and 3 of the FEA, incremental impacts associated with this rulemaking that can be monetized are expected to be limited to administrative costs associated with section 7 consultations.

This rule does not duplicate or conflict with any other laws or regulations. However, the protection of listed species and designated critical habitat may overlap with other sections of the ESA. The protections afforded to threatened and endangered species and their habitat are described in sections 7, 9, and 10 of the ESA. This final determination to designate critical habitat requires Federal agencies to consult, pursuant to section 7 of the ESA, with NMFS on any activities the Federal agency funds, authorizes, or carries out, including permitting, approving, or funding non-Federal activities (*e.g.* approval of state water-quality standards by the EPA under the Clean Water Act) that may affect the critical habitat. The requirement to consult is to ensure that any Federal action authorized, funded, or carried out will not likely jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat. The incremental impacts contemplated in the FRFA are expected to result from the critical habitat designation and not from other Federal regulations.

During consultation under the ESA, there may be communication among NMFS, the Federal action agency, and a third party participant applying for Federal funding or permitting in an effort to minimize potential adverse impacts to the habitat or essential feature. Communication may include written letters, phone calls, and/or meetings. Project variables such as the type of consultation, the location of the activity, impacted essential features, and activity of concern, may in turn dictate the complexity of these interactions. Third party costs may include administrative work, such as cost of time and materials to prepare for letters, calls, or meetings. The cost of analyses related to the activity and associated reports may be included in these administrative costs. In addition, after the section 7 consultation process, as a requirement of the funding or permit received from the Federal action agency, entities may be required to monitor progress during the activity to ensure that impacts to the habitat and features have been minimized. The rule does not directly mandate ''reporting'' or ''record keeping'' within the meaning of the Paperwork Reduction Act (PRA). The rule does not impose record keeping or reporting requirements on small entities.

With the exception of in-water and coastal construction and aquaculture activities (which we discuss in the next paragraph), all other categories of Federal activities addressed in the FEA (*e.g.,* commercial fishing, oil and gas, alternative energy, aquaculture, LNG facilities, water quality management, and scientific research), are expected to result in negligible costs to third parties in related industries. For each of these other activities, one or fewer consultations are anticipated per year spread across all of the specific areas that were considered for designation as critical habitat. As a result, for each of these activities the annualized incremental cost that may be borne by small entities is estimated to be less than $1,400. The analysis thus focuses on the costs of consultations on in-water and coastal construction activities and aquaculture, which occur more frequently within the critical habitat areas.

As described in Chapter 3 of the FEA, approximately eight consultations per year are expected to focus on in-water and coastal construction activities. The majority of these (six per year) are concentrated within critical habitat Unit 10 in Alaska. As such, the analysis focused on the small in-water construction businesses and government jurisdictions in the region surrounding critical habitat Unit 10, which was ultimately excluded from the critical habitat designation. Additionally, the analysis estimates that 12 aquaculture consultations per year are distributed across the critical habitat units in Alaska, with six occurring in Unit 10, and six each occurring in southcentral (Units 6–9) and southwestern Alaska (Units 1–5), respectively. Because Unit 10 is excluded from the designation, we focus the discussion here on the aquaculture activities.

Small entities that may bear the impacts of this final rule include private businesses and small governmental jurisdictions. Relevant businesses in North American Industry Classification System (NAICS) most likely engaged in aquaculture activities include Shellfish Farming and Other Aquaculture. The FRFA identified 25 small government jurisdictions (*i.e.,* jurisdictions with populations of less than 50,000 people) adjacent to critical habitat units that may be involved in future consultations. However, nine of these areas—Juneau City and Borough, Sitka City and Borough, Haines Borough, Ketchikan Gateway Borough, Prince of Wales-Hyder Census Area, Skagway Municipality, Hoonah-Angoon Census Area, Wrangell City and Borough, and Petersburg Borough—are adjacent to the excluded Unit 10.

The FRFA estimates that up to 12 small aquaculture businesses per year may bear costs associated with participation in consultations regarding humpback whale critical habitat. The total annualized administrative costs that may be borne by these small entities engaged in aquaculture activities is $5,300 (discounted at seven percent), half of which would be incurred in Unit 10. This estimate represents the third-party applicant costs associated with 12 informal consultations. The Alaska Mariculture Development Plan states that sales across all aquatic farm operations totaled $1.23 million in 2016. These revenues were spread across 29 different operations, for an average annual revenue of $42,000 per aquatic farm. If the annualized administrative costs of consultation were spread across 12 unique businesses ($440 per business), the costs to each business would represent approximately one percent of average annual revenues. Given available data, the analysis finds there is potential for a substantial number of businesses to be significantly impacted by this rule if all areas under consideration were designated. However, as discussed in chapter 5 of the FEA, the estimate of annual revenues used in the analysis is highly uncertain and likely substantially understated. As a result, and given the exclusion of Unit 10 from the final designation, this outcome is unlikely.

The RFA, as amended by SBREFA, requires us to consider alternatives to the proposed regulation that will reduce the impacts to small entities. We considered two alternatives. First, we considered proposing to designate all areas meeting the ESA section 3 definition of critical habitat. However, following our consideration of probable national security, economic, and other relevant impacts of designating all the specific areas, we rejected this alternative because we elected to exclude multiple areas based on a determination that the benefits of

designating them were outweighed by the benefits of excluding them. A second alternative of designating a subset of the specific areas meeting statutory definition of critical habitat was considered and is the preferred alternative. As stated previously, under section 4(b)(2) of the ESA, we have the discretion to exclude a particular area from designation as critical habitat even though it meets the definition of ''critical habitat'' if the benefits of exclusion (*i.e.,* the impacts that would be avoided if an area were excluded from the designation) outweigh the benefits of designation (*i.e.,* the conservation benefits to the humpback whale if an area were designated), so long as exclusion of the area will not result in extinction of the species. Exclusion under section 4(b)(2) of the ESA of one or more of the areas considered for designation would reduce the total impacts of designation. This alternative—which is the approach taken in the final rule—results in a critical habitat designation that provides for the conservation of the species while reducing the economic, national security, and other relevant impacts on affected entities.

Coastal Zone Management Act

Under section 307(c)(1)(A) of the Coastal Zone Management Act (CZMA) (16 U.S.C. 1456(c)(1)(A)) and its implementing regulations, each Federal activity within or outside the coastal zone that has reasonably foreseeable effects on any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State coastal management programs. We have determined that the designation of critical habitat designation for the CAM and MX DPSs of humpback whales is consistent to the maximum extent practicable with the enforceable policies of the approved Coastal Zone Management Programs of Washington, Oregon, and California. This determination was submitted to the responsible agencies in the aforementioned states for review, and we subsequently received concurrence from each of the three state agencies.

By operation of Alaska State law, the federally approved Alaska Coastal Management Program expired on July 1, 2011, resulting in a withdrawal from participation in the CZMA's National Coastal Management Program (76 FR 39857, July 7, 2011). The CZMA Federal consistency provision, section 307, no longer applies in Alaska.

Paperwork Reduction Act

The purpose of the Paperwork Reduction Act is to minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, and other persons resulting from the collection of information by or for the Federal government. This rule does not contain any new or revised collection of information. This rule does not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

The designation of critical habitat does not impose an ''enforceable duty'' on state, local, tribal governments, or the private sector and therefore does not qualify as a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an ''enforceable duty'' upon non-Federal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.''

This rule will not produce a Federal mandate. The designation of critical habitat does not impose an enforceable or legally-binding duty on non-Federal government entities or private parties. The only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7 of the ESA. Non-Federal entities that receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, but the Federal agency has the legally binding duty to avoid destruction or adverse modification of critical habitat. We do not find that this rule will significantly or uniquely affect small governments because it is not likely to produce a Federal mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. In addition, the designation of critical habitat imposes no obligations on local, state or tribal governments. Therefore, a Small Government Agency Plan is not required.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and co-management agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments outlines the responsibilities of the Federal Government in matters affecting tribal interests. Section 161 of Public Law 108–199 (188 Stat. 452), as amended by section 518 of Public Law 108–447 (118 Stat. 3267), directs all Federal agencies to consult with Alaska Native corporations on the same basis as Indian tribes under E.O. 13175.

None of the critical habitats were identified as occurring on Indian lands. However, the critical habitats overlap with areas used by Indian tribes and Alaska Natives for subsistence, cultural, usual and accustomed fishing, or other purposes. The designations of critical habitat for humpback whales has the potential to affect tribal trust resources, particularly in relation to harvest of fish species that have been identified as important humpback whale prey (*e.g.,* sardine, anchovy, herring). Based on the findings of our analyses as presented in the Final Economic Analysis (IEc 2020) and the Final Section 4(b)(2) Report (NMFS 2020b), while it is possible that the critical habitat designations could result in recommendations for changes in Federal fisheries management, we consider this unlikely at this time given the existing requirement to consider the effect of harvesting prey on the listed humpback whales and given existing Federal fisheries management measures (*e.g.,* prohibitions on krill fishing). Therefore, based on the currently available information, including information received through the outreach described in the preamble, we do not anticipate impacts on tribal fisheries or subsistence harvest as a result of these critical habitat designations and therefore find that this rule will not have tribal implications. Should it be necessary to alter or reduce any tribal fisheries harvest in the future as a consequence of this rule, any reduction would occur in consultation with the affected tribes and consistent with existing Secretarial Orders.

Executive Order 12630, Takings

Under E.O. 12630, Federal agencies must consider the effects of their actions on constitutionally protected private

property rights and avoid unnecessary takings of property. A taking of property includes actions that result in physical invasion or occupancy of private property that substantially affect its value or use. In accordance with E.O. 12630, this rule does not have significant takings implications. The designation of critical habitat affects only Federal agency actions. Further, no areas of private property exist within the proposed critical habitat and therefore none would be affected by this action. Therefore, a takings implication assessment is not required.

Executive Order 12866, Regulatory Planning and Review

OMB has determined that this rule is significant for purposes of E.O. 12866 review. An economic analysis (the FEA, IEc 2020) and Final ESA Section 4(b)(2) Report (NMFS 2020b) have been prepared to support the exclusion process under section 4(b)(2) of the ESA and our consideration of alternatives to this rulemaking as required under E.O. 12866. To view these documents, see the **ADDRESSES** section above.

Based on the FEA, the total estimated present value of the quantifiable incremental impacts of the critical habitat designations at a 7 percent discount rate are approximately $640,000–$680,000 over the next 10 years (2020–2029) and $740,000–$780,000 at a 3 percent discount rate. Assuming a 7 percent discount rate on an annualized basis, the impacts are estimated to be $73,000–$78,000 per year or $84,000–$89,000 per year at a 3 percent discount rate. These total impacts include the additional administrative efforts necessary to consider critical habitat in section 7 consultations. Overall, economic impacts are expected to be small and to be largely associated with the administrative costs borne by Federal agencies.

Beyond the potential for critical habitat to trigger additional conservation efforts as part of section 7 consultations, critical habitat may indirectly affect conservation behaviors in ways that generate both opportunity costs and conservation benefits. For example, critical habitat provides notice to other Federal agencies of areas and features important to species conservation; provides information about the types of activities that may reduce the conservation value of the habitat; and may stimulate research, voluntary conservation actions, and outreach and education activities. To the extent that this information causes agencies, organizations, or individuals to change their behavior for the benefit of humpback whales, these changes would be beneficial to the whales and would be considered benefits of this rulemaking. These changes in behavior could also trigger opportunity costs, for example due to the time or money spent to reduce the risk of negatively affecting the species or its habitat. Insufficient data are available to monetize these impacts (see the FEA, IEc 2020).

Based on the FEA, the total estimated present value of the quantified incremental impacts of the critical habitat designation for the WNP DPS are approximately $186,000–$213,000 over the next 10 years. Assuming a 7 percent discount rate on an annualized basis, the impacts are estimated to be $21,200–$24,300 per year. These total impacts include the additional administrative efforts necessary to consider critical habitat in section 7 consultations. These impacts are also not additive with those associated with the MX DPS, as the areas designated for the WNP DPS are entirely overlapping with areas being designated for the MX DPS. Overall, economic impacts are expected to be small and to be largely associated with the administrative costs borne by Federal agencies. While there are expected beneficial economic impacts of designating critical habitat for the WNP DPS, insufficient data are available to monetize those impacts (see Analysis of the Benefits of Designation section).

Based on the FEA, the total estimated present value of the quantified incremental impacts of the critical habitat designation for the CAM DPS are approximately $416,000–$430,000 over the next 10 years. Assuming a 7 percent discount rate on an annualized basis, the impacts are estimated to be $47,500–$48,500 per year. These total impacts include the additional administrative efforts necessary to consider critical habitat in section 7 consultations. These impacts are also not additive with those associated with the MX DPS, as the areas designated for the CAM DPS are entirely overlapping with areas being designated for the MX DPS. Overall, economic impacts are expected to be small and to be largely associated with the administrative costs borne by Federal agencies. While there are expected beneficial economic impacts of designating critical habitat for the CAM DPS, insufficient data are available to monetize those impacts (see Analysis of the Benefits of Designation section).

Based on the FEA, the total estimated present value of the quantified incremental impacts of the critical habitat designation for the MX DPS are approximately $642,000–$683,000 over the next 10 years. Assuming a 7 percent discount rate on an annualized basis, the impacts are estimated to be $73,300–$77,400 per year. These total impacts include the additional administrative efforts necessary to consider critical habitat in section 7 consultations. Overall, economic impacts are expected to be small and to be largely associated with the administrative costs borne by Federal agencies. These impacts are also not additive with those associated with the WNP and CAM DPSs, as the areas designated for the MX DPS are almost entirely overlapping with areas being designated for another DPS. Because the designation for the MX DPS extends over all other areas being designated as critical habitat for the other two DPSs, the estimated economic impacts associated with the designation for the MX DPS represent the total estimated impacts across all DPSs. As with the other DPSs, there are expected beneficial economic impacts of designating critical habitat for the MX DPS; however, insufficient data are available to monetize those impacts (see Analysis of the Benefits of Designation section).

Executive Order 13132, Federalism

Executive Order 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations in which a regulation may preempt state law or impose substantial direct compliance costs on state and local governments (unless required by statute). Pursuant to E.O. 13132, we determined that this rule does not have significant federalism effects and that a federalism assessment is not required. The designation of critical habitat directly affects only the responsibilities of Federal agencies. As a result, this rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the order.

State or local governments may be indirectly affected by the critical habitat designations if they require Federal funds or formal approval or authorization from a Federal agency as a prerequisite to conducting an action. In these cases, the State or local government agency may participate in the section 7 consultation as a third party. One of the key conclusions of the economic impacts analysis is that the incremental impacts of the designations will likely be limited to additional administrative costs to NMFS, Federal agencies, and to third parties stemming from the need to consider impacts to

critical habitat as part of the forecasted section 7 consultations. Most of these costs are expected to be borne by Federal agencies. Therefore, the designation of critical habitat is also not expected to have substantial indirect impacts on State or local governments.

Executive Order 13211, Energy Supply, Distribution, and Use

E.O. 13211 requires agencies to prepare a Statement of Energy Effects when undertaking a significant energy action. Under E.O. 13211, a significant energy action means any action by an agency that is expected to lead to the promulgation of a final rule or regulation that is a significant regulatory action under E.O. 12866 and is likely to have a significant adverse effect on the supply, distribution, or use of energy. We have considered the potential impacts of this action on the supply, distribution, or use of energy and find that the designations of critical habitat for humpback whales are not likely to have impacts that exceed the thresholds identified in OMB's memorandum M–01–27, Guidance for Implementing E.O. 13211. Thus, these designations are unlikely to have a significant adverse effect within the meaning of the executive order. The energy impacts analysis is presented in chapter 5 of the FEA (IEc 2020).

List of Subjects

50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

50 CFR Part 224

Endangered and threatened species, Exports, Imports, Transportation.

50 CFR Part 226

Endangered and threatened species.

Dated: April 15, 2021.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, 50 CFR parts 223, 224, and 226 are amended as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531 1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.*; 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. In § 223.102, in the table in paragraph (e), revise the entry for ''Whale, humpback (Mexico DPS)'' under Marine Mammals to read as follows:

§ 223.102 Enumeration of threatened marine and anadromous species.

* * * * *

(e) * * *

Species [1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
Marine Mammals					
*	*	* * *	*	*	
Whale, humpback (Mexico DPS).	*Megaptera novaeangliae*	Humpback whales that breed or winter in the area of mainland Mexico and the Revillagigedo Islands, transit Baja California, or feed in the North Pacific Ocean, primarily off California-Oregon, northern Washington-southern British Columbia, northern and western Gulf of Alaska and East Bering Sea.	81 FR 62260, Sept. 8, 2016.	226.227	223.213
*	*	* * *	*	*	

[1] Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR 4722; February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612; November 20, 1991).

* * * * *

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

■ 3. The authority citation for part 224 continues to read as follows:

Authority: 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*

■ 4. In § 224.101, in the table in paragraph (h), revise the entries for ''Whale, humpback (Central America DPS)'' and ''Whale, humpback (Western North Pacific DPS)'' under Marine Mammals to read as follows:

§ 224.101 Enumeration of endangered marine and anadromous species.

* * * * *

(h) * * *

Species [1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
Marine Mammals					
*	*	* * *	*	*	
Whale, humpback (Central America DPS).	*Megaptera novaeangliae*	Humpback whales that breed in waters off Central America in the North Pacific Ocean and feed along the West Coast of the United States and southern British Columbia.	81 FR 62260, Sept. 8, 2016.	226.227	

Species [1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
Whale, humpback (Western North Pacific DPS).	*Megaptera novaeangliae*	Humpback whales that breed or winter in the area of Okinawa and the Philippines in the Kuroshio Current (as well as unknown breeding grounds in the Western North Pacific Ocean), transit the Ogasawara area, or feed in the North Pacific Ocean, primarily in the West Bering Sea and off the Russian coast and the Aleutian Islands.	81 FR 62260, Sept. 8, 2016.	226.227	
*	*	*	*	*	*	*

[1] Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR 4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612, November 20, 1991).

* * * * *

PART 226—DESIGNATED CRITICAL HABITAT

■ 5. The authority citation of part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

■ 6. Add § 226.227 to read as follows:

§ 226.227 Critical habitat for the Central America, Mexico, and Western North Pacific distinct population segments (DPSs) of humpback whales (*Megaptera novaeangliae*).

Critical habitat is designated for the Central America, Mexico, and Western North Pacific humpback whale DPSs as described in this section. The maps in paragraph (h) of this section, and as clarified by the textual descriptions in this section, are the definitive sources for determining the critical habitat boundaries.

(a) *List of states and counties.* Critical habitat is designated in waters off the coasts of the following states and counties for the listed humpback whale DPSs:

DPS	State-counties
(1) Central America	(i) WA—Clallam, Jefferson, Grays Harbor, Pacific. (ii) OR—Clatsop, Tillamook, Lincoln, Lane, Douglas, Coos, and Curry. (iii) CA—Del Norte, Humboldt, Mendocino, Sonoma, Marin, San Francisco, San Mateo, Santa Cruz, Monterey, San Luis Obispo, Santa Barbara, Ventura.
(2) Mexico	(i) AK—Lake and Peninsula, Aleutians East, Aleutian West, Kodiak Island, Kenai Peninsula, and Valdez-Cordova. (ii) WA—Clallam, Jefferson, Grays Harbor, Pacific. (iii) OR—Clatsop, Tillamook, Lincoln, Lane, Douglas, Coos, and Curry. (iv) CA—Del Norte, Humboldt, Mendocino, Sonoma, Marin, San Francisco, San Mateo, Santa Cruz, Monterey, San Luis Obispo, Santa Barbara, Ventura.
(3) Western North Pacific	AK—Lake and Peninsula, Aleutians East, Aleutian West, Kodiak Island, Kenai Peninsula.

(b) *Critical habitat boundaries for the Central America DPS.* Critical habitat for the Central America DPS includes all marine waters within the designated areas as shown by the maps in paragraph (h) of this section and those prepared and made available by the National Marine Fisheries Service (NMFS) pursuant to 50 CFR 424.18.

(1) *Washington.* The nearshore boundary is defined by the 50-meter (m) isobath, and the offshore boundary is defined by the 1,200-m isobath relative to mean lower low water (MLLW). Critical habitat also includes waters within the U.S. portion of the Strait of Juan de Fuca to an eastern boundary line at Angeles Point at 123° 33′ W.

(2) *Oregon.* The nearshore boundary is defined by the 50-m isobath. The offshore boundary is defined by the 1,200-m isobath relative to MLLW; except, in areas off Oregon south of 42° 10′, the offshore boundary is defined by the 2,000-m isobath.

(3) *California.* The nearshore boundary is defined by the 50-m isobath relative to MLLW except, from 38° 40′ N to 36° 00′ N, the nearshore boundary is defined by the 15-m isobath relative to MLLW; and from 36° 00′ N to 34° 30′ N, the nearshore boundary is defined by the 30-m isobath relative to MLLW. North of 40° 20′ N, the offshore boundary of the critical habitat is defined by a line corresponding to the 2,000-m isobath, and from 40° 20′ N to 38° 40′ N, the offshore boundary is defined by the 3,000-m isobath. From 38° 40′ N southward, the remaining areas have an offshore boundary defined by a line corresponding to the 3,700-m isobath.

(c) *Critical habitat boundaries for Mexico DPS.* Critical habitat for the Mexico DPS of humpback whales includes all marine waters within the designated areas as shown by the maps in paragraph (h) of this section and those prepared and made available by NMFS pursuant to 50 CFR 424.18.

(1) *Alaska.* The nearshore boundaries are generally defined by the 1-m isobath relative to MLLW. On the north side of the Aleutian Islands, the seaward boundary of the critical habitat is defined by a line extending from 55° 41 N, 162° 41′ W west to 55° 41′ N, 169° 30′ W, then southward through Samalga Pass to a boundary drawn along the 2,000-m isobath on the south side of the islands. This isobath forms the southern boundary of the critical habitat, eastward to 164° 25′ W. From this point, the 1,000-m isobath forms the offshore boundary, which extends eastward to 158° 39′ W. Critical habitat also includes the waters around Kodiak Island and the Barren Islands. The western boundary for this area runs southward along 154° 54′ W to the 1,000-m depth contour, and then extends eastward to a boundary at 150° 40′ W. The area also extends northward to the mouth of Cook Inlet where it is bounded by a line that extends from Cape Douglas across the inlet to Cape Adam. Critical habitat also includes the Prince William Sound area and associated waters defined by an eastern boundary at 148° 31′ W, a western boundary at 145° 27′ W, and a seaward boundary drawn along the 1,000-m isobath.

(2) *Washington.* The nearshore boundary is defined by the 50-m isobath, and the offshore boundary is defined by the 1,200-m isobath relative

to MLLW. Critical habitat also includes waters within the U.S. portion of the Strait of Juan de Fuca to an eastern boundary line at Angeles Point at 123° 33′ W.

(3) *Oregon.* The nearshore boundary is defined by the 50-m isobath. The offshore boundary is defined by the 1,200-m isobath relative to MLLW; except, in areas off Oregon south of 42° 10′, the offshore boundary is defined by the 2,000-m isobath.

(4) *California.* The nearshore boundary is defined by the 50-m isobath relative to MLLW except, from 38° 40′ N to 36° 00′ N, the nearshore boundary is defined by the 15-m isobath relative to MLLW; and from 36° 00′ N to 34° 30′ N, the nearshore boundary is defined by the 30-m isobath relative to MLLW. North of 40° 20′ N, the offshore boundary of the critical habitat is defined by a line corresponding to the 2,000-m isobath, and from 40° 20′ N to 38° 40′ N, the offshore boundary is defined by the 3,000-m isobath. From 38° 40′ N southward, the remaining areas have an offshore boundary defined by a line corresponding to the 3,700-m isobath.

(d) *Critical habitat boundaries for Western North Pacific DPS.* Critical habitat for the Western North Pacific DPS of humpback whales includes all marine waters within the designated areas as shown by the maps in paragraph (h) of this section and those prepared and made available by NMFS pursuant to 50 CFR 424.18.

(1) *Alaska.* The nearshore boundaries are generally defined by the 1-m isobath relative to MLLW. On the north side of the Aleutian Islands, the seaward boundary of the critical habitat is defined by a line extending due west from 55° 41′ N, 162° 41′ W to 55° 41′ N, 169° 30′ W, then southward through Samalga Pass to a boundary drawn along the 2,000-m isobath on the south side of the islands. This isobath forms the southern boundary of the critical habitat, eastward to 164° 25′ W. From this point, the 1,000-m isobath forms the offshore boundary, which extends eastward to 158° 39′ W. Critical habitat also includes the waters around Kodiak Island and the Barren Islands. The western boundary for this area runs southward along 154° 54′ W to the 1,000-m depth contour, and then extends eastward to a boundary at 150° 40′ W. The area also extends northward to the mouth of Cook Inlet where it is bounded by a line that extends from Cape Douglas across the inlet to Cape Adam.

(2) [Reserved]

(e) *Manmade structures.* Critical habitat does not include manmade structures (*e.g.,* ferry docks, sea plane facilities) and the land on which they rest within the critical habitat boundaries as described in paragraphs (b), (c), and (d) of this section and that were in existence as of May 21, 2021.

(f) *Essential features.* The following features were identified as essential to the conservation of the particular DPS.

(1) *Central America DPS.* Prey species, primarily euphausiids (*Thysanoessa, Euphausia, Nyctiphanes,* and *Nematoscelis*) and small pelagic schooling fishes, such as Pacific sardine (*Sardinops sagax*), northern anchovy (*Engraulis mordax*), and Pacific herring (*Clupea pallasii*), of sufficient quality, abundance, and accessibility within humpback whale feeding areas to support feeding and population growth.

(2) *Mexico DPS.* Prey species, primarily euphausiids (*Thysanoessa, Euphausia, Nyctiphanes,* and *Nematoscelis*) and small pelagic schooling fishes, such as Pacific sardine (*Sardinops sagax*), northern anchovy (*Engraulis mordax*), Pacific herring (*Clupea pallasii*), capelin (*Mallotus villosus*), juvenile walleye pollock (*Gadus chalcogrammus*), and Pacific sand lance (*Ammodytes personatus*) of sufficient quality, abundance, and accessibility within humpback whale feeding areas to support feeding and population growth.

(3) *Western North Pacific DPS.* Prey species, primarily euphausiids (*Thysanoessa and Euphuasia*) and small pelagic schooling fishes, such as Pacific herring (*Clupea pallasii*), capelin (*Mallotus villosus*), juvenile walleye pollock (*Gadus chalcogrammus),* and Pacific sand lance (*Ammodytes personatus*) of sufficient quality, abundance, and accessibility within humpback whale feeding areas to support feeding and population growth.

(g) *Sites owned or controlled by the Department of Defense.* Critical habitat does not include the following particular areas owned or controlled by the Department of Defense, or designated for its use, where they overlap with the areas described in paragraph (b) of this section:

(1) Pursuant to the Endangered Species Act (ESA) section 4(a)(3)(B), all areas subject to the Naval Base Ventura County, Point Mugu, CA, and the Naval Outlying Field, San Nicolas Island, CA, approved Integrated Natural Resource Management Plans (INRMPs); and

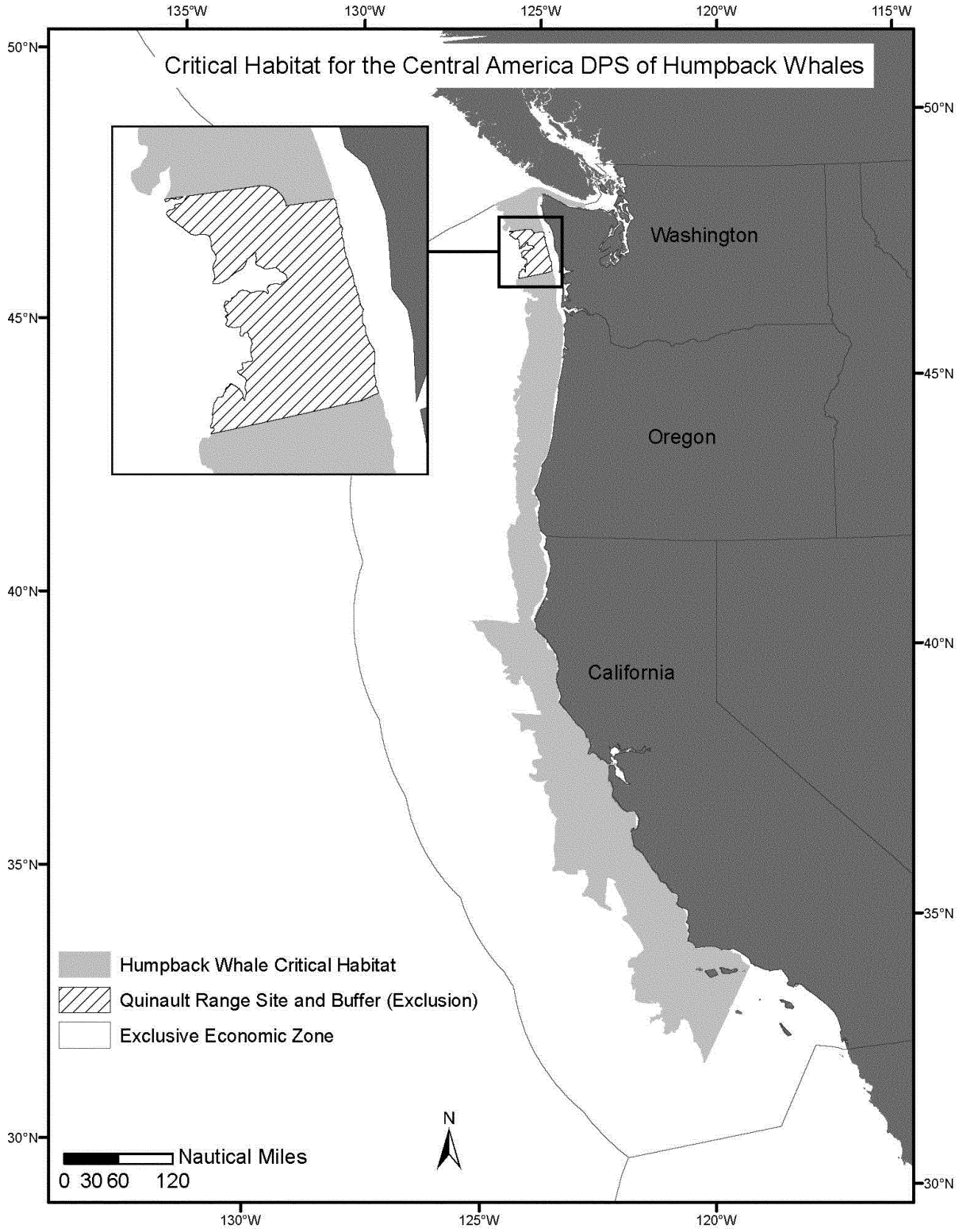
(2) Pursuant to ESA section 4(b)(2), the Quinault Range Site (QRS) with an additional 10-km buffer that extends along the southern edge of the QRS and along the northern edge of the QRS except in areas past 10-km into the Olympic Coast National Marine Sanctuary.

(h) *Maps of humpback whale critical habitat.* (1) Spatial data for these critical habitats and mapping tools are maintained on our website and are available for public use (*www.fisheries.noaa.gov/national/endangered-species-conservation/critical-habitat*).

(2) Overview map of critical habitat for the Central America DPS of humpback whales:

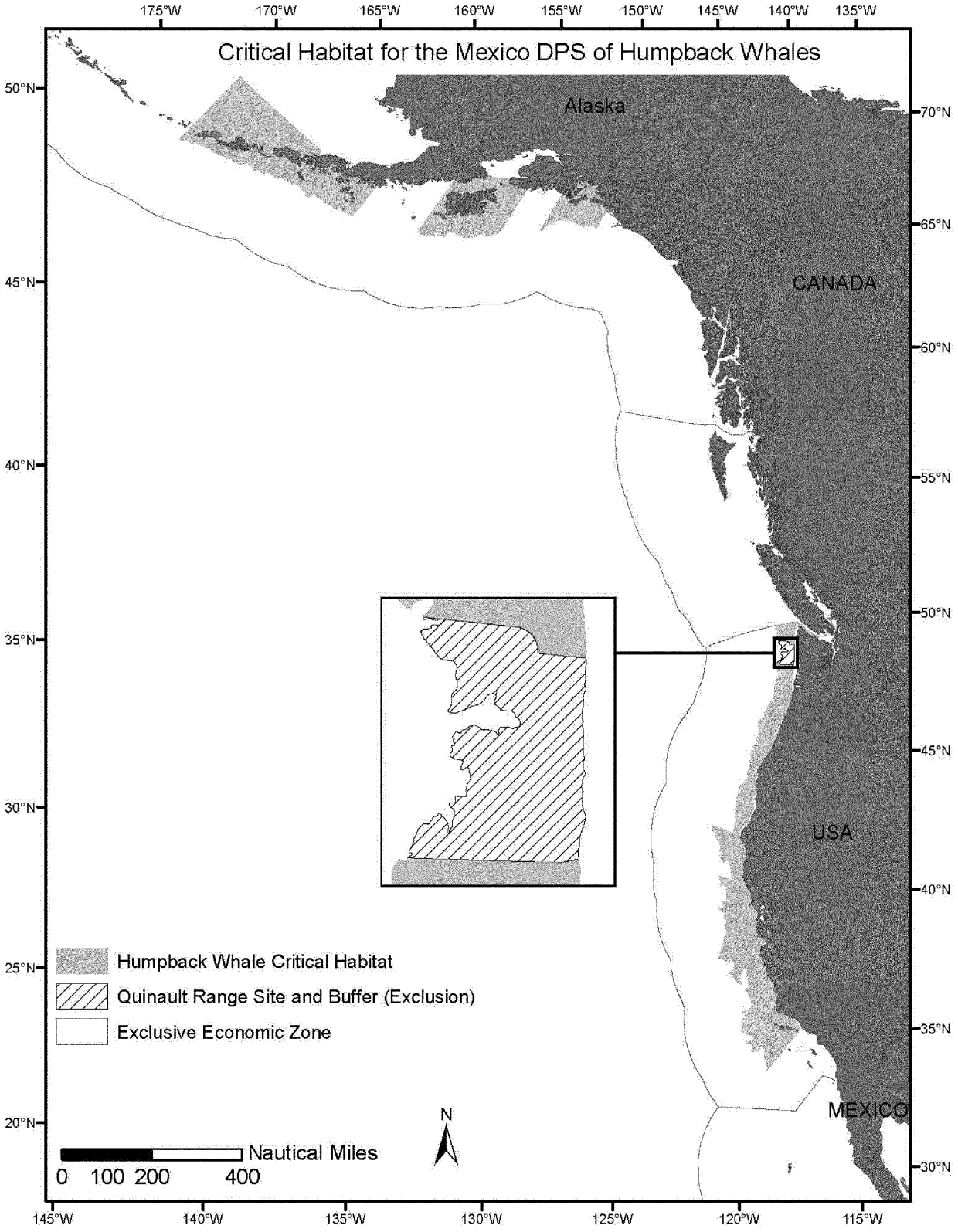
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Figure 1 to paragraph (h)(2)



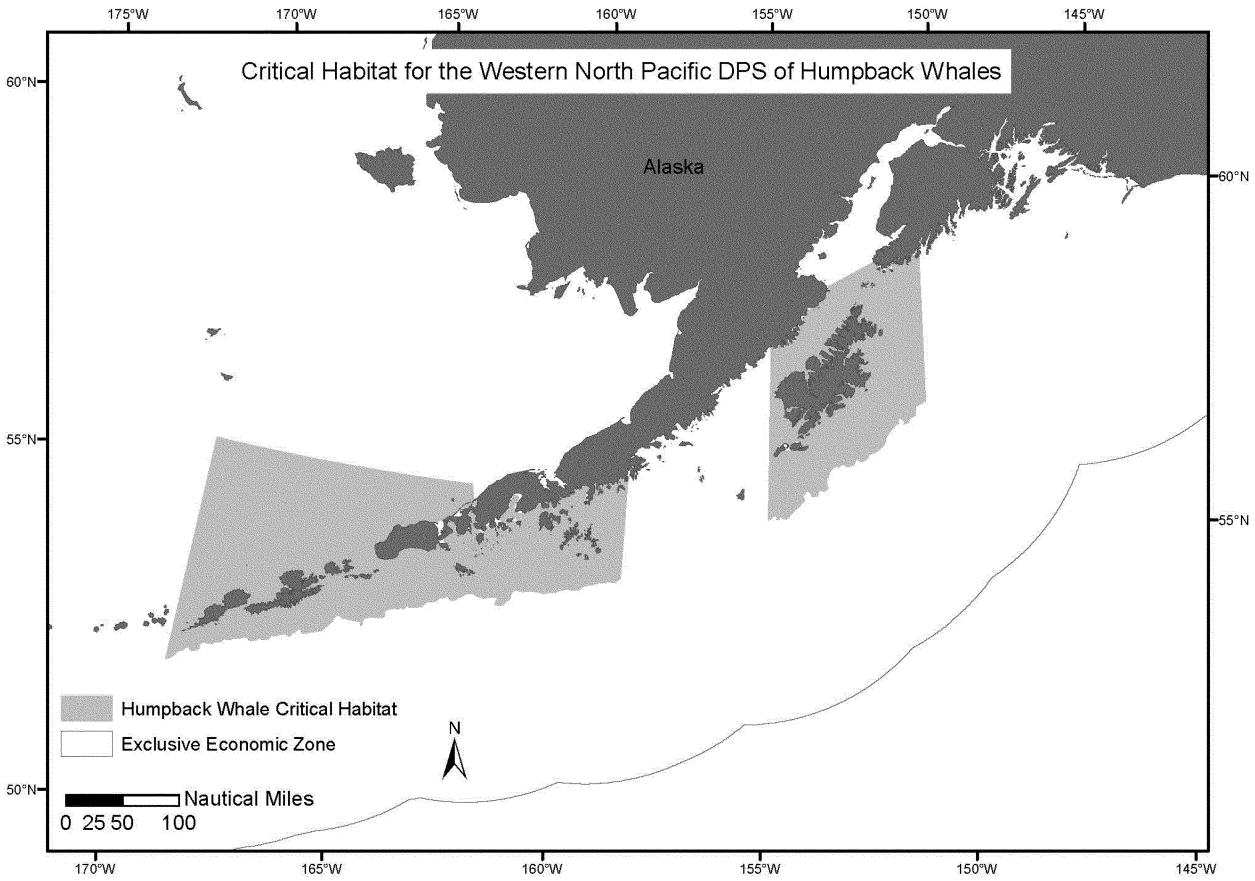
(3) Overview map of critical habitat for the Mexico DPS of humpback whales:

Figure 2 to paragraph (h)(3)



(4) Overview map of critical habitat for the Western North Pacific DPS of humpback whales:

Figure 3 to paragraph (h)(4)



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Federal Register

Vol. 86, No. 75

Wednesday, April 21, 2021

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Federal Register/Code of Federal Regulations	
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FEDERAL REGISTER PAGES AND DATE, APRIL

17055–17270 1
17271–17492 2
17493–17674 5
17675–17892 6
17893–18170 7
18171–18422 8
18423–18882 9
18883–19126 12
19127–19566 13
19567–19774 14
19775–20022 15
20023–20248 16
20249–20434 19
20435–20614 20
20615–21158 21

CFR PARTS AFFECTED DURING APRIL

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
10163 17493
10164 17495
10165 17675
10166 17677
10167 17679
10168 17681
10169 17683
10170 17685
10171 17689
10172 17893
10173 18167
10174 18169
10175 18171
10176 19567
10177 19775
10178 20023
10179 20025
10180 20027
10181 20615
10182 20617
10183 20619

Executive Orders:
14022 17895
14023 19569
14024 20249

Administrative Orders:
Notices:
Notice of April 1, 2021 17673

5 CFR

831 20435
842 20435
870 17271
875 17271
890 17271
894 17271
2641 17691

6 CFR

Proposed Rules:
37 20320

7 CFR

271 18423
273 18423
930 20253
1205 20255
1752 17274

Proposed Rules:
319 20037
932 18216
985 20038
986 19152
1220 19788

10 CFR

Proposed Rules:
37 18477
429 20075
430 ..... 18478, 18901, 20044, 20053, 20327
431 20075

12 CFR

262 18173
271 18423
360 18180
702 20258
Ch. X 17699
1003 17692
1005 17693
1010 17694
1022 17695
1024 17897
1026 ..... 17693, 17697, 17698
1238 18431

Proposed Rules:
209 19152
1006 20334
1024 18840

14 CFR

29 20264
39 ..... 17275, 17278, 17280, 17283, 17285, 17287, 17290, 17497, 17499, 17502, 17504, 17510, 17512, 17515, 17518, 17521, 17700, 17703, 17706, 17708, 17710, 17899, 17902, 17905, 18180, 18883, 18887, 19127, 19571, 19777, 20029, 20266, 20440, 20442, 20445, 20448, 20451, 20453, 20621
71 ..... 18432, 18890, 19129, 19780, 20269, 20270
97 ..... 17524, 17526, 20271, 20276
302 17292
399 17292
415 20625
417 20625
431 20625
435 20625

Proposed Rules:
39 ..... 17087, 17322, 17324, 17326, 17329, 17330, 17993, 17995, 17998, 18218, 18218, 18221, 18479, 18482, 18921, 19157, 19160, 20086, 20089, 20091, 20094, 20097, 20336, 20338, 20341, 20459, 20461, 20465
71 ..... 17333, 17553, 17754, 18484, 18485, 18487, 18488, 18490, 20100, 20468, 20469
73 17555

15 CFR

732 18433
736 18433
744 ..... 18433, 18437

16 CFR

1231.....17296
1640.....18440
Proposed Rules:
1640.....18491

17 CFR

1.....19324
4.....19324
41.....19324
190.....19324
240.....18595
242.....18595
249.....17528, 18595
274.....17528

18 CFR

35.....20627
401.....20628
440.....20628
Proposed Rules:
101.....17342

19 CFR

12.....17055
208.....18183, 19781
361.....17058

20 CFR

426.....20631
Proposed Rules:
655.....17343
656.....17343

21 CFR

1.....17059
207.....17061
510.....17061
520.....17061
522.....17061
524.....17061
528.....17061
558.....17061
821.....17065
862.....20278
866.....20278
880.....20278
884.....20278
892.....20278
1308.....20284

22 CFR

62.....20286
212.....18444, 20632

24 CFR

Proposed Rules:
5.....17346

25 CFR

Proposed Rules:
15.....19585
1187.....19162

26 CFR

Proposed Rules:
1.....19585

27 CFR

Proposed Rules:
9.....20102

29 CFR

4908.....17066
Proposed Rules:
1910.....18924

30 CFR

550.....19782
553.....19782
1206.....20032
1241.....20032

31 CFR

501.....18895
Proposed Rules:
1.....19790
1010.....17557

33 CFR

100 .....20035, 20632, 20633
117.....18445, 19574
165 .....17066, 17068, 18447, 18449, 18896, 19784, 20633, 20636
Proposed Rules:
96.....17090
100.....19169
110.....17090
117 .....17096, 18925, 18927, 18929, 20344
165 .....17565, 17755, 18224, 19171, 19599

34 CFR

Ch. III.....19135
Proposed Rules:
Ch. II.....17757, 20348, 20471

36 CFR

230.....17302
242.....17713

38 CFR

Proposed Rules:
3.....17098

39 CFR

113.....20287
3040.....18451
Proposed Rules:
3030.....17347, 19173
3050.....17100, 20351

40 CFR

52 .....17071, 18457, 20289
62.....17543
80.....17073
81.....19576
180 .....17545, 17907, 17910, 17914, 17917, 19145, 20290
258.....18185
1519.....19149
Proposed Rules:
52 .....17101, 17106, 17567, 17569, 17762, 19174, 19793, 20353, 20642, 20643, 20645
60.....19176
63.....19176
81 .....17762, 18227, 20353
141.....17571
152.....18232
258.....18237
271.....17572

42 CFR

Proposed Rules:
59.....19812
411.....19954
412.....19086, 19480
413.....19954
418.....19700
484.....19700
489.....19954

43 CFR

51.....19786
Proposed Rules:
30.....19585

44 CFR

64.....17078, 19580

46 CFR

Proposed Rules:
71.....17090
115.....17090
176.....17090
520.....18240

47 CFR

Ch. I.....18459, 18898
0.....17726
1 .....17920, 18124, 20294, 20456
2.....17920, 20456
9.....19582
25.....17311
27.....17920
54 .....17079, 18124, 19532
64.....17726
73.....18898, 20294
Proposed Rules:
0.....17575
1.....18000
2.....20111
15.....20111
25.....20111, 20647
27.....18000, 20111
54.....18932
64.....18934
73 .....17110, 17348, 18934, 20648
101.....20111

48 CFR

3001.....17312
3002.....17312
3003.....17312
3004.....17312
3005.....17312
3006.....17312
3007.....17312
3009.....17312
3010.....17312
3011.....17312
3012.....17312
3013.....17312
3015.....17312
3016.....17312
3017.....17312
3018.....17312
3019.....17312
3022.....17312
3023.....17312
3024.....17312
3025.....17312
3027.....17312
3028.....17312
3030.....17312
3031.....17312
3032.....17312
3033.....17312
3034.....17312
3035.....17312
3036.....17312
3037.....17312
3042.....17312
3046.....17312
3047.....17312
3052.....17312
3053.....17312
Proposed Rules:
32.....20648
352.....20648
532.....20359
1532.....19833
1552.....19833

49 CFR

1.....17292
5.....17292
7.....17292
106.....17292
389.....17292
553.....17292
601.....17292
1201.....17548
1333.....17735

50 CFR

17 .....17956, 18189, 20798
92.....20311
100.....17713
217.....17458, 18476
223.....21082
224.....21082
226.....21082
300.....20638
622 .....17080, 17318, 17751
648.....17081, 17551
679 .....17320, 17752, 18476, 20035
Proposed Rules:
17 .....18014, 19184, 19186, 19838
223.....19863, 20475
224.....19863
622.....20649
648.....17764
679.....19207

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List April 16, 2021

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