AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

FEDERAL REGISTER

Vol. 86 Tuesday

No. 232 December 7, 2021

Pages 69157–69574

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Publishing Office, is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.federalregister.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.govinfo.gov*, a service of the U.S. Government Publishing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 1, 1 (March 14, 1936) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Publishing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpocusthelp.com.*

The annual subscription price for the **Federal Register** paper edition is $860 plus postage, or $929, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $330, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Publishing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 86 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**

General online information **202–512–1530; 1–888–293–6498**

Single copies/back copies:

Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**

FEDERAL AGENCIES

Subscriptions:

Assistance with Federal agency subscriptions:

Email	*FRSubscriptions@nara.gov*
Phone	**202–741–6000**

The Federal Register Printing Savings Act of 2017 (Pub. L. 115-120) placed restrictions on distribution of official printed copies of the daily **Federal Register** to members of Congress and Federal offices. Under this Act, the Director of the Government Publishing Office may not provide printed copies of the daily **Federal Register** unless a Member or other Federal office requests a specific issue or a subscription to the print edition. For more information on how to subscribe use the following website link: *https://www.gpo.gov/frsubs.*

Printed on recycled paper.

Contents

Federal Register

Vol. 86, No. 232

Tuesday, December 7, 2021

Agricultural Marketing Service
RULES
Avocados Grown in South Florida:
Increased Assessment Rate, 69159–69161

Agriculture Department
See Agricultural Marketing Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 69219

Bureau of Consumer Financial Protection
NOTICES
Inquiry Into Big Tech Payment Platforms, 69232

Census Bureau
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Ask U.S. Panel, 69220–69221

Centers for Disease Control and Prevention
NOTICES
Requirements for Negative Pre-Departure Covid–19 Test Result or Documentation of Recovery from Covid–19 for All Airline or Other Aircraft Passengers Arriving into the United States from Any Foreign Country, 69256–69284

Children and Families Administration
PROPOSED RULES
Native American Programs, 69215–69217

Civil Rights Commission
NOTICES
Meetings:
Nevada Advisory Committee, 69219–69220

Coast Guard
NOTICES
Monitoring of Certain High Frequency, Voice-Distress Frequencies, 69286

Commerce Department
See Census Bureau
See Economic Development Administration
See International Trade Administration
See National Institute of Standards and Technology
See National Oceanic and Atmospheric Administration
See Patent and Trademark Office

Defense Department
See Engineers Corps
PROPOSED RULES
Federal Acquisition Regulations:
Minimizing the Risk of Climate Change in Federal Acquisitions, 69218

Drug Enforcement Administration
PROPOSED RULES
Schedules of Controlled Substances:
Placement of Methoxetamine in Schedule I, 69187–69194
Temporary Placement of Butonitazene, Etodesnitazene, Flunitazene, Metodesnitazene, Metonitazene, N-pyrrolidino etonitazene, and Protonitazene in Schedule I, 69182–69187

Economic Development Administration
NOTICES
Trade Adjustment Assistance; Determinations, 69221

Energy Department
See Energy Information Administration
See Federal Energy Regulatory Commission
PROPOSED RULES
Energy Conservation Program:
Test Procedure for Ceiling Fans, 69544–69574
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 69232–69233
Application to Amend Presidential Permit:
CHPE, LLC, 69233–69234

Energy Information Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 69234–69235

Engineers Corps
PROPOSED RULES
Revised Definition of Waters of the United States, 69372–69450

Environmental Protection Agency
RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
Michigan; Sulfur Dioxide Clean Data Determination for St. Clair, 69173–69178
PROPOSED RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
Indiana; ArcelorMittal Burns Harbor, 69198–69200
Washington; Yakima Regional Clean Air Agency, General Air Quality Regulations, 69200–69207
Wisconsin; Serious Plan Elements for the Wisconsin Portion of Chicago Nonattainment Area for the 2008 Ozone Standard, 69207–69210
Finding of Failure to Attain the Primary 2010 One-Hour Sulfur Dioxide Standard for the St. Bernard Parish, LA, Nonattainment Area, 69210–69215
Revised Definition of Waters of the United States, 69372–69450
NOTICES
Meetings:
Science Advisory Board Drinking Water Committee Augmented for the Contaminant Candidate List 5 Review Panel, 69241–69242
Pesticide Registration Maintenance Fee:
Requests to Voluntarily Cancel Certain Pesticide Registrations, 69247–69254
Proposed Consent Decree:
Clean Air Act Citizen Suit, 69240–69241

Re-Issuance of a General Permit to the National Science Foundation for the Ocean Disposal of Man-Made Ice Piers from Its Station at McMurdo Sound in Antarctica, 69242–69247

Export-Import Bank
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 69254

Federal Aviation Administration
RULES
Airworthiness Directives:
Airbus Helicopters Deutschland GmbH Helicopters, 69163–69165
Pacific Aerospace Limited Airplanes, 69161–69163, 69165–69167
Extension of the Prohibition Against Certain Flights in Specified Areas of the Sanaa Flight Information Region, 69167–69173
PROPOSED RULES
Airspace Designations and Reporting Points:
Hampton, GA, 69181–69182
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Certification of Airports, 69350–69351
Release from Federal Grant Assurance Obligations and Land Exchange:
San Bernardino International Airport, San Bernardino, San Bernardino County, CA, 69351–69352

Federal Election Commission
NOTICES
Meetings; Sunshine Act, 69254

Federal Energy Regulatory Commission
NOTICES
Combined Filings, 69237–69239
Filing:
Seavers, Dean L., 69240
Initial Market-Based Rate Filings Including Requests for Blanket Section 204 Authorizations:
Arlington Energy Center III, LLC, 69236–69237
NG Renewables Energy Marketing, LLC, 69235
Institution of Section 206 Proceeding and Refund Effective Date:
Basin Electric Power Cooperative, 69239
Request under Blanket Authorization:
Southern Star Central Gas Pipeline, Inc., 69235–69236

Federal Maritime Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 69254–69255

Federal Railroad Administration
NOTICES
Funding Opportunity:
Federal-State Partnership for State of Good Repair Program, 69352–69359
Petition for Extension of Waiver of Compliance, 69359–69360

Federal Reserve System
NOTICES
Change in Bank Control:
Acquisitions of Shares of a Bank or Bank Holding Company, 69255–69256
Formations of, Acquisitions by, and Mergers of Bank Holding Companies, 69256

Federal Retirement Thrift Investment Board
NOTICES
Meetings:
Board Meeting, 69256

Foreign Assets Control Office
NOTICES
Blocking or Unblocking of Persons and Properties, 69365–69369

General Services Administration
PROPOSED RULES
Federal Acquisition Regulations:
Minimizing the Risk of Climate Change in Federal Acquisitions, 69218

Health and Human Services Department
See Centers for Disease Control and Prevention
See Children and Families Administration
See Health Resources and Services Administration
See National Institutes of Health

Health Resources and Services Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Bureau of Health Workforce Performance Data Collection, 69284–69285

Homeland Security Department
See Coast Guard

Interior Department
See National Park Service
NOTICES
Environmental Assessments; Availability, etc.:
Mississippi Trustee Implementation Group Deepwater Horizon Oil Spill Draft Restoration Plan 3; Habitat Projects on Federally Managed Lands; Sea Turtles; Marine Mammals; Birds; and Provide and Enhance Recreational Opportunities, 69287–69288

International Trade Administration
NOTICES
Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Circular Welded Non-Alloy Steel Pipe from the Republic of Korea, 69225–69227
Forged Steel Fittings from the People's Republic of China, 69222–69225

International Trade Commission
NOTICES
Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Walk-Behind Snow Throwers from China, 69294–69295
Investigations; Determinations, Modifications, and Rulings, etc.:
Certain Integrated Circuits, Chipsets, and Electronic Devices, and Products Containing the Same, 69289–69290
Privacy Act; Systems of Records, 69290–69294

Justice Department
See Drug Enforcement Administration

NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
2022 Police Public Contact Survey, 69295–69296
Community Oriented Policing Services Extension Request Form, 69296
Proposed Consent Decree:
Clean Air Act, 69296–69297

Maritime Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Maritime Administration Annual Service Obligation Compliance Report, 69361
U.S. Merchant Marine Academy Candidate Application for Admission, 69363
Coastwise Endorsement Eligibility Determination for a Foreign-built Vessel:
2 AUSTINTATIOUS (Sail), 69362–69363
BRIE (Sail), 69364–69365
HOTEL CALIFORNIA (Motor), 69363–69364
LA VIE DASANTE (Sail), 69360–69361

National Aeronautics and Space Administration
PROPOSED RULES
Federal Acquisition Regulations:
Minimizing the Risk of Climate Change in Federal Acquisitions, 69218

National Credit Union Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 69297

National Institute of Standards and Technology
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Generic Clearance for Usability Data Collections, 69228

National Institutes of Health
NOTICES
Meetings:
Center for Scientific Review, 69285
National Institute on Alcohol Abuse and Alcoholism, 69285–69286
National Institute on Minority Health and Health Disparities, 69286

National Oceanic and Atmospheric Administration
RULES
Extension of Authorized Restricted Tow Times in Lieu of Turtle Excluder Devices for an Additional 30 Days by Shrimp Trawlers in Specific Louisiana Waters, 69178–69180

National Park Service
NOTICES
National Register of Historic Places:
Notification of Pending Nominations and Related Actions, 69288–69289

National Science Foundation
NOTICES
Meetings; Sunshine Act, 69297

Neighborhood Reinvestment Corporation
NOTICES
Meetings; Sunshine Act, 69297–69298

Patent and Trademark Office
PROPOSED RULES
Date of Receipt of Electronic Submissions of Patent Correspondence, 69195–69198
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Patent Review and Derivation Proceedings, 69228–69232

Postal Regulatory Commission
NOTICES
New Postal Product, 69298–69299

Presidential Documents
PROCLAMATIONS
Special Observances:
International Day of Persons With Disabilities (Proc. 10318), 69157–69158

Securities and Exchange Commission
NOTICES
Self-Regulatory Organizations; Proposed Rule Changes:
Cboe BYX Exchange, Inc., 69335–69337
Cboe BZX Exchange, Inc., 69319–69335
Cboe EDGA Exchange, Inc., 69299–69301
Cboe EDGX Exchange, Inc, 69306–69308
Financial Industry Regulatory Authority, Inc., 69337–69349
ICE Clear Credit, LLC, 69308–69311
Long-Term Stock Exchange, Inc., 69311–69313
MIAX Emerald, LLC, 69301–69306
NYSE American, LLC, 69316–69319
NYSE Arca, Inc., 69313–69316

Small Business Administration
NOTICES
Major Disaster Declaration:
Connecticut, 69349
New York, 69349–69350

Trade Representative, Office of United States
NOTICES
Conforming Amendment to Product Exclusion and Extensions:
China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 69350

Transportation Department
See Federal Aviation Administration
See Federal Railroad Administration
See Maritime Administration
PROPOSED RULES
Streamline and Update the Department of Transportation Acquisition Regulation, 69452–69542

Treasury Department
See Foreign Assets Control Office

Separate Parts In This Issue

Part II
Defense Department, Engineers Corps, 69372–69450

Environmental Protection Agency, 69372–69450

Part III
Transportation Department, 69452–69542

Part IV
Energy Department, 69544–69574

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.

To subscribe to the Federal Register Table of Contents electronic mailing list, go to https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

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:

10318 69157

7 CFR

915 69159

10 CFR

Proposed Rules:

429 69544
430 69544

14 CFR

39 (3 documents) 69161, 69163, 69165
91 69167

Proposed Rules:

71 69181

21 CFR

Proposed Rules:

1308 (2 documents) 69182, 69187

33 CFR

Proposed Rules:

328 69372

37 CFR

Proposed Rules:

1 69195

40 CFR

52 69173

Proposed Rules:

52 (4 documents) 69198, 69200, 69207, 69210
120 69372

45 CFR

Proposed Rules:

1336 69215

48 CFR

Proposed Rules:

Ch. 1 69218
Ch. 12 69452

50 CFR

223 69178

Federal Register
Vol. 86, No. 232
Tuesday, December 7, 2021

Presidential Documents

Title 3—

The President

Proclamation 10318 of December 2, 2021

International Day of Persons With Disabilities, 2021

By the President of the United States of America

A Proclamation

Thirty-one years ago, the bipartisan passage of the Americans with Disabilities Act (ADA) enshrined our commitment to building a better Nation for all of us. In the years since, we have made profound progress to advance the rights, opportunities, full participation, and economic self-sufficiency of people with disabilities—both here at home and in nations around the world. On the International Day of Persons with Disabilities, we reaffirm the full promise of dignity, equity, and respect due to all disabled people and recognize the work that still remains to fully deliver on that promise.

I was proud to co-sponsor the ADA as a member of the United States Senate. Today, that law remains a vital source of opportunity and dignity—a defense against discrimination and a path to independence. My Administration continues to build on the legacy of the ADA here at home and lead efforts for disability-inclusive democracies around the world. Earlier this year, I signed Executive Orders to recruit and retain a workforce that truly reflects the American people—including Americans with disabilities—and to help ensure that people with disabilities can exercise their sacred right to vote on a full and equal basis.

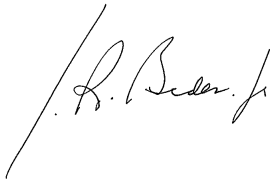
We know that—both here in America and around the world—women and girls with disabilities are disproportionately impacted by gender inequality. That is why my Administration developed the first-ever National Strategy on Gender Equity and Equality, which aims to address discrimination rooted in the nexus of both gender and disability. The American Rescue Plan included landmark support for people with disabilities—including historic funding to expand home- and community-based services under Medicaid, which is enabling more Americans than ever to live safely and independently in their own homes. My Administration's Build Back Better plan will further that commitment by making the most transformative investment in access to home care in 40 years—providing life-changing support to people with disabilities and the dedicated workers who help care for them.

To uphold and advance the human rights of people with disabilities worldwide, I reestablished the role of Special Advisor on International Disability Rights at the Department of State. My Administration will continue to take domestic and international actions to make democracy more accessible around the world. The Summit for Democracy on December 9–10 will affirm that a government of, by, and for the people—including those with disabilities—remains humanity's most enduring means to advance peace, prosperity, and security.

Today and every day, we reaffirm our commitment to ensuring dignity, equity, and respect for all people with disabilities. As we continue to build back better and address the challenges of the 21st century, we will ensure that we deal everybody in and bring everyone along.

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 December 3, 2021, as International Day of Persons with Disabilities. I call on all Americans to observe this day with appropriate ceremonies, activities, and programs.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of December, 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-sixth.



[FR Doc. 2021–26588
Filed 12–6–21; 8:45 am]
Billing code 3395–F2–P

Rules and Regulations

Federal Register
Vol. 86, No. 232
Tuesday, December 7, 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 AGRICULTURE

Agricultural Marketing Service

7 CFR Part 915

[Doc. No. AMS–SC–21–0040; SC21–915–1 FR]

Avocados Grown in South Florida; Increased Assessment Rate

AGENCY: Agricultural Marketing Service (AMS), Department of Agriculture (USDA).

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the Avocado Administrative Committee to increase the assessment rate established for the 2021–22 and subsequent fiscal years. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective January 6, 2022.

FOR FURTHER INFORMATION CONTACT: Abigail Campos, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324–3375, Fax: (863) 291–8614, or Email: *Abigail.Campos@usda.gov* or *Christian.Nissen@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, or Email: *Richard.Lower@usda.gov.*

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Agreement No. 121 and Marketing Order No. 915, both as amended (7 CFR part 915), regulating the handling of avocados grown in south Florida. Part 915, (referred to as ''the Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Avocado Administrative Committee (Committee) locally administers the Order and is comprised of growers and handlers operating within the area of production, and a public member.

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866 and 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

This rule has been reviewed under Executive Order 13175—Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have tribal implications. AMS has determined this rule is unlikely to have substantial direct effects 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.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in effect, Florida avocado handlers are subject to assessments. Funds to administer the Order are derived from such assessments. It is intended that the assessment rate be applicable to all assessable Florida avocados for the 2021–22 fiscal year, and continue unless amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule increases the assessment rate, established for the Committee for the 2021–22 and subsequent fiscal years, from $0.35 to $0.45 per 55-pound bushel container of avocados.

The Order authorizes the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. Nine of the ten members of the Committee are producers and handlers of Florida avocados. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are able to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting and all directly affected persons have an opportunity to participate and provide input.

For the 2016–17 and subsequent fiscal years, the Committee recommended, and USDA approved, an assessment rate that would continue in effect from fiscal year to fiscal year unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on April 14, 2021, and recommended 2021–22 expenditures of $348,484 and an assessment rate of $0.45 per 55-pound bushel container of avocados. In comparison, the previous fiscal year's budgeted expenditures were $280,484. The assessment rate of $0.45 is $0.10 higher than the rate currently in effect. During the last few fiscal years, the Committee has not funded research projects. However, the laurel wilt disease continues to challenge the avocado industry. The Committee

discussed the need for research funding and added $80,000 to its proposed budget for this research and recommended increasing the assessment rate to cover the additional expense. At the current assessment rate, assessment income would equal only $280,000, an amount insufficient to cover the Committee's anticipated expenditures of $348,484. By increasing the assessment rate by $0.10, assessment income will be $360,000. This amount should provide sufficient funds to meet 2021–2022 anticipated expenses.

Major expenditures recommended by the Committee for the 2021–22 fiscal year include $116,164 for salaries, $80,000 for research, and $53,350 for employee benefits. Budgeted expenses for these items in 2020–21 were $116,164, $0, and $53,350, respectively.

The assessment rate recommended by the Committee was derived by reviewing anticipated expenses, expected shipments of Florida avocados, and fiscal the level of funds in reserve. Avocado shipments for the year are estimated at 800,000 55-pound bushel containers, which, as mentioned before, should provide $360,000 in assessment income (80,000 containers × $0.45). Income derived from handler assessments at the new rate, along with interest income, should be adequate to cover budgeted expenses. Funds in the reserve (currently about $250,000) will be kept within the maximum permitted by the Order (approximately three fiscal years' expenses as authorized in § 915.42).

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each fiscal year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's 2021–22 budget and those for subsequent fiscal years will be reviewed and, as appropriate, approved by USDA.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 325 producers of Florida avocados in the production area and 25 handlers subject to regulation under the Order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts less than $1,000,000, and small agricultural service firms are defined as those whose annual receipts are less than $30,000,000 (13 CFR 121.201).

According to the National Agricultural Statistical Service (NASS), the average grower price paid for Florida avocados during the 2020–21 fiscal year was $21.97 per 55-pound bushel. Utilized production was equivalent to 624,364 55-pound bushels for a total value of approximately $13,718,830. Dividing the crop value by the estimated number of producers (325) yields an estimated average receipt per producer of $42,212, so the majority of producers will have annual receipts of less than $1,000,000.

USDA Market News reported April 2021 terminal market prices for green skinned avocados were about $36.43 per 24-pound container. Using this price and the total utilization, the total 2020–21 handler crop value is estimated at $52.1 million. Dividing this figure by the number of handlers (25) yields an estimated average annual handler receipts of over $2 million, which is below the SBA threshold for small agricultural service firms. Thus, the majority of Florida avocado producers and handlers are classified as small entities.

This rule increases the assessment rate established for the Committee and collected from handlers for the 2021–22 and subsequent fiscal years from $0.35 to $0.45 per 55-pound bushel container of avocados. The Committee recommended 2021–22 expenditures of $348,484 and an assessment rate of $0.45 per 55-pound bushel container. The assessment rate of $0.45 is $0.10 higher than the previous rate. The quantity of assessable avocados for the 2021–22 season is estimated at 800,000 55-pound bushel containers. Thus, the $0.45 rate will provide $360,000 in assessment income and be adequate to meet this year's expenses.

Major expenditures recommended by the Committee for the 2021–22 fiscal year include $116,164 for salaries, $80,000 for research, and $53,350 for employee benefits. Budgeted expenses for these items in 2020–21 were $116,164, $0, and $53,350, respectively.

In recent years, the Committee did not fund any research. However, Committee members believe further research is needed to address laurel wilt disease and voted to commit $80,000 to research in the coming fiscal year. At the current assessment rate and with the 2021–22 crop estimated to be 800,000 55-pound bushel containers, assessment income would equal only $280,000, an amount insufficient to cover the Committee's anticipated expenditures of $348,484. By increasing the assessment rate by $0.10, assessment income would be approximately $360,000. This amount will provide sufficient funds to meet 2021–22 anticipated expenses. Consequently, the Committee recommended increasing the assessment rate.

Prior to arriving at this budget and assessment rate, the Committee considered information from various sources, including its Research Subcommittee. The Committee discussed alternative expenditure levels based upon the relative value of various activities to the south Florida avocado industry. The Committee ultimately determined that 2021–22 expenditures of $348,484, including the additional funds for research, were appropriate, and the recommended assessment rate, along with interest income, should generate sufficient revenue to meet its expenses.

A review of historical information and preliminary information pertaining to the upcoming season indicates that the grower price for the 2021–22 season should be around $20–25 per 55-pound bushel container of avocados. Therefore, the estimated assessment revenue for the 2021–22 fiscal year as a percentage of total grower revenue would be between 1.8 and 2.25 percent.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Additionally, these costs will be offset

by the benefits derived by the operation of the Order.

The Committee's meeting was widely publicized throughout the Florida avocado industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the April 14, 2021, meeting was a public meeting, and all entities, both large and small, were able to express views on this issue.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581–0189 Fruit Crops. No changes in those requirements are necessary as a result of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This rule imposes no additional reporting or recordkeeping requirements on either small or large Florida avocado handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

A proposed rule concerning this action was published in the **Federal Register** on August 24, 2021 (86 FR 47248). Copies of the proposed rule were also mailed or sent via email to all Florida avocado handlers. The proposal was made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period ending September 23, 2021, was provided for interested persons to respond to the proposal.

During the comment period, one comment was received in response to the proposal. The comment received did not address the merits of this rule. Accordingly, no changes will be made to the rule as proposed, based on the comment received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *https://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 915

Avocados, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 915 is amended as follows:

PART 915—AVOCADOS GROWN IN SOUTH FLORIDA

■ 1. The authority citation for 7 CFR part 915 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 915.235 is revised to read as follows:

§ 915.235 Assessment rate.

On and after April 1, 2021, an assessment rate of $0.45 per 55-pound container or equivalent is established for avocados grown in South Florida.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2021–26494 Filed 12–6–21; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0711; Project Identifier 2019–CE–024–AD; Amendment 39–21814; AD 2021–23–16]

RIN 2120–AA64

Airworthiness Directives; Pacific Aerospace Limited Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Pacific Aerospace Limited Model 750XL airplanes. This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI identifies the unsafe condition as chafing of the engine fuel feed line hoses. This AD requires inspecting the engine fuel feed line hoses and the electrical wiring and rerouting all fuel lines. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 11, 2022.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 11, 2022.

ADDRESSES: For service information identified in this final rule, contact the Civil Aviation Authority of New Zealand, Level 15, Asteron Centre, 55 Featherston Street, Wellington 6011; phone: +64 4 560 9400; fax: +64 4 569 2024; email: *info@caa.govt.nz.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (816) 329–4148. It is also available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0711.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0711; 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, the MCAI, 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: Mike Kiesov, Aviation Safety Engineer, General Aviation & Rotorcraft Section, International Validation Branch, FAA, 901 Locust, Room 301, Kansas City, MO 64106; phone: (816) 329–4144; fax: (816) 329–4090; email: *mike.kiesov@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain serial-numbered Pacific Aerospace Limited Model 750XL airplanes fitted with an air conditioner and/or standby alternator. The NPRM published in the **Federal Register** on August 27, 2021 (86 FR 48086). The NPRM was prompted by MCAI originated by the Civil Aviation Authority (CAA), which is the aviation

authority for New Zealand. The CAA of New Zealand has issued AD DCA/750XL/37, effective April 25, 2019 (referred to after this as ''the MCAI''), to correct an unsafe condition for certain Pacific Aerospace Limited Model 750XL airplanes. The MCAI states:

DCA/750XL/37 is prompted by a review of the installation of the engine fuel lines and the electrical installation forward of the engine firewall on aircraft fitted with an air conditioner and/or a standby alternator, including those aircraft configured for the installation of an air conditioner and/or a standby alternator. It was found that the engine fuel feed lines hoses could possibly chafe against the adjacent electrical wiring and the ignition exciter, which could result in a fuel leak and possible fire. The [CAA] AD is issued to introduce the corrective actions in Pacific Aerospace Mandatory Service Bulletin (MSB) PACSB/XL/113 issue 2, dated 8 March 2019.

You may examine the MCAI in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0711.

Discussion of Final Airworthiness Directive

Comments

The FAA received a comment from an individual who supported the NPRM without change.

Conclusion

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI and service information referenced above. The FAA reviewed the relevant data, considered any comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. This AD is adopted as proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Pacific Aerospace Mandatory Service Bulletin PACSB/XL/113, Issue 2, dated March 8, 2019. The service information contains procedures for inspecting the engine fuel feed line hoses and the electrical wiring for chafing or damage, rerouting all fuel lines and the fuel transducer and pressure switch wiring (including installing P clips), and inspecting the fuel hose for chafing and replacing chafed fire sleeves or fuel hoses if necessary. 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 **ADDRESSES**.

Differences Between This AD and the MCAI

The MCAI requires an inspection at the next 150 hour maintenance inspection or within the next 50 hours time-in-service (TIS), whichever occurs later, while this AD requires those actions within 50 hours TIS or at the next annual inspection after the effective date of this AD, whichever occurs later. If there is no chafing and damage found during the inspection, the MCAI requires certain follow-on actions at the next 300 hour maintenance inspection or within the next 50 hours TIS, whichever is later. This AD requires those actions within 50 hours TIS or at the next annual inspection, whichever occurs later, because there is no regulatory requirement for operators in the U.S. to have 150-hour or 300-hour maintenance inspections.

Costs of Compliance

The FAA estimates that this AD affects 23 airplanes of U.S. registry. The FAA also estimates that it will take about 5 work-hours per airplane and require parts costing $20 per airplane to comply with the inspection and re-routing that are required by this AD. The average labor rate is $85 per work-hour.

Based on these figures, the FAA estimates the inspection and re-routing cost of this AD on U.S. operators to be $10,235, or $445 per airplane.

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected operators.

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

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.

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 adding the following new airworthiness directive:

2021–23–16 Pacific Aerospace Limited: Amendment 39–21814; Docket No. FAA–2021–0711; Project Identifier 2019–CE–024–AD.

(a) Effective Date

This airworthiness directive (AD) is effective January 11, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Pacific Aerospace Limited Model 750XL airplanes, serial numbers 101 through 215 inclusive, 220, 8001, and 8002, certificated in any category, that are fitted with an air conditioner and/or a standby alternator, including airplanes configured for the installation of an air conditioner and/or a standby alternator, as

shown in Figure 1 of Part A in Pacific Aerospace Mandatory Service Bulletin PACSB/XL/113, Issue 2, dated March 8, 2019 (MSB PACSB/XL/113, Issue 2).

(d) Subject

Joint Aircraft System Component (JASC) Code 2820, Aircraft Fuel Distribution, and 2497, Electrical Power System Wiring.

(e) Unsafe Condition

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as chafing of the engine fuel feed line hoses. The FAA is issuing this AD to prevent chafing of the engine fuel feed line hoses with electrical wiring and the ignition exciter located forward of the engine firewall. The unsafe condition, if not addressed, could result in a fuel leak and fire.

(f) Compliance

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

(g) Required Actions

Within 50 hours time-in-service (TIS) or at the next annual inspection after the effective date of this AD, whichever occurs later, inspect the engine fuel feed line hoses and the electrical wiring for chafing and damage in accordance with the Accomplishment Instructions, Part A steps (3) and (4), in MSB PACSB/XL/113, Issue 2.

(1) If there is any chafing or damage that penetrates the orange outer covering of the fuel line fire sleeve or if there is any chafed or damaged electrical wiring, before further flight, inspect the fuel hose for chafing, replace any chafed fire sleeve or fuel hose, and reroute all fuel lines in accordance with the Accomplishment Instructions, Part B, in MSB PACSB/XL/113, Issue 2.

(2) If there are no chafed or damaged engine fuel feed line hoses and no chafed or damaged electrical wiring, within 50 hours TIS or at the next annual inspection, whichever occurs later, reroute all fuel lines in accordance with the Accomplishment Instructions, Part B, in MSB PACSB/XL/113, Issue 2.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, International Validation Branch, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (i)(1) of this AD or email: *9-AVS-AIR-730-AMOC@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(i) Related Information

(1) For more information about this AD, contact Mike Kiesov, Aviation Safety Engineer, General Aviation & Rotorcraft Section, International Validation Branch, FAA, 901 Locust, Room 301, Kansas City, MO 64106; phone: (816) 329–4144; fax: (816) 329–4090; email: *mike.kiesov@faa.gov.*

(2) Refer to Civil Aviation Authority (CAA) of New Zealand AD DCA/750XL/37, effective April 25, 2019, for more information. You may examine the CAA AD in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0711.

(j) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference 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 the AD specifies otherwise.

(i) Pacific Aerospace Mandatory Service Bulletin PACSB/XL/113, Issue 2, dated March 8, 2019.

(ii) [Reserved]

(3) For service information identified in this AD, contact the CAA of New Zealand, Level 15, Asteron Centre, 55 Featherston Street, Wellington 6011; phone: +64 4 560 9400; fax: +64 4 569 2024; email: *info@caa.govt.nz.*

(4) You may view this service information at FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

(5) 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: *fr.inspection@nara.gov,* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on November 2, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–26496 Filed 12–6–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0779; Project Identifier MCAI–2020–01505–R; Amendment 39–21817; AD 2021–23–18]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters Deutschland GmbH Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus Helicopters Deutschland GmbH Model MBB–BK 117 D–2 helicopters. This AD was prompted by a report of chafing marks on a wiring harness near the locking washer of the lateral control rod. This AD requires an inspection of the wiring harness and the routing of the wiring harness and corrective actions if necessary, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 11, 2022.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 11, 2022.

ADDRESSES: For EASA material incorporated by reference (IBR) in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu;* internet: *www.easa.europa.eu.* You may find the EASA material on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110. It is incorporated by reference is also available in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0779.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0779; 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, the European Union Aviation Safety Agency (EASA) AD, 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: Jacob Fitch, Aerospace Engineer, COS Program Management Section, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; phone: (817) 222–4130; email: *jacob.fitch@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0246, dated November 10, 2020 (EASA AD 2020–0246), to correct an unsafe condition for certain Airbus Helicopters Deutschland GmbH, formerly Eurocopter Deutschland GmbH Model MBB–BK 117 D–2 helicopters.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Airbus Helicopters Deutschland GmbH Model MBB–BK 117 D–2 helicopters. The NPRM published in the **Federal Register** on September 14, 2021 (86 FR 51042). The NPRM was prompted by a report of chafing marks on a wiring harness near the locking washer of the lateral control rod. The NPRM proposed to require an inspection of the wiring harness and the routing of the wiring harness and corrective actions if necessary, as specified in EASA AD 2020–0246.

The FAA is issuing this AD to address chafing marks on a wiring harness near the locking washer of the lateral control rod. The unsafe condition, if not addressed, could result in in-flight loss of the hoist load and possible personal injury, or could generate a burning smell and possible need for the flight crew to implement the applicable emergency procedure. See EASA AD 2020–0246 for additional background information.

Discussion of Final Airworthiness Directive

Comments

The FAA received no comments on the NPRM or on the determination of the costs.

Conclusion

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA about the unsafe condition described in its AD. The FAA reviewed the relevant data and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these helicopters. Except for minor editorial changes, this AD is adopted as proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

EASA AD 2020–0246 requires an inspection of the wiring harness and the routing of the wiring harness for discrepancies (includes damaged wire harnesses and insufficient clearances) and corrective actions (includes repair of wire harnesses and re-routing the wire harness) if necessary, and an update of the Aircraft Maintenance Programme (AMP) to incorporate certain tasks. This material 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.

Differences Between This AD and the EASA AD

EASA AD 2020–0246 requires revising the ''Aircraft Maintenance Programme (AMP),'' whereas this proposed AD would not because not all U.S. operators are required to have a maintenance program.

Costs of Compliance

The FAA estimates that this AD affects 31 helicopters of U.S. Registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, 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	1 work-hour × $85 per hour = $85	$0	$85	$2,635

The FAA estimates the following costs to do any necessary repairs and re-routing that would be required based on the results of the inspection. The agency has no way of determining the number of aircraft that might need these repairs:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Repairs and re-routing	Up to 1 work-hour × $85 per hour = $85	* $0	$85

* The FAA has received no definitive data on which to base the cost estimates for the on-condition repairs 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

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.

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 adding the following new airworthiness directive:

2021–23–18 Airbus Helicopters Deutschland GmbH: Amendment 39–21817; Docket No. FAA–2021–0779; Project Identifier MCAI–2020–01505–R.

(a) Effective Date

This airworthiness directive (AD) is effective January 11, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Helicopters Deutschland GmbH Model MBB–BK 117 D–2 helicopters, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2020–0246, dated November 10, 2020 (EASA AD 2020–0246).

(d) Subject

Joint Aircraft Service Component (JASC) Code: 2597, Equip/Furnishing System Wiring.

(e) Unsafe Condition

This AD was prompted by a report of chafing marks on a wiring harness near the locking washer of the lateral control rod. The FAA is issuing this AD to address chafing marks on a wiring harness near the locking washer of the lateral control rod. The unsafe condition, if not addressed, could result in in-flight loss of the hoist load and possible personal injury, or could generate a burning smell and possible need for the flight crew to implement the applicable emergency procedure.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2020–0246.

(h) Exceptions to EASA AD 2020–0246

(1) Where EASA AD 2020–0246 requires compliance in terms of flight hours, this AD requires using hours time-in-service.

(2) Where EASA AD 2020–0246 refers to its effective date, this AD requires using the effective date of this AD.

(3) Where Paragraph (3) of EASA AD 2020–0246 specifies to update the Aircraft Maintenance Programme (AMP) with certain tasks included in the service information referenced by EASA AD 2020–0246, this AD does not include that requirement.

(4) This AD does not require the ''Remarks'' section of EASA AD 2020–0246.

(i) Special Flight Permit

Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199 to operate the helicopter to a location where the actions of this AD can be performed, provided that no debris from chafing is visible that would allow jamming or fouling of the flight controls, the chafing does not interfere with the flight controls by jamming or fouling, and the systems impacted by the wiring harness are rendered inoperable by collaring the circuit breaker.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, send it to the attention of the person identified in paragraph (k) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(k) Related Information

For more information about this AD, contact Jacob Fitch, Aerospace Engineer, COS Program Management Section, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; phone: (817) 222–4130; email: *jacob.fitch@faa.gov.*

(l) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference 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.

(i) European Union Aviation Safety Agency (EASA) AD 2020–0246, dated November 10, 2020.

(ii) [Reserved].

(3) For EASA AD 2020–0246, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu;* internet: *www.easa.europa.eu.* You may find the EASA material on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110. This material may be found in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0779.

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

Issued on November 4, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–26497 Filed 12–6–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0213; Project Identifier 2018–CE–036–AD; Amendment 39–21818; AD 2021–23–19]

RIN 2120–AA64

Airworthiness Directives; Pacific Aerospace Limited Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Pacific Aerospace Limited Model 750XL airplanes. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI identifies the unsafe condition as insufficient separation of ground terminations for individual power sources and static grounds. This AD requires inspecting and separating, if applicable, the battery and generator common ground connections on the airframe. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 11, 2022.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 11, 2022.

ADDRESSES: For service information identified in this final rule, contact the Civil Aviation Authority of New Zealand, Level 15, Asteron Centre, 55 Featherston Street, Wellington 6011; phone: +64 4 560 9400; fax: +64 4 569 2024; email: *info@caa.govt.nz.* You may review this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0213; 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, the MCAI, 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: Mike Kiesov, Aviation Safety Engineer, FAA, General Aviation & Rotorcraft Section, International Validation Branch, 901 Locust, Room 301, Kansas City, MO 64106; phone: (816) 329–4144; fax: (816) 329–4090; email: *mike.kiesov@faa.gov*.

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain serial-numbered Pacific Aerospace Limited Model 750XL airplanes with the battery installed within the engine bay at the firewall. The NPRM published in the **Federal Register** on August 9, 2021 (86 FR 43446). The NPRM was based on MCAI from the Civil Aviation Authority (CAA), which is the aviation authority for New Zealand. The CAA issued DCA/750XL/30, dated July 5, 2018 (referred to after this as ''the MCAI''), to correct an unsafe condition for Pacific Aerospace Limited Model 750XL airplanes. The MCAI states:

> The ground connections for the individual power sources (BATT & GEN [battery and generator]) have been connected at a common ground point on the aircraft. DCA/750XL/30 is issued to mandate the instructions in Pacific Aerospace Mandatory Service Bulletin (MSB) PACSB/XL/104 issue 1, dated 2 May 2018, or later approved revision to separate the common ground connection on the airframe for the individual power sources (BATT & GEN).

The CAA advises the root cause is a deviation from the approved engineering data. This condition, if not corrected, could lead to the loss of primary and secondary power sources from corrosion of the ground connection or failure of the fastening hardware, which could result in the simultaneous loss of multiple systems. According to the CAA, this condition was observed on the production line and has been corrected for new airplanes in production. The MCAI requires inspecting the battery ground connections and separating the ground connections as necessary. You may examine the MCAI in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0213.

In the NPRM, the FAA proposed to require detecting and correcting ground terminations with insufficient separation on individual power sources and static grounds for continued airworthiness. The FAA is issuing this AD to address the unsafe condition on these products.

Discussion of Final Airworthiness Directive

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The FAA received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI. The FAA reviewed the relevant data and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. This AD is adopted as proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Pacific Aerospace Mandatory Service Bulletin PACSB/XL/104, Issue 1, dated May 2, 2018. The service information specifies procedures for inspecting the battery ground connections and separating the ground connections as necessary. 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 23 airplanes of U.S. registry.

The FAA also estimates that it would take about 1 work-hour per airplane to comply with the grounding connection inspection of this AD. The average labor rate is $85 per work-hour.

Based on these figures, the FAA estimates the cost of the inspection on U.S. operators to be $1,955, or $85 per airplane.

In addition, the FAA estimates that any necessary action to separate the connections would take about 3 work-hours and require parts costing $25, for a cost of $280 per airplane. The FAA has no way of determining the number of airplanes that may need these actions.

The FAA has included all costs in this cost estimate. According to the manufacturer, however, some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected operators.

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

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 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.

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 adding the following new airworthiness directive:

2021–23–19 Pacific Aerospace Limited: Amendment 39–21818; Docket No. FAA–2021–0213; Project Identifier 2018–CE–036–AD.

(a) Effective Date

This airworthiness directive (AD) is effective January 11, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Pacific Aerospace Limited Model 750XL airplanes, serial numbers up to and including 222, certificated in any category, with the battery installed within the engine bay at the firewall.

(d) Subject

Joint Aircraft System Component (JASC) Code 2400, Electrical Power System.

(e) Reason

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI identifies the unsafe condition as insufficient separation of ground terminations for individual power sources and static grounds. The FAA is issuing this AD to detect and correct ground terminations with insufficient separation, which could lead to loss of primary and secondary power sources if the ground connection fails and consequent simultaneous loss of multiple airplane systems.

(f) Compliance

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

(g) Inspection and Corrective Action

(1) Within 12 months after the effective date of this AD, inspect the battery installation in the engine bay to determine if the ground leads connect to a single ground stud as shown in the Accomplishment Instructions, figure 2, of Pacific Aerospace Mandatory Service Bulletin PACSB/XL/104, Issue 1, dated May 2, 2018 (PACSB/XL/104I1).

(2) If the ground leads connect to a single ground stud, before further flight, separate the battery ground lead connections by following the Accomplishment Instructions, steps 4 through 36, of PACSB/XL/104I1.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, International Validation Branch, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (i)(1) of this AD or email: *9-AVS-AIR-730-AMOC@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(i) Related Information

(1) For more information about this AD contact Mike Kiesov, Aviation Safety Engineer, FAA, General Aviation & Rotorcraft Section, International Validation Branch, 901 Locust, Room 301, Kansas City, MO 64106; (816) 329–4144; fax: (816) 329–4090; email: *mike.kiesov@faa.gov.*

(2) Refer to Civil Aviation Authority (CAA) of New Zealand AD DCA/750XL/30, dated July 5, 2018, for related information. You may examine the CAA AD at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0213.

(j) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference 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 the AD specifies otherwise.

(i) Pacific Aerospace Mandatory Service Bulletin PACSB/XL/104, Issue 1, dated May 2, 2018.

(ii) [Reserved]

(3) For Pacific Aerospace Limited service information identified in this AD, contact the Civil Aviation Authority of New Zealand, Level 15, Asteron Centre, 55 Featherston Street, Wellington 6011; phone: +64 4 560 9400; fax: +64 4 569 2024; email: *info@caa.govt.nz.*

(4) You may view this service information at FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

(5) 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: *fr.inspection@nara.gov,* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on November 4, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–26495 Filed 12–6–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No.: FAA–2015–8672; Amdt. No. 91–340C]

RIN 2120–AL69

Extension of the Prohibition Against Certain Flights in Specified Areas of the Sanaa Flight Information Region (FIR) (OYSC)

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

ACTION: Final rule.

SUMMARY: This action extends the Special Federal Aviation Regulation (SFAR) prohibiting certain flights in the specified areas of the Sanaa Flight Information Region (FIR) (OYSC) by all: U.S. air carriers; U.S. commercial operators; persons exercising the privileges of an airman certificate issued by the FAA, except when such persons are operating U.S.-registered aircraft for a foreign air carrier; and operators of U.S.-registered civil aircraft, except when the operator of such aircraft is a foreign air carrier. The FAA finds this action necessary to address hazards to persons and aircraft engaged in such flight operations due to significant, continuing safety-of-flight risks to U.S. civil aviation operations in that airspace associated with the ongoing conflict between the Saudi Arabian-led Coalition and Iranian-aligned Houthi forces. The FAA extends the expiration date of this SFAR from January 7, 2022, until January 7, 2025. Additionally, the FAA republishes the approval process and exemption information for this SFAR, consistent with other recently published flight prohibition SFARs.

DATES: This final rule is effective on December 7, 2021.

FOR FURTHER INFORMATION CONTACT: Stephen Moates, Air Transportation Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone 202–267–8166; email *stephen.moates@faa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

This action extends the prohibition against certain flights in the specified areas of the Sanaa Flight Information Region (FIR) (OYSC) by all: U.S. air carriers; U.S. commercial operators; persons exercising the privileges of an airman certificate issued by the FAA, except when such persons are operating U.S.-registered aircraft for a foreign air carrier; and operators of U.S.-registered civil aircraft, except when the operator of such aircraft is a foreign air carrier. Specifically, this amendment continues to prohibit all persons described in paragraph (a) of SFAR No. 115, title 14 *Code of Federal Regulations* (CFR), § 91.1611, from conducting civil flight operations in the specified areas of the Sanaa FIR (OYSC), as described in paragraph (b) of the rule, until January 7, 2025, due to the significant, continuing safety-of-flight risks to U.S. civil aviation operations in that airspace associated with the ongoing conflict between the Saudi Arabian-led Coalition (SLC) and Iranian-aligned Houthi forces.

II. Legal Authority and Good Cause

A. Legal Authority

The FAA is responsible for the safety of flight in the U.S. and the safety of U.S. civil operators, U.S.-registered civil aircraft, and U.S.-certificated airmen throughout the world. Sections 106(f) and (g) of title 49, *United States Code* (U.S.C.), subtitle I, establish the FAA Administrator's authority to issue rules on aviation safety. Subtitle VII of title 49, Aviation Programs, describes in more detail the scope of the agency's authority. Section 40101(d)(1) provides that the Administrator shall consider in the public interest, among other matters, assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce. Section 40105(b)(1)(A) requires the Administrator to exercise this authority consistently with the obligations of the U.S. Government under international agreements.

The FAA is promulgating this rulemaking under the authority described in 49 U.S.C. 44701, General requirements. Under that section, the FAA is charged broadly with promoting safe flight of civil aircraft in air commerce by prescribing, among other things, regulations and minimum standards for practices, methods, and procedures that the Administrator finds necessary for safety in air commerce and national security.

This regulation is within the scope of the FAA's authority because it continues to prohibit the persons described in paragraph (a) of SFAR No. 115, § 91.1611, from conducting civil flight operations in the specified areas of the Sanaa FIR (OYSC) due to significant, continuing risks to the safety of U.S. civil flight operations, as described in the preamble to this final rule.

B. Good Cause for Immediate Adoption

Section 553(b)(B) of title 5, U.S.C., authorizes agencies to dispense with notice and comment procedures for rules when the agency for ''good cause'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Section 553(d) also authorizes agencies to forgo the delay in the effective date of a final rule for good cause found and published with the rule. In this instance, the FAA finds good cause exists to forgo notice and comment because notice and comment would be impracticable and contrary to the public interest. In addition, it is contrary to the public interest to allow any lapse in the effectivity of the prohibition of U.S. civil flights in the areas to which this SFAR applies, making it appropriate to waive any delay in effective date.

The risk environment for U.S. civil aviation in airspace managed by other countries with respect to the safety of flight is often fluid in circumstances involving weapons capable of targeting, or otherwise negatively affecting, U.S. civil aviation, as well as other hazards to U.S. civil aviation associated with fighting, extremist and militant activity, or heightened tensions. This fluidity and the need for the FAA to rely upon classified information in assessing these risks make issuing notice and seeking comments impracticable and contrary to the public interest. With respect to the impracticability of notice and comment procedures, the potential for rapid changes in the risks to U.S. civil aviation significantly limits how far in advance of a new or amended flight prohibition the FAA can usefully assess the risk environment. Furthermore, to the extent that these rules and any amendments to them are based upon classified information, the FAA is not legally permitted to share such information with the general public, who cannot meaningfully comment on information to which they are not legally allowed access. As a result, engaging in notice and comment would be impracticable.

Additionally, while there is a public interest in having an opportunity for the public to comment on agency action, it is crucial that the FAA's flight prohibitions, and any amendments thereto, reflect the agency's current understanding of the risk environment for U.S. civil aviation. This allows the FAA to protect the safety of U.S. operators' aircraft and the lives of their passengers and crews without over-restricting U.S. operators' routing options.

As described in the preamble to this rule, extending the flight prohibition for U.S. civil aviation operations in the specified areas of the Sanaa FIR (OYSC) is necessary due to significant, continuing safety-of-flight hazards associated with the ongoing conflict between the SLC and Iranian-aligned Houthi forces. Such circumstances establish that engaging in notice and comment for this rule would be impracticable and contrary to the public interest. Accordingly, the FAA finds good cause exists to forgo notice and comment and any delay in the effective date for this rule.

III. Background

On January 7, 2016, the FAA published SFAR No. 115, § 91.1611, to prohibit U.S. civil aviation operations in the specified areas of the Sanaa FIR (OYSC), due to the hazardous situation faced by U.S. civil aviation from ongoing military operations, political instability, violence from competing armed groups, and the continuing terrorism threat from extremist elements associated with the fighting and instability in Yemen.[1]

The FAA determined international civil air routes that transited the then-specified areas of the Sanaa FIR (OYSC) and aircraft operating to and from Yemeni airports were at risk from terrorist and militant groups potentially employing anti-aircraft-capable weapons, including man-portable air defense systems (MANPADS), surface-to-air missiles (SAMs), small-arms fire, and indirect fire from mortars and rockets. At the time it promulgated the January 2016 final rule, the FAA found that due to the fighting and instability, there was a risk of possible loss of state control over more advanced anti-aircraft-capable weapons to terrorist and

[1] *Prohibition Against Certain Flights in Specified Areas of the Sanaa (OYSC) Flight Information Region (FIR)* final rule, 81 FR 727 (Jan. 7, 2016).

militant groups. Some of the weapons about which the FAA was concerned had the capability to target aircraft at higher altitudes or during approach and departure and had weapon ranges that could extend into the near offshore areas along Yemen's coastline.

In the January 2016 final rule, the FAA also indicated that U.S. civil aviation was at risk from combat operations and other military-related activity associated with the fighting and instability in Yemen and that there was an ongoing threat of terrorism. Al-Qa'ida in the Arabian Peninsula (AQAP) remained active in Yemen and had demonstrated the capability and intent to target U.S. and Western aviation interests. Various Yemeni airports had been attacked during the fighting, including Sanaa International Airport (OYSN) and Aden International Airport (OYAA), resulting in instances of damage to airport facilities and temporary closure of those airports.

On December 14, 2017, the FAA amended SFAR No. 115, § 91.1611, to reduce the boundaries of its prohibition of U.S. civil aviation operations in the specified areas of the Sanaa FIR (OYSC).[2] Between January 2016 and December 2017, the situation in Yemen had slightly improved, as a coalition of Yemeni government forces, supporting nations, and allied militia elements successfully limited the area of opposition force control and reduced some of the opposition force's weapon capabilities. In December 2017, opposition elements in Yemen did not possess functional medium-/long-range strategic SAM capabilities. As a result, the FAA found there was a sufficiently reduced level of risk to U.S. civil aviation operations on certain international air routes that transit offshore areas of the Sanaa FIR (OYSC) to permit U.S. civil aviation operations on those routes again. However, U.S. civil aviation operations remained prohibited in the rest of the specified areas of the Sanaa FIR (OYSC).

On December 11, 2019, after it again assessed the situation in the specified areas of the Sanaa FIR (OYSC), the FAA determined the situation continued to be hazardous for U.S. civil aviation.[3] Significant risk to U.S. civil aviation operations in the specified areas of the Sanaa FIR (OYSC) continued to exist due to the ongoing conflict between the SLC and Iranian-aligned Houthi forces and an enduring extremist/militant threat to U.S. civil aviation operations in those areas. There had been multiple reported surface-to-air incidents, including successful shoot downs of military tactical and surveillance aircraft by Houthi forces armed with a variety of anti-aircraft-capable weapons. With international assistance, Houthi elements had received or developed, and successfully employed, innovative anti-aircraft-capable weapons, ballistic missiles, and unmanned aircraft systems (UAS) capabilities. Various entities using multiple capabilities had attacked airports within the Sanaa FIR (OYSC). Additionally, extremist or militant elements continued to exploit the conflict for control of territory to launch attacks. As of December 2019, both AQAP and extremists aligned with the Islamic State of Iraq and ash-Sham (ISIS) operated in Yemen. Both of these international extremist or militant organizations have a history of targeting U.S. interests, including civil aviation.

The FAA continued to assess that opposition elements in Yemen did not possess functional medium-/long-range strategic SAM capabilities and did not control territory from which surface to air weapons could reach air routes off the southern and western coasts of Yemen.

IV. Discussion of the Final Rule

The FAA continues to assess the situation in the specified areas of the Sanaa FIR (OYSC) as presenting significant, continuing safety-of-flight risks for U.S. civil aviation due to the ongoing conflict between the SLC and Iranian-aligned Houthi forces and the enduring extremist or militant threat to U.S. civil aviation operations in those areas. Houthi forces have continued to develop, acquire, and employ advanced weapons capabilities, including non-traditional air defense capabilities, UAS, and missile capabilities. Collectively, such capabilities pose risks to U.S. civil aviation operations at all altitudes in the specified areas of the Sanaa FIR (OYSC) and airports in Yemen.

Houthi forces operate multiple air defense systems capable of targeting aircraft at various altitudes. Notably, they have employed increasingly capable Iranian-supplied SAMs and electro-optical/infrared seeker (E.O./IR) air-to-air (AA) missiles modified for use as SAMs to engage manned and unmanned military aircraft. In 2020, Houthi elements reportedly shot down multiple SLC tactical manned and unmanned aircraft operating in Yemeni airspace, including a Tornado fighter aircraft in February 2020 and an SLC UAS in December 2020. Houthi air defense capabilities pose an inadvertent risk to U.S. civil aviation operations due to the potential for misidentification or miscalculation by irregular forces using advanced air defense capabilities for which they may not have received adequate training and may not have adequate air surveillance information to distinguish accurately between civil aircraft and potential airborne threats. The FAA continues to assess Houthi forces in Yemen do not possess functional medium-/long-range strategic SAM capabilities.

Additionally, Houthi elements have targeted international airports in the region using weaponized UAS, as well as ballistic and cruise missiles. In December 2020, an attack on Aden International Airport (OYAA) occurred shortly after the arrival of a commercial aircraft from Saudi Arabia carrying senior members of the internationally-recognized Government of Yemen.

Although some Houthi offensive weapons systems have range capabilities that would allow them to reach the limited areas of the Sanaa FIR (OYSC) in which the FAA permits U.S. civil aviation to operate, Houthi forces have not demonstrated an intent to conduct weaponized UAS or missile attacks in those areas. Instead, they have focused these types of attacks primarily on targets in Saudi Arabia and targets in contested areas of Yemen. In addition, Houthi weaponized UAS operations would only present a safety of flight hazard to civil aircraft operating off the Yemeni coast if such aircraft were operating below cruising altitudes.

Besides the safety-of-flight risks associated with the conflict between the SLC and Iranian-aligned Houthi forces, extremist or militant groups operating in Yemen likely have access to anti-aircraft-capable weapons, including MANPADS, presenting a risk up to 25,000 feet. AQAP continues to operate in Yemen and historically has attempted to attack Western civil aviation through novel improvised explosive devices, including the 2009 failed underwear bombing attempt on a U.S.-bound flight and the 2010 printer cartridge plot targeting U.S.-bound cargo flights. Additionally, Islamic State of Iraq and ash-Sham (ISIS) cells remain active in Yemen.

As a result of the significant, continuing unacceptable risks to the safety of U.S. civil aviation operations in the specified areas of the Sanaa FIR (OYSC) described in this rule, the FAA extends the expiration date of SFAR No. 115, § 91.1611, from January 7, 2022, until January 7, 2025.

[2] *Amendment of the Prohibition Against Certain Flights in Specified Areas of the Sanaa (OYSC) Flight Information Region* final rule, 82 FR 58722 (Dec. 14, 2017).

[3] *Extension of the Prohibition Against Certain Flights in Specified Areas of the Sanaa Flight Information Region (FIR) (OYSC)* final rule, 84 FR 67659 (Dec. 11, 2019).

In addition, the FAA has determined U.S. civil aviation operations may continue safely at this time in the remainder of the Sanaa FIR (OYSC). Specifically, U.S. civil aviation operations remain permitted in that airspace west of a line drawn direct from KAPET (163322N 0530614E) to NODMA (152603N 0533359E), southwest of a line drawn direct from NODMA to ORBAT (140638N 0503924E) then from ORBAT to PAKER (115500N 0463500E), north of a line drawn direct from PAKER to PARIM (123142N 0432712E), and east of a line drawn direct from PARIM to RIBOK (154700N 0415230E). Operations on jet routes UT702 and M999 also remain permitted.

Further amendments to SFAR No. 115, § 91.1611, might be appropriate if the risk to U.S. civil aviation safety and security changes. In this regard, the FAA will continue to monitor the situation and evaluate the extent to which persons described in paragraph (a) of this rule might be able to operate safely in the specified areas of the Sanaa FIR (OYSC).

The FAA also republishes the details concerning the approval and exemption processes in sections V and VI of this preamble, consistent with other recently published flight prohibition SFARs, to enable interested persons to refer to this final rule for comprehensive information about requesting relief from the FAA from the provisions of SFAR No. 115, § 91.1611.

V. Approval Process Based on a Request From a Department, Agency, or Instrumentality of the United States Government

A. Approval Process Based on an Authorization Request From a Department, Agency, or Instrumentality of the United States Government

In some instances, U.S. Government departments, agencies, or instrumentalities may need to engage U.S. civil aviation to support their activities in the specified areas of the Sanaa FIR (OYSC). If a department, agency, or instrumentality of the U.S. Government determines that it has a critical need to engage any person described in paragraph (a) of SFAR No. 115, § 91.1611, including a U.S. air carrier or commercial operator, to transport civilian or military passengers or cargo or conduct other operations in the specified areas of the Sanaa FIR (OYSC), that department, agency, or instrumentality may request the FAA to approve persons described in paragraph (a) of SFAR No. 115, § 91.1611, to conduct such operations.

The requesting U.S. Government department, agency, or instrumentality must submit the request for approval to the FAA's Associate Administrator for Aviation Safety in a letter signed by an appropriate senior official of the requesting department, agency, or instrumentality.[4] The FAA will not accept or consider requests for approval from anyone other than the requesting U.S. Government department, agency, or instrumentality. In addition, the senior official signing the letter requesting FAA approval must be sufficiently positioned within the requesting department, agency, or instrumentality to demonstrate that the organization's senior leadership supports the request for approval and is committed to taking all necessary steps to minimize aviation safety and security risks to the proposed flights. The senior official must also be in a position to: (1) Attest to the accuracy of all representations made to the FAA in the request for approval, and (2) ensure that any support from the requesting U.S. Government department, agency, or instrumentality described in the request for approval is in fact brought to bear and is maintained over time. Unless justified by exigent circumstances, requesting U.S. Government departments, agencies, or instrumentalities must submit requests for approval to the FAA no less than 30 calendar days before the date on which the requesting department, agency, or instrumentality wishes the proposed operation(s) to commence.

The requestor must send the request to the Associate Administrator for Aviation Safety, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591. Electronic submissions are acceptable, and the requesting entity may request that the FAA notify it electronically as to whether the FAA grants the request for approval. If a requestor wishes to make an electronic submission to the FAA, the requestor should contact the Air Transportation Division, Flight Standards Service, at (202) 267–8166, to obtain the appropriate email address. A single letter may request approval from the FAA for multiple persons described in SFAR No. 115, § 91.1611, or multiple flight operations. To the extent known, the letter must identify the person(s) the requester expects the SFAR to cover on whose behalf the U.S. Government department, agency, or instrumentality seeks FAA approval, and it must describe—

- The proposed operation(s), including the nature of the mission being supported;
- The service the person(s) covered by the SFAR will provide;
- To the extent known, the specific locations in the specified areas of the Sanaa FIR (OYSC) where the proposed operation(s) will occur, including, but not limited to, the flight path and altitude of the aircraft while it is operating in the specified areas of the Sanaa FIR (OYSC) and the airports, airfields, or landing zones at which the aircraft will take off and land; and
- The method by which the requesting department, agency, or instrumentality will provide, or how the operator will otherwise obtain, current threat information and an explanation of how the operator will integrate this information into all phases of the proposed operations (*i.e.,* the pre-mission planning and briefing, in-flight, and post-flight phases).

The request for approval must also include a list of operators with whom the U.S. Government department, agency, or instrumentality requesting FAA approval has a current contract(s), grant(s), or cooperative agreement(s) (or its prime contractor has a subcontract(s)) for specific flight operations in the specified areas of the Sanaa FIR (OYSC). The requestor may identify additional operators to the FAA at any time after the FAA issues its approval. Neither the operators listed in the original request, nor any operators the requestor subsequently seeks to add to the approval, may commence operations under the approval until the FAA issues them an Operations Specification (OpSpec) or Letter of Authorization (LOA), as appropriate, for operations in the specified areas of the Sanaa FIR (OYSC). The approval conditions discussed below apply to all operators. Requestors should send updated lists to the email address they obtain from the Air Transportation Division by calling (202) 267–8166.

If an approval request includes classified information, requestors may contact Aviation Safety Inspector Stephen Moates for instructions on submitting it to the FAA. His contact information appears in the **FOR FURTHER INFORMATION CONTACT** section of this final rule.

FAA approval of an operation under SFAR No. 115, § 91.1611, does not relieve persons subject to this SFAR of the responsibility to comply with all

[4] This approval procedure applies to U.S. Government departments, agencies, or instrumentalities; it does not apply to the public. The FAA describes this procedure in the interest of providing transparency with respect to the FAA's process for interacting with U.S. Government departments, agencies, or instrumentalities that seek to engage U.S. civil aviation to operate in the area in which this SFAR would prohibit their operations in the absence of specific FAA approval.

other applicable FAA rules and regulations. Operators of civil aircraft must comply with the conditions of their certificates, OpSpecs, and LOAs, as applicable. Operators must also comply with all rules and regulations of other U.S. Government departments, agencies, or instrumentalities that may apply to the proposed operation(s), including, but not limited to, regulations issued by the Transportation Security Administration.

B. Approval Conditions

If the FAA approves the request, the FAA's Aviation Safety organization will send an approval letter to the requesting U.S. Government department, agency, or instrumentality informing it that the FAA's approval is subject to all of the following conditions:

(1) The approval will stipulate those procedures and conditions that limit, to the greatest degree possible, the risk to the operator, while still allowing the operator to achieve its operational objectives.

(2) Before any approval takes effect, the operator must submit to the FAA:

(a) A written release of the U.S. Government from all damages, claims, and liabilities, including without limitation legal fees and expenses, relating to any event arising out of or related to the approved operations in the specified areas of the Sanaa FIR (OYSC); and

(b) The operator's written agreement to indemnify the U.S. Government with respect to any and all third-party damages, claims, and liabilities, including without limitation legal fees and expenses, relating to any event arising out of or related to the approved operations in the specified areas of the Sanaa FIR (OYSC).

(3) Other conditions the FAA may specify, including those the FAA might impose in OpSpecs or LOAs, as applicable.

The release and agreement to indemnify do not preclude an operator from raising a claim under an applicable non-premium war risk insurance policy the FAA issues under chapter 443 of title 49, U.S.C.

If the FAA approves the proposed operation(s), the FAA will issue an OpSpec or LOA, as applicable, to the operator(s) identified in the original request and any operators the requestor subsequently adds to the approval, authorizing them to conduct the approved operation(s). In addition, as stated in paragraph (3) of this section V.B., the FAA notes that it may include additional conditions beyond those contained in the approval letter in any OpSpec or LOA associated with a particular operator operating under this approval, as necessary in the interests of aviation safety. U.S. Government departments, agencies, and instrumentalities requesting FAA approval on behalf of entities with which they have a contract or subcontract, grant, or cooperative agreement should request a copy of the relevant OpSpec or LOA directly from the entity with which they have any of the foregoing types of arrangements, if desired.

VI. Information Regarding Petitions for Exemption

Any operations not conducted under an approval the FAA issues through the approval process set forth previously may only occur in accordance with an exemption from SFAR No. 115, § 91.1611. A petition for exemption must comply with 14 CFR part 11. The FAA will consider whether exceptional circumstances exist beyond those described in the approval process in the previous section. To determine whether a petition for exemption from the prohibition this SFAR establishes fulfills the standard of 14 CFR 11.81, the FAA consistently finds necessary the following information:

- The proposed operation(s), including the nature of the operation;
- The service the person(s) covered by the SFAR will provide;
- The specific locations in the specified areas of the Sanaa FIR (OYSC) where the proposed operation(s) will occur, including, but not limited to, the flight path and altitude of the aircraft while it is operating in the specified areas of the Sanaa FIR (OYSC), and the airports, airfields, or landing zones at which the aircraft will take off and land;
- The method by which the operator will obtain current threat information and an explanation of how the operator will integrate this information into all phases of its proposed operations (*i.e.,* the pre-mission planning and briefing, in-flight, and post-flight phases); and
- The plans and procedures the operator will use to minimize the risks identified in this preamble to the proposed operations, to support the relief sought and that granting such relief would not adversely affect safety or would provide a level of safety at least equal to that provided by this SFAR. The FAA has found comprehensive, organized plans and procedures of this nature to be helpful in facilitating the agency's safety evaluation of petitions for exemption from flight prohibition SFARs.

The FAA includes, as a condition of each such exemption it issues, a release and agreement to indemnify, as described previously.

The FAA recognizes that, with the support of the U.S. Government, the governments of other countries could plan operations that may be affected by SFAR No. 115, § 91.1611. While the FAA will not permit these operations through the approval process, the FAA will consider exemption requests for such operations on an expedited basis and in accordance with the order of preference set forth in paragraph (c) of SFAR No. 115, § 91.1611.

If a petition for exemption includes security-sensitive or proprietary information, requestors may contact Aviation Safety Inspector Stephen Moates for instructions on submitting it to the FAA. His contact information is listed in the **FOR FURTHER INFORMATION CONTACT** section of this final rule.

VII. Regulatory Notices and Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Orders 12866 and 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354), as codified in 5 U.S.C. 603 *et seq.,* requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act of 1979 (Pub. L. 96–39), as codified in 19 U.S.C. Chapter 13, prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Agreements Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as codified in 2 U.S.C. Chapter 25, requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule.

In conducting these analyses, the FAA has determined this final rule has benefits that justify its costs. This rule is a significant regulatory action, as defined in section 3(f) of Executive Order 12866, as it raises novel policy issues contemplated under that

Executive order. As 5 U.S.C. 553 does not require notice and comment for this final rule, 5 U.S.C. 603 and 604 do not require regulatory flexibility analyses regarding impacts on small entities. This rule will not create unnecessary obstacles to the foreign commerce of the United States. This rule will not impose an unfunded mandate on State, local, or tribal governments, or on the private sector, by exceeding the threshold identified previously.

A. Regulatory Evaluation

This action extends without change the prohibition against certain U.S. civil flight operations in the specified areas of the Sanaa FIR (OYSC) for an additional three years, due to the significant, continuing hazards to U.S. civil aviation operations in that airspace, as described in the preamble of this final rule. The rule continues to allow U.S. civil aviation to use the M999 and UT702 air routes, so flight times and operating expenses, such as fuel, for U.S. operators that transit the Middle East on those routes are not affected by this final rule.

The FAA acknowledges the continued prohibition of U.S. civil aviation operations in the specified areas of the Sanaa FIR (OYSC) might result in additional costs to some U.S. operators, such as increased fuel costs and other operational-related costs. However, the FAA expects the benefits of this action exceed the costs because it will result in the avoidance of risks of fatalities, injuries, and property damage that could occur if a U.S. operator's aircraft were shot down (or otherwise damaged) while operating in the specified areas of the Sanaa FIR (OYSC). The FAA will continue to monitor and evaluate the safety and security risks to U.S. civil operators and airmen as a result of conditions in the specified areas of the Sanaa FIR (OYSC) and the surrounding region.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), in 5 U.S.C. 603, requires an agency to prepare an initial regulatory flexibility analysis describing impacts on small entities whenever 5 U.S.C. 553 or any other law requires an agency to publish a general notice of proposed rulemaking for any proposed rule. Similarly, 5 U.S.C. 604 requires an agency to prepare a final regulatory flexibility analysis when an agency issues a final rule under 5 U.S.C. 553, after that section or any other law requires publication of a general notice of proposed rulemaking. The FAA concludes good cause exists to forgo notice and comment and to not delay the effective date for this rule. As 5 U.S.C. 553 does not require notice and comment in this situation, 5 U.S.C. 603 and 604 similarly do not require regulatory flexibility analyses.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39) prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to this Act, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

The FAA has assessed the potential effect of this final rule and determined that its purpose is to protect the safety of U.S. civil aviation from risks to their operations in the specified areas of the Sanaa FIR (OYSC), a location outside the U.S. Therefore, the rule complies with the Trade Agreements Act of 1979.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $155 million in lieu of $100 million.

This final rule does not contain such a mandate. Therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires the FAA to consider the impact of paperwork and other information collection burdens it imposes on the public. The FAA has determined no new requirement for information collection is associated with this final rule.

F. International Compatibility and Cooperation

In keeping with U.S. obligations under the Convention on International Civil Aviation, the FAA's policy is to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined no ICAO Standards and Recommended Practices correspond to this regulation. The FAA finds this action is fully consistent with the obligations under 49 U.S.C. 40105(b)(1)(A) to ensure the FAA exercises its duties consistent with the obligations of the United States under international agreements.

While the FAA's flight prohibition does not apply to foreign air carriers, DOT codeshare authorizations prohibit foreign air carriers from carrying a U.S. codeshare partner's code on a flight segment that operates in airspace for which the FAA has issued a flight prohibition for U.S. civil aviation. In addition, foreign air carriers and other foreign operators may choose to avoid, or be advised or directed by their civil aviation authorities to avoid, airspace for which the FAA has issued a flight prohibition for U.S. civil aviation.

G. Environmental Analysis

The FAA has analyzed this action under Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, and DOT Order 5610.1C, Paragraph 16. Executive Order 12114 requires the FAA to be informed of environmental considerations and take those considerations into account when making decisions on major Federal actions that could have environmental impacts anywhere beyond the borders of the United States. The FAA has determined this action is exempt pursuant to Section 2–5(a)(i) of Executive Order 12114 because it does not have the potential for a significant effect on the environment outside the United States.

In accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, paragraph 8–6(c), the FAA has prepared a memorandum for the record stating the reason(s) for this determination and has placed it in the docket for this rulemaking.

VIII. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this rule under the principles and criteria of Executive Order 13132. The agency has determined this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, this

rule will not have federalism implications.

B. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this rule under Executive Order 13211. The agency has determined it is not a ''significant energy action'' under the executive order and will not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

C. Executive Order 13609, Promoting International Regulatory Cooperation

Executive Order 13609 promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609 and has determined that this action will have no effect on international regulatory cooperation.

IX. Additional Information

A. Electronic Access

Except for classified material, all documents the FAA considered in developing this rule, including economic analyses and technical reports, may be accessed from the internet through the docket for this rulemaking.

Those documents may be viewed online at *https://www.regulations.gov* using the docket number listed above. A copy of this rule will be placed in the docket. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at *https://www.federalregister.gov* and the Government Publishing Office's website at *https://www.govinfo.gov.* A copy may also be found at the FAA's Regulations and Policies website at *https://www.faa.gov/regulations_policies.*

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267–9677. Commenters must identify the docket or notice number of this rulemaking.

B. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (Pub. L. 104–121) (set forth as a note to 5 U.S.C. 601) requires the FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document may contact its local FAA official, or the persons listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the internet, visit *https://www.faa.gov/regulations_policies/rulemaking/sbre_act/.*

List of Subjects in 14 CFR Part 91

Air traffic control, Aircraft, Airmen, Airports, Aviation safety, Freight, Yemen.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations, as follows:

PART 91—GENERAL OPERATING AND FLIGHT RULES

■ 1. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40101, 40103, 40105, 40113, 40120, 44101, 44111, 44701, 44704, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506–46507, 47122, 47508, 47528–47531, 47534, Pub. L. 114–190, 130 Stat. 615 (49 U.S.C. 44703 note); articles 12 and 29 of the Convention on International Civil Aviation (61 Stat. 1180), (126 Stat. 11).

■ 2. Amend § 91.1611 by revising paragraph (e) to read as follows:

§ 91.1611 Special Federal Aviation Regulation No. 115—Prohibition Against Certain Flights in Specified Areas of the Sanaa Flight Information Region (FIR) (OYSC).

* * * * *

(e) *Expiration.* This SFAR will remain in effect until January 7, 2025. The FAA may amend, rescind, or extend this SFAR, as necessary.

Issued in Washington, DC, under the authority of 49 U.S.C. 106(f) and (g), 40101(d)(1), 40105(b)(1)(A), and 44701(a)(5), on or about December 1, 2021.

Steve Dickson,

Administrator.

[FR Doc. 2021–26521 Filed 12–6–21; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2020–0385; FRL–8826–02–R5]

Air Plan Approval; Michigan; Sulfur Dioxide Clean Data Determination for St. Clair

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is making a determination that the St. Clair sulfur dioxide (SO_2) nonattainment area has attained the 2010 primary SO_2 National Ambient Air Quality Standard (2010 SO_2 NAAQS). This determination suspends certain planning requirements and sanctions for the nonattainment area for as long as the area continues to attain the 2010 SO_2 NAAQS. EPA proposed this action on August 17, 2021, and received four supportive comments and one set of adverse comments.

DATES: This final rule is effective on December 7, 2021.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2020–0385. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through *www.regulations.gov* or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19. We recommend that you telephone Mary Portanova, Environmental Engineer, at (312) 353–5954 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Mary Portanova, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–5954, *portanova.mary@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever

''we,'' ''us,'' or ''our'' is used, we mean EPA.

I. Background Information

On August 17, 2021 (86 FR 45947), EPA proposed to determine that the St. Clair SO_2 nonattainment area (St. Clair area) has attained the 2010 SO_2 NAAQS. This determination, also known as a Clean Data Determination (CDD), would suspend certain planning requirements for the nonattainment area for as long as the area continues to attain the 2010 SO_2 NAAQS. EPA also proposed to require the Michigan Department of Environment, Great Lakes, and Energy (EGLE) to submit annual statements to address whether the St. Clair area has continued to attain the 2010 SO_2 NAAQS. A detailed analysis of EPA's proposed decision was provided in the August 17, 2021, notice of proposed rulemaking (NPRM) and will not be restated here. The public comment period for this NPRM ended on September 16, 2021. EPA received five comment submittals on the proposed action.

II. Response to Comments

EPA received two anonymous comments and two comments from citizens, all in support of EPA's action. EPA acknowledges these supportive comments. EPA also received a detailed comment document from the Sierra Club (''the commenter''), which includes adverse comments on EPA's proposed action. EPA is addressing these comments below. EPA notes that the commenter frequently refers to information given in an EGLE document which was not part of EGLE's July 24, 2020, CDD submittal. The document is entitled ''Proposed Sulfur Dioxide One-Hour National Ambient Air Quality Standard State Implementation Plan (SIP) for St. Clair County Nonattainment Area,'' dated October 7, 2019. EPA will refer to this document as the ''2019 draft.'' The commenter claimed that this document was submitted to EPA in 2019 for approval and has requested that if there is a final version of the document, that it be added to the docket for this action, but in fact, neither the ''2019 draft'' nor any final version of the ''2019 draft'' document was submitted to EPA as a SIP revision or as part of EGLE's CDD request. EPA considers the ''2019 draft'' document and its contents to be a draft State product which predated and has limited relevance to EGLE's July 24, 2020, CDD request. EPA has no final version of the ''2019 draft'' to docket, but will retain the ''2019 draft'' in Docket ID No. EPA–R05–OAR–2020–0385 as an exhibit attached to Sierra Club's comment.

Comment A: At several places in the Sierra Club comment document, the commenter suggests that certain emission reductions which have been discussed or imposed in the time since the St. Clair area was designated nonattainment should be evaluated for adequacy to provide for full attainment or imposed quickly under a State or Federal plan to provide for healthy air. The commenter additionally requests that EGLE should perform various new modeling analyses either before the CDD is finalized, or during the time that the CDD is in place. These requested analyses would be used to show whether further State regulations are needed to bring healthy air into the St. Clair area. The commenter also states that EPA should not allow delays in achieving healthy air in the St. Clair area.

Response A: In its August 17, 2021, NPRM, EPA presented evidence and proposed to find that the St. Clair area has attained the 1-hour SO_2 NAAQS as of 2017–2020. To the extent that the commenter is asserting that additional measures must be adopted in order for the area to attain the NAAQS, we do not agree. The CDD would cause no delays, as the St. Clair area and surrounding communities have already demonstrated air quality values that meet the health-based NAAQS. Therefore, Clean Air Act (CAA) planning requirements for nonattainment areas can be suspended under a CDD, and no further analyses or emission reduction actions are required of EGLE at this time. As stated in the proposal, EGLE will be required to provide demonstrations on an annual basis that the area continues to attain the NAAQS, and if EPA determines in the future that the area is no longer attaining the NAAQS, the CDD would be rescinded.

Comment B: The commenter asserted that EGLE's request for a CDD relied on the assumption that the St. Clair plant's expected closure will allow the State to formally demonstrate attainment, despite the emissions from the Belle River plant and a new gas power plant. The commenter stated that this assumption has not been tested and should be tested before moving ahead with the CDD. The commenter stated that nothing in the CAA allows EPA to suspend immediate action in anticipation of emission reductions accompanying a plant retirement that is still more than a year away.

Response B: The plan to close the St. Clair plant in 2022 was not a factor which EGLE or EPA relied upon to justify the determination of attainment. EGLE's CDD request relied on actual emissions and monitoring data, and a finding that the area is attaining the NAAQS based on those emissions and monitoring data. In finalizing a CDD, EPA is suspending the CAA obligation to submit attainment planning requirements because the area is currently attaining the standard, regardless of any anticipated future emission reductions, including the planned plant retirement. EPA does not agree that additional modeling analyses are required at this time for EPA to find that this area is currently attaining and to finalize the CDD. Such analyses that the commenter is requesting might instead be expected in a future redesignation request or nonattainment SIP. It is worth noting that although the St. Clair CDD is already fully supported by air quality data, if a coal power plant were to permanently and enforceably close in the St. Clair area, any actual SO_2 emission decreases that occur would only help the area stay in attainment under the CDD and help provide a path forward to eventual redesignation of the area to attainment.

Comment C: The commenter stated that EPA should ensure it is not delaying action that may be needed to demonstrate that the area is meeting the NAAQS based not only on actual emissions, which can increase, but on allowable emissions. The commenter stated that EPA should determine if further action will be needed following St. Clair's retirement, and if so, EGLE should be developing additional measures now, rather than waiting until a monitoring violation occurs and the CDD must be rescinded. Waiting to restart the process of developing needed measures until after rescission of the CDD would cause delays.

Response C: The St. Clair area is currently meeting the 2010 SO_2 NAAQS and therefore, EPA may finalize this CDD. Enforceable allowable emission limits would be expected in a subsequent redesignation request. Again, however, EPA does not require additional action from EGLE for the St. Clair area while the CDD is in place and the area continues to attain the standards.

Comment D: The commenter stated that EPA's NPRM does not explicitly address whether the DTE monitors meet the criteria in 40 CFR part 58, appendices A, C, and E; whether EGLE submitted relevant information for EPA to make this assessment, and whether relying on this data is consistent with other treatment of third-party monitoring.

Response D: As stated in the NPRM, EPA reviewed monitoring data and evidence that quality assurance activities had been performed. EPA

monitoring experts found that the third-party monitoring network and the data quality at the St. Clair area monitors are consistent with EPA requirements and are acceptable to rely upon to characterize air quality in the St. Clair area. The NPRM inadvertently omitted specific reference to a letter EGLE submitted to EPA on October 28, 2020, which provides EGLE's confirmation that the two industrial SO_2 monitoring sites operated by DTE meet the quality assurance and siting requirements in 40 CFR part 58, appendix A and D, respectively. This letter has been added to Docket ID No. EPA–R05–OAR–2020–0385. Additionally, the SO_2 monitoring methods used at these two monitoring sites are reference or equivalent methods as defined in 40 CFR part 50.

Comment E: The commenter expressed concern that the two DTE monitors could be missing maximum concentrations of the SO_2 plume. The commenter cited diagrams from modeling results shown in the ''2019 draft.'' The commenter stated that diagrams in this document appear to indicate an additional area of high modeled concentrations in the St. Clair area which does not currently contain a monitor. The commenter asked EPA to consider how to obtain monitoring results from that third location.

Response E: As previously stated, EPA relied on the modeling analysis in EGLE's July 24, 2020 CDD submittal, which used actual facility SO_2 emissions and an updated meteorological data set from Pontiac, Michigan, 2017–2019. This meteorology was determined to be more complete and more representative of the St. Clair area than other available meteorological datasets which EGLE had considered or used earlier in its other work for the St. Clair area. The CDD modeling of 2017–2019 actual emissions which EGLE submitted indicated that the highest modeled concentrations tended to occur most frequently near the Remer monitor location. EPA's ''SO_2 NAAQS Designations Source-Oriented Monitoring Technical Assistance Document'' (SO_2 Monitoring TAD) considers both high relative magnitude of modeled results, and the frequency of a location experiencing maximum values, in helping to choose appropriate monitoring sites. The third location in the St. Clair area northwest of the plants, which the commenter appears to refer to, does not appear as a location of higher concentrations than the monitored locations in EGLE's CDD modeling analysis. The CDD's modeled values in the northwest location are similar to but lower than the CDD's modeled values in the area of maximum concentration near the Remer monitor's location. EPA is satisfied that the two DTE monitors provide a reasonable representation of the maximum impacts from the two St. Clair sources and that the imposition of a third monitor is not justified by current information.

Comment F: The commenter noted that the Belle River plant had a 7-month outage in 2019 and stated that EPA does not address how this outage affects its assessment that the 2017–2019 monitoring data represents three full years, particularly in the warmer months, or whether the outage skewed the results of the modeling so that it is not representative of maximum SO_2 emissions observed during typical operations.

Response F: The Belle River plant did have outages at Unit 1 from February 2019 to June 2019; from November 2019 to December 2019, and from January 2020 to February 2020, which led to an overall emission reduction of over 6,000 tons of SO_2. These outages would not affect most of the warmer months in the St. Clair area, so presumably the ambient air concentrations measured at the DTE monitors during the summer and early fall of 2019 would represent normal expected conditions for that year.

The monitoring data used to support the CDD represents actual ambient air quality during 2017–2019. Air quality monitoring data can reflect fluctuations in source operating conditions, meteorology, and other factors. The Belle River plant Unit 1 outage does not invalidate the monitoring data. The use of three years of data to calculate a monitor's design value also helps balance variations in emissions and other factors. In addition, the CDD is supported by modeling of actual current facility emissions (in this case, 2017–2019), in order to demonstrate that the NAAQS are attained. The analysis is not intended to evaluate only maximum typical emissions. EPA believes it is appropriate to model the true actual emissions for the modeling period, which encompassed the most recent three years of data available when the CDD was requested.

Comment G: The commenter noted that EGLE had used a single background value in its modeling for the initial nonattainment designation recommendation for the St. Clair area, but later revised the background concentration to a set of lower values for the ''2019 draft'' and another set of background values in the CDD submittal. The commenter questioned EGLE's claim that approximately 90 hours of data were considered in each season and asked that EPA explain the appropriateness of the final background values EGLE used. The commenter asked that EGLE's background spreadsheet be added to the CDD action's docket record and inquired whether EPA limits the number of hours or wind sectors that can be excluded from a background data set.

Response G: Dispersion modeling analysis can be an iterative process, in which initial conservative input data is later evaluated to better reflect actual ambient air conditions within the modeling domain, or more accurate emissions and facility configuration data at the modeled sources. Such adjustments can provide for more appropriate and accurate results. In its initial nonattainment recommendation analysis of the St. Clair area's 2012–2014 SO_2 emissions submitted on September 18, 2015, Michigan chose a conservative Tier I background value. Based in part on the results of the modeling analysis, the State recommended to EPA that the St. Clair area be designated nonattainment. These modeling results were also used to help suggest boundaries for the St. Clair nonattainment area. Having made its nonattainment recommendation, Michigan did not decide to further refine its 2015 modeling or the background value it used.

However, EPA concurs with EGLE that additional refinement of input data such as background concentrations can be part of an acceptable approach to support future planning, or to characterize an area's air quality. The background analysis EGLE submitted with its July 24, 2020, CDD submittal used monitored ambient air quality data from 2017–2019 at the Port Huron monitor, selected by season and hour of day with wind direction exclusions to avoid double-counting of the St. Clair plants' impacts and to avoid overestimating SO_2 impacts from facilities closer to the background monitor which would not be expected to actually impact the St. Clair area when winds came from their locations. EPA accepted this approach, which is a commonly used method of addressing background in SO_2 modeling analyses, fully supported by EPA's modeling guidance. The background values used in the CDD submittal work come from a newer set of air quality data than the background values in the ''2019 draft,'' which may help explain the difference between the data sets cited by the commenter. The actual number of acceptable background exclusions depends on the wind patterns experienced at the Port Huron monitor, and is not specifically limited by EPA guidance as long as the monitor meets

EPA's data completeness requirements, which Port Huron's monitor does. EGLE may not have had 90 hours in every season due to exclusions, but EPA finds that EGLE's background calculations are generally conservative and acceptable in the modeled evaluation submitted with EGLE's CDD request. EPA has added EGLE's background spreadsheet to Docket ID No. EPA–R05–OAR–2020–0385.

Additionally, EPA calculated a much more conservative Tier I background calculation which used the first high concentration to determine one background value for each year 2017–2019. This resulted in the values 7.5 parts per billion (ppb), 6.5 ppb, and 14.4 ppb for 2017, 2018, and 2019, respectively, for a three-year averaged background value of 9.5 ppb. Adding this Tier 1 background value of 9.5 ppb to the CDD modeled design concentration of 64.4 ppb (which already included the season by hour of day values, embedded in the final modeled result) gives a total, very conservative design value of 73.9 ppb, which double counts background but is still below the NAAQS. EPA does not intend to impose this Tier I background value upon EGLE's submitted analysis, but only finds that EGLE's analysis would still show attainment, even if the submitted background values were rejected.

Comment H: EGLE does not state what years the Port Huron data is from on page 4 of its CDD submittal.

Response H: EGLE's table on page 4 of its CDD submittal indicates that the Port Huron background data was from 2017–2019.

Comment I: The commenter noted that the NPRM appeared to reverse the 2017–2019 monitor values which EPA cited as indicating that the modeling and monitoring results matched well near the monitor locations.

Response I: EPA acknowledges that there is an error in the narrative on page 45949 of the NPRM. The values in Table 1 and the comparison of modeled to monitored design values at each monitor are correct as given in the NPRM. The correct wording on page 45949 of the NPRM should be ''The model's predicted design value at the Mills monitor location was 47.7 ppb, compared to the monitored design value of 45 ppb, and the model's predicted design value at the Remer monitor location was 52.7 ppb, compared to the monitored design value of 54 ppb.''

Comment J: The commenter stated that if EPA finds that the area is not meeting the NAAQS after reviewing these comments, it should move forward with a Federal Implementation Plan.

Response J: EPA believes that EGLE has adequately demonstrated that the St. Clair area is currently meeting the 2010 SO_2 NAAQS. If it is necessary to rescind the CDD in future, EPA will follow the requirements of the CAA.

Comment K: The commenter said that EPA should bolster its plan for oversight of the area's continued compliance with the NAAQS with requirements for data submittals on a more frequent basis than an annual report, such as monthly or bimonthly. The commenter also requested that EPA require the DTE monitors to run at least until the area is redesignated, not just until the St. Clair plant closes.

Response K: Areas may verify continued attainment of the NAAQS using air quality monitoring data, which is certified on an annual basis. EPA's inclusion of a requirement that EGLE submit an annual report demonstrating the area's continued attainment permits the State to provide relevant information to support such a finding, including monitoring data, emissions data, or other information. This approach is reasonable given the combination of monitoring and modeling data supporting this final CDD. Moreover, the annual basis for the required demonstration mirrors the certification schedule for air quality monitoring data. We therefore think it represents a reasonable interval for EGLE's reporting requirement. The NPRM (page 45948) proposed to require EGLE to submit an annual statement to EPA addressing whether the St. Clair area is continuing to attain the 2010 SO_2 NAAQS. This is a new requirement intended to bolster and formalize the continuing verification of the area's air quality. EPA does not believe that it is necessary to further modify its proposed schedule for more frequent formal reports from EGLE. EGLE uploads new monitoring data to EPA's Air Quality System (AQS) database frequently. Nothing in the CDD precludes EGLE from routinely reviewing its available air quality information on a short-term basis.

EPA will work with EGLE to ensure that the Mills and Remer monitors continue to operate at least until a full redesignation of the St. Clair area occurs.

After careful consideration of public comments, EPA is finalizing the August 17, 2021, proposed finding that the St. Clair area is attaining the 2010 SO_2 NAAQS. EPA is therefore also finalizing the CDD for the St. Clair nonattainment area.

III. Final Action

EPA is approving EGLE's request for a CDD for the St. Clair nonattainment area in St. Clair County, Michigan. The nonattainment area consists of a portion of southeastern St. Clair County, Michigan, located northeast of Detroit. The nonattainment area shares a border with Ontario, Canada along the St. Clair River. The area's complete boundary description can be found at 40 CFR 81.323. EPA's final determination suspends the requirements for EGLE to submit an attainment demonstration and other associated nonattainment planning requirements for the St. Clair nonattainment area so long as the St. Clair area continues to attain the 2010 SO_2 NAAQS. Finalizing this action does not constitute a redesignation of the St. Clair area to attainment of the 2010 SO_2 NAAQS under section 107(d)(3) of the CAA. The St. Clair area will remain designated nonattainment for the 2010 SO_2 NAAQS until such time as EPA determines that the area meets the CAA requirements for redesignation to attainment and takes action to redesignate the area.

As noted in the proposal on this action, sanctions clocks were started on October 21, 2019, for the State's failure to submit all components of the SO_2 part D nonattainment area SIP, including the emissions inventory, attainment demonstration, reasonably available control measures (RACM) including reasonably available control technology (RACT), enforceable emission limitations and control measures, reasonable further progress (RFP) plan, nonattainment new source review (NNSR), and contingency measures.

With the approval of this CDD, only the emissions inventory and NNSR—*i.e.,* the non-planning requirements—need to be addressed. EPA found EGLE's June 30, 2021, submittal of the St. Clair area's emissions inventory and NNSR elements complete in a letter dated October 7, 2021. On October 26, 2021, (86 FR 59073), EPA proposed to approve EGLE's June 30, 2021, submittal of the St. Clair area's emissions inventory and NNSR elements. Therefore, a complete submittal has been made by the State addressing the finding of failure to submit and, as a result, both the NNSR 2:1 offset sanctions and highway funding sanctions that were in place are now suspended as long as the area continues to demonstrate it is attaining the NAAQS.

In accordance with 5 U.S.C. 553(d) of the Administrative Procedure Act (APA), EPA finds there is good cause for

these actions to become effective immediately upon publication. The immediate effective date for this action is authorized under both 5 U.S.C. 553(d)(1) and U.S.C. 553(d)(3).

Section 553(d)(1) of the APA provides that final rules shall not become effective until 30 days after publication in the **Federal Register** ''except . . . a substantive rule which grants or recognizes an exemption or relieves a restriction.'' The purpose of this provision is to ''give affected parties a reasonable time to adjust their behavior before the final rule takes effect.'' *Omnipoint Corp.* v. *Fed. Commc'n Comm'n,* 78 F.3d 620, 630 (D.C. Cir. 1996); *see also United States* v. *Gavrilovic,* 551 F.2d 1099, 1104 (8th Cir. 1977) (quoting legislative history). However, when the agency grants or recognizes an exemption or relieves a restriction, affected parties do not need a reasonable time to adjust because the effect is not adverse. EPA has determined that this rule relieves a restriction because it relieves the State of planning requirements. This action has no effect on the sources in the nonattainment area, as the area will continue to be nonattainment and therefore continue to be subject to NNSR permitting requirements.

Section 553(d)(3) of the APA provides that final rules shall not become effective until 30 days after publication in the **Federal Register** ''except . . . as otherwise provided by the agency for good cause.'' The purpose of this provision is to ''give affected parties a reasonable time to adjust their behavior before the final rule takes effect.'' *Omnipoint Corp.* v. *Fed. Commc'n Comm'n,* 78 F.3d 620, 630 (D.C. Cir. 1996); *see also United States* v. *Gavrilovic,* 551 F.2d 1099, 1104 (8th Cir. 1977) (quoting legislative history). Thus, in determining whether good cause exists to waive the 30-day delay, an agency should ''balance the necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded a reasonable amount of time to prepare for the effective date of its ruling.'' *Gavrilovic,* 551 F.2d at 1105. EPA has determined that there is good cause for making this final rule effective immediately because this rule does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. For these reasons, EPA finds good cause under both 5 U.S.C. 553(d)(1) and U.S.C. 553(d)(3) for this action to become effective on the date of publication of this action.

IV. 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, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

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

In addition, 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).

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 7, 2022. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: December 1, 2021.

Debra Shore,

Regional Administrator, Region 5.

For the reasons stated in the preamble, EPA amends 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

■ 2. In § 52.1170, the table in paragraph (e) is amended by adding an entry for ''2010 Sulfur Dioxide Clean Data Determination'' immediately after the entry for ''List of permit applications; list of consent order public notices; notice, opportunity for public comment

and public hearing required for certain permit actions'' to read as follows:

§ 52.1170 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED MICHIGAN NONREGULATORY AND QUASI-REGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA Approval date	Comments
*	*	*	*	*
2010 Sulfur Dioxide Clean Data Determination.	St. Clair area	7/24/2020	12/7/2021, [INSERT **FEDERAL REGISTER** CITATION].	EPA's final determination suspends the requirements for EGLE to submit an attainment demonstration and other associated nonattainment planning requirements for the St. Clair nonattainment area requirements for the nonattainment area for as long as the area continues to attain the 2010 SO_2 NAAQS.
*	*	*	*	*

* * * * *

[FR Doc. 2021–26471 Filed 12–6–21; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 211201–0248]

RIN 0648–BK98

Extension of the Authorized Restricted Tow Times in Lieu of Turtle Excluder Devices for an Additional 30 Days by Shrimp Trawlers in Specific Louisiana Waters

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

ACTION: Temporary rule.

SUMMARY: NMFS issues this temporary rule for a period of 30 days, to allow shrimp fishers to use limited tow times as an alternative to Turtle Excluder Devices (TEDs) in specific Louisiana State waters (from 91°23′ West longitude eastward to the Louisiana/Mississippi border, and seaward out 3 nautical miles (5.6 kilometers)). This action is necessary because environmental conditions resulting from Hurricane Ida are preventing fishers from using TEDs effectively.

DATES: Effective from December 7, 2021, through January 5, 2022.

FOR FURTHER INFORMATION CONTACT: Bob Hoffman, 727–824–5312.

SUPPLEMENTARY INFORMATION:

Background

All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the Endangered Species Act of 1973 (ESA). The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) turtles are listed as endangered. The loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico, which are listed as endangered.

Sea turtles are incidentally taken, and some are killed, as a result of numerous activities, including fishery-related trawling activities in the Gulf of Mexico and along the Atlantic seaboard. Under the ESA and its implementing regulations, the taking of sea turtles is prohibited, with exceptions identified in 50 CFR 223.206(d), or according to the terms and conditions of a biological opinion issued under section 7 of the ESA, or according to an incidental take permit issued under section 10 of the ESA. The incidental taking of turtles during shrimp or summer flounder trawling is exempted from the taking prohibition of section 9 of the ESA, if the conservation measures specified in the sea turtle conservation regulations (50 CFR part 223) are followed. The regulations require most shrimp trawlers and summer flounder trawlers operating in the southeastern United States (Atlantic area, Gulf area, and summer flounder sea turtle protection area, see 50 CFR 223.206) to have a NMFS-approved TED installed in each net that is rigged for fishing to allow sea turtles to escape. TEDs currently approved by NMFS include single-grid hard TEDs and hooped hard TEDs conforming to a generic description, the flounder TED, and one type of soft TED—the Parker soft TED (see 50 CFR 223.207).

TEDs incorporate an escape opening, usually covered by a webbing flap, which allows sea turtles to escape from trawl nets. To be approved by NMFS, a TED design must be shown to be 97 percent effective in excluding sea turtles during testing based upon specific testing protocols (50 CFR 223.207(e)(1)). Approved hard TEDs are described in the regulations (50 CFR 223.207(a)) according to generic criteria based upon certain parameters of TED design, configuration, and installation, including height and width dimensions of the TED opening through which the turtles escape.

The regulations governing sea turtle take prohibitions and exemptions provide for the use of limited tow times as an alternative to the use of TEDs for vessels with certain specified characteristics or under certain special circumstances. The provisions of 50 CFR 223.206(d)(3)(ii) specify that the NOAA Assistant Administrator for Fisheries (AA) may authorize compliance with tow time restrictions as an alternative to the TED requirement if the AA determines that the presence of algae, seaweed, debris, or other special environmental conditions in a particular area makes trawling with TED-equipped nets impracticable. Namely, TEDs can become clogged with debris, which can prevent target species from passing into the codend of the net and sea turtles from escaping through the TED opening. The provisions of 50 CFR 223.206(d)(3)(i) specify the maximum tow times that may be used when tow time limits are authorized as an alternative to the use of TEDs. Each tow may be no more than 55 minutes from April 1 through October 31 and no more than 75 minutes from November 1 through March 31, as measured from the time that the trawl doors enter the water until they are removed from the water. For a trawl that is not attached to a door, the tow time begins at the time the codend enters the water and ends at the

time the codend is emptied of catch on deck. These tow time limits are designed to minimize the level of mortality of sea turtles that are captured by trawl nets not equipped with TEDs.

Recent Events

On September 21, 2021, we received a request from the Louisiana Department of Wildlife and Fisheries (LDWF) to allow the use of tow times as an alternative to turtle excluder devices (TEDs) because of excessive storm-related debris on the fishing grounds due to Hurricane Ida. We subsequently issue a temporary rule allowing tow times as an alternative to TEDs in Louisiana waters bounded by 91°23′ West longitude (*i.e.,* where the COLREGS demarcation line intersects the ship channel coming out of the Atchafalaya River), eastward to the Louisiana/Mississippi border, and seaward out 3 nautical miles (5.6 kilometers) (86 FR 61712, November 8, 2021). This authorization runs from November 5, 2021, through December 6, 2021. On November 17, 2021, we received a request from LDWF requesting a 30 day extension of the authorization (December 7, 2021–January 5, 2022) for the same areas because of the continued presence of storm related debris in the area.

Continuing investigation by the Southeast Fisheries Science Center, Pascagoula Lab, Gear Monitoring Team has documented that debris is still affecting fishermen's ability to use TEDs effectively within the area bounded by 91°23′ West longitude (*i.e.,* where the COLREGS demarcation line intersects the ship channel coming out of the Atchafalaya River), eastward to the Louisiana/Mississippi border, and seaward out 3 nautical miles.

Special Environmental Conditions

The AA finds that debris washed into hurricane-affected Louisiana state waters has created special environmental conditions that make trawling with TED-equipped nets impracticable. Therefore, the AA issues this notification to authorize the use of restricted tow times as an alternative to the use of TEDs in specific Louisiana state waters (from 91°23′ West longitude eastward to the Louisiana/Mississippi border, and seaward out 3 nautical miles (5.6 kilometers)). Tow times must be limited to no more than 55 minutes until October 31, and no more than 75 minutes thereafter, as measured from the time that the trawl doors enter the water until they are removed from the water. For a trawl that is not attached to a door, the tow time begins at the time the codend enters the water and ends at the time the codend is emptied of catch on deck.

Continued Use of TEDs

NMFS encourages shrimp trawlers in the affected areas to continue to use TEDs if they can do so effectively, even though they are authorized under this action to use restricted tow times.

NMFS gear experts have provided several general operational recommendations to fishers to maximize the debris exclusion ability of TEDs that may allow some fishers to continue using TEDs without resorting to restricted tow times. To exclude debris, NMFS recommends the use of hard TEDs made of either solid rod or of hollow pipe that incorporate a bent angle at the escape opening, in a bottom-opening configuration. In addition, the installation angle of a hard TED in the trawl extension is an important performance element in excluding debris from the trawl. High installation angles can trap debris either on or in front of the bars of the TED; NMFS recommends an installation angle of 45°, relative to the normal horizontal flow of water through the trawl, to optimize the TED's ability to exclude turtles and debris. Furthermore, the use of accelerator funnels, which are allowable modifications to hard TEDs, is not recommended in areas with heavy amounts of debris or vegetation. Lastly, the webbing flap that is usually installed to cover the turtle escape opening may be modified to help exclude debris quickly: The webbing flap can either be cut horizontally to shorten it so that it does not overlap the frame of the TED or be slit in a fore-and-aft direction to facilitate the exclusion of debris. The use of the double cover flap TED will also aid in debris exclusion.

All of these recommendations represent legal configurations of TEDs for shrimpers fishing in the affected areas. This action does not authorize any other departure from the TED requirements, including any illegal modifications to TEDs. In particular, if TEDs are installed in trawl nets, they may not be sewn shut.

Alternative to Required Use of TEDs

The authorization provided by this rule applies to all shrimp trawlers that would otherwise be required to use TEDs in accordance with the requirements of 50 CFR 223.206(d)(2) who are operating in hurricane-affected Louisiana state waters (*i.e.,* from 91°23′ West longitude eastward to the Louisiana/Mississippi border, and seaward out 3 nautical miles (5.6 kilometers)) for a period of 30 days. Through this temporary rule, shrimp trawlers may choose either restricted tow times or TEDs to comply with the sea turtle conservation regulations, as prescribed above.

Alternative to Required Use of TEDs; Termination

The AA, at any time, may withdraw or modify this temporary authorization to use tow time restrictions in lieu of TEDs through publication of a notification in the **Federal Register**, if necessary to ensure adequate protection of endangered and threatened sea turtles. Under this procedure, the AA may modify the affected area or impose any necessary additional or more stringent measures, including more restrictive tow times, synchronized tow times, or withdrawal of the authorization if the AA determines that the alternative authorized by this rule is not sufficiently protecting turtles or no longer needed. The AA may also terminate this authorization if information from enforcement, state authorities, or NMFS indicates compliance cannot be monitored effectively. This authorization will expire automatically on January 5, 2022, unless it is explicitly extended through another notification published in the **Federal Register**.

Classification

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

The AA has determined that this action is necessary to respond to an environmental situation to allow more efficient fishing for shrimp, while providing effective protection for endangered and threatened sea turtles pursuant to the ESA and applicable regulations.

Pursuant to 5 U.S.C. 553(b)(B), the AA finds that there is good cause to waive prior notice and opportunity to comment on this rule. The AA finds that unusually high amounts of debris are creating special environmental conditions that make trawling with TED-equipped nets impracticable. Prior notice and opportunity to comment are impracticable and contrary to the public interest in this instance because providing notice and comment would prevent the agency from providing the affected industry relief from the effects of Hurricane Ida in a timely manner, while continuing to provide effective protection for sea turtles.

For the same reasons, the AA finds that there is good cause to waive the 30-day delay in effective date pursuant to 5 U.S.C. 553(d)(3).

Since prior notice and an opportunity for public comment are not required to be provided for this action by 5 U.S.C. 553, or by any other law, the analytical requirements of 5 U.S.C. 601 *et seq.* are inapplicable.

Authority: 16 U.S.C. 1531–1543.

Dated: December 2, 2021.

Samuel D. Rauch, III,

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

[FR Doc. 2021–26513 Filed 12–2–21; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 86, No. 232
Tuesday, December 7, 2021

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2021–1049; Airspace Docket No. 21–ASO–36]

RIN 2120–AA66

Proposed Amendment of Class E Airspace; Hampton, GA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E airspace extending upward from 700 feet above the surface for Atlanta Speedway Airport (formerly Clayton County-Tara Field) by updating the airport's name and updating the geographical coordinates to coincide with the FAA's database. Also, during a review of the airspace, it was determined that an increase in the radius was needed. This action would also remove excessive verbiage from the legal description of the airport. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

DATES: Comments must be received on or before January 21, 2022.

ADDRESSES: Send comments on this proposal to: the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; Telephone: (800) 647–5527, or (202) 366–9826. You must identify the Docket No. FAA–2021–1049; Airspace Docket No. 21–ASO–36 at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

FAA Order JO 7400.11F, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; Telephone: (202) 267–8783. FAA Order JO 7400.11F is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order JO 7400.11F at NARA, email *fr.inspection@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: John Goodson, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; Telephone (404) 305–5966.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it would amend Class E airspace for Hampton, GA to support IFR operations in the area.

Comments Invited

Interested persons are invited to comment on this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (Docket No. FAA–2021–1049 and Airspace Docket No. 21–ASO–36) and be submitted in triplicate to DOT Docket Operations (see **ADDRESSES** section for the address and phone number). You may also submit comments through the internet at *https://www.regulations.gov.*

Persons wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2021–1049; Airspace Docket No. 21–ASO–36.'' The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this document may be changed in light of the comments received. All comments submitted will be available for examination in the public docket both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *https://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined between 8:00 a.m. and 4:30 p.m., Monday through Friday, except federal holidays, at the office of the Eastern Service Center, Federal Aviation Administration, Room 350, 1701 Columbia Avenue, College Park, GA 30337.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order JO 7400.11F, Airspace Designations and Reporting Points, dated August 10, 2021, and effective September 15, 2021. FAA Order JO 7400.11F is publicly available as listed

in the **ADDRESSES** section of this document. FAA Order JO 7400.11F lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA proposes an amendment to 14 CFR part 71 to amend Class E airspace extending upward from 700 feet above the surface at Atlanta Speedway Airport (formerly Clayton County-Tara Field), Hampton, GA by updating the airports name and updating the geographical coordinates of the airport to coincide with the FAA's database. This action would also increase the radius to 9.2 miles (formerly 6.8 miles) and eliminate excessive verbiage in the legal description.

Class E airspace designations are published in Paragraphs 6005 of FAA Order JO 7400.11F, dated August 10, 2021, and effective September 15, 2021, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in FAA Order JO 7400.11.

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

Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'', prior to any FAA final regulatory action.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11F, Airspace Designations and Reporting Points, dated August 10, 2021, and effective September 15, 2021, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 feet or More Above the Surface of the Earth.

* * * * *

ASO GA E5 Hampton, GA [Amended]

Atlanta Speedway Airport, GA
(Lat. 33°23′24″ N. long. 84°19′52″ W)

That airspace extending upward from 700 feet above the surface within a 9.2-mile radius of Atlanta Speedway Airport.

Issued in College Park, Georgia, on December 1, 2021.

Andreese C. Davis,

Manager, Airspace & Procedures Team South, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2021–26418 Filed 12–6–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA–900]

Schedules of Controlled Substances: Temporary Placement of Butonitazene, Etodesnitazene, Flunitazene, Metodesnitazene, Metonitazene, N-pyrrolidino etonitazene, and Protonitazene in Schedule I

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Proposed amendment; notice of intent.

SUMMARY: The Administrator of the Drug Enforcement Administration is issuing this notice of intent to publish a temporary order to schedule seven synthetic benzimidazole-opioid substances, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers whenever the existence of such isomers, esters, ethers, and salts is possible, in schedule I of the Controlled Substances Act. When it is issued, the temporary scheduling order will impose the regulatory controls and administrative, civil, and criminal sanctions applicable to schedule I controlled substances on persons who handle (manufacture, distribute, reverse distribute, import, export, engage in research, conduct instructional activities or chemical analysis, or possess) or propose to handle these seven specified controlled substances.

DATES: December 7, 2021.

ADDRESSES: Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, Virginia 22152.

FOR FURTHER INFORMATION CONTACT: Terrence L. Boos, Drug and Chemical Evaluation Section, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (571) 362–3249.

SUPPLEMENTARY INFORMATION: The notice of intent contained in this document is issued pursuant to the temporary scheduling provisions of 21 U.S.C. 811(h). The Drug Enforcement Administration (DEA) intends to issue a temporary scheduling order [1] (in the form of a temporary amendment) to add the following seven substances, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers whenever the existence of such isomers, esters, ethers, and salts is possible, to schedule I under the Controlled Substances Act (CSA):

- 2-(2-(4-butoxybenzyl)-5-nitro-1*H*-benzimidazol-1-yl)-*N,N*-diethylethan-1-amine (butonitazene),
- 2-(2-(4-ethoxybenzyl)-1*H*-benzimidazol-1-yl)-*N,N*-diethylethan-1-amine (etodesnitazene; etazene),
- *N,N*-diethyl-2-(2-(4-fluorobenzyl)-5-nitro-1*H*-benzimidazol-1-yl)ethan-1-amine) (flunitazene),
- *N,N*-diethyl-2-(2-(4-methoxybenzyl)-1*H*-benzimidazol-1-yl)ethan-1-amine (metodesnitazene),
- *N,N*-diethyl-2-(2-(4-methoxybenzyl)-5-nitro-1*H*-

[1] Though DEA has used the term ''final order'' with respect to temporary scheduling orders in the past, this notice of intent adheres to the statutory language of 21 U.S.C. 811(h), which refers to a ''temporary scheduling order.'' No substantive change is intended.

benzimidazol-1-yl)ethan-1-amine (metonitazene),

- 2-(4-ethoxybenzyl)-5-nitro-1-(2-(pyrrolidin-1-yl)ethyl)-1*H*-benzimidazole (*N*-pyrrolidino etonitazene; etonitazepyne), and
- *N,N*-diethyl-2-(5-nitro-2-(4-propoxybenzyl)-1*H*-benzimidazol-1-yl)ethan-1-amine (protonitazene).

The temporary scheduling order will be published in the **Federal Register** on or after January 6, 2022.

Legal Authority

The CSA provides the Attorney General (as delegated to the Administrator of DEA (Administrator) pursuant to 28 CFR 0.100) with the authority to temporarily place a substance in schedule I of the CSA for two years without regard to the requirements of 21 U.S.C. 811(b), if he finds that such action is necessary to avoid an imminent hazard to the public safety. 21 U.S.C. 811(h)(1). In addition, if proceedings to control a substance are initiated under 21 U.S.C. 811(a)(1) while the substance is temporarily controlled under section 811(h), the Attorney General may extend the temporary scheduling for up to one year. 21 U.S.C. 811(h)(2).

Where the necessary findings are made, a substance may be temporarily scheduled if it is not listed in any other schedule under section 202 of the CSA, 21 U.S.C. 812, or if there is no exemption or approval in effect for the substance under section 505 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 355. 21 U.S.C. 811(h)(1); 21 CFR part 1308.

Background

The CSA requires the Administrator to notify the Secretary of the Department of Health and Human Services (HHS) of an intent to place a substance in schedule I of the CSA temporarily (*i.e.,* to issue a temporary scheduling order). 21 U.S.C. 811(h)(4). The then-Acting Administrator transmitted the required notice to the Assistant Secretary for Health of HHS (Assistant Secretary),[2] by letter dated June 16, 2021, regarding butonitazene, etodesnitazene, flunitazene, metodesnitazene, metonitazene, and protonitazene. In a subsequent letter dated August 25, 2021, the Administrator transmitted the required notice to the Assistant Secretary for *N*-pyrrolidino etonitazene. The Assistant Secretary responded to these notices by letters dated July 7 and September 10, 2021, and advised that based on a review by the Food and Drug Administration (FDA), there are currently no investigational new drug applications (IND) or approved new drug applications (NDA) for butonitazene, etodesnitazene, flunitazene, metodesnitazene, metonitazene, *N*-pyrrolidino etonitazene, and protonitazene. The Assistant Secretary also stated that HHS had no objection to the temporary placement of these substances in schedule I. Butonitazene, etodesnitazene, flunitazene, metodesnitazene, metonitazene, *N*-pyrrolidino etonitazene, and protonitazene currently are not listed in any schedule under the CSA, and no exemptions or approvals under 21 U.S.C. 355 are in effect for these seven benzimidazole-opioids.

To find that temporarily placing a substance in schedule I of the CSA is necessary to avoid an imminent hazard to the public safety, the Administrator must consider three of the eight factors set forth in 21 U.S.C. 811(c): The substance's history and current pattern of abuse; the scope, duration and significance of abuse; and what, if any, risk there is to the public health. 21 U.S.C. 811(h)(3). This consideration includes any information indicating actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution of these substances. 21 U.S.C. 811(h)(3).

Substances meeting the statutory requirements for temporary scheduling may only be placed in schedule I. 21 U.S.C. 811(h)(1). Substances in schedule I have high potential for abuse, no currently accepted medical use in treatment in the United States, and no accepted safety for use under medical supervision. 21 U.S.C. 812(b)(1).

Seven Benzimidazole-Opioids: Butonitazene, Etodesnitazene, Flunitazene, Metodesnitazene, Metonitazene, *N*-Pyrrolidino Etonitazene, and Protonitazene

The United States currently is experiencing an opioid overdose epidemic, and the presence of synthetic opioids in the illicit drug market threatens to exacerbate this. The trafficking, continued evolution, and abuse of new synthetic opioids are deadly trends posing imminent hazards to public safety. Adverse health effects associated with abuse of synthetic opioids and increased popularity of these substances have been serious concerns in recent years. Butonitazene, etodesnitazene, flunitazene, metodesnitazene, metonitazene, *N*-pyrrolidino etonitazene, and protonitazene are synthetic opioids recently identified on the illicit drug market in the United States.

Data obtained from preclinical pharmacology studies show that butonitazene, etodesnitazene, flunitazene, metodesnitazene, metonitazene, *N*-pyrrolidino etonitazene, and protonitazene have pharmacological profiles similar to those of the potent benzimidazole-opioids etonitazene and isotonitazene, both schedule I controlled substances. Because of their pharmacological similarities, use of these seven benzimidazole-opioid substances presents a high risk of abuse and may negatively affect users and communities. They have been identified in at least 44 toxicology and post-mortem cases in the United States between November 2020 and July 2021. Specifically, butonitazene has been identified in one case, etodesnitazene in five cases, flunitazene in four cases, metodesnitazene in one case, metonitazene in twenty cases, *N*-pyrrolidino etonitazene in eight cases, and protonitazene in five cases, which together create serious public safety concerns.

Available data and information for butonitazene, etodesnitazene, flunitazene, metodesnitazene, metonitazene, *N*-pyrrolidino etonitazene, and protonitazene, summarized below, indicate that these substances have high potential for abuse, no currently accepted medical use in treatment in the United States, and lack of accepted safety for use under medical supervision. DEA's three-factor analysis is available in its entirety under ''Supporting and Related Material'' of the public docket for this action at *www.regulations.gov* under Docket Number DEA–900.

Factor 4. History and Current Pattern of Abuse

In the late 1950s, pharmaceutical research laboratories of the Swiss chemical company CIBA Aktiengesellschaft synthesized a group of benzimidazole derivatives with analgesic properties; however, the research did not lead to any medically approved analgesic products. These benzimidazole derivatives include schedule I substances such as synthetic opioids clonitazene, etonitazene, and isotonitazene. In 2019, isotonitazene emerged on the illicit drug market and was involved in numerous fatal overdose events. In August 2020, DEA temporarily controlled it as a schedule I substance under the CSA (85 FR 51342).

[2] The Secretary of HHS has delegated to the Assistant Secretary for Health of HHS the authority to make domestic drug scheduling recommendations. 58 FR 35460, July 1, 1993.

Subsequently, the benzimidazole-opioids at issue here have emerged on the illicit drug market. Law enforcement agencies have encountered etodesnitazene, flunitazene, metonitazene, and protonitazene in several solid (*e.g.,* powder and rock) and liquid forms. These substances are not approved for medical use anywhere in the world. The Assistant Secretary, by letters dated July 7 and September 10, 2021, informed DEA that there are no FDA-approved NDAs or INDs for them in the United States. Hence, there are no legitimate channels for these substances as marketed drug products. Their appearance on the illicit drug market is similar to other synthetic opioids trafficked for their psychoactive effects. These seven opioid substances are likely to be abused in the same manner as schedule I opioids such as etonitazene, isotonitazene, and heroin. They have been identified as white to beige powders or in liquid forms, typically of unknown purity or concentration.

In 2020 and 2021, butonitazene, etodesnitazene, flunitazene, metodesnitazene, metonitazene, and protonitazene emerged on the illicit synthetic drug market as evidenced by their identification in forensic drug seizures or biological samples. In July 2020, metonitazene was first reported seized as a white powdery substance in a North Carolina case. Based on data from the National Forensic Laboratory Information System (NFLIS),[3] law enforcement often encounters etodesnitazene, flunitazene, metonitazene, and protonitazene in mixtures. Substances found in combination with some of these benzimidazole-opioids include cutting agents (caffeine, xylazine, etc.) or other substances of abuse such as heroin, fentanyl (schedule II), fentanyl analogs, and tramadol (schedule IV).

In the United States, butonitazene, etodesnitazene, flunitazene, metonitazene, *N*-pyrrolidino etonitazene, and protonitazene have been identified alone or in combination with other substances such as designer benzodiazepines and fentanyl (see Factors 5 and 6). Evidence suggests that individuals are using these substances as a replacement for other opioids, either knowingly or unknowingly. Information gathered from case histories and autopsy findings show that deaths involving metonitazene were similar to those of opioid-related deaths. Identified material or paraphernalia from death-scene investigations also were consistent with opioid use. The seven substances are likely to be abused in the same manner as schedule I opioids such as isotonitazene and heroin.

Factor 5. Scope, Duration, and Significance of Abuse

The subject substances have been described as synthetic opioids, and evidence suggests they are abused for their opioidergic effects (see Factor 6). Their abuse has resulted in their identification in toxicology and post-mortem cases. Between January and February of 2021, metonitazene has been positively identified in 20 forensic post-mortem cases from seven different states: Tennessee (10), Illinois (5), Florida (1), Iowa (1), Ohio (1), South Carolina (1), and Wisconsin (1). Most (18) of the decedents were male, with ages ranging from 19 to 63 years and an average age of 41 years. Metonitazene was identified as the sole drug detected in only three cases, and the only opioid in six cases.

Detection of *N*-pyrrolidino etonitazene in a toxicology case first was reported[4] in May 2021. It has been identified in a total of eight post-mortem cases from five different states (Colorado (1), Florida (1), New York (1), Pennsylvania (1), and West Virginia (4)) between January and April 2021. The decedents' ages spanned their 20s to 50s. *N*-Pyrrolidino etonitazene was the only drug of interest in one of these cases. In the other cases, it was co-identified with designer benzodiazepines (7), fentanyl (4), and methamphetamine (4). Data from law enforcement encounters suggests that etodesnitazene, flunitazene, metonitazene, and protonitazene are abused[5] in the United States as recreational drugs. Law enforcement encounters of etodesnitazene, flunitazene, metonitazene, and protonitazene as reported to NFLIS (Federal, State, and local laboratories) includes 270 exhibits since 2020 (queried 08/04/2021). NFLIS registered one encounter of etodesnitazene from one state, five encounters of flunitazene from four states, 262 encounters of metonitazene from eight states, and two encounters of protonitazene from two states. Data from NFLIS show that 561.55 grams of metonitazene has been encountered by law enforcement since 2020, and it was often suspected as heroin or fentanyl. This suggests that metonitazene might be presented as a substitute for heroin or fentanyl and likely abused in the same manner as either of these substances. The lack of identification of butonitazene, metodesnitazene, and *N*-pyrrolidino etonitazene in law enforcement reports might be due to the rapid appearance of these benzimidazole-opioids and under-reporting as forensic laboratories try to secure reference standards for these substances. However, butonitazene, metodesnitazene, and *N*-pyrrolidino etonitazene have been identified in toxicology cases.

The population likely to abuse these seven benzimidazole-opioids appears to be the same as those abusing other opioid substances such as heroin, tramadol, fentanyl, and other synthetic opioids. This is evidenced by the types of other drugs co-identified in biological samples and law enforcement encounters. Because abusers are likely to obtain these substances through unregulated sources, their identity, purity, and quantity are uncertain and likely to be inconsistent, thus posing significant adverse health risks to the end user. The misuse and abuse of opioids have been demonstrated and are well-characterized. According to the most recent data from the National Survey on Drug Use and Health (NSDUH),[6] as of 2019, an estimated 10.1 million people aged 12 years or older misused opioids in the past year, including 9.7 million prescription pain reliever misusers and 745,000 heroin users. In 2019, an estimated 1.6 million people had an opioid use disorder, including 1.4 million people with a

[3] NFLIS represents an important resource in monitoring illicit drug trafficking, including the diversion of legally manufactured pharmaceuticals into illegal markets. NFLIS is a comprehensive information system that includes data from forensic laboratories that handle more than 96% of an estimated 1.0 million distinct annual state and local drug analysis cases. NFLIS includes drug chemistry results from completed analyses only. While NFLIS data is not direct evidence of abuse, it can lead to an inference that a drug has been diverted and abused. *See* 76 FR 77330, 77332, Dec. 12, 2011.

[4] Center for Forensic Science Research and Education. Public Alert: New High Potency Synthetic Opioid *N*-Pyrrolidino Etonitazene (Etonitazepyne) Linked to Overdoses across United States. June 17, 2021.

[5] While law enforcement data are not direct evidence of abuse, they can lead to an inference that drugs have been diverted and abused. *See* 76 FR 77330, 77332, Dec. 12, 2011.

[6] NSDUH, formerly known as the National Household Survey on Drug Abuse (NHSDA), is conducted annually by the Department of Health and Human Services' Substance Abuse and Mental Health Services Administration (SAMHSA). It is the primary source of estimates of the prevalence and incidence of non-medical use of pharmaceutical drugs, illicit drugs, alcohol, and tobacco use in the United States. The survey is based on a nationally representative sample of the civilian, non-institutionalized population 12 years of age and older. The survey excludes homeless people who do not use shelters, active military personnel, and residents of institutional group quarters such as jails and hospitals. The NSDUH provides yearly national and state level estimates of drug abuse, and includes prevalence estimates by lifetime (*i.e.,* ever used), past year, and past month abuse or dependence. The 2019 NSDUH Annual Report. (Last accessed July 26, 2021).

prescription pain reliever use disorder and 438,000 people with heroin use disorder. This population likely is at risk of abusing butonitazene, etodesnitazene, flunitazene, metodesnitazene, metonitazene, *N*-pyrrolidino etonitazene, and protonitazene. Individuals who initiate (*i.e.,* use a drug for the first time) use of these benzimidazole-opioids are likely to be at risk of developing substance use disorder, overdose, and death similar to that of other opioid analgesics (*e.g.,* fentanyl, morphine, etc.). Law enforcement or toxicology reports demonstrate that the seven substances at issue are being distributed illicitly and abused.

Factor 6. What, if Any, Risk There Is to the Public Health

The increase in opioid overdose deaths in the United States has been exacerbated recently by the availability of potent synthetic opioids in the illicit drug market. Data obtained from pre-clinical studies demonstrate that butonitazene, etodesnitazene, flunitazene, metodesnitazene, metonitazene, *N*-pyrrolidino etonitazene, and protonitazene exhibit pharmacological profiles similar to that of schedule I substances such as etonitazene, isotonitazene, and other mu-opioid receptor agonists. These seven benzimidazole-opioids bind to and act as agonists at the mu-opioid receptors. It is well established that substances that act as mu-opioid receptor agonists have a high potential for abuse and addiction and can induce dose-dependent respiratory depression.

As with any mu-opioid receptor agonist, the potential health and safety risks for users of butonitazene, etodesnitazene, flunitazene, metodesnitazene, metonitazene, *N*-pyrrolidino etonitazene, and protonitazene are high. Consistently, these substances have been identified in toxicology cases. The public health risks attendant to the abuse of mu-opioid receptor agonists are well established. These risks include large numbers of drug treatment admissions, emergency department visits, and fatal overdoses. According to the Centers for Disease Control and Prevention (CDC), opioids, mainly synthetic opioids other than methadone, are predominantly responsible for drug overdose deaths in recent years. According to CDC data, synthetic opioid-related overdose deaths in the United States increased from 36,359 in 2019, to 56,688 in 2020 (CDC, 2021).[7] Of the drug overdose death data (70,630) for 2019, synthetic opioids were involved in about 51.4 percent (36,359) of all drug-involved overdose deaths.

According to a recent publication, since November 2020, there has been an increase in metonitazene-related adverse events, including deaths.[8] Metonitazene has been co-identified with other substances in biological samples from 20 post-mortem cases from seven different states: Florida (1), Illinois (5), Iowa (1), Ohio (1), South Carolina (1), Tennessee (10), and Wisconsin (1). Information gathered from case histories and autopsy findings show that deaths involving metonitazene were similar to those of opioid-related deaths. Identified material or paraphernalia from death-scene investigations were consistent with opioid use. Reports obtained from autopsy findings showed that deaths involving metonitazene presented pulmonary and cerebral edema, as well as distended bladder and signs of intravenous drug use. Of the cases for which death certificate data were available, metonitazene was reported as a cause of death in four cases, of which three cases listed metonitazene as the only cause.

According to recent reports, butonitazene (1 instance), etodesnitazene (5), flunitazene (4), metodesnitazene (1), metonitazene (20), protonitazene (5), and *N*-pyrrolidino etonitazene (10) have been identified in toxicology cases in the United States.[9] For cases involving *N*-pyrrolidino etonitazene, it was co-identified with fentanyl in four cases and with novel benzodiazepines (*e.g.,* flualprazolam, etizolam, and clonazolam) in six others.

Finding of Necessity of Schedule I Placement To Avoid Imminent Hazard to Public Safety

In accordance with 21 U.S.C. 811(h)(3), based on the available data and information summarized above, the uncontrolled manufacture, distribution, reverse distribution, importation, exportation, conduct of research and chemical analysis, possession, and abuse of butonitazene, etodesnitazene, flunitazene, metodesnitazene, metonitazene, *N*-pyrrolidino etonitazene, and protonitazene pose imminent hazards to public safety. DEA is not aware of any currently accepted medical uses for these substances in the United States. A substance meeting the statutory requirements for temporary scheduling, found in 21 U.S.C. 811(h)(1), may only be placed in schedule I. Substances in schedule I must have a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision. Available data and information for butonitazene, etodesnitazene, flunitazene, metodesnitazene, metonitazene, *N*-pyrrolidino etonitazene, and protonitazene indicate that these substances meet the three statutory criteria. As required by 21 U.S.C. 811(h)(4), the then-Acting Administrator transmitted to the Assistant Secretary for Health, via letter dated June 16, 2021, notice of his intent to place butonitazene, etodesnitazene, flunitazene, metodesnitazene, metonitazene, and protonitazene in schedule I on a temporary basis. In a letter to the Assistant Secretary for Health dated August 25, 2021, the Administrator transmitted notice of her intent to place *N*-pyrrolidino etonitazene in schedule I on a temporary basis.

Conclusion

This Notice of Intent provides the 30-day notice pursuant to 21 U.S.C. 811(h)(1) of DEA's intent to issue a temporary scheduling order. In accordance with 21 U.S.C. 811(h)(1) and (3), the Administrator considered available data and information, herein set forth the grounds for her determination that it is necessary to temporarily schedule butonitazene, etodesnitazene, flunitazene, metodesnitazene, metonitazene, *N*-pyrrolidino etonitazene, and protonitazene in schedule I of the CSA, and finds that placement of these substances in schedule I is necessary to avoid an imminent hazard to the public safety.

The temporary placement of butonitazene, etodesnitazene, flunitazene, metodesnitazene, metonitazene, *N*-pyrrolidino etonitazene, and protonitazene in schedule I of the CSA will take effect pursuant to a temporary scheduling order, which will not be issued before January 6, 2022. Because the Administrator hereby finds this temporary scheduling order necessary to avoid an imminent hazard to the public safety, it will take effect on the date the order is published in the **Federal Register**, and remain in effect for two

[7] 12 Month-ending Provisional Number of Drug Overdose Deaths. Reported provisional data as of July 4, 2021. *https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm.*

[8] Krotulski AJ, Papsun DM, Walton SE, Logan BK. Metonitazene in the United States-Forensic toxicology assessment of a potent new synthetic opioid using liquid chromatography mass spectrometry. Drug Test Anal. 2021 Jun 16. doi: 10.1002/dta.3115. Epub ahead of print.

[9] Center for Forensic Science Research and Education. NPS Opioids in the United States—Trend Report Q1 and Q2, 2021.

years, with a possible extension of one year, pending completion of the regular (permanent) scheduling process. 21 U.S.C. 811(h)(1) and (2). The Administrator intends to issue a temporary scheduling order as soon as possible after the expiration of 30 days from the date of publication of this document. Upon the temporary order's publication, butonitazene, etodesnitazene, flunitazene, metodesnitazene, metonitazene, *N*-pyrrolidino etonitazene, and protonitazene will then be subject to the CSA's schedule I regulatory controls and to administrative, civil, and criminal sanctions applicable to their manufacture, distribution, reverse distribution, importation, exportation, research, conduct of instructional activities and chemical analysis, and possession.

The CSA sets forth specific criteria for scheduling drugs or other substances. Regular scheduling actions in accordance with 21 U.S.C. 811(a) are subject to formal rulemaking procedures ''on the record after opportunity for a hearing'' conducted pursuant to the provisions of 5 U.S.C. 556 and 557. 21 U.S.C. 811. The regular scheduling process of formal rulemaking affords interested parties appropriate process and the government any additional relevant information needed to make determinations. Final decisions that conclude the regular scheduling process of formal rulemaking are subject to judicial review. 21 U.S.C. 877. Temporary scheduling orders are not subject to judicial review. 21 U.S.C. 811(h)(6).

Regulatory Analyses

The CSA provides for expedited temporary scheduling actions where necessary to avoid an imminent hazard to the public safety. Under 21 U.S.C. 811(h), the Administrator, as delegated by the Attorney General, may, by order, temporarily place substances in schedule I. Such orders may not be issued before the expiration of 30 days from: (1) The publication of a notice in the **Federal Register** of the intent to issue such order and the grounds upon which such order is to be issued, and (2) the date that notice of the proposed temporary scheduling order is transmitted to the Assistant Secretary for Health of HHS, as delegated by the Secretary of HHS. 21 U.S.C. 811(h)(1).

Inasmuch as section 811(h) directs that temporary scheduling actions be issued by order and sets forth the procedures by which such orders are to be issued, including the requirement to publish in the **Federal Register** a Notice of Intent, the notice-and-comment requirements of section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553, do not apply to this Notice of Intent. The APA expressly differentiates between orders and rules, as it defines an ''order'' to mean a ''final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency *in a matter other than rule making*.'' 5 U.S.C. 551(6) (emphasis added). The specific language chosen by Congress indicates its intent that DEA issue *orders* instead of proceeding by rulemaking when temporarily scheduling substances. Given that Congress specifically requires the Administrator (as delegated by the Attorney General) to follow rulemaking procedures for *other* kinds of scheduling actions, *see* 21 U.S.C. 811(a), it is noteworthy that, in section 811(h), Congress authorized the issuance of temporary scheduling actions by order rather than by rule.

Even assuming that this Notice of Intent is subject to section 553 of the APA, the Administrator finds that there is good cause to forgo its notice-and-comment requirements, as any further delays in the process for issuing temporary scheduling orders would be impracticable and contrary to the public interest given the manifest urgency to avoid an imminent hazard to the public safety.

Although DEA believes this Notice of Intent to issue a temporary scheduling order is not subject to the notice-and-comment requirements of section 553 of the APA, DEA notes that in accordance with 21 U.S.C. 811(h)(4), the Administrator took into consideration comments submitted by the Assistant Secretary in response to the notices that DEA transmitted to the Assistant Secretary pursuant to such subsection.

Further, DEA believes that this temporary scheduling action is not a ''rule'' as defined by 5 U.S.C. 601(2), and, accordingly, is not subject to the requirements of the Regulatory Flexibility Act. The requirements for the preparation of an initial regulatory flexibility analysis in 5 U.S.C. 603(a) are not applicable where, as here, DEA is not required by section 553 of the APA or any other law to publish a general notice of proposed rulemaking.

In accordance with the principles of Executive Orders (E.O.) 12866 and 13563, this action is not a significant regulatory action. E.O. 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). E.O. 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review as established in E.O. 12866. E.O. 12866 classifies a ''significant regulatory action,'' requiring review by the Office of Management and Budget, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. Because this is not a rulemaking action, this is not a significant regulatory action as defined in Section 3(f) of E.O. 12866.

This action will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with E.O. 13132 (Federalism), it is determined that this action does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

For the reasons set out above, DEA proposes to amend 21 CFR part 1308 as follows:

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

■ 1. The authority citation for part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b), 956(b), unless otherwise noted.

■ 2. In § 1308.11, add paragraphs (h)(50) through (56) to read as follows:

§ 1308.11 Schedule I.

* * * * *

(h) * * *

(50) 2-(2-(4-butoxybenzyl)-5-nitro-1*H*-benzimidazol-1-yl)-*N,N*-diethylethan-1-amine, its isomers, esters, ethers, salts, and salts of isomers, esters and ethers (Other name: butonitazene) 9654
(51) 2-(2-(4-ethoxybenzyl)-1*H*-benzimidazol-1-yl)-*N,N*-diethylethan-1-amine, its isomers, esters, ethers, salts, and salts of isomers, esters and ethers (Other names: etodesnitazene; etazene) 9665
(52) *N,N*-diethyl-2-(2-(4-fluorobenzyl)-5-nitro-1*H*-benzimidazol-1-yl)ethan-1-amine, its isomers, esters, ethers, salts, and salts of isomers, esters and ethers (Other name: flunitazene) 9656
(53) *N,N*-diethyl-2-(2-(4-methoxybenzyl)-1*H*-benzimidazol-1-yl)ethan-1-amine, its isomers, esters, ethers, salts, and salts of isomers, esters and ethers (Other name: metodesnitazene) 9664
(54) *N,N*-diethyl-2-(2-(4-methoxybenzyl)-5-nitro-1*H*-benzimidazol-1-yl)ethan-1-amine, its isomers, esters, ethers, salts, and salts of isomers, esters and ethers (Other name: metonitazene) 9657
(55) 2-(4-ethoxybenzyl)-5-nitro-1-(2-(pyrrolidin-1-yl)ethyl)-1*H*-benzimidazole, its isomers, esters, ethers, salts, and salts of isomers, esters and ethers (Other names: *N*-pyrrolidino etonitazene; etonitazepyne) 9658
(56) *N,N*-diethyl-2-(5-nitro-2-(4-propoxybenzyl)-1*H*-benzimidazol-1-yl)ethan-1-amine, its isomers, esters, ethers, salts, and salts of isomers, esters and ethers (Other name: protonitazene) 9659

Anne Milgram,

Administrator.

[FR Doc. 2021–26263 Filed 12–6–21; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA–568]

Schedules of Controlled Substances: Placement of Methoxetamine (MXE) in Schedule I

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Drug Enforcement Administration proposes placing 2-(ethylamino)-2-(3-methoxyphenyl)cyclohexan-1-one (methoxetamine, MXE), including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, in schedule I of the Controlled Substances Act. This action is being taken to enable the United States to meet its obligations under the 1971 Convention on Psychotropic Substances. If finalized, this action would impose the regulatory controls and administrative, civil, and criminal sanctions applicable to schedule I controlled substances on persons who handle (manufacture, distribute, reverse distribute, import, export, engage in research, conduct instructional activities or chemical analysis with, or possess), or propose to handle, methoxetamine.

DATES: Comments must be submitted electronically or postmarked on or before February 7, 2022.

Interested persons may file a request for hearing or waiver of hearing pursuant to 21 CFR 1308.44 and in accordance with 21 CFR 1316.45 and/or 1316.47, as applicable. Requests for hearing and waivers of an opportunity for a hearing or to participate in a hearing, together with a written statement of position on the matters of fact and law asserted in the hearing, must be received on or before January 6, 2022.

ADDRESSES: Interested persons may file written comments on this proposal in accordance with 21 CFR 1308.43(g). The electronic Federal Docket Management System will not accept comments after 11:59 p.m. Eastern Time on the last day of the comment period. To ensure proper handling of comments, please reference ''Docket No. DEA–568'' on all electronic and written correspondence, including any attachments.

- *Electronic comments:* DEA encourages commenters to submit all comments electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the on-line instructions at that site for submitting comments. Upon completion of your submission, you will receive a Comment Tracking Number. Submitted comments are not instantaneously available for public view on *regulations.gov.* If you have received a Comment Tracking Number, you have submitted your comment successfully and there is no need to resubmit the same comment.
- *Paper comments:* Paper comments that duplicate electronic submissions are not necessary and are discouraged. Should you wish to mail a paper comment in lieu of an electronic comment, it should be sent via regular or express mail to: Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.
- *Hearing requests:* All requests for a hearing and waivers of participation, together with a written statement of position on the matters of fact and law asserted in the hearing, must be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for hearing and waivers of participation should also be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/LJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

FOR FURTHER INFORMATION CONTACT: Terrence L. Boos, Drug & Chemical Evaluation Section, Diversion Control Division, Drug Enforcement Administration; Telephone: (571) 362–3249.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments

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

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

prominently identify the confidential business information to be redacted within the comment.

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

An electronic copy of this document and supplemental information to this proposed rule are available at *https://www.regulations.gov* for easy reference.

Request for Hearing or Appearance; Waiver

Pursuant to 21 U.S.C. 811(a), this action is a formal rulemaking ''on the record after opportunity for a hearing.'' Such proceedings are conducted pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. 551–559. 21 CFR 1308.41–1308.45; 21 CFR part 1316, subpart D. Interested persons may file requests for a hearing or notices of intent to participate in a hearing in conformity with the requirements of 21 CFR 1308.44(a) or (b), and such requests must include a statement of interest in the proceeding and the objections or issues, if any, concerning which the person desires to be heard. 21 CFR 1316.47(a). Any interested person may file a waiver of an opportunity for a hearing or to participate in a hearing together with a written statement regarding the interested person's position on the matters of fact and law involved in any hearing as set forth in 21 CFR 1308.44(c).

All requests for a hearing and waivers of participation, together with a written statement of position on the matters of fact and law involved in such hearing, must be sent to DEA using the address information provided above.

Legal Authority

The United States is a party to the 1971 United Nations Convention on Psychotropic Substances (''1971 Convention''), February 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175, as amended. Procedures respecting changes in drug schedules under the 1971 Convention are governed domestically by 21 U.S.C. 811(d)(2)–(4). When the United States receives notification of a scheduling decision pursuant to Article 2 of the 1971 Convention indicating that a drug or other substance has been added to a schedule specified in the notification, the Secretary of the Department Health and Human Services (HHS),[1] after consultation with the Attorney General, shall first determine whether existing legal controls under subchapter I of the Controlled Substances Act (CSA) and the Federal Food, Drug, and Cosmetic Act meet the requirements of the schedule specified in the notification with respect to the specific drug or substance. 21 U.S.C. 811(d)(3). In the event that the Secretary of HHS (Secretary) did not consult with the Attorney General, and the Attorney General did not issue a temporary order, as provided under 21 U.S.C. 811(d)(4), the procedures for permanent scheduling set forth in 21 U.S.C. 811(a) and (b) control. Pursuant to 21 U.S.C. 811(a)(1), the Attorney General may add to such a schedule any drug or other substance, if he finds that such drug or other substance has a potential for abuse, and makes the findings prescribed by 21 U.S.C. 812(b) for the schedule in which such drug or other substance is to be placed. The Attorney General has delegated this scheduling authority to the Administrator of DEA. 28 CFR 0.100.

Background

Methoxetamine (MXE), also known as 2-(ethylamino)-2-(3-methoxyphenyl)cyclohexan-1-one or 2-(3-methoxyphenyl)-2-(*N*-ethylamino)cyclohexanone belongs to the arylcyclohexylamine class of drugs with dissociative anesthetic and hallucinogenic properties, similar to phencyclidine (PCP) and ketamine. Methoxetamine has no approved medical use in the United States.

On December 30, 2014, DEA, in accordance with the provisions of 21 U.S.C. 811(b), requested HHS provide a scientific and medical evaluation as well as a scheduling recommendation for methoxetamine. On April 14, 2017, DEA provided HHS additional scientific and updated information on methoxetamine. The April 14, 2017, communication included that on May 17, 2016, the Secretary-General of the United Nations (UN Secretary General) advised the Secretary of State of the United States that the Commission on Narcotic Drugs (CND), during its 59th Session in March 2016, voted to place methoxetamine in Schedule II of the 1971 Convention (CND Dec/59/6). As a signatory to this international treaty, the United States is required, by scheduling under the CSA, to place appropriate controls on methoxetamine to meet the minimum requirements of the treaty.

Article 2, paragraph 7(b), of the 1971 Convention sets forth the minimum requirements that the United States must meet when a substance has been added to Schedule II of the 1971 Convention. Pursuant to the 1971 Convention, the United States must require licenses for the manufacture, export and import, and distribution of methoxetamine. This license requirement is accomplished by the CSA with the registration requirement as set forth in 21 U.S.C. 822, 823, 957, and 958, and in accordance with 21 CFR parts 1301 and 1312. In addition, the United States must adhere to specific export and import provisions that are provided in the 1971 Convention. This requirement is accomplished by the CSA with the export and import provisions established in 21 U.S.C. 952, 953, 957, and 958, and in accordance with 21 CFR part 1312. Likewise, under Article 13, paragraphs 1 and 2, of the 1971 Convention, a party to the 1971 Convention may notify another party, through the UN Secretary-General, that it prohibits the importation of a substance in Schedule II, III, or IV of the 1971 Convention. If such notice is presented to the United States, the United States shall take measures to ensure that the named substance is not exported to the country of the notifying party. This requirement is also accomplished by the export provisions of the CSA mentioned above. Under Article 16, paragraph 4, of the 1971 Convention, the United States is required to provide annual statistical reports to the International Narcotics Control Board (INCB). Using INCB Form P, the United States shall provide the following information: (1) In regard to each substance in Schedule I and II of the 1971 Convention, quantities manufactured, exported to and imported from each country or region as well as stocks held by manufacturers; (2) in regard to each substance in Schedule III and IV of the 1971 Convention, quantities manufactured, as well as quantities exported and imported; (3) in regard to each substance in Schedule II

[1] As discussed in a memorandum of understanding entered into by the Food and Drug Administration (FDA) and the National Institute on Drug Abuse (NIDA), FDA acts as the lead agency within HHS in carrying out the Secretary's scheduling responsibilities under the Controlled Substances Act, with the concurrence of NIDA. 50 FR 9518 (March 8, 1985). The Secretary of HHS has delegated to the Assistant Secretary for Health of HHS the authority to make domestic drug scheduling recommendations. 58 FR 35460 (July 1, 1993).

and III of the 1971 Convention, quantities used in the manufacture of exempt preparations; and (4) in regard to each substance in Schedule II–IV of the 1971 Convention, quantities used for the manufacture of non-psychotropic substances or products. Lastly, under Article 2 of the 1971 Convention, the United States must adopt measures in accordance with Article 22 to address violations of any statutes or regulations that are adopted pursuant to its obligations under the 1971 Convention. The United States complies with this provision as persons acting outside the legal framework established by the CSA are subject to administrative, civil, and/or criminal action.

DEA notes that there are differences between the schedules of substances in the 1971 Convention and the CSA. The CSA has five schedules (schedules I–V) with specific criteria set forth for each schedule. Schedule I is the only possible schedule in which a drug or other substance may be placed if it has high potential for abuse and no currently accepted medical use in treatment in the United States. See 21 U.S.C. 812(b). In contrast, the 1971 Convention has four schedules (Schedules I–IV) but does not have specific criteria for each schedule. The 1971 Convention simply defines its four schedules, in Article 1, to mean the correspondingly numbered lists of psychotropic substances annexed to the Convention, and altered in accordance with Article 2.

Proposed Determination To Schedule Methoxetamine

Pursuant to 21 U.S.C. 811(b), DEA gathered the necessary data on methoxetamine and on December 30, 2014, submitted it to the Acting Assistant Secretary for Health of HHS (Acting Assistant Secretary) with a request for a scientific and medical evaluation of available information and a scheduling recommendation for methoxetamine. Subsequently, on April 14, 2017, DEA submitted additional data on methoxetamine to the Acting Assistant Secretary. On April 14, 2018, HHS provided to DEA a scientific and medical evaluation entitled ''Basis for the Recommendation to Place (2-(3-methoxyphenyl)-2-(*N*-ethylamino)-cyclohexanone) Methoxetamine and its Optical Isomers and Salts in Schedule I of the Controlled Substances Act'' and a scheduling recommendation. Following consideration of the eight factors and findings related to the substance's abuse potential, legitimate medical use, and dependence liability, HHS recommended that methoxetamine and its optical isomers and salts be controlled in schedule I of the CSA under 21 U.S.C. 812(b). In response, DEA reviewed the scientific and medical evaluation and scheduling recommendation provided by HHS and all other relevant data, and completed its own eight-factor review pursuant to 21 U.S.C. 811(c). Included below is a brief summary of each factor as analyzed by HHS and DEA in their respective eight-factor analyses, and as considered by DEA in this proposed scheduling determination. Please note that both DEA and HHS analyses are available in their entirety under ''Supporting Documents'' of the public docket for this proposed rule at *https://www.regulations.gov* under docket number ''DEA–568.''

1. The Drug's Actual or Relative Potential for Abuse

In addition to considering the information HHS provided in its scientific and medical evaluation document for methoxetamine, DEA also considered all other relevant data regarding actual or relative potential for abuse of methoxetamine. The term ''abuse'' is not defined in the CSA, however the legislative history of the CSA suggests the following four prongs in determining whether a particular drug or substance has a potential for abuse: [2]

a. Individuals are taking the drug or other substance in amounts sufficient to create a hazard to their health or to the safety of other individuals or to the community; or

b. There is a significant diversion of the drug or other substance from legitimate drug channels; or

c. Individuals are taking the drug or other substance on their own initiative rather than on the basis of medical advice from a practitioner licensed by law to administer such drugs; or

d. The drug is so related in its action to a drug or other substance already listed as having a potential for abuse to make it likely that it will have the same potential for abuse as such substance, thus making it reasonable to assume that there may be significant diversions from legitimate channels, significant use contrary to or without medical advice, or that it has a substantial capability of creating hazards to the health of the user or to the safety of the community.

DEA reviewed the scientific and medical evaluation provided by HHS and all other data relevant to the abuse potential of methoxetamine. These data as presented below demonstrate that methoxetamine has a high potential for abuse.

a. There Is Evidence That Individuals Are Taking the Drug or Other Substance in Amounts Sufficient To Create a Hazard to Their Health or to the Safety of Other Individuals or to the Community

According to HHS, individuals are taking methoxetamine in amounts sufficient to create a hazard to their health or to the safety of other individuals and to the community. Published case reports described non-fatal and fatal intoxications from the United States and Europe, including Poland, the United Kingdom, and Switzerland. The 2014 European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) report on methoxetamine mentioned 20 confirmed (by analysis of postmortem biological samples) death reports received between 2011 and 2013 from European Union Member States to the Early Warning System. Between 2011 and 2014, scientific publications have reported one death related to methoxetamine from Switzerland, eight deaths from the United Kingdom, and at least two deaths from Poland. In the United States, methoxetamine has been reported as the cause of death in two cases; one case was mentioned in the 2014 Annual Report of the American Association of Poison Control Centers' National Poison Data System, and the second case was from a 2013 news report mentioning the Medical Examiner's findings from that death. Additionally, two case reports suggest that some individuals use methoxetamine to self-medicate for some clinical conditions, specifically chronic foot pain and post-traumatic stress disorder. Further, a case report published in 2019 suggests a single injection of methoxetamine can induce prolonged psychosis with confirmed cognitive deficits. As stated by HHS, when abused, methoxetamine can be administered through intranasal (insufflation or snorting), oral, sublingual, rectal, intramuscular, and intravenous routes of administration. Abuse of methoxetamine, similar to PCP and ketamine abuse, produces dissociative anesthetic and hallucinogenic effects, including somatic and psychological effects such as: Euphoria, increased empathy, sense of dissociation from the body, vivid visual hallucinations, and pleasant intensification of sensory experiences. Users report in online forums that methoxetamine generally produces longer lasting effects, with a delayed

[2] Comprehensive Drug Abuse Prevention and Control Act of 1970, H.R. Rep. No. 91–1444, 91st Cong., 2nd Sess. (1970) reprinted in 1970 U.S.C.C.A.N. 4566, 4603.

onset compared to PCP or ketamine. At higher doses (>40 mg), users describe the experience as reaching the ''m-hole,'' which is similar to the ketamine ''k-hole'' experience and characterized by extreme dissociation from the body, comparable to an out-of-body experience.

HHS reports that commonly reported side effects of methoxetamine include dizziness, confusion, time distortion, aphasia, psychomotor agitation, vertigo, incoordination, nausea, and vomiting. Similar to PCP and ketamine toxicity, signs and symptoms (toxidrome) of methoxetamine toxicity can be grouped into three types: Dissociative/delirious, sympathomimetic, and cerebellar symptoms. Dissociative or delirious symptoms include depersonalization, derealization, catatonia, audiovisual hallucinations, delusions, confusion, altered or loss of consciousness, agitation, aggression, amnesia, and mood lability. Sympathomimetic symptoms include rapid heart rate (tachycardia), high blood pressure (hypertension), elevated body temperature (pyrexia), rapid breathing (tachypnea), and pupillary dilation (mydriasis). Cerebellar symptoms include inability to sit (truncal ataxia), incoordination, speech impairment (dysarthria), impaired ability to perform rapid alternating movements (dysdiadochokinesis), and rapid and repetitive uncontrolled eye movements (nystagmus). Summarized withdrawal symptoms reported on online forums include low mood, depressive thoughts, and cognitive impairment for many hours in one user followed by two days of insomnia after a single 100 mg intranasal administration. One user reported a suicide attempt after discontinued use of methoxetamine.

HHS states that treatment of acute toxicity caused by methoxetamine and other drugs of the same class (*e.g.,* PCP and ketamine) consists of supportive treatment to control or relieve psychological complications and side effects. This treatment may include administration of benzodiazepines, antiemetics, intravenous fluids, and respiratory support, if needed.

DEA notes that ketamine has been known to cause toxicities to the bladder and renal system. When mice were given daily dose of 30 mg/kg methoxetamine intraperitoneally (i.p.) for 90 days, significant bladder and renal toxicity occurred. Thus, like ketamine, chronic administration of methoxetamine is associated with bladder and renal toxicity, including inflammatory changes with subsequent fibrosis that could lead to bladder and kidney damage.

b. There is Significant Diversion of the Drug or Substance From Legitimate Drug Channels

HHS states that methoxetamine is not a Food and Drug Administration (FDA)-approved drug product for treatment in the United States and is unaware of any country in which its use is legal. There appear to be no legitimate sources for methoxetamine as a marketed drug. Thus, there is no evidence of significant diversion of methoxetamine from legitimate drug channels.

c. Individuals Are Taking the Substance on Their Own Initiative Rather Than on the Basis of Medical Advice From a Practitioner Licensed by Law To Administer Such Substance

Methoxetamine is not approved for medical use and is not formulated or available for clinical use. Therefore, it is assumed that individuals are taking methoxetamine on their own initiative, rather than based on medical advice from a properly-licensed practitioner. This is consistent with the data from law enforcement seizures and case reports indicating that individuals are taking methoxetamine on their own initiative rather than on the medical advice of a licensed practitioner.

d. The Drug is a New Drug so Related in its Action to a Drug or Other Substance Already Listed as Having a Potential for Abuse To Make it Likely That the Drug Substance Will Have the Same Potential for Abuse as Such Drugs, Thus Making it Reasonable To Assume That There May Be Significant Diversion From Legitimate Channels, Significant Use Contrary to or Without Medical Advice, or That it Has a Substantial Capability of Creating Hazards to the Health of the User or to the Safety of the Community

Methoxetamine is a synthetic arylcyclohexylamine and has pharmacological properties similar to other arylcyclohexylamines such as the ethylamine analog of phencyclidine (PCE; schedule I), the thiophene analog of phencyclidine (TCP; schedule I), phencyclidine (PCP, schedule II), and ketamine (schedule III). Methoxetamine, similar to PCE, TCP, PCP, and ketamine, has been shown to produce dissociative anesthetic and hallucinogenic effects.

As mentioned in HHS' review, the primary mechanism of action of methoxetamine is thought to be on glutamatergic neurotransmission. Glutamate is the major excitatory neurotransmitter system in the brain. *In vitro* binding studies show that methoxetamine binds to the glutamatergic *N*-methyl-D-aspartate (NMDA) receptor and acts as an antagonist with similar potency as PCP and ketamine. HHS notes that, similar to PCP, methoxetamine also has affinity for the serotonin reuptake transporter and acts as a serotonin reuptake inhibitor. Further, like many drugs of abuse, methoxetamine acutely increases the firing rate and bursting activity of ventral tegmental area (VTA) dopaminergic neurons projecting to the nucleus accumbens (NAc), and inhibits the reuptake of dopamine. The VTA is an area of the brain, rich in dopamine and serotonin neurons, which along with the NAc is part of the brain reward pathway. The increase in the firing rate and bursting activity of dopamine neurons produced by PCP, ketamine, and methoxetamine that results in increased dopamine levels in the VTA may underlie the psychotomimetic and reinforcing properties of these drugs.

Drug discrimination (an *in vivo* test to assess drug abuse liability and compare drugs to known drugs of abuse) data demonstrate that methoxetamine, similar to PCP, fully substitutes for the discriminative stimulus effect of ketamine in rats. Additionally, conditioned place preference (CPP) studies and self-administration studies used to assess rewarding and reinforcing effects show that methoxetamine produces both rewarding and reinforcing effects. Taken together, methoxetamine produces psychopharmacological effects similar to those produced by ketamine and PCP in animal models that are predictive of abuse potential in humans.

As stated by HHS, users of methoxetamine experience effects similar to those of ketamine and PCP including depersonalization, a mild to strong sense of dissociation from the physical body, distortion of the sense of reality, and vivid visual hallucinations. More negative or challenging effects of methoxetamine, similar to PCP and ketamine, may also occur and include delusions, tachycardia, hypertension, agitation, aggression, and cerebellar toxicity. Case reports of overdose and deaths resulting from methoxetamine abuse have been reported between 2011 and 2019 in scientific literature and by international authorities.

As mentioned by HHS, methoxetamine is being abused for its psychoactive effects. DEA further notes that based on concerns related to trafficking and availability, as well as the risks to the public health associated with its abuse, at least ten states in the United States have controlled methoxetamine. At the international level, as of June 2020, methoxetamine has been controlled in Russia,

Switzerland, Israel, Sweden, United Kingdom, Japan, Germany, France, Brazil, China, Poland, and the European Union member states.

2. Scientific Evidence of the Drug's Pharmacological Effects, if Known

Methoxetamine is an antagonist at the glutamatergic NMDA receptors (with moderately high affinity) and a reuptake inhibitor at the serotonin transporter. Acute methoxetamine exposure increases the firing rate and bursting activity of the ventral tegmental area (VTA) dopaminergic neurons projecting to the nucleus accumbens (NAc) and inhibits reuptake of dopamine, similarly to PCP and ketamine. The VTA is an area of the brain that is rich in dopamine and serotonin neurons and is a contributing part of the brain reward pathway, as is the NAc. The net result is an increase in dopamine levels in the VTA, which may underlie the psychomimetic and reinforcing effects of these drugs.

Animal testing data in rats show that methoxetamine, like PCP, fully substitutes for ketamine discriminative stimulus. Additionally, rats self-administer methoxetamine. Data from self-administration and CPP studies show that methoxetamine has rewarding and reinforcing effects. Thus, methoxetamine produces psychopharmacologic effects similar to those produced by other NMDA antagonists (PCP and ketamine) in animal models, which are predictive of its abuse in humans.

In humans, users of methoxetamine report dissociative anesthetic and hallucinogenic effects similar to PCP and ketamine including euphoria, increased empathy, dissociation from the body, vivid visual hallucinations, and pleasant intensification of sensory experiences. Delusion, tachycardia, hypertension, agitation, aggression, and cerebellar toxicity have also been reported. Methoxetamine-associated overdose and deaths have been reported in scientific literature and by international authorities between 2011 and 2019.

3. The State of Current Scientific Knowledge Regarding the Drug or Other Substance

Chemistry

Methoxetamine, also known as also known as MXE, 2-(ethylamino)-2-(3-methoxyphenyl)cyclohexan-1-one, or 2-(3-methoxyphenyl)-2-(*N*-ethylamino)cyclohexanone, has a molecular weight of 247.338 g/mol. Methoxetamine is primarily present as a white crystalline powder and has also been reported as being off-white, beige, or yellow in color. The Chemical Abstract Service Registry Numbers for methoxetamine are 1239943–76–0 for methoxetamine base and 1239908–48–5 for methoxetamine as the hydrochloride salt. Its molecular formula (as base) is $C_{15}H_{21}NO_2$. Methoxetamine hydrochloride (salt) is soluble in organic solvents like ethanol (10 mg/mL) at 25 °C, dimethyl sulfoxide (DMSO) (14 mg/mL), and dimethyl formamide (5 mg/mL). It is also soluble in aqueous solvents like a pH 7.2 phosphate buffer (5 mg/mL). Synthesis and characterization of methoxetamine and analytical data (nuclear magnetic resonance spectroscopy, mass spectroscopy, and infrared spectroscopy) are reported in the scientific literature.

Pharmacokinetics and Toxicology

Controlled pharmacokinetic clinical research studies have not been conducted to characterize the onset of action, the plasma concentrations after ingestion of a fixed dose of methoxetamine, or to determine the half-life of methoxetamine. However, since methoxetamine has been used recreationally, a summary and description of the onset and duration of the effects of methoxetamine that come from user reports, generally via online forums, can be found in the scientific literature.

A summary of online user reports suggests that methoxetamine is generally administered through intranasal (insufflation or snorting), oral, sublingual, rectal, and intramuscular routes with additional reports of intravenous use. Dose range administered, onset of drug effects, and duration of drug effects vary by the route of administration. Dose associated with intranasal use is 20 to 60 mg, oral administration is 20 to 100 mg, and intramuscular administration is 10 to 50 mg, with reported onset of drug effects of 30 to 90 minutes following intranasal use, up to 90 minutes following oral administration, and five minutes following intramuscular administration. Drug effects can last 2.5 to 7 hours following nasal use, 3 to 5 hours following oral ingestion, and 1 to 4 hours after intramuscular injection. Typical doses and drug-related time effects were not reported for other routes of administration.

As HHS reports, the metabolism of methoxetamine was investigated using human liver microsomes *in vitro* and compared to toxicological analysis of urine from individuals presenting with analytically confirmed acute methoxetamine toxicity. Liquid chromatography high-resolution mass spectrometry was used to identify and characterize the metabolites of methoxetamine *in vitro* and *in vivo.* These studies reported complex metabolism of methoxetamine including *N*-deethylation, *O*-demethylation, hydroxylation, reduction, and dehydrogenation followed by glucuronization (conjugation of the metabolites with glucuronic acid). The normethoxytamine (desethylmethoxetamine) is the main metabolite identified in both *in vivo* and *in vitro* studies.

HHS further states that kinetic studies with human hepatic CYP isozymes have showed that *N*-deethylation is catalyzed by CYP2B6 and CYP3A4, *O*-demethylation by CYP2B6 and CYP2C19, and hydroxylation by CYP2B6. These studies also showed that normethoxamine is the major metabolite in humans and rats.

The role of CYP2B6 in methoxetamine metabolism is of particular importance. Because CYP2B6 is involved in metabolism of numerous drugs (*e.g.,* bupropion, methadone, propofol, sertraline), pharmacokinetic interactions between methoxetamine and other compounds are likely to occur. In addition, the rate of methoxetamine metabolism and toxicity may depend on genetic polymorphism of CYP2B6. Currently, it is unknown if any specific methoxetamine metabolites are biologically active.

4. Its History and Current Pattern of Abuse

As HHS notes, methoxetamine, similar to ketamine and PCP, is a synthetic arylcyclohexylamine with dissociative anesthetic properties. Typical routes of administration by drug users include oral, nasal insufflation, intramuscular, rectal, and intravenous. Based on available abuse data, public health risk, and drug trafficking data, the World Health Organization (WHO) recommended to the United Nations that methoxetamine be controlled internationally. In March 2016, the CND voted to place methoxetamine in Schedule II of the 1971 Convention.

In 2014, WHO reported that methoxetamine has been available in Europe since 2010. Distribution and trafficking of methoxetamine occurred largely via the internet. According to the law enforcement data, the first encounter in the United States occurred in mid-2011.

In 2015, WHO reported non-fatal intoxications and more than 20 deaths associated with methoxetamine. Since 2014 through 2019, there have been reports of several other overdoses and

deaths in which methoxetamine was implicated in Europe. In the United States, there have been at least two documented deaths associated with the use of methoxetamine, one occurring in 2012 and the other in 2014.

5. The Scope, Duration, and Significance of Abuse

In the United States, evidence of abuse of methoxetamine initially appeared in mid-2011 when a case study was published regarding an individual who was brought to the emergency department following methoxetamine intoxication in Massachusetts. The first reported death in the United States from methoxetamine abuse occurred in Milwaukee County, Wisconsin, in May 2012.

Data from the System to Retrieve Information on Drug Evidence (STRIDE) and STARLiMS [3] and the National Forensic Laboratory Information System (NFLIS) [4] indicate that methoxetamine was found in samples starting in August 2004, in California. Specifically, there were 114 STRIDE/STARLIMS reports from August 2004 through July 2021, and 677 NFLIS reports from January 2011 to July 2021. Combining drug reports and exhibits from both NFLIS and STRIDE between August 2004 and July 2021, methoxetamine has been encountered in 45 states and the District of Columbia. Methoxetamine drug quantities seized by United States Customs and Border Protection (CBP) have ranged from 2 to 200 grams. Reportedly, a small percentage of the methoxetamine reports from CBP were in combination with other drugs, such as synthetic cannabinoids, synthetic cathinones, ketamine, caffeine, and sildenafil.

In response to abuse and safety concerns, methoxetamine has been controlled in Virginia, Minnesota, North Dakota, Florida, Ohio, Indiana, Louisiana, Alabama, Arizona, and Utah.

Abuse of methoxetamine has been characterized as causing acute public health and safety issues worldwide. Methoxetamine is now controlled in Russia, Switzerland, Israel, Sweden, United Kingdom, Japan, Germany, France, Brazil, China, Poland and the European Union member states. On September 25, 2014, the European Union council decided to control methoxetamine in all European member states, and on March 18, 2016, the CND, at its 59th Session, added methoxetamine to Schedule II of the 1971 Convention.

6. What, if Any, Risk There Is to the Public Health

Methoxetamine shares similar mechanisms of action with and produces similar physiological and subjective effects (see Factor 2 for more information) as other controlled arylcyclohexylamines, such as the ethylamine analog of phencyclidine (PCE; schedule I), the thiophene analog of phencyclidine (TCP; schedule I), phencyclidine (PCP; schedule II), and ketamine (schedule III). Thus, methoxetamine poses the same risks to public health as PCE, TCP, PCP, and ketamine. Predominantly, the risks to public health are centralized to risks of the user, but in some cases do affect the general public, as is the case of driving under the influence.

Users of methoxetamine describe the drug effects as being similar to those of PCP and ketamine. Effects often include hallucinations and dissociation of the physical body, and can produce antidepressant-like effects. Online reports of use of methoxetamine suggest it is used via all routes of administration (*i.e.,* intranasal, oral, intramuscular, rectal, and intravenous). Due to the various routes of administration, the onset of effects can vary widely (one minute for intravenous to 90 minutes intranasal).

As HHS notes, several case reports pertaining to methoxetamine use, toxicities, and fatal intoxications have been published in the scientific and medical literature in several countries. In particular, in 2014 EMCDDA reported that methoxetamine was mentioned in 20 biologically confirmed death reports from the European Union member states Early Warning System. At least one published death related to methoxetamine has occurred in Switzerland, eight deaths in the United Kingdom, two deaths in Poland, and two deaths in the United States. In 2015, WHO indicated that a total of 120 nonfatal intoxications and 22 deaths related to methoxetamine had been reported, in which many but not all had been biologically confirmed. Two case reports suggest some individuals use methoxetamine to self-medicate to treat various clinical conditions, specifically chronic foot pain and post-traumatic stress disorder. In addition, DEA further notes one case report published in 2019 suggests methoxetamine can induce prolonged psychosis after a single injection.

7. Its Psychic or Physiological Dependence Liability

Psychological and physiological dependence are associated with methoxetamine. The euphoric and hallucinogenic effects associated with methoxetamine and other arylcyclohexylamine drugs serve as reinforcers and can result in psychological dependence and are supported by case studies with methoxetamine abusers. Several preclinical studies and case reports examined and described physical dependence and withdrawal effects associated with methoxetamine abuse. Signs of methoxetamine withdrawal have included low mood and/or depressive thoughts, cognitive impairment lasting several hours followed by two days of insomnia after last use, and a reported suicide attempt.

8. Whether the Substance Is an Immediate Precursor of a Substance Already Controlled Under the CSA

DEA and HHS find that methoxetamine is not an immediate precursor of any controlled substance of the CSA.

Conclusion

Based on consideration of the scientific and medical evaluation and accompanying recommendation of HHS, and on DEA's consideration of its own eight-factor analysis, DEA finds that these facts and all relevant data constitute substantial evidence of potential for abuse of methoxetamine. As such, DEA hereby proposes to schedule methoxetamine as a controlled substance under the CSA.

Proposed Determination of Appropriate Schedule

The CSA establishes five schedules of controlled substances known as schedules I, II, III, IV, and V. The CSA also outlines the findings required to place a drug or other substance in any particular schedule, 21 U.S.C. 812(b). After consideration of the analysis and recommendation of the Acting Assistant Secretary for Health of HHS and review of all other available data, the Administrator of DEA, pursuant to 21 U.S.C. 812(b)(1), finds that:

(1) Methoxetamine has a high potential for abuse that is comparable to other scheduled substances such as the ethylamine analog of phencyclidine (PCE; schedule I), the thiophene analog

[3] STARLiMS is a web-based, commercial laboratory information management system that systematically collects results from drug chemistry analyses conducted by DEA laboratories. On October 1, 2014, STARLiMS replaced STRIDE as DEA's laboratory drug evidence data system of record. DEA laboratory data submitted after September 30, 2014 are reposited in STARLiMS. STRIDE/STARLiMS data were queried on August 18, 2021.

[4] NFLIS is a national forensic laboratory reporting system that systematically collects results from drug chemistry analyses conducted by state and local forensic laboratories in the United States. NFLIS data were queried on August 18, 2021.

of phencyclidine (TCP; schedule I), phencyclidine (PCP; schedule II), and ketamine (schedule III);

(2) Methoxetamine has no currently accepted medical use in treatment in the United States. There are no approved New Drug Applications for methoxetamine and no known therapeutic applications for methoxetamine in the United States. Therefore, methoxetamine has no currently accepted medical use in treatment in the United States.[5]

(3) There is a lack of accepted safety for use of methoxetamine under medical supervision. Because methoxetamine has no approved medical use and has not been investigated as a new drug, its safety for use under medical supervision has not been determined. Therefore, there is a lack of accepted safety for use of methoxetamine under medical supervision.

Based on these findings, the Acting Administrator of DEA concludes that methoxetamine warrants control in schedule I of the CSA. More precisely, because of its hallucinogenic effects, and because it may produce hallucinogenic-like tolerance and dependence in humans, DEA proposes to placing methoxetamine, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical description, in 21 CFR 1308.11(d) (the hallucinogenic substances category of schedule I).

Requirements for Handling Methoxetamine

If this rule is finalized as proposed, methoxetamine would be subject to the CSA's schedule I regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, reverse distribution, import, export, engagement in research, conduct instructional activities or chemical analysis with, and possession of schedule I controlled substances, including the following:

1. Registration. Any person who handles (manufactures, distributes, reverse distributes, imports, exports, engages in research, or conducts instructional activities or chemical analysis with, or possesses), or who desires to handle, methoxetamine would be required to be registered with DEA to conduct such activities pursuant to 21 U.S.C. 822, 823, 957, and 958, and in accordance with 21 CFR parts 1301 and 1312, as of the effective date of a final scheduling action. Any person who currently handles methoxetamine and is not registered with DEA would need to submit an application for registration and may not continue to handle methoxetamine as of the effective date of a final scheduling action, unless DEA has approved that application for registration pursuant to 21 U.S.C. 822, 823, 957, 958, and in accordance with 21 CFR parts 1301 and 1312.

2. Disposal of stocks. Any person who does not desire or is not able to obtain a schedule I registration would be required to surrender or transfer all quantities of currently held methoxetamine to a person registered with DEA before the effective date of a final scheduling action in accordance with all applicable Federal, State, local, and tribal laws. As of the effective date of a final scheduling action, methoxetamine would be required to be disposed of in accordance with 21 CFR part 1317, in addition to all other applicable Federal, State, local, and tribal laws.

3. Security. Methoxetamine would be subject to schedule I security requirements and would need to be handled and stored pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.71–1301.93, as of the effective date of a final scheduling action. Non-practitioners handling methoxetamine would also need to comply with the employee screening requirements of 21 CFR 1301.90–1301.93.

4. Labeling and Packaging. All labels, labeling, and packaging for commercial containers of methoxetamine would need to be in compliance with 21 U.S.C. 825, and be in accordance with 21 CFR part 1302, as of the effective date of a final scheduling action.

5. Quota. Only registered manufacturers would be permitted to manufacture methoxetamine in accordance with a quota assigned pursuant to 21 U.S.C. 826, and in accordance with 21 CFR part 1303, as of the effective date of a final scheduling action.

6. Inventory. Every DEA registrant who possesses any quantity of methoxetamine on the effective date of the final scheduling action would be required to take an inventory of methoxetamine on hand at that time, pursuant to 21 U.S.C. 827, and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11(a) and (d).

Any person who becomes registered with DEA on or after the effective date of the final scheduling action would be required to take an initial inventory of all stocks of controlled substances (including methoxetamine) on hand on the date the registrant first engages in the handling of controlled substances, pursuant to 21 U.S.C. 827 and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11(a) and (b).

After the initial inventory, every DEA registrant would be required to take a new inventory of all controlled substances (including methoxetamine) on hand every two years, pursuant to 21 U.S.C. 827 and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11.

7. Records and Reports. Every DEA registrant would be required to maintain records and submit reports for methoxetamine, or products containing methoxetamine, pursuant to 21 U.S.C. 827 and in accordance with 21 CFR 1301.74(b) and (c) and parts 1304, 1312, and 1317, as of the effective date of a final scheduling action. Manufacturers and distributors would need to submit reports regarding methoxetamine to the Automation of Reports and Consolidated Order System pursuant to 21 U.S.C. 827 and in accordance with 21 CFR parts 1304 and 1312, as of the effective date of a final scheduling action.

8. Order Forms. Every DEA registrant who distributes methoxetamine would be required to comply with the order form requirements, pursuant to 21 U.S.C. 828, and 21 CFR part 1305, as of the effective date of a final scheduling action.

9. Importation and Exportation. All importation and exportation of methoxetamine would need to be in compliance with 21 U.S.C. 952, 953, 957, and 958, and in accordance with 21 CFR part 1312, as of the effective date of a final scheduling action.

10. Liability. Any activity involving methoxetamine not authorized by, or in violation of, the CSA or its implementing regulations, would be unlawful, and may subject the person to administrative, civil, and/or criminal sanctions.

[5] Although there is no evidence suggesting that methoxetamine has a currently accepted medical use in treatment in the United States, it bears noting that a drug cannot be found to have such medical use unless DEA concludes that it satisfies a five-part test. Specifically, with respect to a drug that has not been approved by the FDA, to have a currently accepted medical use in treatment in the United States, all of the following must be demonstrated:

i. The drug's chemistry must be known and reproducible;

ii. there must be adequate safety studies;

iii. there must be adequate and well-controlled studies proving efficacy;

iv. the drug must be accepted by qualified experts; and

v. the scientific evidence must be widely available.

57 FR 10499 (1992), *pet. for rev. denied, Alliance for Cannabis Therapeutics* v. *DEA,* 15 F.3d 1131, 1135 (D.C. Cir. 1994).

Regulatory Analyses

Executive Orders 12866 and 13563, Regulatory Planning and Review, Improving Regulation and Regulatory Review

In accordance with 21 U.S.C. 811(a), this proposed scheduling action is subject to formal rulemaking procedures performed ''on the record after opportunity for a hearing,'' which are conducted pursuant to the provisions of 5 U.S.C. 556 and 557. The CSA sets forth the procedures and criteria for scheduling a drug or other substance. Such actions are exempt from review by the Office of Management and Budget pursuant to section 3(d)(1) of Executive Order (E.O.) 12866 and the principles reaffirmed in E.O. 13563.

Executive Order 12988, Civil Justice Reform

This proposed regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988 to eliminate drafting errors and ambiguity, minimize litigation, provide a clear legal standard for affected conduct, and promote simplification and burden reduction.

Executive Order 13132, Federalism

This proposed rulemaking does not have federalism implications warranting the application of E.O. 13132. The proposed 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.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This proposed rule does not have tribal implications warranting the application of E.O. 13175. It does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Paperwork Reduction Act of 1995

This proposed action does not impose a new collection of information requirement under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Acting Administrator of DEA, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601–612, has reviewed this proposed rule, and by approving it, certifies that it will not have a significant economic impact on a substantial number of small entities.

DEA proposes placing the substance methoxetamine (chemical name: 2-(ethylamino)-2-(3-methoxyphenyl)cyclohexan-1-one), including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, in schedule I of the CSA. This action is being taken to enable the United States to meet its obligations under the 1971 Convention. If finalized, this action would impose the regulatory controls and administrative, civil, and/or criminal sanctions applicable to schedule I controlled substances on persons who handle (manufacture, distribute, reverse distribute, import, export, engage in research, conduct instructional activities or chemical analysis with, or possess) or propose to handle methoxetamine.

According to HHS, and also per DEA's findings in this proposed rule, methoxetamine has high potential for abuse, has no currently accepted medical use in treatment in the United States, and lacks accepted safety for use under medical supervision. DEA's research confirms that there is no commercial market for methoxetamine in the United States. As such, the proposed rule will not have a significant effect on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

On the basis of information contained in the ''Regulatory Flexibility Act'' section above, DEA has determined pursuant to the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 1501 *et seq.*) that this proposed action would not result in any Federal mandate that may result ''in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year * * *.'' Therefore, neither a Small Government Agency Plan nor any other action is required under UMRA of 1995.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

For the reasons set out above, 21 CFR part 1308 is proposed to be amended as follows:

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

■ 1. The authority citation for 21 CFR part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b), 956(b), unless otherwise noted.

■ 2. In § 1308.11, as proposed to be amended at 86 FR 16553 (March 30, 2021) and 86 FR 37719 (July 16, 2021), add paragraph (d)(100) to read as follows:

§ 1308.11 Schedule I.

* * * * *

(d) * * *

(100) 2-(ethylamino)-2-(3-methoxyphenyl)cyclohexan-1-one (methoxetamine, MXE) 7286

* * * * *

Anne Milgram,

Administrator.

[FR Doc. 2021–26293 Filed 12–6–21; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No. PTO–P–2017–0011]

RIN 0651–AD21

Date of Receipt of Electronic Submissions of Patent Correspondence

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Notice of proposed rulemaking.

SUMMARY: The USPTO proposes to amend the patent rules of practice to provide that the receipt date of correspondence officially submitted electronically by way of the Office electronic filing system is the date in the Eastern time zone of the United States (Eastern Time) when the USPTO received the correspondence, rather than the date on which the correspondence is received at the correspondence address in Alexandria, Virginia. This is because the USPTO is expecting to provide physical servers for receiving electronic submissions in locations that are separate from the USPTO headquarters in Alexandria, Virginia. This proposed change will ensure consistency and predictability with respect to correspondence receipt dates as the date of receipt accorded to correspondence submitted electronically will not depend upon the location of USPTO servers. The USPTO is also proposing to amend the patent rules of practice to make other clarifying changes regarding the receipt of electronic submissions, including providing a definition for Eastern Time. These changes will harmonize the patent rules with the trademark rules and provide clarity regarding the date of receipt of electronic submissions.

DATES: Comments must be received by February 7, 2022 to ensure consideration.

ADDRESSES: For reasons of government efficiency, comments must be submitted through the Federal eRulemaking Portal at *www.regulations.gov.* To submit comments via the portal, one should enter docket number PTO–P–2017–0011 on the homepage and click ''search.'' The site will provide search results listing all documents associated with this docket. Commenters can find a reference to this notice and click on the ''Comment Now!'' icon, complete the required fields, and enter or attach their comments. Attachments to electronic comments will be accepted in Adobe® portable document format or Microsoft Word® format. Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

Visit the Federal eRulemaking Portal for additional instructions on providing comments via the portal. If electronic submission of, or access to, comments is not feasible due to a lack of access to a computer and/or the internet, please contact the USPTO using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: For patent-related inquiries, please contact Mark O. Polutta, Senior Legal Advisor, Office of Patent Legal Administration, by telephone at 571–272–7709; or Kristie M. Kindred, Legal Advisor, Office of Patent Legal Administration, by telephone at 571–272–9016; or you can send inquiries by email to *patentpractice@uspto.gov.*

SUPPLEMENTARY INFORMATION: Under current 37 CFR 1.6(a)(4), the receipt date of correspondence submitted to the USPTO by way of the Office electronic filing system is ''the date the correspondence is received at the correspondence address for the USPTO set forth in 37 CFR 1.1 when it was officially submitted.'' Current 37 CFR 1.1 sets forth an Alexandria, Virginia, correspondence address for the Office. The USPTO's physical servers that receive electronic submissions are currently located in Alexandria, Virginia. However, in order to enhance resiliency, the USPTO is in the process of providing servers in Manassas, Virginia, and in the future may provide servers outside of the Eastern time zone. Once the USPTO begins receiving electronically submitted patent correspondence at locations other than Alexandria, Virginia, the language in current 37 CFR 1.6(a)(4) that defines the date the correspondence is received at Alexandria, Virginia, as the receipt date would be inapplicable. Thus, the USPTO is proposing to revise 37 CFR 1.6(a)(4) to specify that the receipt date of correspondence that is officially submitted electronically by way of the Office electronic filing system is the date in Eastern Time when the USPTO received the correspondence, regardless of the physical location of the USPTO server that receives the correspondence. Other clarifying changes regarding the receipt date of electronic submissions, including providing a definition for Eastern Time, are also proposed.

In addition, the changes will align the patent rules with the Legal Framework for the Patent Electronic System, available at *www.uspto.gov/patents/apply/filing-online/legal-framework-efs-web* and in the Manual of Patent Examining Procedure (MPEP) section 502.05, subsection I. The Legal Framework already indicates that the time and date of receipt of an application filed via the Office electronic filing system is the local time and date (Eastern Time) at the USPTO headquarters in Alexandria, Virginia, when the USPTO received the submission. The date of receipt is recorded after the user clicks the ''SUBMIT'' button on the ''Confirm and Submit'' screen. This is the date shown on the Electronic Acknowledgement Receipt. Similarly, follow-on documents filed in a patent application after the initial filing of the application are also accorded the date when the document is received at the USPTO as the date of receipt under existing practice. See MPEP section 502.05, subsection I.C.

With respect to patent correspondence, any references to the Office electronic filing system in this Notice (including in 37 CFR part 1) include EFS-Web and Patent Center. Patent Center is a new tool for the electronic filing and management of patent applications. Patent Center is currently in the Beta phase but is available for all users. Once fully developed, Patent Center will replace EFS-Web and the Patent Application Information Retrieval (PAIR) system. Users of Patent Center Beta are required to abide by the Legal Framework for the Patent Electronic System to the extent applicable and are expected to abide by the Patent Electronic System Subscriber Agreement. See the Patent Center Beta Release Guidelines available at *www.uspto.gov/patents/apply/patent-center.* In the future, as Patent Center gets closer to full development, the Legal Framework for the Patent Electronic System will be revised to expressly refer to and more specifically cover electronic submissions via Patent Center.

The rules of practice in trademark cases already provide that filing dates of electronic submissions are based on Eastern Time. See 37 CFR 2.195(a). Therefore, it is unnecessary to amend the trademark rules of practice.

Discussion of Specific Rules

The following is a discussion of the proposed amendments to 37 CFR part 1.

Section 1.1: Section 1.1(a) is amended to clarify the appropriate address information for patent-related correspondence. In particular, the clause ''[e]xcept as provided in paragraphs (a)(3)(i) and (a)(3)(ii) of this

section'' is being changed to ''[e]xcept for correspondence submitted via the Office electronic filing system in accordance with § 1.6(a)(4).'' Further, the phrase ''to specific areas within the Office as set out in paragraphs (a)(1) and (a)(3)(iii) of this section'' is being replaced with ''to specific areas within the Office as provided in this section.'' Since the USPTO does not strictly require the provision of an address when patent-related correspondence is submitted via the Office electronic filing system, it is appropriate to exclude such correspondence from the address marking requirements of § 1.1(a). Applicants may continue to provide an address on correspondence submitted via the Office electronic filing system consistent with § 1.1(a), but it is not mandatory. The removal of references to specific sub-paragraphs (a)(3)(i) and (a)(3)(ii) from the introductory text of paragraph (a) is a technical correction in view of the remaining language in this section.

Section 1.6: Section 1.6(a)(4) is proposed to be amended to remove the reference to the physical location where correspondence must be received, and to provide that the receipt date of patent correspondence submitted using the Office electronic filing system is the date in Eastern Time when the correspondence is received in the USPTO. Specifically, the USPTO proposes to change the phrase ''Correspondence submitted to the Office by way of the Office electronic filing system will be accorded a receipt date, which is the date the correspondence is received at the correspondence address for the Office set forth in § 1.1 when it was officially submitted'' to ''Correspondence officially submitted to the Office by way of the Office electronic filing system will be accorded a receipt date, which is the date in Eastern Time when the correspondence is received in the Office.'' In view of the relocation of the servers, it is appropriate to eliminate the reference to the correspondence address set forth in § 1.1 in connection with the receipt date of correspondence being filed electronically. Correspondence submitted via the Office electronic filing system will be accorded a receipt date based on the local time and date at the USPTO headquarters in Alexandria, Virginia, when the correspondence is received in the USPTO. Specifically, the Office electronic filing system will record the receipt date in Eastern Time after the user officially submits the correspondence by clicking the ''SUBMIT'' button on the ''Confirm and Submit'' screen and the correspondence is successfully received in the USPTO. Furthermore, the phrase ''regardless of whether that date is a Saturday, Sunday, or Federal holiday within the District of Columbia'' is being added to provide clarity in the rule. This is not a change in practice. See MPEP 502.05, subsection I.C.

It should be noted that the Legal Framework for the Patent Electronic System does not permit certain patent correspondence to be officially submitted via the Office electronic filing system. See MPEP 502.05, subsection I.B.2. Such correspondence will not be accorded a date of receipt or considered officially filed in the USPTO when submitted via the Office electronic filing system. For example, notices of appeal to a court, district court complaints, or other complaints or lawsuits involving the USPTO may not be filed via the Office electronic filing system. See MPEP 1216 for instructions on how to properly serve and/or file documents seeking judicial review of a decision by the Patent Trial and Appeal Board.

Section 1.9: Section 1.9 is proposed to be amended to add a new paragraph (o) to set forth a definition for Eastern Time. In particular, Eastern Time is defined as meaning Eastern Standard Time or Eastern Daylight Time in the United States, as appropriate.

Rulemaking Considerations

A. Administrative Procedure Act: The changes proposed in this rulemaking involve rules of agency practice and procedure, and/or interpretive rules. See *Bachow Commc'ns Inc.* v. *FCC,* 237 F.3d 683, 690 (D.C. Cir. 2001) (rules governing an application process are procedural under the Administrative Procedure Act); *Inova Alexandria Hosp.* v. *Shalala,* 244 F.3d 342, 350 (4th Cir. 2001) (rules for handling appeals are procedural where they do not change the substantive standard for reviewing claims); *Nat'l Org. of Veterans' Advocates* v. *Sec'y of Veterans Affairs,* 260 F.3d 1365, 1375 (Fed. Cir. 2001) (rule that clarifies interpretation of a statute is interpretive).

Accordingly, prior notice and opportunity for public comment for the changes proposed in this rulemaking are not required pursuant to 5 U.S.C. 553(b) or (c), or any other law. See *Cooper Techs. Co.* v. *Dudas,* 536 F.3d 1330, 1336–37 (Fed. Cir. 2008) (stating that 5 U.S.C. 553, and thus 35 U.S.C. 2(b)(2)(B), do not require notice and comment rulemaking for ''interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice'' (quoting 5 U.S.C. 553(b)(A))). However, the USPTO has chosen to seek public comment before implementing the rule to benefit from the public's input.

B. Regulatory Flexibility Act: Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), whenever an agency is required by 5 U.S.C. 553 (or any other law) to publish a notice of proposed rulemaking, the agency must prepare and make available for public comment an Initial Regulatory Flexibility Analysis, unless the agency certifies under 5 U.S.C. 605(b) that the proposed rule, if implemented, will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 605. For the reasons set forth herein, the Senior Counsel for Regulatory and Legislative Affairs, Office of General Law, of the USPTO has certified to the Chief Counsel for Advocacy of the Small Business Administration that the changes proposed in this rule will not have a significant economic impact on a substantial number of small entities (see 5 U.S.C. 605(b)).

This rulemaking amends the rules of practice to provide that the receipt date of correspondence officially submitted electronically by way of the Office electronic filing system is the date in Eastern Time when the Office received the correspondence. The USPTO is also proposing to amend the patent rules of practice to make other clarifying changes regarding the receipt of electronic submissions. These changes are procedural in nature and would not result in a change in the burden imposed on any patent applicant, including a small entity.

For the reasons described above, the proposed changes will not have a significant economic impact on a substantial number of small entities.

C. Executive Order 12866 (Regulatory Planning and Review): This rulemaking has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

D. Executive Order 13563 (Improving Regulation and Regulatory Review): The USPTO has complied with Executive Order 13563 (Jan. 18, 2011). Specifically, the USPTO has, to the extent feasible and applicable: (1) Made a reasoned determination that the benefits justify the costs of the rule; (2) tailored the rule to impose the least burden on society consistent with obtaining the regulatory objectives; (3) selected a regulatory approach that maximizes net benefits; (4) specified performance objectives; (5) identified and assessed available alternatives; (6) involved the public in an open exchange of information and perspectives among experts in relevant disciplines, affected stakeholders in the

private sector, and the public as a whole, and provided online access to the rulemaking docket; (7) attempted to promote coordination, simplification, and harmonization across government agencies and identified goals designed to promote innovation; (8) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (9) ensured the objectivity of scientific and technological information and processes.

E. Executive Order 13132 (Federalism): This rulemaking does not contain policies with federalism implications sufficient to warrant the preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

F. Executive Order 13175 (Tribal Consultation): This rulemaking will not: (1) Have substantial direct effects on one or more Indian tribes; (2) impose substantial direct compliance costs on Indian tribal governments; or (3) preempt tribal law. Therefore, a tribal summary impact statement is not required under Executive Order 13175 (Nov. 6, 2000).

G. Executive Order 13211 (Energy Effects): This rulemaking is not a significant energy action under Executive Order 13211 because this rulemaking is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under Executive Order 13211 (May 18, 2001).

H. Executive Order 12988 (Civil Justice Reform): This rulemaking meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden as set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

I. Executive Order 13045 (Protection of Children): This rulemaking does not concern an environmental risk to health or safety that may disproportionately affect children under Executive Order 13045 (Apr. 21, 1997).

J. Executive Order 12630 (Taking of Private Property): This rulemaking will not affect a taking of private property or otherwise have taking implications under Executive Order 12630 (Mar. 15, 1988).

K. Congressional Review Act: Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), prior to issuing any final rule, the USPTO will submit a report containing the final rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the Government Accountability Office. The changes in this rulemaking are not expected to result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this rulemaking is not expected to result in a ''major rule'' as defined in 5 U.S.C. 804(2).

L. Unfunded Mandates Reform Act of 1995: The changes set forth in this rulemaking do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of $100 million (as adjusted) or more in any one year, or a Federal private sector mandate that will result in the expenditure by the private sector of $100 million (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. See 2 U.S.C. 1501 *et seq.*

M. National Environmental Policy Act of 1969: This rulemaking will not have any effect on the quality of the environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. See 42 U.S.C. 4321 *et seq.*

N. National Technology Transfer and Advancement Act of 1995: The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are not applicable because this rulemaking does not contain provisions that involve the use of technical standards.

O. Paperwork Reduction Act of 1995: The Paperwork Reduction Act of 1995 requires that the USPTO consider the impact of paperwork and other information collection burdens imposed on the public. This rulemaking does not involve any new information collection requirements that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information has a currently valid OMB control number.

List of Subjects in 37 CFR Part 1

Administrative practice and procedure, Biologics, Courts, Freedom of information, Inventions and patents, Reporting and recordkeeping requirements, Small businesses.

For the reasons set forth in the preamble, 37 CFR part 1 is amended as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation for 37 CFR part 1 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2).

■ 2. Section 1.1 is amended by revising the paragraph (a) introductory text to read as follows:

§ 1.1 Addresses for non-trademark correspondence with the United States Patent and Trademark Office.

(a) *In general.* Except for correspondence submitted via the Office electronic filing system in accordance with § 1.6(a)(4), all correspondence intended for the United States Patent and Trademark Office must be addressed to either ''Director of the United States Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450'' or to specific areas within the Office as provided in this section. When appropriate, correspondence should also be marked for the attention of a particular office or individual.

* * * * *

■ 3. Section 1.6 is amended by revising paragraph (a)(4) to read as follows:

§ 1.6 Receipt of Correspondence.

(a) * * *

(4) Correspondence may be submitted using the Office electronic filing system only in accordance with the Office electronic filing system requirements. Correspondence officially submitted to the Office by way of the Office electronic filing system will be accorded a receipt date, which is the date in Eastern Time when the correspondence is received in the Office, regardless of whether that date is a Saturday, Sunday, or Federal holiday within the District of Columbia.

* * * * *

Section 1.9 is amended by adding a new paragraph (o) to read as follows:

§ 1.9 Definitions.

* * * * *

(o) Eastern Time as used in this chapter means Eastern Standard Time or

Eastern Daylight Time in the United States, as appropriate.

Andrew Hirshfeld,

Commissioner for Patents, Performing the Functions and Duties of the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2021–26502 Filed 12–6–21; 8:45 am]

BILLING CODE 3510–16–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2020–0699; FRL–9318–01–R5]

Air Plan Approval; Indiana; ArcelorMittal Burns Harbor

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve revisions to the Indiana sulfur dioxide (SO_2) State Implementation Plan (SIP) for the steel mill in Burns Harbor, Porter County, Indiana, formerly owned by ArcelorMittal Burns Harbor LLC and currently owned by Cleveland-Cliffs Burns Harbor LLC (the Burns Harbor plant). Final approval of these revisions would satisfy a provision in a Federal Settlement Agreement. EPA approval would also strengthen the Indiana SO_2 SIP by lowering SO_2 emission limits and adding SO_2 compliance test procedures for the Burns Harbor plant. EPA is proposing to approve this SIP revision request.

DATES: Comments must be received on or before January 6, 2022.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2020–0699 at *https://www.regulations.gov,* or via email to *Blakley.pamela@epa.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*. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Mary Portanova, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–5954, *Portanova.mary@epa.gov.* The EPA Region 5 office is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

I. Background

On December 10, 2009, the Indiana Department of Environmental Management (IDEM) submitted a site-specific SO_2 SIP revision request to EPA for the Burns Harbor plant. The revised State rule removed the SO_2 emission limit applicable to the blast furnace flare from SIP rule 326 Indiana Administrative Code (IAC) 7–4–14. EPA proposed to disapprove this requested revision on March 20, 2013 (78 FR 17157) and finalized its disapproval on December 27, 2013 (78 FR 78720). The basis for this action was that IDEM had not provided an adequate demonstration that removing the flare limit would enable continued protection of the SO_2 National Ambient Air Quality Standard (NAAQS or standard), as required by section 110(l) of the Clean Air Act (CAA).

On February 25, 2014, ArcelorMittal Burns Harbor LLC filed a petition for review challenging EPA's action in the United States Court of Appeals for the Seventh Circuit. *ArcelorMittal Burns Harbor LLC* v. *EPA,* No. 1412. The Court of Appeals subsequently granted the State of Indiana's request to intervene as a Petitioner.

On May 28, 2019, the parties entered a Settlement Agreement under which the State is required to adopt revised emission limits and other associated requirements into 326 IAC 7–4–14, as further discussed below. The parties entered into an Amended Settlement Agreement on March 23, 2021. On March 31, 2021, IDEM submitted revisions to 326 IAC 7–4–14 to EPA as proposed SIP revisions.

II. What is contained in IDEM's SIP revision request?

The revised rule 326 IAC 7–4–14(1) increases the blast furnace gas flare limit from 0.07 pounds SO_2 per million British thermal units (lb/mmBtu) to 0.50 lb/mmBtu. The revision adds a blast furnace gas testing protocol in 326 IAC 7–4–14(1)(G), which includes a requirement to perform quarterly gas testing of blast furnace gas from blast furnaces C and D, and a requirement to use the test results to calculate the emission rate in lb/mmBtu associated with combusting the blast furnace gas.

Additional revisions in 326 IAC 7–4–14(1) remove the limits and listing for the slab mill soaking pits and the 160-inch plate mill I & O furnace No. 8. The rule clarifies that those units have been permanently shut down (326 IAC 7–4–14 (1)(F)). The limits in pounds of SO_2 per hour (lb/hr) for the 110-inch plate mill furnaces No. 1 and 2 and the 160-inch plate mill I & O furnaces No. 4, 5, 6, and 7 have been reduced by 90 percent. The total lb/hr limit for the power station boilers No. 8, 9, 10, 11, and 12 has been reduced from 2,798 lb/hr to 2,378 lb/hr. The rule revision also removes a separate set of alternative emission limits for the Burns Harbor plant's SO_2 emission units. The remaining emission limits in the rule are unchanged. Table 1 shows the emission limit changes.

TABLE 1—EMISSION LIMIT CHANGES AND CLOSURES AT THE BURNS HARBOR PLANT

Unit name	Former fuel	Former limit	Revised fuel	Revised limit
Blast Furnace Gas Flare	Blast furnace gas	0.07 lb/mmBtu	Blast furnace gas	0.50 lb/mmBtu.
Slab Mill Soaking Pits: 9 of 32 horizontally discharged.	Coke oven gas	482 lb/hr	Closed	0.0 lb/hr.

TABLE 1—EMISSION LIMIT CHANGES AND CLOSURES AT THE BURNS HARBOR PLANT—Continued

Unit name	Former fuel	Former limit	Revised fuel	Revised limit
Slab Mill Soaking Pits: 23 of 32 horizontally discharged.	Blast furnace gas or natural gas.	24 lb/hr	Closed	0.0 lb/hr.
Slab Mill Soaking Pits Set of 4 vertically discharged.	Blast furnace or natural gas.	4 lb/hr	Closed	0.0 lb/hr.
160 inch Plate Mill Continuous Reheat Furnace No. 1 and Boiler No. 1.		299 lb/hr; 1.96 lb/mmBtu.		29.9 lb/hr; 1.96 lb/mmBtu.
110 inch Plate Mill Furnaces No. 1 and 2		441 lb/hr; 1.96 lb/mmBtu.		44.1 lb/hr; 1.96 lb/mmBtu.
160 inch Plate Mill I and O Furnaces No. 4 and 5.		274 lb/hr; 1.96 lb/mmBtu.		27.4 lb/hr; 1.96 lb/mmBtu.
160 inch Plate Mill I and O Furnaces No. 6 and 7.		274 lb/hr; 1.96 lb/mmBtu.		27.4 lb/hr; 1.96 lb/mmBtu.
160 inch Plate Mill I and O Furnace No. 8		176 lb/hr; 1.96 lb/mmBtu.	Closed	0.0 lb/hr.
Power Station Boilers No. 8, 9, 10, 11, and 12.		2,798 lb/hr; 1.45 lb/mmBtu.		2,378 lb/hr; 1.45 lb/mmBtu.

III. CAA Section 110(l)

Section 110(l) of the CAA provides that State submissions cannot be approved as SIP revisions if they interfere with applicable requirements concerning attainment and reasonable further progress. The Burns Harbor plant is located in Porter County, which is designated attainment/unclassifiable for the 2010 1-hour SO_2 standard (86 FR 16055, March 26, 2021). EPA is proposing to find that the overall reductions in allowable SO_2 emissions in IDEM's March 31, 2021 revised rule offset the effect of increasing the limit on the blast furnace gas flare. The rule revisions, which reflect the units that have new, lower emission limits and the closed units that no longer emit SO_2, result in a reduction in total allowable SO_2 emissions of 2,265.6 lb/hr. The increased allowable flare emissions are estimated at 8.89 lb/hr. The net result is an overall allowable SO_2 emissions decrease of 2,256.7 lb/hr. The flare limit has been increased to allow the Burns Harbor plant operational flexibility, as the flare is a necessary safety device. In addition, the improved compliance and testing protocol will greatly improve the accuracy of the actual SO_2 emissions calculations for blast furnace gas combustion. This is because having more accurate SO_2 emissions information should help the Burns Harbor plant personnel properly evaluate and demonstrate its blast furnace flare compliance status. EPA believes that the March 31, 2021 revised rule 326 IAC 7–4–14(1) will not adversely affect Porter County's maintenance of the 2010 1-hour SO_2 standard. EPA proposes to find that IDEM's March 31, 2021 submittal is consistent with CAA section 110(l).

IV. What action is EPA taking?

EPA is proposing to approve the March 31, 2021 SIP revision request for Indiana's SO_2 rule 326 IAC 7–4–14(1) for the Burns Harbor plant. If approved, this revision would satisfy a provision in a Federal Settlement Agreement. It would also strengthen the Indiana SO_2 SIP by lowering SO_2 emission limits and adding improved SO_2 compliance test procedures for the Burns Harbor plant.

V. Incorporation by Reference

In this rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference Indiana rule 326 IAC 7–4–14(1), effective March 20, 2021. EPA has made, and will continue to make, these documents generally available through *www.regulations.gov* and at the EPA Region 5 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

VI. Statutory and Executive Order Reviews

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

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

In addition, 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, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: November 30, 2021.

Debra Shore,

Regional Administrator, Region 5.

[FR Doc. 2021–26467 Filed 12–6–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2021–0751: FRL–9211–01–R10]

Air Plan Approval; Washington; Yakima Regional Clean Air Agency, General Air Quality Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve revisions to the Washington State Implementation Plan (SIP) that were submitted by the Department of Ecology (Ecology) in coordination with the Yakima Regional Clean Air Agency (YRCAA). In 2014, 2015, 2016, and 2020, the EPA approved revisions to the *General Regulations for Air Pollution Sources* promulgated by Ecology in the Washington Administrative Code (WAC). In this action, the EPA proposes to update the SIP for YRCAA's jurisdiction to reflect these changes to the WAC. We also propose to update certain YRCAA regulations currently in the SIP, remove obsolete regulations, and approve a small set of YRCAA regulations to replace or supplement the corresponding WAC regulations for sources in YRCAA's jurisdiction.

DATES: Comments must be received on or before January 6, 2022.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R10–OAR–2021–0751 at *https://www.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, 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.*

FOR FURTHER INFORMATION CONTACT: Jeff Hunt, EPA Region 10, 1200 Sixth Avenue—Suite 155, Seattle, WA 98101, at (206) 553–0256, or *hunt.jeff@epa.gov.*

Table of Contents

I. Background for Proposed Action
II. Proposed Revisions, YRCAA Regulation 1
A. Sections 1.01 Name of Agency, 1.02 Short Title, and 1.03 Policy
B. Appendix A Definitions of Words and Phrases [Formerly Section 1.03 Definitions]
C. Section 1.04 Applicability
D. Sections 1.05 Roles and Responsibilities and 2.01 Authority and Investigation
E. Section 1.06 Records
F. Section 1.07 General Provisions
G. Section 2.02 Authority To Collect Fees
H. Section 2.03 Applicable State and Federal Regulations
I. Section 2.04 Public Participation in Permitting
J. Section 2.05 Appeals
K. Sections 3.01 General Rules and 3.08 Specific Dust Controls
L. Section 4.01 Registration Program
M. Section 4.03 Voluntary Limits on Emissions
N. Sections 5.01 General Information, 5.02 Additional or Alternative Enforcement Actions, and 5.03 Penalties
III. Applicability of Chapter 173–400 WAC
IV. The EPA's Proposed Action
A. Regulations To Approve and Incorporate by Reference Into the SIP
B. Approved But Not Incorporated by Reference Regulations
C. Regulations To Remove From the SIP
D. Scope of Proposed Action
V. Incorporation by Reference
VI. Statutory and Executive Order Reviews

I. Background for Proposed Action

On January 27, 2014, Ecology submitted revisions to update the *General Regulations for Air Pollution Sources* contained in Chapter 173–400 WAC. The EPA approved these updates in three phases on October 3, 2014 (79 FR 59653), November 7, 2014 (79 FR 66291), and April 29, 2015 (80 FR 23721).[1] Under the revised applicability provisions of WAC 173–400–020 approved into the SIP on October 3, 2014, the regulations contained in Chapter 173–400 WAC apply statewide, ''. . . except for specific subsections where a local authority has adopted and implemented corresponding local rules that apply only to sources subject to local jurisdiction as provided under Revised Code of Washington (RCW) 70.94.141 and 70.94.331.''[2] Therefore, the EPA's approval of Ecology's January 2014 submittal applied only to geographic areas and source categories under Ecology's direct jurisdiction. We stated that we would address the revised Chapter 173–400 WAC regulations as they apply to local clean air agency jurisdictions on a case-by-case basis in separate, future actions. Subsequent local clean air agency actions related to Chapter 173–400 WAC include our approval of the Benton Clean Air Agency (80 FR 71695, November 17, 2015), Southwest Clean Air Agency (82 FR 17136, April 10, 2017), Puget Sound Clean Air Agency (85 FR 22355, April 22, 2020), Northwest Clean Air Agency (85 FR 36154, June 15, 2020), and Spokane Regional Clean Air Agency (86 FR 24718, May 10, 2021).

On October 14, 2021, the Director of Ecology, as the Governor's designee for SIP revisions, submitted a request to update the air quality regulations in the SIP as they apply to YRCAA's jurisdiction in 40 CFR 52.2470(c), Table 10—*Additional Regulations Approved for the Yakima Regional Clean Air Agency (YRCAA) Jurisdiction.* YRCAA's jurisdiction consists of Yakima County, excluding Indian reservation land or any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. YRCAA also does not have jurisdiction over certain facilities discussed in section IV.D. *Scope of Proposed Action* of this document. We note that YRCAA regulatory revisions related to outdoor burning, agricultural burning, and wood heaters are outside the scope of this current action and addressed separately.

---

[1] In subsequent actions on October 6, 2016 (81 FR 69385) and February 24, 2020 (85 FR 10302) we approved revisions to the WAC that incorporated by reference the most recent changes to the Federal regulations and other minor changes.

[2] These statutory provisions were subsequently re-codified to RCW 70A.15.2040 and 70A.15.3000, with no substantive revisions to the statutory text. For a more detailed discussion of applicability see page 39352 of the EPA's proposed approval of WAC 173–400–020 (79 FR 39351, July 10, 2014).

II. Proposed Revisions, YRCAA Regulation 1

The EPA last approved updates to YRCAA Regulation 1 on February 2, 1998 (63 FR 5269). Effective December 1, 2002, YRCAA repealed sections 2.04 *Public Participation,* 3.01 *Emission Standards,* 3.11 *Monitoring, Recordkeeping, and Reporting,* and 4.02 *New Source Review* to rely on the statewide provisions of Chapter 173–400 WAC. On October 8, 2020, YRCAA adopted additional changes to align with the WAC and other clarifying changes. The Washington State Register listing the most recent changes to the YRCAA regulations is included in the docket for this action and will not be described in detail here. A brief summary of the major changes since our last SIP approval is provided below.

A. Sections 1.01 Name of Agency, 1.02 Short Title, and 1.03 Policy

These changes reflect the name change from ''Yakima County Clean Air Authority'' to ''Yakima Regional Clean Air Agency.'' YRCAA also renumbered and modified the policy section (now section 1.03) since the last version approved into the SIP. With respect to section 1.03, we note that Ecology and YRCAA did not submit sub-section H related to the State Environmental Policy Act (SEPA). These SEPA provisions are outside the scope of the SIPs approved under Clean Air Act (CAA) section 110. Lastly, we propose to approve YRCAA Regulation 1, section 1.03 *Policy* to replace WAC 173–400–010 *Policy and Purpose.*

B. Appendix A Definitions of Words and Phrases [Formerly Section 1.03 Definitions]

As discussed above, in 2002, YRCAA repealed sections 2.04 *Public Participation,* 3.01 *Emission Standards,* 3.11 *Monitoring, Recordkeeping, and Reporting,* and 4.02 *New Source Review* to rely on the statewide provisions of Chapter 173–400 WAC. To avoid potential inconsistency with the WAC, YRCAA eliminated all definitions in the former section 1.03 *Definitions* that were duplicative with Chapter 173–400 WAC and moved the remaining definitions to Appendix A. Similarly, on October 8, 2020, YRCAA eliminated all definitions in Appendix A that were duplicative with Chapters 173–425, 173–430, and 173–433 WAC because the WAC definitions already apply statewide. The EPA is proposing to approve the revised Appendix A, with the exception of asbestos control program definitions, which YRCAA did not submit for approval because they are outside the scope of SIPs under CAA section 110.

C. Section 1.04 Applicability

This section defines YRCAA's jurisdiction over certain sources within Yakima County. It complements and is consistent with WAC 173–400–020 *Applicability.* A full discussion of applicability as it relates to the Energy Facility Site Evaluation Council (EFSEC), Indian country, and sources directly regulated or permitted by Ecology is included in section IV.D. *Scope of Proposed Action* of this document. The EPA is proposing to approve section 1.04, but it does not replace WAC 173–400–020 in YRCAA's jurisdiction because WAC 173–400–020 is broader in scope in that it contains the criteria for when a local standard applies in lieu of a provision of Chapter 173–400 WAC.

D. Sections 1.05 Roles and Responsibilities and 2.01 Authority and Investigation

These sections describe the roles, responsibilities, powers, and duties of the board of directors, the air pollution control officer, and any advisory councils appointed to advise and consult in development and implementation of the regulations. As described in section IV.B of this document, the EPA reviews and approves state and local clean air agency submissions to ensure they provide adequate enforcement authority and other general authority to implement and enforce the SIP. However, regulations describing such agency enforcement and other general authority are generally not incorporated by reference to avoid potential conflict with the EPA's independent authorities. The EPA is therefore proposing to approve but not incorporate by reference sections 1.05 and 2.01.

E. Section 1.06 Records

This section defines the policy for protecting records and making them available to the public. Many of these provisions were approved into the SIP under the former section 2.04 *Confidentiality.* YRCAA subsequently consolidated all the record provisions into section 1.06 and repealed section 2.04. We are proposing to approve section 1.06 into the SIP and remove the repealed section 2.04 from the SIP. We are also proposing to approve section 1.06 to replace WAC 173–400–175 *Public Information* within YRCAA's jurisdiction.

F. Section 1.07 General Provisions

This section contains several general provisions, some of which were previously approved into the SIP under the former section 2.03 *Miscellaneous Provisions.* Of note are the two sub-sections 1.07(B)(1) and (2). Subsection 1.07(B)(1) states, ''No person shall make any false material statement, representation or certification in any form, notice or report required under Chapter 70A.15 RCW, or any ordinance, resolution, regulation, permit or order in force pursuant thereto.'' This YRCAA provision, adapted to reflect local agency authority, replaces the nearly identical text contained in WAC 173–400–105(6). Subsection 1.07(B)(2) states, ''No person shall render inaccurate any monitoring device or method required under Chapter 70A.15 RCW, or any ordinance, resolution, regulation, permit, or order in force pursuant thereto.'' This YRCAA provision replaces the nearly identical text contained in WAC 173–400–105(8). The EPA is proposing to approve section 1.07 and to approve sub-sections (B)(1) and (2) to replace WAC 173–400–105(6) & (8). We are also proposing to remove the subsequently revoked section 2.03 from the SIP.

G. Section 2.02 Authority To Collect Fees

Under section 110(a)(2)(L) of the CAA, the state, or local agencies acting in lieu of the state, must demonstrate the ability to collect adequate fees for permitting major sources. YRCAA therefore submitted section 2.02 *Authority to Collect Fees* to demonstrate adequate fee authority to implement the major source nonattainment new source review program under WAC 173–400–800 through 173–400–860, should the need arise in the future.[3] Although the EPA reviews these submissions to confirm adequate authority, the EPA generally does not include local or state agency fees as part of the Washington SIP incorporated by reference in 40 CFR 52.2470(c). We are therefore proposing to approve section 2.02 as part of the approved but not incorporated by reference portion of the SIP under 40 CFR 52.2470(e), and to remove from the SIP the previously approved fee provisions at sections 13.01, 13.02, and 13.03.

[3] There are currently no designated nonattainment areas in the State of Washington to which WAC 173–400–800 through 173–400–860 would apply.

H. Section 2.03 Applicable State and Federal Regulations

This section replaces the revoked section 12.01 *State Regulations,* which was approved into the SIP in 1998. Except for Chapter 173–400 WAC discussed in more detail below, the remaining state WAC and federal Code of Federal Regulations (CFR) provisions cited in section 2.03 would apply in YRCAA's jurisdiction according to the terms of the state and federal regulations and do not need to be included as part of the local agency SIP submission. Therefore, we are proposing to remove the revoked section 12.01 from the SIP. For a full list of statewide WAC provisions approved into the SIP, please see 40 CFR 52.2470(c) *Table 1—Regulations Approved Statewide.* For a list of updated Chapter 173–400 WAC provisions proposed for approval in YRCAA's jurisdiction, please see section IV.A *Regulations to Approve and Incorporate by Reference into the SIP* in this document.

I. Section 2.04 Public Participation in Permitting

As previously discussed, in 2002, YRCAA repealed section 2.04 *Public Participation* to rely on WAC 173–400–171 *Public Notice and Opportunity for Public Comment.* On October 8, 2020, YRCAA reestablished section 2.04, creating a cross reference to the provisions of WAC 173–400–171 for permits issued under the new source review program. We are proposing to approve section 2.04. However, section 2.04 will not replace WAC 173–400–171, because the WAC is broader in scope and covers public participation beyond just permitting.

J. Section 2.05 Appeals

This section cites to Washington statutory provisions for the appeals process, as well as the regulatory provisions of WAC 173–400–250. As previously described with respect to sections 1.05 and 2.01, the EPA reviews and approves state and local clean air agency submissions to ensure they provide adequate general authority to implement and enforce the SIP. However, regulations describing such agency enforcement and other general authority are generally not incorporated by reference to avoid potential conflict with the EPA's independent authorities. The EPA is therefore proposing to approve but not incorporate by reference section 2.05.

K. Sections 3.01 General Rules and 3.08 Specific Dust Controls

Section 3.01 contains general rules applicable to all sources under YRCAA's jurisdiction. Section 3.08 contains additional provisions to address fugitive dust from construction and cattle feeding operations. We note that YRCAA is not submitting, and the EPA is not proposing to approve, subsections 3.01(D) *Variance Process,* 3.08(A)(3)(b) *Emergencies,* and 3.08(B)(3) *Emergencies.* It is the EPA's longstanding position that these types of provisions are not appropriate for approval into the SIP. See 69 FR 17368, 17370 (April 2, 2004); see also 80 FR 33840, 33917–33918 (June 12, 2015). We also note that these provisions, which add additional requirements to address a subset of potential fugitive dust sources, do not replace the broader statewide provisions of WAC 173–400–040(9) *Fugitive Dust.* With the exceptions noted above, we are proposing to approve sections 3.01 and 3.08.

L. Section 4.01 Registration Program

Section 4.01 contains the YRCAA-specific registration program, which replaces the registration program of WAC 173–400–099 through 173–400–104. Section 4.01 cites to and uses the source categories in WAC 173–400–100 for applicability. Section 4.01 also uses emissions thresholds established in the WAC for determining annual or triennial emissions reporting to support the federal Air Emissions Reporting Requirements (40 CFR part 51, subpart A) and other local program requirements. We are proposing to approve section 4.01, except for requirements related to Toxic Air Pollutants, which YRCAA did not submit because such provisions are outside the scope of CAA section 110 requirements for SIPs.

M. Section 4.03 Voluntary Limits on Emissions

Section 4.03 replaces WAC 173–400–091 *Voluntary Limits on Emissions.* Section 4.03 contains requirements nearly identical to the WAC, but YRCAA adapted the language slightly to reflect local agency implementation. We are proposing to approve section 4.03 to replace WAC 173–400–091 for sources within YRCAA's jurisdiction as it relates to CAA section 110 requirements for SIPs.

N. Sections 5.01 General Information, 5.02 Additional or Alternative Enforcement Actions, and 5.03 Penalties

These sections describe YRCAA's compliance, enforcement, and penalty authorities. As described in section IV.B of this document, the EPA reviews and approves state and local clean air agency submissions to ensure they provide adequate enforcement authority and other general authority to implement and enforce the SIP. However, regulations describing such agency enforcement and other general authority are generally not incorporated by reference to avoid potential conflict with the EPA's independent authorities. The EPA is therefore proposing to approve but not incorporate by reference sections 5.01, 5.02, and 5.03.

III. Applicability of Chapter 173–400 WAC

As previously discussed, a local clean air agency has the authority under WAC 173–400–020 to establish local regulations to supplement, or act in lieu of, the statewide Chapter 173–400 WAC provisions for sources under its jurisdiction. YRCAA generally implements and enforces Chapter 173–400 WAC, with a small set of YRCAA-specific provisions replacing certain sections or subsections of Chapter 173–400 WAC. The EPA is generally proposing to approve the most recent updates to Chapter 173–400 WAC to apply within YRCAA's jurisdiction subject to the exclusions and conditions discussed in section IV *The EPA's Proposed Action* of this document. This approach is consistent with our previous SIP actions for Benton Clean Air Agency (80 FR 71695, November 17, 2015), Southwest Clean Air Agency (82 FR 17136, April 10, 2017), Puget Sound Clean Air Agency (85 FR 22355, April 22, 2020), Northwest Clean Air Agency (85 FR 36154, June 15, 2020), and Spokane Regional Clean Air Agency (86 FR 24718, May 10, 2021.

IV. The EPA's Proposed Action

A. Regulations To Approve and Incorporate by Reference Into the SIP

The EPA is proposing to approve and incorporate by reference into the Washington SIP at 40 CFR 52.2470(c)—*Table 10—Additional Regulations Approved for the Yakima Regional Clean Air Agency (YRCAA) Jurisdiction,* the YRCAA and Ecology regulations listed in Tables 1 and 2 of this document below for sources within YRCAA's jurisdiction. Table 1 shows the updated YRCAA regulations,

including those YRCAA provisions that replace sections or subsections of Chapter 173–400 WAC.

TABLE 1—UPDATED YAKIMA REGIONAL CLEAN AIR AGENCY REGULATIONS

State/local citation	Title/subject	State/local effective date	Explanation
Regulation 1			
1.01	Name of Agency	11/09/20	
1.02	Short Title	11/09/20	
1.03	Policy	11/09/20	Except sub-section H. Replaces WAC 173–400–010.
1.04	Applicability	11/09/20	
1.06	Records	11/09/20	Replaces WAC 173–400–175.
1.07	General Provisions	11/09/20	Replaces WAC 173–400–105(6) & (8).
2.04	Public Participation in Permitting.	11/09/20	
3.01	General Rules	11/09/20	Except sub-section D.
3.08	Specific Dust Controls.	11/09/20	Except sub-sections 3.08(A)(3)(b) and 3.08(B)(3).
4.01	Registration Program	11/09/20	Excluding any provisions related to the regulation of Toxic Air Pollutants.
4.03	Voluntary Limits on Emissions.	11/09/20	Replaces WAC 173–400–091 (state effective 4/1/11). The 9/20/93 version of WAC 173–400–091 continues to be approved under the authority of CAA Section 112(l) with respect to Section 112 hazardous air pollutants. See 60 FR 28726 (June 2, 1995).
Appendix A	Definitions of Words and Phrases.	11/09/20	Except asbestos control program definitions.
Appendix B	Definitions of Acronyms and Abbreviations.	11/09/20	

Table 2 of this document shows the updated Chapter 173–400 WAC provisions that YRCAA and Ecology requested apply to the SIP within YRCAA's jurisdiction. We note that many of the exclusions listed in Table 2 are identical to the exclusions for Ecology's direct jurisdiction. These exclusions primarily relate to Toxic Air Pollutants or other requirements which YRCAA and Ecology did not submit because they are outside the scope of regulating criteria pollutants under CAA section 110.[4] Table 2 also excludes those parts of the WAC explicitly replaced by the Regulation 1 provisions in Table 1 of this document.

The EPA previously approved Chapter 173–400 WAC as it applied to YRCAA's jurisdiction on June 2, 1995 (60 FR 28726). We note that YRCAA and Ecology did not submit updates for provision that remain unchanged since our 1995 approval. These provisions are WAC 173–400–161, WAC 173–400–190, WAC 173–400–205, and WAC 173–400–210. Similarly, YRCAA and Ecology did not request updates to Chapter 173–400 WAC that have not yet been approved by the EPA for Ecology's direct jurisdiction.[5] For those sections or subsections of Chapter 173–400 WAC that are not updated as part of this action, the EPA will retain, unchanged, our 1995 approval of those sections or subsections as it applies to YRCAA's jurisdiction.

TABLE 2—UPDATED WASHINGTON DEPARTMENT OF ECOLOGY REGULATIONS TO APPLY WITHIN YRCAA'S JURISDICTION

State citation	Title/subject	State effective date	Explanations
Washington Administrative Code, Chapter 173–400—General Regulations for Air Pollution Sources			
173–400–020	Applicability	12/29/12	
173–400–025	Adoption of Federal Rules.	9/16/18	
173–400–030	Definitions	9/16/18	Except: 173–400–030(6); 173–400–030(32); 173–400–030(38); 173–400–030(45); 173–400–030(83); 173–400–030(89); 173–400–030(96); 173–400–030(97); 173–400–030(100); 173–400–030(103); 173–400–030(104).
173–400–036	Relocation of Portable Sources.	12/29/12	
173–400–040	General Standards for Maximum Emissions.	9/16/18	Except: 173–400–040(2); 173–400–040(3); 173–400–040(5);

[4] See 79 FR 39351 (July 10, 2014).

[5] YRCAA and Ecology did not request, and the EPA is not proposing to approve updates to the following Chapter 173–400 WAC sections or subsections to apply within YRCAA's jurisdiction at this time: 173–400–030(6), (32), (38), (45), (83), (89), (97), (100), (103), and (104); 173–400–040(2); 173–400–070; 173–400–081; WAC 173–400–107; and 173–400–171(3)(o). See 85 FR 10302 (February 24, 2020) for the most recent update of Chapter 173–400 WAC in the SIP.

TABLE 2—UPDATED WASHINGTON DEPARTMENT OF ECOLOGY REGULATIONS TO APPLY WITHIN YRCAA'S JURISDICTION—Continued

State citation	Title/subject	State effective date	Explanations
173–400–050	Emission Standards for Combustion and Incineration Units.	9/16/18	Except: 173–400–050(2); 173–400–050(4); 173–400–050(5); 173–400–050(6).
173–400–060	Emission Standards for General Process Units.	11/25/18	
173–400–105	Records, Monitoring, and Reporting.	11/25/18	Except 173–400–105(6) & (8).
173–400–110	New Source Review (NSR) for Sources and Portable Sources.	12/29/12	Except: 173–400–110(1)(c)(ii)(C); 173–400–110(1)(e); 173–400–110(2)(d); The part of WAC 173–400–110(4)(b)(vi) that says, • "not for use with materials containing toxic air pollutants, as listed in chapter 173–460 WAC,"; The part of 400–110 (4)(e)(iii) that says, • "where toxic air pollutants as defined in chapter 173–460 WAC are not emitted"; The part of 400–110(4)(f)(i) that says, • "that are not toxic air pollutants listed in chapter 173–460 WAC"; The part of 400–110 (4)(h)(xviii) that says, • ", to the extent that toxic air pollutant gases as defined in chapter 173–460 WAC are not emitted"; The part of 400–110 (4)(h)(xxxiii) that says, • "where no toxic air pollutants as listed under chapter 173–460 WAC are emitted"; The part of 400–110(4)(h)(xxxiv) that says, • ", or ≤1% (by weight) toxic air pollutants as listed in chapter 173–460 WAC"; The part of 400–110(4)(h)(xxxv) that says, • "or ≤ % (by weight) toxic air pollutants"; The part of 400–110(4)(h)(xxxvi) that says, • "or ≤1% (by weight) toxic air pollutants as listed in chapter 173–460 WAC"; 400–110(4)(h)(xl), second sentence; The last row of the table in 173–400–110(5)(b) regarding exemption levels for Toxic Air Pollutants.
173–400–111	Processing Notice of Construction Applications for Sources, Stationary Sources and Portable Sources.	07/01/16	Except: 173–400–111(3)(h); The part of 173–400–111(8)(a)(v) that says, • "and 173–460–040,"; 173–400–111(9).
173–400–112	Requirements for New Sources in Nonattainment Areas—Review for Compliance with Regulations.	12/29/12	
173–400–113	New Sources in Attainment or Unclassifiable Areas—Review for Compliance with Regulations.	12/29/12	Except: 173–400–113(3), second sentence.
173–400–117	Special Protection Requirements for Federal Class I Areas.	12/29/12	
173–400–118	Designation of Class I, II, and III Areas.	12/29/12	
173–400–131	Issuance of Emission Reduction Credits.	4/1/11	
173–400–136	Use of Emission Reduction Credits (ERC).	4/1/11	
173–400–151	Retrofit Requirements for Visibility Protection.	2/10/05	

TABLE 2—UPDATED WASHINGTON DEPARTMENT OF ECOLOGY REGULATIONS TO APPLY WITHIN YRCAA'S JURISDICTION—Continued

State citation	Title/subject	State effective date	Explanations
173–400–171	Public Notice and Opportunity for Public Comment.	9/16/18	Except: The part of 173–400–171(3)(b) that says, • "or any increase in emissions of a toxic air pollutant above the acceptable source impact level for that toxic air pollutant as regulated under chapter 173–460 WAC"; 173–400–171(3)(o); 173–400–171(12).
173–400–200	Creditable Stack Height and Dispersion Techniques.	2/10/05	
173–400–560	General Order of Approval.	12/29/12	Except: The part of 173–400–560(1)(f) that says, "173–460 WAC".
173–400–800	Major Stationary Source and Major Modification in a Nonattainment Area.	4/1/11	EPA did not review WAC 173–400–800 through 860 for consistency with the August 24, 2016 $PM_{2.5}$ implementation rule (81 FR 58010); nor does YRCAA have an obligation to submit rule revisions to address the 2016 $PM_{2.5}$ implementation rule at this time.
173–400–810	Major Stationary Source and Major Modification Definitions.	07/01/16	
173–400–820	Determining if a New Stationary Source or Modification to a Stationary Source is Subject to these Requirements.	12/29/12	
173–400–830	Permitting Requirements.	07/01/16	
173–400–840	Emission Offset Requirements.	07/01/16	
173–400–850	Actual Emissions Plantwide Applicability Limitation (PAL).	07/01/16	
173–400–860	Public Involvement Procedures.	4/1/11	

B. Approved But Not Incorporated by Reference Regulations

In addition to the regulations proposed for approval and incorporation by reference above in this document, the EPA reviews and approves state and local clean air agency submissions to ensure they provide adequate enforcement authority and other general authority to implement and enforce the SIP. However, regulations describing such agency enforcement and other general authority are generally not incorporated by reference so as to avoid potential conflict with the EPA's independent authorities. We are proposing to include YRCAA Regulation 1, sections 1.05, 2.01, 2.02, 2.05, 5.01, 5.02, and 5.03 in 40 CFR 52.2470(e), *EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures,* as approved but not incorporated by reference regulatory provisions.

C. Regulations To Remove From the SIP

YRCAA and Ecology's October 14, 2021 submittal included a request to remove several obsolete provisions from the SIP and to remove other provisions that are not required SIP elements under CAA section 110. As previously discussed, YRCAA and Ecology requested that the EPA: Remove former section 1.03 which was replaced by Appendix A; remove former section 2.03 which was replaced by the provisions of section 1.07; remove former section 2.04 which was replaced by the provisions of section 1.06; remove former section 5.12 which was replaced by section 3.08 and WAC 173–400–040; remove former sections 13.01, 13.02, and 13.03 which were replaced by the provisions of section 2.02; remove former section 12.01 which was replaced by section 2.03 and is not a required SIP element; and remove former sections 3.11, 4.02, 4.03, 5.06, 5.07, 5.08, and 5.11 in order to rely on Chapter 173–400 WAC. We are also proposing to remove from 40 CFR 52.2470(c) the former sections 2.02, 2.05, 3.01, 3.02, 3.03, 3.04, 8.01, 8.02, 8.03, 8.04, and 8.05, related to local agency enforcement and other general authority, now consolidated in sections 1.05, 2.01, 2.02, 2.05, 5.01, 5.02, and 5.03 and proposed for approval in 40 CFR 52.2470(e), *EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures,* as approved but not incorporated by reference regulatory provisions. Lastly, we are proposing to remove the former section 5.10 *Sensitive Area Designation,* which allowed YRCAA to designate sensitive areas based on a consideration of present and predicted ambient air quality, population density and trends, distance of sources from public roads, recreational areas and areas of human habitation, topographic and meteorological conditions, and other pertinent variables. YRCAA has never used this authority and eliminated it from Regulation 1 effective May 1, 2000. We are also proposing to remove from

the SIP Chapter 173–400 WAC provisions approved by the EPA on June 2, 1995 (60 FR 28726) that we are proposing to replace with the local agency corollaries discussed above. These provisions are WAC 173–400–010 (replaced by section 1.03), 173–400–091 (replaced by section 4.03), and 173–400–100 (replaced by section 4.01).

D. Scope of Proposed Action

This proposed revision to the SIP applies specifically to the YRCAA jurisdiction as described in the SIP at 40 CFR 52.2470(c)—Table 10. As discussed in our October 3, 2014 action approving the general provisions of Chapter 173–400 WAC, local air agency jurisdiction in Washington is generally defined on a geographic basis; however, there are exceptions (79 FR 59653, at page 59654). By statute, YRCAA does not have authority for sources under the jurisdiction of the EFSEC. See Revised Code of Washington Chapter 80.50. Under the applicability provisions of WAC 173–405–012, 173–410–012, and 173–415–012, YRCAA also does not have jurisdiction for kraft pulp mills, sulfite pulping mills, and primary aluminum plants. For these sources, Ecology retains statewide, direct jurisdiction. Ecology and EFSEC also retain statewide, direct jurisdiction for issuing Prevention of Significant Deterioration (PSD) permits. Therefore, the EPA is not approving into 40 CFR 52.2470(c)—Table 10 those provisions of Chapter 173–400 WAC related to the PSD program. Specifically, these provisions are WAC 173–400–116 and WAC 173–400–700 through 173–400–750, which the EPA has already approved as applying statewide under 40 CFR 52.2470(c)—Tables 2 and 3.

As described in an April 29, 2015 final action approving revisions to the Washington SIP, jurisdiction to implement the visibility permitting program contained in WAC 173–400–117 varies depending on the situation. Ecology retains authority to implement WAC 173–400–117 as it relates to PSD permits (80 FR 23721). However, for facilities subject to major nonattainment new source review (NSR) under the applicability provisions of WAC 173–400–800, we are proposing that YRCAA would be responsible for implementing those parts of WAC 173–400–117 as they relate to major nonattainment NSR permits. See 80 FR 23726. The EPA is also proposing to modify the visibility protection Federal Implementation Plan contained in 40 CFR 52.2498 to reflect the approval of WAC 173–400–117 as it applies to implementation of the major nonattainment NSR program in YRCAA's jurisdiction.

With respect to the nonattainment NSR permitting program for major stationary sources, the EPA approved WAC 173–400–800 through 173–400–860 for Ecology's direct permitting jurisdiction on November 7, 2014 (79 FR 59653), with minor revisions to reflect updated federal citations on October 6, 2016 (81 FR 69385). In connection with our November 7, 2014 approval, we reviewed WAC 173–400–800 through 173–400–860 pursuant to the federal regulatory requirements in existence at that time and discussed the fact that the EPA's 2008 $PM_{2.5}$ New Source Review Rule (73 FR 28321, May 16, 2008) had been remanded to the EPA by the U.S. Court of Appeals for the District of Columbia Circuit. See 79 FR 43345, 43347 (July 25, 2014) (proposed action); 79 FR 59653 (final action). EPA's 2008 $PM_{2.5}$ New Source Review Rule has since been replaced by a revised implementation rule published August 24, 2016, which imposed additional NSR requirements for $PM_{2.5}$ nonattainment areas (81 FR 58010). Because there are no designated nonattainment areas within YRCAA's jurisdiction for any criteria pollutant, including $PM_{2.5}$, the EPA did not review WAC 173–400–800 through 173–400–860 for consistency with the newly revised $PM_{2.5}$ implementation rule; nor does Ecology or YRCAA have an obligation to submit rule revisions to address the 2016 $PM_{2.5}$ implementation rule at this time. We also note that the federal major nonattainment NSR requirements remain unchanged for all other criteria pollutants since our review and approval of WAC 173–400–800 through 173–400–860. We are therefore proposing to approve WAC 173–400–800 through 173–400–860 in YRCAA's jurisdiction as meeting the current major nonattainment NSR requirements for all criteria pollutants with respect to the current area designations and classifications in the YRCAA jurisdiction. New nonattainment designations trigger nonattainment NSR SIP revisions, among other area planning requirements.

Lastly, this SIP revision is not approved to apply on any Indian reservation land in Washington or any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction.

V. Incorporation by Reference

In this document, the EPA is proposing to include in a final 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 regulations shown in the tables in section IV.A. *Regulations to Approve and Incorporate by Reference into the SIP* of this document. The EPA is also proposing to remove from the incorporation by reference the regulations discussed in section IV.C. *Regulations to Remove from the SIP* of this document. The EPA has made, and will continue to make, these documents generally available through *https://www.regulations.gov* and at the EPA Region 10 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

VI. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Clean Air 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 approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement

Act of 1995 (15 U.S.C. 272 note) because application of the requirements would be inconsistent with the Clean Air Act; and

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

In addition, this proposed action would not 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 as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). Consistent with EPA policy, the EPA provided an opportunity to request consultation to the Confederated Tribes and Bands of the Yakama Nation in a letter dated April 5, 2021.

List of Subjects in 40 CFR Part 52

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

Dated: December 1, 2021.

Michelle L. Pirzadeh,

Acting Regional Administrator, Region 10.

[FR Doc. 2021–26437 Filed 12–6–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2020–0698; FRL–9215–01–R5]

Air Plan Approval; Wisconsin; Serious Plan Elements for the Wisconsin Portion of Chicago Nonattainment Area for the 2008 Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a revision to the Wisconsin State Implementation Plan (SIP) to meet the volatile organic compound (VOC) and nitrogen oxides (NO_X) reasonably available control technology (RACT), clean-fuel vehicle programs (CFVP), and the enhanced monitoring of ozone and ozone precursors (EMP) requirements of the Clean Air Act (CAA) in the Wisconsin portion of the Chicago-Naperville, Illinois-Indiana-Wisconsin nonattainment area (Chicago area) for the 2008 ozone National Ambient Air Quality Standards (NAAQS or standards). EPA is proposing to approve this SIP revision pursuant to section 110 and part D of the requirements of the CAA and EPA's regulations, because it satisfies the above requirements for an area which is classified as serious nonattainment for the 2008 ozone NAAQS. Other serious elements will be addressed in a separate action.

DATES: Comments must be received on or before January 6, 2022.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2020–0698 at *https://www.regulations.gov,* or via email to *blakley.pamela@epa.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*. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, *etc.*) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Michael Leslie, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–6680, *leslie.michael@epa.gov.* The EPA Region 5 office is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

I. What is the background for this action?

A. Background on the 2008 Ozone Standard

On March 27, 2008, EPA promulgated a revised 8-hour ozone NAAQS of 0.075 parts per million (ppm) (73 FR 16436). Promulgation of a revised NAAQS triggers a requirement for EPA to designate areas of the country as nonattainment, attainment, or unclassifiable for the standard. For the ozone NAAQS, this also involves classifying any nonattainment areas at the time of designation. Ozone nonattainment areas are classified based on the severity of their ozone levels (as determined based on the area's ''design value,'' which represents air quality in the area for the most recent 3 years). The classifications for ozone nonattainment areas are marginal, moderate, serious, severe, and extreme.

Areas that EPA designates nonattainment for the ozone NAAQS are subject to certain requirements, including the general nonattainment area planning requirements of CAA section 172 and the ozone-specific nonattainment planning requirements of CAA section 182. Ozone nonattainment areas in the lower classification levels have fewer and/or less stringent mandatory air quality planning and control requirements than those in higher classifications. For marginal areas, CAA section 182(a) details that a state is required to submit a baseline emissions inventory, adopt provisions into the SIP requiring emissions statements from stationary sources in the area, and implement a nonattainment new source review (NSR) program for the relevant ozone NAAQS. For moderate areas, the SIP requirements are found in CAA section 182(b), a state needs to comply with the marginal area requirements, plus additional moderate area requirements, including the requirement to submit a modeled demonstration that the area will attain the NAAQS as expeditiously as practicable but no later than 6 years after designation, the requirement to submit an Reasonable Further Progress (RFP) plan, the requirement to adopt and implement certain emissions controls, such as RACT and Inspection and Maintenance (I/M), and the requirement for greater emissions offsets for new or modified major stationary sources under the state's nonattainment NSR program. For serious nonattainment areas, the SIP requirements are found in CAA section

182(c) and include: an attainment demonstration, RACT for VOC and NO_X, Reasonably Available Control Measures, RFP reductions in VOC and/or NO_X emissions in the area, contingency measures to be implemented in the event of failure to attain the standard, enhanced I/M program, an EMP, a CFVP, a transportation control demonstration, and changes to permitting programs for serious areas.

B. Background on the Chicago 2008 Ozone Nonattainment Area

On June 11, 2012 (77 FR 34221), EPA designated the Chicago area as a marginal nonattainment area for the 2008 ozone NAAQS. The Chicago area includes Cook, DuPage, Kane, Lake, McHenry, and Will Counties and part of Grundy and Kendall Counties in Illinois; Lake and Porter Counties in Indiana; and the eastern portion of Kenosha County in Wisconsin. On May 4, 2016 (81 FR 26697), pursuant to section 181(b)(2) of the CAA, EPA determined that the Chicago area failed to attain the 2008 ozone NAAQS by the July 20, 2015 marginal area attainment deadline and thus reclassified the area from marginal to moderate nonattainment. On August 23, 2019, EPA again reclassified the Chicago nonattainment area from moderate to serious nonattainment status, effective September 23, 2019 (84 FR 44238). This reclassification was based on 2015–2017 monitoring data.

II. EPA's Evaluation of Wisconsin's SIP Submission

Wisconsin submitted a SIP revision on December 1, 2020, to address the serious nonattainment area requirements for the Wisconsin portion of the Chicago area for the 2008 ozone NAAQS. The submission contained several nonattainment plan elements, including a VOC and NO_X RACT plan, the CFVP, and the EMP. The submission also included an attainment demonstration, RFP, RFP contingency measures, enhanced I/M, transportation conformity motor vehicle emissions budgets, and a transportation control demonstration which will be addressed in a separate action(s).

A. VOC RACT in the Wisconsin Portion of the Chicago Area for the 2008 Ozone NAAQS

Sections 172(c)(1) and 182(b)(2) of the CAA require states to implement RACT in ozone nonattainment areas classified as moderate (and higher). Specifically, these areas are required to implement RACT for all major VOC emissions sources and for all sources covered by a Control Techniques Guideline (CTG). The major source threshold for serious nonattainment ozone areas is a potential to emit (PTE) 50 tons per year (TPY). A CTG is a document issued by EPA which establishes a ''presumptive norm'' for RACT for a specific VOC source category. States must submit rules, or negative declarations when no such sources exist for CTG source categories.

EPA's SIP Requirements Rule for the 2008 ozone NAAQS indicates that states may meet RACT through the establishment of new or more stringent requirements that meet RACT control levels, through a certification that previously adopted RACT controls in their SIPs approved by EPA for a prior ozone NAAQS also represent adequate RACT control levels for attainment of the 2008 ozone NAAQS, or with a combination of these two approaches. In addition, a state may submit a negative declaration in instances where there are no CTG sources.

Wisconsin previously addressed RACT requirements in the Kenosha portion of the nonattainment area when it developed attainment plans for the 1979 and 1997 ozone standards. Wisconsin has previously adopted RACT rules for VOC emission sources in the nonattainment areas under Wisconsin Administrative Code NR 420. Wisconsin has evaluated the previously adopted regulations and determined that these rules still satisfy RACT for its current submittal. Wisconsin's December 1, 2020 submittal describes the VOC RACT program for the Wisconsin portion of the Chicago area for the 2008 ozone NAAQS. Wisconsin has implemented a VOC RACT program for the Wisconsin portion 2008 ozone nonattainment area through: (1) Implementation of CTG-recommended control measures through state administrative rules and an administrative order, (2) Negative declarations certifying that no sources exist in the nonattainment area that are subject to the CTGs whose control measures have not been codified in state administrative rules or enforced through an administrative order, and (3) A negative declaration certifying that no non-CTG major source of VOCs exists in the nonattainment area.

The submittal provided a list of the CTGs for which RACT requirements have been codified in the Wisconsin Administrative Code. Wisconsin has not adopted VOC RACT regulations for four CTGs: Shipbuilding and ship repair, aerospace manufacturing, fiberglass boat manufacturing, and the oil and natural gas industry. In addition, while Wisconsin has adopted rules to cover industrial adhesive use, metal and plastic parts coatings, and automobile and light-duty truck manufacturing, the Wisconsin Administrative Code does not reflect the most recently published CTGs for these categories. Wisconsin performed an applicability analysis for these categories in the Wisconsin portion of the Chicago area. Wisconsin's analysis determined that there are no facilities for these CTGs in the Kenosha nonattainment area: Shipbuilding and ship repair, aerospace manufacturing, fiberglass boat manufacturing, oil and natural gas industry, miscellaneous industrial adhesives, and automobile and light-duty truck assembly coatings. Wisconsin provided negative declarations for these CTG categories.

For the remaining CTG category, miscellaneous metal and plastic parts coatings, Wisconsin's analysis identified three facilities in the Kenosha County 2008 ozone nonattainment area. For two of the facilities, KKSP Precision Machining LLC (Facility Identification 230198760) and IEA, Inc. (Facility Identification 230167520), Wisconsin determined that the emissions were well below the CTG applicability threshold of 15 lb VOC per day, or equivalently, 3 TPY. The State found the remaining facility, Insinkerator (Facility Identification 230167630), to have CTG-applicable emissions of 3.1 TPY in 2017, which is above the CTG threshold. Insinkerator entered into an Administrative Order (AM–20–01) with Wisconsin that established permanent and enforceable emission limits, among other requirements, on this facility, which are consistent with the control requirements and limits set forth in the 2008 Miscellaneous Metal and Plastic Parts Coatings CTG. AM–20–01 was submitted to EPA for incorporation into the SIP on February 12, 2020. EPA approved these components of the VOC RACT program as satisfying moderate area VOC RACT requirements on September 16, 2020 (85 FR 57729).

Wisconsin certified that the Wisconsin portion of the Chicago area's VOC RACT program also satisfies serious area VOC RACT requirements. The approved non-CTG major source negative declaration certifies that there are no sources within the Wisconsin portion of the Chicago area for the 2008 ozone NAAQS that produce non-CTG VOC emissions with a PTE of greater than 50 TPY, the serious nonattainment area major source threshold. Wisconsin has verified with recent emissions data that there continues to be no source within the Wisconsin portion of the Chicago area that meets the non-CTG major source threshold or the applicability criteria for CTGs not

incorporated into the State's administrative code.

Therefore, EPA is proposing to find that Wisconsin submittal has met VOC RACT requirements for its portion of the Chicago area for the serious 2008 ozone NAAQS.

B. NO_X RACT in the Wisconsin Portion of the Chicago Area for the 2008 Ozone NAAQS

Section 182(f) of the CAA requires RACT level controls for major stationary sources of NO_X located in moderate ozone (and higher) nonattainment areas. EPA approved Wisconsin's NO_X RACT program into the SIP on October 19, 2010 (44 FR 53762), for purposes of the 1997 ozone NAAQS. Wisconsin's NO_X RACT requirements are codified at NR 428.20 to 428.26 of the Wisconsin Administrative Code and were established to fulfill the moderate nonattainment requirements for the 1997 ozone NAAQS and to apply to the facilities with a PTE of NO_X greater than 100 TPY. Wisconsin's RACT rules are applicable to major stationary sources of NO_X located in Wisconsin's moderate ozone nonattainment areas, including Kenosha County. With the reclassification from moderate to serious nonattainment for the 2008 ozone NAAQS, the major source threshold has decreased from 100 TPY to 50 TPY. Currently there are no facilities located in the Wisconsin portion of the Chicago area 2008 ozone nonattainment area with PTE of NO_X exceeding 50 TPY. Therefore, no additional facility in this area has become subject to NO_X RACT due to the reclassification of the area from moderate to serious nonattainment.

The 2008 ozone implementation rule provides that states can show that existing NO_X RACT programs fulfill requirements for the 2008 ozone NAAQS. In 2017, the Wisconsin Department of Natural Resources (WDNR) submitted the analysis of the current NO_X RACT program to demonstrate compliance with the implementation rule for the 2008 ozone NAAQS. The analysis showed that there is no incremental difference in control technologies between the existing NO_X RACT program and the updated assessment for the facilities operating in 2008. On February 13, 2019, EPA approved WDNR's NO_X RACT program for compliance with the 2008 ozone NAAQS for moderate nonattainment areas (84 FR 3701). Since the assessment was required for conditions in 2008 and is not dependent on the nonattainment classification level, an updated NO_X RACT control technology assessment is not required for this SIP revision. Thus, based on equivalency in major source applicability and RACT control technology, the WDNR concludes that Wisconsin's current NO_X RACT program under state statute NR 428.20 to 428.26 fulfills RACT requirements for serious nonattainment for the 2008 ozone NAAQS. Therefore, EPA is proposing to find that Wisconsin has met the NO_X RACT for its portion of the Chicago area for the 2008 ozone NAAQS.

C. Clean Fuels Vehicles Program (CFVP)

CAA section 182(c)(4) requires states with ozone nonattainment areas classified as serious or higher to submit a SIP revision describing implementation of a CFVP, as described in CAA title II part C (40 CFR 88). EPA approved Wisconsin's CFVP on March 11, 1996 (61 FR 9641). EPA issued a memorandum on July 21, 2005, that found that then-current emission standards for vehicles (regulated under 40 CFR 86) were as or more stringent than the emission standards specified in 40 CFR 88 for the CFVP. Additionally, EPA issued a memorandum on April 17, 2006, noting that after the CFVP requirement became law, EPA promulgated new vehicle emission standards (*e.g.,* Tier 2 Rule and heavy-duty engine standards) that are generally more stringent, or equivalent to, the CFV emission standards for light-duty vehicles, light-duty trucks, and heavy-duty vehicles and engines. The memorandum also stated that ''[t]o meet the requirements of the Clean Fuel Fleet Program fleet managers can be assured that vehicles and engines certified to current Part 86 emission standards, which EPA has determined to be as or more stringent than corresponding CFV emission standards per the attached EPA Dear Manufacturer Letter meet the CFV emission standards and the CFFP requirements as defined in CFR part 88.'' We expected emission benefits of Tier 2 and heavy-duty engine standards over LEV standards. For example, Tier 2 NO_X standards have a benefit over LEV ranging from 0.09 grams/mile to 0.99 grams/mile on a per vehicle basis. With regard to the heavy-duty engine standards, there is a benefit of 1.4 grams/brake-horsepower per hour for the combination of non-methane hydrocarbons and NO_X on a per vehicle basis. Further reductions from these same vehicles will be achieved by EPA's newly promulgated Tier 3 emission standards.

Since vehicle emission standards have only become more stringent since the memo was issued in 2005, the CAA section 182(c)(4) CFVP requirement remains satisfied without the need for further action by the State.

D. Enhanced Monitoring Plan (EMP)

Section 182(c)(1) of the CAA requires states with nonattainment areas classified serious or higher to adopt and implement a program to improve air monitoring for ambient concentrations of ozone, NO_X and VOC. EPA initiated the Photochemical Assessment Monitoring Stations (PAMS) program in February 1993. The PAMS program required the establishment of an enhanced monitoring network in all ozone nonattainment areas classified as serious, severe, or extreme. On March 18, 1994 (59 FR 6021), EPA approved Wisconsin's SIP revision establishing an enhanced monitoring program.

Since that time, EPA concluded that requiring enhanced monitoring for ozone nonattainment areas classified as moderate or above is appropriate for the purposes of monitoring ambient air quality and better understanding ozone pollution. In EPA's revision to the ozone standard on October 1, 2015, EPA relied on the authority provided in sections 103(c), 110(a)(2)(B), 114(a) and 301(a)(1) of the CAA to expand the PAMS applicability to areas other than those that are serious or above ozone nonattainment and substantially to revise the PAMS requirements in 40 CFR part 58 appendix D (80 FR 65292). Specifically, this rule required states with moderate and above ozone nonattainment areas to develop and implement an EMP. These plans should detail enhanced ozone and ozone precursor monitoring activities to be performed to better understand area-specific ozone issues.

To meet this requirement, Wisconsin submitted its updated EMP as part of the 2018 Wisconsin Air Monitoring Network Plan, which EPA approved via a letter dated September 1, 2017. Wisconsin has submitted subsequent updates to its EMP with each year's network plan. Measures included in Wisconsin's current EMP include: Monitoring of ozone and ozone precursors beyond federal requirements, ozone event triggered VOC samples for the PAMS suite of compounds, engaging and supporting external partners collecting ozone-related data, and analyzing monitoring data that had been previously collected. Wisconsin's EMP specifically includes several enhanced monitoring efforts within the Wisconsin portion of the Chicago area.

Wisconsin will continue to meet its CAA section 182(c)(1) EMP requirements by including its EMP in Wisconsin's Air Monitoring Network Plan, which is subject to EPA review

and approval on an annual basis. Therefore, EPA is proposing to find that Wisconsin has met the EMP requirements for its portion of the Chicago area for the 2008 ozone NAAQS.

III. What action is EPA proposing?

EPA is proposing to approve revisions to Wisconsin's SIP pursuant to section 110 and part D of the CAA and EPA's regulations, because Wisconsin's December 1, 2020 nonattainment plan satisfies the requirements for the VOC and NO_X RACT, the CFVP, and the EMP, in the Wisconsin portion of the Chicago serious nonattainment area for the 2008 ozone NAAQS.

IV. 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, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

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

In addition, 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, Nitrogen oxides, Ozone, Volatile organic compounds.

Dated: December 1, 2021.

Debra Shore,

Regional Administrator, Region 5.

[FR Doc. 2021–26468 Filed 12–6–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2017–0558; FRL–9308–01–R6]

Finding of Failure To Attain the Primary 2010 One-Hour Sulfur Dioxide Standard for the St. Bernard Parish, Louisiana Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to determine that the St. Bernard Parish sulfur dioxide (SO_2) nonattainment area (''St. Bernard area'' or ''area'') failed to attain the primary 2010 one-hour SO_2 national ambient air quality standard (NAAQS) under the Clean Air Act (CAA or the Act) by the applicable attainment date of October 4, 2018. This proposed determination is based upon review of compliance records for the area's primary SO_2 source, the Rain CII Carbon, LLC (Rain) facility, in addition to dispersion modeling based on the allowable limits showing design values close to the SO_2 NAAQS. If the EPA finalizes this determination as proposed, the State of Louisiana will be required to submit revisions to the Louisiana State Implementation Plan (SIP) that, among other elements, provide for expeditious attainment of the 2010 SO_2 standard.

DATES: Comments must be received on or before January 6, 2022.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OAR–2017–0558, at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed. 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.*

Docket: The index to the docket for this action is available electronically at *https://www.regulations.gov.* While all documents in the docket are listed in the index, some information may not be publicly available due to docket file size restrictions or content (*e.g.,* CBI). Publicly available docket materials are available electronically through *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Karolina Ruan Lei, EPA Region 6 Office, SO_2 and Regional Haze Section (R6–ARSH), 214–665–7346, *ruan-lei.karolina@epa.gov.* Out of an abundance of caution for members of the public and our staff, the EPA Region 6 office will be closed to the public to reduce the risk of transmitting COVID–19. We encourage the public to submit comments via *https://www.regulations.gov,* as there will be a delay in processing mail and no courier or hand deliveries will be accepted. Please call or email the contact listed above if you need alternative access to material indexed but not provided in the docket.

SUPPLEMENTARY INFORMATION: Throughout this document ''we,'' ''us,'' or ''our'' means EPA.

Table of Contents

I. Background
A. The 2010 SO_2 NAAQS
B. Designations and Attainment Dates for the 2010 SO_2 NAAQS
C. Louisiana's Nonattainment SIP Revision
II. Proposed Determination
A. Applicable Statutory and Regulatory Provisions
B. Monitoring Network Considerations
C. Data Considerations and Proposed Determination
a. Monitor Data
b. Modeling Data
c. Record of Compliance
d. EPA's Proposed Determination
III. Proposed Action
IV. Statutory and Executive Order Reviews

I. Background

A. The 2010 SO_2 NAAQS

Under section 109 of the Act, the EPA has established primary and secondary NAAQS for certain pervasive air pollutants (referred to as ''criteria pollutants'') and conducts periodic reviews of the NAAQS to determine whether they should be revised or whether new NAAQS should be established. The primary NAAQS represent ambient air quality standards the attainment and maintenance of which the EPA has determined, including a margin of safety, are requisite to protect the public health. The secondary NAAQS represent ambient air quality standards the attainment and maintenance of which the EPA has determined are requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air.

Under the CAA, the EPA must establish NAAQS for criteria pollutants, including SO_2. SO_2 is primarily released to the atmosphere through the burning of fossil fuels by power plants and other industrial facilities. SO_2 is also emitted from industrial processes including metal extraction from ore and heavy equipment that burn fuel with a high sulfur content. Short-term exposure to SO_2 can damage the human respiratory system and increase breathing difficulties. Small children and people with respiratory conditions, such as asthma, are more sensitive to the effects of SO_2. Sulfur oxides at high concentrations in ambient air can also react with compounds to form small particulates that can penetrate deeply into the lungs and cause health problems.

The EPA first established primary SO_2 standards in 1971 at 0.14 parts per million (ppm) over a 24-hour averaging period and 0.3 ppm over an annual averaging period.[1] In June 2010, the EPA revised the NAAQS for SO_2 to provide increased protection of public health, providing for revocation of the 1971 primary annual and 24-hour SO_2 standards for most areas of the country following area designations under the new NAAQS.[2] The primary 2010 SO_2 NAAQS is 75 parts per billion (ppb), or 0.075 ppm, over a one-hour averaging period.[3] A violation of the 2010 one-hour SO_2 NAAQS occurs when the annual 99th percentile of ambient daily maximum one-hour average SO_2 concentrations, averaged over a 3-year period, exceeds 75 ppb.[4]

B. Designations and Attainment Dates for the 2010 SO_2 NAAQS

Following promulgation of any new or revised NAAQS, the EPA is required by CAA section 107(d) to designate areas throughout the nation as attaining or not attaining the NAAQS. On August 5, 2013, the EPA finalized its first round of designations for the 2010 primary SO_2 NAAQS.[5] In this 2013 action, the EPA designated 29 areas in 16 states as nonattainment for the 2010 SO_2 NAAQS, including the St. Bernard area in Louisiana. The EPA designated the St. Bernard area nonattainment based on certified monitoring data for years 2009 through 2011.[6] The EPA's initial round of designations for the 2010 SO_2 NAAQS including the St. Bernard area became effective on October 4, 2013. Pursuant to CAA section 192(a), the maximum attainment date for the St. Bernard area was October 4, 2018, five years after the effective date of the final action designating the area as nonattainment for the 2010 SO_2 NAAQS.

C. Louisiana's Nonattainment SIP Revision

Section 172(c) of the CAA lists the required components of a nonattainment plan submittal. In addition to an attainment demonstration, the nonattainment plan addresses the requirements for meeting reasonable further progress (RFP) toward attainment of the NAAQS, implementation of reasonably available control measures and reasonably available control technology (RACM/RACT), base-year and projection-year emission inventories, a new source review permit program, enforceable emissions limitations and control measures, and contingency measures. The attainment demonstration includes a modeling analysis showing that the enforceable emissions limitations and other control measures taken by the state will provide for RFP and expeditious attainment of the NAAQS (section 172(c)(2), (4), (6), and (7)).

On November 9, 2017, the Louisiana Department of Environmental Quality (LDEQ) submitted a nonattainment area SIP for the St. Bernard Parish area. On February 8, 2018, LDEQ submitted a letter to the EPA, accompanied by an Administrative Order on Consent (AOC), dated February 2, 2018, executed between LDEQ and the Rain CII Carbon, LLC (Rain) facility, that included new emissions limits for the Rain facility's cold stack and hot stack/pyroscrubber, as well as monitoring, testing and recordkeeping requirements. LDEQ submitted this as a source specific SIP revision and supplement to the 2017 nonattainment area SIP. Rain is a coke calcining operation that includes a waste heat recovery boiler. During normal operations, the exhaust from the calcining operation is routed through the recovery boiler and then through a scrubber and finally to the atmosphere through what is termed the ''cold stack.'' During start up and times when the recovery boiler is down, emissions are routed to the atmosphere through what is known as the ''hot stack.'' The modeling covers three operation scenarios: Cold stack only operation, hot stack only operation, and a transitional period with emissions through both stacks. The transition period from hot stack to cold stack occurs in a phased approach, gradually routing more and more exhaust to the cold stack from the hot stack until all exhaust is routed to the cold stack. The emission limits in the AOC included all operation regimes at the facility, with differing emission limits depending on the stage of operation defined by a minimum or range of flowrates and stack temperatures of the cold and hot stacks. On April 19, 2018, we published a proposed rulemaking action to approve the 2010 SO_2 Primary NAAQS Nonattainment Area SIP revision for St. Bernard Parish.[7] The April 19, 2018 action proposed approval of the following CAA SIP elements: The attainment demonstration for the SO_2 NAAQS; enforceable emissions limits including the AOC dated February 2, 2018, for the Rain facility; RFP plan; RACM and RACT demonstrations; emission inventories; and contingency

[1] See 36 FR 8186 (April 30, 1971).
[2] See 40 CFR 50.4(e).
[3] See 75 FR 35520 (June 22, 2010).
[4] See 40 CFR 50.17.
[5] See 78 FR 47191 (August 5, 2013).
[6] See 78 FR 47191, codified at 40 CFR part 81, subpart C.
[7] See 83 FR 17349 (April 19, 2018).

measures. We also proposed to find that the State had demonstrated that its current nonattainment new source review (NNSR) program covered the 2010 one-hour SO_2 NAAQS; therefore, no revision to the SIP was required for the NNSR element.

After the close of the public comment period to the April 19, 2018 proposal, the LDEQ submitted additional information to EPA on August 24, 2018.[8] The additional information was submitted to EPA partly in response to a public comment that expressed concern that Rain would need to modify the February 2018 AOC entered between Rain and LDEQ as Rain did not believe that it could meet the limits set forth in the AOC without an additional extension to the compliance dates.[9] In response to the comment, and in order to determine feasible emission limits for operations during transitions from exhaust flow through the hot stack to the cold stack, LDEQ granted an extension of the deadline of the February 2018 AOC on April 27, 2018.[10]

On August 2, 2018, Rain and LDEQ revised their existing AOC. On August 24, 2018, LDEQ supplemented their SIP submittal with the revised AOC and additional modeling analysis. On October 9, 2018, LDEQ again supplemented their SIP with an updated modeling analysis. The revised AOC[11] and the October 9, 2018 modeling files served as a supplement to the November 9, 2017 and February 8, 2018 SIP submittals and incorporated certain additional AOC revisions (dated August 2, 2018) and supporting modeling into the 2010 SO_2 NAAQS Nonattainment Area SIP revision for St. Bernard Parish. On February 8, 2019, EPA proposed to approve LDEQ's August 24, 2018 and October 9, 2018 submittals as a supplement to the prior SIP submittals (84 FR 2801). Please refer to EPA's April 19, 2018 proposed approval and February 8, 2019 supplemental notice of proposed rulemaking.

In a May 29, 2019 final action, EPA approved the nonattainment SIP for the St. Bernard area (84 FR 24712). For additional information concerning the St. Bernard Parish, Louisiana nonattainment SIP revision see docket ID No. EPA–R06–OAR–2017–0558 available at *https://www.regulations.gov.*

II. Proposed Determination

A. Applicable Statutory and Regulatory Provisions

Section 179(c)(1) of the Act requires the EPA to determine whether a nonattainment area has achieved an applicable attainment date based on the area's air quality as of the attainment date. A determination of whether an area's air quality meets applicable standards is generally based upon the most recent three years of complete, quality-assured data gathered at established state and local air monitoring stations (SLAMS) in a nonattainment area and entered into the EPA's Air Quality System (AQS) database.[12] Data from ambient air monitors operated by state and local agencies in compliance with the EPA monitoring requirements must be submitted to AQS.[13] Monitoring agencies annually certify that these data are accurate to the best of their knowledge.[14] All SO_2 data are reviewed to determine the area's air quality status in accordance with 40 CFR part 50, Appendix T.

Under EPA regulations in 40 CFR 50.17 and in accordance with 40 CFR part 50 Appendix T, the 2010 one-hour annual SO_2 standard is met when the design value is less than or equal to 75 ppb. Design values are calculated by computing the three-year average of the annual 99th percentile daily maximum one-hour average concentrations.[15] An SO_2 one-hour primary standard design value is valid if it encompasses three consecutive calendar years of complete data. A year is considered complete when all four quarters are complete, and a quarter is complete when at least 75 percent of the sampling days are complete. A sampling day is considered complete if 75 percent of the hourly concentration values are reported; this includes data affected by exceptional events that have been approved for exclusion by the Administrator.[16]

We note that when determining the attainment status of SO_2 nonattainment areas, including when making determinations of attainment by the attainment date, in addition to ambient monitoring data, the EPA may also consider air quality dispersion modeling and/or a demonstration that the control strategy in the SIP has been fully implemented.[17] With regard to the use of monitoring data for such determinations, the EPA's SO_2 Nonattainment Area Guidance specifically notes that ''[i]f the EPA determines that the air quality monitors located in the affected area are located in the area of maximum concentration, the EPA may be able to use the data from these monitors to make the determination of attainment without the use of air quality modeling data.'' If there are no air quality monitors located in the affected area, or there are air quality monitors located in the area, but analyses show that none of the monitors are located in the area of maximum concentration,[18] then air quality dispersion modeling will generally be needed to estimate SO_2 concentrations in the area. In this case, as discussed in our proposed actions on the St. Bernard nonattainment plan and Technical Support Documents (TSDs),[19] the monitors are not located in the area of expected maximum concentration, meaning we-must also consider the available modeling data in determining whether the area attained by the attainment date. When relying on a modeling demonstration based on allowable emissions for purposes of determining attainment by the attainment date, the EPA looks to whether the emission limit or limits were adopted and whether the relevant source or sources were complying with those modeled limits prior to the attainment date. That is, when determining attainment by the attainment date using air quality modeling of allowable emissions, EPA looks to whether the state has demonstrated that the control strategy in the SIP has been fully implemented (compliance records demonstrating that the control measures have been implemented as required by the approved SIP). This is necessary because a modeling demonstration based on allowable emissions is not itself sufficient since, without the supporting emissions information

[8] See letter from Secretary Chuck Carr Brown to Anne Idsal, August 24, 2018, St. Bernard 2008 Sulfur Dioxide State Implementation Plan Supplemental Information and Executed Administrative Order on Consent (AOC) included in the docket for this action.

[9] See the April 24, 2018 letter (in the docket to this action) from Senator Cassidy to EPA that referred to Rain's need to modify the February 2, 2018 AOC.

[10] See April 27, 2018 Letter from Secretary Chuck Carr Brown to Rain in the docket for this action.

[11] AOC signed by LDEQ and Rain on August 2, 2018, and submitted to EPA on August 24, 2018.

[12] AQS is the EPA's repository of ambient air quality data.

[13] See 40 CFR 58.16.

[14] See 40 CFR 58.15.

[15] As defined in 40 CFR part 50, Appendix T section 1(c), daily maximum 1-hour values refer to the maximum one-hour SO_2 concentration values measured from midnight to midnight that are used in the NAAQS computations.

[16] See 40 CFR part 50, Appendix T sections 1(c), 3(b), 4(c), and 5(a).

[17] EPA, April 23, 2014 Guidance for 1-Hour SO_2 Nonattainment Area SIP Submissions (''SO_2 Nonattainment Area Guidance''), page 49.

[18] See section VIII.A of the SO_2 Nonattainment Area Guidance

[19] See EPA's April 19, 2018 proposed approval (83 FR 17349), February 8, 2019 supplemental notice of proposed rulemaking (84 FR 2801) and EPA's Technical Support Documents, available in the docket for this action.

reflected in the control strategy, there would be no way to confirm that the actual emissions were below the modeled limits within the period under review.

B. Monitoring Network Considerations

Section 110(a)(2)(B)(i) of the CAA requires states to establish and operate air monitoring networks to compile data on ambient air quality for all criteria pollutants. The EPA's monitoring requirements are specified by regulation in 40 CFR part 58. These requirements are applicable to state, and where delegated, local air monitoring agencies that operate criteria pollutant monitors. In section 4.5 of Appendix D to 40 CFR part 58, the EPA specifies the minimum requirements for SO_2 monitoring sites to be classified as state or local air monitoring stations (SLAMS). SLAMS produce data that are eligible for comparison with the NAAQS, and therefore, the monitor must be an approved federal reference method (FRM) or federal equivalent method (FEM), per section 2 of Appendix C to 40 CFR part 58. In St. Bernard Parish, LDEQ operates a SLAMS monitor at Chalmette-Vista (EPA Site ID 22–087–0007, 24 E Chalmette Circle). In addition, LDEQ operates a special purpose monitor (SPM) at Meraux (EPA Site ID 22–087–0004, 4101 Mistrot Drive).

C. Data Considerations and Proposed Determination

a. Monitor Data

Under 40 CFR 58.15, monitoring agencies must certify, on an annual basis, data collected at all SLAMS by FRM, FEM, and special purpose monitors (SPMs) that meet EPA quality assurance requirements. In doing so, monitoring agencies must certify that the previous year of ambient concentration and quality assurance data are completely submitted to AQS and that the ambient concentration data are accurate to the best of their knowledge.

The one-hour SO_2 design values at Chalmette Vista and Meraux monitoring sites within the St. Bernard area for the 2013–2020 period are shown below.

TABLE 1—2013–2020 ONE-HOUR DESIGN VALUES FOR THE ST. BERNARD AREA

Years	Chalmette vista design value (ppb)	Meraux design value (ppb)
2013–2015	114	19
2014–2016	82	16
2015–2017	73	13
2016–2018	59	10
2017–2019	44	7
2018–2020	42	8

The attainment date for the area was October 4, 2018. In order for the EPA to determine that the area attained by the October 4, 2018 attainment date based solely on air quality monitoring data, the design value based upon complete, quality-assured monitored air quality data from three consecutive years (2015–2017) at each eligible monitoring site must be equal to or less than 75 ppb for the one-hour standard, and air quality modeling would need to show that there was an air quality monitor located in the area of maximum concentration.

Although the one-hour SO_2 design values at the Chalmette Vista monitoring site located within the St. Bernard area show a downward trend of SO_2 concentrations less than 75 ppb for the one-hour standard beginning with the 2015–2017 design value, this monitor is not located in the area of maximum predicted concentration, and therefore cannot be used, on its own, to determine that the St. Bernard Parish area attained by the attainment date.

b. Modeling Data

LDEQ and Rain developed the one-hour SO_2 emission limits contained in the August 2, 2018 AOC to ensure compliance with the SO_2 NAAQS. The emission limits in the AOC were effective August 2, 2018. The LDEQ undertook an additional modeling analysis which also incorporated the amended stack parameters and utilized more recent allowable emission rates from other contributing sources, an expanded receptor grid, and covered all operating scenarios. The additional modeling used the most recent version of AERMOD and followed EPA's guidance for SIP modeling for SO_2.[20] The analysis included modeling allowable emissions and stack parameters for different operational stages at the Rain facility, including stand-alone operations for the waste heat boiler and the pyroscrubber as well as transition stages between the two modes of operation; a summary of the results is given in Table 2. The modeling demonstration approved in the nonattainment SIP demonstrates that compliance with the emission limits and required stack parameters in the AOC provide for attainment, with predicted SO_2 concentrations near (just below) the NAAQS if the emission limits and stack parameters are met.[21] Additional, more detailed discussion of the State's modeling is contained in the TSD for the EPA's proposed Approval and Promulgation of Implementation Plans; Louisiana Attainment Demonstration for the St. Bernard Parish 2010 SO_2 Primary National Ambient Air Quality Standard Nonattainment Area published on February 8, 2019 (84 FR 2801).

TABLE 2—SUMMARY OF LDEQ SUPPLEMENTAL MODELING RESULTS FOR THE ST. BERNARD PARISH SIP USING THE EMISSION LIMITS AND STACK PARAMETERS FROM THE AOC

Operational stage	Model design value
Waste Heat Boiler Stack Alone	190.8 μg/m³ (72.9 ppb).
Pyroscrubber Stack Alone	176.6 μg/m³ (67.4 ppb).
Transition between Pyroscrubber Stack to the Waste Heat Boiler Stack (transitional stage with maximum design value).	185.6 μg/m³ (70.9 ppb).

c. Record of Compliance

As noted, when relying on modeling of allowable emissions to support a determination of whether an area has attained by its attainment date, the EPA must also look at whether the control strategy in the SIP has been fully implemented and whether the relevant sources in an area are complying with the emission limits and stack parameters required in the SIP. As discussed above, the modeling, based on the August 2, 2018 AOC limits, shows attainment of the NAAQS with maximum modeled concentrations just below the 75 ppb standard. Emissions higher than modeled limits and/or

[20] See Appendix A, page A–1 of the SO_2 Nonattainment Area Guidance.

[21] See Table 2.

actual stack parameters (flowrate or temperature) below the modeled stack parameters can result in downwind concentrations higher than those modeled. We note that Rain's compliance records, Title V deviation reports, and annual stack tests since August 2, 2018 (the effective date of AOC) demonstrate a pattern of difficulty complying with the SIP emission limits at all times and difficulty in estimating emissions and flowrates from the pyroscrubber to demonstrate compliance.[22] During the 9-week period between when the AOC limits became effective (August 2, 2018) and the attainment date (October 4, 2018), Rain reported that deviations occurred on 7 separate days for a total duration of 27.2 hours (25.2 hours due to calculated pyroscrubber flowrates less than the AOC requirements, and 2 hours when cold stack emissions exceeded the AOC emission limits).[23] Rain has since identified the need to revise the limits and potentially adjust the methodology used to estimate emissions and flowrates in the pyroscrubber that are contained in the AOC. In March of 2019, Rain conducted the first annual stack test as required by the August 2, 2018 AOC.[24] The 2019 stack test report found that ''the AOC hot stack equation underestimates hot stack emissions during most of the transition from hot stack to cold stack'' and ''[d]uring no hour did the combined flue gas flow and temperature meet the description of any transition stage.'' The report then states ''the AOC limits and conditions do not reflect actual emissions conditions and it is difficult to identify the appropriate transition stage,'' before recommending that the August 2018 AOC's flue gas flow rates, temperatures, and emissions limits for transitions stages 1, 2, and 3 be replaced with new conditions. Generally, one stack test may not be determinative, but the EPA believes that it is reasonable to conclude that the problems identified in the 2019 stack test were significant and, in conjunction with the 2018 semiannual monitoring report violations, indicative that the facility not only failed to meet the AOC requirements during the two days of the stack test, but likely failed to meet the 2018 AOC's transition stage operational requirements during the period between the effective date of the AOC and the attainment date.

The EPA also notes that the semiannual monitoring report for January through June 2020, while not the basis or rational for our decision making, includes additional deviations indicating that the facility continued to have difficulty complying with the limits in the SIP after the attainment date had passed. The report further states that: ''Rain continues to analyze this and similar deviations to identify a corrective action. The permit requirements do not match actual start-up conditions. Rain is in negotiations with EPA and LDEQ to revise the permit requirements to reflect actual start-up conditions.''

From the available information, EPA cannot determine with certainty that the area attained the NAAQS as the emissions and stack parameters at times fall outside the limits and conditions modeled in the approved attainment demonstration. The noted violations of the permit limits or underestimated emissions may have resulted in violations of the one-hour SO_2 NAAQS in areas other than the monitored location. Furthermore, the data demonstrates a clear need for development of a new attainment SIP with revised limits that better align with the source's operations and modeling to demonstrate attainment.

d. EPA's Proposed Determination

Based on our review of the monitor, modeling and compliance data, EPA proposes to find that the St. Bernard area did not attain the 2010 one-hour SO_2 NAAQS by the October 4, 2018 attainment date. The modeling data demonstrates that the emission limits and stack parameters in the AOC required of the Rain facility were necessary for the St. Bernard area to attain the standard. However, review of Rain's compliance record demonstrates that emissions have exceeded those limits, and stack temperatures and flowrates have not met the necessary parameters to demonstrate attainment in the St. Bernard area. As described in the previous section, Rain reported deviations during the period between the effective date of the limits and the attainment date. Rain has also reported underestimation of emissions from the hot stack when comparing estimated emissions to the measured emissions during the 2019 stack test indicative that Rain has failed to meet the AOC limits since the effective date. We also note, without relying upon, that Rain continued to report deviations in additional stack tests and deviation reports from 2018, 2019, and 2020. Under CAA section 179(d)(2), if the EPA determines that an area did not attain the NAAQS by the applicable deadline, the responsible air agency has up to 12 months from the effective date of the determination to submit a revised SIP for the area demonstrating attainment and containing any additional measures that the EPA may reasonably prescribe that can be feasibly implemented in the area in light of technological achievability, costs, and any non-air quality and other air quality-related health and environmental impacts as required. According to CAA section 179(d)(3), this revised SIP is to achieve attainment of the one-hour SO_2 NAAQS as expeditiously as practicable, but no later than 5 years from the effective date of the area's failure to attain (*i.e.,* 5 years after the EPA publishes a final action in the **Federal Register** determining that the nonattainment area failed to attain the SO_2 NAAQS). In addition to triggering requirements for a new SIP submittal, a final determination that a nonattainment area failed to attain the NAAQS by the attainment date would trigger the implementation of contingency measures adopted under 172(c)(9).

III. Proposed Action

Under CAA section 179(d)(2), the EPA proposes to determine that the St. Bernard Parish SO_2 nonattainment area has failed to attain the 2010 one-hour SO_2 standard of 75 ppb by the applicable attainment date of October 4, 2018. This determination is based upon review of (1) the state's air quality modeling demonstration, which showed the emission limits and stack parameters required at Rain, the primary source of SO_2 emission in the area, that were necessary to provide for the area's attainment and (2) Rain's available compliance records. The state's dispersion modeling, which was based on the allowable limits in the AOC, showed that with compliance with the limits, modeled design values were close to the SO_2 NAAQS. Rain has demonstrated a pattern of difficulty meeting its federally enforceable applicable SO_2 emission limits and stack parameters (memorialized in its Title V permit and the AOC). Emissions have exceeded those limits, and stack temperatures and flowrates have not met the necessary parameters to demonstrate attainment in the St. Bernard area, including the deviations noted above during the period between the effective date of the limits and the attainment date and reported underestimation of emissions from the

[22] See deviations listed in semiannual monitoring reports for 2018. We also note as dicta that the source continued to experience deviations in 2019 and 2020. The semiannual monitoring reports for 2018, 2019, and 2020 as well as the 2019 and 2020 stack test reports are available in the docket for this action.

[23] See deviations listed in semiannual monitoring report for July 1–December 31, 2018.

[24] Annual stack tests are a requirement of the August 2, 2018 AOC. The 2019 stack test was the first annual stack test performed pursuant to this requirement.

hot stack. If finalized as proposed, the State of Louisiana would be required under CAA section 179(d) to submit revisions to the SIP for the St. Bernard area. The required SIP revision for the area must, among other elements, demonstrate expeditious attainment of the SO_2 standard within the time period prescribed by CAA section 179(d) and such additional measures as the Administrator may reasonably prescribe that can be feasibly implemented in the area in light of technological achievability, costs, and any non-air quality and other air quality-related health and environmental impacts. If finalized as proposed, the SIP revisions required under CAA section 179(d) would be due for submittal to the EPA no later than one year after the publication date of the final action.

IV. Statutory and Executive Order Reviews

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

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

This action is not a significant regulatory action and therefore was not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the provisions of the PRA because it does not contain any information collection activities.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This proposed action, if finalized, would require the state to adopt and submit SIP revisions to satisfy CAA requirements and would not itself directly regulate any small entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate of $100 million or more, as described in UMRA (2 U.S.C. 1531–1538) and does not significantly or uniquely affect small governments. This action itself imposes no enforceable duty on any state, local, or tribal governments, or the private sector. This action proposes to determine that the St. Bernard Parish SO_2 nonattainment area failed to attain the SO_2 NAAQS by the applicable attainment dates. If finalized, this determination would trigger existing statutory timeframes for the State to submit SIP revisions. Such a determination in and of itself does not impose any federal intergovernmental mandate.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have tribal implications as specified in Executive Order 13175. The proposed finding of failure to attain the SO_2 NAAQS does not apply to tribal areas, and the proposed rule would not impose a burden on Indian reservation lands or other areas where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction within the St. Bernard Parish SO_2 nonattainment area. Thus, this proposed 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.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This proposed action is not subject to Executive Order 13045 because the effect of this proposed action, if finalized, would be to trigger additional planning requirements under the CAA. This proposed action does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The effect of this proposed action, if finalized, would be to trigger additional planning requirements under the CAA.

List of Subjects in 40 CFR Part 52

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

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

Dated: December 1, 2021.

David Gray,

Acting Regional Administrator, Region 6.

[FR Doc. 2021–26433 Filed 12–6–21; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1336

RIN 0970–AC88

Native American Programs

AGENCY: Administration for Native Americans (ANA), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS).

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice of proposed rulemaking (NPRM) proposes changes to ANA regulations to allow grant recipients to apply for an emergency waiver of part or all of their proposed non-Federal share (NFS) due to emergency circumstances.

DATES: In order to be considered, written comments on this proposed rule must be received on or before February 7, 2022.

ADDRESSES: You may submit comments, identified by docket number ACF–2021–004 and/or RIN number, by the following method:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions below for submitting comments.

• *Instructions:* All submissions received must include the agency name and docket number or RIN for this rulemaking. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Carmelia Strickland, Administration for Native Americans, 202–401–6741. Deaf and hearing-impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 between 8 a.m. and 7 p.m. Eastern Time.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
II. Statutory Authority
III. Section by Section Discussion of the Proposed Rule
IV. Regulatory Process Matters
Paperwork Reduction Act of 1995
Regulatory Flexibility Act
Treasury and General Government Appropriations Act of 1999
Unfunded Mandates Reform Act of 1995
Federalism Assessment Executive Order 13132
Congressional Review
Executive Orders 12866 and 13563—Regulatory Impact Analysis

I. Background

Native American Programs Act of 1974

The Native American Programs Act of 1974 (NAPA), Public Law 93–644, was first enacted on January 4, 1975. The last time substantial amendments to the NAPA regulations were made was 1996. Section 802 of the NAPA establishes as its broad statutory purpose the promotion of ''the goal of economic and social self-sufficiency for American Indians, Native Hawaiians, other Native American Pacific Islanders (including American Samoan Natives), and Alaska Natives.'' ANA executes this purpose through the provision of project-based financial assistance to Native Americans authorized under sections 803 and 803C of the NAPA, as well as through advocacy on behalf of Native Americans within HHS and with other departments and agencies of the Federal Government ''regarding all Federal policies affecting Native Americans,'' under section 803B (c) of the NAPA.

Goal of This NPRM: Incorporation of Emergency Waiver Provision

Current regulations (45 CFR 1336.50) state that grant recipients can only apply for a waiver for NFS at the time of application or while applying for a non-competitive continuation award. The on-going public health emergency has greatly impacted our recipients. The pandemic has greatly increased the risk of language and cultural decline among Native communities with many Elders dying from the COVID–19 virus. As tribes began closing their revenue generating businesses and other governmental operations due to the COVID–19 pandemic, they lost income they needed to fund Federal projects requiring a NFS. In addition, planned sources of income, such as use of tribal-owned facilities from which to operate the project, as part of the NFS also diminished. NAPA requires a 20 percent cost-share and match requirement. ANA's current cost-share waiver does not allow for a process to address a recipient's inability to meet the cost-share due to an emergency in the middle of a budget period. The proposed revisions to the regulations (45 CFR 1336.50(b)(2)(ii)) add a provision allowing grant recipients to apply for an emergency waiver within the current budget period in order to remedy this burden.

II. Statutory Authority

Pursuant to 42 U.S.C. 2991b of the NAPA, ANA is authorized to allow applicants the ability to submit a request for a waiver of the required 20 percent non-Federal cost match, subject to ANA regulations.[1]

III. Section by Section Discussion of the Proposed Rule

This NPRM proposes changes to 45 CFR part 1336, subpart E, Financial Assistance Provisions, in § 1336.50. These changes will have no regulatory burden impact but will provide a waiver provision and ensure programmatic success of American Indian, Native Hawaiian, other Native American Pacific Islander (including American Samoan Natives), and Alaska Native–based recipients.

Section 1336.50 Financial and Administrative Requirements

This section includes the conditions that must be met in order to submit a 20 percent, non-Federal, cost-sharing or match requirement. The proposed rule would amend the existing language and application requirements under § 1336.50(b)(2). Specifically, we propose in § 1336.50(b)(2)(i) that if an applicant anticipates that they will be unable to meet the cost-sharing or matching requirement and wishes to request a waiver of the requirement, they must include with the application for funding, the submission of a revised SF 424A, a written justification that clearly explains why the applicant cannot provide the matching share including the amount of non-Federal share to be waived, and how it meets the criteria indicated in the revised § 1336.50(b)(3)(ii). The request for a waiver must be submitted at the time of the initial application or Non-Competing Continuation (NCC) application.

Further, the proposed rule adds a provision for an emergency waiver in § 1336.50(b)(2)(ii) to include the ability to request a waiver during the budget period. If a recipient is unable to contribute part or all of the required non-Federal matching share during a budget period due to an emergency situation such as a natural disaster, man-made disaster, act of terrorism, public health emergency, or other qualifying event, the recipient may request a waiver of all or part of the requirement for a 20 percent non-Federal matching share specified under § 1336.50(b)(1).

Finally, this proposed rule amends the language in § 1336.50(b)(3)(ii). We propose that an applicant should provide evidence of the emergency situation and document that reasonable efforts to obtain cash or in-kind contributions for the purposes of the project from third parties have been unsuccessful, including evidence and the results of such attempts. Evidence of such efforts can include letters from possible sources of funding or any relevant correspondence, indicating that the requested resources are not available for that project. The requests must be appropriate to the source in terms of project purpose, applicant eligibility, and reasonableness of the request.

IV. Regulatory Process Matters

Paperwork Reduction Act of 1995

Section 1336.50(b) does not contain new information collection requirements. This action does not include any information collection requirements, only an additional circumstance that would allow for the submission of the information already outlined in the regulation.

Regulatory Flexibility Act

The Secretary certifies, under 5 U.S.C. 605(b), and enacted by the Regulatory Flexibility Act (Pub. L. 96, 354), that this proposed rule will not result in a significant impact on a substantial number of small entities.

[1] Native American Programs Act, 42 U.S.C. 2991b

Treasury and General Government Appropriations Act of 1999

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a proposed policy or regulation may affect family well-being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing criteria specified in the law. This regulation will not have an impact on family well-being as defined in this legislation, which asks agencies to assess policies with respect to whether the policy strengthens or erodes family stability and the authority and rights of parents in the education, nurturing, and supervision of their children; helps the family perform its functions; and increases or decreases disposable income.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $141 million or more in any one year. The Department has determined that this proposed rule would not impose a mandate that will result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year.

Federalism Assessment Executive Order 13132

Executive Order 13132 on federalism applies to policies that have federalism implications, defined as ''regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the states, or on the distributions of power and responsibilities among the various levels of government.'' This rulemaking does not have federalism implications for state or local governments as defined in the Executive order.

Congressional Review

This regulation is not a major rule as defined in 5 U.S.C. 8.

Executive Orders 12866 and 13563—Regulatory Impact Analysis

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if the regulation is necessary, to select the regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. While there are some costs associated with these regulations, they are not economically significant as defined under Executive Order 12866. However, the regulation is significant and has been reviewed by Office of Management and Budget.

The proposed regulation change would benefit recipients that have been financially impacted by an emergency event and are unable to meet their matching cost requirement, as required by the grant award. It would reduce the financial burden to recipients that need a waiver to provide the 20 percent cost share. Also, there is no cost to the agency other than the administrative time that it would take to review and approve the waiver request.

List of Subjects in 45 CFR Part 1336

Disaster assistance, Emergency preparedness, Public health.

JooYeun Chang,

Acting Assistant Secretary for Children and Families.

Approved:

Xavier Becerra,

Secretary.

For reasons stated in the preamble, we propose to amend 45 CFR part 1336 as follows:

PART 1336—NATIVE AMERICAN PROGRAMS

■ 1. The authority citation for part 1336 continues to read as follows:

Authority: 42 U.S.C. 2991 *et seq.*

■ 2. Amend § 1336.50 by revising paragraphs (b)(2) and (b)(3)(ii) to read as follows:

§ 1336.50 Financial and administrative requirements.

* * * * *

(b) * * *

(2) *Application.* If an applicant wishes to request a waiver of the requirement for a 20 percent non-Federal matching share, the follow conditions must be met:

(i) If an applicant anticipates that it will be temporarily unable to meet the cost-sharing or matching requirement, the applicant may request a waiver of the 20 percent non-Federal matching share. It must include with its application for funding, the submission of a revised SF 424A, a written justification that clearly explains why the applicant cannot provide the matching share including the amount of non-Federal share to be waived, and how it meets the criteria indicated in paragraph (b)(3) of this section. A request for a waiver must be submitted at the time of the initial application or non-competing continuation (NCC) application.

(ii) If a recipient is unable to contribute part or all of the required non-Federal matching share during a budget period due to an emergency situation such as a natural disaster, man-made disaster, act of terrorism, public health emergency, or other qualifying event, the recipient may request a waiver of all or part of the requirement for a 20 percent non-Federal matching share specified under paragraph (b)(1) of this section. Any requests for an emergency waiver may be submitted at any time during a budget period as soon as the adverse effect is known to the recipient and must be submitted in accordance with the requirements specified in paragraph (b)(3) of this section.

(3) * * *

(ii) Applicant should document the reasonable efforts to obtain cash or in-kind contributions for the purposes of the project from third parties have been unsuccessful, including evidence and the results of such attempts. Evidence of such efforts can include letters from possible sources of funding or any relevant correspondence, indicating that the requested resources are not available for that project. The requests must be appropriate to the source in terms of project purpose, applicant eligibility, and reasonableness of the request.

* * * * *

[FR Doc. 2021–25906 Filed 12–6–21; 8:45 am]

BILLING CODE 4184–34–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[FAR Case 2021–016, Docket No. FAR–2021–0016, Sequence No. 1]

RIN 9000–AO33

Federal Acquisition Regulation: Minimizing the Risk of Climate Change in Federal Acquisitions

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Advance notice of proposed rulemaking; extension of comment period.

SUMMARY: The Federal Acquisition Regulatory Council published an advance notice of proposed rulemaking on October 15, 2021, seeking public input on a potential amendment to the Federal Acquisition Regulation (FAR) to ensure that major Federal agency procurements minimize the risk of climate change. The deadline for submitting comments is being extended from December 14, 2021, to January 13, 2022, to provide additional time for interested parties to provide inputs.

DATES: For the advance notice of proposed rulemaking published on October 15, 2021 (86 FR 57404), submit comments on or before January 13, 2022.

ADDRESSES: Submit comments in response to FAR Case 2021–016 to the Federal eRulemaking portal at *https://www.regulations.gov* by searching for ''FAR Case 2021–016''. Select the link ''Comment Now'' that corresponds with ''FAR Case 2021–016''. Follow the instructions provided on the ''Comment Now'' screen. Please include your name, company name (if any), and ''FAR Case 2021–016'' on your attached document. If your comment cannot be submitted using *https://www.regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite ''FAR Case 2021–016'' in all correspondence related to this case. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer Hawes, Procurement Analyst, at 202–969–7386 or by email at *jennifer.hawes@gsa.gov,* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FAR Case 2021–016.

SUPPLEMENTARY INFORMATION:

I. Background

On October 15, 2021, the Federal Acquisition Regulatory Council published an advance notice of proposed rulemaking (ANPR) in the **Federal Register** at 86 FR 57404 seeking public input on a potential FAR amendment to implement section 5(b)(ii) of Executive Order 14030, Climate-Related Financial Risk. The comment period is extended to January 13, 2022, to allow additional time for interested parties to submit comments in response to the questions posed in the ANPR.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2021–26243 Filed 12–6–21; 8:45 am]

BILLING CODE 6820–EP–P

Notices

Federal Register

Vol. 86, No. 232

Tuesday, December 7, 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

Submission for OMB Review; Reinstatement of a Previously Approved Collection Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for reinstatement under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding: Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by January 6, 2022 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Housing Service

Title: 7 CFR 1951–E, Servicing of Community and Direct Business Programs Loans and Grants.

OMB Control Number: 0575–0066.

Summary of Collection: Rural Development (Agency) is the credit agency for agriculture and rural development for the U.S. Department of Agriculture. The Community Facilities program is authorized to make loans and grants for the development of essential community facilities primarily serving rural residents. The Direct Business and Industry Program is authorized to make loans to improve, develop, or finance business, industry, and employment, and improve the economic and environmental climate in rural communities. Section 331 and 335 of the Consolidated Farm and Rural Development Act, as amended, authorizes the Secretary of Agriculture, acting through the Agency, to establish provisions for security servicing policies for the loans and grants in questions. When there is a problem, a recipient of the loan, grant, or loan guarantee must furnish financial information to aid in resolving the problem through reamortization, sale, transfer, debt restructuring, liquidation, or other means provided in the regulations.

Need and Use of the Information: The Agency will use several different forms to collect information from applicants, borrowers, consultants, lenders and attorneys. This information is used to determine applicant/borrower eligibility and project feasibility for various servicing actions. The information enables field staff to ensure that borrowers operate on a sound basis and use loan and grant funds for authorized purposes.

Description of Respondents: State, Local or Tribal Government; Not-for-profit Institutions.

Number of Respondents: 102.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 1,504.

Dated: December 2, 2021.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2021–26503 Filed 12–6–21; 8:45 am]

BILLING CODE 3410–XV–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Nevada Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act (FACA) that the Nevada Advisory Committee (Committee) will hold a meeting via web conference on Thursday, December 16, 2021, at 3:00 p.m. Pacific Time. The purpose of the meeting is to review Committee Op-Ed on remote learning and equity in education.

DATES: Thursday, December 16, 2021, at 3:00 p.m. Pacific Time.

Webex Information: Register online *https://civilrights.webex.com/meet/afortes.*

Audio: (800) 360–9505, ID: 199–167–8181.

FOR FURTHER INFORMATION CONTACT: Ana Victoria Fortes, Designated Federal Officer (DFO) at *afortes@usccr.gov* or by phone at (202) 681–0857.

SUPPLEMENTARY INFORMATION: Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit Office within 30 days following the meeting. Written comments may be mailed to Ana Victoria Fortes at *afortes@usccr.gov* in the Regional Programs Unit Office/Advisory Committee Management Unit. Persons who desire additional information may

contact the Regional Programs Unit Office (202) 681–0587.

Records and documents discussed during the meeting will be available for public viewing prior to and after the meetings at *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzlJAAQ.*

Please click on the ''Committee Meetings'' tab. Records generated from these meetings may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meetings. Persons interested in the work of this Committee are directed to the Commission's website, *https://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

I. Welcome
II. Review Op-Ed
III. Public Comment
IV. Vote on Op-Ed
V. Planning Discussion for January Web Hearing
VI. Next Steps
VII. Adjournment

Exceptional Circumstance: Pursuant to 41 CFR 102–3.150, the notice for this meeting is given less than 15 calendar days prior to the meeting because of the exceptional circumstances of the immediacy of the subject matter.

December 2, 2021.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2021–26501 Filed 12–6–21; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Census Bureau

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Ask U.S. Panel

AGENCY: Census Bureau, Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act (PRA) of 1995, 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 on the proposed new information collection of the Ask U.S. Panel prior to the submission of the information collection request (ICR) to OMB for approval.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before February 7, 2022.

ADDRESSES: Interested persons are invited to submit written comments by email to *adrm.pra@census.gov.* Please reference Ask U.S. Panel in the subject line of your comments. You may also submit comments, identified by Docket Number USBC–2021–0024, to the Federal e-Rulemaking Portal: *http://www.regulations.gov.* All comments received are part of the public record. No comments will be posted to *http://www.regulations.gov* for public viewing until after the comment period has closed. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. You may submit attachments to electronic comments in Microsoft Word, Excel, or Adobe PDF file formats.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Jennifer Hunter Childs, Assistant Center Chief, 202–603–4927 and *Jennifer.hunter.childs@census.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Ask U.S. Panel (''the Panel'') will be a probability-based nationwide nationally representative survey panel for tracking public opinion on a variety of topics of interest to numerous federal agencies and their partners, and for conducting experimentation on alternative question wording and methodological approaches. The Ask U.S. Panel may also be used to collect nationwide rapid-response data to address emerging data needs.

The Panel will be developed through a multi-year effort. The first year of data collection will focus on conducting a large-scale field Pilot Test. Nationally representative data collection based on a probability sample of US adults will begin in the year following the pilot test.

The goal of the Ask U.S. Panel is to ensure availability of frequent data collection for nationwide estimates on a variety of topics and a variety of subgroups of the population, meeting standards for transparent quality reporting of the Federal Statistical Agencies and the Office of Management and Budget (OMB).

The Panel is an interagency effort, with representatives from Census, the Economic Research Service, the Bureau of Labor Statistics, the National Center for Health Statistics, the National Center for Science and Engineering Statistics, the National Center for Education Statistics, the Department of Defense, Department of Transportation, Department of Labor and the Social Security Administration guiding its design, content and methodological rigor, that will be used to meet data needs across the federal statistical system.

Data will be collected in two distinct phases. In Phase 1, ten percent of the panel (1,700 people) will be recruited and surveyed as a proof-of-concept to refine methods. In Phase 2, the remainder of the panel (17,000 people) will be recruited and surveyed using methodology refined during Phase 1. This package describes both sets of data collection.

II. Method of Collection

Using RTI's address-based frame, a probability sample of addresses in the United States (excluding territories) will be taken with oversamples of specific populations of interest, including households who face food insecurity and households who speak Spanish as a first language. A separate sample of active-duty military members and active-duty military spouses will also be recruited from a frame provided by the Department of Defense. In the pilot, potential panelists will be mailed invitations and asked to participate in an online or inbound telephone screener. If the household qualifies, two members will be randomly sampled and invited to join the panel by completing the baseline questionnaire in the same mode (online or inbound telephone). Households who do not respond to the mailed invitation will be in sample for a face-to-face nonresponse follow up. In these cases, an interviewer would administer the screener and the baseline questionnaire. Participating households who do not have stable internet access will be offered a tablet device with cell service for the duration of the panel to facilitate participation. Panelists will be eligible for online topical surveys no more than once a month once they join the panel for up to 3 years.

These methods may be refined between the pilot and the build-out of the panel.

III. Data

OMB Control Number: 0607–XXXX.

Form Number(s): Not yet determined.

Type of Review: Regular submission, New Information Collection Request.

Affected Public: Individuals or households.

Estimated Number of Respondents: 2022: 1,700; 2023: 17,000; 2024: 17,000.

Estimated Time Per Response: 2022: 2 hours per respondent; 2023: 4 hours per respondent; 2024: 4 hours per respondent.

Estimated Total Annual Burden Hours: 2022: 3,400 hours; 2023: 68,000 hours; 2024: 68,000 hours.

Estimated Total Annual Cost to Public: $0 (This is not the cost of respondents' time, but the indirect costs respondents may incur for such things as purchases of specialized software or hardware needed to report, or expenditures for accounting or records maintenance services required specifically by the collection.)

Respondent's Obligation: Voluntary.

Legal Authority: The Panel is being developed under a cooperative agreement awarded by the Census Bureau pursuant to the Consolidated Appropriations Act of 2021, Public Law 116–260, section 110. Data collection from the Panel for Census Bureau sponsored surveys is authorized by Title 13, Sections, 131, 141, 161, 181, 182, 193, and 301. Data collection from the Panel for surveys sponsored by other agencies is authorized by 13 U.S.C. 8(b), where the Census Bureau is the collection agent, 44 U.S. Code 3509, where OMB can direct data collection, and the various U.S. Code titles that authorize those agencies to collect information, including but not limited to title 49, section 329 for Bureau of Transportation Statistics collections, and the Education Sciences Reform Act of 2002 (ESRA 2002, 20 U.S.C. 9543) for National Center for Education Statistics surveys.

The confidentiality of information collected on topical surveys in this panel is assured by CIPSEA, Title 13 United States Code, or other applicable titles which authorize the collection of information.

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. 2021–26515 Filed 12–6–21; 8:45 am]

BILLING CODE 3510–07–P

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, 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

[10/29/2021 through 11/30/2021]

Firm name	Firm address	Date accepted for investigation	Product(s)
AKM Manufacturing, Inc	418 Calle A, San Juan, PR 00920	11/12/2021	The firm manufactures electrical equipment.

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. 2021–26483 Filed 12–6–21; 8:45 am]

BILLING CODE 3510–WH–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–067]

Forged Steel Fittings From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission; 2019–2020

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that Both-Well (Taizhou) Steel Fittings Co., Ltd. (Both-Well), the sole respondent participating in this review, and an exporter of forged steel fittings from the People's Republic of China (China), sold subject merchandise in the United States at prices below normal value (NV) during the period of review (POR) November 1, 2019, through October 31, 2020. We are also preliminarily rescinding this review with respect to Shanghai Maorun International Co., Ltd. (Shanghai Maorun). Interested parties are invited to comment on these preliminary results.

DATES: Applicable December 7, 2021.

FOR FURTHER INFORMATION CONTACT: Jinny Ahn, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0339.

SUPPLEMENTARY INFORMATION:

Background

This administrative review is being conducted in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act). On January 6, 2021, Commerce published the notice of initiation of this administrative review, covering Both-Well and Shanghai Maorun.[1] On January 27, 2021, Commerce issued the non-market economy (NME) antidumping duty (AD) questionnaire to Both-Well and Shanghai Maorun. On February 1, 2021, Shanghai Maorun withdrew its request for review.[2]

On June 28, 2021, Commerce extended the preliminary results deadline by 120 days.[3] For a complete description of the events that followed the initiation of this administrative review, *see* the Preliminary Decision Memorandum.[4]

Scope of the Order

The merchandise covered by the *Order*[5] is carbon and alloy forged steel fittings, whether unfinished (commonly known as blanks or rough forgings) or finished. For a complete description of the scope of the *Order, see* the Preliminary Decision Memorandum.

Partial Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if a party who requested the review withdraws the request within 90 days of the date of the date of publication of the notice of initiation of the requested review. On February 1, 2021, Shanghai Maorun timely withdrew its request for review. Because there was a timely withdrawal of request for review for Shanghai Maorun and because there are no other active requests for review for Shanghai Maorun, we are rescinding this review with respect to Shanghai Maorun, pursuant to 19 CFR 351.213(d)(1).

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Act and 19 CFR 351.213. We calculated export prices in accordance with section 772 of the Act. Because China is an NME country within the meaning of section 771(18) of the Act, NV has been calculated in accordance with section 773(c) of the Act.

For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. A list of the topics included in the Preliminary Decision Memorandum is included in the appendix to this notice. The Preliminary Decision Memorandum is a public document and is made available to the public via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum is available at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Separate Rates

In all proceedings involving an NME country, Commerce maintains a rebuttable presumption that all companies are subject to government control and, thus, should be assessed a single weighted-average dumping margin unless the company can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to its export activities so that it is entitled to separate rate status.[6] Commerce has preliminary determined that information placed on the record by Both-Well demonstrates that Both-Well is eligible for separate rate status.

As noted above, we are rescinding this review with respect to Shanghai Maorun. For the reasons stated below, as Shanghai Maorun is currently a part of the China-wide entity, we will continue to treat Shanghai Maorun as part of the China-wide entity. *See* Assessment Rates.

Commerce's policy regarding conditional review of the China-wide entity applies to this administrative review.[7] Under this policy, the China-wide entity will not be under review unless a party specifically requests, or Commerce self-initiates, a review of the China-wide entity.[8] Because no party requested a review of the China-wide entity in this review, the China-wide entity is not under review and the China-wide entity's rate (*i.e.,* 142.72 percent) is not subject to change.[9] For additional information, *see* the Preliminary Decision Memorandum.

Preliminary Results of the Review

Commerce preliminarily determines that the following weighted-average dumping margin exist for the POR:

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 86 FR 515 (January 6, 2021) (*Initiation Notice*).

[2] *See* Shanghai Maorun's Letter, ''Withdrawal of Request of Review,'' dated February 1, 2021 (Maorun's Withdrawal of Request for Review).

[3] *See* Memorandum, ''Forged Steel Fittings from the People's Republic of China: Extension of Deadline for Preliminary Results of the Second Antidumping Duty Administrative Review,'' dated June 28, 2021.

[4] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission: Forged Steel Fittings from the People's Republic of China; 2019–2020,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[5] *See Forged Steel Fittings from Italy and the People's Republic of China: Antidumping Duty Orders,* 83 FR 60397 (November 26, 2018) (*Order*).

[6] *See Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products from the People's Republic of China,* 71 FR 53079, 53082 (September 8, 2006); *see also Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China,* 71 FR 29303, 29307 (May 22, 2006).

[7] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[8] *Id.*

[9] *See Order,* 83 FR at 60397.

Exporter	Weighted-average dumping margin (percent)
Both-Well (Taizhou) Steel Fittings Co., Ltd	0.51

Disclosure and Public Comment

Commerce intends to disclose the calculations performed for these preliminary results to the parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Pursuant to 19 CFR 351.309(c)(ii), interested parties may each submit a case brief no later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the case briefs are filed.[10] Parties who submit a case brief or a rebuttal brief in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance within 30 days of the date of publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues parties intend to discuss. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs.[11] If a request for a hearing is made, Commerce will announce the date and time of the hearing.

All submissions to Commerce must be filed electronically using Enforcement and Compliance's electronic records system, ACCESS,[12] and must also be served on interested parties.[13] An electronically filed document must be received successfully in its entirety by ACCESS, by 5 p.m. Eastern Time (ET) on the date that the document is due. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[14]

Final Results of Review

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, which will include the results of its analysis of issues raised in any briefs, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

In accordance with section 751(a)(2)(C) of the Act, the final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by this review. Upon issuance of the final results, Commerce will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[15] Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review, when the importer-specific assessment rate calculated in the final results of this review for Both-Well, are not zero or *de minimis* (*i.e.,* less than 0.50 percent). Where Both-Well's importer-specific assessment rate is zero or *de minimis,*[16] we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. If Both-Well's weighted-average dumping margin is not zero or *de minimis* in the final results of this review, Commerce will instruct CBP to collect the appropriate duties at the time of liquidation, in accordance with 19 CFR 351.212(b)(1).[17] We intend to calculate importer-specific *ad valorem* assessment rates by dividing the total amount of dumping calculated for all reviewed U.S. sales to the importer by the total entered value of the merchandise sold to the importer for Both-Well.[18]

For entries that were not reported in the U.S. sales data submitted by Both-Well during this review, Commerce will instruct CBP to liquidate such entries at the rate for the China-wide entity pursuant to the NME reseller policy.[19]

For Shanghai Maorun, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). For Shanghai Maorun, Commerce intends to issue appropriate assessment instructions to CBP no earlier than 35 days after the date of publication of this notice.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) For Both-Well, the cash deposit rate will be equal to the weighted-average dumping margin established in the final results of this review (except, if the rate is *de minimis,* then the cash deposit rate will be zero); (2) for previously examined Chinese and non-Chinese exporters not listed above that received a separate rate in a prior completed segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific cash deposit rate; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the rate for the China-wide entity (*i.e.,* 142.72 percent); and (4) for all non-Chinese exporters of subject merchandise which have not received their own separate rate, the cash deposit rate will be the rate applicable to the Chinese exporter that supplied that non-Chinese exporter.

These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

[10] *See* 19 CFR 351.309(d).

[11] *See* 19 CFR 351.310(c).

[12] *See* 19 CFR 351.303.

[13] *See* 19 CFR 351.303(f).

[14] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 41363 (July 10, 2020).

[15] *See* 19 CFR 351.212(b)(1).

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

[17] Commerce will apply the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012).

[18] *See* 19 CFR 351.212(b)(1).

[19] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (December 23, 2010) at 65694–65695, for a full discussion of this practice.

Notification to Interested Parties

This administrative review and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, 19 CFR 351.213, and 19 CFR 351.221(b)(4).

Dated: November 30, 2021.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Partial Rescission of Administrative Review
V. Discussion of the Methodology
VI. Date of Sale
VII. Comparisons to Normal Value
VIII. U.S. Price
IX. Normal Value
X. Currency Conversion
XI. Adjustment Under Section 777A(f) of the Act
XII. Recommendation

[FR Doc. 2021–26463 Filed 12–6–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–068]

Forged Steel Fittings From the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2019

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

SUMMARY: The Department of Commerce (Commerce) is conducting an administrative review of the countervailing duty (CVD) order on forged steel fittings from the People's Republic of China (China) for the period of review January 1, 2019, through December 31, 2019. Commerce preliminarily determines that countervailable subsidies are being provided to Both-Well (Taizhou) Steel Fittings, Co., Ltd. (Both-Well), the sole producer/exporter of forged steel fittings from China subject to this review.

DATES: Applicable December 7, 2021.

FOR FURTHER INFORMATION CONTACT: Janaé Martin or William Horn, 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) 482–0238 or (202) 482–4868, respectively.

SUPPLEMENTARY INFORMATION:

Background

On January 6, 2021, Commerce published the notice of initiation of an administrative review of the CVD order on forged steel fittings from China.[1] On July 13, 2021, Commerce extended the time period for issuing the preliminary results of this review by 120 days.[2] Accordingly, the deadline for the preliminary results in this administrative review was postponed to November 30, 2021.[3]

For a complete description of the events that followed the initiation of this administrative review, *see* the Preliminary Decision Memorandum.[4] A list of topics discussed in the Preliminary Decision Memorandum is included as an appendix to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov,* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly *https://access.trade.gov/public/FRNoticesListLayout.aspx/.*

Scope of the Order

The merchandise covered by the order is forged steel fittings. For a complete description of the scope of the order, *see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, we preliminarily determine that there is a subsidy, *i.e.,* a government financial contribution that gives rise to a benefit to the recipient, and that the subsidy is specific.[5] For a full description of the methodology underlying our preliminary conclusions, *see* the accompanying Preliminary Decision Memorandum.

As explained in the Preliminary Decision Memorandum, Commerce relied on adverse facts available because the Government of China did not act to the best of its ability in responding to Commerce's requests for information, and consequently, we have drawn an adverse inference, where appropriate, in selecting from among the facts otherwise available.[6] For further information, *see* ''Use of Facts Otherwise Available and Adverse Inferences'' in the Preliminary Decision Memorandum.

Preliminary Results of Review

In accordance with 19 CFR 351.221(b)(4)(i), we calculated a countervailable subsidy rate for Both-Well, the sole mandatory respondent in this review. We preliminarily determine that the following subsidy rate exists for Both-Well:

Company	Subsidy rate (percent)
Both-Well (Taizhou) Steel Fittings, Co., Ltd	13.39

Assessment Rate

In accordance with 19 CFR 351.221(b)(4)(i), we preliminarily assigned a subsidy rate in the amount shown above for the producer/exporter shown above. Upon completion of the administrative review, consistent with section 751(a)(1) of the Act and 19 CFR 351.212(b)(2), Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, countervailing duties on all appropriate entries covered by this review. Commerce intends to issue instructions directly to CBP no earlier than 35 days after publication of the final results of this review in the **Federal Register**.

Cash Deposit Rate

Pursuant to section 751(a)(1) of the Act, Commerce intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amount indicated for Both-Well with regard to shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. For all non-reviewed firms, we will instruct CBP to continue to collect cash deposits of estimated countervailing duties at the most recent company-specific or all-others rate

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 86 FR 511 (January 6, 2021).

[2] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Countervailing Duty Administrative Review,'' dated July 13, 2021.

[3] *Id.* at 2.

[4] *See* Memorandum, ''Decision Memorandum for the Preliminary Results: Administrative Review of the Countervailing Duty Order on Forged Steel Fittings from the People's Republic of China; 2019,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[5] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[6] *See* sections 776(a) and (b) of the Act.

applicable to the company, as appropriate. These cash deposit instructions, when imposed, shall remain in effect until further notice.

Verification

Commerce intends to verify the non-use information for the Export Buyer's Credit Program in making its final determination in this administrative review. Normally, Commerce verifies information using standard procedures, including an on-site examination of original accounting, financial, and sales documentation. However, due to current travel restrictions in response to the global COVID–19 pandemic, Commerce is unable to conduct on-site verification in this investigation. Accordingly, we intend to verify the information relied upon in making the final determination through alternative means in lieu of an on-site verification.

Disclosure and Public Comment

We will disclose to parties to this proceeding the calculations performed in reaching the preliminary results within five days of the date of publication of these preliminary results.[7] Interested parties will be notified of the timeline for the submission of case briefs at a later date. Rebuttal briefs, limited to issues raised in these case briefs, may be submitted no later than seven days after the deadline date for case briefs.[8] Pursuant to 19 CFR 351.309(d)(2), rebuttal briefs must be limited to issues raised in the case briefs. Parties who submit arguments are requested to submit with the argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[9]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must do so within 30 days of publication of these preliminary results by submitting a written request to the Assistant Secretary for Enforcement and Compliance using Enforcement and Compliance's ACCESS system.[10] Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce will inform parties of the scheduled date of the hearing which will be held at a time and date to be determined.[11] Issues addressed during the hearing will be limited to those raised in the briefs.[12] Parties should confirm the date and time of the hearing two days before the scheduled date.

Parties are reminded that all briefs and hearing requests must be filed electronically using ACCESS and received successfully in their entirety by 5 p.m. Eastern Time on the due date. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[13]

Unless the deadline is extended pursuant to section 751(a)(3)(A) of the Act, Commerce intends to issue the final results of this administrative review, including the results of our analysis of the issues raised by the parties in their comments, within 120 days after publication of these preliminary results.

This administrative review and notice are in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213.

Dated: November 30, 2021.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Diversification of China's Economy
V. Subsidies Valuation
VI. Benchmarks and Discount Rates
VII. Use of Facts Otherwise Available and Adverse Inferences
VIII. Analysis of Programs
IX. Conclusion

[FR Doc. 2021–26464 Filed 12–6–21; 8:45 am]

BILLING CODE 3510–DS–P

[7] *See* 19 CFR 224(b).

[8] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements); and *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006, 17007 (March 26, 2020).

[9] *See* 19 CFR 351.309(c)(2) and 351.309(d)(2).

[10] *See* 19 CFR 351.310(c).

[11] *See* 19 CFR 351.310.

[12] *See* 19 CFR 351.310(c).

[13] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements); *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020); and *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–809]

Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2019–2020

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

SUMMARY: The Department of Commerce (Commerce) preliminarily finds that circular welded non-alloy steel pipe (CWP) from the Republic of Korea (Korea) was sold at prices below normal value. The period of review (POR) is November 1, 2019, through October 31, 2020. We invite interested parties to comment on these preliminary results.

DATES: Applicable December 7, 2021.

FOR FURTHER INFORMATION CONTACT: Dusten Hom and Richard Roberts, 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) 482–5075 and (202) 482–3464, respectively.

SUPPLEMENTARY INFORMATION:

Background

These preliminary results are made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this administrative review on January 6, 2021.[1] Commerce selected Husteel Co., Ltd. (Husteel) and Hyundai Steel Company (Hyundai Steel) as the two mandatory respondents in this review.[2] On July 2, 2021, Commerce extended the time limit for issuing the preliminary results of this review by 120 days, to no later than November 30, 2021.[3]

For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[4] A list of topics

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 86 FR 511 (January 6, 2021).

[2] *See* Memorandum, ''Antidumping Duty Administrative Review of Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Respondent Selection,'' dated February 18, 2021.

[3] *See* Memorandum, ''Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Extension of Deadline for Preliminary Results of 2019–2020 Antidumping Administrative Review,'' dated July 2, 2021.

[4] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of Antidumping Duty

Continued

included in the Preliminary Decision Memorandum is included as Appendix I to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order [5]

The merchandise subject to the *Order* is CWP from Korea. A full description of the scope, *see* the Preliminary Decision Memorandum.[6]

Methodology

Commerce is conducting this review in accordance with section 751(a) of the Act. Constructed export prices have been calculated in accordance with section 772(b) of the Act. Normal value is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying these preliminary results, *see* the Preliminary Decision Memorandum.

Preliminary Determination of No Shipments

On February 5, 2021, HiSteel Co., Ltd (HiSteel) submitted a letter certifying that it had no exports or sales of subject merchandise into the United States during the POR.[7] U.S. Customs and Border Protection (CBP) did not have any information to contradict this claim of no shipments during the POR.[8] Therefore, we preliminarily determine that HiSteel did not have any shipments of subject merchandise during the POR. Consistent with Commerce's practice, we will not rescind the review with respect to HiSteel but will complete the review and issue instructions to CBP based on the final results.

Rate for Non-Selected Companies

The statute and Commerce's regulations do not address the rate to be applied to companies not selected for examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a market economy investigation, for guidance when calculating the rate for companies which were not selected for individual examination in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}.'' In this review, we preliminarily calculated dumping margins for the two mandatory respondents, Hyundai Steel and Husteel, of 1.97 and 4.07 percent, respectively, and we have assigned to the non-selected companies a rate of 3.21 percent, which is the weighted-average dumping margins of Husteel and Hyundai Steel weighted by their publicly ranged U.S. sales values.[9]

Preliminary Results of the Administrative Review

Commerce preliminarily finds that the following weighted-average dumping margins exist for the period November 1, 2019, through October 31, 2020:

Producer/exporter	Weighted-average dumping margin (percent)
Husteel Co., Ltd	4.07
Hyundai Steel Company [10]	1.97
Review-Specific Average Rate Applicable to the Following Companies	
Other Respondents [11]	3.21

Disclosure

We intend to disclose the calculations performed for these preliminary results to interested parties within five days after the date of publication of this notice in accordance with 19 CFR 351.224(b).

Public Comment

Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs no later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the date for filing case briefs.[12] Commerce modified certain of its requirements for serving documents containing business proprietary information until further notice.[13] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[14] Executive summaries should be limited to five pages total, including footnotes. Case and rebuttal briefs should be filed using ACCESS [15] and must be served on interested parties.[16] An electronically filed document must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Time on the date that the document is due.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. An electronically filed document must be received successfully in its entirety by Commerce's electronic records system,

Administrative Review and Preliminary Determination of No Shipments: Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: 2019–2020,'' dated concurrently with these preliminary results and hereby adopted by this notice (Preliminary Decision Memorandum).

[5] *See Notice of Antidumping Duty Orders: Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico, and Venezuela, and Amendment to Final Determination of Sales at Less Than Fair Value: Certain Circular Welded Non-Alloy Steel Pipe from Korea,* 57 FR 49453 (November 2, 1992) (*Order*).

[6] For a full description of the scope of the *Order, see* Preliminary Decision Memorandum.

[7] *See* HiSteel's Letter, ''Administrative Review of the Antidumping Duty Order on Circular Welded Non-Alloy Steel Pipe from Korea for the 2019–20 Review Period—No Shipments Letter,'' dated February 5, 2021.

[8] *See* Memorandum, ''Welded Non-Alloy Steel Pipe from the Republic of Korea (A–580–809), No Shipment Inquiry for HiSteel Co., Ltd. during the period 11/01/2019 through 10/31/2020,'' dated November 8, 2021

[9] With two respondents under examination, Commerce normally calculates (A) a weighted-average of the dumping margins calculated for the examined respondents; (B) a simple average of the dumping margins calculated for the examined respondents; and (C) a weighted-average of the dumping margins calculated for the examined respondents using each company's publicly-ranged U.S. sale quantities for the merchandise under consideration. Commerce then compares (B) and (C) to (A) and selects the rate closest to (A) as the most appropriate rate for all other producers and exporters. *See, e.g., Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53663 (September 1, 2010).

[10] This company is also known as Hyundai Steel Corporation; Hyundai Steel; and Hyundai Steel (Pipe Division).

[11] *See* Appendix II for a full list of these companies.

[12] *See* 19 CFR 351.309(d).

[13] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[14] *See* 19 CFR 351.309(c)(2) and (d)(2).

[15] *See generally* 19 CFR 351.303.

[16] *See* 19 CFR 351.303(f).

ACCESS, by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice.[17] Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Issues raised in the hearing will be limited to those raised in the briefs. Parties should confirm the date, time, and location of the hearing two days before the scheduled date.

Unless the deadline is extended, Commerce intends to issue the final results of this revies, including the results of its analysis of issues raised by parties in their comments, within 120 days after the publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h).

Assessment Rates

Upon issuing the final results, Commerce will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review. If an examined respondent's weighted-average dumping margin is above *de minimis* (*i.e.,* 0.5 percent) in the final results of this review, we will calculate importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the examined sales to that importer, and we will instruct CBP to assess antidumping duties on all appropriate entries covered by this. Where either the respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

For entries of subject merchandise during the POR produced by Husteel or Hyundai Steel for which they did not know that the merchandise was destined to the United States and for all entries attributed to HiSteel, for which we found no shipments during the POR, we will instruct CBP to liquidate those entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[18]

For the companies that were not selected for individual review, we intend to assign an assessment rate based on the methodology described in the ''Rates for Non-Examined Companies'' section. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by this review where applicable.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication in the **Federal Register** of the notice of final results of administrative review for all shipments of CWP from Korea entered, or withdrawn from warehouse, for consumption on or after the date of publication as provided by section 751(a)(2) of the Act: (1) The cash deposit rate for companies subject to this review will be the rates established in the final results of this administrative review; (2) for merchandise exported by a company not covered in this review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation but the producer is, then the cash deposit rate will be the rate established for the most recent period for the producer of the merchandise; (4) the cash deposit rate for all other producers or exporters will continue to be 4.80 percent,[19] the all-others rate established in the less-than-fair-value investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

Commerce is issuing and publishing the preliminary results of this review in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.221(b)(4).

Dated: November 30, 2021.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix I—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Rates for Non-Examined Companies
V. Preliminary Determination of No Shipments
VI. Affiliation
VII. Discussion of the Methodology
VIII. Normal Value
IX. Currency Conversion
X. Recommendation

Appendix II—List of Companies Not Individually Examined

1. Aju Besteel
2. Bookook Steel
3. Chang Won Bending
4. Dae Ryung
5. Daewoo Shipbuilding & Marine Engineering (Dsme)
6. Daiduck Piping
7. Dong Yang Steel Pipe
8. Dongbu Steel[20]
9. Eew Korea Company
10. Hyundai Rb
11. Kiduck Industries
12. Kum Kang Kind
13. Kumsoo Connecting
14. Miju Steel Mfg.[21]
15. Nexteel Co., Ltd.[22]
16. Samkang M&T
17. Seah Fs
18. Seah Steel[23]
19. Steel Flower
20. Vesta Co., Ltd.
21. Ycp Co.

[FR Doc. 2021–26465 Filed 12–6–21; 8:45 am]

BILLING CODE 3510–DS–P

[17] *See* 19 CFR 351.310(c).

[18] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[19] *See Order.*

[20] This company is also known as Dongbu Steel Co., Ltd.

[21] This company is also known as Miju Steel Manufacturing.

[22] This company is also known as Nexteel.

[23] This company is also known as Seah Steel Corporation.

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Generic Clearance for Usability Data Collections

AGENCY: National Institute of Standards and Technology (NIST), 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 February 7, 2022.

ADDRESSES: Interested persons are invited to submit written comments by mail to Maureen O'Reilly, Management Analyst, NIST by email to *PRAcomments@doc.gov.* Please reference OMB Control Number 0693–0043 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 Maureen O'Reilly, Management Analyst, NIST, 100 Bureau Drive, MS 1710, Gaithersburg, MD 20899, 301–975–3189, *maureen.oreilly@nist.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

In accordance with the Executive Order 12862, the National Institute of Standards and Technology (NIST), a non-regulatory agency of the Department of Commerce, proposes to conduct both quantitative and qualitative data collections. The data collections will be designed to determine requirements and evaluate the usability and utility of NIST research for measurement and standardization work. These data collections efforts may include, but may not be limited to electronic methodologies, empirical studies, video and audio collections, interviews, and questionnaires. For example, data collection efforts may include the public safety communications survey and the smart home devices study. NIST will limit its inquiries to data collections that solicit strictly voluntary opinions or responses. NIST will not conduct individual data collections under this generic clearance that are mandatory, required, or regulated. The data collected will be used to guide NIST research.

II. Method of Collection

NIST will collect this information by electronic means, when possible, as well as by mail, fax, telephone and person-to-person interviews. If an information collection is conducted in person, NIST will provide the respondent with a paper copy of the collection instrument that displays the ''public burden statement'', OMB Control # and current Expiration date.

III. Data

OMB Control Number: 0693–0043.

Form Number(s): None.

Type of Review: Regular submission, extension of a current information collection.

Affected Public: Individuals or households, State, local or tribal government, Federal government.

Estimated Number of Respondents: 150,000.

Estimated Time per Response: Varied, dependent upon the data collection method used. The estimated response time to complete a questionnaire is 15 minutes or 2 hours to participate in an empirical study.

Estimated Total Annual Burden Hours: 100,000.

Estimated Total Annual Cost to Public: $0.

Respondent's Obligation: Voluntary.

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. 2021–26514 Filed 12–6–21; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Patent Review and Derivation Proceedings

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Notice of information collection; request for comment.

SUMMARY: The United States Patent and Trademark Office (USPTO), as required by the Paperwork Reduction Act of 1995, invites comments on the extension and revision of an existing information collection: 0651–0069 (Patent Review and Derivation Proceedings). The purpose of this notice is to allow 60 days for public comment preceding submission of the information collection to OMB.

DATES: To ensure consideration, comments regarding this information collection must be received on or before February 7, 2022.

ADDRESSES: Interested persons are invited to submit written comments by any of the following methods. Do not submit Confidential Business Information or otherwise sensitive or protected information.

- *Email: InformationCollection@uspto.gov.* Include ''0651–0069 comment'' in the subject line of the message.
- *Federal Rulemaking Portal: http://www.regulations.gov.*

• *Mail:* Kimberly Hardy, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Michael P. Tierney, Vice Chief Administrative Patent Judge, Patent Trial and Appeals Board, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450; by telephone at 571–272–4676; or by email to *Michael.Tierney@uspto.gov* with ''0651–0069 comment'' in the subject line. Additional information about this information collection is also available at *http://www.reginfo.gov* under ''Information Collection Review.''

SUPPLEMENTARY INFORMATION:

I. Abstract

The Leahy-Smith America Invents Act, which was enacted into law on September 16, 2011, provided for many changes to the procedures of the Patent Trial and Appeal Board (''PTAB'' or ''Board'', formerly the Board of Patent Appeals and Interferences) procedures. These changes included the introduction of *inter partes* review, post-grant review, derivation proceedings, and the transitional program for covered business method patents. Under these administrative trial proceedings, third parties may file a petition with the PTAB challenging the validity of issued patents, with each proceeding having different requirements regarding timing restrictions, grounds for challenging validity, and who may request review.

Inter partes review is a trial proceeding conducted at the Board to review the patentability of one or more claims in a patent only on a ground that could be raised under §§ 102 or 103, and only on the basis of prior art consisting of patents or printed publications. Post grant review is a trial proceeding conducted at the Board to review the patentability of one or more claims in a patent on any ground that could be raised under § 282(b)(2) or (3). A derivation proceeding is a trial proceeding conducted at the Board to determine whether (1) an inventor named in an earlier application derived the claimed invention from an inventor named in the petitioner's application, and (2) the earlier application claiming such invention was filed without authorization. The transitional program for covered business method patents is a trial proceeding conducted at the Board to review the patentability of one or more claims in a covered business method patent. The covered business method program expired on September 16, 2020 and the Board no longer accepts new petitions related to this program, but continues to accept papers in previously-instituted proceedings.

This information collection covers information submitted by the public to petition the Board to initiate an *inter partes* review, post-grant review, derivation proceeding, and the transitional program for covered business method patents, as well as any responses to such petitions, and the filing of any motions, replies, oppositions, and other actions, after a review/proceeding has been instituted.

II. Method of Collection

Applicants submit the information electronically using the PTAB End-to-End (PTAB E2E) filing system. Parties may seek authorization to submit a filing by means other than electronic filing pursuant to 42 CFR 42.6(b)(2).

III. Data

OMB Control Number: 0651–0069.

Form Numbers: None.

Type of Review: Extension and revision of a currently approved information collection.

Affected Public: Private sector; individuals or households.

Estimated Number of Respondents: 9,138 respondents per year.

Estimated Number of Responses: 12,238 responses per year.

Estimated Time per Response: The USPTO estimates that the responses in this information collection will take the public between 30 minutes (0.5 hours) and 165 hours to complete. This includes the time to gather the necessary information, create the document, and submit the completed request to the USPTO.

Estimated Total Annual Respondent Burden Hours: 1,360,058 hours.

Estimated Total Annual Respondent (Hourly) Cost Burden: $591,625,230.

TABLE 1—BURDEN HOUR/BURDEN COST TO PRIVATE SECTOR RESPONDENTS

Item No.	Item	Estimated annual respondents (a)	Responses per respondent (b)	Estimated annual responses (a) × (b) = (c)	Estimated time for response (hours) (d)	Estimated burden (hour/year) (c) × (d) = (e)	Rate[1] ($/hour) (f)	Estimated annual respondent cost burden (e) × (f) = (g)
1	Petition for *Inter Partes* Review.	1,450	1	1,450	124	179,800	$435	$78,213,000
2	Petition for Post-Grant Review or Covered Business Method Patent Review.	100	1	100	165	16,500	435	7,177,500
3	Petition for Derivation	10	1	10	165	1,650	435	717,750
4	Patent Owner Preliminary Response to Petition for Initial *Inter Partes* Review.	1,175	1	1,175	91	106,925	435	46,512,375
5	Patent Owner Preliminary Response to Petition for Initial Post-Grant Review or Covered Business Method Patent Review.	100	1	100	91	9,100	435	3,958,500
6	Request for Rehearing	250	1	250	80	20,000	435	8,700,000
7	Other Motions, Replies, Surreplies, and Oppositions in *Inter Partes* Review.	2,900	2	5,800	158	916,400	435	398,634,000

TABLE 1—BURDEN HOUR/BURDEN COST TO PRIVATE SECTOR RESPONDENTS—Continued

Item No.	Item	Estimated annual respondents (a)	Responses per respondent (b)	Estimated annual responses (a) × (b) = (c)	Estimated time for response (hours) (d)	Estimated burden (hour/year) (c) × (d) = (e)	Rate[1] ($/hour) (f)	Estimated annual respondent cost burden (e) × (f) = (g)
8	Other Motions, Replies, Surreplies, and Oppositions in Post-Grant Review or Covered Business Method Review.	200	2	400	148	59,200	435	25,752,000
9	Other Motions, Replies, Surreplies, and Oppositions in Derivation Proceedings.	10	1	10	120	1,200	435	522,000
10	Pro Hac Vice Admission Motion.	950	1	950	*0.5	475	435	206,625
11	Request for Oral Hearing.	575	1	575	2	1,150	435	500,250
12	Request to Treat a Settlement as Business Confidential.	450	1	450	2	900	435	391,500
13	Settlement	450	1	450	100	45,000	435	19,575,000
14	Arbitration Agreement and Award.	1	1	1	4	4	435	1,740
15	Request to Make a Settlement Agreement Available.	1	1	1	1	1	435	435
16	Notice of Judicial Review of a Board Decision (e.g. Notice of Appeal Under 35 U.S.C. § 142).	500	1	500	1	500	435	217,500
	Total	9,222		12,222		1,358,805		591,080,175

* (30 minutes).
[1] 2021 Report of the Economic Survey, published by the Committee on Economics of Legal Practice of the American Intellectual Property Law Association (AIPLA); pg. F–27. The USPTO uses the average billing rate for intellectual property attorneys in private firms which is $435 per hour.

TABLE 2—BURDEN HOUR/BURDEN COST TO INDIVIDUALS OR HOUSEHOLDS RESPONDENTS

Item No.	Item	Estimated annual respondents (a)	Responses per respondent (b)	Estimated annual responses (a) × (b) = (c)	Estimated time for response (hours) (d)	Estimated burden (hour/year) (c) × (d) = (e)	Rate[2] ($/hour) (f)	Estimated annual respondent cost burden (e) × (f) = (g)
1	Petition for *Inter Partes* Review.	1	1	1	124	124	$435	$53,940
2	Petition for Post-Grant Review or Covered Business Method Patent Review.	1	1	1	165	165	435	71,775
3	Petition for Derivation	1	1	1	165	165	435	71,775
4	Patent Owner Preliminary Response to Petition for Initial *Inter Partes* Review.	1	1	1	91	91	435	39,585
5	Patent Owner Preliminary Response to Petition for Initial Post-Grant Review or Covered Business Method Patent Review.	1	1	1	91	91	435	39,585
6	Request for Rehearing	1	1	1	80	80	435	34,800
7	Other Motions, Replies, Surreplies, and Oppositions in *Inter Partes* Review.	1	1	1	158	158	435	68,730
8	Other Motions, Replies, Surreplies, and Oppositions in Post-Grant Review or Covered Business Method Review.	1	1	1	148	148	435	64,380
9	Other Motions, Replies, Surreplies, and Oppositions in Derivation Proceedings.	1	1	1	120	120	435	52,200
10	Pro Hac Vice Motion	1	1	1	*0.5	1	435	435

TABLE 2—BURDEN HOUR/BURDEN COST TO INDIVIDUALS OR HOUSEHOLDS RESPONDENTS—Continued

Item No.	Item	Estimated annual respondents (a)	Responses per respondent (b)	Estimated annual responses (a) × (b) = (c)	Estimated time for response (hours) (d)	Estimated burden (hour/year) (c) × (d) = (e)	Rate [2] ($/hour) (f)	Estimated annual respondent cost burden (e) × (f) = (g)
11	Request for Oral Hearing.	1	1	1	2	2	435	870
12	Request to Treat a Settlement as Business Confidential.	1	1	1	2	2	435	870
13	Settlement	1	1	1	100	100	435	43,500
14	Arbitration Agreement and Award.	1	1	1	4	4	435	1,740
15	Request to Make a Settlement Agreement Available.	1	1	1	1	1	435	435
16	Notice of Judicial Review of a Board Decision (*e.g.,* Notice of Appeal Under 35 U.S.C. § 142).	1	1	1	1	1	435	435
	Total	16		16		1,253		545,055

* (30 minutes).
[2] 2021 Report of the Economic Survey, published by the Committee on Economics of Legal Practice of the American Intellectual Property Law Association (AIPLA); pg. F–27. The USPTO uses the average billing rate for intellectual property attorneys in private firms which is $435 per hour.

Estimated Total Annual Respondent (Non-hourly) Cost Burden: $69,638,370. There are no capital start-up, maintenance, or postage associated with this information collection. However, this information collection does have annual (non-hour) costs in the form of filing fees which are listed in the table below.

TABLE 3—FILING FEES (NON-HOUR) COST BURDEN PATENT REVIEW AND DERIVATION PROCEEDINGS

Item No.	Item	Estimated annual responses (a)	Filing fee ($) (d)	Estimated cost burden ($) (a) × (b) = (c)
1	*Inter Partes* Review Request Fee—Up to 20 Claims	1,450	19,000	27,550,000
1	*Inter Partes* Post-Institution Fee—Up to 20 Claims	1,450	22,500	32,625,000
1	*Inter Partes* Review Request of Each Claim in Excess of 20	3,500	375	1,312,500
1	*Inter Partes* Post-Institution Request of Each Claim in Excess of 20	3,500	750	2,625,000
2	Post-Grant or Covered Business Method Review Request Fee—Up to 20 Claims.	100	20,000	2,000,000
2	Post-Grant or Covered Business Method Review Post-Institution Fee—Up to 20 Claims.	100	27,500	2,750,000
2	Post-Grant or Covered Business Method Review Request of Each Claim in Excess of 20.	350	475	166,250
2	Post-Grant or Covered Business Method Review Post-Institution Fee of Each Claim in Excess of 20.	350	1,050	367,500
3	Petition for Derivation	10	420	4,200
10	Pro Hac Vice Admission Fee	950	250	237,500
14	Request to Make a Settlement Agreement Available	1	420	420
	Total			69,638,370

Respondent's Obligation: Required to obtain or retain benefits.

Request for Comments

The USPTO is soliciting public comments to:

(a) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility;

(b) Evaluate the accuracy of the Agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected; and

(d) Minimize the burden of the collection 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.

All comments submitted in response to this notice are a matter of public record. USPTO will include or summarize each comment in the request to OMB to approve this information collection. Before including an address, phone number, email address, or other personally identifiable information (PII) in a comment, be aware that the entire comment—including PII—may be made publicly available at any time. While you may ask in your comment to withhold PII from public view, USPTO

cannot guarantee that it will be able to do so.

Kimberly Hardy,

Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.

[FR Doc. 2021–26441 Filed 12–6–21; 8:45 am]

BILLING CODE 3510–16–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB–2021–0017]

Notice and Request for Comment Regarding the CFPB's Inquiry Into Big Tech Payment Platforms

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice; request for comment; re-opening of comment period.

SUMMARY: On October 21, 2021, the Consumer Financial Protection (Bureau or CFPB) ordered six large technology companies operating payments systems in the United States to provide information about certain of their business practices. Accompanying the orders, the Director of the Bureau issued a statement and invited interested parties to comment on the inquiry. The statement and request for comment was published in the **Federal Register** on November 5, 2021, in a document titled, ''Notice and Request for Comment Regarding the CFPB's Inquiry Into Big Tech Payment Platforms.'' The Bureau has determined that a re-opening of the comment period until December 21, 2021, is appropriate.

DATES: The end of the comment period for the document titled, ''Notice and Request for Comment Regarding the CFPB's Inquiry Into Big Tech Payment Platforms,'' published on November 5, 2021 (86 FR 61182), is reopened from December 6, 2021, until December 21, 2021.

ADDRESSES: You may submit comments by any of the methods identified in the notice.[1]

FOR FURTHER INFORMATION CONTACT: Amy Zirkle, Program Manager for Payments & Deposits, (202) 435–7505. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION: On October 21, 2021, the Bureau ordered six large technology companies operating payments systems in the United States to provide information about certain of their business practices. The information will help the CFPB better understand how these firms use personal payments data and manage data access to users so the Bureau can ensure adequate consumer protection. Accompanying the orders, the Director of the Bureau issued a statement and invited interested parties to comment on the inquiry. The statement and request for comment that published in the **Federal Register** stated that the comment period would close on December 6, 2021. Allowing an additional comment period will provide additional opportunity for the public to prepare comments related to this inquiry. Therefore, the Bureau is re-opening the comment period for this request until December 21, 2021. The Bureau will also accept any comments that arrive between the time the original comment period closed on December 6, 2021, and December 7, 2021.

Rohit Chopra,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2021–26562 Filed 12–3–21; 4:15 pm]

BILLING CODE 4810–AM–P

[1] *See* 86 FR 61182 (Nov. 5, 2021).

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: Department of Energy.

ACTION: Submission for Office of Management and Budget (OMB) review; comment request.

SUMMARY: The Department of Energy (DOE) has submitted an information collection request to the OMB for extension under the provisions of the Paperwork Reduction Act of 1995. The information collection requests a three-year extension of its collection for Superior Energy Performance 50001 (SEP 50001) Certification and 50001 Ready Recognition, OMB Control Number 1910–5177. The proposed collection will relate to tracking partner participation and calculating the energy efficiency impact of DOE's Superior Energy Performance certification and 50001 Ready recognition programs.

DATES: Comments regarding this collection must be received on or before January 6, 2022. 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, please advise the OMB Desk Officer of your intention to make a submission as soon as possible. The Desk Officer may be telephoned at (202) 395–4718.

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: Ethan Rogers, EE–5A/Forrestal Building, 1000 Independence Avenue SW, Washington, DC 20585, by fax at 202–287–6093, or by email at *ethan.rogers@ee.doe.gov.*

SUPPLEMENTARY INFORMATION: This information collection request contains:

(1) *OMB No.:* 1910–5177;

(2) *Information Collection Request Title:* Superior Energy Performance 50001 (SEP 50001) Certification and 50001 Ready Recognition;

(3) *Type of Request:* Renewal;

(4) *Purpose:* This Information Collection Request applies to the Department of Energy (DOE) voluntary ISO 50001 programs for industrial facilities: Superior Energy Performance® (SEP®) and 50001 Ready™ recognition. SEP is an energy efficiency certification and recognition program for commercial, institutional, and industrial facilities demonstrating excellence in energy management as well as continual improvement in energy efficiency through third-party verified energy performance. 50001 Ready recognition is a self-attestation of the implementation of an ISO 50001 energy management system without the need for external audits. Respondents include commercial, institutional, and industrial facilities. For SEP 50001, additional respondents include SEP 50001 Verification Bodies.

(5) *Annual Estimated Number of Respondents:* 450;

(6) *Annual Estimated Number of Total Responses:* 450;

(7) *Annual Estimated Number of Burden Hours:* 450;

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $31,452.

Statutory Authority: Accelerating Investment in Industrial Energy Efficiency. Executive Order 13624, 77 FR 54779 (Aug. 30, 2012); 42 U.S.C. 16191.

Signing Authority

This document of the Department of Energy was signed on November 24, 2021, by Rebecca Jones-Albertus, Acting Director, Advanced Manufacturing Office, Office of 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 December 1, 2021.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2021–26427 Filed 12–6–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[OE Docket No. PP- 481–2]

Application To Amend Presidential Permit; CHPE LLC

AGENCY: Office of Electricity, Department of Energy.

ACTION: Notice of application.

SUMMARY: CHPE LLC (the Applicant) has filed an application to amend Presidential Permit No. PP–481–1. CHPE LLC is requesting the amendment to clarify the maximum electric transmission capacity of the previously permitted facilities.

DATES: Comments, protests, or motions to intervene must be submitted on or before December 22, 2021.

ADDRESSES: Comments or motions to intervene should be addressed to Christopher Lawrence, *Christopher.Lawrence@hq.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Christopher Lawrence (Program Office) at (202) 586–5260 or by email to *Christopher.Lawrence@hq.doe.gov,* or Christopher Drake (Attorney-Adviser) at (202) 586–2919 or by email to *Christopher.Drake@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: The construction, operation, maintenance, and connection of facilities at the international border of the United States for the transmission of electric energy between the United States and a foreign country is prohibited in the absence of a Presidential permit issued pursuant to Executive Order (E.O.) 10485, as amended by E.O. 12038.

On November 24, 2021, CHPE LLC filed an application with the Office of Electricity of the Department of Energy (DOE), as required by regulations at 10 CFR 205.320 *et seq.,* requesting that DOE amend Presidential Permit No. PP–481–1 to clarify the maximum electric transmission capacity of the previously permitted facilities.

On October 6, 2014, DOE issued Presidential Permit No. PP–362, authorizing Champlain Hudson Power Express, Inc. (CHPEI) to construct, operate, maintain, and connect the Champlain Hudson Power Express Project (Project). As described in PP–362, the Project is a 1,000-megawatt (MW), high-voltage direct current (HVDC), underground and underwater merchant transmission system that will cross the United States-Canada international border underwater near the Town of Champlain, New York, extend approximately 336 miles south through New York State, and interconnect to facilities located in Queens County, New York, owned by the Consolidated Edison Company of New York. The aquatic segments of the transmission line will primarily be buried in sediments of Lake Champlain and the Hudson, Harlem, and East rivers. The terrestrial portions of the transmission line will primarily be buried within existing road and railroad rights-of-way (ROW). On July 21, 2020, DOE issued Presidential Permit PP–481 transferring the facilities authorized in PP–362 to CHPE LLC at the request of CHPEI and CHPE LLC.

On April 30, 2021, DOE issued Presidential Permit No. PP–481–1, amending CHPE LLC's permit to incorporate proposed revisions to the Project route and authorizing the increase in the Project's capacity from 1,000 MW to 1,250 MW.

In its Supplemental Request for authorization to increase the Project's capacity from 1,000 MW to 1,250 MW in PP–481–1, CHPE LLC noted that it had ''submitted an application request (NYISO Queue Position #887) for an additional 250 MW injection at the Point of Interconnection at the New York Power Authority's Astoria Annex 345 kV substation.'' The New York Independent System Operator (NYISO) evaluated the request via an ''Interconnection System Reliability Impact Study for the NYISO Q887: CH Uprate Project'' (Interconnection Study) and provided the Interconnection Study to DOE. To gauge the reliability impact of the additional 250 MW injection at the Astoria Annex Substation, the Interconnection Study modeled 1,298 MW of Project withdrawal at the Hertel Substation in Canada to account for expected transmission line losses. In other words, an assumption in the Interconnection Study was that the transmission rate at the U.S.-Canada border would have to be 1,298 MW for 1,250 MW to be injected at the Astoria Annex Substation more than 300 miles away.

Article 3 of PP–481–1 states, in part, that the ''maximum non-simultaneous rate of transmission over the permitted facilities shall not exceed 1,250 MW.'' On its face, this language limits the Project's authorized capacity such that the Project cannot transmit at a rate greater than 1,250 MW anywhere between the border crossing and the Astoria Annex Substation, and therefore is prohibited from withdrawing approximately 1,298 MW at the Hertel Substation in order to inject 1,250 MW at the Astoria Annex Substation. CHPE LLC requests that DOE amend the Presidential Permit to explicitly state that the Project is authorized to inject 1,250 MW at the point of interconnection at the Astoria Annex Substation. This amendment would account for anticipated line losses and is consistent with the reliability analysis conducted by NYISO. The requested capacity increase to allow 1,250 MW injection at the Astoria Annex Substation is the only requested amendment; no other changes to the permitted facilities as described or analyzed in PP–481–1 are contemplated.

Comments and other filings concerning this application should be clearly marked with OE Docket No. PP–481–2. Consideration of comments is limited to those addressing the subject of the proposed amendment; comments on any part of PP–481–1 will not be considered. Additional copies are to be provided directly to Mr. Donald Jessome, Chief Executive Officer, Transmission Developers Inc., Pieter Schuyler Building, 600 Broadway, Albany, New York 12207–2283, *donald.jessome@transmissiondevelopers.com,* and Jay Ryan, Baker Botts LLP, 700 K Street NW, Washington, DC 20001, *jay.ryan@bakerbotts.com.*

Before a Presidential permit may be issued or amended, DOE must determine that the proposed action is in the public interest. In making that determination, DOE will consider the environmental impacts of the proposed action (*i.e.,* granting the Presidential permit or amendment, with any conditions and limitations, or denying the permit), determine the proposed project's impact on electric reliability by ascertaining whether the proposed project would adversely affect the operation of the U.S. electric power supply system under normal and contingency conditions, and weigh any other factors that DOE may also consider relevant to the public interest. DOE also must obtain the favorable recommendation of the Secretary of

State and the Secretary of Defense before taking final action on a Presidential permit application.

This application may be reviewed or downloaded electronically at *https://www.energy.gov/oe/pending-applications.*

Signed in Washington, DC, on December 2, 2021.

Christopher Lawrence,

Management and Program Analyst, Electricity Delivery Division, Office of Electricity.

[FR Doc. 2021–26475 Filed 12–6–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

U.S. Energy Information Administration

Agency Information Collection Proposed Extension

AGENCY: U.S. Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Notice and request for comments.

SUMMARY: EIA invites public comment on the proposed three-year extension, without change, to the *Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery,* pursuant to the Paperwork Reduction Act of 1995. This generic clearance enables EIA to collect customer and stakeholder feedback from the public on service delivery in an efficient and timely manner to ensure that EIA's programs effectively meet our customers' needs and to collect feedback on improving service delivery to the public.

DATES: EIA must receive all comments on this proposed information collection no later than February 7, 2022. If you anticipate any difficulties in submitting your comments by the deadline, contact the person listed in the **ADDRESSES** section of this notice as soon as possible.

ADDRESSES: Submit comments electronically to Gerson Morales by email at *Gerson.Morales@eia.gov.*

FOR FURTHER INFORMATION CONTACT: Gerson Morales, U.S. Energy Information Administration, telephone (202) 586–7077, or by email at *Gerson.Morales@eia.gov.*

SUPPLEMENTARY INFORMATION: This information collection request contains:

(1) *OMB No.:* 1905–0210;

(2) *Information Collection Request Title:* Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery;

(3) *Type of Request:* Three-year extension without change;

(4) *Purpose:* This information collection activity provides a means to collect qualitative customer and stakeholder feedback in an efficient timely manner, in accordance with the Administration's commitment to improving service delivery. Qualitative feedback means data that provide useful insights on perceptions and opinions but are not statistical surveys that yield quantitative results that can be generalized to the population of the study. This feedback provides insights into customer or stakeholder perceptions, experiences, and expectations. It also provides an early warning of issues with service, or focuses attention on areas where communication, training or changes in operations might improve the accuracy of data report on survey instruments or the delivery of products or services. These collections allow for ongoing, collaborative, and actionable communications between the agency and its customers and stakeholders. It also allows feedback to contribute directly to the improvement of program management. EIA will only submit a collection for approval under this generic clearance if it meets the following conditions:

- Information gathered will be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency;
- Information gathered will not be used for the purpose of substantially informing influential policy decisions;
- Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study;
- The collections are voluntary;
- The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;
- The collections are non-controversial and do not raise issues of concern to other Federal agencies;
- Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future; and
- With the exception of information needed to provide remuneration for participants of focus groups and cognitive laboratory studies, personally identifiable information (PII) is collected only to the extent necessary and is not retained.

If these conditions are not met, EIA will submit an information collection request to OMB for approval through the normal PRA process. The solicitation of feedback on Agency Service Delivery includes topics such as: Timeliness of publishing, understanding of questions and terminology used in EIA products, perceptions on data confidentiality and security, appropriateness and relevancy of information published, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses are assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. Advances in technology and service delivery systems in the private sector, have increased the public's expectations of the Government's customer service promise. The Federal Government has a responsibility to streamline and make more efficient its service delivery to better serve the public.

(5) *Annual Estimated Number of Respondents:* 80,600;

(6) *Annual Estimated Number of Total Responses:* 80,600;

(7) *Annual Estimated Number of Burden Hours:* 8,600;

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $702,190 (8,600 annual burden hours multiplied by $81.65 per hour). EIA estimates that respondents will have no additional costs associated with the surveys other than the burden hours and the maintenance of the information during the normal course of business.

Comments are invited on whether or not: (a) The proposed collection of information is necessary for the proper performance of agency functions, including whether the information will have a practical utility; (b) EIA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used, is accurate; (c) EIA can improve the quality, utility, and clarity of the information it will collect; and (d) EIA can minimize the burden of the collection of information on respondents, such as automated collection techniques or other forms of information technology.

Statutory Authority: Executive Order 12,862 (1993) and Executive Order 13,571 (2011).

Signed in Washington, DC, on December 2, 2021.

Samson A. Adeshiyan,

Director, Office of Statistical Methods and Research, U.S. Energy Information Administration.

[FR Doc. 2021–26476 Filed 12–6–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER22–497–000]

NG Renewables Energy Marketing, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of NG Renewables Energy Marketing, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 21, 2021.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically 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.

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://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. 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.

Dated: December 1, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–26491 Filed 12–6–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP22–20–000]

Southern Star Central Gas Pipeline, Inc.; Notice of Request Under Blanket Authorization and Establishing Intervention and Protest Deadline

Take notice that on November 23, 2021, Southern Star Central Gas Pipeline, Inc. (Southern Star), 4700 State Route 56, Owensboro, Kentucky 42301, filed in the above referenced docket, a prior notice request to increase the maximum allowable operating pressure (MAOP) on Southern Star's Lines TGB–001, TGB–002, TGB–003, TGB–004, TGB–005, TGB–006 and TGB–008 in Harper, Kingman, Sedgwick, and Sumner Counties, Kansas (collectively, Line TGB), all as more fully set forth in the application which is on file with the Commission and open to public inspection.

The current MAOP of Line TGB is 400 pounds per square inch gauge psig. Southern Star request to increase the MAOP of Line TGB from 400 psig to 490 psig, in order to be able to provide adequate pressure for the running of inline inspection tools. The current pressure test, materials and equipment support the MAOP of 490 psig; therefore, no work is required for this MAOP increase.

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 FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions regarding this prior notice request should be directed to Cindy Thompson, Manager, Regulatory and Compliance, Southern Star Central Gas Pipeline, Inc., 4700 State Route 56, Owensboro, Kentucky 42301, by phone at (270) 852–4655, or by email to *cindy.thompson@southernstar.com.*

Public Participation

There are three ways to become involved in the Commission's review of this project: You can file a protest to the project, you can file a motion to intervene in the proceeding, and you can file comments on the project. There is no fee or cost for filing protests, motions to intervene, or comments. The deadline for filing protests, motions to intervene, and comments is 5:00 p.m. Eastern Time on January 31, 2022. How to file protests, motions to intervene, and comments is explained below.

Protests

Pursuant to section 157.205 of the Commission's regulations under the NGA,[1] any person [2] or the Commission's staff may file a protest to the request. If no protest is filed within the time allowed or if a protest is filed and then withdrawn within 30 days after the allowed time for filing a protest, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request for

[1] 18 CFR 157.205.

[2] Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

authorization will be considered by the Commission.

Protests must comply with the requirements specified in section 157.205(e) of the Commission's regulations,[3] and must be submitted by the protest deadline, which is January 31, 2022. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

Interventions

Any person 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 January 31, 2022. 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.*

All timely, unopposed motions to intervene are automatically granted by operation of Rule 214(c)(1). 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. 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.

Comments

Any person wishing to comment on the project may do so. The Commission considers all comments received about the project in determining the appropriate action to be taken. To ensure that your comments are timely and properly recorded, please submit your comments on or before January 31, 2022. 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.

How To File Protests, Interventions, and Comments

There are two ways to submit protests, motions to intervene, and comments. In both instances, please reference the Project docket number CP22–20–000 in your submission.

(1) You may file your protest, motion to intervene, and comments 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 ''Protest'', ''Intervention'', or ''Comment on a Filing''; or [6]

(2) You can file a paper copy of your submission by mailing it to the address below.[7] Your submission must reference the Project docket number CP22–20–000.

Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426

The Commission encourages electronic filing of submissions (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Protests and motions to intervene must be served on the applicant either by mail at: 4700 State Route 56, Owensboro, Kentucky 42301, by phone at (270) 852–4655, or by email (with a link to the document) at: *cindy.thompson@southernstar.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.

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.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.*

Dated: December 1, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–26492 Filed 12–6–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER22–415–000]

Arlington Energy Center III, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Arlington Energy Center III, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and

[3] 18 CFR 157.205(e).

[4] 18 CFR 385.214.

[5] 18 CFR 157.10.

[6] Additionally, 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.

[7] Hand-delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

assumptions of liability, is December 21, 2021.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically 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.

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://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. 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.

Dated: December 1, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–26493 Filed 12–6–21; 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 rate filings:

Docket Numbers: ER19–1200–002; ER19–842–002; ER10–2346–011; ER10–2353–011; ER11–4351–012; ER21–1947–001.

Applicants: NedPower Mount Storm LLC, Pinnacle Wind, LLC, Lookout WindPower LLC, Forward WindPower LLC, Energy Center Paxton LLC, Clearway Power Marketing LLC.

Description: Supplement to May 19, 2021 Notice of Change in Status of Clearway Power Marketing LLC, *et al.*

Filed Date: 7/12/21.

Accession Number: 20210712–5182.

Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER21–1295–001.

Applicants: ISO New England Inc., Eversource Energy Service Company (as agent).

Description: Compliance filing: ISO New England Inc. submits tariff filing per 35: Eversource; ER21–1295 Amended Order 864 Comp. Filing Supplementing Comp. Filings to be effective 1/1/2020.

Filed Date: 12/1/21.

Accession Number: 20211201–5071.

Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER21–2183–002.

Applicants: Southwest Power Pool, Inc.

Description: Compliance filing: Substitute 3825 Prairie Hills Wind GIA to be effective 6/14/2021.

Filed Date: 12/1/21.

Accession Number: 20211201–5128.

Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER22–191–000.

Applicants: Tidal Energy Marketing (U.S.) L.L.C.

Description: Supplement to October 22, 2021 Tidal Energy Marketing (U.S.) L.L.C. tariff filing.

Filed Date: 11/5/21.

Accession Number: 20211105–5145.

Comment Date: 5 p.m. ET 12/10/21.

Docket Numbers: ER22–502–000.

Applicants: New England Power Pool Participants Committee.

Description: § 205(d) Rate Filing: November 2021 Membership Filing to be effective 11/1/2021.

Filed Date: 11/30/21.

Accession Number: 20211130–5258.

Comment Date: 5 p.m. ET 12/21/21.

Docket Numbers: ER22–503–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 1534R14 Kansas Municipal Energy Agency NITSA and Sunflower NITSA Cancellation to be effective 11/1/2021.

Filed Date: 12/1/21.

Accession Number: 20211201–5017.

Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER22–505–000.

Applicants: Consolidated Edison Company of New York, Inc.

Description: § 205(d) Rate Filing: DG Wheeling PASNY Tariff 12–1–201 to be effective 12/1/2021.

Filed Date: 12/1/21.

Accession Number: 20211201–5127.

Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER22–506–000.

Applicants: PPL Electric Utilities Corporation, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: PPL Electric Utilities Corporation submits tariff filing per 35.13(a)(2)(iii: PPL Electric submits SA No. 6255, ECSA for MAIT Alburtis Substation Project to be effective 12/2/2021.

Filed Date: 12/1/21.

Accession Number: 20211201–5133.

Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER22–507–000.

Applicants: Pinnacle Wind, LLC.

Description: Baseline eTariff Filing: Filing of Reactive Power Rate Schedule to be effective 1/1/2022.

Filed Date: 12/1/21.

Accession Number: 20211201–5134.

Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER22–508–000.

Applicants: Indra Power Business IL LLC.

Description: Baseline eTariff Filing: Tariffs and Agreements to be effective 2/1/2022.

Filed Date: 12/1/21.

Accession Number: 20211201–5136.

Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER22–509–000.

Applicants: Northern States Power Company, a Minnesota corporation.

Description: § 205(d) Rate Filing: 2021–12–01 NSP–OTP–CIAC-Fiber-695–0.0.0 to be effective 12/2/2021.

Filed Date: 12/1/21.

Accession Number: 20211201–5137.

Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER22–510–000.

Applicants: PJM Interconnection, L.L.C., Wabash Valley Power Association, Inc.

Description: § 205(d) Rate Filing: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Original Service Agreement No. 6258 re: NITSA among PJM and Wabash Valley to be effective 11/1/2021.

Filed Date: 12/1/21.

Accession Number: 20211201–5142.

Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER22–511–000.

Applicants: Morongo Transmission LLC.

Description: § 205(d) Rate Filing: Annual Operating Cost Update Filing to be effective 1/1/2022.

Filed Date: 12/1/21.

Accession Number: 20211201–5154.

Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER22–512–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 3215R11 People's Electric Cooperative NITSA NOAs to be effective 11/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5187.
Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER22–513–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 3396R2 Otter Tail Power Company NITSA and NOA to be effective 11/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5195.
Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER22–514–000.
Applicants: Arizona Public Service Company.
Description: § 205(d) Rate Filing: Rate Schedule No. 217 Exhibit B Revisions to be effective 1/31/2022.
Filed Date: 12/1/21.
Accession Number: 20211201–5208.
Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER22–515–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 3397R1 Otter Tail Power Company NITSA and NOA to be effective 11/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5209.
Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER22–516–000.
Applicants: Arizona Public Service Company.
Description: § 205(d) Rate Filing: Service Agreement No. 396 to be effective 11/29/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5219.
Comment Date: 5 p.m. ET 12/22/21.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 1, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–26489 Filed 12–6–21; 8:45 am]

BILLING CODE 6717–01–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:

Filings Instituting Proceedings

Docket Numbers: PR22–8–000.
Applicants: Louisville Gas and Electric Company.
Description: Submits tariff filing per 284.123(b),(e)/: Revised Statement of Operating Conditions Rate Change to be effective 11/1/2021.
Filed Date: 11/29/2021.
Accession Number: 20211129–5209.
Comments/Protests Due: 5 p.m. ET 12/20/21.

Docket Numbers: PR22–9–000.
Applicants: Valley Crossing Pipeline, LLC.
Description: Submits tariff filing per 284.123(b),(e)/: Valley Crossing PAL Filing to be effective 12/1/2021.
Filed Date: 11/29/2021.
Accession Number: 20211129–5214.
Comments/Protests Due: 5 p.m. ET 12/20/21.

Docket Numbers: RP22–358–000.
Applicants: Rockies Express Pipeline LLC.
Description: § 4(d) Rate Filing: REX 2021–11–30 Non-Conforming Negotiated Rate Amendment to be effective 12/1/2021.
Filed Date: 11/30/21.
Accession Number: 20211130–5089.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–359–000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Leidy South—Interim Svc 3—Seneca Resources to be effective 12/1/2021.
Filed Date: 11/30/21.
Accession Number: 20211130–5108.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–360–000.
Applicants: Northern Natural Gas Company.
Description: § 4(d) Rate Filing: 20211130 Negotiated Rate to be effective 12/1/2021.
Filed Date: 11/30/21.
Accession Number: 20211130–5111.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–361–000.
Applicants: Colorado Interstate Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rate Agreements Update Filing (CSU Dec 21) to be effective 12/1/2021.
Filed Date: 11/30/21.
Accession Number: 20211130–5144.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–362–000.
Applicants: Natural Gas Pipeline Company of America LLC.
Description: § 4(d) Rate Filing: Update Filing—Removal of Expired Negotiated Rate Agreements—November 2021 to be effective 12/30/2021.
Filed Date: 11/30/21.
Accession Number: 20211130–5150.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–363–000.
Applicants: Tennessee Gas Pipeline Company, L.L.C.
Description: Compliance filing: Cashout Report 2020–2021 to be effective N/A.
Filed Date: 11/30/21.
Accession Number: 20211130–5151.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–364–000.
Applicants: Kinder Morgan Louisiana Pipeline LLC.
Description: § 4(d) Rate Filing: Fuel Adjustment to be effective 1/1/2022.
Filed Date: 11/30/21.
Accession Number: 20211130–5155.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–365–000.
Applicants: Young Gas Storage Company, Ltd.
Description: § 4(d) Rate Filing: Annual Fuel and Lost and Unaccounted For Filing to be effective 1/1/2022.
Filed Date: 11/30/21.
Accession Number: 20211130–5248.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–366–000.
Applicants: Equitrans, L.P.
Description: § 4(d) Rate Filing: Negotiated Rate Agreement Amendment Effective 12/1/2021 to be effective 12/1/2021.
Filed Date: 11/30/21.
Accession Number: 20211130–5279.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–367–000.
Applicants: Texas Eastern Transmission, LP.
Description: § 4(d) Rate Filing: Negotiated Rates—Various Releases eff 12–1–2021 to be effective 12/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5004.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–368–000.
Applicants: Maritimes & Northeast Pipeline, L.L.C.

Description: § 4(d) Rate Filing: Negotiated Rate—Northern Utilities 210363 Release eff 12–1–2021 to be effective 12/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5005.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–369–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Various Releases eff 12–1–2021 to be effective 12/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5007.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–370–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Cap Rel Neg Rate Agmt (Constellation re-release to Exelon eff 12–1–2021) to be effective 12/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5010.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–371–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Cap Rel Neg Rate Agmt (Marathon releases to Spire eff 12–1–2021) to be effective 12/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5011.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–372–000.
Applicants: NEXUS Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Various Releases eff 12–1–2021 to be effective 12/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5012.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–373–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Amendment to Neg Rate Agmt (Aethon 53154) to be effective 12/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5014.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–374–000.
Applicants: Chandeleur Pipe Line, LLC.
Description: Annual Fuel Adjustment Filing of Chandeleur Pipe Line, LLC.
Filed Date: 12/1/21.
Accession Number: 20211201–5047.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–375–000.
Applicants: Equitrans, L.P.
Description: § 4(d) Rate Filing: Negotiated Rate Capacity Release Agreements—12/1/2021 to be effective 12/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5052.
Comment Date: 5 p.m. ET 12/13/21.

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.

Filings in Existing Proceedings

Docket Numbers: RP22–376–000.
Applicants: Alliance Pipeline L.P.
Description: § 4(d) Rate Filing: Hess 2022 Tioga Usage Charge Filing to be effective 1/1/2022.
Filed Date: 12/1/21.
Accession Number: 20211201–5069.
Comment Date: 5 p.m. ET 12/13/21.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

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: December 1, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–26485 Filed 12–6–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL22–10–000]

Basin Electric Power Cooperative; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On December 1, 2021, the Commission issued an order in Docket No. EL22–10–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation into whether Basin Electric Power Cooperative's 2022 Rate Schedule A is unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. *Basin Electric Power Cooperative,* 177 FERC ¶ 61,156 (2021).

The refund effective date in Docket No. EL22–10–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL22–10–000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2020), within 21 days of the date of issuance of the order.

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://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. 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 FERC 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 ''eFile'' link at *http://www.ferc.gov.* 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.

Dated: December 1, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–26487 Filed 12–6–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ID–9340–000]

Seavers, Dean L.; Notice of Filing

Take notice that on November 30, 2021, Dean L. Seavers submitted for filing, application for authority to hold interlocking positions, pursuant to section 305(b) of the Federal Power Act, 16 U.S.C. 825d (b) and part 45.8 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR part 45.8.

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. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than 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://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. 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 December 21, 2021.

Dated: December 1, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–26490 Filed 12–6–21; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OGC–2021–0850; FRL–9324–01–OGC]

Proposed Consent Decree, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed consent decree; request for public comment.

SUMMARY: In accordance with the Clean Air Act, as amended (CAA or the Act), notice is given of a proposed consent decree in *Texas Environmental Justice Advocacy Services, et al.* v. *Regan,* No. 1:20–cv–03733–RJL. On December 18, 2020, Plaintiffs Texas Environmental Justice Advocacy Services, California Communities Against Toxics, Environmental Integrity Project, Louisiana Environmental Action Network, Ohio Valley Environmental Council, RISE St. James, and Sierra Club (collectively ''Plaintiffs'') filed a complaint in the United States District Court for the District of Columbia. Plaintiffs alleged that the Environmental Protection Agency (EPA or the Agency) failed to perform certain non-discretionary duties in accordance with the Act to ''review and, if appropriate, revise'' the New Source Performance Standards (''NSPS'') or to promulgate a determination that revision ''is not appropriate in light of readily available information on the efficacy of such standard[s]'' for four categories of synthetic organic chemical manufacturing industry (''SOCMI'') stationary sources, and to ''review, and revise as necessary'' the National Emission Standards for Hazardous Air Pollutants (''NESHAP'') for SOCMI source categories regulated under the Hazardous Organic NESHAP Rule (''HON'') at least every 8 years. The proposed consent decree would establish deadlines for EPA to take actions.

DATES: Written comments on the proposed consent decree must be received by *January 6, 2022.*

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OGC–2021–0850, online at *https://www.regulations.gov* (EPA's preferred method). Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID number for this action. Comments received may 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 ''Additional Information about Commenting on the Proposed Consent Decree'' heading under the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov,* as there may be a delay in processing mail and faxes. Hand-deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our federal partners so that we can respond rapidly as conditions change regarding COVID–19.

FOR FURTHER INFORMATION CONTACT: Michael Thrift, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone (202) 564–8852; email address *thrift.mike@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining a Copy of the Proposed Consent Decree

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2021–0850) contains a copy of the proposed consent decree.

The electronic version of the public docket for this action contains a copy of the proposed consent decree, and is available through *https://www.regulations.gov.* You may use *https://www.regulations.gov* to submit or view public comments, access the

index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search.''

II. Additional Information About the Proposed Consent Decree

The proposed consent decree would establish deadlines for EPA to take proposed and final actions pursuant to CAA sections 111(b)(1) and 112(d)(6) for the NSPS for SOCMI under 40 CFR part 60, subparts III, NNN, RRR, and VVa and for the SOCMI source categories regulated under the HON Rule, 40 CFR part 63, subparts F, G, H, and I. The consent decree would require by December 16, 2022, that EPA review the NSPS under section 111(b)(1)(B) and sign either: (A) A proposed rule containing revisions to the NSPS; or (B) a proposed determination not to revise the NSPS, and then that EPA take final action by March 29, 2024. In addition, it would require by December 16, 2022, that EPA sign for publication a proposed rule containing all ''necessary'' revisions (taking into account developments in practices, processes, and control technologies) to subparts F, G, H, and I under section 112(d)(6) of the Act, 42 U.S.C. 7412(d)(6), and then that EPA take final action by March 29, 2024.

In accordance with section 113(g) of the CAA, for a period of thirty (30) days following the date of publication of this document, the Agency will accept written comments relating to the proposed consent decree. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act.

III. Additional Information About Commenting on the Proposed Consent Decree

Submit your comments, identified by Docket ID No. EPA–HQ–OGC–2021–0850, via *https://www.regulations.gov*. Once submitted, comments cannot be edited or removed from this docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets*. For additional information about submitting information identified as CBI, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this document. Note that written comments containing CBI and submitted by mail may be delayed and deliveries or couriers will be received by scheduled appointment only.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *https://www.regulations.gov* website to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment.

Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

Gautam Srinivasan,

Associate General Counsel.

[FR Doc. 2021–26434 Filed 12–6–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL—9332–01–OA]

Notification of a Public Meeting of the Science Advisory Board Drinking Water Committee (DWC) Augmented for the Contaminant Candidate List (CCL) 5 Review Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) Science Advisory Board (SAB) Staff Office announces a public meeting of the Science Advisory Board Drinking Water Committee (DWC) Augmented for the Contaminant Candidate List (CCL) 5 Review Panel (DWC CCL 5 Review Panel). The DWC CCL 5 Review Panel will review EPA's Drinking Water Contaminant Candidate List 5 (CCL 5)—Draft and three associated support documents: Technical Support Document for the Draft Fifth Contaminant Candidate List (CCL 5)—Chemical Contaminants; Technical Support Document for the Draft Fifth Contaminant Candidate List (CCL 5)—Microbial Contaminants; and Draft CCL 5 Contaminant Information Sheets Technical Support Document.

DATES: The public meeting will be held on January 11, 2022, from 12:00 p.m.–5:00 p.m., February 16, 2022 from 12:00 p.m.–5:00 p.m., and February 18, 2022, from 12:00 p.m.–5:00 p.m.. All times listed are in Eastern Standard Time.

ADDRESSES: The meeting will be conducted virtually. Please refer to the SAB website at *https://sab.epa.gov* for information on how to attend the meeting.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wants further information concerning this notice may contact Carolyn Kilgore, Designated Federal Officer (DFO), via telephone (202) 564–0230, or email at *kilgore.carolyn@epa.gov.* General information about the SAB, as well as any updates concerning the meetings announced in this notice can be found on the SAB website at *https://sab.epa.gov.*

SUPPLEMENTARY INFORMATION:

Background: The SAB was established pursuant to the Environmental Research, Development, and Demonstration Authorization Act (ERDDAA), codified at 42 U.S.C. 4365, to provide independent scientific and technical advice to the EPA Administrator on the scientific and technical basis for agency positions and

regulations. The SAB is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies. Pursuant to FACA and EPA policy, notice is hereby given that the Science Advisory Board DWC CCL 5 Review Panel will hold a public meeting to review EPA's Drinking Water Contaminant Candidate List 5 (CCL 5)—Draft (86 FR 37948) and three associated support documents: Technical Support Document for the Draft Fifth Contaminant Candidate List (CCL 5)—Chemical Contaminants; Technical Support Document for the Draft Fifth Contaminant Candidate List (CCL 5)—Microbial Contaminants; and Draft CCL 5 Contaminant Information Sheets Technical Support Document. The CCL is one tool EPA uses to identify priority contaminants for future regulatory decision making and research needs and does not impose any requirements on any regulated entity.

The DWC CCL 5 Review Panel will meet on January 11, 2022 to receive a briefing from the EPA, discuss the charge to the SAB, and hear oral public comments. The Panel will meet on February 16, 2022 and February 18, 2022, to review EPA's Drinking Water Contaminant Candidate List 5 (CCL 5)—Draft (86 FR 37948) and associated support documents.

Technical Contact: Any technical questions concerning the EPA documents to be reviewed and chemical contaminants should be directed to Kesha Forrest, Office of Ground Water and Drinking Water, Standards and Risk Management Division, at *forrest.kesha@epa.gov.* Any technical questions concerning the EPA documents to be reviewed and microbial contaminants should be directed to Nicole Tucker, Office of Ground Water and Drinking Water, Standards and Risk Management Division, at *tucker.nicole@epa.gov.*

Availability of Meeting Materials: All meeting materials, including the agenda will be available on the SAB web page at *https://sab.epa.gov.*

Procedures for Providing Public Input: Public comment for consideration by EPA's federal advisory committees and panels has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a federal advisory committee is different from the process used to submit comments to an EPA program office. Federal advisory committees and panels, including scientific advisory committees, provide independent advice to the EPA. Members of the public can submit relevant comments pertaining to the committee's charge or meeting materials. Input from the public to the SAB will have the most impact if it provides specific scientific or technical information or analysis for the SAB to consider or if it relates to the clarity or accuracy of the technical information. Members of the public wishing to provide comment should follow the instruction below to submit comments.

Oral Statements: In general, individuals or groups requesting an oral presentation at a public meeting will be limited to three minutes. Each person making an oral statement should consider providing written comments as well as their oral statement so that the points presented orally can be expanded upon in writing. Persons interested in providing oral statements on January 11, 2021, should contact the DFO, in writing (preferably via email) at the contact information noted above by January 4, 2022, to be placed on the list of registered speakers.

Written Statements: Written statements will be accepted throughout the advisory process; however, for timely consideration by SAB members, statements should be submitted to the DFO by January 4, 2022, for consideration at the public meeting on January 11, 2022, February 16, 2022, and February 18, 2022. Written statements should be supplied to the DFO at the contact information above via email. Submitters are requested to provide a signed and unsigned version of each document because the SAB Staff Office does not publish documents with signatures on its websites. Members of the public should be aware that their personal contact information, if included in any written comments, may be posted to the SAB website. Copyrighted material will not be posted without explicit permission of the copyright holder.

Accessibility: For information on access or services for individuals with disabilities, please contact the DFO, at the contact information noted above, preferably at least ten days prior to the meetings, to give the EPA as much time as possible to process your request.

Thomas Brennan,

Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2021–26470 Filed 12–6–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2013–0262; FRL–8912–02—OW]

Re-Issuance of a General Permit to the National Science Foundation for the Ocean Disposal of Man-Made Ice Piers From Its Station at McMurdo Sound in Antarctica

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; final permit.

SUMMARY: Environmental Protection Agency (EPA) is re-issuing a general permit under the Marine Protection, Research, and Sanctuaries Act (MPRSA) authorizing the National Science Foundation (NSF) to dispose of ice piers in ocean waters. The permit conditions are substantively the same as those established in the permit issued on April 22, 2014. Permit re-issuance is necessary because the current permit has expired.

DATES: This general permit is effective January 6, 2022.

ADDRESSES: This final permit is identified as Docket No. EPA–HQ–OW–2013–0262.

The record is closed but available for inspection at *https://www.regulations.gov.* Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Betsy Valente, Physical Scientist, Freshwater and Marine Regulatory Branch, Oceans, Wetlands, and Communities Division (4504T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone (202) 564–9895; email address: *valente.betsy@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has issued three MPRSA permits to NSF for the ocean disposal of man-made ice piers from its station at McMurdo Sound in Antarctica: An emergency permit issued on February 1, 1999; a general permit published in the **Federal Register** on February 14, 2003 (68 FR 7536); and a general permit published in the **Federal Register** on April 22, 2014 (79 FR 22488).

MPRSA section 104(a) provides that permits shall be issued for a period not to exceed seven years, 33 U.S.C. 1414(a). This general permit published in the **Federal Register** on April 22, 2014, has expired, but it remains in effect under the Administrative Procedure Act, 5 U.S.C. 558(c) because NSF filed a timely and sufficient application for renewal prior to expiration. EPA published a notice proposing re-issuance of a general permit on April 28, 2021 (86 FR 22408). Today's action by the EPA finalizes the provisions of the general permit and authorizes NSF to ocean dispose of man-made ice piers from McMurdo Station in Antarctica for a seven-year period. This general permit is re-issued under sections 102(a) and 104(c) of the MPRSA.

NSF is the agency of the United States Government responsible for oversight of the United States Antarctic Program. NSF currently operates three major stations in Antarctica: McMurdo Station on Ross Island, adjacent to McMurdo Sound; Palmer Station, near the western terminus of the Antarctic Peninsula; and Amundsen-Scott South Pole Station, at the geographic South Pole. McMurdo Station is the largest of the three stations and serves as the primary logistics site for operations at McMurdo and South Pole Stations, with the great majority of supplies arriving here via vessel. To unload supplies, ships dock at a man-made ice pier.

The service life of past man-made ice piers has ranged from one to ten years. NSF constructed the current ice pier in 2021. Prior to the current pier, the three most recently constructed ice piers averaged two years of use before disposal in ocean waters. The permit allows NSF to ocean dispose of ice piers at the end of their service life, including the pier currently in use and any additional ice piers constructed at McMurdo Station. Eight is the maximum number of man-made ice piers estimated for ocean disposal during the seven-year effective period of the permit; however, NSF anticipates that four or fewer piers will need to be ocean disposed during this period.

When an ice pier is at the end of its effective life, all structures, operational equipment and materials, debris, and any objects of anthropogenic origin are removed from the surface of the pier to the safest extent possible. The pier then is cast loose from its moorings at the base and is either allowed to drift with the wind and current or towed to McMurdo Sound for ocean disposal, where it would float freely within the ice pack, mix with the annual sea ice, and eventually disintegrate naturally with any remaining internal pipes or cables eventually dropping out and falling to the seafloor. This general permit is necessary because ice piers must be released from shore and transported to sea for disposal at the end of their effective life. While it is preferable to tow these ice piers out to sea for disposal before releasing them to ensure they do not lodge on shore near McMurdo Station, which this general permit authorizes, this is not often possible due to the lack of availability of an appropriate towing vessel. Thus, many past ice piers have been merely released directly from shore and been allowed to float freely with the wind and current. This general permit is intended to protect the marine environment by setting forth specific permit terms and conditions, including operating conditions that occur over the life of the pier and required clean-up actions prior to disposal, with which NSF would need to comply in advance of any ice pier disposal. The majority of permit terms involve activities that occur in advance of any anticipated disposal of the ice pier, regardless of the method of release to ocean waters.

A. Background on McMurdo Station Ice Pier

NSF constructs ice piers during the austral winter, beginning when the frozen pack ice in McMurdo Sound reaches a thickness of approximately three feet. First, a berm of snow is created on the ice pack to define the perimeter of what will become the ice pier. Heavy-duty pumps are used to flood the bermed area with approximately four inches of seawater. The water freezes in about 24 to 48 hours. The process is repeated, each time creating another four-inch layer until the ice reaches a total thickness of approximately five to seven feet. At this stage, holes are drilled in the ice and sections of eight-inch diameter steel pipe are inserted vertically into the holes. One-inch steel cable is woven around the steel pipes; this cable is used to keep the pier ''strung together'' should cracks occur, rather than to provide structural strength. The entire aforementioned process is repeated; approximately five to seven feet of ice is added on the first layer, a second layer of cable is added, and approximately five to seven feet of ice is added on top of that. The final target thickness of the pier is a maximum of 20 feet. Throughout construction, at intervals dictated by environmental conditions, cuts are made around the edge of the pier to separate it from the surrounding ice. This can be done using trenching equipment or a drill.

Several steel pipe sections are frozen around the proximal edge of the pier to attach the pier to the mainland via cables and to serve as bollards to moor vessels. Following completion of the ice portion of the pier, a six- to eight-inch layer of one-inch locally-sourced gravel is applied to the surface of the pier to insulate the structure during the warmest part of the year and to provide a non-slip working surface. A tracking device is also placed on the ice pier during this process. At the end of each austral summer season, the gravel is removed and stored for use the following season.

A typical ice pier measures 550 feet (168 meters) long, 250 feet (76 meters) wide, and 20 feet (6 meters) in thickness. Ice piers are generally constructed using (1) 13,000 feet (3,962 meters) of one-inch steel cable; (2) 150 feet (46 meters) of eight-inch steel pipe; (3) 150 feet of 12-inch steel pipe; and (4) 4,000 cubic yards of one-inch or smaller gravel.

On occasion, cracks develop in the ice pier and must be repaired to ensure that the pier is safe for use. One repair method uses additional steel pipe and cable to ''suture'' the surface of the pier. A second method uses passive thermosyphons (a device that transfers heat via natural convection in a fluid, known programmatically as a ''freeze cell'') to repair cracks in the ice pier. In 1998, thermosyphons filled with food grade glycol were used on an experimental basis to stimulate ice growth to repair cracks in the ice pier. The cells stimulated adequate ice growth and were removed with no impact to the environment. Because the technique has proven to be successful, thermosyphons may be used when cracks develop that require additional ice growth to effect repair. Thermosyphons are constructed of approximately 40-foot lengths of 3.5-inch diameter steel pipe filled with glycol and are placed into holes drilled into an ice pier. Approximately half of the pipe's length is embedded in the ice while the remaining half is exposed above the surface. Thermosyphons are fully removed once the repairs are completed.

Spills of materials such as food grade glycol, hydraulic fluid, oil, and diesel fuel may occur on an ice pier. All spills are thoroughly reported, documented and cleaned up to the extent practicable; however, some spilled material may penetrate the ice and full recovery would damage the pier to the point that it may become unusable. Locations of spills on the ice pier are marked and mapped. Before a pier is transported and disposed at sea, NSF recovers any

residual spilled material to the extent possible. Since 2011 there have been 16 small spills, eight of which related to the use of thermosyphons. NSF has since reviewed and revised its procedures for the installation and removal of thermosyphons to minimize the possibility of further spills associated with this activity.

The other eight spills on an ice pier were primarily the result of mechanical equipment failures due to the extreme environmental conditions (*e.g.,* failed hydraulic line). Spill amounts since 2011 ranged from 0.25 to 9 gallons.

The effective lifespan of previous man-made ice piers has ranged from one to ten years and was highly dependent on regional environmental conditions in the years following construction. Wave action or contact with vessels may cause erosion of the seaward face of an ice pier. Local meltwater drainage may erode parts of the mainland side of an ice pier. Periods of unseasonably warm weather can also decrease the lifespan of an ice pier. Factors such as stress cracking and erosion can cause an ice pier to deteriorate and become unsafe for use. In the period between the late 1970s through 2009, ocean current and wave action reaching McMurdo Sound were lower compared to current conditions due to more stable ice cover caused by the grounding of the world's largest iceberg in the early 2000s. Since that time, conditions, temperatures, and storminess have been more variable.

When an ice pier has deteriorated to the point that it is not capable of being used the following year, it is prepared for disposal. Prior to the disposal of an ice pier, all structures, operational equipment and materials, debris, and any objects of anthropogenic origin are removed from the surface of the pier to the safest extent possible. Additionally, all steel pipes are cut at the ice surface and removed from the pier leaving only the portion embedded in the ice. Removal of steel pipes embedded in the ice is not technically feasible and likely impossible. The gravel cover is removed to the maximum extent possible and transported to the mainland for subsequent use or storage. Like steel pipes, removal of gravel embedded in the ice is not technically feasible. Due to the extreme Antarctic environment, and at times unpredictable weather, the safety of personnel will always be considered a higher priority than achieving maximum material removal.

Before a new ice pier can be constructed during the austral winter (March through September), the existing ice pier in the same location must first be ocean disposed. Ocean disposal of an ice pier typically occurs following the annual delivery of fuel and supplies to McMurdo Station at the end of the austral summer (approximately late February–March) when there are 18 to 24 hours of daylight per day.

If possible, an ice pier may be towed from its location by vessel (*e.g.,* by a United States Coast Guard icebreaker) for ocean disposal in McMurdo Sound. The chartered icebreaker is typically at McMurdo Station for very limited periods (*i.e.,* no more than one month), and it has been rare for an icebreaker to be at the station when an ice pier needs to be transported for ocean disposal. The last time an ice pier was towed from McMurdo Station was 1990. An ice pier is more likely to be freely released from its site of attachment at the shore in Winter Quarters Bay when winds and tide conditions are favorable to move the pier north out of McMurdo Sound. The pier is then carried north by winds and tide to the Ross Sea gyre and may enter the Antarctic Circumpolar Current which flows from west to east and carries the ice pier away from the seasonal sea ice and along the coast of Antarctica. This path has been well documented from the tracking device reporting, as initially required under the 2003 general permit and since. The tracking and reporting requirement is retained in this permit. Occasionally, a large storm has broken an ice pier loose and caused the unexpected release of a pier; in such cases, the piers either moved along the same current paths or became frozen in McMurdo Sound. Regardless of method of release, the disposal site is McMurdo Sound, where the pier then floats freely within the ice pack, mix with the annual sea ice, and eventually disintegrate due to wind or waves.

The materials dumped under this general permit (other than ice, which melts naturally) include the remaining materials used in the construction of the ice pier that cannot be removed prior to disposal, and generally consist of: (1) 13,000 Feet of one-inch steel cable; (2) 150 feet of eight-inch steel pipe; and (3) 150 feet of 12-inch steel pipe, all of which remain embedded in the ice because removal is technically infeasible. Although the general permit generally requires NSF to remove above-surface materials on the piers and to place a tracking device on the pier prior to release, this is not always possible due to safety concerns when conditions deteriorate rapidly; the permit recognizes the need for disposal in emergency circumstances. Over the past decade, the placement of materials on the ice pier has been significantly reduced, decreasing the potential for materials to enter the ocean if an unplanned release of the pier occurs. The tracking devices are now secured on the pier and turned on before the arrival of the ice breaker in case there is an event which causes the pier to be inadvertently released. When offload operations are complete and the pier is securely frozen in place for the winter, the tracking device is turned off and removed from the pier for use in the following year.

B. Statutory and Regulatory Background

1. Marine Protection, Research, and Sanctuaries (MPRSA)

Section 102(a) of the MPRSA, 33 U.S.C. 1412(a) requires that agencies or instrumentalities of the United States obtain a permit to transport any material from any location for the purpose of dumping into ocean waters. NSF is an agency or instrumentality of the United States. MPRSA section 104(c), 33 U.S.C. 1414(c), and EPA regulations at 40 CFR 220.3(a) authorize the issuance of a general permit under the MPRSA for the dumping of materials which have a minimal adverse environmental impact and are generally disposed of in small quantities. The transportation of ice piers from McMurdo Station for disposal at sea constitutes transportation of material for the purpose of dumping in ocean waters, and thus is subject to the MPRSA. EPA has determined that ocean disposal of the material associated with the ice piers is likely to cause only a minimal adverse environmental effect and represents comparatively small quantities of unrecoverable non-ice materials. In the United States, the MPRSA implements the requirements of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972, known as the London Convention.

2. Obligations Under International Law

The Antarctic Science, Tourism, and Conservation Act of 1996 amended the Antarctic Conservation Act of 1978. This law is designed to implement the provisions of the Protocol on Environmental Protection to the Antarctic Treaty (''the Protocol''). The United States Senate ratified the Protocol on April 17, 1997, and it entered into force on January 18, 1998. The Protocol builds on the Antarctic Treaty to extend its effectiveness as a mechanism for ensuring protection of the Antarctic environment. The Protocol designates Antarctica as a natural reserve, devoted to peace and science, and sets forth basic principles and detailed, mandatory rules applicable to

human activities in Antarctica. The Protocol prohibits all activities relating to mineral resources in Antarctica, except for scientific research, and commits signatories to the Protocol (known as Parties) to environmental impact assessment procedures for proposed activities, both governmental and private. Among other things, the Protocol also requires Parties to protect Antarctic flora and fauna and imposes strict limitations on disposal of wastes in Antarctica, and discharges of pollutants into Antarctic waters.

Several sets of regulations implement the legislation that, in turn, implements the Protocol, including: (a) NSF regulations regarding environmental impact assessment of proposed NSF actions in Antarctica (45 CFR part 641); (b) NSF waste regulations for Antarctica (45 CFR part 671); and (c) EPA regulations regarding environmental impact assessment of non-governmental activities in Antarctica (40 CFR part 8).

In this regard, EPA notes that NSF completed a United States Antarctic Program (USAP) Environmental Impact Statement (June 1980), a USAP Final Supplemental Environmental Impact Statement (October 1991), and a Comprehensive Environmental Evaluation for Continuation and Modernization of McMurdo Station Area Activities (August 2019) Additional environmental impact assessments included an Initial Environmental Evaluation (May 1992) and issued two Records of Environmental Review: Installation of Freeze Cells in Ice Piers (1998) and Use of Freeze Cells in Ice piers to Repair Cracks (2000). All these documents address various aspects of the construction, operation, and disposal of ice piers at McMurdo Station in Antarctica. The documents are available for review through the EPA docket for this action and at the Office of Polar Programs of NSF, 2515 Eisenhower Avenue, Alexandria, VA 22314. (For further information from NSF, please contact Polly Penhale, at 703–292–7420.) None of these documents identified any potential environmental impacts from the disposal of ice piers, other than the minor navigational hazard equivalent to that posed by an ice floe or a small iceberg. The Agency considered the analyses contained in these six documents in re-issuance of the general permit for NSF.

C. Potential Effects of Ice Pier Disposal

EPA's decision to authorize NSF's ocean disposal of ice piers under this general permit is based on findings regarding three areas of the ocean disposal of ice piers in ocean waters off the Antarctic: (1) The fate of the materials disposed in the ocean, (2) the potential effects of ice pier disposal on organisms in the polar marine environment, large whales, seals, bird species, and (3) environmental concerns associated with any operational discharges, leaks, or spills that may have contaminated the surface of the pier.

The materials contained in the ice pier that cannot be removed (approximately 13,000 feet of one-inch steel cable, 150 feet of eight-inch steel pipe, and 150 feet of 12-inch steel pipe) will, eventually, sink to the sea floor after the surrounding ice has disintegrated. While the ice is slowly disintegrating into the Antarctic Sea or the Southern Ocean, it is possible that loops of cable from partially disintegrated layers of ice may hang temporarily from the floating pier. However, considering the normal behavior and habits of whales, seals, and sea birds, the disposal if ice piers under this permit are not anticipated to effect any of these species; any effects on species are extremely unlikely to occur.

In 1993 and again in 1994, NSF sampled the ice on the surface of the pier to assess the potential for contamination from discharges of gasoline and antifreeze. Contamination was detected in only one location directly under two 55-gallon fuel drums. In response, NSF issued a directive that all fuel drums shall be underlain with secondary containment methods. Also, as one of the conditions of the 2003 permit, NSF developed and now implements a spill prevention, control, and countermeasure (SPCC) plan for its station at McMurdo Sound under NSF jurisdiction in Antarctica to reduce the potential for adverse effects associated with any such spills. That plan, updated in 2017, is titled: Spill Prevention, Control, and Countermeasure (SPCC) Plan, McMurdo Station, McMurdo Sound, Antarctica. The SPCC plan includes a section addressing fuel storage and transfer systems for the ice pier at McMurdo Station. With the implementation of new protective measures in the updated 2017 plan, such as longer length hoses for unloading petroleum products from the annual supply tanker and new precautions taken in the handling and return to facilities outside Antarctica of used or contaminated chemicals, solvents, and hazardous materials, the risks of any spill or any discharge of these materials is now lower than under the 2012 SPCC plan. There is considerable vehicular traffic on the ice pier during the austral summer season, and the possibility of engine block leaks or discharges from these vehicles cannot be totally avoided. However, NSF has provided EPA reasonable assurance that every effort to mitigate the risk of leakages or discharges is being taken, including limits on the time that vehicles are parked on the pier and that no vehicles are ever parked on the pier overnight.

D. Discussion

Considering the information presented in the previous section, EPA finds that the potential effects of this disposal are minimal and in accordance with the statutory standards applicable to permit issuance under the MPRSA.

This general permit re-issued to NSF and its agents for the ocean disposal of man-made ice piers from the NSF station at McMurdo Sound, Antarctica, is subject to nine specific conditions, outlined below, applicable during the use and disposal of ice piers.

First, the general permit requires that NSF continue to maintain and implement an SPCC plan, consistent with the requirements of 40 CFR 112.3, for man-made ice piers. The SPCC plan (and any update) shall address procedures for loading and unloading the following materials, and shall include methods to minimize the accidental release or discharge of any of the following materials to an ice pier:

(1) Petroleum products unloaded from supply tankers to the storage tanks at McMurdo Station;

(2) Drummed chemicals, petroleum products, and materials unloaded from cargo freighters to supply depots at McMurdo Station; and

(3) Materials loaded to freighters destined to be returned to facilities outside Antarctica.

(4) Material spilled as a result of thermosyphon use or related activities.

Second, the general permit requires that if a spill or discharge occurs on an ice pier, it must be completely cleaned so that no visible evidence remains, unless 100% removal would result in greater environmental risk or put the safety of personnel at risk. All spills or discharges on an ice pier should be cleaned soon as possible.

Third, an official record of the following information shall be kept by NSF:

(1) The date and time of all spills or discharges, the location of the spill or discharge, a description of the material that was spilled or discharged, the approximate volume of the spill or discharge, clean-up procedures employed, the amount of gravel and/or ice removed, photos of the spill sites before and after clean-up, if lighting

allows, and the results of clean-up procedures (*e.g.,* estimate of percentage of spill removed);

(2) The length of the steel cables and steel pipe used in construction of the ice pier;

(3) The length of the steel cables and steel pipe remaining on the ice pier at the time of its release;

(4) Any other materials remaining on the ice pier at the time of its release; and

(5) The date of detachment of the ice pier from McMurdo Station, as well as the geographic coordinates (latitude and longitude) of the point of its release if the release occurs at a location other than directly from shore at McMurdo Station.

Fourth, NSF shall place a tracking device on the pier prior to ship operations each season.

The fifth condition refers to incidents where an ice pier may be released from shore if NSF finds that rapid deterioration of a pier is becoming a threat to human health and safety, or because anticipated weather conditions (*e.g.,* strong storms) are likely to break an ice pier apart or break an ice pier loose from its moorings. Should this unanticipated release be needed, an attempt shall be made to meet all of the requirements described in the sixth condition below that can be safely completed given the circumstances.

The sixth condition describes actions that shall be taken by NSF prior to the towing of an ice pier to sea for ocean disposal or the planned release from shore due to the absence of vessels capable of towing. Actions to be taken by NSF include the following:

(1) Other than the matter embedded in the ice pier (*i.e.,* the ends of pipes frozen in the pier, and the strengthening cables), all other objects (including the non-embedded portions of materials used for maintaining a connection between the pier and the mainland and any removable equipment, debris, or objects of anthropogenic origin), shall be removed from the pier and shall not be disposed in the ocean.

(2) The gravel non-slip surface of the pier shall be removed to the maximum extent practicable.

(3) Documentation including photographs, if lighting allows, of ice pier clean-up and of the ice pier just prior to, during and after release shall be developed.

(4) NSF shall use the tracking device required in condition 4 above to track the ice piers disposed of under this permit for as long as the device remains active. NSF shall include the tracking data from this effort in the annual report that NSF is required to submit to EPA under condition 7 below.

Seventh, NSF shall submit a report by June 30 of every year to the Director of the Oceans, Wetlands, and Communities Division in EPA's Office of Water. The report must identify:

(1) Any spills, discharges, or clean-up procedures on the ice pier at McMurdo Station, including but not limited to:

a. Amount of surface gravel removed due to spills,

b. Description of removal of potentially contaminated ice layers,

c. Images, if lighting allows, documenting the spill sites before and after clean-up, and

d. Copies of spill and clean-up records and other records.

(2) Detailed reports of all ice pier ocean disposals from McMurdo Station for the year, including:

a. Detailed descriptions and photographs of release, and if towed, the name and activity of the vessel associated with the disposal,

b. The time, date, and geographic coordinates (latitude and longitude) of the point of release (if released from a location other than directly from shore at McMurdo Station) in McMurdo Sound or the Ross Sea and the tracking data as the ice pier moves on its trajectory in the Southern Ocean,

c. Other reports and materials (*e.g.,* documents, photos) generated under permit,

d. Details of clean-up procedures,

e. Amounts of all materials remaining on the piers at the time of release, and

f. Any tracking efforts of ice piers released from McMurdo Station under this general permit for the year preceding the date of the annual report.

(3) A current copy of the SPCC, if revised or updated since previous submission.

The eighth and ninth conditions define the term ''ice pier'' and explain that the permit shall be valid for seven years, as per the MPRSA, respectively.

Any contaminants remaining on the surface of the piers after release are expected to be minimal and insignificant. The area over which the disintegration of the piers occurs is immense. Thus, the dilution of contaminants in ocean waters should be adequate such that the potential for damage to the environment from ocean disposal of any McMurdo Station ice piers is minimal. In addition, the possibility of entanglement of large organisms in suspended loops of cable from the disintegrating ice piers has been determined by EPA to be very minimal. (Further discussion of this issue can be found in ''C. Potential Effects of Ice Pier Disposal,'' above.)

Finally, the re-issuance of this permit to NSF does not in any way relieve NSF of meeting the United States' obligations under the Antarctic Protocol, the Antarctic Conservation Act, or the implementing regulations.

E. Responses to Comments Received

EPA received one comment during the public comment period. The comment raised objections to the steel cable being allowed to remain in the ice piers disposed at sea and suggested that the steel cable should be reused or shipped back from Antarctica rather than disposed at sea.

EPA disagrees that these concerns warrant rejecting the permit re-issuance application. The steel cable is an essential structural component of ice piers needed to hold the pier together in the event of cracking, to maintain the stability of the pier, and for safety, and more importantly, the cable contained within the ice piers cannot be safely removed at the end of the useful life of the ice pier. This general permit is as protective of the environment as possible as it requires the removal of all materials from the ice pier prior to disposal except those which cannot be removed because they are embedded (contained within) in the ice pier itself.

F. Statutory and Executive Order Reviews

Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* is intended to minimize the reporting and record-keeping burden on the regulated community, as well as to minimize the cost of Federal information collection and dissemination. In general, the Act requires that information requests and record-keeping requirements affecting ten or more non-Federal respondents be approved by the Office of Management and Budget. Because this general permit affects only Federal agency record-keeping and reporting requirements, it is not subject to the requirements of the Paperwork Reduction Act.

Brian Frazer,

Director, Oceans, Wetlands, and Communities Division.

For the reasons stated above, EPA re-issues the general permit for NSF as follows:

Disposal of Ice Piers From McMurdo Station, Antarctica

The United States National Science Foundation (NSF) and its agents are hereby granted a general permit under sections 102(a) and 104(c) of the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. 1412(a) and 1414(c), to transport ice piers from the McMurdo Sound, Antarctica, research station for

the purpose of ocean dumping, subject to the following conditions:

(A) The NSF shall implement a spill prevention, control, and countermeasure (SPCC) plan, consistent with the requirements of 40 CFR 112.3, for the McMurdo Station ice pier. The SPCC plan shall address procedures for loading and unloading the following materials, and shall include methods to minimize the accidental release or discharge of any of the following materials to the ice pier:

(1) Petroleum products unloaded from supply tankers to the storage tanks at McMurdo Station;

(2) Drummed chemicals, petroleum products, and materials unloaded from cargo freighters to supply depots at McMurdo Station;

(3) Materials loaded to freighters destined to be returned to facilities outside Antarctica; and

(4) Material spilled as a result of thermosyphon use or related activities.

(B) If a spill or discharge occurs on an ice pier, it will be completely cleaned up, such that no visible evidence remains, unless 100% removal would result in greater environmental risk or put the safety of personnel at risk. All spills or discharges on an ice pier should be cleaned up soon as possible.

(C) An up-to-date record of the following information shall be kept by NSF:

(1) The date and time of all spills or discharges, the location of the spill or discharge, a description of the material that was spilled or discharged, the approximate volume of the spill or discharge, cleanup procedures employed, the amount of gravel and/or ice removed, photos of the spill sites before and after clean-up, if lighting allows, and the results of the clean-up procedures (*e.g.,* estimate of percentage of spill removed);

(2) The length of the steel cables and steel pipe used in the construction of the ice pier;

(3) The length of the steel cables and steel pipe remaining on the ice pier at the time of its release;

(4) Any other materials remaining on the ice pier at the time of its release; and

(5) The date of detachment of the ice pier from McMurdo Station and the geographic coordinates (latitude and longitude) of the point of its release if the release occurs at a location other than directly from shore at McMurdo Station.

(D) NSF shall place a tracking device, as specified in paragraph (F)(3), on the pier prior to ship operations each season.

(E) An ice pier may be released from shore if NSF finds that rapid deterioration of a pier is becoming a threat to human health and safety or because anticipated weather conditions (*e.g.,* strong storms) are likely to break an ice pier apart or break an ice pier loose from its moorings. Should this unanticipated release be needed, an attempt shall be made to meet all of the requirements described in paragraph F below that can be safely completed given the circumstances.

(F) Prior to the towing of an ice pier to sea for ocean disposal or the planned release from shore due to the absence of vessels capable of towing, the following actions shall be taken by NSF:

(1) Other than the matter embedded in the ice pier (*i.e.,* the ends of pipe frozen in the pier, and the strengthening cables), all other objects (including the non-embedded portions of materials used for maintaining a connection between the pier and the mainland and any removable equipment, debris, or objects of anthropogenic origin), shall be removed from the pier and shall not be disposed in the ocean.

(2) The gravel non-slip surface of the pier shall be removed to the maximum extent practicable.

(3) Documentation including photographs, if lighting allows, of ice pier clean-up and of the ice pier just prior to, during and after release shall be developed.

(4) NSF shall implement a methodology using the tracking device placed on the ice pier under Section D above to track the ice piers disposed of under this permit for as long as the device remains active. NSF shall include the tracking data from this effort as well as any visual observations taken regarding the trajectory of the ice pier in the annual report that NSF is required to submit to EPA under paragraph G below.

(G) NSF shall submit a report by June 30 of every year to the Director of the Oceans, Wetlands and Communities Division, in EPA's Office of Water, on

(1) any spills, discharges, or clean-up procedures on the ice pier at McMurdo Station, including but not limited to:

a. Amount of surface gravel removed due to spills,

b. Description of removal of potentially contaminated ice layers,

c. Images, if lighting allows, documenting the spill sites before and after clean-up, and

d. Copies of spill and cleanup records and other records as developed under Section C above.

(2) Detailed reports of all ice pier ocean disposals from McMurdo Station for the year, including:

a. Detailed descriptions and photographs of release of the ice pier from shore including documentation about the circumstances that led to release of the pier from shore and how the pier was released, and if towed, the name and activity of the vessel associated with the disposal,

b. The time, date, and geographic coordinates (latitude and longitude) of the point of release (if released from a location other than directly from shore at McMurdo Station) in McMurdo Sound or the Ross Sea and the tracking data as the ice pier moves on its trajectory in the Southern Ocean,

c. All reports/materials (*e.g.,* documents, photos) generated under paragraphs C, D, E, and F above,

d. Details of clean-up procedures,

e. Amounts of all materials remaining on the piers at the time of release, and

f. Any tracking efforts of ice piers released from McMurdo Station under this general permit for the year preceding the date of the annual report.

(3) A current copy of the SPCC, if revised or updated since previous submission.

(H) For the purpose of this permit, the term ''ice pier(s)'' means those manmade ice structures containing embedded steel cable, and pipe, and any remaining gravel frozen into the surface of the pier, that are constructed at McMurdo Station, Antarctica, for the purpose of off-loading the annual provision of material and supplies for McMurdo and South Pole Stations and for loading the previous year's accumulation of wastes, which are returned to the United States.

(I) This permit shall be valid for a period of seven years beginning 30 days after the date of publication in the **Federal Register**.

[FR Doc. 2021–26473 Filed 12–6–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2021–0839; FRL–9277–01–OCSPP]

Pesticide Registration Maintenance Fee: Notice of Receipt of Requests To Voluntarily Cancel Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is issuing a notice of receipt of requests by registrants through 2020 Pesticide Registration Maintenance Fee responses to voluntarily cancel certain pesticide

registrations. EPA intends to grant these requests at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the requests, or unless the registrants withdraw its requests. If these requests are granted, any sale, distribution, or use of products listed in this notice will be permitted after the registrations have been cancelled only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments must be received on or before January 6, 2022.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2021–0839, through the *Federal eRulemaking Portal* at *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. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

Submit written withdrawal request by mail to: Registration Division (7502P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001. ATTN: Michael Yanchulis.

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: Michael Yanchulis, Registration Division (7502P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–2981; email address: *yanchulis.michael@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides.

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 *http://www.epa.gov/dockets/comments.html.*

II. What action is the Agency taking?

This notice announces receipt by the Agency of requests from registrants to cancel 289 pesticide products registered under FIFRA section 3 (7 U.S.C. 136a) or 24(c) (7 U.S.C. 136v(c)). These registrations are listed in sequence by registration number (or company number and 24(c) number) in Table 1 of this unit.

Unless the Agency determines that there are substantive comments that warrant further review of the requests or the registrants withdraw their requests, EPA intends to issue an order in the **Federal Register** canceling all the affected registrations.

TABLE 1—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Company No.	Product name
100–1078	100	Scimitar CS Insecticide.
100–1163	100	Suprend Herbicide.
228–611	228	Proclipse 0.2% Fertilizer.
228–614	228	Proclipse 1.0% Fertilizer.
241–319	241	Image 70 DG.
241–383	241	Acrobat MZ Fungicide.
241–395	241	Acrobat MZ WDG Fungicide.
241–410	241	Acrobat 50WP Fungicide.
241–411	241	Stature MZ Fungicide.
241–419	241	Stature DM Fungicide.
241–438	241	Bas 711 02H Herbicide.
279–3358	279	F7954 Ornamental Insecticide/Miticide.
279–3553	279	Zoro Miticide/Insecticide.
279–3554	279	Abamectin CHA 2071.
400–485	400	Meta-Mil Fungicide.
400–557	400	Hi-Moly/Captan-D.
400–560	400	Kernel Guard Supreme.
400–562	400	Protector D.
499–371	499	Whitmire Pt 120 XLO Sumithrin Contact Insecticide.
499–376	499	Whitmire PT 1810 Total Release Insecticide.
499–426	499	Whitmire TC 114 Emulsifiable Concentrate.
499–443	499	Whitmire TC 161 Injection System.
499–471	499	Whitmire Micro-Gen TC200 Injection System.
499–485	499	TC 218.
499–489	499	TC 62.
499–523	499	TC 260.
499–538	499	TC 130 GEN II.
524–650	524	M1838 Growth Regulator.
524–652	524	M1839 Growth Regulator.

TABLE 1—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration No.	Company No.	Product name
538–279	538	Miracle-Gro (R) Weed & Feed.
1021–1602	1021	Pyrocide Flea & Tick Dip 7407.
1677–241	1677	Hydris.
1706–112	1706	Nalcon 7619.
1706–201	1706	H–510–M Microbiocide.
1839–120	1839	Humidifier Bacteria-Algae Treatment.
1839–152	1839	BTC 1010 7.5% Solution.
2596–22	2596	Hartz 2 In 1 Rid Flea Dog Shampoo.
2693–61	2693	Interlux Interpoxy Bottomkote 559 Green.
2693–64	2693	Red Hand Antifouling Bottom Paint 50 Red.
2693–144	2693	Ultra-Kote 2449H Red.
2693–177	2693	Interclene XMH242 Red.
2693–178	2693	Interspeed BWA360 Red.
2693–217	2693	Intersmooth 460 HS BEAO47 Red.
2724–825	2724	RF2180 KC A/T Combo.
3432–57	3432	L-Clor.
3862–178	3862	Tek-Phene.
3862–179	3862	Opti-Phene Cleaner Disinfectant Deodorant.
5383–155	5383	Troy EX2270.
5383–158	5383	Mergal 187.
5383–177	5383	Fungitrol 400 PVC Fungicide.
5383–181	5383	Nuosept BMC 422.
5481–163	5481	Alco Weed Killer Contact.
5481–167	5481	Wettable Sulfur Agricultural Insecticide-Fungicide.
5481–273	5481	Royal 70 Superior Spray Oil.
5481–494	5481	Chlorethoxyfos 2.5G Granular Insecticide.
5481–502	5481	Ambush 25W Insecticide.
5481–540	5481	Wisdom 0.069% RUP Insecticide.
5481–552	5481	Bidrin XP.
5481–555	5481	Wisdom 0.1% RUP Insecticide.
5481–556	5481	Wisdom 0.10% Granular Insecticide.
5481–557	5481	Wisdom 0.05% Granular Insecticide.
5481–558	5481	Wisdom 0.05% RUP Insecticide.
5481–560	5481	Smartchoice 2.5G.
5481–588	5481	Wisdom 0.2% RUP Granular Insecticide.
5481–593	5481	Wisdom 0.2% Granular Insecticide.
5481–8980	5481	Phorate 20 G.
5481–9029	5481	Aztec 2.1% G Insecticide.
5481–9032	5481	Aztec 3.78% Granular Insecticide.
5736–103	5736	D'Germ Clinging Toilet Bowl Cleaner.
5785–48	5785	Terr-O-Gas 50.
5785–52	5785	67–33.
5785–58	5785	Chloropicrin.
7173–294	7173	Rozol Pocket Gopher Bait III.
7401–9	7401	Ferti-Lome Dormant Spray and Summer Oil Spray.
7401–443	7401	Ferti-Lome Scalecide.
7969–263	7969	Bas 556 01F Fungicide.
7969–296	7969	Stamina F3 HL Fungicide Seed Treatment.
7969–317	7969	Segment Herbicide.
7969–343	7969	Cyfluthrin Encapsulated Residual Insecticide Spray.
8329–94	8329	Merus 2.0.
8660–12	8660	Herbicide Granules Formula A.
9688–84	9688	Chemsico Lawn & Garden Insect Control.
9688–85	9688	Chemsico Home Insect Control C.
9688–120	9688	Chemsico Concentrate MP.
9688–122	9688	Chemsico Aerosol MP.
9688–149	9688	Chemsico Insecticide Concentrate 57P.
9688–184	9688	Chemsico Fire Ant Killer PD.
9688–200	9688	Chemsico Insect Granules Formula C.
9688–201	9688	Chemsico Home Insect Control G.
9688–202	9688	Chemsico Insecticide Concentrate C.
9688–203	9688	Chemsico FAK Formula C.
9688–257	9688	Chemsico Insecticide Dust D.
9779–303	9779	Trust 4EC.
9779–326	9779	Trific 10G.
9779–341	9779	Trific 2L.
10807–144	10807	Misty EX–IT Emulsifiable Concentrate.
10807–149	10807	Misty 2 Plus 2.
10807–205	10807	Misty Repco Kill III.
10807–207	10807	Misty EX-IT CF.
12455–72	12455	5% Warfarin Concentrate.
19713–50	19713	Drexel Carbaryl 80S.

TABLE 1—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration No.	Company No.	Product name
19713–53	19713	Drexel Carbaryl 10D.
19713–84	19713	Drexel Carbaryl 95 Sprayable.
19713–89	19713	Drexel Carbaryl 2L.
19713–212	19713	Drexel Carbaryl 10D (10% Sevin Dust).
19713–213	19713	Drexel Carbaryl 5D (5% Sevin Dust).
19713–244	19713	Drexel Carbaryl 80 Dust Base.
19713–363	19713	Drexel Carbaryl 85 Sprayable.
34704–843	34704	Amplify.
34704–921	34704	Thiofan 8 Methyl 4.5 Fungicide.
34704–935	34704	Dyna-Shield Captan Fungicide.
34704–980	34704	Dyna-Shield Tebuconazole—Thiram Flowable Fungicide.
34704–996	34704	Agsco B–4 Herbicide.
34704–1007	34704	LPI Thio-M 70 WSB.
34704–1008	34704	LPI Thio-M Ag 4.5F.
42750–227	42750	Thiabendazole 98% MP.
45458–17	45458	Trichlor 1″ Tablets.
45458–18	45458	Trichlor 3″ Tablets.
45458–20	45458	Dichlor Granular.
45458–21	45458	60% Non-Foaming Algaecide.
45458–22	45458	30% Non-Foaming Algaecide.
53871–3	53871	Stimukil Fly Bait.
63838–27	63838	Q–D50.
69681–32	69681	Clor Mor Trigran.
70060–4	70060	Aseptrol Dry Carpet Sanitizer 7L.
70299–3	70299	Terracyte.
70506–281	70506	Hawk-1 N/O G.
74530–76	74530	Helosate 75 SG Pro Herbicide.
74530–82	74530	Helm Sulfentrazone 4F–CA.
83529–22	83529	Shar-Guard.
83529–33	83529	Shotaran 4SC.
83529–39	83529	Flufenacet 500 SC Herbicide.
83529–56	83529	Sharda Metolachlor 86.4EC.
87373–19	87373	ARG221.05.
89459–23	89459	Prentox Prenfish Toxicant.
91234–201	91234	A335.06.
AL070005	279	Zoro Miticide/Insecticide.
AL190002	100	A21472 Plus Vaporgrip Technology.
AR810050	5481	Orthene 75 S Soluble Powder.
AZ030002	5481	Orthene 97 Pellets.
AZ130001	12455	Final Soft Bait.
AZ920008	5481	Orthene 75 S Soluble Powder.
CA010013	73049	Promalin Plant Growth Regulator Solution.
CA010014	73049	Pro-Gibb 4% Liquid Concentrate.
CA010015	73049	Pro-Gibb 4% Liquid Concentrate.
CA010028	5481	Metam 426.
CA030014	66222	Diasol AG 500.
CA070007	73049	Retain Plant Growth Regulator Soluble Powder.
CA080023	73049	Provide 10SG Plant Growth Regulator.
CA130007	12455	Agrid3 Blox.
CA150003	10324	Maquat 615-HD.
CA180003	73049	Maxcel.
FL030001	73049	Pro-Gibb 4% Liquid Concentrate.
FL030005	5481	Ambush 25W Insecticide.
FL150004	66222	Fluensulfone 480EC.
GA060006	62719	Indar 75WSP.
GA070002	62719	Indar 75WSP.
GA070003	279	Zoro Miticide/Insecticide.
GA190003	7969	Engenia Herbicide.
GA190006	100	A21472 Plus Vaporgrip Technology.
HI080002	7173	Rozol Pellets.
HI100001	73049	Retain Plant Growth Regulator Soluble Powder.
HI130001	73049	Protone SG.
IA190002	7969	Engenia Herbicide.
IA200001	100	A21472 Plus Vaporgrip Technology.
IA970001	100	AATREX 4L Herbicide.
ID010016	5481	Orthene 75 S Soluble Powder.
ID060025	5481	Orthene 97.
ID070008	279	Brigade 2EC Insecticide/Miticide.
ID080002	279	Zoro Miticide/Insecticide.
ID090012	71512	Omega 500F.
ID100003	10163	Moncut 70-DF.
ID110001	7173	Rozol Vole Bait.

TABLE 1—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration No.	Company No.	Product name
ID140004	5481	Parazone 3SL.
ID150009	5481	Abba Ultra Miticide/Insecticide.
ID830009	100	AATREX Nine-O Herbicide.
IL070005	100	Dual Magnum.
IL100003	100	Dual Magnum Herbicide.
IL110001	5481	Dupont Assure II Herbicide.
IL190003	7969	Engenia Herbicide.
IL190005	100	A21472 Plus Vaporgrip Technology.
IN200001	7969	Engenia Herbicide.
IN200004	100	A21472 Plus Vaporgrip Technology.
KS030003	100	AATREX 4L Herbicide.
KS060001	12455	ZP Rodent Bait AG.
KS080002	12455	ZP Rodent Oat Bait AG.
KS100002	33270	Sentry Atrazine 4L Herbicide.
KS120004	12455	ZP Rodent Oat Bait AG.
KS130004	33270	US Sentry Atrazine 4L Herbicide.
KS130005	33270	US Sentry Atrazine 90DF.
KS190001	7969	Engenia Herbicide.
LA190003	100	A21472 Plus Vaporgrip Technology.
MD080004	70506	Dupont Manzate Pro-Stick Fungicide.
MI140010	279	Aim EC.
MI180003	60063	Echo 90DF.
MI180004	60063	Echo 720.
MN030010	60063	Echo 720 Agricultural Fungicide.
MN030011	60063	Echo ZN Agricultural Fungicide.
MN090005	100	Warrior II with Zeon Technology.
MN100002	71512	Omega 500F.
MN120001	100	Dual Magnum Herbicide.
MN190002	7969	Engenia Herbicide.
MN190004	100	A21472 Plus Vaporgrip Technology.
MN200002	7969	Engenia Herbicide.
MN200004	100	A21472 Plus Vaporgrip Technology.
MO000002	5785	Meth-O-Gas 100.
MO080004	70506	Dupont Manzate Pro-Stick Fungicide.
MS040005	279	NUFOS 4E.
MS070002	279	Zoro Miticide/Insecticide.
MT070004	279	Brigade 2ec Insecticide/Miticide.
MT150001	5481	Thimet 20-G.
NC080003	70506	Penncozeb 75DF.
NC120002	66222	Cotoran 4L.
NC150005	5481	Parazone 3SL.
NC180005	7969	Engenia Herbicide.
NC190002	100	A21472 Plus Vaporgrip Technology.
NC190006	7969	Engenia Herbicide.
NC920001	5481	Counter Systemic Insecticide-Nematicide.
ND030016	60063	Echo 720 Agricultural Fungicide.
ND030017	60063	Echo ZN Agricultural Fungicide.
ND100002	71512	Omega 500F.
ND190002	7969	Engenia Herbicide.
ND190006	100	A21472 Plus Vaporgrip Technology.
ND190008	7969	Engenia Herbicide.
ND190009	100	A21472 Plus Vaporgrip Technology.
ND200001	7969	Engenia Herbicide.
ND200004	100	A21472 Plus Vaporgrip Technology.
NE140002	1381	Carnivore Herbicide.
NJ000005	5481	Orthene 97 Pellets.
NJ960004	5481	Orthene 75 S Soluble Powder.
NM150003	74530	Helmquat 3SL.
NV050001	5481	Discipline 2EC.
NV070006	279	Brigade 2EC Insecticide/Miticide.
NV080001	279	Zoro Miticide/Insecticide.
NV090001	5481	Abba 0.15EC.
NY080010	70506	Kraken.
NY080014	70506	Redwing.
NY180002	5481	Deadline Bullets.
OH000007	5481	Orthene 97 Pellets.
OH110002	100	Dual Magnum Herbicide.
OK190001	7969	Engenia Herbicide.
OK830003	100	AATREX 4L Herbicide.
OK830029	100	AATREX 4L Herbicide.
OK830030	100	AATREX Nine-0.
OK920007	100	AATREX 4L Herbicide.

TABLE 1—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration No.	Company No.	Product name
OK920008	100	AATREX Nine-0.
OR040008	100	AATREX Nine-0 Herbicide.
OR050005	5481	Discipline 2EC.
OR050006	100	Touchdown Hitech.
OR140009	5481	Parazone 3SL.
OR150001	70506	Lifeline Herbicide.
OR150011	5481	Abba Ultra Miticide/Insecticide.
PA170002	1381	Dimetric DF 75%.
PA930004	5481	Orthene 75 S Soluble Powder.
PR110002	5481	Dupont Assure II Herbicide.
PR910002	5481	Orthene 75 S Soluble Powder.
SD190002	7969	Engenia Herbicide.
SD190006	100	A21472 Plus Vaporgrip Technology.
TN070002	279	Zoro Miticide/Insecticide.
TN080007	70506	Dupont Manzate Pro-Stick Fungicide.
TN080009	70506	Penncozeb 75DF.
TN140003	70506	Manzate Pro-Stick Fungicide.
TX000006	100	Tilt Fungicide.
TX080004	279	Command 3ME Herbicide.
TX100006	5481	Orthene Turf, Tree & Ornamental 97 Spray.
TX170007	67690	Captain Liquid Copper Algaecide.
TX190002	7969	Engenia Herbicide.
UT070006	279	Brigade 2ec Insecticide/Miticide.
UT090002	279	Zoro.
UT140003	59639	Zeal WP Miticide.
UT170001	5481	Parazone 3SL Herbicide.
VA080004	70506	Dupont Manzate Pro-Stick Fungicide.
VA870007	5481	Orthene 75 S Soluble Powder.
VA920003	5481	Orthene 75 S Soluble Powder.
VA930005	5481	Orthene 75 S Soluble Powder.
WA070017	279	Brigade 2EC Insecticide/Miticide.
WA080003	279	Zoro Miticide/Insecticide.
WA120004	7969	Ignite.
WA150005	74530	Ro-Neet Herbicide.
WA150006	74530	Ro-Neet Herbicide.
WA200002	34704	Atrazine 4L.
WA930001	5481	Dupont Krovar I DF Herbicide.
WI100001	60063	Echo 720 Agricultural Fungicide.
WI100002	60063	Echo ZN.
WI150001	279	Aim EC.
WI160003	60063	Echo ZN.
WI160004	60063	Echo 720.
WI160005	60063	Echo 90DF.
WI160006	71512	Omega 500F.

Table 2 of this unit includes the names and addresses of record for all registrants of the products in Table 1 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in this unit.

TABLE 2—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

EPA company No.	Company name and address
100	Syngenta Crop Protection, LLC, 410 Swing Road, P.O. Box 18300, Greensboro, NC 27419.
228	Nufarm Americas, Inc., 4020 Aerial Center Parkway, Suite 101, Morrisville, NC 27560.
241	BASF Corporation, P.O. Box 13528, Research Triangle Park, NC 27709.
279	FMC Corporation, 2929 Walnut Street, Philadelphia, PA 19104.
400	Macdermid Agricultural Solutions, Inc., 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406.
499	BASF Corporation, P.O. Box 13528, Research Triangle Park, NC 27709.
524	Bayer CropScience LP, 800 N Lindbergh Blvd., St. Louis, MO 63141.
538	The Scotts Company, 14111 Scottslawn Road, Marysville, OH 43041.
1021	McLaughlin Gormley King Company, d/b/a MGK, 7325 Aspen Lane N., Minneapolis, MN 55428.
1381	Winfield Solutions, LLC, P.O. Box 64589, St. Paul, MN 55164.
1677	Ecolab, Inc., 1 Ecolab Place, St. Paul, MN 55102.
1706	NALCO Company, LLC, A Subsidiary of Ecolab, Inc., 1601 West Diehl Road, Naperville, IL 60563.
1839	Stepan Company, 22 W Frontage Road, Northfield, IL 60093.
2596	The Hartz Mountain Company, 400 Plaza Drive, Secaucus, NJ 07094.
2693	International Paint LLC, 6001 Antoine Drive, Houston, TX 77091.

TABLE 2—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION—Continued

EPA company No.	Company name and address
2724	Wellmark International, 1501 E Woodfield Road, Suite 200 West, Schaumburg, IL 60173.
3432	N. Jonas @Co., Inc., P.O. Box 425, Bensalem, PA 19020.
3862	ABC Compounding Co., Inc. P.O. Box 16247, Atlanta, GA 30321.
5383	Troy Chemical Corp., c/o. Troy Corporation, 8 Vreeland Road, Florham Park, NJ 07932.
5481	AMVAC Chemical Corporation, 4695 MacArthur Court, Suite 1200, Newport Beach, CA 92660.
5736	Diversey, Inc. P.O. Box 19747, Charlotte, NC 28219.
5785	LANXESS Corporation, 111 RIDC Park West Drive, Pittsburgh, PA 15275.
7173	Liphatech, Inc., 3600 W Elm Street, Milwaukee, WI 53209.
7401	Voluntary Purchasing Groups, Inc., 230 FM 87, Bonham, TX 75418.
7969	BASF Corporation, P.O. Box 13528, Research Triangle Park, NC 27709.
8329	Clarke Mosquito Control Products, Inc., 675 Sidwell Court, St. Charles, IL 60174.
8660	United Industries Corp., D/B/A SYLORR Plant Corp., P.O. Box 142642, St. Louis, MO 63114.
9688	CHEMSICO, A Division of United Industries Corp., One Rider Trail Plaza Drive, Suite 300, Earth City, MO 63045.
9779	Winfield Solutions, LLC, P.O. Box 64589, St. Paul, MN 55164.
10163	Gowan Company, 370 S Main Street, Yuma, AZ 85366.
10324	Mason Chemical Company, 9075 Centre Pointe Drive, Suite 400, West Chester, OH 45069.
10807	AMREP, Inc., 3330 Cumberland Blvd., Suite 700, Atlanta, GA 30339.
12455	Bell Laboratories, Inc., 3699 Kinsman Blvd., Madison, WI 53704.
19713	Drexel Chemical Company, P.O. Box 13327, Memphis, TN 38113.
33270	Winfield Solutions, LLC, P.O. Box 64589, St. Paul, MN 55164.
34704	Loveland Products, Inc., P.O. Box 1286, Greeley, CO 80632.
42750	Albaugh, LLC, 1525 NE 36th Street, Ankeny, IA 50021.
45458	Haviland Consumer Products, Inc., D/B/A Baleco International, 421 Ann Street, NW, Grand Rapids, MI 49504.
53871	Troy Chemical Corp., c/o. Troy Corporation, 8 Vreeland Road, Florham Park, NJ 07932.
59639	Valent U.S.A. LLC, P.O. Box 5075, San Ramon, CA 94583.
60063	SIPCAM Agro USA, Inc., 2525 Meridian Pkwy., Suite 350, Durham, NC 27713.
62719	Corteva Agrosciences LLC, 9330 Zionsville Road, Indianapolis, IN 46268.
63838	Enviro Tech Chemical Services, Inc., 500 Winmoore Way, Modesto, CA 95358.
66222	Makhteshim Agan of North America, Inc., D/B/A ADAMA, 3120 Highwoods Blvd., Suite 100, Raleigh, NC 27604.
67690	SEPRO Corporation, 11550 N Meridian Street, Suite 600, Carmel, IN 46032.
69681	Allchem Performance Products, Inc., 6010 NW First Place, Gainesville, FL 32607.
70060	BASF Corporation, 100 Park Avenue, Florham Park, NJ 07932.
70299	Biosafe Systems, LLC, 22 Meadow Street, East Hartford, CT 06108.
70506	UPL NA, Inc., 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406.
71512	ISK Biosciences Corporation, 7470 Auburn Road, Suite A, Concord, OH 44077.
73049	Valent Biosciences, LLC, 1910 Innovation Way, Suite 100, Libertyville, IL 60048.
74530	Helm Agro US, Inc., 401 E Jackson Street, Suite 1400, Tampa, FL 33602.
83529	Sharda USA LLC, c/o Wagner Regulatory Associates, Inc., P.O. Box 640, Hockessin, DE 19707.
87373	Argite, LLC, 5000 Centregreen Way, Suite 100, Cary, NC 27513.
89459	Central Garden & Pet Company, 1501 East Woodfield Road, Suite 200W, Schaumburg, IL 60173.
91234	Atticus, LLC, 5000 Centregreen Way, Suite 100, Cary, NC 27513.

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

Section 6(f)(1) of FIFRA (7 U.S.C. 136d(f)(1)) provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. EPA will provide a 30-day comment period on the proposed requests. Thereafter, the EPA Administrator may approve such a request.

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation should submit such withdrawal in via email to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the products have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

V. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. Because the Agency has identified no significant potential risk concerns associated with these pesticide products, upon cancellation of the products identified in Table 1 of Unit II., EPA anticipates allowing registrants to sell and distribute existing stocks of these products until January 15, 2022, or the date of that the cancellation notice is published in the **Federal Register** whichever is later. Thereafter, registrants will be prohibited from selling or distributing the pesticides identified in Table 1 of Unit II., except for export consistent with FIFRA section 17 or for proper disposal. Persons other than registrants will generally be allowed to sell, distribute, or use existing stocks until such stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products.

(Authority: 7 U.S.C. 136 *et seq.*)

Dated: November 26, 2021.

Catherine Aubee,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2021–26466 Filed 12–6–21; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice: 2021–6046]

Agency Information Collection Activities: Comment Request

AGENCY: Export-Import Bank of the United States.

ACTION: Submission for OMB review and comments request.

SUMMARY: The Export-Import Bank 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. Government-wide policy requires all Federal employees to be vaccinated against COVID–19, with exceptions only as required by law. Employees may seek a legal exception to the vaccination requirement due to a disability, using the reasonable accommodation Form. The agency may also ask for other information, as needed. Requests for ''medical accommodation'' or ''medical exceptions'' will be treated as requests for a disability accommodation and evaluated and decided under applicable Rehabilitation Act standards for reasonable accommodation absent undue hardship to the agency.

DATES: Comments must be received on or before February 7, 2022 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *www.regulations.gov* (EIB 21–03) or by email to *Nakia.Burton@exim.gov,* or by mail to Nakia Burton, Export-Import Bank, 811 Vermont Ave. NW, Washington, DC 20571. The information collection tool can be reviewed at: eib21–03.pdf (*exim.gov*).

FOR FURTHER INFORMATION CONTACT: To request additional information, please Nakia Burton, *nakia.burton@exim.gov,* 202–565–3225.

SUPPLEMENTARY INFORMATION:

Title and Form Number: EIB 21–03 REQUEST FOR A MEDICAL EXCEPTION TO THE COVID–19 VACCINATION REQUIREMENT.

OMB Number: 3048–xxxx.

Type of Review: Regular.

Need and Use: The information collected will allow EXIM to determine compliance and content for transaction requests submitted to the Export-Import Bank under its insurance, guarantee, and direct loan programs.

Affected Public: This form affects EXIM employees.

Annual Number of Respondents: 12.

Estimated Time per Respondent: 2 hours.

Annual Burden Hours: 24 hours.

Frequency of Reporting of Use: As required.

Government Expenses:

Reviewing time per Year: 2 hours.

Average Wages per Hour: $42.50.

Average Cost per Year: $1,020.00 (time*wages).

Benefits and Overhead: 20%.

Total Government Cost: $1,224.00.

Bassam Doughman,

IT Specialist.

[FR Doc. 2021–26462 Filed 12–6–21; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meetings

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 86 FR 67468.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Thursday, December 2, 2021, following the conclusion of the audit hearing. virtual meeting.

CHANGES IN THE MEETING: *The following matter was also considered:* Audit Division Recommendation Memorandum on the Republican Party of Minnesota—Federal (A19–09).

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Authority: Government in the Sunshine Act, 5 U.S.C. 552b.

Vicktoria J. Allen,

Acting Deputy Secretary of the Commission.

[FR Doc. 2021–26546 Filed 12–3–21; 11:15 am]

BILLING CODE 6715–01–P

FEDERAL MARITIME COMMISSION

Agency Information Collection Activities: 60-Day Public Comment Request

AGENCY: Federal Maritime Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of our continuing effort to reduce paperwork and respondent burden, and as required by the Paperwork Reduction Act of 1995, the Federal Maritime Commission (Commission) invites comments on the continuing information collections listed below in this notice.

DATES: Written comments must be submitted on or before February 7, 2022.

ADDRESSES: Submit comments for the proposed information collection requests to Lucille L. Marvin, Managing Director at email: *omd@fmc.gov.* Please refer to the assigned OMB control number on any correspondence submitted. The FMC will summarize any comments received in response to this notice in a subsequent notice and include them in its information collection submission to OMB for approval.

FOR FURTHER INFORMATION CONTACT: Copies of the information collections and instructions, or copies of any comments received, may be obtained by contacting Donna Lee at *omd@fmc.gov* or 202–523–5800.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Commission, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on the continuing information collections listed in this notice, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Comments submitted in response to this notice will be included or summarized in our request for Office of Management and Budget (OMB) approval of the relevant information collection. All comments are part of the public record and subject to disclosure. Please do not include any confidential or inappropriate material in your comments. We invite comments on: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Information Collections Open for Comment

Title: 46 CFR part 531—NVOCC Service Arrangements.

OMB Approval Number: 3072–0070 (Expires April 30, 2022).

Abstract: Section 16 of the Shipping Act of 1984, 46 U.S.C. 40103, authorizes the Commission to exempt by rule ''any class of agreements between persons subject to this part or any specified activity of those persons from any

requirement of this part if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce. The Commission may attach conditions to an exemption and may, by order, revoke an exemption.'' 46 CFR part 531 allows non-vessel-operating common carriers (NVOCCs) and shippers' associations with NVOCC members to act as shipper parties in NVOCC Service Arrangements (NSAs), and to be exempt from certain tariff publication requirements of the Shipping Act provided the NVOCC posts a prominent notice in its rules tariff invoking the NSA exemption, and provides electronic access to its rules tariff to the public free of charge. This information collection corresponds to the requirements to include the NSA exemption in the tariff, recordkeeping requirements, and the requirement to make the tariff publicly available free of charge.

Current Actions: This information being submitted contains updates to the information collection.

Type of Review: Extension.

Needs and Uses: The Commission uses NSAs and associated data for monitoring and investigatory purposes and, in its proceedings, to adjudicate related issues raised by private parties.

Frequency: NVOCCs that opt to enter into an NSA in lieu of publishing tariff rate(s) must post a one-time notice in its rules tariff invoking the NSA exemption.

Type of Respondents: Parties that enter into NSAs are NVOCCs and shippers' associations with NVOCC members.

Number of Annual Respondents: The Commission estimates an annual respondent universe of 325. The Commission expects the estimated number of annual respondents to remain at 325 in the future.

Estimated Time per Response: The time per response is estimated to be 15 minutes to add a tariff rule invoking the NSA exemption, and 1 hour for recordkeeping requirements.

Total Annual Burden: For the 325 annual respondents, the burden is calculated as 325 × .25 hour = 81.25 hours, rounded to 81 and 325 × 1= 325. Total annual burden is estimated to be 406 hours.

Title: 46 CFR part 532—NVOCC Negotiate Rate Arrangements.

OMB Approval Number: 3072–0071 (Expires April 30, 2022).

Abstract: Section 16 of the Shipping Act of 1984, 46 U.S.C. 40103, authorizes the Commission to exempt by order or regulation ''any class of agreements between persons subject to this [Act] or any specified activity of those persons from any requirement of this [Act] if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce.'' The Commission may attach conditions to any exemption and may, by order, revoke an exemption. In 46 CFR part 532, the Commission exempted non-vessel-operating common carriers (NVOCCs) from the tariff rate publication requirements of Part 520, and allowed an NVOCC to enter into an NVOCC Negotiated Rate Arrangement (NRA) in lieu of publishing its tariff rate(s), provided the NVOCC posts a prominent notice in its rules tariff invoking the NRA exemption and provides electronic access to its rules tariff to the public free of charge. This information collection corresponds to the rules tariff prominent notice and the requirement to make its rules tariff publicly available free of charge.

Current Actions: There are no changes to this information collection, and it is being submitted for extension purposes only.

Type of Review: Extension.

Needs and Uses: The Commission uses the information filed by an NVOCC in its rules tariff to determine whether the NVOCC has invoked the exemption for a particular shipment or shipments. The Commission has used and will continue to use the information required to be maintained by NVOCCs for monitoring and investigatory purposes, and, in its proceedings, to adjudicate related issues raised by private parties.

Frequency: NVOCCs that opt to enter into an NRA in lieu of publishing tariff rate(s) must post a one-time notice in its rules tariff invoking the NRA exemption. NVOCCs that opt to use NRAs exclusively must publish an NRA rules tariff.

Type of Respondents: NVOCCs.

Number of Annual Respondents: The Commission expects the estimated number of annual respondents to remain at 194 in the future.

Estimated Time per Response: 15 minutes for those adding a tariff rule to use a combination of tariff rates and NRAs, and 1 hour for recordkeeping requirements. For those using NRAs exclusively, one hour to publish an NRA rules tariff.

Total Annual Burden: Of the 194 new NVOCCs who have filed a rule or prominent notice in their respective tariffs, we estimate that 3% (6) will use NRAs exclusively. For the 194 annual respondents, the total burden is calculated as follows: 194 × 1 hour = 194 and 6 × 1 hour = 6 hours (3% using NRAs exclusively) and 188 × .25 hour = 47 hours. Total annual burden is estimated to be 247 hours.

JoAnne D. O'Bryant,

Program Analyst.

[FR Doc. 2021–26425 Filed 12–6–21; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The 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 December 21, 2021.

A. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Sally Jo Schmaderer Trust, Jon D. Schmaderer, as trustee, both of Stuart, Nebraska; Joel M. Steinhauser and Nancy Jo Steinhauser, both of Ainsworth, Nebraska; and Sue Anne Philson, Lincoln, Nebraska;* to become members of the Schmaderer Family Group, a group acting in concert, to retain voting shares of Tri-County Company, and thereby indirectly retain voting shares of The Tri-County Bank, both of Stuart, Nebraska;

In addition, Jon D. Schmaderer; to acquire additional voting shares of Tri-County Company, and indirectly acquire voting shares of The Tri-County Bank.

B. Federal Reserve Bank of Dallas (Karen Smith, Director, Applications) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *The Morris Family Trust and Frank E. Morris, individually and as trustee of the Trust, both of Gainesville, Texas;* to retain voting shares of Red River Bancorp, Inc., and thereby indirectly retain voting shares of First State Bank, both of Gainesville, Texas.

Board of Governors of the Federal Reserve System, December 2, 2021.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2021–26519 Filed 12–6–21; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The 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 the BHC Act (12 U.S.C. 1842(c)).

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 December 31, 2021.

A. Federal Reserve Bank of Philadelphia (William Spaniel, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105–1521. Comments can also be sent electronically to *Comments.applications@phil.frb.org:*

1. *Workers United, Philadelphia, Pennsylvania; and Amalgamated Financial Corp., New York, New York;* to merge with Amalgamated Investments Company, and thereby indirectly acquire Amalgamated Bank of Chicago, both of Chicago, Illinois. This notice supplements FR Doc. 2021–26297.

Board of Governors of the Federal Reserve System, December 1, 2021.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2021–26422 Filed 12–6–21; 8:45 am]

BILLING CODE P

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Notice of Board Meeting

DATES: December 17, 2021 at 10:00 a.m.

ADDRESSES: Telephonic. Dial-in (listen only) information: Number: 1–415–527–5035, Code: 2764 722 1247; or via web: *https://tspmeet.webex.com/tspmeet/onstage/g.php?MTID=e1220191d046633c698c24283fba3fb14.*

FOR FURTHER INFORMATION CONTACT: Kimberly Weaver, Director, Office of External Affairs, (202) 942–1640.

SUPPLEMENTARY INFORMATION:

Board Meeting Agenda

Open Session

1. Approval of the November 19, 2021 Board Meeting Minutes
2. Monthly Reports
   (a) Participant Activity Report
   (b) Investment Performance
   (c) Legislative Report
3. Quarterly Report
   (d) Vendor Risk Management Update
4. 2022/23 Internal Audit Plan Approval

Closed Session

Information covered under 5 U.S.C. 552b (c)(2) and (c)(9).

Authority: 5 U.S.C. 552b (e)(1).

Dated: December 1, 2021.

Dharmesh Vashee,

General Counsel, Federal Retirement Thrift Investment Board.

[FR Doc. 2021–26421 Filed 12–6–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Requirements for Negative Pre-Departure Covid–19 Test Result or Documentation of Recovery From Covid–19 for All Airline or Other Aircraft Passengers Arriving Into the United States From Any Foreign Country

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of amended Agency Order.

SUMMARY: The Centers for Disease Control and Prevention (CDC), located within the Department of Health and Human Services (HHS), announces an Amended Order requiring a negative pre-departure COVID–19 test result or documentation of recovery from COVID–19 for all airline or other aircraft passengers arriving into the United States from any foreign country. This Amended Order was signed by the CDC Director on December 2, 2021, and supersedes the previous Order signed by the CDC Director on October 25, 2021.

DATES: This Amended Order will become effective at 12:01 a.m. on December 6, 2021.

FOR FURTHER INFORMATION CONTACT: Jennifer Buigut, Division of Global Migration and Quarantine, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H16–4, Atlanta, GA 30329. Email: *dgmqpolicyoffice@cdc.gov.* Telephone: 1–800–232–4636.

SUPPLEMENTARY INFORMATION: This Amended Order updates COVID–19 testing requirements for air passengers 2 years or older boarding a flight to the United States.

This Amended Order prohibits the boarding of any passenger 2 years or older on any airline or aircraft destined to the United States from a foreign country unless the passenger presents paper or digital documentation of one of the following requirements:

(i) A negative pre-departure viral test result for SARS–CoV–2 conducted on a specimen collected no more than 1 calendar day before the flight's departure from a foreign country (*Qualifying Test*)

Or

(ii) Documentation of having recovered from COVID–19 in the past 90 days in the form of both of the following (*Documentation of Recovery*):

- A positive viral test result for SARS–CoV–2 conducted on a specimen

collected no more than 90 calendar days before the flight; *and*

• A letter from a licensed healthcare provider or public health official stating that the passenger has been cleared for travel.

This Amended Order also constitutes a controlled free pratique to any airline or other aircraft operator with an aircraft arriving into the United States. Pursuant to this controlled free pratique, the airline or other aircraft operator must comply with the requirements outlined in the Order.

A copy of the Amended Order and Passenger Attestation form is provided below. A copy of the signed Amended Order and Passenger Attestation form can be found at *https://www.cdc.gov/quarantine/fr-proof-negative-test.html.*

CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC) DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS)

NOTICE AND AMENDED ORDER UNDER SECTION 361 OF THE PUBLIC HEALTH SERVICE ACT (42 U.S.C. 264) AND 42 CODE OF FEDERAL REGULATIONS 71.20 & 71.31(b)

REQUIREMENTS FOR NEGATIVE PRE-DEPARTURE COVID–19 TEST RESULT OR DOCUMENTATION OF RECOVERY FROM COVID–19 FOR ALL AIRLINE OR OTHER AIRCRAFT PASSENGERS ARRIVING INTO THE UNITED STATES FROM ANY FOREIGN COUNTRY

Summary

Pursuant to 42 CFR 71.20 and 71.31(b) and as set forth in greater detail below, this Notice and Amended Order prohibits the boarding of any passenger—2 years of age or older—on any aircraft destined to the United States [1] from a foreign country unless the passenger: [2]

Presents paper or digital documentation of one of the following requirements:

(iii) A negative pre-departure viral test result for SARS–CoV–2 conducted on a specimen collected no more than 1 calendar day before the flight's departure from a foreign country (*Qualifying Test*)

Or

(iv) Documentation of having recovered from COVID–19 in the past 90 days in the form of both of the following (*Documentation of Recovery*):

• A positive viral test result for SARS–CoV–2 conducted on a specimen collected no more than 90 calendar days before the flight; *and*

• A letter from a licensed healthcare provider or public health official stating that the passenger has been cleared for travel.

Each passenger must retain paper or digital documentation presented to the airline or other aircraft operator reflecting one of the following:

• A negative result for the *Qualifying Test; or*

• *Documentation of Recovery* from COVID–19.

Upon request, a passenger, or the passenger's authorized representative, must also produce such documentation to any U.S. government official or a cooperating state or local public health authority.

Pursuant to 42 CFR 71.31(b), and as set forth in greater detail below, this Notice and Amended Order constitutes a controlled free pratique to any airline or other aircraft operator with an aircraft arriving into the United States.[3] Pursuant to this controlled free pratique, the airline or other aircraft operator must comply with the following conditions to receive permission for the aircraft to enter and disembark passengers within the United States:

• Airline or other aircraft operator must confirm that every passenger onboard the aircraft has presented a negative result for a *Qualifying Test* or *Documentation of Recovery.*

• Airline or other aircraft operator must verify that every passenger onboard the aircraft has attested to receiving a negative result for the *Qualifying Test* or having tested positive for SARS–CoV–2 on a specimen collected no more than 90 calendar days before the flight and been cleared to travel as *Documentation of Recovery.*

This Notice and Amended Order does not alter the obligation of persons to comply with the applicable requirements of other CDC Orders, including:

• Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs (published at 86 FR 8025, February 3, 2021) (as may be further amended);

• Amended Order Implementing Presidential Proclamation on Advancing the Safe Resumption of Global Travel During the COVID–19 Pandemic (published at 86 FR 61224, November 5, 2021); and

• Other CDC Orders or CDC Directives that may be published relating to preventing the introduction, transmission, and spread of COVID–19 into and throughout the United States.

This Notice and Amended Order supersede the previous Order signed by the CDC Director on October 25, 2021. This Order shall enter into effect for flights departing at or after 12:01 a.m. EST (5:01 a.m. GMT) on December 06, 2021.

Statement of Intent

This Amended Order shall be interpreted and implemented to achieve the following paramount objectives:

• Preservation of human life;

• Preventing the further introduction, transmission, and spread of the virus that causes COVID–19 into the United States, including the Omicron virus variant and other new virus variants;

• Preserving the health and safety of crew members, passengers, airport personnel, and communities; and

• Preserving hospital, healthcare, and emergency response resources within the United States.

Definitions

Aircraft shall have the same definition as under 49 U.S.C. 40102(a)(6). ''Aircraft'' includes, but is not limited to, commercial, general aviation, and private aircraft destined for the United States from a foreign country.

Aircraft Operator means an individual or organization causing or authorizing the operation of an aircraft.

Airline shall have the same definition as under 42 CFR 71.1(b).

Attest/Attestation means having completed the attestation in Attachment A.[4] Such attestation may be completed in paper or digital form. The attestation

[1] This includes any flight regardless of whether the United States is the final destination or a connection to another country.

[2] A parent or other authorized individual may present the required documentation on behalf of a passenger 2–17 years of age. Children under the age of 2 years of age are not subject to the requirements of this Amended Order. An authorized individual may act on behalf of any passenger who is unable to act on their own behalf (*e.g.,* by reason of age, or physical or mental impairment).

[3] On October 25, 2021, the President issued a Proclamation, titled, ''Advancing the Safe Resumption of Global Travel During the COVID–19 Pandemic.'' On November 26, 2021, the President issued a Proclamation, titled, ''A Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019.'' These Proclamations were issued pursuant to Sections1182(f) and 1185(a)(1) of Title 8, and Section 301 of Title 3, United States Code. This amended CDC Order complements and advances these Proclamations.

[4] CDC has provided a combined passenger disclosure and attestation that fulfills the requirements of CDC Orders: *Requirements for Negative Pre-departure COVID–19 Test Result or Documentation of Recovery from COVID–19 and Testing for All Airline or Other Aircraft Passengers Arriving into the United States from Any Foreign Country* and *Order Implementing Presidential Proclamation on Advancing the Safe Resumption of Global Travel During the COVID–19 Pandemic.*

is a statement, writing, entry, or other representation under 18 U.S.C. 1001.[5]

Documentation of Recovery means paper or digital documentation of having recovered from COVID–19 in the form of a positive SARS–CoV–2 viral test result and a letter from a licensed healthcare provider or public health official stating that the person has been cleared for travel (*i.e.,* has recovered).[6] [7] The viral test must have been conducted on a specimen collected no more than 90 calendar days before the departure of the flight, or at such other intervals as specified in CDC guidance.

Foreign country means anywhere that is not a state, territory, or possession of the United States.

Qualifying Test means a negative result on a SARS–CoV–2 viral test that was conducted on a specimen collected no more than *1 calendar day* before the flight's departure from a foreign country to the United States.

United States has the same definition as ''United States'' in 42 CFR 71.1(b), meaning ''the 50 States, District of Columbia, and the territories (also known as possessions) of the United States, including American Samoa, Guam, the Northern Mariana Islands, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.''

Viral Test means a viral detection test for current infection (*i.e.,* a nucleic acid amplification test [NAAT] or a viral antigen test) cleared, approved, or issued an emergency use authorization (EUA) by the U.S. Food and Drug Administration, or granted marketing authorization by the relevant national authority, for the detection of SARS–CoV–2, performed in accordance with the approval/clearance/EUA/marketing authorization.

Exemptions

The following categories of individuals and organizations are exempt from the requirements of this Amended Order:

- Crew members of airlines or other aircraft operators if they follow industry standard protocols for the prevention of COVID–19 as set forth in relevant Safety Alerts for Operators (SAFOs) issued by the Federal Aviation Administration (FAA).[8]
- Airlines or other aircraft operators transporting passengers with COVID–19 pursuant to CDC authorization and in accordance with CDC guidance.[9]
- U.S. federal law enforcement personnel on official orders who are traveling for the purpose of carrying out a law enforcement function, provided they are covered under an occupational health and safety program that takes measures to ensure personnel are not symptomatic or otherwise at increased risk of spreading COVID–19 during travel. Those traveling for training or other business purposes remain subject to the requirements of this Order.
- U.S. military personnel, including civilian employees, dependents, contractors, and other U.S. government employees when traveling on U.S. military assets (including whole aircraft charter operators), if such individuals are under competent military or U.S. government travel orders and observing U.S. Department of Defense guidance to prevent the transmission of COVID–19 as set forth in *Force Protection Guidance Supplement 20—Department of Defense Guidance for Personnel Traveling During the Coronavirus Disease 2019 Pandemic* (April 12, 2021) including its testing guidance.[10]
- Individuals and organizations for which the issuance of a humanitarian exemption is necessary based on both: (1) Exigent circumstances where emergency travel is required to preserve health and safety (*e.g.,* emergency medical evacuations); and (2) where pre-departure testing cannot be accessed or completed before travel because of exigent circumstances.

Background

A. COVID–19 Pandemic

Since January 2020, the respiratory disease known as ''COVID–19,'' caused by a novel coronavirus (SARS–CoV–2), has spread globally, including cases reported in all 50 states within the United States, plus the District of Columbia and all U.S. territories. As of December 02, 2021, there have been over 262,000,000 million cases of COVID–19 globally, resulting in over 5,200,000 deaths.[11] In the United States, more than 48,000,000 cases have been identified, and over 775,000 deaths attributed to the disease.

SARS–CoV–2 spreads mainly from person-to-person through respiratory fluids released during exhalation, such as when an infected person coughs, sneezes, or talks. Exposure to these respiratory fluids occurs in three principal ways: (1) Inhalation of very fine respiratory droplets and aerosol particles; (2) deposition of respiratory droplets and particles on exposed mucous membranes in the mouth, nose, or eye by direct splashes and sprays; and (3) touching mucous membranes with hands that have been soiled either directly by virus-containing respiratory fluids or indirectly by touching surfaces with virus on them.[12] [13] Spread is more likely when people are in close contact with one another (within about 6 feet), especially in crowded or poorly ventilated indoor settings. Persons who are not fully vaccinated, including those with asymptomatic or pre-symptomatic infections, are significant contributors to community SARS–CoV–2 transmission and occurrence of COVID–19.[14] [15]

[5] CDC encourages airlines and aircraft operators to incorporate the attestation into paperless check-in processes. An airline or aircraft operator may use a third party (including a third-party application) to collect attestations, including to provide translations. However, an airline or aircraft operator has sole legal responsibility to provide and collect attestations, to ensure the accuracy of any translation, and to comply with all other obligations under this Order. An airline or aircraft operator is responsible for any failure of a third party to comply with this Order. An airline or aircraft operator may not shift any legal responsibility to a third party.

[6] Healthcare providers and public health officials should follow CDC guidance in clearing patients for travel to the United States. Applicable guidance is available at *https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html.*

[7] A letter from a healthcare provider or a public health official that clears the person to end isolation (*e.g.,* to return to work or school), can also be used to show that the person has been cleared to travel, even if travel is not specifically mentioned in the letter.

[8] Airlines, aircraft operators, and their crew members may follow stricter protocols for crew and passenger health, including testing protocols. SAFO 20009, COVID–19: Updated Interim Occupational Health and Safety Guidance for Air Carriers and Crews, available at *https://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/safo/all_safos/media/2020/SAFO20009.pdf.*

[9] Interim Guidance for Transporting or Arranging Transportation by Air into, from, or within the United States of People with COVID–19 or COVID–19 Exposure, available at *https://www.cdc.gov/quarantine/interim-guidance-transporting.html.*

[10] Force Protection Guidance Supplement 20—Department of Defense Guidance for Personnel Traveling During the Coronavirus Disease 2019 Pandemic, available at *https://media.defense.gov/2021/Apr/16/2002622876/-1/-1/1/MEMORANDUM-FOR-FORCE-HEALTH-PROTECTION-GUIDANCE-SUPPLEMENT%2020-DEPARTMENT-OF-DEFENSE-GUIDANCE-FOR-PERSONNEL-TRAVELING-DURING-THE-CORONAVIRUS-DISEASE-2019-PANDEMIC.PDF.*

[11] *https://covid19.who.int/.*

[12] *Scientific Brief: SARS–CoV–2 Transmission,* Centers for Disease Control and Prevention (May 7, 2021), *https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html.*

[13] *Science Brief: SARS–CoV–2 and Surface (Fomite) Transmission for Indoor Community Environments,* Centers for Disease Control and Prevention (Apr. 5, 2021), *https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html.*

[14] Moghadas SM, Fitzpatrick MC, Sah P, et al. The implications of silent transmission for the control of COVID–19 outbreaks. *Proc Natl Acad Sci U S A.* 2020;117(30):17513–17515.10.1073/pnas.2008373117, available at *https://www.ncbi.nlm.nih.gov/pubmed/32632012.*

[15] Johansson MA, Quandelacy TM, Kada S, et al. SARS–CoV–2 Transmission from People Without COVID–19 Symptoms. Johansson MA, et al. JAMA Netw Open. 2021 January4;4(1):e2035057. doi: 10.1001/jamanetworkopen.2020.35057.

Among adults, the risk for severe illness from COVID–19 increases with age, with older adults at highest risk.[16] Severe illness means that persons with COVID–19 may require hospitalization, intensive care, or a ventilator to help them breathe. People of any age with certain underlying medical conditions (*e.g.,* cancer, obesity, serious heart conditions, diabetes, conditions that weaken the immune system) are at increased risk for severe illness from COVID–19.[17]

B. Emergence of Variants of Concern: Omicron

New variants of SARS–CoV–2 have emerged globally, several of which have been broadly classified as ''variants of concern.'' Some variants are more transmissible, even among those who are vaccinated, and some may cause more severe disease, which can lead to more hospitalizations and deaths among infected individuals.[18] Furthermore, recent findings suggest that antibodies generated during previous infection or vaccination may have a reduced ability to neutralize some variants, resulting in reduced effectiveness of treatments or vaccines, or increased diagnostic detection failures.[19] The emergence of variants that substantially decrease the effectiveness of available vaccines against severe or deadly disease is a primary public health concern.

On November 24, 2021, the Republic of South Africa informed the World Health Organization (WHO) of a new variant of SARS–CoV–2, the virus that causes COVID–19, that was detected in that country. On November 26, 2021, WHO designated the variant B.1.1.529 as a variant of concern and named it Omicron.[20] This decision was based on the evidence presented to the Technical Advisory Group on SARS–CoV–2 Virus Evolution (TAG–VE) which is a group of independent experts charged with assessing the evolution of SARS–CoV–2 and examining if specific mutations and combinations of mutations may alter how the virus spreads and whether it may cause more severe illness. The evidence presented to the TAG–VE noted that Omicron has several mutations that may have an impact on how easily it spreads or the severity of illness it causes.[21]

Currently, there are no data available to assess the ability of sera from vaccinated persons or those with previous SARS–CoV–2 infection to neutralize the Omicron variant. The spike protein is the primary target of vaccine-induced immunity. The Omicron variant contains more changes in the spike protein than have been observed in other variants. Based on the number of substitutions, the location of these substitutions, and data from other variants with similar spike protein substitutions, significant reductions in neutralizing activity of sera from vaccinated or previously infected individuals, which may indicate reduced protection from infection, are anticipated.[22]

At the present time, WHO and CDC are coordinating with many researchers around the world to better understand the Omicron variant. Studies include assessments of transmissibility, severity of infection (including symptoms), performance of vaccines and diagnostic tests, and effectiveness of treatments. CDC and other federal agencies are working closely with international public health agencies to monitor the situation closely and are taking steps to enhance surveillance for and response to the Omicron variant within the United States. Considering these ongoing studies into the potential danger to public health posed by this newly identified variant, CDC has determined that proactive measures must be implemented now to protect the U.S. public health from the importation, transmission and spread of the emergent Omicron variant into the United States.

C. Requirement for Pre-Departure Testing Regardless of Vaccination Status

On November 26, 2021, the President issued a Proclamation suspending the entry into the United States, of immigrants or nonimmigrants, of noncitizens who were physically present within certain Southern African countries during the 14-day period preceding their entry or attempted entry into the United States.[23] This Proclamation was issued under the authority of sections 212(f) and 215(a) of the Immigration and Nationality Act, as codified at sections 1182(f) and 1185(a) of title 8, United States Code (U.S.C.), and 3 U.S.C. 301 based on a determination that entry of certain noncitizens covered by the Proclamation would be detrimental to the interests of the United States. The Proclamation directs the Secretary of State, the Secretary of Transportation, and the Secretary of Homeland Security to endeavor to ensure that any noncitizen subject to the Proclamation does not board an aircraft traveling to the United States, to the extent permitted by law. The Proclamation also states that any individuals exempt from the suspension may nevertheless be subject to an entry suspension, limitation, or restriction under Proclamation 10294 of October 25, 2021.

As the virus that causes COVID–19 spreads, it has new opportunities to change (mutate) and become more difficult to control. While it is known and expected that viruses change through mutation leading to the emergence of new variants, the emergent Omicron variant is particularly concerning and of critical significance for this Amended Order. CDC has determined that given the rapid spread of the Omicron variant, including to countries and regions outside of those originally identified in the November 26 Proclamation, requiring a SARS–CoV–2 test no more than 1 calendar day before the flight's departure from a foreign country as specified in this Notice and Amended Order, and applicable to all passengers regardless of vaccination status or country of origin (except passengers who present valid *Documentation of Recovery*), is necessary to protect the public health of the United States.

In response to this new variant, the United States Government, including CDC, reexamined its policies on international travel and concluded the proactive 1 calendar day testing measure is necessary to protect the public health and should remain in place until more information becomes available that may alter or improve the public health outlook. This Amended Order requires that all passengers,

[16] CDC. COVID–19 Risks and Vaccine Information for Older Adults *https://www.cdc.gov/aging/covid19/covid19-older-adults.html.*

[17] People with Certain Medical Conditions *https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html.*

[18] Dougherty K, Mannell M, Naqvi O, Matson D, Stone J. SARS–CoV–2 B.1.617.2 (Delta) Variant COVID–19 Outbreak Associated with a Gymnastics Facility—Oklahoma, April–May 2021. MMWR Morb Mortal Wkly Rep 2021;70:1004–1007. DOI: *http://dx.doi.org/10.15585/mmwr.mm7028e2* (describing a B.1.617.2 (Delta) Variant COVID–19 outbreak associated with a gymnastics facility and finding that the Delta variant is highly transmissible in indoor sports settings and households, which might lead to increased incidence rates).

[19] SARS–CoV–2 Variant Classifications and Definitions, Centers for Disease Control and Prevention, *https://www.cdc.gov/coronavirus/2019-ncov/variants/variant-info.html#Concern.*

[20] *https://www.who.int/news/item/26-11-2021-classification-of-omicron-(b.1.1.529)-sars-cov-2-variant-of-concern.*

[21] *https://www.who.int/news/item/28-11-2021-update-on-omicron.*

[22] *Science Brief: Omicron (B.1.1.529) Variant,* Centers for Disease Control and Prevention, *https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/scientific-brief-omicron-variant.html.*

[23] *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/11/26/a-proclamation-on-suspension-of-entry-as-immigrants-and-nonimmigrants-of-certain-additional-persons-who-pose-a-risk-of-transmitting-coronavirus-disease-2019/.*

regardless of vaccination status or country of origin, except passengers who present a valid *Documentation of Recovery,* provide documentation of a negative SARS–CoV–2 viral test result from a specimen collected no more than 1 calendar day preceding the departure of the passenger's originating flight to the United States. While CDC's previous Amended Order [24] indicated that ''decreasing the time window for testing before departure from three days to one day provides minimal additional public health benefit for fully vaccinated travelers,'' this statement did not account for the Omicron variant, which had not yet been identified.

At this time, it is unknown what level of protection current vaccines will provide against this newly emergent mutated variant. To best protect the health of the United States, unless and until CDC can confirm that current approved and authorized vaccines provide adequate protection against the Omicron variant, all passengers—including those who are fully vaccinated, but excluding passengers who present a valid *Documentation of Recovery*—must obtain a viral test on a specimen collected no more than 1 calendar day before their flight's departure to meet the requirements of this Amended Order. The one-day time window, a reduction from the previous 3-day window for fully vaccinated passengers, will provide less opportunity to develop infection with the Omicron variant prior to arrival into the United States.

Testing for SARS–CoV–2 infection is a proactive, risk-based approach that is not dependent on the infecting variant, nor on vaccination status of the individual. This risk-based testing approach has been addressed in CDC guidance and the Runway to Recovery guidance jointly issued by the Departments of Transportation, Homeland Security, and Health and Human Services.[25] Most countries now use testing in some form to monitor risk and control introduction and spread of SARS–CoV–2.[26] With case counts and deaths due to COVID–19 continuing to increase around the globe and the emergence of the new and concerning Omicron variant, the United States is taking a multi-layered proactive approach to combating COVID–19, concurrently preventing and slowing the continued introduction of cases and further spread of the virus within U.S. communities. CDC acknowledges that pre-departure testing does not eliminate all risk.

D. Statement of Good Cause Under the Administrative Procedure Act (''APA'')

To reduce introduction and spread of current and future SARS–CoV–2 variants into the United States at a time when global air travel is increasing, CDC must take quick and targeted action to help curtail the introduction and spread of the Omicron variant into the United States. As of December 2, 2021, WHO has indicated that 23 countries have reported cases of the Omicron variant, many of which were associated with international travelers.

This Amended Order is not a rule within the meaning of the Administrative Procedure Act (''APA'') but rather is an emergency action taken under the existing authority of 42 U.S.C. 264(a) and 42 CFR 71.20 and 71.31(b), which were promulgated in accordance with the APA after full notice-and-comment rulemaking and a delay in effective date. In the event that this Amended Order qualifies as a new rule under the APA, notice and comment and a delay in effective date are not required because there is good cause to dispense with prior public notice and comment and a delay in effective date. *See* 5 U.S.C. 553(b)(B), (d)(3).

Considering the rapid and unpredictable developments in the public health emergency caused by COVID–19, including the recently identified emergent Omicron variant, it would be impracticable and contrary to the public's health, and by extension the public's interest, to delay the issuance and effective date of this Amended Order. Further delay could increase risk of transmission and importation of additional undetected cases of SARS–CoV–2 Omicron variant or other emerging variants through passengers.

Similarly, the Office of Information and Regulatory Affairs has determined that if this Amended Order were a rule, it would be a major rule under Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (the Congressional Review Act), 5 U.S.C. 804(2), but there would not be a delay in its effective date as the agency has determined that there would be good cause to make the requirements herein effective immediately under the APA, 5 U.S.C. 808(2).

This Amended Order is also an economically significant regulatory action under Executive Order 12866 and has therefore been reviewed by the Office of Information and Regulatory Affairs of the Office of Management and Budget.

If any provision of this Amended Order, or the application of any provision to any carriers, persons, or circumstances, shall be held invalid, the remainder of the provisions, or the application of such provisions to any carriers, persons, or circumstances other than those to which it is held invalid, shall remain valid and in effect.

Pursuant to 5 U.S.C. 553(b)(B), and for the reasons stated above, I hereby conclude that notice-and-comment rulemaking would defeat the purpose of the Amended Order and endanger the public health, and is, therefore, impracticable and contrary to the public interest. For the same reasons, I have determined, consistent with 5 U.S.C. 553(d)(3), that there is good cause to make this Amended Order effective immediately upon filing at the Office of the Federal Register.

Action

For the reasons outlined above, I hereby determine that passengers covered by this Amended Order are at risk of transmitting SARS–CoV–2 virus, including the emergent Omicron variant and other virus variants. Accordingly, requiring passengers to demonstrate pre-departure either a negative COVID–19 test result or recovery from COVID–19 after previous SARS–CoV–2 infection in the past 90 days is necessary to reduce the risk of transmission of the SARS–CoV–2 virus, including the Omicron variant and other virus variants, and to protect the health of fellow passengers, aircraft crew, and U.S. communities. This Amended Order shall remain effective until either the expiration of the Secretary of HHS' declaration that COVID–19 constitutes a public health emergency, or I determine that based on specific public health or other considerations that continuation of this Order is no longer necessary to prevent the further introduction, transmission, and spread of COVID–19 into the United States, whichever occurs first. Upon determining that continuation of this Order is no longer necessary to prevent the further introduction, transmission, and spread of COVID–19 into the United States, I will publish a notice in the **Federal Register** terminating this Order. I retain the authority to modify or terminate the Order, or its implementation, at any time as needed to protect public health.

[24] *https://www.federalregister.gov/documents/2021/11/05/2021-24388/requirement-for-negative-pre-departure-covid-19-test-result-or-documentation-of-recovery-from.*

[25] Runway to Recovery 1.1, December 21, 2020, available at *https://www.transportation.gov/briefing-room/runway-recovery-11.*

[26] *https://ourworldindata.org/coronavirus-testing#testing-and-contact-tracing-policy.*

1. Requirements for Airlines & Other Aircraft Operators

Any airline or other aircraft operator with passengers arriving into the United States from a foreign country, shall:

A. Confirm that every passenger—2 years or older—onboard the aircraft has paper or digital documentation reflecting a *Qualifying Test* or *Documentation of Recovery.*

(1) Requirements for a *Qualifying Test* include:

a. Documentation of a negative SARS–CoV–2 viral test result from a specimen collected no more than 1 calendar day preceding the passenger's flight to the United States. The negative SARS–CoV–2 viral test result must include:

i. personal identifiers (*e.g.,* name and date of birth) on the negative test result that match the personal identifiers on the passenger's passport or other travel documents;

ii. a specimen collection date indicating that the specimen was collected no more than 1 calendar day before the flight's departure (or first flight in a series of connections booked on the same itinerary);

iii. the type of viral test indicating it is a NAAT or antigen test;

iv. a test result that states ''NEGATIVE,'' ''SARS–CoV–2 RNA NOT DETECTED,'' ''SARS–CoV–2 ANTIGEN NOT DETECTED,'' or ''COVID–19 NOT DETECTED,'' or other indication that SARS–CoV–2 was not detected in the individual's specimen. A test marked ''invalid'' is not acceptable; and

v. information about the entity issuing the result (*e.g.,* laboratory, healthcare entity, or telehealth service), such as the name and contact information.

(2) Requirements for *Documentation of Recovery* include:

a. Documentation of a positive SARS–CoV–2 viral test result from a specimen collected no more than 90 calendar days preceding the passenger's scheduled flight to the United States.[27] The positive SARS–CoV–2 viral test result must include:

i. Personal identifiers (*e.g.,* name and date of birth) on the positive test result match the personal identifiers on the passenger's passport or other travel documents;

ii. a specimen collection date indicating that the specimen was collected no more than 90 calendar days before the flight's departure;

iii. information that the test performed was a viral test indicating it is a NAAT or antigen test;

iv. a test result that states ''POSITIVE,'' ''SARS–CoV–2 RNA DETECTED,'' ''SARS–CoV–2 ANTIGEN DETECTED,'' or ''COVID–19 DETECTED,'' or other indication that SARS–CoV–2 was detected in the individual's specimen. A test marked ''invalid'' is not acceptable; and

v. information about the entity issuing the result (*e.g.,* laboratory, healthcare entity, or telehealth service), such as the name and contact information.

b. A signed letter from a licensed healthcare provider or a public health official stating that the passenger has been cleared for travel.[28] [29] The letter must have personal identifiers (*e.g.,* name and date of birth) that match the personal identifiers on the passenger's passport or other travel documents. The letter must be signed and dated on official letterhead that contains the name, address, and phone number of the healthcare provider or public health official who signed the letter.

B. Confirm that each passenger has attested to having received a negative result for a *Qualifying Test* or having tested positive for SARS–CoV–2 on a specimen collected no more than 90 calendar days before the flight and been cleared to travel. Airlines or other aircraft operators must retain a copy of each passenger attestation for 2 years. The attestation is attached to this order as Attachment A.

C. Not board any passenger without confirming the documentation as set forth in section 1.A and 1.B.

Any airline or other aircraft operator that fails to comply with section 1, ''Requirements for Airlines & Other Aircraft Operators,'' may be subject to criminal penalties under, *inter alia,* 42 U.S.C. 271 and 42 CFR 71.2, in conjunction with 18 U.S.C. 3559 and 3571.

2. Requirements for Aircraft Passengers

Any aircraft passenger[30] departing from any foreign country with a destination in the United States shall—

A. Present paper or digital documentation reflecting one of the following:

(1) A negative *Qualifying Test* that has a specimen collection date indicating that the specimen was collected no more than 1 calendar day before the flight's departure (or first flight in a series of connections booked on the same itinerary); or

(2) *Documentation of Recovery* from COVID–19 that includes a positive SARS–CoV–2 viral test result conducted on a specimen collected no more than 90 calendar days before the flight and a letter from a licensed healthcare provider or public health official stating that the passenger has been cleared for travel.[31] [32]

B. Provide the attestation to the airline or other aircraft operator, of:

(1) Having received a negative result for the *Qualifying Test;* or

(2) having tested positive for SARS–CoV–2 on a specimen collected no more than 90 calendar days before the flight and been cleared to travel.

The attestation is attached to this order as Attachment A. Unless otherwise permitted by law, a parent or other authorized individual may present the required documentation on behalf of a passenger 2–17 years of age. An authorized individual may act on behalf of any passenger who is unable to act on their own behalf (*e.g.,* by reason of age, or physical or mental impairment).

C. Retain a copy of the applicable documentation listed in part A of this section and produce such documentation upon request to any U.S. government official or a cooperating state or local public health authority after arrival into the United States.

Any passenger who fails to comply with the requirements of section 2, ''Requirements for Aircraft Passengers,'' may be subject to criminal penalties under, *inter alia,* 42 U.S.C. 271 and 42 CFR 71.2, in conjunction with 18 U.S.C. 3559 and 3571. Willfully giving false or misleading information to the government may result in criminal penalties under, *inter alia,* 18 U.S.C. 1001.

This Amended Order shall be enforceable through the provisions of 18 U.S.C. 3559, 3571; 42 U.S.C. 243, 268, 271; and 42 CFR 71.2.

[27] Interim Guidance on Ending Isolation and Precautions for Adults with COVID–19 *https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html.*

[28] Healthcare providers and public health officials should follow CDC guidance in clearing patients for travel to the United States. Applicable guidance is available at *https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html.*

[29] A letter from a healthcare provider or a public health official that clears the person to end isolation, *e.g.,* to return to work or school, can also be used to show that the person has been cleared to travel, even if travel is not specifically mentioned in the letter.

[30] A parent or other authorized individual may present the required documentation on behalf of a passenger 2–17 years of age. An authorized individual may act on behalf of any passenger who is unable to act on their own behalf (*e.g.,* by reason of age, or physical or mental impairment).

[31] A letter from a healthcare provider or a public health official that clears the person to end isolation, *e.g.,* to return to work or school, can also be used to show that the person has been cleared to travel, even if travel is not specifically mentioned in the letter.

[32] Healthcare providers and public health officials should follow CDC guidance in clearing patients for travel to the United States. Applicable guidance is available at *https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html.*

As the pandemic continues to rapidly evolve and more scientific data becomes available regarding the emergent Omicron variant and/or the effectiveness of COVID–19 vaccines related to currently circulating variants, CDC may exercise its enforcement discretion to adjust the scope of accepted pre-departure testing requirements to allow passengers and airline and aircraft operators greater flexibility regarding the requirements of this Amended Order or to align with current CDC guidance. Such exercises of enforcement discretion will be announced on CDC's website and the Amended Order will be further amended as soon as practicable through an updated publication in the **Federal Register**.

Effective Date

This Amended Order shall enter into effect for flights departing at or after 12:01 a.m. EST (5:01 a.m. GMT) on December 6, 2021, and will remain in effect unless modified or rescinded based on specific public health or other considerations, or until the Secretary of Health and Human Services rescinds the determination under section 319 of the Public Health Service Act (42 U.S.C. 247d) that a public health emergency exists with respect to COVID–19.

BILLING CODE 4163–18–P

Form OMB Control No: XXXX-XXXX

Expiration date: XX/XX/XXXX[33]

ATTACHMENT A: COMBINED PASSENGER DISCLOSURE AND ATTESTATION TO THE UNITED STATES OF AMERICA

This combined passenger disclosure and attestation fulfills the requirements of U.S. Centers for Disease Control and Prevention (CDC) Orders: *Requirement for Proof of Negative COVID-19 Test Result or Recovery from COVID-19 for All Airline Passengers Arriving into the United States* and *Order Implementing Presidential Proclamation on Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic.*[34] As directed by the CDC and the Transportation Security Administration (TSA), through Security Directive 1544-21-03

[33] Public reporting burden of this collection of information is estimated to average 2 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the 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. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to CDC/ATSDR Reports Clearance Officer, 1600 Clifton Road NE, MS D-74, Atlanta, Georgia 30333; ATTN: PRA XXXX-XXXX

[34] These requirements (e.g., proof of negative COVID-19 test result and proof of being fully vaccinated against COVID-19) do not apply to crew members of airlines or other aircraft operators if they are traveling for the purpose of operating the aircraft, or repositioning (i.e., on "deadhead" status), provided their assignment is under an air carrier's or operator's occupational health and safety program that follows applicable industry standard protocols for the prevention of COVID-19 as set forth in relevant Safety Alerts for Operators (SAFOs) issued by the Federal Aviation Administration (FAA).

and Emergency Amendment 1546-21-02, and consistent with CDC's Order implementing the Presidential Proclamation, all airline or other aircraft operators must provide the following disclosures to all passengers prior to their boarding a flight from a foreign country to the United States.

The information provided below must be accurate and complete to the best of the individual's knowledge. Under United States federal law, the applicable portion of the attestation must be completed for each passenger age two or older and the attestation must be provided to the airline or aircraft operator prior to boarding a flight to the United States from a foreign country. Failure to complete and present the applicable portion of the attestation, or submitting false or misleading information, could result in delay of travel, denial of boarding, or denial of boarding on future travel, or put the passenger or other individuals at risk of harm, including serious bodily injury or death. Any passenger who fails to comply with these requirements may be subject to criminal penalties. Willfully providing false or misleading information may lead to criminal fines and imprisonment under, among others, 18 U.S.C. § 1001. Providing this information can help protect you, your friends and family, your communities, and the United States. CDC appreciates your cooperation.

AIRLINE AND AIRCRAFT OPERATOR DISCLOSURE REQUIREMENTS:

As required by United States federal law, all airlines or other aircraft operators must collect the passenger attestation on behalf of the U.S. Government.[35]

Required Proof of Negative COVID-19 Test Result or Recovery from COVID-19

All airlines and other aircraft operators must additionally confirm one of the following for each passenger – 2 years or older--prior to their boarding a flight to the United States from a foreign country:

1. A negative result for a *Qualifying Test* or
2. *Documentation of Recovery* from COVID-19 in the form of a positive COVID-19 viral test on a sample taken no more than 90 days prior to departure **and** a letter from a licensed healthcare provider or public health official stating that the passenger has been cleared for travel.

Required Proof of COVID-19 Vaccination for Non-U.S. citizen, Nonimmigrant Air Passengers

As directed by the TSA, including through a security directive or emergency amendment, all airlines and other aircraft

[35] Children under 2 years of age do not need to complete Section 1 or Section 2 of this attestation. The airline or other aircraft operator may permit them to board an aircraft without an attestation.

operators must additionally confirm one of the following for each noncitizen who is a nonimmigrant passenger prior to their boarding a flight to the United States from a foreign country:

1. Proof of being *Fully Vaccinated Against COVID-19*
2. Proof of being excepted from the requirement to be *Fully Vaccinated Against COVID-19*.

SECTION 1:

Passenger Attestation Requirement Relating to Proof of Negative COVID-19 Test Result or Recovery from COVID-19

TO BE COMPLETED BY OR ON BEHALF OF ALL PASSENGERS 2 YEARS OR OLDER, REGARDLESS OF CITIZENSHIP OR VACCINATION STATUS:[36]

A. NEGATIVE PRE-DEPARTURE TEST RESULT

[ ] I attest that I have received a **negative** pre-departure test result for COVID-19. The test was a viral test that was conducted on a specimen collected from me no more than **1 calendar day** before the flight's departure.

[ ] On behalf of [_____], I attest that this person received a **negative** pre-departure test result for COVID-19. The test was a viral test that was conducted

[36] U.S. military personnel, including civilian employees, dependents, contractors, and other U.S. government employees when traveling on official military travel orders are exempt from the testing or documentation or recovery requirement and do not need to fill out Section 1. U.S. Federal Law Enforcement Officials traveling on official orders for purposes of carrying out a law enforcement function are also exempt from the testing or documentation of recovery requirement and do not have to fill out Section 1.

on a specimen collected from the person no more than **1 calendar day** before the flight's departure.

B. DOCUMENTATION OF RECOVERY FROM COVID-19

[ ] I attest that I tested positive for COVID-19 and **have been cleared** for travel by a licensed healthcare provider or public health official. The test was a viral test that was conducted on a specimen collected from me no more than 90 days before the flight's departure.

[ ] On behalf of [_____], I attest that this person tested positive for COVID-19 and **has been cleared for travel** by a licensed healthcare provider or public health official. The test was a viral test that was conducted on a specimen collected from the person no more than 90 days before the flight's departure.

C. HUMANITARIAN EXEMPTION

[ ] I attest that I have received a humanitarian exemption to the testing requirement, as determined by CDC and documented by an official U.S. Government letter.

[ ] On behalf of [_____], I attest that this person has received a humanitarian exemption to the testing requirement, as determined by CDC and documented by an official U.S. Government letter.

SECTION 2:

Passenger Attestation Requirement Relating to Presidential Proclamation on Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic

TO BE COMPLETED BY OR ON BEHALF OF EVERY COVERED INDIVIDUAL 2 YEARS OR OLDER.[37]

Covered individuals must complete Section 1 and Section 2, and comply with applicable after travel requirements in Section 2.

A. FULLY VACCINATED COVERED INDIVIDUALS

(After you check a box in A, proceed to signature line and sign the form to complete the Attestation)

[ ] I attest that I am **fully vaccinated** against COVID-19.

[ ] On behalf of [_____], I attest that this person is **fully vaccinated** against COVID-19.

B. NOT FULLY VACCINATED COVERED INDIVIDUALS

[37] This means any passenger covered by the Presidential Proclamation and CDC's implementing Order: a noncitizen (other than a U.S. lawful permanent resident or U.S. national) who is a nonimmigrant seeking to enter the United States by air travel. This term does not apply to crew members of airlines or other aircraft operators if such crewmembers and operators adhere to all industry standard protocols for the prevention of COVID-19, as set forth in relevant guidance for crewmember health issued by the CDC or by the Federal Aviation Administration in coordination with the CDC.

[ ] I am a Covered Individual who is not fully vaccinated and attest that I am **excepted** from the requirement to present *Proof of Being Fully Vaccinated Against COVID-19* based on one of the following *(check only one box, as applicable)*:

- ☐ Diplomatic and Official Foreign Government Travel (*proceed to and complete C only and then sign the form to complete the Attestation*).
- ☐ Child 2 to 17 years of age (*proceed to and complete D only and then sign the form or have a legal representative sign on this person's behalf to complete the Attestation)*.
- ☐ Participant in certain COVID-19 vaccine trials as determined by CDC (*proceed to and complete D only and then sign the form to complete the Attestation)*.
- ☐ Medical contraindication to an accepted COVID-19 vaccine as determined by CDC (*proceed to and complete E only and then sign the form to complete the Attestation)*.
- ☐ Humanitarian or emergency exception as determined by CDC and documented by an official U.S. Government letter (*proceed to and complete F only and then sign the form to complete the Attestation)*.
- ☐ Valid nonimmigrant visa holder (excluding B-1 or B-2 visas) and citizen of a *Foreign Country with Limited COVID-19 Vaccine Availability* as determined by CDC

(*proceed to and complete F only and then sign the form to complete the Attestation*).

- ☐ Member of the U.S. Armed Forces or spouse or child (under 18 years of age) of a member of the U.S. Armed Forces (*proceed to signature line only and sign the form to complete the Attestation*).
- ☐ Sea crew member traveling pursuant to a C-1 and D nonimmigrant visa (*proceed to and complete F only and then sign the form to complete the Attestation*).
- ☐ Person whose entry is in the U.S. national interest as determined by the Secretary of State, the Secretary of Transportation, the Secretary of Homeland Security, or their designees (*proceed to and complete G only and then sign the form to complete the Attestation*).

[ ] On behalf of [_____], I attest that this person is **excepted** from the requirement to present *Proof of Being Fully Vaccinated Against COVID-19* based on one of the following *(check only one box, as applicable)*:

- ☐ Diplomatic and Official Foreign Government Travel (*proceed to and complete C only and then sign the form to complete the Attestation*).
- ☐ Child 2 to 17 years of age (*proceed to and complete D only and then sign the form or have a legal representative sign on this person's behalf to complete the Attestation*).

- ☐ Participant in certain COVID-19 vaccine trials as determined by CDC (*proceed to and complete D only and then sign the form to complete the Attestation)*.
- ☐ Medical contraindication to an accepted COVID-19 vaccine as determined by CDC (*proceed to and complete E only and then sign the form to complete the Attestation)*.
- ☐ Humanitarian or emergency exception as determined by CDC and documented by an official U.S. Government letter (*proceed to and complete F only and then sign the form to complete the Attestation)*.
- ☐ Valid nonimmigrant visa holder (excluding B-1 or B-2 visas) and citizen of a *Foreign Country with Limited COVID-19 Vaccine Availability* as determined by CDC (*proceed to and complete F only and then sign the form to complete the Attestation)*.
- ☐ Member of the U.S. Armed Forces or spouse or child (under 18 years of age) of a member of the U.S. Armed Forces (*proceed to signature line only and sign the form to complete the Attestation*).
- ☐ Sea crew member traveling pursuant to a C-1 and D nonimmigrant visa (*proceed to and complete F only and then sign the form to complete the Attestation)*.
- ☐ Person whose entry is in the U.S. national interest as determined by the Secretary of State, the Secretary

of Transportation, the Secretary of Homeland Security, or their designees (*proceed to and complete G only and then sign the form to complete the Attestation).*

C. EXCEPTION: Diplomat and Official Foreign Government Travel

[ ] I am **excepted** from the requirement to present *Proof of Being Fully Vaccinated Against COVID-19* and have made the following arrangements (*must check all boxes in C and then proceed to sign Attestation*).

- ☐ To be tested with a COVID-19 viral test 3-5 days after arriving in the United States, unless I have documentation of having recovered from COVID-19 in the past 90 days;
- ☐ To self-quarantine for a full 7 calendar days, even if the test result to my post-arrival viral test is negative, except during periods when my attendance is required to carry out the purposes of the diplomatic or official foreign government travel (e.g., to attend official meetings or events), unless I have documentation of having recovered from COVID-19 in the past 90 days.
- ☐ To self-isolate if the result of the post-arrival viral test is positive or if I develop COVID-19 symptoms.

[ ] On behalf of [_____], I attest that such person is **excepted** from the requirement to present *Proof of Being Fully Vaccinated Against COVID-19* and has made or has had the following arrangements made on their behalf (*must check all boxes in C and then proceed to sign Attestation*).

- ☐ To be tested with a COVID-19 viral test 3-5 days after arriving in the United States, unless this person has documentation of having recovered from COVID-19 in the past 90 days;
- ☐ To self-quarantine for a full 7 calendar days, even if the test result to this person's post-arrival viral test is negative, except during periods when this person's attendance is required to carry out the purposes of the diplomatic or official foreign government travel (e.g., to attend official meetings or events), unless this person has documentation of having recovered from COVID-19 in the past 90 days.
- ☐ To self-isolate if the result of the post-arrival viral test is positive or if this person develops COVID-19 symptoms.

D. EXCEPTIONS:

- **Child 2 to 17 years of age**
- **Participant in certain COVID-19 vaccine trials as determined by CDC**

[ ] I attest that I am **excepted** from the requirement to present *Proof of Being Fully Vaccinated Against COVID-19* and have made the following arrangements (*must check all boxes in D and then proceed to sign Attestation*).

- ☐ To be tested with a COVID-19 viral test 3-5 days after arriving in the United States, unless I have documentation of having recovered from COVID-19 in the past 90 days;
- ☐ To self-isolate if the result of the post-arrival viral test is positive or if I develop COVID-19 symptoms.

[ ] On behalf of [_____], I attest that such person is **excepted** from the requirement to present *Proof of Being Fully Vaccinated Against COVID-19* and has made or has had the following arrangements made on their behalf (*must check all boxes in D and then proceed to sign Attestation*).

- ☐ To be tested with a COVID-19 viral test 3-5 days after arriving in the United States, unless this person has documentation of having recovered from COVID-19 in the past 90 days;
- ☐ To self-isolate if the result of the post-arrival viral test is positive or if this person develops COVID-19 symptoms.

E. EXCEPTION: Medical contraindication to an accepted COVID-19 vaccine as determined by CDC

[ ] I attest that I am **excepted** from the requirement to present *Proof of Being Fully Vaccinated Against COVID-19* and have made the following arrangements (*must check all boxes in E and then proceed to sign Attestation*).

- ☐ To be tested with a COVID-19 viral test 3-5 days after arriving in the United States, unless I have documentation of having recovered from COVID-19 in the past 90 days;
- ☐ To self-quarantine for a full 7 calendar days, even if the test result to my post-arrival viral test is negative, unless I have documentation of having recovered from COVID-19 in the past 90 days.
- ☐ To self-isolate if the result of the post-arrival viral test is positive or if I develop COVID-19 symptoms.

[ ] On behalf of [_____], I attest that such person is **excepted** from the requirement to present *Proof of Being Fully Vaccinated Against COVID-19* and has made or has had the following arrangements made on their behalf (*must check all boxes in E and then proceed to sign Attestation*).

- To be tested with a COVID-19 viral test 3-5 days after arriving in the United States, unless this person has documentation of having recovered from COVID-19 in the past 90 days;
- To self-quarantine for a full 7 calendar days, even if the test result to this person's post-arrival viral test is negative, unless this person has documentation of having recovered from COVID-19 in the past 90 days.
- To self-isolate if the result of the post-arrival viral test is positive or if this person develops COVID-19 symptoms.

F. EXCEPTIONS:

- **Humanitarian or emergency exception as determined by CDC;** or
- **Valid nonimmigrant visa holder (excluding B-1 or B-2 visas) and citizen of a Foreign Country with Limited COVID-19 Vaccine Availability as determined by CDC;** or
- **Sea crew member traveling pursuant to a C-1 and D nonimmigrant visa**

[ ] I attest that I am **excepted** from the requirement to present *Proof of Being Fully Vaccinated Against COVID-19*

and have made the following arrangements (*must check all boxes in F and then proceed to sign Attestation*).

- ☐ To be tested with a COVID-19 viral test 3-5 days after arriving in the United States, unless I have documentation of having recovered from COVID-19 in the past 90 days;
- ☐ To self-quarantine for a full 7 calendar days, even if the test result to my post-arrival viral test is negative, unless I have documentation of having recovered from COVID-19 in the past 90 days.
- ☐ To self-isolate if the result of the post-arrival viral test is positive or if I develop COVID-19 symptoms.
- ☐ To become fully vaccinated against COVID-19 within 60 days of arriving in the United States, or as soon thereafter as is medically appropriate, if intending to stay in the United States for more than 60 days.

[ ] On behalf of [_____], I attest that such person is **excepted** from the requirement to present *Proof of Being Fully Vaccinated Against COVID-19* and has made or has had the following arrangements made on their behalf (*must check all boxes in F and then proceed to sign Attestation*).

- ☐ To be tested with a COVID-19 viral test 3-5 days after arriving in the United States, unless this person has

documentation of having recovered from COVID-19 in the past 90 days;

- ☐ To self-quarantine for a full 7 calendar days, even if the test result to this person's post-arrival viral test is negative, unless this person has documentation of having recovered from COVID-19 in the past 90.
- ☐ To self-isolate if the result of the post-arrival viral test is positive or if this person develops COVID-19 symptoms.
- ☐ To become fully vaccinated against COVID-19 within 60 days of arriving in the United States, or as soon thereafter as is medically appropriate, if intending to stay in the United States for more than 60 days.

G. EXCEPTION: Person whose entry is in the U.S. National Interest

[ ] I am **excepted** from the requirement to present *Proof of Being Fully Vaccinated Against COVID-19* and have made the following arrangements (*must check all boxes in G and then proceed to sign Attestation*).

- ☐ To be tested with a COVID-19 viral test 3-5 days after arriving in the United States, unless I have documentation of having recovered from COVID-19 in the past 90 days;

- ☐ To self-quarantine for a full 7 calendar days, even if the test result to my post-arrival viral test is negative, except during periods when my attendance is required to carry out the purposes of the travel for the U.S. national interest (e.g., to attend official meetings or events), unless I have documentation of having recovered from COVID-19 in the past 90 days.
- ☐ To self-isolate if the result of the post-arrival viral test is positive or if I develop COVID-19 symptoms.
- ☐ To become fully vaccinated against COVID-19 within 60 days of arriving in the United States, or as soon thereafter as is medically appropriate, if intending to stay in the United States for more than 60 days.

[ ] On behalf of [_____], I attest that such person is excepted from the requirement to present *Proof of Being Fully Vaccinated Against COVID-19* and has made or has had the following arrangements made on their behalf (*must check all boxes in G and then proceed to sign Attestation*).

- ☐ To be tested with a COVID-19 viral test 3-5 days after arriving in the United States, unless this person has documentation of having recovered from COVID-19 in the past 90 days;

- ☐ To self-quarantine for a full 7 calendar days, even if the test result to this person's post-arrival viral test is negative, except during periods when this person's attendance is required to carry out the purposes of the travel for the U.S. national interest (e.g., to attend official meetings or events), unless this person has documentation of having recovered from COVID-19 in the past 90 days.
- ☐ To self-isolate if the result of the post-arrival viral test is positive or if this person develops COVID-19 symptoms.
- ☐ To become fully vaccinated against COVID-19 within 60 days of arriving in the United States, or as soon thereafter as is medically appropriate, if intending to stay in the United States for more than 60 days.

_____ Print Name

_____ Signature

_____Date

Privacy Act Statement for Travelers Relating to the Requirement to Provide Proof of a Negative COVID-19 Test Result

The United States Centers for Disease Control and Prevention (CDC) requires airlines and other aircraft operators to collect this information pursuant to 42 C.F.R., 71.20 and 71.31(b), as authorized by 42 U.S.C. § 264. Providing this information is mandatory for all passengers arriving by aircraft into the United States. Failure to provide this information may prevent you from boarding the plane. Additionally, passengers will be required to attest to providing complete and accurate information, and failure to do so may lead to other consequences, including criminal penalties. CDC will use this information to help prevent the introduction, transmission, and spread of communicable diseases by performing contact tracing investigations and notifying exposed individuals and public health authorities; and for health education, treatment, prophylaxis, or other appropriate public health interventions, including the implementation of travel restrictions.

The Privacy Act of 1974, 5 U.S.C. § 552a, governs the collection and use of this information. The information maintained by CDC will be covered by CDC's System of Records No. 09-20-0171, Quarantine- and Traveler-Related Activities,

Including Records for Contact Tracing Investigation and Notification under 42 C.F.R. Parts 70 and 71. See 72 Fed. Reg. 70867 (Dec. 13, 2007), as amended by 76 Fed. Reg. 4485 (Jan. 25, 2011) and 83 Fed. Reg. 6591 (Feb. 14, 2018). CDC will only disclose information from the system outside the CDC and the U.S. Department of Health and Human Services as the Privacy Act permits, including in accordance with the routine uses published for this system in the Federal Register, and as authorized by law. Such lawful purposes may include, but are not limited to, sharing identifiable information with state and local public health departments, and other cooperating authorities. CDC and cooperating authorities will retain, use, delete, or otherwise destroy the designated information in accordance with federal law and the System of Records Notice (SORN) set forth above. You may contact the system manager at dgmqpolicyoffice@cdc.gov or by mailing Policy Office, Division of Global Migration and Quarantine, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H16-4, Atlanta, GA 30329, if you have questions about CDC's use of your data.

Authority

The authority for this Amended Order is Section 361 of the Public Health Service Act (42 U.S.C. 264) and 42 CFR 71.20 & 71.31(b).

Sherri Berger,

Chief of Staff, Centers for Disease Control and Prevention.

[FR Doc. 2021–26603 Filed 12–3–21; 4:15 pm]

BILLING CODE 4163–18–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

[OMB No. 0915–0061—Revision]

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; Bureau of Health Workforce Performance Data Collection

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with of the Paperwork Reduction Act of 1995, HRSA has submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30-day comment period for this Notice has closed.

DATES: Comments on this ICR should be received no later than January 6, 2022.

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: To request a copy of the clearance requests submitted to OMB for review, email Samantha Miller, the acting HRSA Information Collection Clearance Officer at *paperwork@hrsa.gov* or call (301) 443–9094.

SUPPLEMENTARY INFORMATION:

Information Collection Request Title: Bureau of Health Workforce (BHW) Performance Data Collection, OMB No. 0915–0061—Revision.

Abstract: Over 40 BHW programs award grants to health professions schools and training programs across the United States to develop, expand, and enhance training, and to strengthen the distribution of the health workforce. These programs are governed by the Public Health Service Act (42 U.S.C. 201 *et seq.*), specifically Titles III, VII, and VIII. Performance information about these health professions programs is collected in the HRSA Performance Report for Grants and Cooperative Agreements. Specific performance measurement requirements for each program may be found on the HRSA website at *https://bhw.hrsa.gov/grants/reportonyourgrant.* Data collection activities consist of two reports, an annual progress and annual performance report that are submitted by awardees to comply with statutory and programmatic requirements for performance measurement and evaluation (including specific Title III, VII and VIII requirements), as well as the Government Performance and Results Act of 1993 (GPRA) and the GPRA Modernization Act of 2010 requirements. The performance measures were last revised in 2019 to ensure they addressed programmatic changes, met evolving program management needs, and responded to emerging workforce concerns. As these changes successfully enabled BHW to demonstrate accurate outputs and outcomes associated with the health professions programs, BHW will continue with its current performance management strategy and make only minor changes that reduce burden, simplify reporting, and reflect new Department of Health and Human Services and HRSA priorities as well as elements to enable longitudinal analysis of program performance. An Excel upload feature will be implemented for a majority of programs, discipline-related questions will be split into two parts to make it easier for respondents to find the appropriate answer, COVID-related questions are being added, additional information is being collected for telehealth, and additional loan repayment questions are being added.

A 60-day Notice was published in the **Federal Register**, 86 FR 53069 (September 24, 2021). There were no public comments.

Need and Proposed Use of the Information: The purpose of the proposed data collection is to continue analysis and reporting of awardee training activities and educational programs, identify intended practice locations and report outcomes of funded initiatives. Data collected from these grant programs will also provide a description of the program activities of approximately 1,630 reporting grantees to inform policymakers on the barriers, opportunities, and outcomes involved in health care workforce development. The proposed measures focus on five key outcomes: (1) Increasing the workforce supply of well-educated practitioners in needed professions; (2) increasing the number of practitioners that practice in underserved and rural areas; (3) enhancing the quality of education; (4) increasing the recruitment, training, and placement of under-represented groups in the health workforce; and (5) supporting educational infrastructure to increase the capacity to train more health professionals in high demand areas.

Likely Respondents: Respondents are awardees of BHW health professions grant programs.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Direct Financial Support Program	699	1	699	2.7	1,887.3
Infrastructure Program	142	1	142	6.2	880.4
Multipurpose or Hybrid Program	789	1	789	3.4	2,682.6
Total	1,630		1,630		5,450.3

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2021–26460 Filed 12–6–21; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; 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: Center for Scientific Review Special Emphasis Panel; Mechanisms in AD pathogenesis.

Date: December 16, 2021.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Carole L. Jelsema, Ph.D., Chief and Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4176, MSC 7850, Bethesda, MD 20892, (301) 435–1248, *jelsemac@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 1, 2021.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–26474 Filed 12–6–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed 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: Center for Scientific Review Special Emphasis Panel; Skin Biology and Disease.

Date: December 20, 2021.

Time: 3:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Robert Gersch, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 800K, Bethesda, MD 20817, (301) 867–5309, *robert.gersch@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 2, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–26516 Filed 12–6–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Clinical, Treatment and Health Services Research Study Section.

Date: February 9, 2022.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Alcohol Abuse and

Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Luis Espinoza, Ph.D., Scientific Review Officer, Extramural Project Review Branch, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Room 2109 Bethesda, MD 20817, (301) 443–8599, *espinozala@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards., National Institutes of Health, HHS)

Dated: December 2, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–26517 Filed 12–6–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Minority Health and Health Disparities; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Council on Minority Health and Health Disparities.

The meeting will be held as a virtual meeting and is open to the public as indicated below. Individuals who plan to view the virtual meeting and need special assistance or other reasonable accommodations to view the meeting, should notify the Contact Person listed below in advance of the meeting. The open session will be videocast and can be accessed from the NIH Videocasting and Podcasting website (*http://videocast.nih.gov/*).

A portion of the meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Minority Health and Health Disparities.

Date: February 3, 2022.

Closed: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Name of Committee: National Advisory Council on Minority Health and Health Disparities.

Date: February 4, 2022.

Open: 11:00 a.m. to 4:00 p.m.

Agenda: Opening Remarks, Administrative Matters, Director's Report, Presentations, and Other Business of the Council.

Place: National Institutes of Health, 7201 Wisconsin Avenue, Bethesda, MD 20814 (Virtual Meeting).

Contact Person: Denise Russo, Ph.D., National Advisory Council on Minority Health and Health Disparities, Office of Extramural Research Administration, 7201 Wisconsin Avenue, 5th Floor Room 533, Bethesda, Maryland 20814, (301) 402–1366, *denise.russo@nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: NIMHD: *https://www.nimhd.nih.gov/about/advisory-council/,* where an agenda and any additional information for the meeting will be posted when available.

Dated: December 1, 2021.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–26472 Filed 12–6–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2020–0668]

Monitoring of Certain High Frequency, Voice-Distress Frequencies

AGENCY: Coast Guard, DHS.

ACTION: Notice of decision.

SUMMARY: The U.S. Coast Guard will cease monitoring all High Frequency (HF) voice distress frequencies within the contiguous United States and Hawaii because they are rarely used. These frequencies are: 4125 kHz; 6215 kHz; 8291 kHz; and 12290 kHz. Advances in radio technology offer alternative means to send out distress notices. We will continue to monitor HF Digital Selective Calling distress alerting for all existing regions and voice distress alerting and hailing from Kodiak, Alaska, and Guam.

DATES: The Coast Guard will cease monitoring all high frequency voice distress frequencies on February 7, 2022.

FOR FURTHER INFORMATION CONTACT: For information about this document, please call or email Patrick Gallagher, Communications Specialist, Spectrum Management and Communications Policy, U.S. Coast Guard (Commandant CG–672); telephone: 202–475–3537; email: *Patrick.J.Gallagher@USCG.mil.*

SUPPLEMENTARY INFORMATION: On November 20, 2020, we published a notice in the **Federal Register** (85 FR 74361) that the Coast Guard was considering no longer monitoring four High Frequency (HF) voice distress frequencies within the contiguous United States and Hawaii. In the notice, we requested feedback from the public on the proposed termination. The comment period closed on January 19, 2021. We received four submissions in response to our inquiry, requesting the Coast Guard maintain these frequencies, due to the cost of purchasing a Digital Selective Calling (DSC)-capable HF radio. DCS-capable radios have been in production and available for purchase to the maritime community for over 20 years and are accessible to all mariners. In addition, low-cost satellite Global Maritime Distress and Safety System (GMDSS) radios have become available to the commercial market.

Due to the advances in radio technology (DSC-capable HF radios and GMDSS Satellite radios), regular HF radio call outs have been virtually nonexistent. DSC technology has been available to the maritime community since 1999 and along with mobile satellite communications has resulted in almost no regular HF voice distress traffic. This has been exemplified by the Coast Guard not having received a single voice distress call that could be correlated to an actual response in excess of 7 years.

The Coast Guard is terminating the monitoring of all HF Voice Distress Frequencies (4125 kHz; 6215 kHz; 8291 kHz; and 12290 kHz) in the contiguous United States and Hawaii. As noted, DSC-capable HF radios have been available for decades and low-cost satellite GMDSS radios are also available. We will continue to monitor the HF DSC distress alerting for all existing regions and voice distress alerting and hailing from Kodiak, Alaska, and Guam.

This notice is issued under the authority of *14 U.S.C. 504*(a)(16) and *5 U.S.C. 552*(a).

Dated: December 02, 2021.

J.L. Ulcek,

Chief, Spectrum Management and Communication Policy.

[FR Doc. 2021–26518 Filed 12–6–21; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF THE INTERIOR

[FWS–R4–ES–2021–N209; FVHC98220410150–XXX–FF04H00000]

Mississippi Trustee Implementation Group Deepwater Horizon Oil Spill Draft Restoration Plan 3 and Environmental Assessment: Habitat Projects on Federally Managed Lands; Sea Turtles; Marine Mammals; Birds; and Provide and Enhance Recreational Opportunities

AGENCY: Department of the Interior.

ACTION: Notice of availability; request for public comments.

SUMMARY: In accordance with the Oil Pollution Act of 1990, the National Environmental Policy Act of 1969, the Final Programmatic Damage Assessment Restoration Plan and Final Programmatic Environmental Impact Statement (Final PDARP/PEIS) and Record of Decision, and the Consent Decree, the Federal and State natural resource trustee agencies for the Mississippi Trustee Implementation Group (MS TIG) have prepared the *Mississippi Trustee Implementation Group Draft Restoration Plan 3 and Environmental Assessment: Habitat Projects on Federally Managed Lands; Sea Turtles; Marine Mammals; Birds; and Provide and Enhance Recreational Opportunities* (Draft RP3/EA). In the Draft RP3/EA, the MS TIG proposes projects to partially restore injured habitats, sea turtles, marine mammals, birds, and to compensate for lost recreational use in the Mississippi Restoration Area as a result of the *Deepwater Horizon* oil spill. The approximate cost to implement the MS TIG's proposed action (seven preferred alternatives) is $19,000,000. We invite public comments on the Draft RP3/EA.

DATES: We will consider public comments on the Draft RP3/EA received on or before 45 days after the date of publication in the **Federal Register**.

The MS TIG will host a public webinar on Tuesday, January 11, 2022, at 2 p.m. Central Time. The public webinar will include a presentation of the Draft RP3/EA. The public may register for the webinar at *https://attendee.gotowebinar.com/register/6376489461251797774.* After registering, participants will receive a confirmation email with instructions for joining the webinar. Instructions for commenting will be provided during the webinar. Shortly after the webinar is concluded, the presentation material will be posted on the web at *https://www.gulfspillrestoration.noaa.gov/restoration-areas/mississippi.*

ADDRESSES: *Obtaining Documents:* You may download the Draft RP3/EA from either of the following websites:

- *https://www.doi.gov/deepwaterhorizon*
- *https://www.gulfspillrestoration.noaa.gov/restoration-areas/mississippi*

Alternatively, you may request a CD of the Draft RP3/EA (see **FOR FURTHER INFORMATION CONTACT**).

Submitting Comments: You may submit comments by one of the following methods:

- *Via the Web: http://www.gulfspillrestoration.noaa.gov/restoration-areas/mississippi.*
- *Via U.S. Mail:* U.S. Fish and Wildlife Service, P.O. Box 29649, Atlanta, GA 30345. To be considered, mailed comments must be postmarked on or before the comment deadline given in **DATES**.
- *During the Public Webinar:* Written comments may be provided by the public during the webinar. Webinar information is provided in **DATES**.

FOR FURTHER INFORMATION CONTACT: Nanciann Regalado, at *nanciann_regalado@fws.gov* or 678–296–6805, or via the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Introduction

On April 20, 2010, the mobile offshore drilling unit *Deepwater Horizon* (DWH), which was being used to drill a well for BP Exploration and Production, Inc. (BP), in the Macondo prospect (Mississippi Canyon 252–MC252), experienced a significant explosion, fire, and subsequent sinking in the Gulf of Mexico, resulting in an unprecedented volume of oil and other discharges from the rig and from the wellhead on the seabed. The DWH oil spill is the largest offshore oil spill in U.S. history, discharging millions of barrels of oil over a period of 87 days. In addition, well over 1 million gallons of dispersants were applied to the waters of the spill area in an attempt to disperse the spilled oil. An undetermined amount of natural gas was also released into the environment as a result of the spill.

The Trustees conducted the natural resource damage assessment (NRDA) for the DWH oil spill under the Oil Pollution Act 1990 (OPA; 33 U.S.C. 2701 *et seq.*). Pursuant to OPA, Federal and State agencies act as trustees on behalf of the public to assess natural resource injuries and losses and to determine the actions required to compensate the public for those injuries and losses. The OPA further instructs the designated trustees to develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the injured natural resources under their trusteeship to baseline (the resource quality and conditions that would exist if the spill had not occurred). This includes the loss of use and services provided by those resources from the time of injury until the completion of restoration.

The DWH Trustees are:

- U.S. Department of the Interior (DOI), as represented by the National Park Service, U.S. Fish and Wildlife Service, and Bureau of Land Management;
- National Oceanic and Atmospheric Administration (NOAA), on behalf of the U.S. Department of Commerce;
- U.S. Department of Agriculture (USDA);
- U.S. Environmental Protection Agency (EPA);
- State of Louisiana Coastal Protection and Restoration Authority, Oil Spill Coordinator's Office, Department of Environmental Quality, Department of Wildlife and Fisheries, and Department of Natural Resources;
- State of Mississippi Department of Environmental Quality;
- State of Alabama Department of Conservation and Natural Resources and Geological Survey of Alabama;
- State of Florida Department of Environmental Protection and Fish and Wildlife Conservation Commission; and
- State of Texas: Texas Parks and Wildlife Department, Texas General Land Office, and Texas Commission on Environmental Quality.

On April 4, 2016, the United States District Court for the Eastern District of Louisiana entered a Consent Decree resolving civil claims by the Trustees against BP arising from the DWH oil spill: *United States* v. *BPXP et al.,* Civ. No. 10–4536, centralized in MDL 2179, In re: Oil Spill by the Oil Rig ''Deepwater Horizon'' in the Gulf of Mexico, on April 20, 2010 (E.D. La.) (*http://www.justice.gov/enrd/deepwater-horizon*). Pursuant to the Consent Decree, restoration projects in the Mississippi Restoration Area are chosen and managed by the MS TIG. The MS TIG is composed of the following Trustees: State of Mississippi Department of Environmental Quality; DOI; NOAA; EPA; and USDA.

Background

On October 30, 2020, the MS TIG posted a public notice at *http://www.gulfspillrestoration.noaa.gov* requesting new or revised natural resource restoration project ideas by November 30, 2020, for the Mississippi

Restoration Area. The notice stated that the MS TIG was seeking project ideas for the following restoration types: (1) Habitat Projects on Federally Managed Lands; (2) Sea Turtles; (3) Marine Mammals; (4) Birds; and (5) Provide and Enhance Recreational Opportunities. On June 11, 2021, the MS TIG announced that it had initiated drafting of the RP3/EA and that it would include a reasonable range of restoration alternatives (projects) for the five restoration types.

Overview of the MS TIG Draft RP3/EA

The Draft RP3/EA provides the MS TIG's analysis of the reasonable range of alternatives. The MS TIG's seven preferred alternatives are presented in the following table under the restoration type from which funds would be allocated in accordance with the DWH Consent Decree. The MS TIG also evaluated five non-preferred alternatives as part of the reasonable range, and a No Action alternative for each restoration type in the plan.

Restoration Type: Habitat Projects on Federally Managed Lands

Improve Native Habitats by Removing Marine Debris from Mississippi Barrier Islands

Restoration Type: Sea Turtles

Maintaining Enhanced Sea Turtle Stranding Network Capacity and Diagnostic Capabilities

Restoration Type: Marine Mammals

Maintaining Enhanced Marine Mammal Stranding Network Capacity and Diagnostic Capabilities

Reduction of Marine Mammal Fishery Interactions through Trawl Technique and Component Material Improvements

Restoration Type: Birds

Bird Stewardship and Enhanced Monitoring in Mississippi

Restoration Type: Provide and Enhance Recreational Opportunities

Clower Thornton Nature Park Trail Improvement

Environmental Education and Stewardship at Walter Anderson Museum of Art

Next Steps

As described above in DATES, the MS TIG will host a public webinar to facilitate the public review and comment process. After the public comment period ends, the MS TIG will consider and address the comments received before issuing a final RP3/EA. Public comments and MS TIG responses will be included in the final RP3/EA.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Administrative Record

The documents comprising the Administrative Record for the Draft RP3/EA can be viewed electronically at *https://www.doi.gov/deepwaterhorizon/adminrecord.*

Authority

The authority for this action is the Oil Pollution Act of 1990 (33 U.S.C. 2701 *et seq.*), its implementing NRDA regulations found at 15 CFR part 990, and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and its implementing regulations found at 40 CFR 1500–1508.

Mary Josie Blanchard,

Director, Gulf of Mexico Restoration, Department of the Interior.

[FR Doc. 2021–26415 Filed 12–6–21; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#–33078; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting electronic comments on the significance of properties nominated before November 27, 2021, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted electronically by December 22, 2021.

ADDRESSES: Comments are encouraged to be submitted electronically to *National_Register_Submissions@nps.gov* with the subject line ''Public Comment on <property or proposed district name, (County) State>.'' If you have no access to email you may send them via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C Street NW, MS 7228, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Sherry A. Frear, Chief, National Register of Historic Places/National Historic Landmarks Program, 1849 C Street NW, MS 7228, Washington, DC 20240, *sherry_frear@nps.gov,* 202–913–3763.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before November 27, 2021. Pursuant to Section 60.13 of 36 CFR part 60, comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

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.

Nominations submitted by State or Tribal Historic Preservation Officers:

ARIZONA

Pima County

Casitas de Castilian Historic District, 643 West Las Lomitas Rd., Tucson, SG100007293

CALIFORNIA

Alameda County

People's Park, Between Haste St. Dwight Way, Telegraph Ave., and Bowditch St., Berkeley, SG100007288

Los Angeles County

Commercial Club, 1100 South Broadway, Los Angeles, SG100007286

Orange County

Floral Park Historic District, Roughly bounded by Santiago Cr., Broadway, 17th, and Flower Sts., Santa Ana, SG100007287

FLORIDA

St. Johns County, St. Augustine Beach Hotel and Beachfront, 370 FL A1A, St. Augustine Beach, SG100007284

GEORGIA

Habersham County

Cornelia Commercial Historic District, Centered around intersection of Main and Irvin Sts., Cornelia, SG100007277

ILLINOIS

Madison County

Middletown Historic District (Boundary Increase II), Roughly bounded by Front,

State, Fourth, Market, Broadway, Third, Alby, Langdon, and Ridge Sts., Alton, BC100007272

KANSAS

Bourbon County

Herbert, Thomas L. and Anna B., House, 512 South Judson Street, Fort Scott, SG100007280

Cowley County

Winfield Fox Theatre, (Theaters and Opera Houses of Kansas MPS), 1007 Main St., Winfield, MP100007282

Crawford County

Pittsburg Foundry & Machine Company, 104 North Locust St., Pittsburg, SG100007281

Shawnee County

Country Club Residential Historic District, Roughly bounded by SW 24th St., SW Topeka Blvd., SW Merriam Ct., and SW Western Ave., Topeka, SG100007279

Wyandotte County

Kansas City, Kansas City Hall and Fire Headquarters (Boundary Increase), 538 Ann Ave., Kansas City, BC100007283

LOUISIANA

Orleans Parish, White Rock Saloon, 1216 Bienville St., New Orleans, SG100007295

NEW HAMPSHIRE

Rockingham County

Plains Cemetery, Cemetery Ln., Kingston, SG100007290

NORTH CAROLINA

Pasquotank County

Elizabeth City Historic District (Boundary Increase II), Roughly along Selden between West Main and West Church Sts.; roughly bounded by North Elliot, Elizabeth, Poindexter, McMorrine, Church, Pool, and Grice Sts.; and roughly bounded by Poindexter, Grice, McMorrine, and Fearing Sts., and 302 Colonial Ave., Elizabeth City, BC100007276

TEXAS

Bexar County

Borden's Creamery, 875 East Ashby Pl., San Antonio, SG100007273

An owner objection has been received for the following resources:

CALIFORNIA

Orange County

Christiansen and Grow Filling Station, 305 South Main St., Orange, SG100007285

UTAH

Salt Lake County, Pantages Theatre, 144 South Main St., Salt Lake City, SG100007291

Additional documentation has been received for the following resources:

ARIZONA

Maricopa County

Borden Homes Historic District (Additional Documentation), 1118 South Butte St., Tempe, AD11001072

Pima County

Barrio El Hoyo Historic District (Additional Documentation), 508 W. 18th St., Tucson, AD08000763

West University Historic District (Additional Documentation), Roughly bounded by Speedway Blvd., 6th St., Park and Stone Aves., Tucson, AD80004240

CALIFORNIA

San Francisco County

San Francisco-Oakland Bay Bridge (Additional Documentation), I–80, San Francisco vicinity, AD00000525

Authority: Section 60.13 of 36 CFR part 60.

Dated: November 30, 2021.

Sherry A. Frear,

Chief, National Register of Historic Places/National Historic Landmarks Program.

[FR Doc. 2021–26429 Filed 12–6–21; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1287]

Certain Integrated Circuits, Chipsets, and Electronic Devices, and Products Containing the Same; Notice of Institution

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 November 1, 2021, under section 337 of the Tariff Act of 1930, as amended, on behalf of NXP Semiconductors N.V. of Eindhoven, Netherlands and NXP USA, Inc. of Austin, Texas. 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 integrated circuits, chipsets, and electronic devices, and products containing the same by reason of infringement of certain claims of U.S. Patent No. 7,593,202 (''the '202 patent''); U.S. Patent No. 8,482,136 (''the '136 patent''); U.S. Patent No. 8,558,591 (''the '591 patent''); U.S. Patent No. 9,729,214 (''the '214 patent''); and U.S. Patent No. 10,904,058 (''the '058 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: Pathenia M. Proctor, The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

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 December 1, 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 one or more of claims 1 and 2 of the '202 patent; claims 1–6, 11, 18, 19, 21, and 22 of the '136 patent; claims 1, 3, 10, and 11 of the '591 patent; claims 1 and 10 of the '214 patent; and claims 1–3, 5, 7, 9–12, 14, 16, 18, and 19 of the '058 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 ''MTK integrated

circuits and chipsets, and Wi-Fi 6 capable products, streaming media products, and smart home products containing the MTK integrated circuits and chipsets;''

(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:

NXP Semiconductors N.V., High Tech Campus 60, 5656 AG Eindhoven, Netherlands

NXP USA, Inc., 6501 W. William Cannon Dr., Austin, TX 78735

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

MediaTek Inc., No. 1 Dusing Road 1, Hsinchu Science Park, Hsinchu City 30078, Taiwan

MediaTek USA Inc., 2840 Junction Avenue, San Jose, CA 95134

Amazon.com, Inc., 410 Terry Ave. North, Seattle, WA 98109

Belkin International, Inc., 12045 E Waterfront Drive, Playa Vista, CA 90094

Linksys USA, Inc., 121 Theory Drive, Irvine, CA 92617

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW, Suite 401, Washington, DC 20436; and

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

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: December 1, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–26443 Filed 12–6–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Privacy Act of 1974; System of Records

AGENCY: United States International Trade Commission (USITC).

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the United States International Trade Commission (USITC or Commission) proposes to add a new system of records to collect information related to employee-submitted requests for reasonable accommodations, including for reasons relating to a disability, and employee-submitted requests for religious accommodations due to sincerely held religious beliefs, practices, or observances. Records contained in this system are collected to: (1) Allow the USITC to collect and maintain records on prospective, current, and former employees with disabilities who request or receive a reasonable accommodation by the USITC; (2) allow the USITC to collect and maintain records on prospective, current, and former employees with sincerely held religious beliefs, practices, or observances who request or receive a religious accommodation by USITC; (3) track and report the processing of requests for such accommodations to comply with applicable laws and regulations; and (4) preserve and maintain the confidentiality of medical and religious information submitted by or on behalf of applicants or employees requesting such an accommodation.

DATES: These systems will become effective upon publication in today's **Federal Register**, with the exception of the routine uses that will be effective on January 6, 2022. The USITC invites written comments on the routine uses and other aspects of this system of records. Submit any comments by January 6, 2022.

ADDRESSES: You may submit comments via the Electronic Document Filing System (EDIS) at *https://edis.usitc.gov.* All submissions must include the investigation number (MISC–043), along with a physical or electronic signature on the cover letter. Any information that you provide, including personal information, will be publicly available for viewing.

FOR FURTHER INFORMATION CONTACT: Michael O'Rourke, Privacy Officer, (202) 708–1390, United States International Trade Commission, 500 E St. SW, Washington, DC 20436, at *privacy@usitc.gov.* Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810.

SUPPLEMENTARY INFORMATION: Under the Privacy Act of 1974 (''Privacy Act''), 5 U.S.C. 552a, the USITC proposes to add one new system of records: ITC–3 (Reasonable and Religious Accommodation Records). The USITC is publishing this system of records notice to provide information regarding the collection, maintenance, use, and disclosure of records relating to employee-submitted requests for reasonable or religious accommodations, which may include medical or religious information. The USITC invites interested persons to submit comments on the actions proposed in this notice.

As required by subsection 552a(r) of the Privacy Act (5 U.S.C. 552a(r)), the USITC has provided a report to the Office of Management and Budget, the Chair of the Committee on Oversight and Government Reform of the House of Representatives, and the Chair of the Committee on Homeland Security and Governmental Affairs of the Senate.

SYSTEM NAME AND NUMBER:

ITC–3, Reasonable and Religious Accommodation Records.

SECURITY CLASSIFICATION:

Non-classified.

SYSTEM LOCATION:

The Office of Human Resources, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436 maintains the records. Records may also be maintained at an additional location for Business Continuity Purposes. Duplicate systems may exist, in part, for administrative purposes in the office to which the employee is assigned.

SYSTEM MANAGER(S):

Director, Office of Human Resources, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Authority for maintenance of the system includes the following with any revisions or amendments: 19 U.S.C.1331(a)(1)(A)(iii); 29 U.S.C. 791 *et seq.;* 42 U.S.C. 12101 *et seq.;* 42 U.S.C. 2000e *et seq.;* 29 CFR part 1614; Executive Order 13164 (July 28, 2000); Executive Order 13548 (July 10, 2010); and Executive Order 14043 (Sept. 9, 2021).

PURPOSE(S) OF THE SYSTEM:

The purpose of this system is to: (1) Allow the USITC to collect and maintain records on prospective, current, and former employees with disabilities who request or receive a reasonable accommodation by the USITC; (2) allow the USITC to collect and maintain records on prospective, current, and former employees with sincerely held religious beliefs, practices, or observances who request or receive a religious accommodation by USITC; (3) track and report the processing of requests for accommodations to comply with applicable laws and regulations; and (4) preserve and maintain the confidentiality of medical and religious information submitted by or on behalf of applicants or employees requesting an accommodation.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Prospective, current, and former USITC employees who request or receive an accommodation for a disability or a sincerely held religious belief, practice, or observance; authorized individuals or representatives (*e.g.,* family members or attorneys) who file a request for an accommodation on behalf of a prospective, current, or former employee.

CATEGORIES OF RECORDS IN THE SYSTEM:

The categories of records in this system include, but are not limited to: Name and employment information of employees requesting an accommodation; assigned case numbers; requestor's name and contact information (if different than the employee who requests an accommodation); the date that the request was initiated; information concerning the nature of the disability and the need for accommodation, including appropriate medical documentation; information concerning the nature of the sincerely held religious belief, practice, or observance and the need for accommodation, including any appropriate documentation; details of the accommodation request, such as: The type of accommodation requested, how the requested accommodation would assist in job performance, the sources of technical assistance consulted in trying to identify alternative reasonable accommodation, any additional information provided by the requestor related to the processing of the request, and whether the request was approved or denied, and whether the accommodation was approved for a trial period; and notification(s) to the employee and the employee's supervisor(s) regarding the accommodation.

RECORD SOURCE CATEGORIES:

Subject individuals; subject individuals' supervisors and other agency officials with a need to know; related correspondence from organizations or persons.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

The USITC may disclose information about covered individuals without consent as permitted by the Privacy Act, 5 U.S.C. 552a(b), and by USITC General Routine Uses A–C and E–N. See 82 FR 45046, 45066 (Sept. 27, 2017) for Appendix A: General Routine Uses Applicable to More Than One System of Records. The USITC may disclose information in this system to any Federal, State, or local agency, organization or individual to the extent necessary to obtain information or witness cooperation if there is reason to believe the recipient possesses information related to the matter. The USITC may disclose information to a Federal, State, or local agency to the extent necessary to comply with laws governing reporting of communicable diseases. The USITC may produce anonymized summary descriptive statistics and analytical studies, as a data source for management information, in support of the function for which the records are collected and maintained, or for related personnel management functions or manpower studies.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

The USITC will maintain records in paper and electronic form, including on computer databases, all of which are stored in a secure location.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

The USITC will retrieve records by the following: Prospective, current, or former employee name or assigned case number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Reasonable accommodation records are maintained in accordance the National Archives and Records Administration's (NARA's) General Records Retention Schedule 2.3, Employee Relations Records, and specifically, item 20: Reasonable Accommodation Case Files. The USITC will dispose of records that have met required retention periods in accordance with NARA guidelines and USITC policy and procedures. The USITC will shred paper records and remove electronic records in accordance with National Institute of Standards and Technology (NIST) guidelines for media sanitization.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The USITC has adopted appropriate administrative, technical, and physical controls in accordance with the USITC's security program to protect the security, confidentiality, availability, and integrity of the information, and to ensure that records are not disclosed to or accessed by unauthorized individuals. Access to this system of records is limited to persons who have a need to know the information for the performance of their official duties.

Paper records are stored in locked file cabinets in areas of restricted access that are locked throughout the workday and after office hours. Only authorized individuals can access the cabinets and the rooms in which they are stored. Only authorized individuals with a need to know access the electronic records in this system through the use of safeguards such as multifactor authentication.

RECORD ACCESS PROCEDURES:

Individuals wishing to request access to their records should contact the Privacy Act Officer, Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Individuals must furnish the following information for their records to be located and identified:

1. Full name(s), current address, date and place of birth;
2. Dates of employment;
3. Identification of the relevant system of records, if possible;
4. Description of the record sought; and
5. Signature.

Individuals requesting access must comply with the Commission's Privacy Act regulations on verification of identity and access to such records, available at 19 CFR 201.22–201.32.

CONTESTING RECORD PROCEDURES:

See Record Access Procedures above.

NOTIFICATION PROCEDURES:

See Record Access Procedures above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

None.

By order of the Commission.

Issued: December 1, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–26430 Filed 12–6–21; 8:45 am]

BILLING CODE P

INTERNATIONAL TRADE COMMISSION

Privacy Act of 1974; System of Records

AGENCY: United States International Trade Commission (USITC).

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the Privacy Act of 1974 (Privacy Act), the United States International Trade Commission (USITC or Commission) proposes to add a new system of records to collect information in response to a public health emergency. This system of records maintains information collected in response to a public health emergency and will collect information from USITC personnel (political appointees, employees, detailees, interns, and volunteers), contractors, visitors, job applicants, and others who access or seek to access the USITC worksite, to assist the USITC with maintaining a safe and healthy workplace and to protect its workforce from risks associated with communicable diseases.

DATES: The system of records will become effective upon publication in today's **Federal Register**, with the exception of the routine uses that will be effective on January 6, 2022. The USITC invites written comments on the routine uses and other aspects of this system of records. Submit any comments by January 6, 2022.

ADDRESSES: You may submit comments via the Electronic Document Filing System (EDIS) at *https://edis.usitc.gov.* All submissions must include the investigation number (MISC–043), along with a physical or electronic signature on the cover letter. Any information that you provide, including personal information, will be publicly available for viewing.

FOR FURTHER INFORMATION CONTACT: Michael O'Rourke, (202) 708–1390, Privacy Officer, United States International Trade Commission, 500 E St. SW, Washington, DC 20436, at *privacy@usitc.gov.* Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810.

SUPPLEMENTARY INFORMATION: To collect and maintain contractor, visitor, and job applicant disclosures, the USITC is establishing ITC–4, Public Health and Safety Records, a system of records under the Privacy Act. The USITC is committed to maintaining a safe and healthy workplace and to protect its workforce from risks associated with a public health emergency. To ensure and maintain the safety of all USITC personnel, contractors, visitors, job applicants, and others who access or seek to access the USITC worksite during a public health emergency, the USITC may develop and institute safety measures that require the collection of personal information. For further information on how the USITC will maintain records relating to employee requests for reasonable and religious accommodations, please refer to ITC–3, Reasonable Accommodation Records.

Records may include information on individuals' vaccination status and information related to accommodations based on disability or a sincerely held religious belief. Records may also include information on 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. Records may also include information on the individual circumstances surrounding the disease or illness, such as dates of suspected exposure, testing results, symptoms, treatments, and other related health status information. Any contact tracing that the USITC conducts will involve collecting information about USITC personnel, contractors, and visitors who are exhibiting symptoms or who have tested positive for an infectious disease in order to identify and notify other USITC personnel, contractors, and visitors with whom they may have come into contact and who may have been exposed.

As required by subsection 552a(r) of the Privacy Act (5 U.S.C. 552a(r)), the USITC has provided a report to the Office of Management and Budget, the Chair of the Committee on Oversight and Reform of the House of Representatives, and the Chair of the Committee on Homeland Security and Governmental Affairs of the Senate.

SYSTEM NAME AND NUMBER:

ITC–4, Public Health and Safety Records

SECURITY CLASSIFICATION:

Non-classified.

SYSTEM LOCATION:

The Office of Human Resources, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436 maintains the records. Records may also be maintained at an additional location for Business Continuity Purposes. Duplicate systems may exist, in part, for administrative purposes in the office to which the employee is assigned.

SYSTEM MANAGER(S):

Director, Office of Human Resources, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Authority for maintenance of the system includes the following with any revisions or amendments: 19 U.S.C. 1331(a)(1)(A)(iii); 29 U.S.C. 654, 668; 42 U.S.C. 247d; Executive Order 13991 (Jan. 20, 2021); Executive Order 14042 (Sept. 9, 2021); and Executive Order 14043 (Sept. 9, 2021).

PURPOSE(S) OF THE SYSTEM:

The purpose of this system is to assist the USITC with maintaining a safe and healthy workplace and to protect its workforce from risks associated with communicable diseases that the Secretary of the Department of Health and Human Services has determined to be a public health emergency pursuant to the Public Health Service Act (42 U.S.C. 247d) (Public Health Emergency). Records in this system may be collected, maintained, and used to: (1) Determine who may be allowed access to the USITC worksite and what testing or medical screening is necessary before a person may enter; (2) respond to a significant risk of harm to USITC personnel, contactors, and visitors, as well as to any others at the USITC worksite; (3) document reports that USITC personnel, contractors, or any persons who have been at the USITC worksite may have or may have been exposed to a communicable disease that is the subject of a Public Health Emergency; (4) perform contact tracing investigations of and notifications to USITC personnel, contractors, and visitors known or suspected of exposure to a communicable diseases that are the subject of a Public Health Emergency; (5) implement such actions (*e.g.,*

quarantine or isolation) as necessary to prevent the introduction, transmission, and spread of a communicable disease that is the subject of a Public Health Emergency; and (6) comply with Occupational Safety and Health Administration Act recordkeeping requirements.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All USITC personnel (political appointees, employees, detailees, interns, and volunteers), contractors, visitors, job applicants, and others who access or seek to access the USITC worksite.

CATEGORIES OF RECORDS IN THE SYSTEM:

The categories of records in this system include, but are not limited to: Biographical information (name and contact information); health information (body temperature, dates of and symptoms relating to a potential or actual exposure to a pathogen, vaccination information, medical information); information indicating that an individual has received an accommodation based on disability or sincerely held religious belief, practice, or observance; contact tracing information (dates of visits to the USITC worksite, locations visited within the USITC worksite; duration of time spent in each location, potential contacts between potentially contagious persons and others at the USITC worksite); testing results (negative test results, confirmed or unconfirmed positive test results, and documents related to the reasons for testing or other aspects of test results); and subsequent actions taken by the USITC to address an incident (identifying and contact information of individuals who are suspected or confirmed to have contracted or been exposed to a communicable disease that is the subject of a Public Health Emergency, individual circumstances and dates of suspected exposure). The USITC will use this information to maintain a safe and healthy workplace and to protect its workforce. Although the USITC does not intend 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 in question. To the extent that the USITC acquires this information inadvertently, the USITC will store such information with the employee's confidential medical record that is stored separately from an employee's personnel file.

RECORD SOURCE CATEGORIES:

Subject individuals; subject individuals' supervisors and other agency officials with a need to know; related correspondence from organizations or persons.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

The USITC may disclose information about covered individuals without consent as permitted by the Privacy Act, 5 U.S.C. 552a(b), and by USITC General Routine Uses A–C and E–K, M–N. See 82 FR 45046, 45066 (Sept. 27, 2017) for Appendix A: General Routine Uses Applicable to More Than One System of Records. The USITC may disclose information in this system to any Federal, State, or local agency, organization or individual to the extent necessary to obtain information or witness cooperation if there is reason to believe the recipient possesses information related to the matter. The USITC may disclose information to a Federal, State, or local agency to the extent necessary to comply with laws governing reporting of infectious diseases. The USITC may produce anonymized summary descriptive statistics and analytical studies, as a data source for management information, in support of the function for which the records are collected and maintained, or for related personnel management functions or manpower studies. The USITC may also disclose to USITC personnel, contractors, visitors, emergency contacts, or others to notify an individual who (1) has been exposed or may have potentially been exposed to a communicable disease that is the subject of a Public Health Emergency of information regarding the exposure or potential exposure, or (2) may have reason to know of circumstances that increase the risk of such exposure. For such disclosures, to the extent possible, all information will be anonymized.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

The USITC will maintain records in paper and electronic form, including on computer databases, all of which are stored in a secure location.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

The USITC will generally retrieve records by the name of the individual, contact information, or other related information.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

The records are maintained in accordance the National Archives and Records Administration's (NARA's) General Records Retention Schedule 2.7, Employee Health and Safety Records. The USITC will dispose of records that have met required retention periods in accordance with NARA guidelines and USITC policy and procedures. The USITC will shred paper records and remove electronic records in accordance with National Institute of Standards and Technology (NIST) guidelines for media sanitization.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The USITC has adopted appropriate administrative, technical, and physical controls in accordance with the USITC's security program to protect the security, confidentiality, availability, and integrity of the information, and to ensure that records are not disclosed to or accessed by unauthorized individuals. Access to this system of records is limited to persons who have a need to know the information for the performance of their official duties.

Paper records are stored in locked file cabinets in areas of restricted access that are locked throughout the workday and after office hours. Only authorized individuals can access the cabinets and the rooms in which they are stored. Only authorized individuals with a need to know access the electronic records in this system through the use of safeguards such as multifactor authentication.

RECORD ACCESS PROCEDURES:

Individuals wishing to request access to their records should contact the Privacy Act Officer, Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Individuals must furnish the following information for their records to be located and identified:

1. Full name(s), current address, date and place of birth;
2. Dates of employment;
3. Identification of the relevant system of records, if possible;
4. Description of the record sought; and
5. Signature.

Individuals requesting access must comply with the Commission's Privacy Act regulations on verification of identity and access to such records, available at 19 CFR 201.22–201.32.

CONTESTING RECORD PROCEDURES:

See Record Access Procedures above.

NOTIFICATION PROCEDURES:

See Record Access Procedures above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

None.

By order of the Commission.

Issued: December 1, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–26431 Filed 12–6–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–666 and 731–TA–1558 (Final)]

Walk-Behind Snow Throwers From China; Scheduling of the Final Phase of Countervailing Duty and Anti-Dumping Duty Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of the final phase of antidumping and countervailing duty investigations Nos. 701–TA–666 and 731–TA–1558 (Final) pursuant to the Tariff Act of 1930 (''the Act'') to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of walk-behind snow throwers from China, provided for in subheading 8430.20.00 of the Harmonized Tariff Schedule of the United States, preliminarily determined by the Department of Commerce (''Commerce'') to be subsidized and sold at less-than-fair-value.

DATES: November 5, 2021.

FOR FURTHER INFORMATION CONTACT: Stamen Borisson (202–205–3125), 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:

Scope.—For purposes of these investigations, Commerce has defined the subject merchandise as ''gas-powered, walk-behind snow throwers (also known as snow blowers), which are snow moving machines that are powered by internal combustion engines and primarily pedestrian-controlled. The scope of these investigations covers certain snow throwers (also known as snow blowers), whether self-propelled or non-self-propelled, whether finished or unfinished, whether assembled or unassembled, and whether containing any additional features that provide for functions in addition to snow throwing. Subject merchandise also includes finished and unfinished snow throwers that are further processed in a third country or in the United States, including, but not limited to, assembly or any other processing that would not otherwise remove the merchandise from the scope of these investigations if performed in the country of manufacture of the in-scope snow throwers. Specifically excluded is merchandise covered by the scope of the antidumping and countervailing duty orders on certain vertical shaft engines between 225cc and 999cc, and parts thereof from the People's Republic of China. Also specifically excluded is merchandise covered by the scope of the antidumping and countervailing duty orders on certain vertical shaft engines between 99cc and Up to 225cc, and parts thereof from the People's Republic of China.'' For Commerce's complete scope and tariff treatment, see 86 FR 61135, November 5, 2021.

Background.—The final phase of these investigations is being scheduled pursuant to sections 705(b) and 731(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b) and 1673d(b)), as a result of affirmative preliminary determinations by Commerce that certain benefits which constitute subsidies within the meaning of § 703 of the Act (19 U.S.C. 1671b) are being provided to manufacturers, producers, or exporters in China of walk-behind snow throwers, and that such products are being sold in the United States at less than fair value within the meaning of § 733 of the Act (19 U.S.C. 1673b). The investigations were requested in petitions filed on March 30, 2021, by MTD Products Inc., Valley City, Ohio.

For further information concerning the conduct of this phase of the investigations, hearing procedures, and rules of general application, consult 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).

Participation in the investigations and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigations need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov.*) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of these investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigations. A party granted access to BPI in the preliminary phase of the investigations need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the final phase of these investigations will be placed in the nonpublic record on March 9, 2022, and a public version will be issued thereafter, pursuant to § 207.22 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the final phase of these investigations beginning at 9:30 a.m. on March 23, 2022. Information about the place and form of the hearing, including about how to participate in and/or view the hearing, will be posted on the Commission's website at *https://www.usitc.gov/calendarpad/calendar.html.* Interested parties should check the Commission's

website periodically for updates. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before March 17, 2022. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on March 21, 2022. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

Written submissions.—Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of § 207.23 of the Commission's rules; the deadline for filing is March 16, 2022. Parties may also file written testimony in connection with their presentation at the hearing, as provided in § 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of § 207.25 of the Commission's rules. The deadline for filing posthearing briefs is March 30, 2022. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations, including statements of support or opposition to the petition, on or before March 30, 2022. On April 15, 2022, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before April 19, 2022, but such final comments must not contain new factual information and must otherwise comply with § 207.30 of the Commission's rules. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

Additional written submissions to the Commission, including requests pursuant to § 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 §§ 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 § 207.21 of the Commission's rules.

By order of the Commission.

Issued: December 1, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–26428 Filed 12–6–21; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1121–0260]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Reinstatement, Without Change, of a Previously Approved Collection for Which Approval Has Expired: 2022 Police Public Contact Survey (PPCS)

AGENCY: Office of Justice Programs, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Statistics, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until February 7, 2022.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Elizabeth Davis (email: *Elizabeth.Davis@usdoj.gov;* telephone: 202–305–2667) or Susannah Tapp (email: *Susannah.Tapp@usdoj.gov;* telephone: 202–353–5162), Bureau of Justice Statistics, 810 Seventh Street NW, Washington, DC 20531.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, 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;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; 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.

Overview of This Information Collection

1. *Type of Information Collection:* Reinstatement, without change, of a previously approved collection for which approval has expired.

2. *Title of the Form/Collection:* 2022 Police Public Contact Survey (PPCS).

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* The form number for the questionnaire is PPCS–1. The applicable component within the Department of Justice is the Bureau of Justice Statistics (BJS), in the Office of Justice Programs.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Respondents will be persons 16 years or older living in households located throughout the United States sampled for the National Crime Victimization Survey (NCVS). The PPCS will be conducted as a supplement to the NCVS in all sample households for a six (6) month period. The PPCS is typically conducted periodically with the last administration occurring in 2020. The PPCS is one component of the BJS effort to fulfill the mandate set forth by the Violent Crime Control and Law Enforcement Act of 1994 to collect, evaluate, and publish data on the use of

excessive force by law enforcement personnel. The goal of the collection is to report national statistics that provide a better understanding of the types, frequency, and outcomes of contacts between the police and the public, public perceptions of police behavior during the contact, and the conditions under which police force may be threatened or used. BJS plans to publish this information in reports and reference it when responding to queries from the U.S. Congress, Executive Office of the President, the U.S. Supreme Court, state officials, international organizations, researchers, students, the media, and others interested in criminal justice statistics.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimate of the total number of respondents is 119,880 persons ages 16 and older. About 81.2% of PPCS respondents (97,343) will have no police contact and will complete the short interview with an average burden of four minutes. Among the 18.8% of respondents (22,537) who experienced police contact, the time to ask the detailed questions regarding the nature of the contact is estimated to take an average of 8 minutes. Respondents will be asked to respond to this survey only once during the six-month period. The burden estimates are based on data from the prior administration of the PPCS.

6. An estimate of the total public burden (in hours) associated with the collection: There are an estimated 9,495 total burden hours associated with this information collection.

If additional information is required, contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: December 2, 2021.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–26500 Filed 12–6–21; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

[OMB Number 1103–0093]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Revision of a Previously Approved Collection; COPS Extension Request Form

AGENCY: Community Oriented Policing Services (COPS) Office, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Community Oriented Policing Services (COPS) Office, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 30 days until January 6, 2022.

ADDRESSES: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Lashon M. Hilliard, Policy Analyst, Department of Justice, Community Oriented Policing Services (COPS) Office, 145 N Street NE, Washington, DC 20530 (202–514–6563).

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, 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;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; 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.

Overview of This Information Collection

1. *Type of Information Collection:* Revision of a currently approved collection, with change; comments requested.

2. *The Title of the Form/Collection:* COPS Extension Request Form.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* None. U.S. Department of Justice, Community Oriented Policing Services (COPS) Office.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Law enforcement agencies and other COPS grants recipients that have grants expiring within 90 days of the date of the form/request. The extension request form will allow recipients of COPS grants the opportunity to request a ''no-cost'' time extension in order to complete the federal funding period and requirements for their grant/cooperative agreement award. Requesting and/or receiving a time extension *will not* provide additional funding.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that approximately 2,700 respondents annually will complete the form within 30 minutes.

6. *An estimate of the total public burden (in hours) associated with the collection:* 1,350 total annual burden hours (0.5 hours × 2,700 respondents + 1,350 total burden hours).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, Washington, DC 20530.

Dated: December 2, 2021.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–26499 Filed 12–6–21; 8:45 am]

BILLING CODE 4410–AT–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

On December 1, 2021, the Department of Justice lodged a proposed consent decree with the United States District Court for the Western District of Kentucky in the lawsuit entitled *United States and Louisville Metro Air*

Pollution Control District v. *Louisville Gas & Electric Company,* Civil Action No. 3:20–cv–00542–CRS.

The United States and the Louisville Metro Air Pollution Control District (''District'') filed a complaint against Louisville Gas & Electric Company (''LG&E'') alleging violations of the Clean Air Act (''Act'') at LG&E's Mill Creek facility in Jefferson County, Kentucky. The claims alleged in the complaint and resolved by the proposed consent decree concern LG&E's emission of sulfuric acid mist. The proposed consent decree requires LG&E to pay a $750,000 civil penalty, perform a supplemental environmental project estimated to cost $540,000, and perform injunctive relief.

The publication of this notice opens a period for public comment on the proposed consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division and should refer to *United States and Louisville Metro Air Pollution Control District* v. *Louisville Gas & Electric Company,* D.J. Ref. No. 90–5–2–1–11597. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, D.C. 20044–7611.

During the public comment period, the proposed consent decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the proposed consent decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $12.00 (25 cents per page reproduction cost) payable to the United States Treasury.

Lori Jonas,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2021–26461 Filed 12–6–21; 8:45 am]

BILLING CODE 4410–15–P

NATIONAL CREDIT UNION ADMINISTRATION

Submission for OMB Review; Comment Request

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice.

SUMMARY: The National Credit Union Administration (NCUA) 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.

DATES: Comments should be received on or before January 6, 2022 to be assured of consideration.

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: Copies of the submission may be obtained by contacting Dawn Wolfgang at (703) 548–2279, emailing *PRAComments@ncua.gov,* or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

OMB Number: 3133–0004.

Type of Review: Revision of a currently approved collection.

Title: NCUA Call Report.

Form: NCUA Form 5300.

Abstract: Sections 106 and 202 of the Federal Credit Union Act require federally insured credit unions to make financial reports to the NCUA. Section 741.5 prescribes the method in which federally insured credit unions must submit this information to NCUA. NCUA Form 5300, Call Report, is used to file quarterly financial and statistical data through NCUA's online portal, CUOnline.

The financial and statistical information is essential to NCUA in carrying out its responsibility for supervising federal credit unions. The information also enables NCUA to monitor all federally insured credit unions with National Credit Union Share Insurance Fund (NCUSIF) insured share accounts.

Affected Public: Private Sector: Not-for-profit institutions.

Estimated Total Annual Burden Hours: 81,552.

By Melane Conyers-Ausbrooks, Secretary of the Board, the National Credit Union Administration, on November 29, 2021.

Dated: December 2, 2021.

Dawn D. Wolfgang,

NCUA PRA Clearance Officer.

[FR Doc. 2021–26498 Filed 12–6–21; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meetings

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 86 FR 68688, December 23, 2021.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: The National Science Board's Committee on External Engagement teleconference meeting was scheduled for December 8, 2021, from 10:30–11:30 p.m. EST.

CHANGES IN THE MEETING: The new date and time is December 8, 2021, from 10:30–11:30 a.m. EST.

CONTACT PERSON FOR MORE INFORMATION: Chris Blair, 703/292–7000, *cblair@nsf.gov.*

Chris Blair,

Executive Assistant to the National Science Board Office.

[FR Doc. 2021–26567 Filed 12–3–21; 11:15 am]

BILLING CODE 7555–01–P

NEIGHBORHOOD REINVESTMENT CORPORATION

Sunshine Act Meetings

TIME AND DATE: 2:00 p.m., Thursday, December 16, 2021.

PLACE: Via Conference Call.

STATUS: Parts of this meeting will be open to the public. The rest of the meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Regular Board of Directors meeting.

The General Counsel of the Corporation has certified that in his opinion, one or more of the exemptions set forth in the Government in the Sunshine Act, 5 U.S.C. 552b (c)(2) and (4) permit closure of the following portion(s) of this meeting:

- Executive Session

Agenda

I. Call to Order
II. Executive Session Sunshine Act
III. Executive Session Other Matter
IV. Executive Session: Report from CEO
V. Executive Session: Report from CFO
VI. Executive Session: NeighborWorks Compass™ Update
VII. Action Item Approval of Minutes

VIII. Action Item DC Office Lease Execution
IX. Action Item Events and Training Management System
X. Action Item Large AV Event Services Contract
XI. Action Item $3M JPMorgan Chase Grant Agreement
XII. Discussion Item November 5 Audit Committee Report
XIII. Discussion Item Interim CIO Report
XIV. Discussion Item FY22 Corporate Scorecard
XV. Discussion Item Federal Budget Update
XVI. Adjournment

Portions Open to the Public: Everything except the Executive Session.

Portions Closed to the Public: Executive Session.

CONTACT PERSON FOR MORE INFORMATION: Lakeyia Thompson, Special Assistant, (202) 524–9940; *Lthompson@nw.org.*

Lakeyia Thompson,

Special Assistant.

[FR Doc. 2021–26538 Filed 12–3–21; 11:15 am]

BILLING CODE 7570–02–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2022–26 and CP2022–28; MC2022–27 and CP2022–29]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 8, 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.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2022–26 and CP2022–28; *Filing Title:* USPS Request to Add Priority Mail & First-Class Package Service Contract 211 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 30, 2021; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* December 8, 2021.

2. *Docket No(s).:* MC2022–27 and CP2022–29; *Filing Title:* USPS Request to Add Priority Mail Express & Priority Mail Contract 127 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 30, 2021; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* December 8, 2021.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2021–26435 Filed 12–6–21; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2022–24 and CP2022–26]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 9, 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.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2022–24 and CP2022–26; *Filing Title:* USPS Request to Add Priority Mail & First-Class Package Service Contract 210 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 1, 2021; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* December 9, 2021.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2021–26505 Filed 12–6–21; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93694; File No. SR–CboeEDGA–2021–025]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Introduce a New Data Product To Be Known as the Short Volume Report, Modify the Name of Rule 13.8 to "Data Products", and Add a Preamble to Rule 13.8

December 1, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 17, 2021, Cboe EDGA Exchange, Inc. (''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to adopt Exchange Rule 13.8(h) to introduce a new data product to be known as the Short Volume Report, modify the name of Rule 13.8 to ''Data Products'', and add a preamble to Rule 13.8. The text of the proposed rule change is provided in Exhibit 5. 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://markets.cboe.com/us/equities/regulation/rule_filings/edga/*), 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 proposes to adopt Rule 13.8(h) to provide for a new data product to be known as the Short Volume Report. The proposal introduces the Short Volume Report which will be available for purchase to EDGA Members (''Members'') and non-Members. The Exchange notes that the proposed data product is substantially similar to information included in the short sale volume report offered by the Nasdaq Stock Market LLC (''Nasdaq'')[3] and the TAQ Group Short Volume file offered by the New York Stock Exchange LLC (''NYSE''),[4] with the exception that the proposed product will include buy and sell volume as well as trade counts for buy, sell, sell short, and sell short exempt volume. The Exchange also proposes to change the name of Rule 13.8 to ''Data Products'' and add a preamble to Rule 13.8 to conform to Cboe BZX Exchange, Inc. (''BZX'') and Cboe BYX Exchange, Inc. (''BYX'') Rule 11.22.

A description of each market data product offered by the Exchange is described in Exchange Rule 13.8. The Exchange proposes to amend Rule 13.8(h) to introduce and add a description of the Short Volume Report. The Exchange proposes to describe the Short Volume Report as ''an end-of-day report that summarizes equity trading activity on the Exchange, including trade count and volume by symbol for buy, sell, sell short, and sell short exempt trades.'' Specifically, the end-of-day report will include the following information: Trade date, symbol, total volume, buy volume, buy trade count, sell volume, sell trade count, sell short volume, sell short trade count, sell short exempt volume, and sell short exempt trade count. The Exchange notes that the proposed product includes substantially similar information as that included in comparable products offered on Nasdaq and NYSE except that the Exchange proposes to also include

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* the Nasdaq Price List—Equities, Nasdaq Web-based Reports, Nasdaq Short Sale Volume Reports at Price List—NASDAQ Global Data Products (*nasdaqtrader.com*).

[4] *See* the NYSE Historical Proprietary Market Data Pricing, NYSE Group Summary Data Products, TAQ NYSE Group Short Volume (Daily File) at *https://www.nyse.com/publicdocs/nyse/data/NYSE_Historical_Market_Data_Pricing.pdf.*

buy and sell volume as well as trade counts for buy, sell, sell short, and sell short exempt volume.[5] The Exchange believes the additional data points will benefit market participants because they will allow market participants to better understand the changing risk environment on a daily basis.

The Short Volume Report will be available for purchase[6] on a monthly subscription basis for which subscribers will receive a daily end-of-day file that will be delivered after the conclusion of the Post-Closing Session.[7] Additionally, historical Short Volume Reports dating as far back as January 2, 2015 will be available for purchase on an ad hoc basis in monthly increments. The subscription files and historical files will include the same data points. Lastly, the Exchange notes the proposed product is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make this data available and that potential subscribers may subscribe to it only if they voluntarily choose to do so.

Based on the above proposal, the Exchange also proposes to amend the name of Rule 13.8 from ''EDGA Book Feeds'' to ''Data Products''. Such an amendment would accurately describe the Rule as the proposed product is not a book feed, but rather a data product. Further, the existing data feeds identified in Rule 13.8 are also data products. The Exchange also proposes to add the following preamble to Rule 13.8: ''The Exchange offers the following data products free of charge, unless otherwise noted in the Exchange's fee schedule''. The proposed language conforms to rule text provided in BZX and BYX Rules 11.22.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[9] 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)[10] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that the proposed Short Volume Report would further broaden the availability of U.S. equity market data to investors consistent with the principles of Regulation NMS. The proposal also promotes increased transparency through the dissemination of data included in the Short Volume Report. The proposed rule change would benefit investors by providing access to the Short Volume Report, which may promote better informed trading. Particularly, information included in the Short Volume Report may allow a market participant to identify the source of selling pressure and whether it is long or short.

Moreover, other exchanges offer substantially similar data products. The Nasdaq daily short sale volume file reflects the aggregate number of shares executed on Nasdaq, Nasdaq BX, Inc. and Nasdaq PHLX LLC.[11] Specifically, the Nasdaq daily short volume report provides the following information: Trade date, symbol, volume during regular trading hours, and CTA market identifier. Additionally, the NYSE Group Short Volume daily file reflects a summary of short sale volume for securities traded on NYSE, NYSE American LLC, NYSE Arca, Inc., NYSE National, Inc., and NYSE Chicago, Inc. Specifically, the NYSE Group Short Volume product provides the following information: Trade date, symbol, short exempt volume, short volume, total volume of all transactions, and market identifier. While the proposed product offers volume and trade counts which are not offered in the comparable NYSE and Nasdaq short sale volume reports, similar data is otherwise available or determinable in other NYSE data product offerings. Specifically, the NYSE TAQ product provides trade and quote information for orders entered on the NYSE affiliated equity exchanges, which include buy, sell, and sell short volume.[12] Thus, subscribers to NYSE TAQ could determine volume and trade counts from such data. Additionally, the NYSE Monthly Short Sales report provides a record of every short sale transaction on NYSE during the month, which includes a size and short sale indicator.[13] Thus, subscribers to the NYSE Monthly Short Sales report could determine the sell short and sell short exempt volume and trade count, albeit on a monthly basis rather than a daily basis. Moreover, the Exchange believes the proposed Short Volume Report will benefit market participants because they will provide visibility into market activity that is not currently available. Further it will allow market participants to better understand the changing risk environment on a daily basis. Therefore, the Exchange believes it is reasonable to include such data in the proposed product.

Finally, as noted above the proposed Short Sale Report is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make this data available and that potential subscribers may subscribe to it only if they voluntarily choose to do so.

The Exchange believes the proposal to change the name of Rule 13.8 to ''Data Products'' is reasonable because the proposed Short Volume Report is not a book feed, and thus ''EDGA Book Feeds'' does not accurately describe all of the paragraphs under Rule 13.8. The Exchange also believes the proposal to add the preamble to Rule 13.8 is reasonable because it will eliminate potential investor confusion as to which data products the Exchange charges a fee. Furthermore, both of the aforementioned changes to Rule 13.8 are identical to the text of BZX and BYX Rule 11.22.

[5] The Exchange notes that the Nasdaq and NYSE comparable products reflect aggregate information across their affiliated equity exchanges. The Exchange is not proposing an aggregated Short Volume Report across its affiliated equity exchanges; thus, the proposal is only applicable to trades executed on BZX [sic].

[6] The Exchange intends to submit a separate rule filing to adopt fees for the Short Volume Report product.

[7] *See* Exchange Rule 1.5(r).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] *See* Supra notes 3 and 4.

[11] *See* Supra note 3. As noted in the Nasdaq Price List, BX and PSX short sale files are available for free.

[12] *See https://www.nyse.com/publicdocs/nyse/data/TAQ_XDP_Products_Client_Spec_v2.3c.pdf.*

[13] *See https://www.nyse.com/publicdocs/nyse/data/Monthly_Short_Sales_Client_Spec_v1.3.pdf.*

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange 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. Rather, the Exchange believes that the proposal will promote competition by permitting the Exchange to offer data products similar to those offered by other competitor equities exchanges.[14] The Exchange is proposing to introduce the Short Volume Report in order to keep pace with changes in the industry and evolving customer needs, and believes this proposed rule change would contribute to robust competition among national securities exchanges. As noted, at least two other U.S. equity exchanges offer a market data product that is substantially similar to the proposed Short Volume Report.[15] As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges. Therefore, the Exchange does not believe 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

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeEDGA–2021–025 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–CboeEDGA–2021–025. 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–CboeEDGA–2021–025, and should be submitted on or before December 28, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–26449 Filed 12–6–21; 8:45 am]

BILLING CODE 8011–01–P

[14] *See* Supra notes 3 and 4.

[15] *Id.*

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93698; File No. SR–EMERALD–2021–38]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing of Proposed Rule Change To Amend Exchange Rule 531 To Provide for a New Service Called the "High Precision Network Time Signal Service"

December 1, 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 November 19, 2021, MIAX Emerald, LLC (''MIAX Emerald'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the 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 amend Exchange Rule 531 to provide for the new service called the ''High Precision Network Time Signal Service''.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/emerald,* at MIAX Emerald's principal office, 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 provides a resilient and robust technology platform,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

deterministic functionality, transparent trading platform, and a culture of technological innovation to the U.S. options market. In keeping with its culture of innovation, the Exchange proposes to amend Exchange Rule 531, Reports and Market Data Products, to provide for the new service called the ''High Precision Network Time Signal Service'' (hereinafter referred to as ''HPNTSS'' or the ''Service'').[3] The Service is an optional product[4] available to Members.[5] In sum, Members would be able to utilize the proposed Service to synchronize their systems to the Exchange's Global Positioning Satellite (''GPS'') clock[6] at sub-nanosecond level accuracy for correlated latency measurements between the Exchange's and the Member systems' time measurements related to the same message or order. Time synchronization services are well established in the U.S. and utilized in many areas of the U.S. economy and infrastructure. The proposed Service is not novel to the securities markets and it is similar to other network time synchronization services currently available to U.S. registered broker-dealers by two U.S. exchange groups[7] and a service currently offered by at least two foreign securities exchanges.[8]

GPS network time is the benchmark by which most, if not all, Members use to synchronize their internal primary clock devices. Using the time signals publicly available through the GPS network is a de facto standard for high precision time synchronization across geographically diverse locations. Typically, a GPS antenna serves as a time signal receiver and feeds a primary clock device the Coordinated Universal Time (referred to as ''UTC'') using Precision Time Protocol (''PTP'').[9] Coordinated Universal Time is the primary time standard by which the world regulates clocks and time.[10]

Today, the Exchange understands many Members attempt to sync their primary clock devices to the GPS clock. By getting the GPS signal through a GPS capable antenna, Members can synchronize their primary clock device to the GPS network time to within an accuracy of approximately 30 nanoseconds. From there, by using a PTP time synchronization protocol, Members can synchronize their internal devices to their primary clock devices. Through this method, the Members' internal devices can be synchronized to within a few billionths of a second (nanoseconds) of one another. This is the same method the Exchange uses today to synchronize its primary clock device to the GPS network time, *i.e.,* the Exchange gets the GPS signal through a GPS capable antenna. By using this method, however, measurement times of market events may oscillate by approximately 30 or more nanoseconds between the Member and an exchange.[11] This may, in turn, lead to incorrect latency measurements that may adversely affect a Member's time calculations in determining how long it took for their order or message to leave their systems and reach the trading center to which it was sent.

As stated above, time synchronization services are well established in the U.S. and utilized in many areas of the U.S. economy and infrastructure. The proposed Service simply provides time synchronization signals to align the subscribing Member's clock to the Exchange's clock at the more acute nanosecond level. This will allow Members to timestamp messages or orders within their infrastructure and leverage various Exchange clock provided timestamp information to provide more precise network telemetry information to assess the health and efficiency of their network. The proposed Service would enable Members to more accurately synchronize their primary clock devices and/or timestamping devices to the Exchange's primary clock devices at the more accurate, sub-nanosecond level. The Exchange's primary clock currently feeds a time signal to the Exchange's timestamping devices and provides sub-nanosecond level synchronization using an enhanced PTP (''Enhanced PTP''). This sub-nanosecond time signal is used to synchronize the Exchange's network packet/order/message capture devices. Some Members may also currently utilize Enhanced PTP with their primary clock devices that feed their own timestamping devices at a sub-nanosecond level. However, despite the Exchange and some Members utilizing separate Enhanced PTP devices, the timestamps between the Exchange and those Members may still oscillate up to 30 nanoseconds due to GPS time precision limitations. Under the proposed Service, Members would be able to synchronize their own primary clock devices to the Exchange's primary clock device, by receiving time signals from the Exchange, at a sub-nanosecond level, reducing or eliminating the potential for those timestamps to differ. The sub-nanosecond time signal would

[3] The Exchange also proposes to amend the title of Exchange Rule 531 to include the phrase ''and Services'' so the title would read as ''Reports, Market Data Products, and Services.''

[4] The Exchange intends to submit a separate filing with the Commission pursuant to Section 19(b)(1) to propose fees for the Service.

[5] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[6] For a description of the GPS clock, *see* Official U.S. Government Information About the Global Positioning System (GPS) and Related Topic, *available at https://www.gps.gov/applications/timing/* (providing that ''[i]n addition to longitude, latitude, and altitude, the Global Positioning System (GPS) provides a critical fourth dimension—time. Each GPS satellite contains multiple atomic clocks that contribute very precise time data to the GPS signals. GPS receivers decode these signals, effectively synchronizing each receiver to the atomic clocks. This enables users to determine the time to within 100 billionths of a second, without the cost of owning and operating atomic clocks.'').

[7] ICE Data Services offers a variety of timing solutions in its colocation centers, allowing market participants to effectively timestamp their order flow by synching their primary clock devices to the primary clock devices in ICE Data Services' network. *See* ICE Global Network Timing Services, *available at Timing Services | ICE (theice.com)* (last visited November 9, 2021). A similar service is also offered by Nasdaq in its colocation centers. *See NIST Enables Precision Time-stamping of Financial Transactions*, by the National Institute of Standards and Technology, U.S. Department of Commerce, *available at https://www.nist.gov/news-events/news/2014/12/nist-enables-precision-time-stamping-financial-transactions* (last visited November 9, 2021), *https://www.tradersmagazine.com/departments/technology/nasdaq-launches-ultra-high-precision-time-stamping/* (last visited November 9, 2021), and *https://www.gpsworld.com/nasdaq-offers-precision-time-service-for-trading/* (last visited November 9, 2021).

[8] A similar service is currently offered by Deutche Börse Group and Nasdaq. *See* a description of Deutsche Börse Group's Time Services, *available at https://www.deutsche-boerse.com/dbg-en/products-services/ps-technology/ps-connectivity-services/ps-connectivity-services-time-services* (last visited September 29, 2021), and a description of Nasdaq Nordic PTP Services, *available at https://www.nasdaq.com/docs/nasdaq-nordic-ptp-services-fs.pdf* (last visited November 9, 2021)/. *See also* slides 28–39 of ''Precise Timing in Financial Markets'', by Deutche Börse Group, *available at* White Rabbit in Financial Markets (*stanford.edu*) (last visited October 4, 2021). *See also* slides 11–13 of ''Wall Street Clock'', by Seven Solutions, *available at* White Rabbit synchronization use cases (*atis.org*) (last visited October 4, 2021).

[9] The term ''Coordinated Universal Time'' is defined as the ''international standard of time that is kept by atomic clocks around the world.'' *See* Merriam-Webster Dictionary, *available at https://www.merriam-webster.com/dictionary/Coordinated%20Universal%20Time* (last visited November 10, 2021).

[10] *See https://www.timeanddate.com/time/aboututc.html* (last visited October 5, 2021).

[11] *See* slide 11–13 of ''Wall Street Clock'', by Seven Solutions, *available at* White Rabbit synchronization use cases (*atis.org*) (last visited October 4, 2021). *See also* How Accurate is GPS for Timing, *available at GPS.gov:* GPS Accuracy (last visited November 11, 2021) (providing that ''GPS time transfer is a common method for synchronizing clocks and networks to Coordinated Universal Time (UTC). The government distributes UTC as maintained by the U.S. Naval Observatory (USNO) via the GPS signal in space with a time transfer accuracy relative to UTC (USNO) of ≤30 nanoseconds (billionths of a second), 95% of the time. This performance standard assumes the use of a specialized time transfer receiver at a fixed location.'').

simply tell the Member the Exchange's time at a sub-nanosecond level at a particular point in time. Members may, in turn, use this time signal to calculate the time an order or message traveled between their network and that of the Exchange at a more granular sub-nanosecond level.

The Service would operate as follows. As stated above, some Members may currently utilize Enhanced PTP with their primary clock devices that feed their own timestamping devices at a sub-nanosecond level. A Member may utilize these existing compatible clock synchronization device or install one within their network. This device is not provided by the Exchange and would need to be built by the Member or acquired from a third party. This device would be synchronized, via the HPNTSS, to the Exchange's primary clock device, and ultimately provide to them the Exchange's single view of the GPS clock time, at a sub-nanosecond level, at a particular point in time. The Member's clock synchronization device would then be used to synchronize the clocks within the Member's computer and network infrastructure, as appropriate. This enables the Member to record certain times an order or message traveled through and leaves the Member's system at a sub-nanosecond level. The Exchange's computer and network infrastructure, synchronized via the HPNTSS device(s) records the times the order or message reached certain points within the Exchange's network/systems.

Members may use the proposed Service for numerous purposes. The proposed Service would allow Members to better understand the times at which their order or message reached certain points when traveling from their network to the Exchange allowing them to better understand the latency of their orders and messages when traveling between their network and that of the Exchange. The proposed Service will provide greater visibility into the latency between their network and the Exchange, which will allow Members to optimize their network, models, and trading patterns to potentially improve the timeliness of their interactions with the Exchange.

The Exchange believes the Service will provide Members with an opportunity to learn more about better opportunities to access liquidity and receive better execution rates. However, the utility of the proposed Service is not limited to evaluating the timeliness of Members' orders and may be used for other purposes, including, but not limited to the following use cases discussed below. Members may use the proposed Service to analyze the efficiency of their network and connections when not only routing orders to the Exchange, but also when receiving messages back from the Exchange. These messages include communications regarding whether their order was accepted, rejected, or executed. Therefore, Members may measure message traversal times by comparing their message (*e.g.,* order, quote, cancellation, etc.) timestamp to the Exchange's matching engine timestamp on acknowledgement messages (*e.g.,* order acknowledgment, quote acknowledgment, cancellation acknowledgment, etc.). Members may also measure the time it takes for any message to be received by the Exchange's matching engine. Members may also measure the traversal times by comparing their message timestamp to the matching engine timestamp on the Exchange's proprietary market data feed messages and measure the time it takes for any message to be published to the Exchange's proprietary market data feeds by the Exchange's matching engine. Members may then use this information to further enhance their own systems to receive such communications in a timelier manner to verify that their systems are working as intended. Members may also use the Service for other purposes, such as determining compliance with certain regulatory requirements [12] and trading surveillance. Members may also utilize time synchronization to assist them in evaluating compliance with certain clock synchronization requirements.[13]

Specifically, the Service would be described under proposed Exchange Rule 531(c), which would provide that:

> HPNTSS is an enhanced Precision Time Protocol (''PTP'') Ethernet-based service for synchronizing device clocks to within sub-nanosecond accuracy of one another. HPNTSS enables Members to synchronize their internal devices to the same time as the Exchange devices with high precision. Tightly synchronized clocks enable the ability to correlate event timestamps from within their own systems to those within the Exchange's network. For example, HPNTSS allows Members to precision timestamp a quote sent from their system to the very same quote timestamped by the Exchange and accurately measure the time delta between the timestamps to less than one nanosecond.

The proposed rule text includes an example related to comparing a quote timestamps at a sub-nanosecond level. However, this example is included for illustrative purposes only and is one of may use cases in which the proposed Service may be used by Members. Additional examples of use cases are described above.

The Exchange proposes to provide the Service in response to Member demand for tighter and more accurate clock synchronization options with the Exchange's network. The purpose of the proposed Service is to provide Members an additional, optional tool to aid in them in [sic] synchronizing their systems with the Exchange's network to ensure more accurate clock synchronization and timestamp calculations.

As discussed above, Members may currently have their own GPS clock and synchronization devices that allow them to determine the timeliness and speed of their orders and messages. They may also currently have those GPS devices synchronized with the GPS clocks of other trading centers or other third parties that they engage with. The Exchange proposes to allow all Members to do the same here and synchronize their GPS devices with the Exchange's GPS clock. The Exchange simply proposes to provide the Service in response to Member demand for data concerning the timeliness of their incoming orders and messages that now wish to sync their own devices with the Exchange's GPS clock at a sub-nanosecond level. Again, the proposed Service is an optional product and no Member is required to subscribe to the Service to trade or participate on the Exchange.

Change to Title of Exchange Rule 531

With the proposed change to add the new Service, the Exchange also proposes to amend the title of Exchange Rule 531, which is currently titled ''Reports and Market Data Products.'' With the addition of the Service, the Exchange proposes to place a comma after the word ''Reports'' in the title of Exchange Rule 531, and add the phrase ''and Services'' at the end. Accordingly, with the proposed changes, the title of Exchange Rule 531 will be as follows: ''Reports, Market Data Products and Services.'' The purpose of this change is to provide clarity within the Exchange's rules.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act

[12] *See, e.g.,* Chapter III of the Exchange's Rules, which incorporates by reference Rule 301, Interpretation and Policy .02 (Just and Equitable Principles of Trade), of Miami International Securities Exchange, LLC (''MIAX''); *and* Financial Industry Regulatory Authority, Inc. (''FINRA'') Rule 5320.

[13] *See* Chapter XVII of the Exchange's Rules, which incorporates by reference MIAX Rule 1707 (Consolidated Audit Trail Compliance Rule—Clock Synchronization Rule Violation); *and* FINRA Rule 6820.

and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[14] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[15] 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. This proposal is in keeping with those principles in that it promotes improved technology management and optimization by providing an optional Service to those Members interested in synchronizing their system's GPS clocks and timestamps with those of the Exchange at a sub-nanosecond level. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[16] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers as it will be available to all Members who chose [sic] to subscribe. Members that chose [sic] not to subscribe to the proposed Service are free to utilize existing time synchronization methods described above or utilize some other services that may assist them in time synchronization of their systems at a more granular level.

Today, GPS clocks contribute very precise time data to the GPS signals. GPS receivers decode these signals, effectively synchronizing each receiver to the atomic clocks. This enables users to determine the time to within 30 nanoseconds.[17] These precise time measurements are crucial to a variety of economic activities. Communication systems and financial networks all rely on precision timing for synchronization and operational efficiency. These benefits include precise synchronization of communications systems, financial networks, and other critical infrastructure, as well as improved network management and optimization, making traceable timestamps possible for financial transactions and billing.[18] The proposed Service, therefore, perfects the mechanism of a free and open market and a national market system by providing an additional, optional tool for Members to further enhance their timestamp calculations at a sub-nanosecond level. The proposed Service is also not novel to the securities markets and it is similar to other network time services currently available to U.S. registered broker-dealers by two U.S. exchange groups and currently offered by at least two foreign securities exchanges.[19]

The Exchange believes the proposed Service removes impediments to and perfects the mechanism of a free and open market and a national market system by providing Members an optional tool that would enable them to better time synchronize their systems to the Exchange. The proposed Service would be beneficial in multiple areas, one of which is enabling Members to better understand the latency of their incoming orders and messages. Members may also use the proposed Service to analyze the efficiency of their networks when receiving messages from the Exchange, such as whether their order or quote was accepted, rejected, or executed. Members may also use the proposed Service to measure the time it takes for their message, such as an instruction to cancel a resting order, to be received by the Exchange's matching engine, not just at the outside wall of the Exchange's network. The proposed Service may also be used by Members to measure traversal times by comparing their message timestamp to the Exchange's matching engine timestamp, which is published on the Exchange's proprietary data feeds. Members may then, in turn, measure the time it takes for a message or order to be published to the Exchange's proprietary data feed by the matching engine. Based on the above use cases, the proposed Service would facilitate transactions in securities by providing Members with an optional tool that enables them to further enhance their systems to send and receive such communications to the Exchange in a timelier manner and to verify that their systems are performing correctly.

The proposed Service is designed for Members that are interested in gaining insight into latency by providing those Members with an optional service to better calculate the time it took for their orders or messages to travel between their network and that of the Exchange. The Exchange believes providing this optional clock synchronization service to interested Members is consistent with facilitating transactions in securities, removing impediments to and perfecting the mechanism of a free and open market and a national market system, and, in general, protecting investors and the public interest because it provides greater visibility into the latency of Members' orders, messages, and interactions with the Exchange. Members may use the proposed Service to optimize their models and trading patterns in an effort to yield better execution results by better understanding the time their order left their network and was received by the Exchange. This would, in turn, benefit other market participants who may experience better executions when sending orders to Members that utilize the Service.

The proposed Service also enables Members to further enhance their own systems to send and receive communications to and from the Exchange in a timelier manner and to verify that their systems are working as intended. The proposed Service also promotes just and equitable principles of trade because Members may use the Service for determining compliance with certain regulatory requirements,[20] trading surveillance, and to assist them in evaluating compliance with certain clock synchronization requirements.[21]

The proposed Service is not a market data product or access/connectivity service and the Exchange does not propose to include additional connectivity options or modify existing connectivity options as part of this proposal. Members may use their existing methods to connect to and send orders to the Exchange. The proposed Service is simply a clock synchronization service, requested by Members, that would allow Members to better understand the time by which their orders travel from their systems to those of the Exchange. It is simply an additional, optional tool that Members may use to calculate time measurements at a sub-nanosecond level. The proposed Service will not include any trading data regarding the Member's activity on the Exchange or include any data from other trading activity on the Exchange.

The proposed Service may not provide utility to all Members based on their business model, use of existing time synchronization methods, or reliance on other methods to test their system's performance to ensure it is operating as intended. Nonetheless, the Exchange understands that some Members may view the proposed

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] *Id.*

[17] *See supra* note 11.

[18] *See GPS.gov:* Timing Applications (last visited November 12, 2021).

[19] *See supra* notes 7 and 8.

[20] *See supra* note 12.

[21] *See supra* note 13.

Service as critical in that it would assist them in better calculating time measurements of their orders at a sub-nanosecond level and further enhance their trading systems to perform with minimal latency as compare [sic] to other market participants that participate on the Exchange. However, the Exchange notes that use of the proposed Service will be on voluntary basis and no Member will be required to subscribe to the Service. Members may utilize existing time synchronization methods described above or utilize some other services that may assist them in time synchronization of their systems. Members may view these alternatives as more in line with their business needs or chose [sic] an alternative that is more compatible with their existing technology. As noted above, other Members may also not think the proposed Service is necessary or in line with their business need because they are not latency sensitive or have developed other methods to test and ensure that their network is operating as they intend.

Again, the Exchange notes that there is no rule or regulation that requires the Exchange to provide, or that a Member elect to subscribe to, the Service. It is entirely a business decision of each Member to subscribe to the Service. Members that do not chose to subscribe to the Service may avail themselves to other products that assist them in better calculating time measurements related to their messages or orders. The Exchange proposes to offer the Service as a convenience to Members to provide them with additional information regarding trading activity on the Exchange. A Member that chooses to subscribe to the Service may discontinue the Service at any time if that Member determines that the Service is no longer useful or that alternatives better meet their business or system needs.

In summary, the proposed Service will help to protect a free and open market by providing an additional tool (offered on an optional basis) to the marketplace and by providing investors with greater choices. Additionally, the proposal would not permit unfair discrimination because the proposed Service will be available to all Exchange Members.

Lastly, the Exchange believes the proposed changes to the title of Exchange Rule 531 promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed rule changes will provide greater clarity to Members and the public regarding the Exchange's Rules. It is in the public interest for rules to be accurate and concise so as to eliminate the potential for confusion.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange 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, as amended. In this instance, the proposed rule change to offer the optional Service is in response to Member interest and requests for tools that would enable them to better measure traversal times between their network and that of the Exchange at a more granular level. The Exchange does not believe the proposed Service will have an inappropriate burden on intra-market competition between Members that choose to subscribe to the Service and those Members that do not. As discussed above, other latency measurement tools are available to U.S. registered broker-dealers, alternative trading systems, and currently offered by at least two foreign securities exchanges.[22] Like the proposed Service, these tools also provide market participants the ability to further enhance their systems to send and receive such communications to the Exchange in a timelier manner and to verify that their systems are performing correctly. Additionally, some Members may be able to enhance their own traversal time calculations without subscribing to the proposed Service by using existing time synchronization methods described above or utilize some other services that may assist them in time synchronization of their systems. Members may view these alternatives as more in line with their business needs or chose [sic] an alternative that is more compatible with their existing technology.

The Exchange does not believe the proposed Service will have an inappropriate burden on inter-market competition as similar services are currently available to brokers-dealers by at least two other U.S. exchange groups.[23] The proposed Service would therefore serve to enhance competition by allowing the Exchange to offer a time synchronization service that is similar to those currently available on other U.S. securities exchanges. The proposed rule change should enhance competition by promoting further initiatives and innovation among market centers and market participants as it concerns time measurements and synchronization among trading platforms.

Lastly, if the proposed Service is unattractive to Members, Members will opt not to subscribe to it. Accordingly, the Exchange does not believe that the proposed change will impair the ability of Members or competing order execution venues to maintain their competitive standing in the financial markets.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–EMERALD–2021–38 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–EMERALD–2021–38. 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

[22] *See supra* notes 7 and 8.

[23] *See supra* note 7.

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–EMERALD–2021–38, and should be submitted on or before December 28, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–26451 Filed 12–6–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93696; File No. SR–CboeEDGX–2021–049]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Introduce a New Data Product To Be Known as the Short Volume Report, Modify the Name of Rule 13.8 to "Data Products", and Add a Preamble to Rule 13.8

December 1, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 17, 2021, Cboe EDGX Exchange, Inc. (''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to adopt Exchange Rule 13.8(h) to introduce a new data product to be known as the Short Volume Report, modify the name of Rule 13.8 to ''Data Products'', and add a preamble to Rule 13.8. 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://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), 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 proposes to adopt Rule 13.8(h) to provide for a new data product to be known as the Short Volume Report. The proposal introduces the Short Volume Report which will be available for purchase to EDGX Members (''Members'') and non-Members. The Exchange notes that the proposed data product is substantially similar to information included in the short sale volume report offered by the Nasdaq Stock Market LLC (''Nasdaq'')[3] and the TAQ Group Short Volume file offered by the New York Stock Exchange LLC (''NYSE''),[4] with the exception that the proposed product will include buy and sell volume as well as trade counts for buy, sell, sell short, and sell short exempt volume. The Exchange also proposes to change the name of Rule 13.8 to ''Data Products'' and add a preamble to Rule 13.8 to conform to Cboe BZX Exchange, Inc. (''BZX'') and Cboe BYX Exchange, Inc. (''BYX'') Rule 11.22.

A description of each market data product offered by the Exchange is described in Exchange Rule 13.8. The Exchange proposes to amend Rule 13.8(h) to introduce and add a description of the Short Volume Report. The Exchange proposes to describe the Short Volume Report as ''an end-of-day report that summarizes equity trading activity on the Exchange, including trade count and volume by symbol for buy, sell, sell short, and sell short exempt trades.'' Specifically, the end-of-day report will include the following information: Trade date, symbol, total volume, buy volume, buy trade count, sell volume, sell trade count, sell short volume, sell short trade count, sell short exempt volume, and sell short exempt trade count. The Exchange notes that the proposed product includes substantially similar information as that included in comparable products offered on Nasdaq and NYSE except that the Exchange proposes to also include buy and sell volume as well as trade counts for buy, sell, sell short, and sell short exempt volume.[5] The Exchange believes the additional data points will benefit market participants because they will allow market participants to better understand the changing risk environment on a daily basis.

The Short Volume Report will be available for purchase[6] on a monthly subscription basis for which subscribers will receive a daily end-of-day file that will be delivered after the conclusion of the Post-Closing Session.[7] Additionally, historical Short Volume Reports dating as far back as January 2, 2015 will be available for purchase on an ad hoc basis in monthly increments. The

[24] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* the Nasdaq Price List—Equities, Nasdaq Web-based Reports, Nasdaq Short Sale Volume Reports at Price List—NASDAQ Global Data Products (*nasdaqtrader.com*).

[4] *See* the NYSE Historical Proprietary Market Data Pricing, NYSE Group Summary Data Products, TAQ NYSE Group Short Volume (Daily File) at *https://www.nyse.com/publicdocs/nyse/data/NYSE_Historical_Market_Data_Pricing.pdf.*

[5] The Exchange notes that the Nasdaq and NYSE comparable products reflect aggregate information across their affiliated equity exchanges. The Exchange is not proposing an aggregated Short Volume Report across its affiliated equity exchanges; thus, the proposal is only applicable to trades executed on BZX [sic].

[6] The Exchange intends to submit a separate rule filing to adopt fees for the Short Volume Report product.

[7] *See* Exchange Rule 1.5(r).

subscription files and historical files will include the same data points. Lastly, the Exchange notes the proposed product is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make this data available and that potential subscribers may subscribe to it only if they voluntarily choose to do so.

Based on the above proposal, the Exchange also proposes to amend the name of Rule 13.8 from ''EDGX Book Feeds'' to ''Data Products''. Such an amendment would accurately describe the Rule as the proposed product is not a book feed, but rather a data product. Further, the existing data feeds identified in Rule 13.8 are also data products. The Exchange also proposes to add the following preamble to Rule 13.8: ''The Exchange offers the following data products free of charge, unless otherwise noted in the Exchange's fee schedule''. The proposed language conforms to rule text provided in BZX and BYX Rules 11.22.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[9] 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)[10] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that the proposed Short Volume Report would further broaden the availability of U.S. equity market data to investors consistent with the principles of Regulation NMS. The proposal also promotes increased transparency through the dissemination of data included in the Short Volume Report. The proposed rule change would benefit investors by providing access to the Short Volume Report, which may promote better informed trading. Particularly, information included in the Short Volume Report may allow a market participant to identify the source of selling pressure and whether it is long or short.

Moreover, other exchanges offer substantially similar data products. The Nasdaq daily short sale volume file reflects the aggregate number of shares executed on Nasdaq, Nasdaq BX, Inc. and Nasdaq PHLX LLC.[11] Specifically, the Nasdaq daily short volume report provides the following information: Trade date, symbol, volume during regular trading hours, and CTA market identifier. Additionally, the NYSE Group Short Volume daily file reflects a summary of short sale volume for securities traded on NYSE, NYSE American LLC, NYSE Arca, Inc., NYSE National, Inc., and NYSE Chicago, Inc. Specifically, the NYSE Group Short Volume product provides the following information: Trade date, symbol, short exempt volume, short volume, total volume of all transactions, and market identifier. While the proposed product offers volume and trade counts which are not offered in the comparable NYSE and Nasdaq short sale volume reports, similar data is otherwise available or determinable in other NYSE data product offerings. Specifically, the NYSE TAQ product provides trade and quote information for orders entered on the NYSE affiliated equity exchanges, which include buy, sell, and sell short volume.[12] Thus, subscribers to NYSE TAQ could determine volume and trade counts from such data. Additionally, the NYSE Monthly Short Sales report provides a record of every short sale transaction on NYSE during the month, which includes a size and short sale indicator.[13] Thus, subscribers to the NYSE Monthly Short Sales report could determine the sell short and sell short exempt volume and trade count, albeit on a monthly basis rather than a daily basis. Moreover, the Exchange believes the proposed Short Volume Report will benefit market participants because they will provide visibility into market activity that is not currently available. Further it will allow market participants to better understand the changing risk environment on a daily basis. Therefore, the Exchange believes it is reasonable to include such data in the proposed product.

Finally, as noted above the proposed Short Sale Report is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make this data available and that potential subscribers may subscribe to it only if they voluntarily choose to do so.

The Exchange believes the proposal to change the name of Rule 13.8 to ''Data Products'' is reasonable because the proposed Short Volume Report is not a book feed, and thus ''EDGX Book Feeds'' does not accurately describe all of the paragraphs under Rule 13.8. The Exchange also believes the proposal to add the preamble to Rule 13.8 is reasonable because it will eliminate potential investor confusion as to which data products the Exchange charges a fee. Furthermore, both of the aforementioned changes to Rule 13.8 are identical to the text of BZX and BYX Rule 11.22.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange 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. Rather, the Exchange believes that the proposal will promote competition by permitting the Exchange to offer data products similar to those offered by other competitor equities exchanges.[14] The Exchange is proposing to introduce the Short Volume Report in order to keep pace with changes in the industry and evolving customer needs, and believes this proposed rule change would contribute to robust competition among national securities exchanges. As noted, at least two other U.S. equity exchanges offer a market data product that is substantially similar to the proposed Short Volume Report.[15] As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges. Therefore, the Exchange does not believe the proposed rule change will result in any burden on competition that

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] *See* Supra notes 3 and 4.

[11] *See* Supra note 3. As noted in the Nasdaq Price List, BX and PSX short sale files are available for free.

[12] *See https://www.nyse.com/publicdocs/nyse/data/TAQ_XDP_Products_Client_Spec_v2.3c.pdf.*

[13] *See https://www.nyse.com/publicdocs/nyse/data/Monthly_Short_Sales_Client_Spec_v1.3.pdf.*

[14] *See* Supra notes 3 and 4.

[15] *Id.*

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

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeEDGX–2021–049 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–CboeEDGX–2021–049. 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–CboeEDGX–2021–049, and should be submitted on or before December 28, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–26450 Filed 12–6–21; 8:45 am]

BILLING CODE 8011–01–P

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93690; File No. SR–ICC–2021–023]

Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Proposed Rule Change Relating to the ICC Clearing Rules and ICC Exercise Procedures

December 1, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,[1] and Rule 19b–4,[2] notice is hereby given that on November 19, 2021, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared primarily by ICC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The principal purpose of the proposed rule change is to revise the ICC Clearing Rules (''Rules'') and Exercise Procedures[3] in connection with the clearing of credit default index Swaptions (''Index Swaptions'').[4]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICC included statements concerning the purpose of and basis for the proposed rule change, security-based swap submission, or advance notice and discussed any comments it received on the proposed rule change, security-based swap submission, or advance notice. The text of these statements may be examined at the places specified in Item IV below. ICC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

ICC proposes revising the ICC Rules and Exercise Procedures related to the clearing of Index Swaptions.[5] The proposed changes to the ICC Rules and Exercise Procedures enhance the restructuring component of iTraxx Index Swaptions and include other clarifications or updates, including with respect to fallback measures in the Exercise Procedures. ICC proposes to make the changes effective following Commission approval of the proposed rule change. The proposed revisions are described in detail as follows.

I. Rule Amendments

The proposed amendments revise Rule 26R–319, which addresses procedures for settlement of an exercised Index Swaption. ICC proposes clarifications to Rule 26R–319(b), under which additional settlements may be required. The proposed changes add a parenthetical with an exception and specify that clause (i) regarding the settlement of amounts owed is subject to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Capitalized terms used but not defined herein have the meanings specified in the Rules and Exercise Procedures.

[4] Index Swaptions are also referred to in ICC's policies and procedures as ''index options'' or ''index CDS options'', or in similar terms.

[5] Pursuant to an Index Swaption, one party (the ''Swaption Buyer'') has the right (but not the obligation) to cause the other party (the ''Swaption Seller'') to enter into an index credit default swap transaction at a pre-determined strike price on a specified expiration date on specified terms. In the case of Index Swaptions cleared by ICC, the underlying index credit default swap is limited to certain CDX and iTraxx index credit default swaps that are accepted for clearing by ICC, and which would be automatically cleared by ICC upon exercise of the Index Swaption by the Swaption Buyer in accordance with its terms.

any modification with respect to fixed rate payments or accrual rebates as specified by ICC Circular.

ICC proposes to revise Rule 26R–319(c) to amend the restructuring component of iTraxx Index Swaptions. Currently, the iTraxx Index Swaption delivers a single name position in addition to the re-versioned underlying index. For bilateral iTraxx Index Swaptions, counterparties to Index Swaption contracts on the restructured single name decide what the Index Swaption will deliver in the future if exercised/assigned: Single name physical position, buyer triggered auction cash payment, or seller triggered auction cash payment. Following the changes, the cleared iTraxx Index Swaption would deliver a blend of all three outcomes such that the cleared instrument would more closely replicate the payout of the bilateral instrument.

Namely, under the amendments, the blended deliverables apply for iTraxx Index Swaption expiries on or after the auction settlement date, such that the Index Swaption delivers a re-versioned underlying index plus a blend of cash payment and single name. In subsection (c), ICC proposes minor updates in introducing Existing Restructuring as a defined term. Clause (ii) continues to discuss the Underlying New Trade that comes into effect [6] and includes a reference to new clause (v). Clause (iii) would be amended and divided into two clauses. Amended clause (iii) discusses the treatment of the Underlying New Trade described in clause (ii) if the expiration date occurs prior to commencement of the CEN Triggering Period (as defined in the Restructuring Procedures) [7] for the Existing Restructuring. New clause (iv) discusses the treatment of the Underlying New Trade described in clause (ii) if the expiration date occurs on or following the commencement of such period but prior to the auction settlement date.

Proposed clause (v) sets out the framework for the blended deliverables and would be applicable if the expiration date occurs on or following the auction settlement date. The proposed language requires ICC to (1) determine the extent to which positions in relevant single name contracts of the relevant tenor referencing the reference entity subject to the Existing Restructuring are settled; (2) determine, if applicable, a cash settlement amount with respect to the corresponding portion of the notional amount of the Index Swaption applicable to such reference entity; and (3) with respect to the remaining portion of such notional amount, an Underlying New Trade to come into effect. Additional specifications with respect to the Underlying New Trade and a reference to the Exercise Procedures or other applicable procedures are included.

II. Exercise Procedures Amendments

The Exercise Procedures supplement the provisions of Subchapter 26R of the Rules with respect to Index Swaptions. The proposed amendments define Minimum Intrinsic Value in paragraph 1 as a minimum intrinsic value below which an Index Swaption position would not be identified as ''in the money'' for paragraph 2.2(e)(ii) or 2.8. ICC may establish a Minimum Intrinsic Value and/or permit an exercising party to specify a Minimum Intrinsic Value for its Index Swaptions for a relevant pre-exercise notification period or exercise period. ICC would incorporate this term in respect of fallback provisions described in paragraphs 2.2(e)(ii) and 2.8. Specifically, ICC would take into account any applicable Minimum Intrinsic Value as part of its procedures for the pre-exercise notification period (during which preliminary exercise notices can be submitted, modified, and/or withdrawn) in paragraph 2.2(e)(ii) and for automatic exercise in paragraph 2.8. The proposed changes further specify that an ''in the money'' determination will be based on intrinsic value. In general, if intrinsic value is greater than the Minimum Intrinsic Value, the position will be exercised.

ICC proposes paragraph 3, which would apply in connection with Rule 26R–319(c)(v) where an Existing Restructuring has occurred with respect to a reference entity underlying an exercised Index Swaption and the Index Swaption expiration date occurs on or following the auction settlement date. Paragraph 3 provisions may be modified or supplemented pursuant to ICC Circular, as specified in paragraph 3.1.

Paragraph 3.2 would set out the determination of settled portions. The proposed changes define Relevant CDS Transactions as single name contracts in the relevant reference entity cleared at ICC and such others as ICC may specify by Circular. ICC would determine the portion of the aggregate notional amount of Relevant CDS Transactions for which an eligible party timely delivered a credit event notice (''Triggered Portion'') and the portion as to which no such notice was timely delivered (''Untriggered Portion''). With respect to the Triggered Portion, paragraph 3.2 defines the Buyer and Seller Triggered Portions as the portions for which the protection buyer or seller delivered certain notices (*i.e.,* prevailing credit event notice, prevailing notice to exercise movement option). The portion for which a movement option was applicable but for which neither protection buyer nor seller delivered a notice to exercise would be the Unmoved Portion, and together with the Untriggered Portion, the Untriggered/Unmoved Portion. ICC may establish by Circular a threshold pertaining to the Untriggered/Unmoved Portion under paragraph 3.2. This paragraph also sets out how the Buyer Triggered, Seller Triggered and Untriggered/Unmoved Portions are defined as percentages, namely the Buyer Triggered, Seller Triggered, and Untriggered/Unmoved Percentages.

Paragraph 3.3 would discuss settlement in respect of an exercised Index Swaption to which Rule 26R–319(c)(v) applies. Subsection (a) sets forth ICC's determination of the cash settlement amount owed pursuant to Rule 26R–319(c)(v)(2). ICC would sum the settlement amounts in cash applicable to the Buyer and Seller Triggered Portions, which would be calculated based on the Relevant Notional Amount (*i.e.,* the notional amount under the Index Swaption applicable to such reference entity) multiplied by the Buyer and Seller Triggered Percentages. The cash settlement amount may be adjusted to take into account applicable fixed payments and accrual rebates as specified by ICC Circular. Under subsection (b), the notional amount of the Underlying New Trade established under Rule 26R–319(c)(ii) and (v)(3) would be the Relevant Notional Amount multiplied by the Untriggered/Unmoved Percentage.

(b) Statutory Basis

ICC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act [8] and the regulations thereunder applicable to it, including the applicable standards under Rule 17Ad–22.[9] In particular, Section 17A(b)(3)(F) of the Act [10] requires that the rule change be consistent with the prompt and accurate clearance and settlement of securities

[6] An Underlying New Trade remains defined in Rule 26R–102 as a new single name CDS trade that would arise upon exercise of an Index Swaption where a relevant Restructuring Credit Event, if applicable, has occurred with respect to a reference entity in the relevant index.

[7] ICC Restructuring Procedures available at: *https://www.theice.com/publicdocs/clear_credit/ICE_Clear_Credit_Restructuring_Procedures.pdf.*

[8] 15 U.S.C. 78q–1.

[9] 17 CFR 240.17Ad–22.

[10] 15 U.S.C. 78q–1(b)(3)(F).

transactions and derivative agreements, contracts and transactions cleared by ICC, the safeguarding of securities and funds in the custody or control of ICC or for which it is responsible, and the protection of investors and the public interest. ICC proposes changes to the Rules and Exercise Procedures to support the clearing of Index Swaptions, including to amend the restructuring component of iTraxx Index Swaptions. Currently, the iTraxx Index Swaption delivers a single name position in addition to the re-versioned underlying index. Under the amendments, the blended deliverables apply for iTraxx Index Swaption expiries on or after the auction settlement date, such that the Index Swaption delivers a re-versioned underlying index plus a blend of cash payment and single name. These changes enhance the restructuring component such that the cleared instrument more closely replicates the payout of bilateral instruments, which would provide additional consistency to market participants. The additional clarifications or updates ensure that the Rules and Exercise Procedures remain effective, clear, and up-to-date. The changes clearly identify where ICC may modify or supplement procedures by Circular. The amended Exercise Procedures incorporate Minimum Intrinsic Value in respect of fallback provisions in paragraphs 2.2(e)(ii) and 2.8. ICC believes that defining this value would enhance the procedures to ensure that ICC's cleared Index Swaptions are appropriately exercised. Moreover, the changes continue to specify ICC's role in identifying ''in the money'' positions, taking into account Minimum Intrinsic Value, to ensure that the processes associated with the pre-exercise notification period and automatic exercise operate reliably. In ICC's view, the proposed rule change will ensure that ICC's Rules and policies and procedures clearly reflect the terms and conditions applicable to Index Swaptions and is thus consistent with the prompt and accurate clearing and settlement of the contracts cleared by ICC, including Index Swaptions, the safeguarding of securities and funds in the custody or control of ICC or for which it is responsible, and the protection of investors and the public interest, within the meaning of Section 17A(b)(3)(F) of the Act.[11]

The amendments would also satisfy relevant requirements of Rule 17Ad–22.[12] Rule 17Ad–22(e)(1)[13] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for a well-founded, clear, transparent, and enforceable legal basis for each aspect of its activities in all relevant jurisdictions. The proposed changes support the clearing of Index Swaptions by ICC, including by enhancing the restructuring component of iTraxx Index Swaptions and making other clarifications or updates, to ensure that the Rules and Exercise Procedures clearly and accurately reflect the requirements and procedures applicable to iTraxx Index Swaptions and Index Swaptions more generally. Moreover, the changes to the Rules and Exercise Procedures clearly identify where ICC may modify or supplement procedures by Circular. The proposed rule change would thus continue to support the legal basis for ICC's clearance of Index Swaptions and operation of the exercise and assignment process. As such, the proposed rule change would satisfy the requirements of the Rule 17Ad–22(e)(1).[14]

Rule 17Ad–22(e)(10)[15] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to establish and maintain transparent written standards that state its obligations with respect to the delivery of physical instruments, and establish and maintain operational practices that identify, monitor, and manage the risks associated with such physical deliveries. The Rules continue to clearly set out the procedures for settlement of Index Swaptions on exercise. Under the amendments, the blended deliverables apply for iTraxx Index Swaption expiries on or after the auction settlement date, such that the Index Swaption delivers a re-versioned underlying index plus a blend of cash payment and single name. Moreover, the amended Exercise Procedures clearly set out procedures associated with the determination of the cash settlement amount owed pursuant to Rule 26R–319(c)(v)(2) and the notional amount of the Underlying New Trade established under Rule 26R–319(c)(ii) and (v)(3). In ICC's view, the Rules and Exercise Procedures continue to enable ICC to identify and manage the risks of settlement of Index Swaptions on exercise. As such, the amendments would satisfy the requirements of Rule 17Ad–22(e)(10).[16]

Rule 17Ad–22(e)(17)[17] requires, in relevant part, each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to manage its operational risks by (i) identifying the plausible sources of operational risk, both internal and external, and mitigating their impact through the use of appropriate systems, policies, procedures, and controls; and (ii) ensuring that systems have a high degree of security, resiliency, operational reliability, and adequate, scalable capacity. The enhanced restructuring component in Rule 26R–319 would avoid introducing unnecessary complexity or operational risk, as the iTraxx Index Swaption would deliver a re-versioned underlying index plus a blend of cash payment and single name, and proposed paragraph 3 of the Exercise Procedures would further set out associated procedures. Moreover, the Exercise Procedures allow ICC to manage the operational risks associated with the exercise and assignment process by establishing procedures for the exercise and assignment of Index Swaptions and including fallback measures, which help mitigate the impact from operational or technical issues and ensure that the system has a high degree of security, resiliency, operational reliability, and adequate, scalable capacity. The amendments to the Exercise Procedures add clarity by specifying a minimum intrinsic value below which an Index Swaption position would not be identified as ''in the money'' in respect the pre-exercise notification period and automatic exercise and would further ensure that the processes associated with these fallback measures operate reliably. ICC's procedures continue to be designed to help mitigate the impact from technical issues to ensure that the system has a high degree of security, resiliency, operational reliability, and adequate, scalable capacity. The proposed rule change is therefore reasonably designed to meet the requirements of Rule 17Ad–22(e)(17).[18]

(B) Clearing Agency's Statement on Burden on Competition

ICC does not believe the proposed amendments would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purpose of the Act. The proposed changes to the ICC Rules and Exercise Procedures will apply uniformly across all market participants. Therefore, ICC does not believe the proposed rule

[11] *Id.*

[12] 17 CFR 240.17Ad–22.

[13] 17 CFR 240.17Ad–22(e)(1).

[14] *Id.*

[15] 17 CFR 240.17Ad–22(e)(10).

[16] *Id.*

[17] 17 CFR 240.17Ad–22(e)(17)(i) and(ii).

[18] *Id.*

change imposes any burden on competition not necessary or appropriate in furtherance of the purpose of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed rule change have not been solicited or received. ICC will notify the Commission of any written comments received by ICC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ICC–2021–023 on the subject line.

Paper Comments

Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–ICC–2021–023. 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 filings will also be available for inspection and copying at the principal office of ICE Clear Credit and on ICE Clear Credit's website at *https://www.theice.com/clear-credit/regulation.* 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–ICC–2021–023 and should be submitted on or before December 28, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–26448 Filed 12–6–21; 8:45 am]

BILLING CODE 8011–01–P

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93702; File No. SR–LTSE–2021–07]

Self-Regulatory Organizations; Long-Term Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Make Juneteenth National Independence Day a Holiday of the Exchange in Rule 11.110 (Hours of Trading and Trading Days)

December 1, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 18, 2021, Long-Term Stock Exchange, Inc. (''LTSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

LTSE proposes to amend LTSE Rule 11.110 (Hours of Trading and Trading Days) to make Juneteenth National Independence Day a holiday of the Exchange. Juneteenth National Independence Day was designated a legal public holiday in June 2021.

The text of the proposed rule change is available at the Exchange's website at *https://longtermstockexchange.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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 proposes to amend LTSE Rule 11.110(b) (Hours of Trading and Trading Days) to make Juneteenth National Independence Day a holiday of the Exchange.

On June 17, 2021, Juneteenth National Independence Day was designated a legal public holiday.[3] As noted in the related Presidential Proclamation:[4]

> Juneteenth is a day of profound weight and power.
>
> A day in which we remember the moral stain and terrible toll of slavery on our country . . . A long legacy of systemic racism, inequality, and inhumanity.
>
> But it is a day that also reminds us of our incredible capacity to heal, hope, and emerge from our darkest moments with purpose and resolve.

On this day, in solidarity with Black Americans, LTSE urges its employees,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Public Law 117–17.

[4] See *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/18/a-proclamation-on-juneteenth-day-of-observance-2021/.*

member firms and listed companies to pause, reflect and recommit to the work of bringing forth equity, equality, and justice. Thus, the Exchange proposes to add ''Juneteenth National Independence Day'' to the existing list of holidays in LTSE Rule 11.110(b).

As a result of this change, the Exchange will not be open for business on Juneteenth National Independence Day, which falls on June 19 of each year. As with other designated holidays, when a holiday falls on a Saturday, the Exchange will not be open for business on the preceding Friday, and when it falls on a Sunday, the Exchange will not be open for business on the succeeding Monday.

The first two sentences in paragraph (b) of the revised rule would read as follows (proposed additions are *italicized*):

> The Exchange will be open for the transaction of business on business days. The Exchange will not be open for business on New Year's Day, Martin Luther King Jr. Day, Presidents' Day, Good Friday, Memorial Day, *Juneteenth National Independence Day,* Independence Day, Labor Day, Thanksgiving Day and Christmas Day.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Section 6(b)(5) of the Act,[6] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed change would remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors and the public interest because the proposed amended rule would clearly state that the Exchange will not be open for business on Juneteenth National Independence Day, which is a federal holiday, and would address what day would be taken off if June 19 fell on a Saturday or Sunday. The change would thereby promote clarity and transparency in the Exchange rules by updating the list of holidays of the Exchange.

The proposed change does not raise any new or novel issues. For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[7] the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is not designed to address any competitive issue but rather to amend the Exchange rule regarding holidays.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has 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: (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[8] and Rule 19b–4(f)(6)(iii) thereunder.[9]

A proposed rule change filed under Rule 19b–4(f)(6)[10] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[11] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative prior to 30 days after the date of the filing. The Exchange states that waiver of the operative delay would be consistent with the protection of investors and the public interest because the requested waiver would ensure that the rules of the Exchange would more immediately evidence the updated list of holidays. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change does not raise any new or novel issues. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.[12]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of 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–LTSE–2021–07 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–LTSE–2021–07. 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

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78f(b)(8).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 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.

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–LTSE–2021–07, and should be submitted on or before December 28, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–26455 Filed 12–6–21; 8:45 am]

BILLING CODE 8011–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93686; File No. SR–NYSEArca–2021–100]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 6.4–O To Allow Monday and Wednesday Expirations for Options Listed Pursuant to the Short Term Option Series Program on the iShares Russell 2000 ETF ("IWM")

December 1, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 22, 2021, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the 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.

[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 amend Rule 6.4–O (Series of Options Open for Trading) to permit Monday and Wednesday expirations for options listed pursuant to the Short Term Option Series Program on the iShares Russell 2000 ETF. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 6.4–O (Series of Options Open for Trading) to permit Monday and Wednesday expirations for options listed pursuant to the Short Term Option Series Program (the "STOS Program") on the iShares Russell 2000 ETF ("IWM"). This is a competitive filing that is based on a proposal recently submitted by Nasdaq Phlx LLC ("Phlx") and approved by the Securities and Exchange Commission ("Commission").[5]

A Short Term Option Series is a series in an option class that is approved for listing and trading on the Exchange in which the series is opened for trading on any Monday, Tuesday, Wednesday, Thursday or Friday that is a business day and that expires on the Monday, Wednesday or Friday of the next business week, or, in the case of a series that is listed on a Friday and expires on a Monday, is listed one business week and one business day prior to that expiration.[6]

The Exchange is proposing to amend Commentary .07 to Rule 6.4–O to permit the listing of options series that expire on Mondays and Wednesdays in IWM.

Monday Expirations

As proposed, with respect to Monday IWM Expirations within Commentary .07(g) to Rule 6.4–O, the Exchange may open for trading on any Friday or Monday that is a business day series of options on IWM to expire on any Monday of the month that is a business day and is not a Monday in which Quarterly Options Series on the same class expire ("Monday IWM Expirations"), provided that Monday IWM Expirations that are listed on a Friday must be listed at least one business week and one business day prior to the expiration. The Exchange may list up to five consecutive Monday IWM Expirations at one time; the Exchange may have no more than a total of five Monday IWM Expirations.

Wednesday Expirations

As proposed, with respect to Wednesday IWM Expirations within Commentary .07(g) to Rule 6.4–O, the Exchange may open for trading on any Tuesday or Wednesday that is a business day series of options on IWM to expire on any Wednesday of the month that is a business day and is not a Wednesday in which Quarterly Options Series on the same class expire ("Wednesday IWM Expirations"). The Exchange may list up to five consecutive Wednesday IWM Expirations at one time; the Exchange

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 93157 (September 28, 2021), 86 FR 54749 (October 4, 2021) (SR–PHLX–2021–43) (order approving Phlx rule change).

[6] The term "Short Term Option Series" is a series in an option class that is approved for listing and trading on the Exchange in which the series is opened for trading on any Monday, Tuesday, Wednesday, Thursday or Friday that is a business day and that expires on the Monday, Wednesday or Friday of the next business week, or, in the case of a series that is listed on a Friday and expires on a Monday, is listed one business week and one business day prior to that expiration. If a Tuesday, Wednesday, Thursday or Friday is not a business day, the series may be opened (or shall expire) on the first business day immediately prior to that Tuesday, Wednesday, Thursday or Friday, respectively. For a series listed pursuant to this section for Monday expiration, if a Monday is not a business day, the series shall expire on the first business day immediately following that Monday. *See* Rule 6.1–O(b)(41).

may have no more than a total of five Wednesday IWM Expirations.

Monday and Wednesday Expirations

The interval between strike prices for the proposed Monday and Wednesday IWM Expirations will be the same as those for the current Short Term Option Series for Wednesday and Friday expirations applicable to the STOS Program.[7] Specifically, the Monday and Wednesday IWM Expirations will have a $0.50 strike interval minimum.[8] As is the case with other equity options series listed pursuant to the STOS Program, the Monday and Wednesday IWM Expirations series will be P.M.-settled.

Pursuant to Rule 6.1–O(b)(41), with respect to the STOS Program, if Monday is not a business day the series shall expire on the first business day immediately following that Monday. This procedure differs from the expiration date of Wednesday expiration series that are scheduled to expire on a holiday. Pursuant to Rule 6.1–O(b)(41), a Wednesday expiration series shall expire on the first business day immediately prior to that Wednesday, *e.g.,* Tuesday of that week, if the Wednesday is not a business day. For purposes of IWM, the Exchange believes that it is preferable to require Monday expiration series in this scenario to expire on the Tuesday of that week rather than the previous business day, *e.g.,* the previous Friday, since the Tuesday is closer in time to the scheduled expiration date of the series than the previous Friday, and therefore may be more representative of anticipated market conditions. Monday SPY and QQQ expirations are treated in this manner today.[9] Cboe Exchange, Inc. (''Cboe'') uses the same procedure for options on the S&P 500 index (''SPX''), Mini-SPX Index Options (''XSP''), Russell 2000 Index (''RUT'') and Mini-Russell 2000 Index Options (''MRUT'') and with Monday expirations that are listed pursuant to its Nonstandard Expirations Pilot Program and that are scheduled to expire on a holiday.[10] Also Nasdaq Phlx [11] and Nasdaq ISE, LLC (''ISE'') [12] also use the same procedure for options on the Nasdaq-100® (''NDX'') with Monday expirations that are listed pursuant to its Nonstandard Expirations Pilot Programs, respectively.

Currently, for each option class eligible for participation in the STOS Program, the Exchange is limited to opening thirty (30) series for each expiration date for the specific class.[13] The thirty (30) series restriction does not include series that are open by other securities exchanges under their respective short term options rules; the Exchange may list these additional series that are listed by other exchanges.[14] This thirty (30) series restriction would apply to Monday and Wednesday IWM Expiration series as well. In addition, the Exchange will be able to list series that are listed by other exchanges, assuming they file similar rules with the Commission to list IWM options expiring on Mondays and Wednesdays.

Finally, the Exchange is amending Commentary .07(a) to Rule 6.4–O, which addresses the listing of Short Term Option Series that expire in the same week as monthly or quarterly options series.[15] Currently, that rule states that no Short Term Option Series may expire in the same week in which monthly option series on the same class expire (with the exception of Monday and Wednesday SPY and QQQ Expirations) or, in the case of Quarterly Options Series, on an expiration that coincides with an expiration of Quarterly Options Series on the same class.[16] As with Monday and Wednesday SPY and QQQ Expirations, the Exchange is proposing to permit Monday and Wednesday IWM Expirations to expire in the same week as monthly options series on the same class. The Exchange believes that it is reasonable to extend this exemption to Monday and Wednesday IWM Expirations because Monday and Wednesday IWM Expirations and standard monthly options will not expire on the same trading day, as standard monthly options expire on Fridays. Additionally, the Exchange believes that not listing Monday and Wednesday IWM Expirations for one week every month because there was a monthly IWM expiration on the Friday of that week would create investor confusion.

The Exchange does not believe that any market disruptions will be encountered with the introduction of P.M.-settled Monday and Wednesday IWM Expirations. The Exchange has the necessary capacity and surveillance programs in place to support and properly monitor trading in the proposed Monday and Wednesday IWM Expirations. The Exchange currently trades P.M.-settled Short Term Option Series that expire Monday and Wednesday for SPY and QQQ and has not experienced any market disruptions nor issues with capacity. The Exchange currently has surveillance programs in place to support and properly monitor trading in Short Term Option Series that expire Monday and Wednesday for SPY and QQQ.

Similar to SPY and QQQ, the introduction of Monday and Wednesday IWM Expirations will, among other things, expand hedging tools available to market participants and continue the reduction of the premium cost of buying protection. The Exchange believes that Monday and Wednesday IWM Expirations will allow market participants to purchase IWM based on their timing as needed and allow them to tailor their investment and hedging needs more effectively.

2. Statutory Basis

For the reasons set forth above, the Exchange believes the proposed rule change is consistent with Section 6(b) of the Act [17] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[18] in that it is designed to promote just and equitable principles of trade, 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 by providing the investing public and other market participants more flexibility to closely tailor their investment and hedging decisions in IWM options, thus allowing them to better manage their risk exposure.

In particular, the Exchange believes the STOS Program has been successful to date and that Monday and Wednesday IWM Expirations should simply expand the ability of investors to hedge risk against market movements stemming from economic releases or market events that occur throughout the month in the same way that the STOS Program has expanded the landscape of hedging. Similarly, the Exchange believes Monday and Wednesday IWM Expirations should create greater trading and hedging opportunities, as well as flexibility that will provide Members with the ability to tailor their investment objectives more effectively.

The Exchange currently lists Monday and Wednesday SPY and QQQ

[7] *See* Commentary .07(e) to Rule 6.4–O.

[8] *Id.*

[9] *See* Commentary .07 to Rule 6.4–O.

[10] *See* Cboe Rule 4.13(e)(1).

[11] *See* Phlx Options 4A, Section 12(b)(5).

[12] *See* ISE Supplementary Material .07 to Options 4A, Section 12.

[13] *See* Commentary .07(c) to Rule 6.4–O.

[14] *See* Rule 6.4A–O(b)(vi).

[15] The Exchange also proposes to make a conforming change to Commentary .07(a) to Rule 6.4–O to include reference to Rule 6.4–O(g) (as modified) to include reference to Monday and Wednesday IWM Expirations. *See* proposed Commentary .07(a) to Rule 6.4–O.

[16] *See* Commentary .07(g) to Rule 6.4–O.

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(4) and (5).

Expirations.[19] Also, Cboe currently permits Monday and Wednesday expirations for other options with a weekly expiration, such as options on SPX, XSP, RUT, and MRUT pursuant to its Nonstandard Expirations Pilot Program.[20] Phlx [21] and ISE [22] currently permit Monday and Wednesday expirations for other options with a weekly expiration on NDX pursuant to their Nonstandard Expirations Pilot Programs.

With the exception of Monday expiration series that are scheduled to expire on a holiday, there are no material differences in the treatment of Monday and Wednesday IWM Expirations for Short Term Option Series. The Exchange believes that it is consistent with the Act to treat Monday expiration series that expire on a holiday differently than Wednesday or Friday expiration series, since the proposed treatment for Monday expiration series will result in an expiration date that is closer in time to the scheduled expiration date of the series, and therefore may be more representative of anticipated market conditions. Monday SPY and QQQ expirations are treated in this manner today.[23] Cboe [24] uses the same procedure for SPX, XSP, RUT, and MRUT options with Monday expirations that are scheduled to expire on a holiday, as do Phlx [25] and ISE [26] for NDX options with Monday expirations that are listed pursuant to their Nonstandard Expirations Pilot Programs, respectively.

Given the similarities between Monday and Wednesday SPY and QQQ Expirations and the proposed Monday and Wednesday IWM Expirations, the Exchange believes that applying the provisions in Commentary .07(a) to Rule 6.4–O, which currently apply to Monday and Wednesday SPY and QQQ Expirations, to Monday and Wednesday IWM Expirations is justified. For example, the Exchange believes that allowing Monday and Wednesday IWM Expirations and monthly IWM expirations in the same week will benefit investors and minimize investor confusion by providing Monday and Wednesday IWM Expirations in a continuous and uniform manner. The Exchange also believes that it is appropriate to amend Commentary .07(a) to Rule 6.4–O, to clarify that no Short Term Option Series may expire on the same day as an expiration of Quarterly Options Series on the same class, same as SPY and QQQ. The Exchange also believes the non-substantive conforming change to Commentary .07(a) to Rule 6.4–O would add clarity and transparency to the STOS Program to the benefit of investors.[27]

The Exchange represents that it has an adequate surveillance program in place to detect manipulative trading in Monday and Wednesday expirations, including Monday and Wednesday IWM Expirations, in the same way that it monitors trading in the current Short Term Option Series and trading in Monday and Wednesday SPY and QQQ Expirations. The Exchange also represents that it has the necessary systems capacity to support the new options series. Finally, the Exchange does not believe that any market disruptions will be encountered with the introduction of Monday and Wednesday IWM Expirations.

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. In this regard and as indicated above, the Exchange notes that the rule change is being proposed as a competitive response to a filing submitted by Phlx.[28] The Exchange also notes that having Monday and Wednesday IWM Expirations is not a novel proposal, as Monday and Wednesday SPY and QQQ Expirations are currently listed on the Exchange.[29] Cboe uses the same procedure for SPX, XSP, RUT, and MRUT options with Monday expirations that are listed pursuant to its Nonstandard Expirations Pilot Program and that are scheduled to expire on a holiday,[30] as do Phlx [31] and ISE [32] for NDX options with Monday expirations that are listed pursuant to their Nonstandard Expirations Pilot Programs, respectively.

The Exchange does not believe the proposal will impose any burden on intra-market competition, as all market participants will be treated in the same manner under this proposal. Additionally, the Exchange does not believe the proposal will impose any burden on inter-market competition, as nothing prevents the other options exchanges from proposing similar rules to list and trade Short-Term Option Series with Monday and Wednesday expirations.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [33] and Rule 19b–4(f)(6) thereunder.[34]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) [35] 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 requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission notes that it recently approved Phlx's substantially similar proposal to list and trade Monday IWM Expirations and Wednesday IWM Expirations.[36] The Exchange stated that waiver of the operative delay is consistent with the protection of investors and the public interest as it would encourage fair competition among exchanges by allowing the Exchange to compete effectively with Phlx by having the ability to list and trade the same Monday and Wednesday IWM Expirations that Phlx is able to list and trade. For these reasons, the Commission believes that the proposed

[19] *See* Commentary .07(a) and (g) to Rule 6.4–O.

[20] *Supra* note 10.

[21] *Supra* note 11.

[22] *Supra* note 12.

[23] *See* Commentary .07(a) to Rule 6.4–O.

[24] *Supra* note 10.

[25] *Supra* note 11.

[26] *Supra* note 12.

[27] *See supra* note 15.

[28] *See supra* note 5 (approval of Phlx filing).

[29] *See* Commentary .07 to Rule 6.4–O.

[30] *Supra* note 10.

[31] *Supra* note 11.

[32] *Supra* note 12.

[33] 15 U.S.C. 78s(b)(3)(A).

[34] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change 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.

[35] 17 CFR 240.19b–4(f)(6)(iii).

[36] *See* supra note 5.

rule change presents no novel issues and that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest, and will allow the Exchange to remain competitive with other exchanges. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.[37]

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–NYSEArca–2021–100 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2021–100. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2021–100 and should be submitted on or before December 28, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[38]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–26444 Filed 12–6–21; 8:45 am]

BILLING CODE 8011–01–P

[37] 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).

[38] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93687; File No. SR–NYSEAMER–2021–44]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 903 To Allow Monday and Wednesday Expirations for Options Listed Pursuant to the Short Term Option Series Program on the iShares Russell 2000 ETF (''IWM'')

December 1, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 22, 2021, NYSE American LLC (''NYSE American'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the 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 Rule 903 (Series of Options Open for Trading) to permit Monday and Wednesday expirations for options listed pursuant to the Short Term Option Series Program on the iShares Russell 2000 ETF. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 903 (Series of Options Open for Trading) to permit Monday and Wednesday expirations for options listed pursuant to the Short Term Option Series Program (the ''STOS Program'') on the iShares Russell 2000 ETF (''IWM''). This is a competitive filing that is based on a proposal recently submitted by Nasdaq Phlx LLC (''Phlx'') and approved by the Securities and Exchange Commission (''Commission'').[5]

A Short Term Option Series is a series in an option class that is approved for listing and trading on the Exchange in which the series is opened for trading on any Monday, Tuesday, Wednesday,

[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* Securities Exchange Act Release No. 93157 (September 28, 2021), 86 FR 54749 (October 4, 2021) (SR–PHLX–2021–43) (order approving Phlx rule change).

Thursday or Friday that is a business day and that expires on the Monday, Wednesday or Friday of the next business week, or, in the case of a series that is listed on a Friday and expires on a Monday, is listed one business week and one business day prior to that expiration.[6]

The Exchange is proposing to amend Commentary .10(f) to Rule 903 to permit the listing of options series that expire on Mondays and Wednesdays in IWM.

Monday Expirations

As proposed, with respect to Monday IWM Expirations within Commentary .10(f) to Rule 903, the Exchange may open for trading on any Friday or Monday that is a business day series of options on IWM to expire on any Monday of the month that is a business day and is not a Monday in which Quarterly Options Series on the same class expire (''Monday IWM Expirations''), provided that Monday IWM Expirations that are listed on a Friday must be listed at least one business week and one business day prior to the expiration. The Exchange may list up to five consecutive Monday IWM Expirations at one time; the Exchange may have no more than a total of five Monday IWM Expirations.

Wednesday Expirations

As proposed, with respect to Wednesday IWM Expirations within Commentary .10(f) to Rule 903, the Exchange may open for trading on any Tuesday or Wednesday that is a business day series of options on IWM to expire on any Wednesday of the month that is a business day and is not a Wednesday in which Quarterly Options Series on the same class expire (''Wednesday IWM Expirations''). The Exchange may list up to five consecutive Wednesday IWM Expirations at one time; the Exchange may have no more than a total of five Wednesday IWM Expirations.

Monday and Wednesday Expirations

The interval between strike prices for the proposed Monday and Wednesday IWM Expirations will be the same as those for the current Short Term Option Series for Wednesday and Friday expirations applicable to the STOS Program.[7] Specifically, the Monday and Wednesday IWM Expirations will have a $0.50 strike interval minimum.[8] As is the case with other equity options series listed pursuant to the STOS Program, the Monday and Wednesday IWM Expirations series will be P.M.-settled.

Pursuant to Rule 900.2NY(50), with respect to the STOS Program, if Monday is not a business day the series shall expire on the first business day immediately following that Monday. This procedure differs from the expiration date of Wednesday expiration series that are scheduled to expire on a holiday. Pursuant to Rule 900.2NY(50), a Wednesday expiration series shall expire on the first business day immediately prior to that Wednesday, *e.g.,* Tuesday of that week, if the Wednesday is not a business day. For purposes of IWM, the Exchange believes that it is preferable to require Monday expiration series in this scenario to expire on the Tuesday of that week rather than the previous business day, *e.g.,* the previous Friday, since the Tuesday is closer in time to the scheduled expiration date of the series than the previous Friday, and therefore may be more representative of anticipated market conditions.[9] Monday SPY and QQQ expirations are treated in this manner today.[10] Cboe Exchange, Inc. (''Cboe'') uses the same procedure for options on the S&P 500 index (''SPX''), Mini-SPX Index Options (''XSP''), Russell 2000 Index (''RUT'') and Mini-Russell 2000 Index Options (''MRUT'') and with Monday expirations that are listed pursuant to its Nonstandard Expirations Pilot Program and that are scheduled to expire on a holiday.[11] Also Nasdaq Phlx [12] and Nasdaq ISE, LLC (''ISE'') [13] also use the same procedure for options on the Nasdaq-100® (''NDX'') with Monday expirations that are listed pursuant to its Nonstandard Expirations Pilot Programs, respectively.

Currently, for each option class eligible for participation in the STOS Program, the Exchange is limited to opening thirty (30) series for each expiration date for the specific class.[14] The thirty (30) series restriction does not include series that are open by other securities exchanges under their respective short term options rules; the Exchange may list these additional series that are listed by other exchanges.[15] This thirty (30) series restriction would apply to Monday and Wednesday IWM Expiration series as well. In addition, the Exchange will be able to list series that are listed by other exchanges, assuming they file similar rules with the Commission to list IWM options expiring on Mondays and Wednesdays.

Finally, the Exchange is amending Rule 903(h), which addresses the listing of Short Term Option Series that expire in the same week as monthly or quarterly options series.[16] Currently, that rule states that no Short Term Option Series may expire in the same week in which monthly option series on the same class expire (with the exception of Monday and Wednesday SPY and QQQ Expirations) or, in the case of Quarterly Options Series, on an expiration that coincides with an expiration of Quarterly Options Series on the same class.[17] As with Monday and Wednesday SPY and QQQ Expirations, the Exchange is proposing to permit Monday and Wednesday IWM Expirations to expire in the same week as monthly options series on the same class. The Exchange believes that it is reasonable to extend this exemption to Monday and Wednesday IWM Expirations because Monday and Wednesday IWM Expirations and standard monthly options will not expire on the same trading day, as standard monthly options expire on Fridays. Additionally, the Exchange believes that not listing Monday and Wednesday IWM Expirations for one week every month because there was a monthly IWM expiration on the Friday of that week would create investor confusion.

The Exchange does not believe that any market disruptions will be encountered with the introduction of

[6] The term ''Short Term Option Series'' is a series in an option class that is approved for listing and trading on the Exchange in which the series is opened for trading on any Monday, Tuesday, Wednesday, Thursday or Friday that is a business day and that expires on the Monday, Wednesday or Friday of the next business week, or, in the case of a series that is listed on a Friday and expires on a Monday, is listed one business week and one business day prior to that expiration. If a Tuesday, Wednesday, Thursday or Friday is not a business day, the series may be opened (or shall expire) on the first business day immediately prior to that Tuesday, Wednesday, Thursday or Friday, respectively. For a series listed pursuant to this section for Monday expiration, if a Monday is not a business day, the series shall expire on the first business day immediately following that Monday. *See* Rule 900.2NY(50).

[7] *See* Commentary .10(d) to Rule 903.

[8] *Id.*

[9] The Exchange also proposes a non-substantive change to eliminate excess verbiage from the title of paragraph (f), which would add clarity and transparency to Exchange rules to the benefit of investors. *See* proposed Commentary .10(f) to Rule 903 (setting forth ''Monday and Wednesday SPY, QQQ, and IWM Expirations'').

[10] *See* Commentary .10 to Rule 903.

[11] *See* Cboe Rule 4.13(e)(1).

[12] *See* Phlx Options 4A, Section 12(b)(5).

[13] *See* ISE Supplementary Material .07 to Options 4A, Section 12.

[14] *See* Commentary .10(b) to Rule 903.

[15] *See* Rule 903A(b)(vi).

[16] The Exchange also proposes to make a conforming change to Rule 903(h) to include reference to Commentary .10(f) to Rule 903 (as modified) to include reference to Monday and Wednesday IWM Expirations. *See* proposed Rule 903(h).

[17] *See* Commentary .10(f) to Rule 903.

P.M.-settled Monday and Wednesday IWM Expirations. The Exchange has the necessary capacity and surveillance programs in place to support and properly monitor trading in the proposed Monday and Wednesday IWM Expirations. The Exchange currently trades P.M.-settled Short Term Option Series that expire Monday and Wednesday for SPY and QQQ and has not experienced any market disruptions nor issues with capacity. The Exchange currently has surveillance programs in place to support and properly monitor trading in Short Term Option Series that expire Monday and Wednesday for SPY and QQQ.

Similar to SPY and QQQ, the introduction of Monday and Wednesday IWM Expirations will, among other things, expand hedging tools available to market participants and continue the reduction of the premium cost of buying protection. The Exchange believes that Monday and Wednesday IWM Expirations will allow market participants to purchase IWM based on their timing as needed and allow them to tailor their investment and hedging needs more effectively.

2. Statutory Basis

For the reasons set forth above, the Exchange believes the proposed rule change is consistent with Section 6(b) of the Act [18] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[19] in that it is designed to promote just and equitable principles of trade, 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 by providing the investing public and other market participants more flexibility to closely tailor their investment and hedging decisions in IWM options, thus allowing them to better manage their risk exposure.

In particular, the Exchange believes the STOS Program has been successful to date and that Monday and Wednesday IWM Expirations should simply expand the ability of investors to hedge risk against market movements stemming from economic releases or market events that occur throughout the month in the same way that the STOS Program has expanded the landscape of hedging. Similarly, the Exchange believes Monday and Wednesday IWM Expirations should create greater trading and hedging opportunities, as well as flexibility that will provide Members with the ability to tailor their investment objectives more effectively.

The Exchange currently lists Monday and Wednesday SPY and QQQ Expirations.[20] Also, Cboe currently permits Monday and Wednesday expirations for other options with a weekly expiration, such as options on SPX, XSP, RUT, and MRUT pursuant to its Nonstandard Expirations Pilot Program.[21] Phlx [22] and ISE [23] currently permit Monday and Wednesday expirations for other options with a weekly expiration on NDX pursuant to their Nonstandard Expirations Pilot Programs.

With the exception of Monday expiration series that are scheduled to expire on a holiday, there are no material differences in the treatment of Monday and Wednesday IWM Expirations for Short Term Option Series. The Exchange believes that it is consistent with the Act to treat Monday expiration series that expire on a holiday differently than Wednesday or Friday expiration series, since the proposed treatment for Monday expiration series will result in an expiration date that is closer in time to the scheduled expiration date of the series, and therefore may be more representative of anticipated market conditions. Monday SPY and QQQ expirations are treated in this manner today.[24] Cboe [25] uses the same procedure for SPX, XSP, RUT, and MRUT options with Monday expirations that are scheduled to expire on a holiday, as do Phlx [26] and ISE [27] for NDX options with Monday expirations that are listed pursuant to their Nonstandard Expirations Pilot Programs, respectively.

Given the similarities between Monday and Wednesday SPY and QQQ Expirations and the proposed Monday and Wednesday IWM Expirations, the Exchange believes that applying the provisions in Rule 903(h), which currently apply to Monday and Wednesday SPY and QQQ Expirations, to Monday and Wednesday IWM Expirations is justified. For example, the Exchange believes that allowing Monday and Wednesday IWM Expirations and monthly IWM expirations in the same week will benefit investors and minimize investor confusion by providing Monday and Wednesday IWM Expirations in a continuous and uniform manner. The Exchange also believes that it is appropriate to amend Rule 903(h) to clarify that no Short Term Option Series may expire on the same day as an expiration of Quarterly Options Series on the same class, same as SPY and QQQ. The Exchange also believes the non-substantive change to the title of Commentary .10(f) to Rule 903 as well as the conforming change to Rule 903(h) would add clarity and transparency to the STOS Program to the benefit of investors.[28]

The Exchange represents that it has an adequate surveillance program in place to detect manipulative trading in Monday and Wednesday expirations, including Monday and Wednesday IWM Expirations, in the same way that it monitors trading in the current Short Term Option Series and trading in Monday and Wednesday SPY and QQQ Expirations. The Exchange also represents that it has the necessary systems capacity to support the new options series. Finally, the Exchange does not believe that any market disruptions will be encountered with the introduction of Monday and Wednesday IWM Expirations.

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. In this regard and as indicated above, the Exchange notes that the rule change is being proposed as a competitive response to a filing submitted by Phlx.[29] The Exchange also notes that having Monday and Wednesday IWM Expirations is not a novel proposal, as Monday and Wednesday SPY and QQQ Expirations are currently listed on the Exchange.[30] Cboe uses the same procedure for SPX, XSP, RUT, and MRUT options with Monday expirations that are listed pursuant to its Nonstandard Expirations Pilot Program and that are scheduled to expire on a holiday,[31] as do Phlx [32] and ISE [33] for NDX options with Monday expirations that are listed pursuant to their Nonstandard Expirations Pilot Programs, respectively.

The Exchange does not believe the proposal will impose any burden on

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(4) and (5).

[20] *See* Rule 903(h) and Commentary. 10(f) to Rule 903.

[21] *Supra* note 11.

[22] *Supra* note 12.

[23] *Supra* note 13.

[24] *See* Commentary .10(b) to Rule 903.

[25] *Supra* note 11.

[26] *Supra* note 12.

[27] *Supra* note 13.

[28] *See supra* notes 9 and 16.

[29] *See supra* note 5 (approval of Phlx filing).

[30] *See* Commentary .11 to Rule 903.

[31] *Supra* note 11.

[32] *Supra* note 12.

[33] *Supra* note 13.

intra-market competition, as all market participants will be treated in the same manner under this proposal. Additionally, the Exchange does not believe the proposal will impose any burden on inter-market competition, as nothing prevents the other options exchanges from proposing similar rules to list and trade Short-Term Option Series with Monday and Wednesday expirations.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [34] and Rule 19b–4(f)(6) thereunder.[35]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) [36] 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 requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission notes that it recently approved Phlx's substantially similar proposal to list and trade Monday IWM Expirations and Wednesday IWM Expirations.[37] The Exchange stated that waiver of the operative delay is consistent with the protection of investors and the public interest as it would encourage fair competition among exchanges by allowing the Exchange to compete effectively with Phlx by having the ability to list and trade the same Monday and Wednesday IWM Expirations that Phlx is able to list and trade. For these reasons, the Commission believes that the proposed rule change presents no novel issues and that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest, and will allow the Exchange to remain competitive with other exchanges. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.[38]

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–NYSEAMER–2021–44 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–NYSEAMER–2021–44. 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–NYSEAMER–2021–44 and should be submitted on or before December 28, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[39]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–26445 Filed 12–6–21; 8:45 am]

BILLING CODE 8011–01–P

[34] 15 U.S.C. 78s(b)(3)(A).

[35] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change 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.

[36] 17 CFR 240.19b–4(f)(6)(iii).

[37] *See* supra note 5.

[38] 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).

[39] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93688; File No. SR–CboeBZX–2021–078]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Introduce a New Data Product To Be Known as the Short Volume Report

December 1, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 17, 2021, Cboe BZX Exchange, Inc. (''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the 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

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to Exchange Rule 11.22(f) to introduce a new data product to be known as the Short Volume Report. 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://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), 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 proposes to amend Rule 11.22(f) to provide for a new data product to be known as the Short Volume Report. The proposal introduces the Short Volume Report which will be available for purchase to BZX Members (''Members'') and non-Members. The Exchange notes that the proposed data product is substantially similar to information included in the short sale volume report offered by the Nasdaq Stock Market LLC (''Nasdaq'') [3] and the TAQ Group Short Volume file offered by the New York Stock Exchange LLC (''NYSE''),[4] with the exception that the proposed product will also include buy and sell volume as well as trade counts for buy, sell, sell short, and sell short exempt volume.

A description of each market data product offered by the Exchange is described in Exchange Rule 11.22. The Exchange proposes to amend Rule 11.22(f) to introduce and add a description of the Short Volume Report. The Exchange proposes to describe the Short Volume Report as ''an end-of-day report that summarizes equity trading activity on the Exchange, including trade count and volume by symbol for buy, sell, sell short, and sell short exempt trades.'' Specifically, the end-of-day report will include the following information: Trade date, symbol, total volume, buy volume, buy trade count, sell volume, sell trade count, sell short volume, sell short trade count, sell short exempt volume, and sell short exempt trade count. The Exchange notes that the proposed product includes substantially similar information as that included in comparable products offered on Nasdaq and NYSE except that the Exchange proposes to also include buy and sell volume as well as trade counts for buy, sell, sell short, and sell short exempt volume.[5] The Exchange believes the additional data points will benefit market participants because they will allow market participants to better understand the changing risk environment on a daily basis.

The Short Volume Report will be available for purchase [6] on a monthly subscription basis for which subscribers will receive a daily end-of-day file that will be delivered after the conclusion of the After Hours Trading Session.[7] Additionally, historical Short Volume Reports dating as far back as January 2, 2015 will be available for purchase on an ad hoc basis in monthly increments. The subscription files and historical files will include the same data points. Lastly, the Exchange notes the proposed product is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make this data available and that potential subscribers may subscribe to it only if they voluntarily choose to do so.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [9] 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) [10] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that the proposed Short Volume Report would further broaden the availability of U.S. equity market data to investors consistent with the principles of Regulation NMS. The proposal also promotes increased transparency through the dissemination of data included in the Short Volume Report. The proposed rule change would benefit investors by providing access to the Short Volume Report, which may promote better informed trading. Particularly, information included in the Short Volume Report may allow a market participant to identify the source of selling pressure and whether it is long or short.

Moreover, other exchanges offer substantially similar data products. The Nasdaq daily short sale volume file reflects the aggregate number of shares executed on Nasdaq, Nasdaq BX, Inc. and Nasdaq PHLX LLC.[11] Specifically, the Nasdaq daily short volume report provides the following information:

[3] *See* the Nasdaq Price List—Equities, Nasdaq Web-based Reports, Nasdaq Short Sale Volume Reports at Price List—NASDAQ Global Data Products (*nasdaqtrader.com*).

[4] *See* the NYSE Historical Proprietary Market Data Pricing, NYSE Group Summary Data Products, TAQ NYSE Group Short Volume (Daily File) at *https://www.nyse.com/publicdocs/nyse/data/NYSE_Historical_Market_Data_Pricing.pdf*.

[5] The Exchange notes that the Nasdaq and NYSE comparable products reflect aggregate information across their affiliated equity exchanges. The Exchange is not proposing an aggregated Short Volume Report across its affiliated equity exchanges; thus, the proposal is only applicable to trades executed on BZX.

[6] The Exchange intends to submit a separate rule filing to adopt fees for the Short Volume Report product.

[7] *See* Exchange Rule 1.5(c).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] *See* Supra notes 3 and 4.

[11] *See* Supra note 3. As noted in the Nasdaq Price List, BX and PSX short sale files are available for free.

Trade date, symbol, volume during regular trading hours, and CTA market identifier. Additionally, the NYSE Group Short Volume daily file reflects a summary of short sale volume for securities traded on NYSE, NYSE American LLC, NYSE Arca, Inc., NYSE National, Inc., and NYSE Chicago, Inc. Specifically, the NYSE Group Short Volume product provides the following information: Trade date, symbol, short exempt volume, short volume, total volume of all transactions, and market identifier. While the proposed product offers volume and trade counts which are not offered in the comparable NYSE and Nasdaq short sale volume reports, similar data is otherwise available or determinable in other NYSE data product offerings. Specifically, the NYSE TAQ product provides trade and quote information for orders entered on the NYSE affiliated equity exchanges, which include buy, sell, and sell short volume.[12] Thus, subscribers to NYSE TAQ could determine volume and trade counts from such data. Additionally, the NYSE Monthly Short Sales report provides a record of every short sale transaction on NYSE during the month, which includes a size and short sale indicator.[13] Thus, subscribers to the NYSE Monthly Short Sales report could determine the sell short and sell short exempt volume and trade count, albeit on a monthly basis rather than a daily basis. Moreover, the Exchange believes the proposed Short Volume Report will benefit market participants because they will provide visibility into market activity that is not currently available. Further it will allow market participants to better understand the changing risk environment on a daily basis. Therefore, the Exchange believes it is reasonable to include such data in the proposed product.

Finally, as noted above the proposed Short Sale Report is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make this data available and that potential subscribers may subscribe to it only if they voluntarily choose to do so.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange 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. Rather, the Exchange believes that the proposal will promote competition by permitting the Exchange to offer data products similar to those offered by other competitor equities exchanges.[14] The Exchange is proposing to introduce the Short Volume Report in order to keep pace with changes in the industry and evolving customer needs, and believes this proposed rule change would contribute to robust competition among national securities exchanges. As noted, at least two other U.S. equity exchanges offer a market data product that is substantially similar to the proposed Short Volume Report.[15] As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges. Therefore, the Exchange does not believe 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

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeBZX–2021–078 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–CboeBZX–2021–078. 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–CboeBZX–2021–078, and should be submitted on or before December 28, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–26446 Filed 12–6–21; 8:45 am]

BILLING CODE 8011–01–P

[12] *See https://www.nyse.com/publicdocs/nyse/data/TAQ_XDP_Products_Client_Spec_v2.3c.pdf.*

[13] *See https://www.nyse.com/publicdocs/nyse/data/Monthly_Short_Sales_Client_Spec_v1.3.pdf.*

[14] *See* Supra notes 3 and 4.

[15] *Id.*

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93700; File No. SR–CboeBZX–2021–024])

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Disapproving a Proposed Rule Change To List and Trade Shares of the WisdomTree Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

December 1, 2021.

I. Introduction

On March 26, 2021, Cboe BZX Exchange, Inc. (''BZX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the WisdomTree Bitcoin Trust (''Trust'') under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on April 15, 2021.[3]

On May 26, 2021, pursuant to Section 19(b)(2) of the Exchange Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On July 13, 2021, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act [6] to determine whether to approve or disapprove the proposed rule change.[7] On September 29, 2021, the Commission designated a longer period for Commission action on the proposed rule change.[8]

This order disapproves the proposed rule change. The Commission concludes that BZX has not met its burden under the Exchange Act and the Commission's Rules of Practice to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5), in particular, the requirement that the rules of a national securities exchange be ''designed to prevent fraudulent and manipulative acts and practices'' and ''to protect investors and the public interest.'' [9]

When considering whether BZX's proposal to list and trade the Shares is designed to prevent fraudulent and manipulative acts and practices, the Commission applies the same standard used in its orders considering previous proposals to list bitcoin [10]-based commodity trusts and bitcoin-based trust issued receipts.[11] As the Commission has explained, an exchange that lists bitcoin-based exchange-traded products (''ETPs'') can meet its obligations under Exchange Act Section 6(b)(5) by demonstrating that the exchange has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying or reference bitcoin assets.[12]

The standard requires such surveillance-sharing agreements since they ''provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.'' [13] The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading the underlying assets for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules.[14] The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.[15]

In the context of this standard, the terms ''significant market'' and ''market of significant size'' include a market (or group of markets) as to which (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist in detecting and deterring misconduct, and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[16] A surveillance-sharing agreement must be entered into with a ''significant market'' to assist in

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 91521 (Apr. 9, 2021), 86 FR 19917 (''Notice''). Comments on the proposed rule change can be found at: *https://www.sec.gov/comments/sr-cboebzx-2021-024/srcboebzx2021024.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 92032, 86 FR 29611 (June 2, 2021).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 92392, 86 FR 38154 (July 19, 2021).

[8] *See* Securities Exchange Act Release No. 93173, 86 FR 55065 (Oct. 5, 2021).

[9] 15 U.S.C. 78f(b)(5).

[10] Bitcoins are digital assets that are issued and transferred via a decentralized, open-source protocol used by a peer-to-peer computer network through which transactions are recorded on a public transaction ledger known as the ''bitcoin blockchain.'' The bitcoin protocol governs the creation of new bitcoins and the cryptographic system that secures and verifies bitcoin transactions. *See, e.g.,* Notice, 86 FR at 19918.

[11] *See* Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (Aug. 1, 2018) (SR–BatsBZX–2016–30) (''Winklevoss Order''); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, To Amend NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) and To List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 88284 (Feb. 26, 2020), 85 FR 12595 (Mar. 3, 2020) (SR–NYSEArca–2019–39) (''USBT Order''). *See also* Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the SolidX Bitcoin Trust Under NYSE Arca Equities Rule 8.201, Securities Exchange Act Release No. 80319 (Mar. 28, 2017), 82 FR 16247 (Apr. 3, 2017) (SR–NYSEArca-2016–101) (''SolidX Order''). The Commission also notes that orders were issued by delegated authority on the following matters: Order Disapproving a Proposed Rule Change To List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF, Securities Exchange Act Release No. 83904 (Aug. 22, 2018), 83 FR 43934 (Aug. 28, 2018) (NYSEArca–2017–139) (''ProShares Order''); Order Disapproving a Proposed Rule Change To List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF, Securities Exchange Act Release No. 83913 (Aug. 22, 2018), 83 FR 43923 (Aug. 28, 2018) (SR–CboeBZX–2018–001) (''GraniteShares Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93559 (Nov. 12, 2021), 86 FR 64539 (Nov. 18, 2021) (SR–CboeBZX–2021–019).

[12] *See* USBT Order, 85 FR at 12596. *See also* Winklevoss Order, 83 FR at 37592 n.202 and accompanying text (discussing previous Commission approvals of commodity-trust ETPs); GraniteShares Order, 83 FR at 43925–27 nn.35–39 and accompanying text (discussing previous Commission approvals of commodity-futures ETPs).

[13] *See* Amendment to Rule Filing Requirements for Self-Regulatory Organizations Regarding New Derivative Securities Products, Securities Exchange Act Release No. 40761 (Dec. 8, 1998), 63 FR 70952, 70959 (Dec. 22, 1998) (''NDSP Adopting Release''). *See also* Winklevoss Order, 83 FR at 37594; ProShares Order, 83 FR at 43936; GraniteShares Order, 83 FR at 43924; USBT Order, 85 FR at 12596.

[14] *See* NDSP Adopting Release, 63 FR at 70959.

[15] *See* Winklevoss Order, 83 FR at 37592–93; Letter from Brandon Becker, Director, Division of Market Regulation, Commission, to Gerard D. O'Connell, Chairman, Intermarket Surveillance Group (June 3, 1994), *available at https://www.sec.gov/divisions/marketreg/mr-noaction/isg060394.htm.*

[16] *See* Winklevoss Order, 83 FR at 37594. This definition is illustrative and not exclusive. There could be other types of ''significant markets'' and ''markets of significant size,'' but this definition is an example that will provide guidance to market participants. *See id.*

detecting and deterring manipulation of the ETP, because a person attempting to manipulate the ETP is reasonably likely to also engage in trading activity on that ''significant market.'' [17]

Consistent with this standard, for the commodity-trust ETPs approved to date for listing and trading, there has been in every case at least one significant, regulated market for trading futures on the underlying commodity—whether gold, silver, platinum, palladium, or copper—and the ETP listing exchange has entered into surveillance-sharing agreements with, or held Intermarket Surveillance Group (''ISG'') membership in common with, that market.[18] Moreover, the surveillance-sharing agreements have been consistently present whenever the Commission has approved the listing and trading of derivative securities, even where the underlying securities were also listed on national securities exchanges—such as options based on an index of stocks traded on a national securities exchange—and were thus subject to the Commission's direct regulatory authority.[19]

Listing exchanges have also attempted to demonstrate that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices, including that the bitcoin market as a whole or the relevant underlying bitcoin market is ''uniquely'' and ''inherently'' resistant to fraud and manipulation.[20] In response, the Commission has agreed that, if a listing exchange could establish that the underlying market inherently possesses a unique resistance to manipulation beyond the protections that are utilized by traditional commodity or securities markets, it would not necessarily need to enter into a surveillance-sharing agreement with a regulated significant market.[21] Such resistance to fraud and manipulation, however, must be novel and beyond those protections that exist in traditional commodity markets or equity markets for which the Commission has long required surveillance-sharing agreements in the context of listing derivative securities products. No listing exchange has satisfied its burden to make such demonstration.[22]

Here, BZX contends that approval of the proposal is consistent with Section 6(b)(5) of the Exchange Act, in particular Section 6(b)(5)'s requirement that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest.[23] As discussed in more detail below, BZX asserts that the proposal is consistent with Section 6(b)(5) of the Exchange Act because the Exchange has a comprehensive surveillance-sharing agreement with a regulated market of significant size,[24] and there exist other means to prevent fraudulent and manipulative acts and practices that are sufficient to justify dispensing with the requisite surveillance-sharing agreement.[25]

Although BZX recognizes the Commission's focus on potential manipulation of bitcoin ETPs in prior disapproval orders, BZX argues that such manipulation concerns have been sufficiently mitigated, and that the growing and quantifiable investor protection concerns should be the central consideration of the Commission.[26] Specifically, as discussed in more detail below, the Exchange asserts that the significant increase in trading volume in bitcoin futures on the Chicago Mercantile Exchange (''CME''), the growth of liquidity in the spot market for bitcoin, and certain features of the Shares and the Reference Rate (as defined herein) mitigate potential manipulation concerns to the point that the investor protection issues that have arisen from the rapid growth of over-the-counter (''OTC'') bitcoin funds, including premium/discount volatility and management fees, should be the central consideration as the Commission determines whether to approve this proposal.[27]

Further, BZX believes that the proposal would give U.S. investors access to bitcoin in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors. According to BZX, the proposed listing and trading of the Shares would mitigate risk by: (i) Reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks associated with investing in operating companies that are imperfect proxies for bitcoin exposure; and (iv) providing an alternative to custodying spot bitcoin.[28]

In the analysis that follows, the Commission examines whether the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act by addressing: in Section III.B.1 assertions that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices; in Section III.B.2 assertions that BZX has entered into a comprehensive surveillance-sharing agreement with a regulated market of significant size related to bitcoin; and in Section III.C assertions that the proposal is consistent with the protection of investors and the public interest. As discussed further below, BZX repeats various assertions made in prior bitcoin-based ETP proposals that the Commission has previously addressed and rejected and more importantly, BZX does not respond to the Commission's reasons for rejecting those assertions but merely repeats them. The Commission concludes that BZX has not established that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Commission further concludes that BZX has not established that it has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to bitcoin. As a result, the Commission is unable to find that the

[17] *See* USBT Order, 85 FR at 12597.

[18] *See* Winklevoss Order, 83 FR at 37594.

[19] *See* USBT Order, 85 FR at 12597; Securities Exchange Act Release No. 33555 (Jan. 31, 1994), 59 FR 5619, 5621 (Feb. 7, 1994) (SR–Amex–93–28) (order approving listing of options on American Depository Receipts). The Commission has also required a surveillance-sharing agreement in the context of index options even when (i) all of the underlying index component stocks were either registered with the Commission or exempt from registration under the Exchange Act; (ii) all of the underlying index component stocks traded in the U.S. either directly or as ADRs on a national securities exchange; and (iii) effective international ADR arbitrage alleviated concerns over the relatively smaller ADR trading volume, helped to ensure that ADR prices reflected the pricing on the home market, and helped to ensure more reliable price determinations for settlement purposes, due to the unique composition of the index and reliance on ADR prices. *See* Securities Exchange Act Release No. 26653 (Mar. 21, 1989), 54 FR 12705, 12708 (Mar. 28, 1989) (SR–Amex–87–25) (stating that ''surveillance-sharing agreements between the exchange on which the index option trades and the markets that trade the underlying securities are necessary'' and that ''[t]he exchange of surveillance data by the exchange trading a stock index option and the markets for the securities comprising the index is important to the detection and deterrence of intermarket manipulation.''). And the Commission has required a surveillance-sharing agreement even when approving options based on an index of stocks traded on a national securities exchange. *See* Securities Exchange Act Release No. 30830 (June 18, 1992), 57 FR 28221, 28224 (June 24, 1992) (SR–Amex–91–22) (stating that surveillance-sharing agreements ''ensure the availability of information necessary to detect and deter potential manipulations and other trading abuses'').

[20] *See* USBT Order, 85 FR at 12597.

[21] *See* Winklevoss Order, 83 FR at 37580, 37582–91 (addressing assertions that ''bitcoin and bitcoin [spot] markets'' generally, as well as one bitcoin trading platform specifically, have unique resistance to fraud and manipulation); *see also* USBT Order, 85 FR at 12597.

[22] *See supra* note 11.

[23] *See* Notice, 86 FR at 19924.

[24] *See id.* at 19929–30.

[25] *See id.* at 19930.

[26] *See id.* at 19920.

[27] *See id.* at 19929.

[28] *See id.* at 19920.

proposed rule change is consistent with the statutory requirements of Exchange Act Section 6(b)(5).

The Commission again emphasizes that its disapproval of this proposed rule change does not rest on an evaluation of whether bitcoin, or blockchain technology more generally, has utility or value as an innovation or an investment. Rather, the Commission is disapproving this proposed rule change because, as discussed below, BZX has not met its burden to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5).

II. Description of the Proposed Rule Change

As described in more detail in the Notice,[29] the Exchange proposes to list and trade the Shares of the Trust under BZX Rule 14.11(e)(4), which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.

The investment objective of the Trust is to gain exposure to the price of bitcoin, less expenses and liabilities of the Trust's operation.[30] The Trust would hold bitcoin, and it would calculate the Trust's net asset value (''NAV'') daily based on the value of bitcoin as reflected by the CF Bitcoin US Settlement Price (''Reference Rate''). The Reference Rate was created, and is administered, by CF Benchmarks Ltd. (''Benchmark Administrator''). The Reference Rate aggregates the trade flow of several bitcoin spot platforms, the composition of which currently includes Bitstamp, Coinbase, Gemini, itBit, and Kraken. In calculating the Reference Rate, the methodology creates a joint list of the trade prices and sizes from the Constituent Bitcoin Platforms (as defined herein) between 3:00 p.m. E.T. and 4:00 p.m. E.T. The methodology divides this list into 12 equally-sized time intervals of five minutes and calculates the volume-weighted median trade price for each of those time intervals.[31] The Reference Rate is the arithmetic mean of these 12 volume-weighted median trade prices.[32]

Each Share represents a fractional undivided beneficial interest in and ownership of the Trust. The Trust's assets will consist of bitcoin held by the Bitcoin Custodian on behalf of the Trust. The Trust generally does not intend to hold cash or cash equivalents. However, there may be situations where the Trust will unexpectedly hold cash on a temporary basis.[33]

The administrator will determine the NAV and NAV per Share of the Trust on each day that the Exchange is open for regular trading after 4:00 p.m. E.T. (often by 5:30 p.m. E.T. and almost always by 8:00 p.m. E.T.). The NAV of the Trust is the aggregate value of the Trust's assets, less total liabilities of the Trust. In determining the Trust's NAV, the administrator values the bitcoin held by the Trust based on the price set by the Reference Rate as of 4:00 p.m. E.T.[34]

The Trust will provide information regarding the Trust's bitcoin holdings, as well as an Intraday Indicative Value (''IIV'') per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the value of the Trust's bitcoin holdings during the trading day.[35]

When the Trust sells or redeems its Shares, it will do so in ''in-kind'' transactions in blocks of aggregations of Shares. When creating the Shares, authorized participants will deliver, or facilitate the delivery of, bitcoin to the Trust's account with the Bitcoin Custodian in exchange for the Shares, and, when redeeming the Shares, the Trust, through the Bitcoin Custodian, will deliver bitcoin to such authorized participants.[36]

III. Discussion

A. The Applicable Standard for Review

The Commission must consider whether BZX's proposal is consistent with the Exchange Act. Section 6(b)(5) of the Exchange Act requires, in relevant part, that the rules of a national securities exchange be designed ''to prevent fraudulent and manipulative acts and practices'' and ''to protect investors and the public interest.''[37] Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization ['SRO'] that proposed the rule change.''[38]

The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[39] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.[40] Moreover, ''unquestioning reliance'' on an SRO's representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.[41]

[29] *See* Notice, *supra* note 3. *See also* Registration Statement on Form S–1, dated March 11, 2021 (File No. 333–254134), filed with the Commission on behalf of the Trust (''Registration Statement'').

[30] WisdomTree Digital Commodity Services, LLC (''Sponsor'') is the sponsor of the Trust, and Delaware Trust Company is the trustee. A third-party regulated custodian (''Bitcoin Custodian'') will be responsible for custody of the Trust's bitcoin. The Sponsor is responsible for selecting the Bitcoin Custodian as well as an administrator, a transfer agent, a marketing agent, and an auditor for the Trust. *See* Notice, 86 FR at 19918, 19925–26.

[31] According to BZX, the Reference Rate is based on materially the same methodology (except calculation time, as described herein) as the Benchmark Administrator's CME CF Bitcoin Reference Rate (''BRR''), which was first introduced on November 14, 2016, and is the rate on which bitcoin futures contracts are cash-settled in U.S. dollars on CME. The Reference Rate is calculated as of 4:00 p.m. E.T., whereas the CME CF BRR is calculated as of 4:00 p.m. London Time. The Reference Rate aggregates the trade flow of several bitcoin platforms during an observation window between 3:00 p.m. and 4:00 p.m. E.T. into the U.S. dollar price of one bitcoin at 4:00 p.m. E.T. The current constituent bitcoin platforms of the Reference Rate are Bitstamp, Coinbase, Gemini, itBit, and Kraken (''Constituent Bitcoin Platforms''). *See* Notice, 86 FR at 19926 & n.70.

[32] *See id.* at 19926.

[33] *See id.* at 19925.

[34] *See id.* at 19927.

[35] *See id.* at 19926.

[36] *See id.* at 19925–26.

[37] 15 U.S.C. 78f(b)(5). Pursuant to Section 19(b)(2) of the Exchange Act, 15 U.S.C. 78s(b)(2), the Commission must disapprove a proposed rule change filed by a national securities exchange if it does not find that the proposed rule change is consistent with the applicable requirements of the Exchange Act. Exchange Act Section 6(b)(5) states that an exchange shall not be registered as a national securities exchange unless the Commission determines that ''[t]he rules of the exchange are 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; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange.'' 15 U.S.C. 78f(b)(5).

[38] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[39] *See id.*

[40] *See id.*

[41] *Susquehanna Int'l Group, LLP* v. *Securities and Exchange Commission*, 866 F.3d 442, 447 (D.C. Cir. 2017) (''Susquehanna'').

B. Whether BZX Has Met its Burden To Demonstrate That the Proposal Is Designed To Prevent Fraudulent and Manipulative Acts and Practices

(1) Assertions That Other Means Besides Surveillance-Sharing Agreements Will Be Sufficient To Prevent Fraudulent and Manipulative Acts and Practices

As stated above, the Commission has recognized that a listing exchange could demonstrate that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with a comprehensive surveillance-sharing agreement with a regulated market of significant size, including by demonstrating that the bitcoin market as a whole or the relevant underlying bitcoin market is uniquely and inherently resistant to fraud and manipulation.[42] Such resistance to fraud and manipulation must be novel and beyond those protections that exist in traditional commodities or securities markets.[43]

BZX asserts that bitcoin is resistant to price manipulation. According to BZX, the geographically diverse and continuous nature of bitcoin trading render it difficult and prohibitively costly to manipulate the price of bitcoin.[44] Fragmentation across bitcoin platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of bitcoin prices through continuous trading activity challenging.[45] To the extent that there are bitcoin platforms engaged in or allowing wash trading or other activity intended to manipulate the price of bitcoin on other markets, such pricing does not normally impact prices on other platforms because participants will generally ignore markets with quotes that they deem non-executable.[46] BZX further argues that the linkage between the bitcoin markets and the presence of arbitrageurs in those markets means that the manipulation of the price of bitcoin on any single venue would require manipulation of the global bitcoin price in order to be effective.[47] Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular bitcoin trading venue.[48] As a result, BZX concludes that the potential for manipulation on a bitcoin trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.[49]

As with the previous proposals, the Commission here concludes that the record does not support a finding that the bitcoin market is inherently and uniquely resistant to fraud and manipulation.[50] BZX asserts that, because of how bitcoin trades occur, including through continuous means and through fragmented platforms, arbitrage across the bitcoin platforms essentially helps to keep global bitcoin prices aligned with one another, thus hindering manipulation. The Exchange, however, does not provide any data or analysis to support its assertions, either in terms of how closely bitcoin prices are aligned across different bitcoin trading venues or how quickly price disparities may be arbitraged away.[51] As stated above, ''unquestioning reliance'' on an SRO's representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.[52]

Efficient price arbitrage, moreover, is not sufficient to support the finding that a market is uniquely and inherently resistant to manipulation such that the Commission can dispense with surveillance-sharing agreements.[53] The Commission has stated, for example, that even for equity options based on securities listed on national securities exchanges, the Commission relies on surveillance-sharing agreements to detect and deter fraud and manipulation.[54] Here, the Exchange provides no evidence to support its assertion of efficient price arbitrage across bitcoin platforms, let alone any evidence that price arbitrage in the bitcoin market is novel or unique so as to warrant the Commission dispensing with the requirement of a surveillance-sharing agreement. Moreover, BZX does not take into account that a market participant with a dominant ownership position would not find it prohibitively expensive to overcome the liquidity supplied by arbitrageurs and could use dominant market share to engage in manipulation.[55]

In addition, the Exchange makes the unsupported claim that bitcoin prices on platforms with wash trades or other activity intended to manipulate the price of bitcoin do not influence the ''real'' price of bitcoin. The Exchange also asserts that, to the extent that there are bitcoin platforms engaged in or allowing wash trading or other manipulative activities, market participants will generally ignore those platforms. However, without the necessary data, such as lead-lag or other similar analyses, or other evidence, the Commission has no basis on which to conclude that bitcoin platforms are insulated from prices of others that engage in or permit fraud or manipulation.[56]

Additionally, the continuous nature of bitcoin trading does not eliminate manipulation risk, and neither does linkages among markets, as BZX asserts.[57] Even in the presence of continuous trading or linkages among markets, formal (such as those with consolidated quotations or routing requirements) or otherwise (such as in the context of the fragmented, global bitcoin markets), manipulation of asset prices, as a general matter, can occur simply through trading activity that

[42] *See* USBT Order, 85 FR at 12597 n.23. The Commission is not applying a ''cannot be manipulated'' standard. Instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met. *See id.*

[43] *See id.* at 12597.

[44] *See* Notice, 86 FR at 19924 n.58.

[45] *See id.*

[46] *See id.*

[47] *See id.*

[48] *See id.*

[49] *See id.*

[50] Two commenters also question the bitcoin market's resistance to fraud and manipulation. One commenter asserts that the bitcoin network is the preferred network for global criminals, and a pyramid scheme in which the top holders encourage existing holders to keep holding and entice new retail investors to invest. *See* letter from Maulik Patel, dated July 4, 2021 (''Patel Letter''). Another commenter describes digital assets such as bitcoin, and the blockchains on which they rely, as having complexity that makes users vulnerable to fraud. *See* letter from Lourdes Ciao, dated June 24, 2021 (''Ciao Letter 3'').

[51] For example, the Registration Statement states that ''[i]f increases in throughput on the Bitcoin network lag behind growth in usage of bitcoin, average fees and settlement times may increase considerably . . . . which could adversely impact the value of the Shares.'' *See* Registration Statement at 21. BZX does not provide data or analysis to address, among other things, whether such risks of increased fees and bitcoin transaction settlement times may affect the arbitrage effectiveness that BZX asserts. *See also infra* note 65 and accompanying text (referencing statements made in the Registration Statement that contradict assertions made by BZX).

[52] *See supra* note 41.

[53] *See* Winklevoss Order, 83 FR at 37586; SolidX Order, 82 FR at 16256–57; USBT Order, 85 FR at 12601.

[54] *See, e.g.,* USBT Order, 85 FR at 12601.

[55] *See, e.g.,* Winklevoss Order, 83 FR at 37584; USBT Order, 85 FR at 12600–01.

[56] *See* USBT Order, 85 FR at 12601. *See also infra* notes 131–132 and accompanying text (explaining the lead-lag analysis as central to understanding whether it is reasonably likely that a would-be manipulator of the proposed ETP would have to trade on the CME bitcoin futures market to successfully manipulate the proposed ETP).

[57] *See* Winklevoss Order, 83 FR at 37585 n.92 and accompanying text.

creates a false impression of supply or demand.[58]

BZX also argues that the significant liquidity in the bitcoin spot market and the impact of market orders on the overall price of bitcoin mean that attempting to move the price of bitcoin is costly and has grown more expensive over the past year.[59] According to BZX, in January 2020, for example, the cost to buy or sell $5 million worth of bitcoin averaged roughly 30 basis points (compared to 10 basis points in February 2021) with a market impact of 50 basis points (compared to 30 basis points in February 2021). For a $10 million market order, the cost to buy or sell was roughly 50 basis points (compared to 20 basis points in February 2021) with a market impact of 80 basis points (compared to 50 basis points in February 2021). BZX contends that as the liquidity in the bitcoin spot market increases, it follows that the impact of $5 million and $10 million orders will continue to decrease.[60]

However, the data furnished by BZX regarding the cost to move the price of bitcoin, and the market impact of such attempts, are incomplete. BZX does not provide meaningful analysis pertaining to how these figures compare to other markets or why one must conclude, based on the numbers provided, that the bitcoin market is costly to manipulate. Further, BZX's analysis of the market impact of a mere two sample transactions is not sufficient evidence to conclude that the bitcoin market is resistant to manipulation.[61] Even assuming that the Commission agreed with BZX's premise, that it is costly to manipulate the bitcoin market and it is becoming increasingly so, any such evidence speaks only to establish that there is some resistance to manipulation, not that it establishes *unique* resistance to manipulation to warrant dispensing with the standard surveillance-sharing agreement.[62] The Commission thus concludes that the record does not demonstrate that the nature of bitcoin trading renders the bitcoin market inherently and uniquely resistant to fraud and manipulation.

Moreover, BZX does not sufficiently contest the presence of possible sources of fraud and manipulation in the bitcoin spot market generally that the Commission has raised in previous orders, which have included (1) ''wash'' trading,[63] (2) persons with a dominant position in bitcoin manipulating bitcoin pricing, (3) hacking of the bitcoin network and trading platforms, (4) malicious control of the bitcoin network, (5) trading based on material, non-public information, including the dissemination of false and misleading information, (6) manipulative activity involving the purported ''stablecoin'' Tether (USDT), and (7) fraud and manipulation at bitcoin trading platforms.[64]

In addition, BZX does not address risk factors specific to the bitcoin blockchain and bitcoin platforms, described in the Trust's Registration Statement, that undermine the argument that the bitcoin market is inherently resistant to fraud and manipulation. For example, the Registration Statement acknowledges that ''bitcoin [platforms] on which bitcoin trades are relatively new and, in some cases, unregulated, and, therefore, may be more exposed to fraud and security breaches than established, regulated exchanges for other financial assets or instruments''; that ''as an intangible asset without centralized issuers or governing bodies, bitcoin has been, and may in the future be, subject to security breaches, cyberattacks or other malicious activities''; that ''[t]he trading for bitcoin occurs on multiple trading venues that have various levels and types of regulation, but are not regulated in the same manner as traditional stock and bond exchanges'' and if these spot markets ''do not operate smoothly or face technical, security or regulatory issues, that could impact the ability of Authorized Participants to make markets in the Shares'' which could lead to ''trading in the Shares [to] occur at a material premium or discount against the NAV''; that the bitcoin blockchain could be vulnerable to a ''51% attack,'' in which a bad actor that controls a majority of the processing power dedicated to mining on the bitcoin network may be able to alter the bitcoin blockchain on which the bitcoin network and bitcoin transactions rely; that the nature of the assets held at bitcoin platforms makes them ''appealing targets for hackers'' and that ''a number of bitcoin [platforms] have been victims of cybercrimes''; and that bitcoin trading platforms ''have been closed or faced issues due to fraud, failure'' and ''security breaches.''[65]

BZX also asserts that other means to prevent fraud and manipulation are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange mentions that the Reference Rate, which is used to value the Trust's bitcoin, is itself resistant to manipulation based on the Reference Rate's methodology.[66] The Exchange states that the Reference Rate is calculated based on the ''Relevant Transactions''[67] of all of its Constituent Bitcoin Platforms. All Relevant Transactions are added to a joint list, recording the time of execution, trade price, and size for each transaction, and the list is partitioned by timestamp into 12 equally-sized time intervals of five minute length.[68] For each partition separately, the volume-weighted median trade price is calculated from the trade prices and sizes of all Relevant Transactions.[69] The Reference Rate is then determined by the arithmetic mean of the volume-weighted medians of all partitions.[70] According to BZX, ''[b]y employing the foregoing steps, the Reference Rate thereby seeks to ensure that transactions in bitcoin conducted at outlying prices do not have an undue effect on the value of a specific partition, large trades or clusters of trades transacted over a short period of time will not have an undue influence on the index level, and the effect of large trades at prices that deviate from the prevailing price are mitigated from having an undue influence on the benchmark level.''[71] BZX concludes its analysis of the Reference Rate by noting that ''an oversight function is implemented by the Benchmark Administrator in seeking to ensure that the Reference Rate is administered through codified policies for Reference Rate integrity.''[72]

The Benchmark Administrator, in a comment letter, elaborates on how, in

[58] *See id.* at 37585.

[59] *See* Notice, 86 FR at 19925.

[60] *See id.*

[61] Aside from stating that the ''statistics are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Gemini, Bitstamp, Kraken, LMAX Exchange, BinanceUS, and OKCoin during February 2021,'' the Exchange provides no other information pertaining to the methodology used to enable the Commission to evaluate these findings or their significance. *See id.* at 19925 nn.64–65.

[62] *See* USBT Order, 85 FR at 12601.

[63] *See supra* note 56 and accompanying text.

[64] *See* USBT Order, 85 FR at 12600–01 & nn.66–67 (discussing J. Griffin & A. Shams, *Is Bitcoin Really Untethered?* (October 28, 2019), *available at https://ssrn.com/abstract=3195066* and published in 75 J. Finance 1913 (2020)); Winklevoss Order, 83 FR at 37585–86.

[65] *See* Registration Statement at 11, 18–20, 38. *See also* Winklevoss Order, 83 FR at 37585.

[66] *See* Notice, 86 FR at 19925.

[67] According to the Exchange, a ''Relevant Transaction'' is any cryptocurrency versus U.S. dollar spot trade that occurs during the observation window between 3:00 p.m. and 4:00 p.m. E.T. on a Constituent Bitcon Platform in the BTC/USD pair that is reported and disseminated by a Constituent Bitcoin Platform and observed by the Benchmark Administrator. *See id.* at 19926 n.71.

[68] *See id.* at 19926.

[69] *See id.* According to the Exchange, a volume-weighted median differs from a standard median in that a weighting factor, in this case trade size, is factored into the calculation. *See id.*

[70] *See id.*

[71] *See id.*

[72] *See id.*

its view, its oversight of the Reference Rate helps to prevent fraud and manipulation.[73] The Benchmark Administrator states that it is subject to the UK Benchmarks Regulation (''BMR''), which is enforced by the UK Financial Conduct Authority (''FCA''), including requirements to surveil for attempted and actual manipulation.[74] The Benchmark Administrator further states that, in order to fulfil its regulatory obligations under the UK BMR: It only includes as ''Constituent Bitcoin Platforms'' those trading platforms that conform to certain criteria, including assessment of a platform's risks to market participants, compliance with law, and policies to identify and impede manipulative trading practices;[75] it has in place information-sharing agreements with each of the Constituent Bitcoin Platforms;[76] and it operates a Benchmark Surveillance Program, over which the UK FCA has authority, whereby it monitors for, investigates, and reports signs of manipulation.[77]

In addition, in its comment letter, the Benchmark Administrator asserts that CME, in the course of operating and overseeing its bitcoin futures market under the regulatory oversight of the Commodity Futures Trading Commission (''CFTC''), has in place information-sharing agreements with the Constituent Bitcoin Platforms for the purposes of impeding and detecting any attempted manipulation of the futures contracts, as they are the platforms from which trade data is gathered to compute the CME CF BRR;[78] and that given such agreements, ''this would allow for [potentially manipulative acts to] be detected and deterred by CME.''[79] The Benchmark Administrator further asserts that, because the CME and BZX are both members of the ISG, BZX would also have access to this information to allow for detection and deterrence of manipulation should it occur.[80]

Simultaneously with the Exchange's and the Benchmark Administrator's assertions regarding the Reference Rate, the Exchange also states that, because the Trust will engage in in-kind creations and redemptions only, the ''manipulability of the Reference Rate [is] significantly less important.''[81] The Exchange elaborates further that, ''because the Trust will not accept cash to buy bitcoin in order to create new shares or . . . be forced to sell bitcoin to pay cash for redeemed shares, the price that the Sponsor uses to value the Trust's bitcoin is not particularly important.''[82] According to BZX, when authorized participants create Shares with the Trust, they would need to deliver a certain number of bitcoin per share (regardless of the valuation used), and when they redeem with the Trust, they would similarly expect to receive a certain number of bitcoin per share.[83] As such, BZX argues that even if the price used to value the Trust's bitcoin is manipulated, the ratio of bitcoin per Share does not change, and the Trust will either accept (for creations) or distribute (for redemptions) the same number of bitcoin regardless of the value.[84] This, according to BZX, not only mitigates the risk associated with potential manipulation, but also discourages and disincentivizes manipulation of the Reference Rate because there is little financial incentive to do so.[85]

Based on assertions made and the information provided, the Commission can find no basis to conclude that BZX has articulated other means to prevent fraud and manipulation that are sufficient to justify dispensing with the requisite surveillance-sharing agreement. First, the record does not demonstrate that the proposed methodology for calculating the Reference Rate would make the proposed ETP resistant to fraud or manipulation such that a surveillance-sharing agreement with a regulated market of significant size is unnecessary. Specifically, the Exchange has not assessed the possible influence that spot platforms not included among the Constituent Bitcoin Platforms would have on bitcoin prices used to calculate the Reference Rate.[86] And as discussed above, the record does not establish that the broader bitcoin market is inherently and uniquely resistant to fraud and manipulation. Accordingly, to the extent that trading on platforms not directly used to calculate the Reference Rate affects prices on the Constituent Bitcoin Platforms, the characteristics of those other platforms—where various kinds of fraud and manipulation from a variety of sources may be present and persist—affect whether the Reference Rate is resistant to manipulation.

Moreover, the Exchange's assertions that the Reference Rate's methodology helps make the Reference Rate resistant to manipulation are contradicted by the Registration Statement's own statements. Specifically, the Registration Statement states that ''[b]itcoin [platforms] on which bitcoin trades . . . may be more exposed to fraud and security breaches than established, regulated exchanges for other financial assets or instruments, which could have a negative impact on the performance of the Trust.''[87] Constituent Bitcoin Platforms are a subset of the bitcoin platforms currently in existence. Although the Sponsor raises concerns regarding fraud and security of bitcoin platforms in the Registration Statement, the Exchange does not explain how or why such concerns are consistent with its assertion that the Reference Rate is resistant to fraud and manipulation.

BZX also has not shown that its proposed use of 12 equally-sized time intervals of five minute length over the observation window between 3:00 p.m. and 4:00 p.m. E.T. to calculate the Reference Rate would effectively be able to eliminate fraudulent or manipulative activity that is not transient. Fraud and manipulation in the bitcoin spot market could persist for a ''significant duration.''[88] The Exchange does not connect the use of such partitions to the duration of the effects of the wash and fictitious trading that may exist in the bitcoin spot market.[89]

The Commission thus concludes that the Exchange has not demonstrated that its Reference Rate methodology makes the proposed ETP resistant to manipulation. While the proposed procedures for calculating the Reference Rate using only prices from the Constituent Bitcoin Platforms are intended to provide some degree of protection against attempts to manipulate the Reference Rate, these procedures are not sufficient for the Commission to dispense with the

[73] *See* letter from CF Benchmarks, dated April 2021 (''CF Benchmarks Letter'').

[74] *See id.* at 2.

[75] *See id.* at 3. The Benchmark Administrator further states that the same Constituent Bitcoin Platforms are used to compute the CME CF BRR, which it also administers, and which is used to settle the bitcoin-USD futures contracts listed for trading on CME. *See id.* at 2.

[76] *See id.* at 2.

[77] *See id.* at 4.

[78] *See id.* at 2.

[79] *See id.* at 7.

[80] *See id.*

[81] *See* Notice, 86 FR at 19925.

[82] *See id.*

[83] *See id.*

[84] *See id.*

[85] *See id.*

[86] As discussed above, while the Exchange asserts that bitcoin prices on platforms with wash trades or other activity intended to manipulate the price of bitcoin do not influence the ''real'' price of bitcoin, the Commission has no basis on which to conclude that bitcoin platforms are insulated from prices of others that engage in or permit fraud or manipulation. *See supra* note 56 and accompanying text.

[87] *See* Registration Statement at 19.

[88] *See* USBT Order, 85 FR at 12601 n.66; *see also id.* at 12607.

[89] The Commission has previously considered and rejected similar arguments about the valuation of bitcoin according to a benchmark or reference price. *See id.;* SolidX Order, 82 FR at 16258; Winklevoss Order, 83 FR at 37589–90.

requisite surveillance-sharing agreement with a regulated market of significant size.

Second, the Benchmark Administrator argues that its oversight of the Reference Rate and the CME's information-sharing agreements with the Constituent Bitcoin Platforms help to prevent fraud and manipulation.[90] However, the level of oversight of the Constituent Bitcoin Platforms, whose trade flows contribute to the Reference Rate, is not equivalent to the obligations, authority, and oversight of national securities exchanges or futures exchanges and therefore is not an appropriate substitute.[91] National securities exchanges are required to have rules that are ''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.'' [92] Moreover, national securities exchanges must file proposed rules with the Commission regarding certain material aspects of their operations,[93] and the Commission has the authority to disapprove any such rule that is not consistent with the requirements of the Exchange Act.[94] Thus, national securities exchanges are subject to Commission oversight of, among other things, their governance, membership qualifications, trading rules, disciplinary procedures, recordkeeping, and fees.[95]

The Constituent Bitcoin Platforms, on the other hand, have none of these requirements (none are registered as a national securities exchange) [96]—even if they may have, as the Benchmark Administrator asserts, AML/KYC compliance policies and prohibitions against wash trading and fraudulent claims of trading volume.[97] In addition, although the Commission recognizes that the CFTC maintains some jurisdiction over the bitcoin spot market, under the Commodity Exchange Act, the CFTC does not have regulatory authority over bitcoin spot trading platforms, including the Constituent Bitcoin Platforms.[98] Except in certain limited circumstances, bitcoin spot trading platforms are not required to register with the CFTC, and the CFTC does not set standards for, approve the rules of, examine, or otherwise regulate bitcoin spot markets.[99] As the CFTC itself stated, while the CFTC ''has an important role to play,'' U.S. law ''does not provide for direct, comprehensive Federal oversight of underlying Bitcoin or virtual currency spot markets.'' [100]

And while the Benchmark Administrator asserts that the CME has in place information-sharing agreements with the Constituent Bitcoin Platforms, it does not provide any information on the scope, terms, or enforcement authority for such information-sharing agreements. Nor has BZX put any information in the record as to whether and how it would use or enforce such agreements. Moreover, such agreements are contractual in nature and do not satisfy the regulatory requirements or purposes of national securities exchanges and the Exchange Act. The CME (and the CFTC, as discussed above) does not have regulatory authority over the spot bitcoin trading platforms,[101] and, while the CME is regulated by the CFTC, the CFTC's regulations do not extend to the Constituent Bitcoin Platforms by virtue of such contractual agreements.

In addition, although the Benchmark Administrator states that its oversight of the Reference Rate helps prevent fraud and manipulation, the oversight by the Benchmark Administrator does not represent a unique measure to resist manipulation beyond mechanisms that exist in securities or commodities markets. Other commodity-based and equity index ETPs approved by the Commission for listing and trading utilize reference rates or indices administered by similar benchmark administrators,[102] and the Commission has not, in those instances, dispensed with the need for a surveillance-sharing agreement with a significant regulated market.[103]

Furthermore, the Benchmark Administrator does not itself exercise governmental regulatory authority. Rather, the Benchmark Administrator is a registered, privately-held company in England.[104] The Benchmark Administrator's relationship with the Constituent Bitcoin Platforms is based on their participation in the determination of reference rates, such as the Reference Rate. While the Benchmark Administrator is regulated

[90] *See* CF Benchmarks Letter at 2–4.

[91] *See also* USBT Order, 85 FR at 12603–05.

[92] *See* 15 U.S.C. 78f(b)(5).

[93] 17 CFR 240.19b-4(a)(6)(i).

[94] Section 6 of the Exchange Act, 15 U.S.C. 78f, requires national securities exchanges to register with the Commission and requires an exchange's registration to be approved by the Commission, and Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b), requires national securities exchanges to file proposed rules changes with the Commission and provides the Commission with the authority to disapprove proposed rule changes that are not consistent with the Exchange Act. Designated contract markets (''DCMs'') (commonly called ''futures markets'') registered with and regulated by the CFTC must comply with, among other things, a similarly comprehensive range of regulatory principles and must file rule changes with the CFTC. *See, e.g.,* Designated Contract Markets (DCMs), CFTC, *available at http://www.cftc.gov/IndustryOversight/TradingOrganizations/DCMs/index.htm.*

[95] *See* Winklevoss Order, 83 FR at 37597. The Commission notes that the New York State Department of Financial Services (''NYSDFS'') has issued ''guidance'' to supervised virtual currency business entities, stating that these entities must ''implement measures designed to effectively detect, prevent, and respond to fraud, attempted fraud, and similar wrongdoing.'' *See* Maria T. Vullo, Superintendent of Financial Services, NYSDFS, *Guidance on Prevention of Market Manipulation and Other Wrongful Activity* (Feb. 7, 2018), *available at https://www.dfs.ny.gov/docs/legal/industry/il180207.pdf.* The NYSDFS recognizes that its ''guidance is not intended to limit the scope or applicability of any law or regulation'' (*id.*), which would include the Exchange Act. Nothing in the record evidences whether the Constituent Bitcoin Platforms have complied with this NYSDFS guidance. Further, as stated previously, there are substantial differences between the NYSDFS and the Commission's regulation. AML and KYC policies and procedures, for example, have been referenced in other bitcoin-based ETP proposals as a purportedly alternative means by which such ETPs would be uniquely resistant to manipulation. The Commission has previously concluded that such AML and KYC policies and procedures do not serve as a substitute for, and are not otherwise dispositive in the analysis regarding the importance of, having a surveillance sharing agreement with a regulated market of significant size relating to bitcoin. For example, AML and KYC policies and procedures do not substitute for the sharing of information about market trading activity or clearing activity and do not substitute for regulation of a national securities exchange. *See* USBT Order, 85 FR at 12603 n.101.

[96] *See* 15 U.S.C. 78e, 78f.

[97] *See* CF Benchmarks Letter at 5.

[98] *See* USBT Order, 85 FR at 12604.

[99] *See id.*

[100] *See* Winklevoss Order, 83 FR at 37599 n.288.

[101] *See supra* notes 98–100 and accompanying text.

[102] *See, e.g.,* Securities Exchange Act Release Nos. 80840 (June 1, 2017) 82 FR 26534 (June 7, 2017) (SR–NYSEArca–2017–33) (approving the listing and trading of shares of exchange traded funds seeking to track the Solactive GLD EUR Gold Index, Solactive GLD GBP Gold Index, and the Solactive GLD JPY Gold Index); and 83046 (Apr. 13, 2018) 83 FR 17462 (Apr. 19, 2018) (SR–Nasdaq–2018–012) (approving the listing and trading of shares of an exchange-traded fund that seeks to track an equity index, the CBOE Russell 2000 30–Delta BuyWrite V2 Index).

[103] *See* USBT Order, 85 FR at 12605. *See also supra* note 19.

[104] *See https://blog.cfbenchmarks.com/legal/* (stating that the Benchmark Administrator is authorized and regulated by the UK FCA as a registered Benchmark Administrator (FRN 847100) under the EU benchmark regulation, and further noting that the Benchmark Administrator is a member of the Crypto Facilities group of companies which is in turn a member of the Payward, Inc. group of companies, and Payward, Inc. is the owner and operator of the Kraken Exchange, a venue that facilitates the trading of cryptocurrencies). The Commission notes that the Kraken is one of the Constituent Bitcoin Platforms underlying the Reference Rate.

by the UK FCA as a benchmark administrator, the UK FCA's regulations do not extend to the Constituent Bitcoin Platforms by virtue of their trade prices serving as input data underlying the Reference Rate.[105]

Further, the oversight performed by the Benchmark Administrator of the Constituent Bitcoin Platforms is for the purpose of ensuring the accuracy and integrity of the Reference Rate.[106] Such oversight serves a fundamentally different purpose as compared to the regulation of national securities exchanges and the requirements of the Exchange Act. While the Commission recognizes that this may be an important function in ensuring the integrity of the Reference Rate, such requirements do not imbue either the Benchmark Administrator or the Constituent Bitcoin Platforms with regulatory authority similar to that the Exchange Act confers upon self-regulatory organizations such as national securities exchanges.[107]

And although the Benchmark Administrator states that it has information-sharing agreements with each Constituent Bitcoin Platform, it does not describe the scope of such agreements or what authority the Benchmark Administrator would have to compel the platforms' compliance with such agreements. Moreover, even assuming that the Constituent Bitcoin Platforms are as vigilant towards fraud and manipulation as the Benchmark Administrator describes, neither the Exchange nor the Benchmark Administrator attempts to establish that only the Constituent Bitcoin Platforms' ability to detect and deter fraud and manipulation would matter, exclusive of other bitcoin spot markets. In other words, neither addresses how fraud and manipulation on other bitcoin spot markets may influence the price of bitcoin.

Third, the Exchange does not explain the significance of the Reference Rate's purported resistance to manipulation to the overall analysis of whether the proposal to list and trade the Shares is designed to prevent fraud and manipulation. Even assuming that the Exchange's argument is that, if the Reference Rate is resistant to manipulation, the Trust's NAV, and thereby the Shares as well, would be resistant to manipulation, the Exchange has not established in the record a basis for such conclusion. That assumption aside, the Commission notes that the Shares would trade at market-based prices in the secondary market, not at NAV, which then raises the question of the significance of the NAV calculation to the manipulation of the Shares.[108]

Fourth, the Exchange's arguments are contradictory. While arguing that the Reference Rate is resistant to manipulation, the Exchange simultaneously downplays the importance of the Reference Rate in light of the Trust's in-kind creation and redemption mechanism.[109] The Exchange points out that the Trust will create and redeem Shares in-kind, not in cash, which renders the NAV calculation, and thereby the ability to manipulate NAV, ''significantly less important.'' [110] In BZX's own words, the Trust will not accept cash to buy bitcoin in order to create shares or sell bitcoin to pay cash for redeemed shares, so the price that the Sponsor uses to value the Trust's bitcoin ''is not particularly important.'' [111] If the Reference Rate that the Trust uses to value the Trust's bitcoin ''is not particularly important,'' it follows that the Reference Rate's resistance to manipulation is not material to the Shares' susceptibility to fraud and manipulation. As the Exchange does not address or provide any analysis with respect to these issues, the Commission cannot conclude that the Reference Rate aids in the determination that the proposal to list and trade the Shares is designed to prevent fraudulent and manipulative acts and practices.

Finally, the Commission finds that BZX has not demonstrated that in-kind creations and redemptions provide the Shares with a unique resistance to manipulation. The Commission has previously addressed similar assertions.[112] As the Commission stated before, in-kind creations and redemptions are a common feature of ETPs, and the Commission has not previously relied on the in-kind creation and redemption mechanism as a basis for excusing exchanges that list ETPs from entering into surveillance-sharing agreements with significant, regulated markets related to the portfolio's assets.[113] Accordingly, the Commission is not persuaded here that the Trust's in-kind creations and redemptions afford it a unique resistance to manipulation.[114]

[105] *See* USBT Order, 85 FR at 12604. The Benchmark Administrator is also not required to apply certain provisions of EU benchmark regulation to the Constituent Bitcoin Platforms because the Reference Rate's input data is not ''contributed.'' *See* Benchmark Statement, at 5 *available at https://docs-cfbenchmarks.s3.amazonaws.com/CME+CF+Benchmark+Statement.pdf.*

[106] *See supra* note 72 and accompanying text.

[107] *See* 15 U.S.C. 78f(b).

[108] One commenter states that BZX's statement that the price used to value the Trust's bitcoin ''is not particularly important'' focuses on the primary market and transactions with authorized participants. The commenter asserts that, for secondary market participants (*e.g.,* retail investors), the price source used by the Sponsor should be viewed as important because the ETP's value (*i.e.,* its NAV) ''has a relationship to the secondary market trading price, including for market makers and other liquidity participants in determining ET[P] pricing levels with respect to order flow, as well as for calculating premiums/discounts between NAV and the secondary market price.'' The commenter asserts that this is true for any ETP in the marketplace, but ''arguably the price source is even more important for a bitcoin ET[P]'' given the number of platforms worldwide where bitcoin is traded, the price differences between them, and the Commission's concerns regarding potential bitcoin price manipulation. *See* letter from Global Digital Finance, dated August 9, 2021 (''GDF Letter''), at 6. The commenter, however, provides no further information on the relationship between NAV and secondary market prices in general, nor specifically in the context of ETPs with only in-kind create/redeem processes, nor how market makers or other liquidity participants would use NAV to determine such an ETP's ''pricing levels with respect to order flow.'' As for the assertion that the price source is even more important for bitcoin ETPs because of the number of platforms and the price differences between them, the commenter does not elaborate further and does not explain why the opposite conclusion is not equally valid—that the price source (*i.e.,* the Constituent Bitcoin Platforms) is less important in light of other bitcoin platforms with different prices.

[109] *See supra* notes 81–85 and accompanying text.

[110] *See* Notice, 86 FR at 19925 (''While the Sponsor believes that the Reference Rate which it uses to value the Trust's bitcoin is itself resistant to manipulation based on the methodology further described below, the fact that creations and redemptions are only available in-kind makes the manipulability of the Reference Rate significantly less important.'').

[111] *See id.* (concluding that ''because the Trust will not accept cash to buy bitcoin in order to create new shares or, barring a forced redemption of the Trust or under other extraordinary circumstances, be forced to sell bitcoin to pay cash for redeemed shares, the price that the Sponsor uses to value the Trust's bitcoin is not particularly important.'').

[112] *See* Winklevoss Order, 83 FR at 37589–90; USBT Order, 85 FR at 12607–08.

[113] *See, e.g.,* iShares COMEX Gold Trust, Securities Exchange Act Release No. 51058 (Jan. 19, 2005), 70 FR 3749, 3751–55 (Jan. 26, 2005) (SR–Amex–2004–38); iShares Silver Trust, Securities Exchange Act Release No. 53521 (Mar. 20, 2006), 71 FR 14969, 14974 (Mar. 24, 2006) (SR–Amex–2005–072).

[114] Putting aside the Exchange's various assertions about the nature of bitcoin and the bitcoin market, the Reference Rate, and the Shares, the Exchange also does not address concerns the Commission has previously identified, including the susceptibility of bitcoin markets to potential trading on material, non-public information (such as plans of market participants to significantly increase or decrease their holdings in bitcoin; new sources of demand for bitcoin; the decision of a bitcoin-based investment vehicle on how to respond to a ''fork'' in the bitcoin blockchain, which would create two different, non-interchangeable types of bitcoin), or to the dissemination of false or misleading information. *See* Winklevoss Order, 83 FR at 37585. *See also* USBT Order, 85 FR at 12600–01.

(2) Assertions That BZX Has Entered Into a Comprehensive Surveillance-Sharing Agreement With a Regulated Market of Significant Size

As BZX has not demonstrated that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices, the Commission next examines whether the record supports the conclusion that BZX has entered into a comprehensive surveillance-sharing agreement with a regulated market of significant size relating to the underlying assets. In this context, the term ''market of significant size'' includes a market (or group of markets) as to which (i) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist in detecting and deterring misconduct, and (ii) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[115]

As the Commission has stated in the past, it considers two markets that are members of the ISG to have a comprehensive surveillance-sharing agreement with one another, even if they do not have a separate bilateral surveillance-sharing agreement.[116] Accordingly, based on the common membership of BZX and the CME in the ISG,[117] BZX has the equivalent of a comprehensive surveillance-sharing agreement with CME. However, while the Commission recognizes that the CFTC regulates the CME futures market,[118] including the CME bitcoin futures market, and thus such market is ''regulated,'' in the context of the proposed ETP, the record does not, as explained further below, establish that the CME bitcoin futures market is a ''market of significant size'' as that term is used in the context of the applicable standard here.[119]

(i) Whether There Is a Reasonable Likelihood That a Person Attempting To Manipulate the ETP Would Also Have To Trade on the CME Bitcoin Futures Market To Successfully Manipulate the ETP

The first prong in establishing whether the CME bitcoin futures market constitutes a ''market of significant size'' is the determination that there is a reasonable likelihood that a person attempting to manipulate the ETP would have to trade on the CME bitcoin futures market to successfully manipulate the ETP.

BZX notes that the CME began to offer trading in bitcoin futures in 2017.[120] According to BZX, nearly every measurable metric related to CME bitcoin futures contracts, which trade and settle like other cash-settled commodity futures contracts, has ''trended consistently up since launch and/or accelerated upward in the past year.'' [121] For example, according to BZX, there was approximately $28 billion in trading in CME bitcoin futures in December 2020 compared to $737 million, $1.4 billion, and $3.9 billion in total trading in December 2017, December 2018, and December 2019, respectively.[122] Additionally, CME bitcoin futures traded over $1.2 billion per day in December 2020 and represented $1.6 billion in open interest compared to $115 million in December 2019.[123] Similarly, BZX contends that the number of large open interest holders [124] has continued to increase, even as the price of bitcoin has risen, as have the number of unique accounts trading CME bitcoin futures.[125]

BZX argues that the significant growth in CME bitcoin futures across each of trading volumes, open interest, large open interest holders, and total market participants since the USBT Order was issued is reflective of that market's growing influence on the spot price. BZX asserts that where CME bitcoin futures lead the price in the spot market such that a potential manipulator of the bitcoin spot market (beyond just the Constituent Bitcoin Platforms) would have to participate in the CME bitcoin futures market, it follows that a potential manipulator of the Shares would similarly have to transact in the CME bitcoin futures market.[126]

BZX further states that academic research corroborates the overall trend outlined above and supports the thesis that CME bitcoin futures pricing leads the spot market. BZX asserts that academic research demonstrates that the CME bitcoin futures market was already leading the spot price in 2018 and 2019.[127] BZX concludes that a person attempting to manipulate the Shares would also have to trade on that market to manipulate the ETP.[128]

The Commission disagrees. The record does not demonstrate that there is a reasonable likelihood that a person attempting to manipulate the proposed ETP would have to trade on the CME bitcoin futures market to successfully manipulate it. Specifically, BZX's assertions about the general upward trends from 2018 to February 2021 in trading volume and open interest of, and in the number of large open interest holders and number of unique accounts trading in, CME bitcoin futures do not establish that the CME bitcoin futures market is of significant size. As the Commission has previously articulated, the interpretation of the term ''market of significant size'' or ''significant market'' depends on the interrelationship between the market with which the listing exchange has a surveillance-sharing agreement and the proposed ETP.[129] BZX's recitation of data reflecting the size of the CME bitcoin futures market, alone, either currently or in relation to previous years, is not sufficient to establish an interrelationship between the CME bitcoin futures market and the proposed ETP.[130]

Further, the evidence in the record for this proposal also does not support a conclusion that the CME bitcoin futures market leads the bitcoin spot market in such a manner that the CME bitcoin

[115] *See* Winklevoss Order, 83 FR at 37594. This definition is illustrative and not exclusive. There could be other types of ''significant markets'' and ''markets of significant size,'' but this definition is an example that provides guidance to market participants. *See id.*

[116] *See id.* at 37580 n.19.

[117] *See* Notice, 86 FR at 19924 n.60 and accompanying text.

[118] While the Commission recognizes that the CFTC regulates the CME, the CFTC is not responsible for direct, comprehensive regulation of the underlying bitcoin spot market. *See* Winklevoss Order, 83 FR at 37587, 37599. *See also supra* notes 98–100 and accompanying text.

[119] A commenter asserts that CME, Bakkt, and Crypto Facilities are the only venues that offer bitcoin futures trading under ''relevant capital markets regulation.'' *See* CF Benchmarks Letter at 6. BZX, however, argues only that the CME is a regulated market of significant size. In addition, as described above (*see supra* notes 91–100 and accompanying text), in the context of the proposed ETP, the Constituent Bitcoin Platforms are not ''regulated.'' They are not registered as ''exchanges'' and lack the obligations, authority, and oversight of national securities exchanges. Thus the Commission limits the scope of its analysis to CME.

[120] According to BZX, each contract represents five bitcoin and is based on the CME CF BRR. *See* Notice, 86 FR at 19922.

[121] *See id.*

[122] *See id.*

[123] *See id.*

[124] BZX represents that a large open interest holder in CME bitcoin futures is an entity that holds at least 25 contracts, which is the equivalent of 125 bitcoin. According to BZX, at a price of approximately $30,000 per bitcoin on December 31, 2020, more than 80 firms had outstanding positions of greater than $3.8 million in CME bitcoin futures. *See id.* at 19922 n.54.

[125] *See id.* at 19922.

[126] *See id.* at 19924, 19929.

[127] *See id.* at 19923 & n.55 (citing Y. Hu, Y. Hou & L. Oxley, *What role do futures markets play in Bitcoin pricing? Causality, cointegration and price discovery from a time-varying perspective,* 72 Int'l Rev. of Fin. Analysis 101569 (2020) (available at: *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7481826/*) (''Hu, Hou & Oxley'')).

[128] *See id.* at 19923.

[129] *See* USBT Order, 85 FR at 12611.

[130] *See id.* at 12612.

futures market is a ''market of significant size.'' As the Commission has previously explained, establishing a lead-lag relationship between the bitcoin futures market and the spot market is ''central to understanding whether it is reasonably likely that a would-be manipulator of the ETP would need to trade on the bitcoin futures market to successfully manipulate prices on those spot platforms that feed into the proposed ETP's pricing mechanism.'' [131] The Commission has previously stated that, in particular, if the spot market leads the futures market, this would indicate that it would not be necessary to trade on the futures market to manipulate the proposed ETP, because the futures price would move to meet the spot price.[132]

While BZX states that CME bitcoin futures pricing leads the spot market,[133] it relies on the findings of a price discovery analysis in one section of a single academic paper to support the overall thesis.[134] However, the findings of that paper's Granger causality analysis, which is widely used to formally test for lead-lag relationships, are concededly mixed.[135] In addition, the Commission considered an unpublished version of the paper in the USBT Order, as well as a comment letter submitted by the authors on that record.[136] In the USBT Order, as part of the Commission's conclusion that ''mixed results'' in academic studies failed to demonstrate that the CME bitcoin futures market constitutes a market of significant size, the Commission noted the paper's inconclusive evidence that CME bitcoin futures prices lead spot prices—in particular that the months at the end of the paper's sample period showed that the spot market was the leading market—and stated that the record did not include evidence to explain why this would not indicate a shift towards prices in the spot market leading the futures market that would be expected to persist into the future.[137] The Commission also stated that the paper's use of daily price data, as opposed to intraday prices, may not be able to distinguish which market incorporates new information faster.[138] BZX has not addressed either issue.

Moreover, BZX does not provide results of its own analysis and does not present any other data supporting its conclusion. BZX's unsupported representations constitute an insufficient basis for approving a proposed rule change in circumstances where, as here, the Exchange's assertion would form such an integral role in the Commission's analysis and the assertion is subject to several challenges.[139] In this context, BZX's reliance on a single paper, whose own lead-lag results are inconclusive, is especially lacking because the academic literature on the lead-lag relationship and price discovery between bitcoin spot and futures markets is unsettled.[140] In the USBT Order, the Commission responded to multiple academic papers that were cited and concluded that, in light of the mixed results found, the exchange there had not demonstrated that it is reasonably likely that a would-be manipulator of the proposed ETP would transact on the CME bitcoin futures market.[141] Likewise, here, given the body of academic literature to indicate to the contrary, the Commission concludes that the information that BZX provides is not a sufficient basis to support a determination that it is reasonably likely that a would-be manipulator of the proposed ETP would have to trade on the CME bitcoin futures market.[142]

The Benchmark Administrator, in a comment letter, also asserts that a body of research from both academic and commercial sources ''has amply demonstrated that price discovery for bitcoin is largely achieved through the CME BTC–USD futures market as opposed to the spot markets,'' and that such conclusions ''have not been widely challenged in the academic literature.'' [143] This commenter argues that the combination of (1) the CME bitcoin futures market leading price formation, (2) the CME bitcoin futures market constituting a ''significant proportion'' of the bitcoin futures

[131] *See id.*

[132] *See id.*

[133] *See* Notice, 86 FR at 19923.

[134] *See supra* note 127 and accompanying text. BZX references the following conclusion from the ''time-varying price discovery'' section of Hu, Hou & Oxley: ''There exist no episodes where the Bitcoin spot markets dominates the price discovery processes with regard to Bitcoin futures. This points to a conclusion that the price formation originates solely in the Bitcoin futures market. We can, therefore, conclude that the Bitcoin futures markets dominate the dynamic price discovery process based upon time-varying information share measures. Overall, price discovery seems to occur in the Bitcoin futures markets rather than the underlying spot market based upon a time-varying perspective . . .'' *See* Notice, 86 FR at 19923 n.55.

[135] The paper finds that the CME bitcoin futures market dominates the spot markets in terms of Granger causality, but that the causal relationship is bi-directional, and a Granger causality episode from March 2019 to June/July 2019 runs from bitcoin spot prices to CME bitcoin futures prices. The paper concludes: ''[T]he Granger causality episodes are not constant throughout the whole sample period. Via our causality detection methods, market participants can identify when markets are being led by futures prices and when they might not be.'' *See* Hu, Hou & Oxley, *supra* note 127.

[136] *See* USBT Order, 85 FR at 12609.

[137] *See id.* at 12613 n.244.

[138] *See id.*

[139] *See Susquehanna,* 866 F.3d at 447.

[140] *See, e.g.,* D. Baur & T. Dimpfl, *Price discovery in bitcoin spot or futures?,* 39 J. Futures Mkts. 803 (2019) (finding that the bitcoin spot market leads price discovery); O. Entrop, B. Frijns & M. Seruset, *The determinants of price discovery on bitcoin markets,* 40 J. Futures Mkts. 816 (2020) (finding that price discovery measures vary significantly over time without one market being clearly dominant over the other); J. Hung, H. Liu & J. Yang, *Trading activity and price discovery in Bitcoin futures markets,* 62 J. Empirical Finance 107 (2021) (finding that the bitcoin spot market dominates price discovery); B. Kapar & J. Olmo, *An analysis of price discovery between Bitcoin futures and spot markets,* 174 Econ. Letters 62 (2019) (finding that bitcoin futures dominate price discovery); E. Akyildirim, S. Corbet, P. Katsiampa, N. Kellard & A. Sensoy, *The development of Bitcoin futures: Exploring the interactions between cryptocurrency derivatives,* 34 Fin. Res. Letters 101234 (2020) (finding that bitcoin futures dominate price discovery); A. Fassas, S. Papadamou, & A. Koulis, *Price discovery in bitcoin futures,* 52 Res. Int'l Bus. Fin. 101116 (2020) (finding that bitcoin futures play a more important role in price discovery) (''Fassas et al''); S. Aleti & B. Mizrach, *Bitcoin spot and futures market microstructure,* 41 J. Futures Mkts. 194 (2021) (finding that relatively more price discovery occurs on the CME as compared to four spot exchanges); J. Wu, K. Xu, X. Zheng & J. Chen, *Fractional cointegration in bitcoin spot and futures markets,* 41 J. Futures Mkts. 1478 (2021) (finding that CME bitcoin futures dominate price discovery). *See also* C. Alexander & D. Heck, *Price discovery in Bitcoin: The impact of unregulated markets,* 50 J. Financial Stability 100776 (2020) (finding that, in a multi-dimensional setting, including the main price leaders within futures, perpetuals, and spot markets, CME bitcoin futures have a very minor effect on price discovery; and that faster speed of adjustment and information absorption occurs on the unregulated spot and derivatives platforms than on CME bitcoin futures) (''Alexander & Heck'').

[141] *See* USBT Order, 85 FR at 12613 nn.239–244 and accompanying text.

[142] In addition, the Exchange fails to address the lead-lag relationship (if any) between prices on other bitcoin futures markets and the CME bitcoin futures market, the bitcoin spot market, and/or the particular Constituent Bitcoin Platforms, or where price formation occurs when the entirety of bitcoin futures markets, not just CME, is considered.

[143] *See* CF Benchmarks Letter at 6 (citing Fassas et al and A. Chang, W. Herrmann & W. Cai, *Efficient Price Discovery in the Bitcoin Markets,* Wilshire Phoenix, Oct. 14, 2020 (''Wilshire Phoenix'')). Another commenters also argues that the CME is a market of significant size. *See* GDF Letter at 5. This commenter states that there is ''no doubt'' that the CME represents a market of significant size because, as of May 2021, it had the second-largest amount of open interest, and represented roughly 15.5 percent of total open interest in bitcoin futures. The commenter also references the Wilshire Phoenix working paper which suggests that the CME bitcoin futures market contribute more to price discovery than its related spot markets. The commenter, however, also states that ''the crypto markets do change rapidly,'' and cites Alexander & Heck (*see also supra* note 140) for an opposing view that the CME bitcoin futures contribute far less than spot markets to price discovery. The Commission finds that this additional information is not sufficient to establish that the CME is a market of ''significant size.'' As noted above, data reflecting the size of the CME bitcoin futures market, alone, is not sufficient to establish an interrelationship between the CME bitcoin futures market and the proposed ETP, and the papers cited by the commenter evidences the unsettled nature of the academic literature.

market,[144] (3) the Constituent Bitcoin Platforms accounting for a ''significant proportion'' of the bitcoin spot markets,[145] (4) the Trust striking its NAV to the Reference Rate, which is calculated using transaction data from the Constituent Bitcoin Platforms, and (5) the Shares being traded by authorized participants who will use the CME bitcoin futures market and underlying bitcoin spot markets as ''liquidity rails'' for pricing and arbitrage, means that any attempted manipulator of the Trust will have to undertake trading on both the CME and at least one, likely more than one, of the five Constituent Bitcoin Platforms to engage in potentially manipulative acts.[146] The commenter states that this demonstrates that the CME bitcoin futures market can be considered a ''significant market.'' [147]

The Commission does not agree. The Commission has already addressed and rejected three of these assertions—that CME bitcoin futures lead price discovery,[148] the size of the CME bitcoin futures market,[149] and the relevance of using the Reference Rate to compute NAV.[150] As with the size of the CME market, data reflecting the size of the Constituent Bitcoin Platforms as a proportion of all bitcoin spot trading also does not help to establish an interrelationship between the CME bitcoin futures market and the proposed ETP. Nor does it establish how fraud and manipulation on other bitcoin spot markets may influence the price of bitcoin. Finally, the commenter assumes, without any supporting evidence, that authorized participants will use the CME bitcoin futures market (as well as underlying bitcoin spot market) ''for pricing and arbitrage.'' Even assuming the commenter is correct that authorized participants would transact on bitcoin futures markets, the commenter does not explain why they would transact on the CME rather than on any other bitcoin futures markets.

The Commission accordingly concludes that the information provided in the record does not establish a reasonable likelihood that a would-be manipulator of the proposed ETP would have to trade on the CME bitcoin futures market to successfully manipulate the proposed ETP. Therefore, the information in the record also does not establish that the CME bitcoin futures market is a ''market of significant size'' with respect to the proposed ETP.

(ii) Whether It Is Unlikely That Trading in the Proposed ETP Would Be the Predominant Influence on Prices in the CME Bitcoin Futures Market

The second prong in establishing whether the CME bitcoin futures market constitutes a ''market of significant size'' is the determination that it is unlikely that trading in the proposed ETP would be the predominant influence on prices in the CME bitcoin futures market.[151]

BZX asserts that trading in the Shares would not be the predominant force on prices in the CME bitcoin futures market (or spot market) because of the significant volume in the CME bitcoin futures market, the size of bitcoin's market capitalization, which is approximately $1 trillion, and the significant liquidity available in the spot market.[152] BZX provides that, according to February 2021 data, the cost to buy or sell $5 million worth of bitcoin averages roughly 10 basis points with a market impact of 30 basis points.[153] For a $10 million market order, the cost to buy or sell is roughly 20 basis points with a market impact of 50 basis points. Stated another way, BZX states that a market participant could enter a market buy or sell order for $10 million of bitcoin and only move the market 0.5 percent.[154] BZX further asserts that more strategic purchases or sales (such as using limit orders and executing through OTC bitcoin trade desks) would likely have less obvious impact on the market, which is consistent with MicroStrategy, Tesla, and Square being able to collectively purchase billions of dollars in bitcoin.[155] Thus, BZX concludes that the combination of CME bitcoin futures leading price discovery, the overall size of the bitcoin market, and the ability for market participants (including authorized participants creating and redeeming in-kind with the Trust) to buy or sell large amounts of bitcoin without significant market impact, will help prevent the Shares from becoming the predominant force on pricing in either the bitcoin spot or the CME bitcoin futures market.[156]

The Commission does not agree. The record does not demonstrate that it is unlikely that trading in the proposed ETP would be the predominant influence on prices in the CME bitcoin futures market. As the Commission has already addressed and rejected one of the bases of BZX's assertion—that CME bitcoin futures leads price discovery [157]—it will only address below the other two bases: The overall size of, and the impact of buys and sells on, the bitcoin market.

BZX's assertions about the potential effect of trading in the Shares on the CME bitcoin futures market and bitcoin spot market are general and conclusory, repeating the aforementioned trade volume of the CME bitcoin futures market and the size and liquidity of the bitcoin spot market, as well as the market impact of a large transaction, without any analysis or evidence to support these assertions. For example, there is no limit on the amount of mined bitcoin that the Trust may hold. Yet BZX does not provide any information on the expected growth in the size of the Trust and the resultant increase in the amount of bitcoin held by the Trust over time, or on the overall expected number, size, and frequency of creations and redemptions—or how any of the foregoing could (if at all) influence prices in the CME bitcoin futures market. Moreover, in the Trust's Registration Statement, the Sponsor acknowledges that the Trust may acquire large size positions in bitcoin, which would increase the risk of illiquidity in the underlying bitcoin. Specifically, the Sponsor, in the Registration Statement, states that the Trust may acquire large size positions in bitcoin, which will increase the risk of illiquidity by both making the positions more difficult to liquidate and increasing the losses incurred while

[144] The commenter states that the CME accounts for approximately 15 percent of all bitcoin futures open interest, and asserts that, while it is difficult to ascertain what proportion of the total bitcoin derivatives market is represented by CME, it is likely that it constitutes significantly more than the 15 percent—''very likely 30 percent plus''—of all *bona fide* bitcoin futures trading. *See* CF Benchmarks Letter at 6.

[145] The commenter states that, although difficult to fully verify due to the distributed nature of cryptocurrency trading and the difficulting identifying bona fide trading volumes, the BTC–USD markets of the Constituent Bitcoin Platforms constitute roughly 76 percent of all BTC–USD trading from cryptocurrency trading platforms whose volumes are publicly available during the period January 2020–March 2021. The commenter further estimates that the Constituent Bitcoin Platforms account for 15 percent of all bitcoin trading and ''very likely 25 percent plus'' of all *bona fide* bitcoin trading conducted on trading platforms. *See id.* at 4–5.

[146] *See id.* at 7.

[147] *See id.*

[148] *See supra* notes 134–142 and accompanying text.

[149] *See supra* notes 129–130 and accompanying text.

[150] *See supra* notes 86–111 and accompanying text.

[151] *See* Winklevoss Order, 83 FR at 37594; USBT Order, 85 FR at 12596–97.

[152] *See* Notice, 86 FR at 19925.

[153] *See id.* According to BZX, these statistics are based on samples of bitcoin liquidity in U.S. dollars (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Gemini, Bitstamp, Kraken, LMAX Exchange, BinanceUS, and OKCoin during February 2021. *See id.* nn.64–65.

[154] *See id.* at 19925.

[155] *See id.*

[156] *See id.*

[157] *See supra* notes 134–142 and accompanying text.

trying to do so, or by making it more difficult for authorized participants to acquire or liquidate bitcoin as part of the creation and/or redemption of Shares of the Trust.[158] Although the Trust's Registration Statement concedes that the Trust could negatively affect the liquidity of bitcoin, BZX does not address this in the proposal or discuss how impacting the liquidity of bitcoin can be consistent with the assertion that the Shares are unlikely to be the predominant influence on the prices of the CME bitcoin futures market. Thus, the Commission cannot conclude, based on BZX's statements alone and absent any evidence or analysis in support of BZX's assertions, that it is unlikely that trading in the ETP would be the predominant influence on prices in the CME bitcoin futures market.

The Commission also is not persuaded by BZX's assertions about the minimal effect a large market order to buy or sell bitcoin would have on the bitcoin market.[159] While BZX concludes by way of a $10 million market order example that buying or selling large amounts of bitcoin would have insignificant market impact, the conclusion does not analyze the extent of any impact on the CME bitcoin futures market. Even assuming that BZX is suggesting that a single $10 million order in bitcoin would have immaterial impact on the prices in the CME bitcoin futures market, this prong of the ''market of significant size'' determination concerns the influence on prices from trading *in* the proposed ETP, which is broader than just trading *by* the proposed ETP. While authorized participants of the Trust might only transact in the bitcoin spot market as part of their creation or redemption of Shares, the Shares themselves would be traded in the secondary market on BZX. The record does not discuss the expected number or trading volume of the Shares, or establish the potential effect of the Shares' trade prices on CME bitcoin futures prices. For example, BZX does not provide any data or analysis about the potential effect the quotations or trade prices of the Shares might have on market-maker quotations in CME bitcoin futures contracts and whether those effects would constitute a predominant influence on the prices of those futures contracts.

Thus, because BZX has not provided sufficient information to establish both prongs of the ''market of significant size'' determination, the Commission cannot conclude that the CME bitcoin futures market is a ''market of significant size'' such that BZX would be able to rely on a surveillance-sharing agreement with the CME to provide sufficient protection against fraudulent and manipulative acts and practices.

The requirements of Section 6(b)(5) of the Exchange Act apply to the rules of national securities exchanges. Accordingly, the relevant obligation for a comprehensive surveillance-sharing agreement with a regulated market of significant size, or other means to prevent fraudulent and manipulative acts and practices that are sufficient to justify dispensing with the requisite surveillance-sharing agreement, resides with the listing exchange. Because there is insufficient evidence in the record demonstrating that BZX has satisfied this obligation, the Commission cannot approve the proposed ETP for listing and trading on BZX.

C. Whether BZX Has Met Its Burden To Demonstrate That the Proposal Is Designed To Protect Investors and the Public Interest

BZX contends that, if approved, the proposed ETP would protect investors and the public interest. However, the Commission must consider these potential benefits in the broader context of whether the proposal meets each of the applicable requirements of the Exchange Act.[160] Because BZX has not demonstrated that its proposed rule change is designed to prevent fraudulent and manipulative acts and practices, the Commission must disapprove the proposal.

BZX asserts that, with the growth of U.S. investor exposure to bitcoin through OTC bitcoin funds, so too has grown the potential risk to U.S. investors.[161] Specifically, BZX argues that premium and discount volatility, high fees, insufficient disclosures, and technical hurdles are putting U.S. investor money at risk on a daily basis and that such risk could potentially be eliminated through access to a bitcoin ETP.[162] As such, the Exchange believes that approving this proposal (and comparable proposals submitted hereafter) would give U.S. investors access to bitcoin in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) Reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) providing an alternative to custodying spot bitcoin; and (iv) reducing risks associated with investing in operating companies that are imperfect proxies for bitcoin exposure.[163]

According to BZX, OTC bitcoin funds are generally designed to provide exposure to bitcoin in a manner similar to the Shares. However, unlike the Shares, BZX states that ''OTC bitcoin funds are unable to freely offer creation and redemption in a way that incentivizes market participants to keep their shares trading in line with their NAV and, as such, frequently trade at a price that is out-of-line with the value of their assets held.'' [164] BZX represents that, historically, OTC bitcoin funds have traded at a significant premium to NAV.[165] Although the Exchange concedes that trading at a premium (or potentially a discount) is not unique to OTC bitcoin funds and not inherently problematic, BZX believes that it raises certain investor protections issues. First, according to BZX, investors are buying shares of a fund for a price that is not reflective of the per share value of the fund's underlying assets.[166] Second, according to BZX, because only accredited investors, generally, are able to create or redeem shares with the issuing trust and can buy or sell shares directly with the trust at NAV (in exchange for either cash or bitcoin) without having to pay the premium or sell into the discount, these investors that are allowed to interact directly with the trust are able to hedge their bitcoin exposure as needed to satisfy holding

[158] *See* Registration Statement at 32.

[159] *See* Notice, 86 FR at 19929 (''For a $10 million market order, the cost to buy or sell is roughly 20 basis points with a market impact of 50 basis points. Stated another way, a market participant could enter a market buy or sell order for $10 million of bitcoin and only move the market 0.5%.'').

[160] *See* Winklevoss Order, 83 FR at 37602. *See also* GraniteShares Order, 83 FR at 43931; ProShares Order, 83 FR at 43941; USBT Order, 85 FR at 12615.

[161] *See* Notice, 86 FR at 19920.

[162] *See id.* BZX states that while it understands the Commission's previous focus on potential manipulation of a bitcoin ETP in prior disapproval orders, it now believes that ''such concerns have been sufficiently mitigated and that the growing and quantifiable investor protection concerns should be the central consideration as the Commission reviews this proposal.'' *See id.*

[163] *See id.*

[164] *See id.* BZX also states that, unlike the Shares, because OTC bitcoin funds are not listed on an exchange, they are not subject to the same transparency and regulatory oversight by a listing exchange. BZX further asserts that the existence of a surveillance-sharing agreement between BZX and the CME bitcoin futures market would result in increased investor protections for the Shares compared to OTC bitcoin funds. *See id.* at 19920 n.39.

[165] *See id.* at 19920. BZX further represents that the inability to trade in line with NAV may at some point result in OTC bitcoin funds trading at a discount to their NAV. According to BZX, while that has not historically been the case, trading at a discount would give rise to nearly identical potential issues related to trading at a premium. *See id.* at 19920 n.40.

[166] *See id.* at 19920.

requirements and collect on the premium or discount opportunity. BZX argues, therefore, that the premium in OTC bitcoin funds essentially creates a direct payment from retail investors to more sophisticated investors.[167]

One commenter expresses support for the approval of bitcoin ETPs because they believe such ETPs would have lower premium/discount volatility and lower management fees than an OTC bitcoin fund.[168] Another commenter asserts that the reality is that many U.S. investors are investing in products overseas, which complicates U.S. regulatory reach, or investing in U.S. bitcoin products that have historically exhibited significant premiums or discounts to net asset value, among other issues; and that to the extent that U.S. investors are able to use U.S. regulated products, that should increase investor protection.[169]

BZX also asserts that exposure to bitcoin through an ETP also presents advantages for retail investors compared to buying spot bitcoin directly.[170] BZX asserts that, without the advantages of an ETP, an individual retail investor holding bitcoin through a cryptocurrency trading platform lacks protections.[171] BZX explains that, typically, retail platforms hold most, if not all, retail investors' bitcoin in ''hot'' (internet-connected) storage and do not make any commitments to indemnify retail investors or to observe any particular cybersecurity standard.[172] Meanwhile, a retail investor holding spot bitcoin directly in a self-hosted wallet may suffer from inexperience in private key management (*e.g.,* insufficient password protection, lost key, etc.), which could cause them to lose some or all of their bitcoin holdings.[173] BZX represents that the Bitcoin Custodian would, by contrast, use ''cold'' (offline) storage to hold private keys, employ a certain degree of cybersecurity measures and operational best practices, be highly experienced in bitcoin custody, and be accountable for failures.[174] In addition, BZX explains that retail investors would be able to hold the Shares in traditional brokerage accounts, which provide SIPC protection if a brokerage firm fails.[175] Thus, with respect to custody of the Trust's bitcoin assets, BZX concludes that, compared to owning spot bitcoin directly, the Trust presents advantages from an investment protection standpoint for retail investors.[176]

BZX further asserts that a number of operating companies engaged in unrelated businesses have announced investments as large as $1.5 billion in bitcoin.[177] Without access to bitcoin ETPs, BZX argues that retail investors seeking investment exposure to bitcoin may purchase shares in these companies in order to gain the exposure to bitcoin that they seek.[178] BZX contends that such operating companies, however, are imperfect bitcoin proxies and provide investors with partial bitcoin exposure paired with additional risks associated with whichever operating company they decide to purchase. BZX concludes that investors seeking bitcoin exposure through publicly traded companies are gaining only partial exposure to bitcoin and are not fully benefitting from the risk disclosures and associated investor protections that come from the securities registration process.[179]

BZX also states that investors in many other countries, including Canada, are able to use more traditional exchange-listed and traded products to gain exposure to bitcoin, disadvantaging U.S. investors and leaving them with more risky means of getting bitcoin exposure.[180]

In essence, BZX asserts that the risky nature of direct investment in the underlying bitcoin and the unregulated markets on which bitcoin and OTC bitcoin funds trade compel approval of the proposed rule change. BZX, however, offers no limiting principle to this argument, under which, by logical extension, the Commission would be required to approve the listing and trading of any ETP that arguably presents marginally less risk to investors than a direct investment in the underlying asset or in an OTC-traded product.

The Commission disagrees with this reading of the Exchange Act. Pursuant to Section 19(b)(2) of the Exchange Act, the Commission must approve a proposed rule change filed by a national securities exchange if it finds that the proposed rule change is consistent with the applicable requirements of the Exchange Act—including the requirement under Section 6(b)(5) that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices—and it must disapprove the filing if it does not make such a finding.[181] Thus, even if a proposed rule change purports to protect investors from a particular type of investment risk—such as the susceptibility of an asset to loss or theft—the proposed rule change may still fail to meet the requirements under the Exchange Act.[182]

Here, even if it were true that, compared to trading in unregulated bitcoin spot markets, trading a bitcoin-based ETP on a national securities exchange provides some additional protection to investors, the Commission must consider this potential benefit in the broader context of whether the proposal meets each of the applicable requirements of the Exchange Act.[183] As explained above, for bitcoin-based ETPs, the Commission has consistently

[167] *See id.* at 19921.

[168] *See* letter from Anonymous, dated June 17, 2021 (''Anonymous Letter'').

[169] *See* GDF Letter at 4.

[170] *See* Notice, 86 FR at 19921.

[171] *See id.*

[172] *See id.*

[173] *See id.*

[174] *See id.*

[175] *See id.*

[176] *See id.* One commeter agrees that there are certain advantages, particularly for ''average'' and first-time crypto investors, to bitcoin ETPs, including not having to secure keys or digital wallets, and greater protection from online hacking or theft if funds are secured offline in cold storage. *See* GDF Letter at 1–2. Another commenter is a NYSDFS-chartered trust company for purposes of providing non-discretionary fiduciary custody of digital assets. This commenter agrees that regulated, secure custodial solutions exist in the marketplace to support the Trust's operations. The commenter states that NYSDFS subjects it to additional controls tailored to the risks presented by digital asset custody, including robust review of its wallet environment, capitalization, AML procedures, confidentiality, security, and storage architecture. The commenter states that its cold storage solution is the same architecture used by its affiliated trading platform, is built on best practices across both cyber and physical security, and has not lost any customer funds due to a security breach over the past eight years. The commenter specifies that this solution employs proprietary key generation ceremonies, a geographically distributed network of vaults to store the keys, and multiple levels of technical and protocol-specific consensus and security requirements. According to the commenter, it offers broad and deep digital asset insurance, and is regularly audited by major financial and security audit firms. *See* letter from Coinbase Custody Trust Company, LLC, dated May 7, 2021.

[177] *See* Notice, 86 FR at 19921.

[178] *See id.*

[179] *See id.* at 19922.

[180] *See id.* at 19920. BZX represents that the Purpose Bitcoin ETF, a retail bitcoin-based ETP launched in Canada, reportedly reached $421.8 million in assets under management in two days, demonstrating the demand for a North American market listed bitcoin ETP. BZX contends that the Purpose Bitcoin ETF also offers a class of units that is U.S. dollar denominated, which could appeal to U.S. investors. BZX also argues that without an approved bitcoin ETP in the U.S. as a viable alternative, U.S. investors could seek to purchase these shares in order to get access to bitcoin exposure. BZX believes that, given the separate regulatory regime and the potential difficulties associated with any international litigation, such an arrangement would create more risk exposure for U.S. investors than they would otherwise have with a U.S. exchange-listed ETP. *See id.* at 19920 n.37. BZX also notes that regulators in other countries have either approved or otherwise allowed the listing and trading of bitcoin-based ETPs. *See id.* at 19920 n.38.

[181] *See* Exchange Act Section 19(b)(2)(C), 15 U.S.C. 78s(b)(2)(C).

[182] *See* SolidX Order, 82 FR at 16259.

[183] *See supra* note 160.

required that the listing exchange have a comprehensive surveillance-sharing agreement with a regulated market of significant size related to bitcoin, or demonstrate that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The listing exchange has not met that requirement here. Therefore, the Commission is unable to find that the proposed rule change is consistent with the statutory standard.

Pursuant to Section 19(b)(2) of the Exchange Act, the Commission must disapprove a proposed rule change filed by a national securities exchange if it does not find that the proposed rule change is consistent with the applicable requirements of the Exchange Act—including the requirement under Section 6(b)(5) that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices.[184]

For the reasons discussed above, BZX has not met its burden of demonstrating that the proposal is consistent with Exchange Act Section 6(b)(5),[185] and, accordingly, the Commission must disapprove the proposal.[186]

D. Other Comments

Comment letters also address the general nature and uses of bitcoin;[187] the state of development of bitcoin as a digital asset;[188] the state of regulation of bitcoin markets;[189] the inherent value of, and risks of investing in, bitcoin;[190] the desire of investors to gain access to bitcoin through an ETP;[191] the potential impact of Commission approval of the proposed ETP on the price of bitcoin and on bitcoin markets;[192] the potential impact of Commission approval of bitcoin ETPs on the economy, U.S. monetary policy, U.S. innovation, and/or U.S. geopolitical position;[193] the tax and/or retirement investment benefits or risks of a bitcoin ETP;[194] and the bitcoin network's effect on the environment.[195] Ultimately, however, additional discussion of these topics is unnecessary, as they do not bear on the basis for the Commission's decision to disapprove the proposal.

IV. Conclusion

For the reasons set forth above, the Commission does not find, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(5) of the Exchange Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act, that proposed rule change SR–CboeBZX–2021–024 be, and hereby is, disapproved.

By the Commission.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–26442 Filed 12–6–21; 8:45 am]

BILLING CODE 8011–01–P

[184] *See* 15 U.S.C. 78s(b)(2)(C).

[185] 15 U.S.C. 78f(b)(5).

[186] In disapproving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f). A commenter argues, for efficiency reasons, against approving a bitcoin ETP. This commenter asserts that the adoption of multiple digital assets would force merchants to deal with ''complexity [that] doesn't foster [the] modularity which is needed to gain economic efficiency.'' *See* Ciao Letter 3 at 1. For the reasons discussed throughout, however, *see supra* note 37, the Commission is disapproving the proposed rule change because it does not find that the proposed rule change is consistent with the Exchange Act. *See also* USBT Order, 85 FR at 12615.

[187] *See, e.g.,* Ciao Letter 3; Patel Letter; letters from: Lourdes Ciao, dated June 2, 2021 (''Ciao Letter 1''); Lourdes Ciao, dated June 2, 2021 (''Ciao Letter 2'').

[188] *See, e.g.,* GDF Letter.

[189] *See, e.g.,* GDF Letter; letter from Douglas Slemmer, dated July 23, 2021 (''Slemmer Letter'').

[190] *See, e.g.,* Ciao Letter 1; Ciao Letter 3; Patel Letter; Slemmer Letter; letters from: Sam Ahn, dated April 12, 2021; Bradley M. Kuhn, dated April 25, 2021 (''Kuhn Letter'').

[191] *See, e.g.,* Kuhn Letter; GDF Letter.

[192] *See, e.g.,* GDF Letter.

[193] *See, e.g.,* Ciao Letter 1; Ciao Letter 2; Ciao Letter 3.

[194] *See, e.g.,* Kuhn Letter; Ciao Letter 2; Ciao Letter 3.

[195] *See, e.g.,* Patel Letter.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93689; File No. SR–CboeBYX–2021–028]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Introduce a New Data Product To Be Known as the Short Volume Report

December 1, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 22, 2021, Cboe BYX Exchange, Inc. (''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to Exchange Rule 11.22(f) to introduce a new data product to be known as the Short Volume Report. 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://markets.cboe.com/us/equities/regulation/rule_filings/byx/*), 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 proposes to amend Rule 11.22(f) to provide for a new data product to be known as the Short Volume Report. The proposal introduces the Short Volume Report which will be available for purchase to BYX Members (''Members'') and non-Members. The Exchange notes that the proposed data product is substantially similar to information included in the short sale volume report offered by the Nasdaq Stock Market LLC (''Nasdaq'')[3] and the TAQ Group Short Volume file offered by the New York Stock Exchange LLC (''NYSE''),[4] with the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* the Nasdaq Price List—Equities, Nasdaq Web-based Reports, Nasdaq Short Sale Volume Reports at Price List—NASDAQ Global Data Products (*nasdaqtrader.com*).

[4] *See* the NYSE Historical Proprietary Market Data Pricing, NYSE Group Summary Data Products, TAQ NYSE Group Short Volume (Daily File) at *https://*

Continued

exception that the proposed product will also include buy and sell volume as well as trade counts for buy, sell, sell short, and sell short exempt volume.

A description of each market data product offered by the Exchange is described in Exchange Rule 11.22. The Exchange proposes to amend Rule 11.22(f) to introduce and add a description of the Short Volume Report. The Exchange proposes to describe the Short Volume Report as ''an end-of-day report that summarizes equity trading activity on the Exchange, including trade count and volume by symbol for buy, sell, sell short, and sell short exempt trades.'' Specifically, the end-of-day report will include the following information: Trade date, symbol, total volume, buy volume, buy trade count, sell volume, sell trade count, sell short volume, sell short trade count, sell short exempt volume, and sell short exempt trade count. The Exchange notes that the proposed product includes substantially similar information as that included in comparable products offered on Nasdaq and NYSE except that the Exchange proposes to also include buy and sell volume as well as trade counts for buy, sell, sell short, and sell short exempt volume.[5] The Exchange believes the additional data points will benefit market participants because they will allow market participants to better understand the changing risk environment on a daily basis.

The Short Volume Report will be available for purchase[6] on a monthly subscription basis for which subscribers will receive a daily end-of-day file that will be delivered after the conclusion of the After Hours Trading Session.[7] Additionally, historical Short Volume Reports dating as far back as January 2, 2015 will be available for purchase on an ad hoc basis in monthly increments. The subscription files and historical files will include the same data points. Lastly, the Exchange notes the proposed product is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make this data available and that potential subscribers may subscribe to it only if they voluntarily choose to do so.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[9] 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)[10] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that the proposed Short Volume Report would further broaden the availability of U.S. equity market data to investors consistent with the principles of Regulation NMS. The proposal also promotes increased transparency through the dissemination of data included in the Short Volume Report. The proposed rule change would benefit investors by providing access to the Short Volume Report, which may promote better informed trading. Particularly, information included in the Short Volume Report may allow a market participant to identify the source of selling pressure and whether it is long or short.

Moreover, other exchanges offer substantially similar data products. The Nasdaq daily short sale volume file reflects the aggregate number of shares executed on Nasdaq, Nasdaq BX, Inc. and Nasdaq PHLX LLC.[11] Specifically, the Nasdaq daily short volume report provides the following information: Trade date, symbol, volume during regular trading hours, and CTA market identifier. Additionally, the NYSE Group Short Volume daily file reflects a summary of short sale volume for securities traded on NYSE, NYSE American LLC, NYSE Arca, Inc., NYSE National, Inc., and NYSE Chicago, Inc. Specifically, the NYSE Group Short Volume product provides the following information: Trade date, symbol, short exempt volume, short volume, total volume all transactions, and market identifier. While the proposed product offers volume and trade counts which are not offered in the comparable NYSE and Nasdaq short sale volume reports, similar data is otherwise available or determinable in other NYSE data product offerings. Specifically, the NYSE TAQ product provides trade and quote information for orders entered on the NYSE affiliated equity exchanges, which include buy, sell, and sell short volume.[12] Thus, subscribers to NYSE TAQ could determine volume and trade counts from such data. Additionally, the NYSE Monthly Short Sales report provides a record of every short sale transaction on NYSE during the month, which includes a size and short sale indicator.[13] Thus, subscribers to the NYSE Monthly Short Sales report could determine the sell short and sell short exempt volume and trade count, albeit on a monthly basis rather than a daily basis. Moreover, the Exchange believes the proposed Short Volume Report will benefit market participants because they will provide visibility into market activity that is not currently available. Further it will allow market participants to better understand the changing risk environment on a daily basis. Therefore, the Exchange believes it is reasonable to include such data in the proposed product.

Finally, as noted above the proposed Short Sale Report is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make this data available and that potential subscribers may subscribe to it only if they voluntarily choose to do so.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in

www.nyse.com/publicdocs/nyse/data/NYSE_Historical_Market_Data_Pricing.pdf.

[5] The Exchange notes that the Nasdaq and NYSE comparable products reflect aggregate information across their affiliated equity exchanges. The Exchange is not proposing an aggregated Short Volume Report across its affiliated equity exchanges; thus, the proposal is only applicable to trades executed on BYX.

[6] The Exchange intends to submit a separate rule filing to adopt fees for the Short Volume Report product.

[7] *See* Exchange Rule 1.5(c).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] *See* Supra notes 3 and 4.

[11] *See* Supra note 3. As noted in the Nasdaq Price List, BX and PSX short sale files are available for free.

[12] *See https://www.nyse.com/publicdocs/nyse/data/TAQ_XDP_Products_Client_Spec_v2.3c.pdf.*

[13] *See https://www.nyse.com/publicdocs/nyse/data/Monthly_Short_Sales_Client_Spec_v1.3.pdf.*

any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Exchange believes that the proposal will promote competition by permitting the Exchange to offer data products similar to those offered by other competitor equities exchanges.[14] The Exchange is proposing to introduce the Short Volume Report in order to keep pace with changes in the industry and evolving customer needs, and believes this proposed rule change would contribute to robust competition among national securities exchanges. As noted, at least two other U.S. equity exchanges offer a market data product that is substantially similar to the proposed Short Volume Report.[15] As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges. Therefore, the Exchange does not believe 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

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeBYX–2021–028 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–CboeBYX–2021–028. 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–CboeBYX–2021–028, and should be submitted on or before December 28, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–26447 Filed 12–6–21; 8:45 am]

BILLING CODE 8011–01–P

[14] *See* Supra notes 3 and 4.

[15] Id.

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93699; File No. SR–FINRA–2021–030]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Amend FINRA Rule 6730 To Require Members To Append Modifiers to Delayed Treasury Spot and Portfolio Trades When Reporting to TRACE

December 1, 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 November 22, 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, II, and III 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 amend FINRA Rule 6730 to require members to append modifiers to identify delayed Treasury spot and portfolio trades when reporting to FINRA's Trade Reporting and Compliance Engine (''TRACE'').

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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On February 10, 2020, the Commission's Fixed Income Market Structure Advisory Committee (''FIMSAC'') unanimously approved a recommendation from its Technology and Electronic Trading Subcommittee for FINRA to amend its TRACE [3] reporting rules to provide additional information on two types of trades in corporate bond TRACE-Eligible Securities [4] (''FIMSAC Recommendation'').[5] Specifically, the FIMSAC recommended that FINRA amend its TRACE reporting rules to require members to: (1) Identify corporate bond trades where the price of the trade is based on a spread to a benchmark U.S. Treasury Security [6] that was agreed upon earlier in the day (referred to as a ''delayed Treasury spot trade'') and report the time at which the spread was agreed upon; and (2) identify corporate bond trades that are part of a larger portfolio trade. Because the price reported to TRACE for these two types of trades may not reflect the market prices at the time the trades are reported and disseminated, the FIMSAC believed that reporting and disseminating this additional information would improve price transparency in the corporate bond market.[7]

On July 16, 2020, FINRA published *Regulatory Notice* 20–24 to solicit public comment on potential changes to its TRACE reporting rules in line with the FIMSAC's recommendations. FINRA also sought comment on whether any modifications to the scope of the FIMSAC's recommended approach might be appropriate.[8] As discussed in greater detail below, FINRA received seven comments in response to *Regulatory Notice* 20–24. After further consideration, FINRA is proposing the FIMSAC-recommended changes to the TRACE reporting rules to append modifiers to identify both delayed Treasury spot trades and portfolio trades, with modifications to the portfolio trade provision to clarify and simplify its conditions (based on feedback received in response to *Regulatory Notice* 20–24), as further discussed below.

Delayed Treasury Spot Trades

For purposes of the proposed amendment, a delayed Treasury spot trade is a transaction in a corporate bond that occurs on the basis of a spread to a benchmark U.S. Treasury Security, where the agreed upon spread is later converted to a dollar price by ''spotting'' the benchmark U.S. Treasury Security at a designated time. For example, parties may determine to trade a corporate bond based on an agreed spread to a specified U.S. Treasury Security at 10:00 a.m. (*e.g.,* 150 bps over the 10 Year Treasury yield), but the dollar price is determined later, *e.g.,* at 3:00 p.m., when the parties ''spot'' the spread against the agreed benchmark U.S. Treasury Security yield (*e.g.,* a reported dollar price of 97.5, expressed as a percentage of par value, calculated by applying the agreed spread of 150 bps to the 10 Year Treasury yield at 3:00 p.m.). The TRACE reporting rules generally require members to report transactions in corporate bonds within 15 minutes of the Time of Execution,[9] which is the time when the parties agree to all of the terms of the transaction that are sufficient to calculate the dollar price of the trade.[10] Therefore, in the above scenario, the delayed Treasury spot trade is reportable at 3:00 p.m., which is when the dollar price has been determined. Because the spread was negotiated earlier in the day, the dollar price reported at 3:00 p.m. may be away from the current market price for the security.

The FIMSAC believed that a specific modifier to identify delayed Treasury spot trades, along with disseminating the time at which the spread was agreed (*e.g.,* 10:00 a.m.), would both alert market participants that the spread-based economics of the trade had been agreed upon earlier in the day as well as provide market participants with the ability to estimate the agreed-upon spread.[11]

Consistent with the FIMSAC Recommendation, FINRA is proposing amendments to Rule 6730 to provide additional transparency into delayed Treasury spot trades. Specifically, FINRA is proposing to amend Rule 6730: (1) Add new paragraph (d)(4)(H) to require that a member append a new modifier [12] when reporting a delayed Treasury spot trade—*i.e.,* a transaction in a corporate bond,[13] the price of which is based on a spread to the yield of a U.S. Treasury Security and where the spread was agreed upon that day prior to the Time of Execution of the transaction; [14] and (2) add new paragraph (c)(14) to require that the member report the time at which the spread for a delayed Treasury spot trade was agreed upon.[15] Both the new delayed Treasury spot modifier and the time at which the spread was agreed would be disseminated through TRACE,

[3] TRACE is the FINRA-developed system that facilitates the mandatory reporting of over-the-counter transactions in eligible fixed income securities. *See generally* Rule 6700 Series.

[4] Rule 6710(a) generally defines a ''TRACE-Eligible Security'' as a debt security that is United States (''U.S.'') dollar-denominated and is: (1) Issued by a U.S. or foreign private issuer, and, if a ''restricted security'' as defined in Securities Act Rule 144(a)(3), sold pursuant to Securities Act Rule 144A; (2) issued or guaranteed by an Agency as defined in Rule 6710(k) or a Government-Sponsored Enterprise as defined in Rule 6710(n); or (3) a U.S. Treasury Security as defined in Rule 6710(p). ''TRACE-Eligible Security'' does not include a debt security that is issued by a foreign sovereign or a Money Market Instrument as defined in Rule 6710(o).

[5] *See* FIMSAC, Recommendation Regarding Additional TRACE Reporting Indicators for Corporate Bond Trades (February 10, 2020). *https://www.sec.gov/spotlight/fixed-income-advisory-committee/fimsac-additional-trace-flags-recommendation.pdf.*

[6] Rule 6710 defines a ''U.S. Treasury Security'' as ''a security, other than a savings bond, issued by the U.S. Department of the Treasury to fund the operations of the federal government or to retire such outstanding securities.'' The term ''U.S. Treasury Security'' also includes separate principal and interest components of a U.S. Treasury Security that has been separated pursuant to the Separate Trading of Registered Interest and Principal of Securities (STRIPS) program operated by the U.S. Department of Treasury. *See* Rule 6710(p).

[7] *See* FIMSAC Recommendation at 1. FINRA reminds members that, pursuant to Rule 3110, they must have policies and procedures in place that are reasonably designed to ensure compliance with the TRACE reporting rules, including the accurate reporting of applicable trade modifiers or indicators. Firms also must be able to demonstrate that a transaction meets the applicable conditions associated with a particular modifier or indicator.

[8] *See* FINRA Requests Comment on Proposed Changes to TRACE Reporting Relating to Delayed Treasury Spot and Portfolio Trades, *Regulatory Notice* 20–24 (July 2020).

[9] *See* Rule 6730(a).

[10] *See* Rule 6710(d).

[11] *See* FIMSAC Recommendation at 2.

[12] As for other TRACE modifiers and indicators under Rule 6730, the specific format for the new delayed Treasury spot trade modifier would be published in TRACE technical specifications.

[13] The FIMSAC Recommendation related to delayed Treasury spot trades was limited to corporate bond trades. *See* FIMSAC Recommendation at 1. Similarly, FINRA proposes to limit use of the new modifier to transactions in corporate bonds (*i.e.,* CUSIPs that are disseminated as part of the TRACE Corporate Bond Data Set). A CUSIP, standing for the Committee on Uniform Security Identification Procedures, is a 9-character alphanumeric code that identifies a North American security for the purposes of facilitating clearing and settlement of trades. FINRA may in the future consider applying the delayed Treasury spot modifier and associated requirement to report the time at which the spread was agreed to other types of TRACE-Eligible Securities, such as Agency Debt Securities.

[14] FINRA is also proposing a non-substantive, stylistic change to the title of paragraph (d)(4) of Rule 6730, so that it refers to ''Modifiers and Indicators'' rather than ''Modifiers; Indicators''.

[15] As a result of this addition, current paragraph (c)(14) of Rule 6730 would be renumbered as paragraph (c)(15).

together with other information on the transaction, immediately upon receipt of the transaction report.[16]

FINRA believes that, by specifically identifying delayed Treasury spot trades, the proposed rule change will enhance FINRA's regulatory audit trail data and improve price transparency for corporate bond market participants by identifying transactions whose prices may not be at the current market for the security.[17] FINRA also believes that disseminating the time that the spread was agreed will further enhance price transparency by providing market participants with the ability to estimate the agreed-upon-spread.[18]

Portfolio Trades

FINRA also is proposing a new modifier to identify portfolio trades.[19] For purposes of the proposed amendment, a ''portfolio trade'' is a trade between only two parties for a basket of corporate bonds at a single aggregate price for the entire basket. For example, a market participant may seek to trade a portfolio consisting of 50 corporate bonds. The parties may obtain mid-market prices for each of the 50 component bonds as a framework for the pricing, and, during the negotiation process, ultimately agree on a uniform spread, resulting in an aggregate dollar price for the entire portfolio. In such cases, members must report to TRACE a trade for each individual bond in the basket with an attributed dollar price for each bond. While, in many cases, the reported price for each corporate bond in a portfolio trade is in line with the security's current market price, in other cases—based on, for example, the liquidity profile of a specific bond or other factors—the attributed price reported for an individual security may deviate from its current market price.

The FIMSAC believed it would be beneficial if market participants were able to identify with certainty which trades were part of a portfolio trade because of the possibility that the reported price may not be reflective of the independent market for the bond.[20] The FIMSAC therefore recommended that FINRA amend its TRACE reporting rules to identify corporate bond trades: (i) Executed between only two parties; (ii) involving a basket of securities of at least 30 unique issuers; (iii) for a single agreed price for the entire basket; and (iv) executed on an all-or-none or most-or-none basis.[21]

In line with the FIMSAC's recommendation, FINRA is proposing to amend Rule 6730 to provide additional transparency into portfolio trades. Specifically, FINRA is proposing to add new paragraph (d)(4)(I) to Rule 6730 to require that a member append a new modifier[22] if reporting a transaction in a corporate bond:[23] (i) Executed between only two parties; (ii) involving a basket of corporate bonds of at least 10 unique issues; and (iii) for a single agreed price for the entire basket (''Portfolio Trade Definition''). The new portfolio trade modifier would be disseminated through TRACE, together with other information on the transaction, immediately upon receipt of the transaction report. Based on feedback from commenters, the scope of FINRA's proposed Portfolio Trade Definition differs from the FIMSAC recommended definition in two ways, as discussed further below.

Both the FIMSAC recommendation and the proposal would limit use of the portfolio trade modifier to instances where the trade is executed between only two parties at a single agreed price for the entire basket. However, instead of applying the portfolio modifier to transactions involving a basket of corporate bonds of 30 or more unique issuers (as recommended by the FIMSAC), FINRA is proposing to apply the portfolio trade modifier to transactions involving a basket of corporate bonds of at least 10 unique issues/securities (*i.e.,* individual securities counted using security identifiers such as CUSIPs or TRACE symbols). As described in further detail below, FINRA received several comments on this aspect of the proposal. Commenters stated that basing the numerical threshold on the number of issuers represented in a portfolio rather than the number of securities would be challenging to implement and would raise interpretive issues, and therefore suggested instead basing the threshold on the number of unique corporate bond securities in the portfolio. Commenters believed that this alternative approach would effectively identify portfolio trades while avoiding challenges that would be associated with correctly identifying bonds associated with a particular issuer. Commenters also stated that basing the threshold on the number of unique issues would be simpler and more easily automatable for members to implement. FINRA agrees that using individual securities, rather than issuers, would provide a simpler and more effective way to identify portfolio trades for purposes of the new modifier. Therefore, FINRA is proposing to base the size threshold condition in prong (ii) of the Portfolio Trade Definition on the number of unique issues in the basket of corporate bonds.

Second, the FIMSAC recommended setting the size threshold for portfolio trades at 30 unique issuers. As described in further detail below, FINRA also received comments on the appropriate basket size, with commenters expressing a range of views on the most appropriate threshold. After further consideration, FINRA is proposing to modify the size threshold in prong (ii) of the Portfolio Trade Definition by lowering the threshold from 30 to 10 unique securities. FINRA believes that lowering the threshold for

[16] FINRA generally disseminates information on transactions in TRACE-Eligible Securities immediately upon receipt of the transaction report, except as otherwise provided in Rule 6750. *See* Rule 6750(a).

[17] The FIMSAC considered several potential means of improving transparency around Treasury spot trades, including whether the terms (including the agreed spread and applicable Treasury benchmark) should be reported to TRACE within 15 minutes of the parties' agreement to all of the terms of the transaction other than the price of the Treasury. The FIMSAC noted that, while these alternatives would allow market participants to fully understand the spread-based economics of the trade at the time at which they are agreed, the recommended approach would be simpler and more cost-effective to implement, assuming the need for reporting parties to enhance the initial TRACE report with the calculated dollar price of the trade when the delayed spot trade is ''spotted'' later in the day. *See* FIMSAC Recommendation at 2 n.3. Following implementation, FINRA will assess the reported data regarding delayed Treasury spot trades and continue to engage with industry participants regarding whether any future changes may be appropriate to further improve transparency.

[18] FINRA understands that the most common pricing benchmark used for delayed Treasury spot trades is the on-the-run U.S. Treasury Security with the maturity that corresponds to the maturity of the corporate bond being priced. For example, market participants would use the most recently issued 10-year U.S. Treasury Security as the benchmark to price a 10-year corporate bond.

[19] As noted below, the specific format and requirements for both the new delayed Treasury spot modifier and the new portfolio trade modifier would be published in TRACE technical specifications. Where a specific trade meets the criteria for both modifiers, such specifications may require the use of a third, single modifier indicating that both the delayed Treasury spot modifier and the portfolio trade modifier apply to the trade.

[20] The FIMSAC acknowledged that market participants currently may be able to surmise which TRACE reports are part of a portfolio trade, based on a common time of execution or the characteristics of the components. *See* FIMSAC Recommendation at 2.

[21] *See* FIMSAC Recommendation at 4.

[22] As for other TRACE modifiers and indicators under Rule 6730(d)(4), the specific format for the new portfolio trade modifier would be published in TRACE technical specifications.

[23] The FIMSAC Recommendation related to portfolio trades was limited to corporate bond trades. *See* FIMSAC Recommendation at 2. Similarly, FINRA proposes to limit use of the new modifier to transactions in corporate bonds (*i.e.,* CUSIPs that are disseminated as part of the TRACE Corporate Bond Data Set). FINRA may in the future consider expanding the portfolio trade modifier to cover other types of TRACE-Eligible Securities, such as Agency Debt Securities.

use of the portfolio trade modifier to 10 would provide greater informational benefits to market participants by capturing a greater number of transactions that satisfy the other conditions of the Portfolio Trade Definition.

Consistent with the FIMSAC Recommendation, prong (iii) of the Portfolio Trade Definition would apply the new modifier to transactions entered into ''for a single agreed price'' for the entire basket. As described above, this prong represents the key characteristic of portfolio trades, *i.e.,* that the transaction is entered into at an agreed aggregate price for the entire basket (as opposed to individually negotiated trades), which may result in the attributed price reported for individual securities in the basket being away from their current market price.

FINRA notes that the FIMSAC also recommended that the Portfolio Trade Definition include a requirement that the basket be executed on an ''all-or-none or most-or-none basis.'' [24] One commenter suggested deleting the reference to ''most-or-none'' in this proposed prong because a definition of ''most-or-none'' does not currently exist in current market practice and the concept is not well understood. After further consideration, FINRA believes that removing this prong in its entirety would reduce the proposal's complexity without reducing the new modifier's informational value. FINRA is therefore not proposing to include an ''all-or-none or most-or-none'' prong as part of the Portfolio Trade Definition. Therefore, if two parties agree on a price with respect to a basket of bonds, the component trades would be identified with the new portfolio trade modifier so long as the resulting basket trade includes the minimum of 10 unique issues at a single agreed price, regardless of the number of securities that originally were contemplated as part of the basket.

If the Commission approves the proposed rule change, FINRA will announce the effective date(s) of the proposed rule change in a *Regulatory Notice.*[25] FINRA will publish a *Regulatory Notice* announcing the effective date(s) of the proposed amendments pursuant to Rule 6730(d)(4)(H) and (I) no later than 90 days following Commission approval, and the effective date(s) will be no later than 365 days following publication of the *Regulatory Notice.* FINRA will publish a *Regulatory Notice* announcing the effective date of the proposed amendments pursuant to Rule 6730(c)(14) once determined.[26]

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[27] 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, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change to improve transparency for delayed Treasury spot and portfolio trades is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, generally, to protect investors and the public.

FINRA believes that the proposed rule change will improve transparency into pricing in the corporate bond market and enhance FINRA's regulatory audit trail data by specifically identifying delayed Treasury spot trades and portfolio trades, which are two types of trades where the price may not be reflective of the current market price at the time the trades are reported and disseminated. FINRA also believes that the proposed rule change will enable market participants and investors to better understand pricing for delayed Treasury spot trades by requiring members to report the time at which the spread was agreed, which will provide market participants with the ability to estimate the agreed-upon-spread for such trades.

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.

Economic Impact Assessment

Regulatory Objective

As discussed above, delayed Treasury spot trades and portfolio trades may not be reflective of the current market price for the bonds and may be less informative for market participants that rely on TRACE for price discovery or other analyses. The proposed modifiers would specifically identify these types of trades and add the time at which the spread was agreed upon in disseminated data.

Economic Baseline

A. Delayed Treasury Spot Trades

Because delayed Treasury spot trades are currently not identified in the TRACE data, the economic baseline first establishes the TRACE reported trades most likely to be associated with delayed Treasury spot trades. Using TRACE data from June 2020 to May 2021, FINRA examined the daily average concentration of corporate bond trades around 3:00 p.m., which FINRA understands to be the ''spotting'' time usually used by dealers for delayed Treasury spot trades. Figures F1–1 and F1–2 below compare the percentage of trades during the 3:00 p.m. to 3:14 p.m. time interval with: (1) The average percentage of trades for all 15-minute intervals before 3:00 p.m.; and (2) and the average percentage of trades for all 15-minute intervals after 3:14 p.m. Figures F1–1 and F1–2 also provide these trade distributions based on the size of trades and for all trades combined. These data are likely to either overcount the number of delayed Treasury spot trades because some of the trades executed in the time interval are not delayed Treasury spot trades, or undercount because they exclude delayed Treasury spot trades executed at other times during the day. Nevertheless, FINRA believes this methodology will provide a reasonable baseline for the analysis.

Figure F1–1 provides statistics for customer trades in investment grade bonds and Figure F1–2 provides statistics for inter-dealer trades in investment grade bonds. Figures F1–1 and F1–2 show that, across all trade sizes in investment grade bonds, volumes in the 3:00 p.m. trade interval are larger than both the pre-3:00 p.m. and the post-3:14 p.m. intervals. For investment grade customer trades, the 3:00 p.m. volumes are several times larger than both the pre-3:00 p.m. and the post-3:14 p.m. intervals. Figures F1–3 and F1–4 provide similar information for trades in non-investment grade bonds. These figures show that the differences in trades across the time intervals are much less material in non-investment grade bond trades. Although trades during the 3:00 p.m. to 3:14 p.m. time interval may not all be delayed spot trades, the jump in investment grade bond volume during

[24] *See* FIMSAC Recommendation at 4.

[25] FINRA may implement the proposed modifier requirements (pursuant to proposed Rule 6730(d)(4)(H) and (I)) separately from the proposed requirement to report the time at which the spread was agreed (pursuant to proposed Rule 6730(c)(14)).

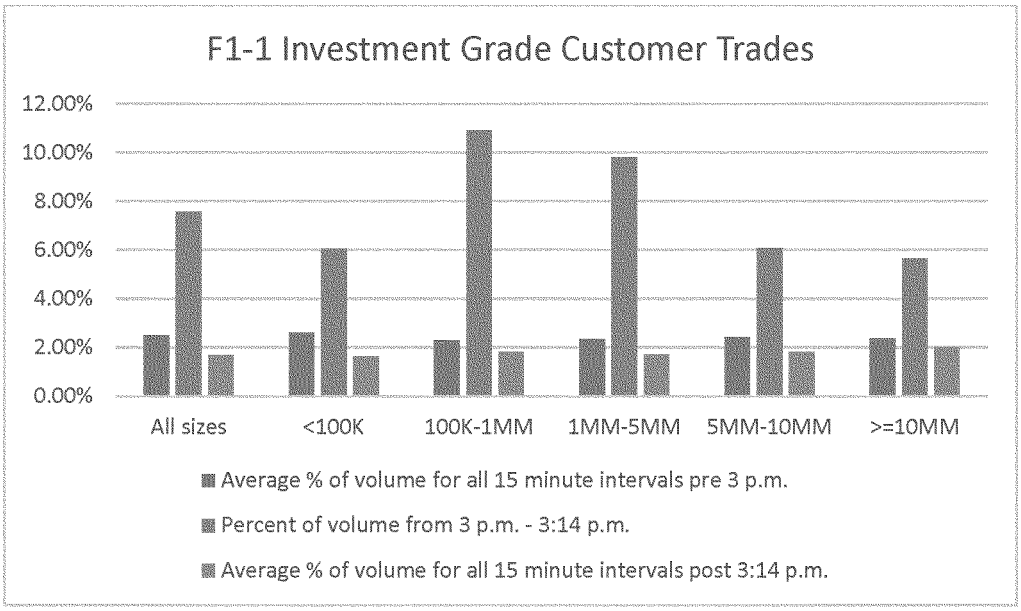
[26] FINRA is currently in the process of developing and implementing enhancements to its reporting systems, including TRACE. Because the proposed requirement to report the time at which the spread was agreed for a delayed Treasury spot trade under Rule 6730(c) would require the addition of a new TRACE reporting field, FINRA intends to set the effective date for this requirement at a later date following completion of TRACE system changes.

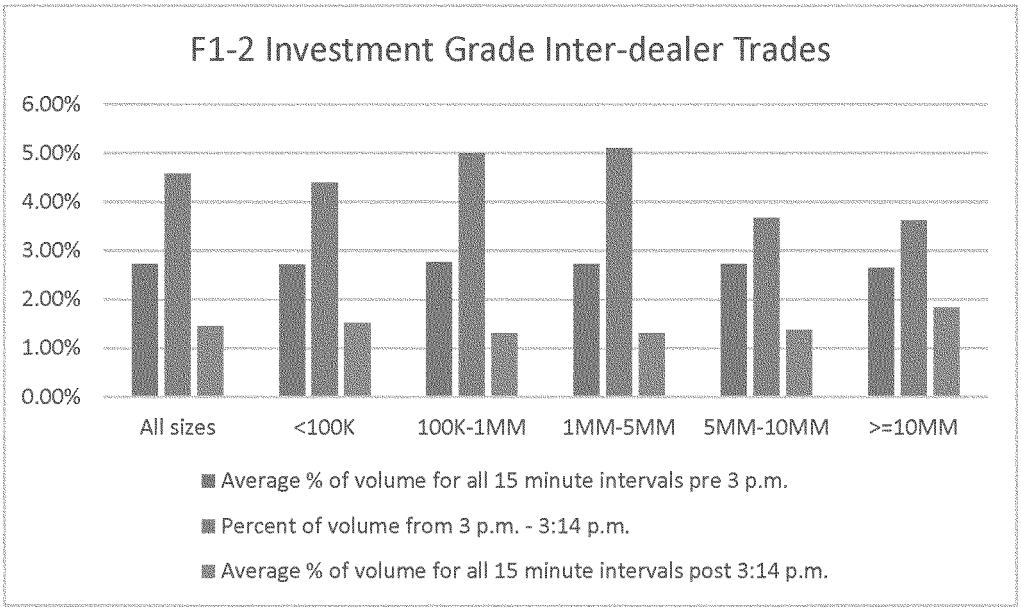
[27] 15 U.S.C. 78*o*–3(b)(6).

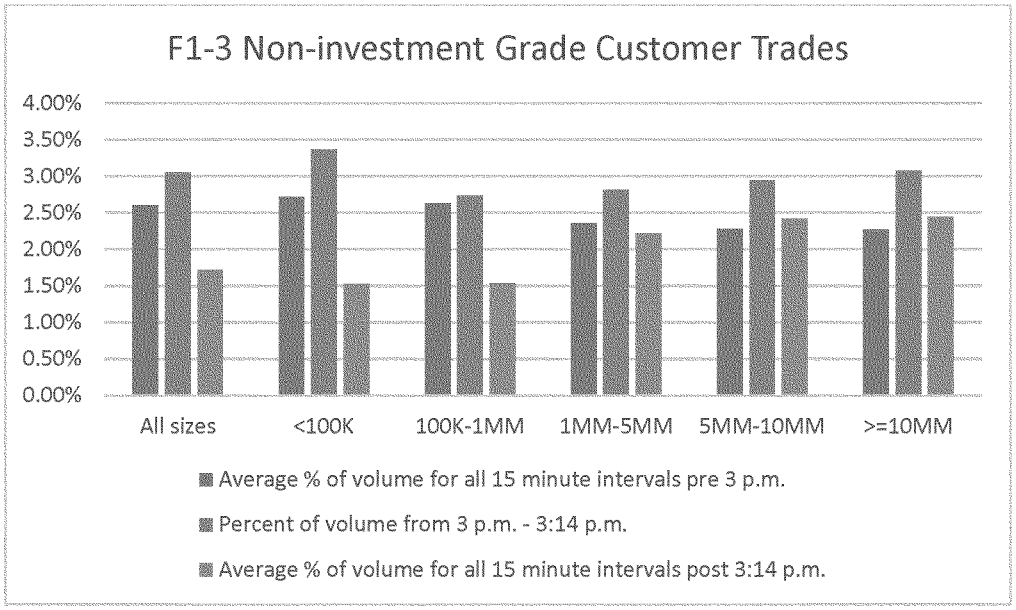
the period is consistent with FINRA's understanding of when delayed Treasury spot trades are priced and reported (regardless of when the spread was agreed upon).

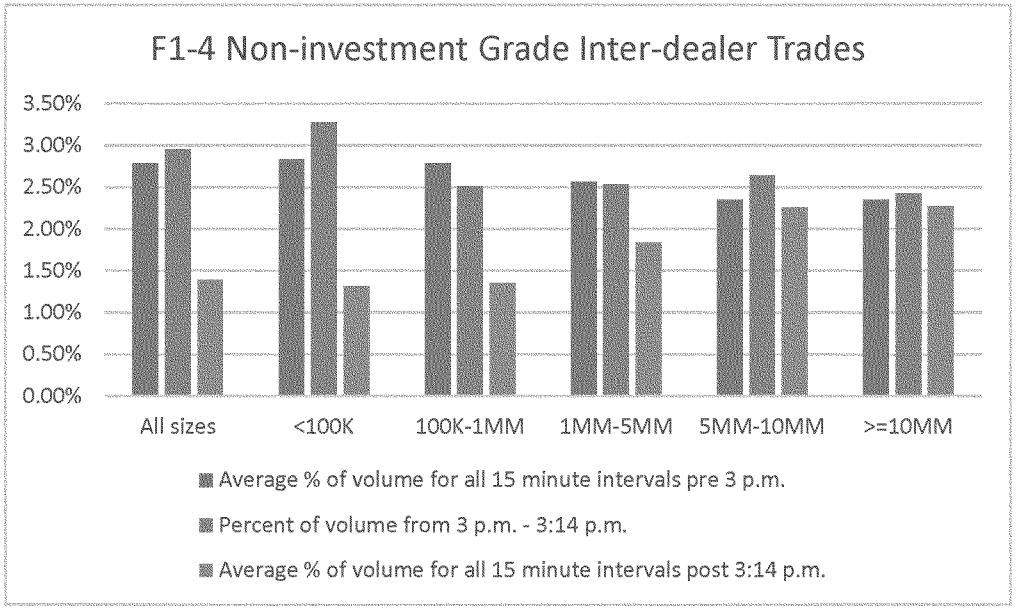
BILLING CODE 4910–13–P

Figure 1: Distribution of Corporate Bond Trading Volume during Trading Hours (June 2020 to May 2021)









B. Portfolio Trades

Evidence supports the hypothesis that portfolio trading has been increasing over time.[28] An analysis by Morgan Stanley shows that $88 billion in portfolio trades were executed from January 2019 through November 2019, compared to virtually none in 2017.[29] The analysis also shows that portfolio trades with 140 bonds or more increased tenfold since 2018. According to a Financial Times article citing Greenwich Associates' survey of 67 bond traders, more than 50% of the traders have executed a portfolio trade in the past year.[30]

FINRA computed the annual percentage of trades that can be classified as portfolio trades of increasing portfolio sizes from 2015 to 2020 using TRACE data. For purposes of these calculations, a ''portfolio trade'' is a trade of a basket of corporate bonds between only two parties at the same execution time.[31] ''Portfolio size'' is defined as the number of unique CUSIPs contained in the basket. This analysis demonstrates that portfolio trades reported to TRACE grew significantly in the past six years. For example, Table 1 shows that the percentage of customer portfolio trades involving at least 10 CUSIPs more than quadrupled from

[28] *See infra* notes 29 and 30.

[29] *See* Jennifer Surane & Matthew Leising, Bond Trade That's Gone from Zero to $88 Billion in Two Years, Bloomberg (Nov. 18, 2019), *https://www.bloomberg.com/news/articles/2019-11-18/the-bond-trade-that-s-gone-from-zero-to-88-billion-in-two-years.*

[30] *See* Joe Rennison, Robert Armstrong & Robin Wigglesworth, The New Kings of the Bond Market, Financial Times (Jan. 22, 2020), *https://www.ft.com/content/9d6e520e-3ba8-11ea-b232-000f4477fbca.* Among those traders, 75% executed the portfolio trade with dealers while the remaining did so through other means such as an electronic trading platform.

[31] Using current TRACE data, FINRA can only approximate ''portfolio trades'' as defined in the proposed rule change. Specifically, the analysis may include trades that are not executed at a single agreed price for the entire basket or that are not limited to two parties. As a result, the method used in this analysis may include as a ''portfolio trade'' some trades that would fall outside of the scope using the criteria set forth in the proposed rule change. However, FINRA believes that the method used in these calculations is reasonable for purposes of the analysis given the scope of information currently available in TRACE.

1.34% in 2015 to 5.64% in 2020. For portfolio trades involving at least 30 CUSIPs, the percentage of trades increased from 0.29% in 2015 to 3.60% in 2020. Inter-dealer portfolio trades grew at an even higher rate, albeit from a lower base level.

Table 1: Percentage of trades by portfolio size

	2015	2016	2017	2018	2019	2020
1: Customer Trades						
>= 1	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%
>= 2	14.60%	12.63%	13.14%	16.38%	18.89%	21.94%
>= 10	1.34%	1.21%	1.10%	2.20%	3.09%	5.64%
>= 20	0.44%	0.38%	0.42%	1.30%	1.98%	4.10%
>= 30	0.29%	0.15%	0.25%	1.01%	1.62%	3.60%
>= 50	0.20%	0.06%	0.18%	0.86%	1.33%	2.98%
>= 70	0.16%	0.05%	0.16%	0.78%	1.15%	2.58%
>= 100	0.11%	0.04%	0.14%	0.71%	0.95%	2.10%
2: Dealer to Dealer Trades						
>= 1	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%
>= 2	3.65%	4.73%	5.44%	7.99%	11.36%	14.44%
>= 10	0.39%	0.78%	0.99%	2.68%	5.03%	7.18%
>= 20	0.09%	0.27%	0.41%	2.03%	4.14%	6.22%
>= 30	0.02%	0.08%	0.17%	1.70%	3.55%	5.54%
>= 50	0.00%	0.01%	0.08%	1.34%	2.65%	4.31%
>= 70			0.07%	1.04%	1.97%	3.38%
>= 100			0.06%	0.73%	1.21%	2.49%

BILLING CODE 4910–13–C

Economic Impact

1. Delayed Treasury Spot Trades

A modifier identifying delayed Treasury spot trades would add valuable information to disseminated TRACE data by indicating that the reported price may not be at the current market. The new disseminated time field would benefit the market because market participants can use it to reasonably evaluate the spread at the time when the spread was agreed upon and compare it to other trades at or near the same time. Together, these additions will increase post-trade price transparency.

Members would be required to make systems changes to accommodate the new modifier and time field. This would represent a fixed cost to FINRA members that report corporate bond transactions priced through a delayed Treasury spot process. The cost may be higher for members that house information regarding the time of spotting in a different platform or system that is not connected to its TRACE reporting system.[32] FINRA expects that the ongoing variable cost of reporting the new modifier and populating the time field will be low for firms as costs currently are incurred for existing TRACE reporting.

2. Portfolio Trades

A modifier identifying trades executed as part of a portfolio trade would allow market participants to identify with certainty which trades

[32] *See* SIFMA Letter, *infra* note 37.

occurred at attributed prices as part of a portfolio trade. With this information, market participants could better identify trade prices that may not reflect the market price for the individual bond. This modifier will improve post-trade price transparency. While some market participants may be capable of inferring portfolio trades from current disseminated data,[33] the added modifier may particularly benefit smaller market participants, market observers and researchers who may not have systems in place to actively screen for portfolio trades using currently available data.

FINRA members would incur costs associated with making system changes required to accommodate the new modifier. This would represent a fixed cost to FINRA members that execute and report portfolio trades. The variable cost of reporting the new modifier should be minimal to firms as costs are currently incurred for existing TRACE reporting. In addition, while market participants currently may infer that some trades may be portfolio trades, they cannot do so with certainty. The FIMSAC noted that there may be an increased theoretical risk that a market participant may identify the seller of a portfolio trade if these trades are identified in disseminated data.[34] FINRA requested comments on the possibility of increased risk and members did not raise concerns regarding such risk.

3. Effects on Competition

FINRA does not believe that the proposed modifiers will unduly burden competition. The costs for a firm to modify the reporting process for the proposed modifiers will be proportional to the fixed cost of the firm's reporting system, and thus be helped by similar factors. For example, firms with no activities in delayed Treasury spot trades or portfolio trades may not need to update their system; firms with limited activities may choose to manually input the new modifiers; and firms can also use third party reporting system vendors, which are intended to take advantage of lower costs due to economy of scale.

Alternatives Considered

With respect to the proposed delayed Treasury spot provisions, FINRA considered requiring firms to report the available terms (including the agreed spread and applicable Treasury benchmark) of delayed Treasury spot trades within 15 minutes of the parties' agreement to the spread and benchmark. FIMSAC noted this alternative in its recommendation and stated that, while this construct would allow market participants to fully understand the spread-based economics of the trade at the point at which they are agreed, the proposed approach will be simpler and more cost-effective to implement and would avoid the need for reporting parties to enhance the initial TRACE report with the calculated dollar price of the trade when the delayed spot trade is ''spotted'' later in the day.[35] FINRA agrees and also believes that the proposed approach is beneficial in requiring reporting of the dollar price of the transaction once determined, which is then disseminated immediately upon receipt.

With respect to the proposed portfolio modifier, FINRA considered other thresholds for the number of unique issues to qualify as a portfolio trade, such as 30 unique issues, similar to the FIMSAC recommendation to identify trades involving a basket of at least 30 unique issuers (rather than issues), or as few as 2 unique issues, as suggested by some commenters. Lowering the threshold generally captures more portfolio trades and therefore provides greater informational benefits to market participants. It may also discourage traders from splitting up portfolio trades into smaller lists that do not meet the specified criteria to avoid identifying trades under the proposal. On the other hand, setting the threshold too low reduces the usefulness of the identifier. Portfolio trades are used to diversify individual bond risk and save on trading costs. Most of these benefits will diminish as the portfolio size becomes small. The deviation of individual bond price in a portfolio from market price will likely be less as the number of bonds in the portfolio decreases. The proposed threshold of 10 strikes an appropriate balance between the trade-offs and is also recommended by some commenters.[36]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The proposed rule change was published for comment in *Regulatory Notice* 20–24 (July 2020). Seven comments were received in response to the *Regulatory Notice*.[37] A copy of the *Regulatory Notice* is available on FINRA's website at *http://www.finra.org.* A list of the comment letters received in response to *Regulatory Notice* 20–24 is available on FINRA's website.[38] Copies of the comment letters received in response to the *Regulatory Notice* are also available on FINRA's website. The comments are summarized below.

Delayed Treasury Spot Trades

Bloomberg, Jane Street and T. Rowe Price supported the proposal to require members to identify corporate bond trades where the price of the trade is based on a spread to a benchmark U.S. Treasury Security that was agreed upon earlier in the day and report the time at which the spread was agreed upon.[39] Bloomberg stated that the proposal ''adds an incredible amount of value, insight and transparency into TRACE data,'' including by making it possible for ''market participants to derive intraday credit spread moves in specific corporate bond issues and issuers.''[40] Jane Street noted that while market participants would initially incur costs to modify trading reporting procedures to provide this information, such costs are outweighed by the benefit of obtaining additional information about delayed Treasury spot trades.[41] T. Rowe Price noted that the reported dollar price for delayed Treasury spot trades may not take into account market or issuer-specific developments that have occurred throughout the day, such that

[33] *See* SIFMA Letter, *infra* note 37.

[34] *See* FIMSAC Recommendation at 2.

[35] *See* note 17 *supra.*

[36] *See* Jane Street Letter and SIFMA Letter, *infra* note 37.

[37] *See* Comment submission from Melinda Ramirez, Consultant, dated July 19, 2020 (stating only ''Thank you for the opportunity to invest.'' [sic]); letter from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated September 14, 2020 (''Bloomberg Letter''); letter from Howard Meyerson, Managing Director, Financial Information Forum, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated September 14, 2020 (''FIF Letter''); letter from Kathleen Callahan, FIX Operations Director, FIX Trading Community, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated September 14, 2020 (''FIX Letter''); letter from Matt Berger, Global Head of Fixed Income and Commodities, Jane Street Capital, LLC, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated September 14, 2020 (''Jane Street Letter''); letter from Chris Killian, Managing Director, Securitization and Credit, SIFMA, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated September 15, 2020 (''SIFMA Letter''); and letter from Michael Grogan, V.P. & Head of US Fixed Income Trading—Investment Grade, Dwayne Middleton, V.P. & Head of Fixed Income Trading, Brian Rubin, V.P. & Head of US Fixed Income Trading—Below Investment Grade and Jonathan Siegel, V.P. & Senior Legal Counsel—Legislative & Regulatory Affairs, T. Rowe Price, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated September 15, 2020 (''T. Rowe Price Letter'').

[38] *See* SR–FINRA–2021–030 (Form 19b–4, Exhibit 2b) (available on FINRA's website at *http://www.finra.org*).

[39] *See* Bloomberg Letter at 2; Janes Street Letter at 1–2; T. Rowe Price Letter at 1.

[40] *See* Bloomberg Letter at 2.

[41] *See* Jane Street Letter at 2.

the proposal would benefit investment advisers and other market participant by providing timely and definitive clarity on whether reported transactions are delayed Treasury spot trades, and further would support price formation.[42] T. Rowe Price also noted benefits of the proposal to transaction cost analysis and the portfolio valuation process for institutional investors.[43]

SIFMA expressed mixed views on the delayed Treasury spot trade proposal. SIFMA noted that its members ''both see benefits to this proposal but also have material questions including the overall benefit vs. cost balancing.'' [44] SIFMA stated that a potential benefit of the proposal would be to provide a ''clearer picture, retrospectively, as to liquidity flows throughout the day.'' [45] However, SIFMA noted that some of its members indicated that the technical implementation of this proposal is complex, particularly around the new time field.[46] SIFMA also highlighted that the fixed-cost burden presented by the proposal would be more meaningful for smaller, non-primary dealers, which could lead such dealers to use manual processes for trade reporting or no longer engage in these type of trades.[47]

FIF did not support the delayed Treasury spot proposal, noting that the proposal would require firms to implement significant system changes.[48] FIF stated that its members advised that dealer systems do not currently store the time the original terms are agreed in a manner that would enable reporting to TRACE on a timely basis, such that implementation would require significant cost and work for firms to upgrade various systems.[49] FIF instead proposed that FINRA consider mandating that the SpecialPriceIndicator tag, or another existing TRACE tag, be marked as instructed by FINRA to identify delayed Treasury spot trades.[50] FIF stated that this alternative would signal to the market that the terms of the trade were not agreed based on current market conditions.[51]

FINRA agrees with commenters that the proposal relating to delayed Treasury spot trades will provide significant benefits to market participants and investors by enhancing transparency into corporate bond pricing for these types of trades. FINRA acknowledges that implementing the proposal will require members to make systems changes to identify Treasury spot trades and append the modifiers, as well as to capture and report the time at which the spread was agreed. FINRA believes, however, that the ongoing transparency benefits of reporting and disseminating this additional information will outweigh the initial costs required to modify trade reporting systems to enable gathering and reporting this new information. FINRA does not believe that use of an existing TRACE modifier or indicator, such as the special price tag, would sufficiently differentiate delayed Treasury spot trades in disseminated TRACE data or its regulatory audit trail data, nor would use of such a tag provide information about the time that the spread was agreed such that market participants can estimate the agreed-upon spread for such trades.[52]

SIFMA also responded to two specific requests for comment in *Regulatory Notice* 20–24 concerning the proposed Treasury spot modifier. First, FINRA asked whether it should consider requiring firms to report the spread, either at the time the spread is agreed or later in the day, and, if reported at the time the spread is agreed, whether the dollar price should also be reported later in the day. SIFMA responded that FINRA should have enough information from the proposed trade reports to derive an estimate of the spread without requiring reporting of this additional data.[53] SIFMA also noted that, in any case, dealers should not have to submit two reports, or amend a previous report, for the same trade.[54] As described above, FINRA is not modifying the proposal to require reporting of the spread or to require members to submit two reports for the same trade.[55] Second, FINRA requested comment on its understanding that most common pricing benchmark used for delayed Treasury spot trades is the on-the-run U.S. Treasury Security with the maturity that corresponds to the maturity of the corporate bond being priced. SIFMA stated that its members share that understanding.[56]

FIX didn't express a substantive view on the proposed amendments but suggested that it can assist in developing standard solutions for reporting of the proposed new delayed Treasury spot trade modifier.[57] For example, FIX noted that adding the capability for FINRA to capture the time that the spread was agreed would be a minimal extension to an existing concept in FIX, specifically the TrdRegTimestamps field.[58] FINRA notes that it supports several technical standards for reporting of trade information to TRACE, including FIX, and that the specific format and requirements for the new delayed Treasury spot modifier and reporting field for the time the spread was agreed would be published in TRACE technical specifications. As noted above, where a specific trade meets the criteria for both modifiers, such specifications may require the use of a third, single modifier indicating that both the delayed Treasury spot modifier and the portfolio trade modifier apply to the trade.

Portfolio Trades

T. Rowe Price supported the proposal to require members to identify corporate bond trades that are components of a larger portfolio trade, as defined in the FIMSAC Recommendation.[59] T. Rowe Price noted that the prices reported to TRACE for transactions that are part of a portfolio trade may not be at the current market for the security and that the proposal would benefit investment advisers and other market participants by providing timely and definitive clarity on whether a transaction is part of a portfolio trade, and further would support price formation.[60] T. Rowe Price also noted benefits of the proposal to transaction cost analysis and the portfolio valuation process for institutional investors.[61]

FIF, Bloomberg and Jane Street generally supported the proposal but suggested certain modifications to the conditions for trades that would qualify for the proposed portfolio trade modifier under the FIMSAC Recommendation,[62] while SIFMA expressed generally mixed views on the portfolio trade proposal.[63]

[42] *See* T. Rowe Price Letter at 1–2.

[43] *See* T. Rowe Price Letter at 2.

[44] *See* SIFMA Letter at 3.

[45] *See* SIFMA Letter at 4.

[46] *See* SIFMA Letter at 4.

[47] *See* SIFMA Letter at 4.

[48] *See* FIF Letter at 2.

[49] *See* FIF Letter at 2.

[50] *See* FIF Letter at 2.

[51] *See* FIF Letter at 2.

[52] The ''special price'' modifier must be appended when a transaction is executed at a price based on arm's length negotiation and done for investment, commercial or trading considerations, but does not reflect current market pricing. *See* FINRA Rule 6730(d)(4)(A) and *Notice to Members* 05–77 (November 2005). Thus a member must first make a determination, on a trade-by-trade basis, that a price is off-market before it appends the special price modifier.

[53] *See* SIFMA Letter at 4.

[54] *See* SIFMA Letter at 4–5.

[55] *See* note 17 *supra.*

[56] *See* SIFMA Letter at 5.

[57] *See* FIX letter at 3.

[58] *See* FIX letter at 2.

[59] *See* T. Rowe Price Letter at 1.

[60] *See* T. Rowe Price Letter at 1–2.

[61] *See* T. Rowe Price Letter at 2.

[62] *See* FIF Letter at 1–2; Bloomberg Letter at 3–4; Jane Street Letter at 2.

[63] *See* SIFMA Letter at 1–3.

FIF and SIFMA recommended that prong (ii) of the Portfolio Trade Definition be changed to a threshold based on the number of unique issues or securities, rather than the number of unique issuers.[64] FIF noted that shifting to a security basis for this prong would avoid challenges in identifying and processing which bonds are associated with a particular issuer and would result in more trades being reported as portfolio trades, which would provide greater transparency and enhance FINRA's audit trail.[65] FIF also stated that basing the determination of a portfolio trade on the number of unique issuers would raise the question of whether bonds of affiliated issuers should be counted as one or multiple issuers, and highlighted in particular bonds issued by special purpose vehicle subsidiaries.[66] SIFMA stated that while it understands that using the number of unique issuers is intended to scope in diversified portfolio trades, its members raised the concern that doing so would be more complicated to implement than basing the threshold on the number of securities in the portfolio.[67] SIFMA noted several examples of potential complications that could arise by using unique issuers, such as determining how to treat affiliates and subsidiaries and how guarantees might affect the analysis.[68] SIFMA stated that these issues would require market participants to generate large lists of bonds and determine how to attribute each bond to a unique issuer, which would not be easily automatable and would introduce the risk of errors and omissions in TRACE reporting.[69] FINRA agrees with these commenters that using a threshold based on the number of individual securities, rather than issuers, to determine when to append the portfolio trade modifier would result in a clearer and easier to implement approach to identifying portfolio trades, and has modified the proposal accordingly.

Jane Street, Bloomberg, FIF and SIFMA commented on the threshold number for appending the portfolio trade modifier, which the FIMSAC recommendation set at 30. FIF stated that a trade involving fewer than 30 unique issuers should still be considered a portfolio trade if it meets the other conditions in the definition.[70] Jane Street stated that 30 unique issuers is too high and recommended that a basket containing bonds from at least 10 unique issuers should be reported using the portfolio trade modifier, which would maximize the informational benefit of the new modifier since many portfolio trades contain bonds of between 10 and 30 unique issuers.[71] SIFMA stated that some of its members believe that a lower number of securities would be more appropriate, such as 10, while other of its members are comfortable with the proposed 30 or an even higher number.[72] Bloomberg recommended that TRACE should identify every situation where two or more securities are transacted at an agreed upon price where the price may not reflect the current market price for the bonds.[73] As described above, FINRA has modified the proposal by lowering the threshold from 30 to 10. FINRA believes that lowering the threshold for portfolio trades that would be identified by the new modifier in this manner would provide greater informational benefits to market participants. However, FINRA believes that a lower threshold than 10 issues, such as two or more securities, would be over-inclusive and reduce the usefulness of the modifier.

With respect to the proposed prong requiring that a portfolio trade must be executed on an all or none or most or none basis, Bloomberg noted that an ''all-or-none'' designation is ''an execution constraint that is well defined in all markets'' but that the concept of ''most-or-none'' does not currently exist and would require further clarification around what number of constituents in the basket constitutes ''most.''[74] Bloomberg therefore recommended using a definition of a basket that focuses on executions, rather than order designations.[75] As described above, FINRA agrees that this aspect of the initial proposal is not well-understood and believes that the Portfolio Trade Definition would be best implemented without an ''all-or-none or most-or-none'' prong. Therefore, under the current formulation, if two parties enter into negotiations with respect to a basket of bonds, the component trades would be identified with the new portfolio trade modifier so long as the resulting basket trade meets the other conditions specified in the Portfolio Trade Definition.

SIFMA also commented more broadly on the portfolio trade proposal. SIFMA stated that its members see two aspects to the portfolio trade proposal: (1) The identification of portfolio trades vs. other kinds of trades and (2) the identification of potentially off-market trades.[76] With respect to the first aspect, SIFMA noted that, while the proposal would make it easier to identify portfolio trades, some of its members believe it is already fairly easy to identify portfolio trades today without the specific modifier.[77] However, SIFMA also noted that other of its members believe that the proposal would benefit smaller market participants, market observers and researchers, who may not have systems in place to actively screen for portfolio trades using currently available data.[78] SIFMA noted that some of its members have concerns about the potential impact on liquidity resulting from disclosure of trading strategies, while other members did not believe that this is a material concern. With respect to the second aspect, SIFMA stated that some of its members have questioned the appropriateness of a flag that does not provide definitive information regarding whether the price is off-market, since a price in a portfolio trade may or may not be off-market.[79] SIFMA noted that dealers are already expected to review each line item in a portfolio trade to determine if it is off-market and, if so, append the existing special price indicator in TRACE reports. SIFMA stated that one potential benefit of the proposal could be to reduce compliance burdens if the new portfolio trade modifier replaces the special price indicator for components of portfolio trades.[80] On a related point, SIFMA asked FINRA to confirm that the portfolio trade modifier would be taken into account in fair pricing reviews.[81] SIFMA also stated dealers should not face an undue burden to explain why a price on a trade identified as a portfolio trade was off-market.[82] FINRA confirms that the portfolio trade modifier would be taken into account in FINRA's reviews of members' trading activities, including fair pricing reviews, along with any other indicators or modifiers that may be appended to individual trades (such as the special price indicator, where applicable). However, the new portfolio trade modifier would

[64] *See* FIF Letter at 2; SIFMA Letter at 2–3.

[65] *See* FIF Letter at 2–3.

[66] *See* FIF Letter at 3.

[67] *See* SIFMA Letter at 2–3.

[68] *See* SIFMA Letter at 3.

[69] *See* SIFMA Letter at 3.

[70] *See* FIF Letter at 2.

[71] *See* Jane Street Letter at 2.

[72] *See* SIFMA Letter at 3.

[73] *See* Bloomberg Letter at 4.

[74] *See* Bloomberg Letter at 3–4.

[75] *See* Bloomberg Letter at 4.

[76] *See* SIFMA Letter at 1.

[77] *See* SIFMA Letter at 2. SIFMA also expressed concern that the proposal shifts TRACE away from being a price transparency tool into a tool that provides trading strategy details. *See id.*

[78] *See* SIFMA Letter at 2.

[79] *See* SIFMA Letter at 2.

[80] *See* SIFMA Letter at 2.

[81] *See* SIFMA Letter at 2.

[82] *See* SIFMA Letter at 2.

not replace any other applicable indicators or modifiers, including the special price indicator, where applicable. FINRA continues to believe that, on balance, identification of portfolio trades through the proposed portfolio trade modifier would improve market transparency and provide greater certainty to market participants and investors regarding such trades.

Bloomberg also commented more generally on the portfolio trade proposal. Bloomberg stated that it has significant reservations about the portfolio trade proposal because there would be significant incentives for liquidity seekers to avoid sending baskets that meet criteria.[83] Specifically, Bloomberg noted that dissemination of individual components of portfolio trades as unrelated transactions in TRACE data, as it is today, protects liquidity seekers, while appending the proposed modifier could lead to significant information leakage such that market participants would understand both why and how the trade was executed.[84] Bloomberg expressed concern that the modifier would therefore be problematic because it would alert the market that a change in portfolio strategy had occurred, for example by allowing participants to reverse engineer a particular institution's views on a particular issue, which could dampen liquidity. Bloomberg stated that these concerns would reduce the transparency benefits sought by the proposal because liquidity seekers and providers may simply split up their baskets into smaller lists that do not meet the proposed criteria for the portfolio trade modifier.[85] Bloomberg also suggested that transparency could be enhanced by instead identifying every situation where two or more securities are transacted at an agreed upon price where the price may not reflect the current market price for the bonds, drawing an analogy to reporting modifiers used for equities in the public data feeds to indicate transactions with special circumstances that impact price.[86] As discussed above, FINRA believes that, on balance, identification of portfolio trades through the new proposed portfolio trade modifier would improve market transparency and provide greater certainty to market participants and investors regarding such trades. With respect to Bloomberg's suggestion to identify any portfolio trades involving two or more securities, as discussed above FINRA believes such a low threshold would be over-inclusive and would reduce the usefulness of the modifier, while a threshold of 10 securities as proposed would benefit market participants by providing greater transparency into pricing in the corporate bond market, while avoiding capturing transactions that are not portfolio trades, as that term is commonly understood in the market. In addition, as discussed above, FINRA believes lowering the threshold to 10 unique issues (from the threshold of 30 set forth in the FIMSAC Recommendation) may discourage traders from splitting up portfolio trades into smaller lists that do not meet the specified criteria for the proposed modifier to avoid identifying the trade under the proposal.

FIF requested guidance on application of the portfolio trade proposal in certain scenarios. Specifically, FIF stated that its members request guidance on whether non-TRACE-Eligible Securities should be counted toward the portfolio basket size threshold where a portfolio trade involves some bonds that are TRACE-Eligible Securities and other bonds that are not TRACE-Eligible Securities.[87] FINRA confirms that a security that is a non-TRACE Eligible Security, as well as a security other than a corporate bond that is a TRACE Eligible Security, should not be counted toward the portfolio basket size threshold. FIF also asked for guidance on the definition of a ''single agreed price'' in the context of a portfolio trade.[88] FINRA is clarifying that a portfolio trade would be considered to be executed for a ''single agreed price'' for the entire basket where the overall price for the basket has been negotiated or agreed on an aggregate basis, including where the parties used a pricing list or pricing service as the starting point for negotiations but the final price was determined by applying a uniform spread to all securities in the basket. However, where the parties simply aggregate individual prices obtained from a pricing list or service without further negotiation, this would not be considered within the scope of the proposed portfolio trade modifier.[89] FIF further asked whether a portfolio trade involving a delayed spotting process would qualify as a portfolio trade.[90] FINRA notes that, where a trade meets the conditions for applying multiple modifiers, all applicable modifiers should be appended unless otherwise provided for in the TRACE technical specifications. Thus, in the scenario presented by FIF, the trade may qualify for the delayed Treasury spot modifier if the trades are based on a spread to the yield of a U.S. Treasury Security and the spread was agreed upon that day prior to the Time of Execution of the transaction. If the trade also involved at least 10 unique securities and was transacted for a single agreed price for the entire basket and the other conditions of the Portfolio Trade Definition have been met, the trade must also be appended with the portfolio trade modifier. The specific format and requirements for the new modifiers would be published in TRACE technical specifications, which may require the use of a third, single modifier indicating that both the delayed Treasury spot modifier and the portfolio trade modifier apply to the trade. As noted below, FINRA will work with members to provide further interpretive guidance, where needed.

FIX suggested that it can assist in developing standard solutions for reporting the proposed new portfolio trade modifier.[91] For example, FIX noted that the TrdType and TrdSubType fields could be used to identify portfolio trades.[92] FINRA notes that it supports several technical standards for reporting of trade information to TRACE, including FIX, and that the specific format and requirements for the new portfolio trade modifier would be published in TRACE technical specifications.

Implementation Period

FIF, Bloomberg and SIFMA commented on the implementation period that would be necessary with respect to both the delayed Treasury spot and portfolio trade aspects of the proposal. FIF requested that the implementation timeline for the changes

[83] *See* Bloomberg Letter at 3.

[84] *See* Bloomberg Letter at 3.

[85] *See* Bloomberg Letter at 3.

[86] *See* Bloomberg Letter at 4.

[87] *See* FIF Letter at 3.

[88] *See* FIF Letter at 3.

[89] For example, consistent with the FIMSAC's recommendation, the ''single agreed price'' prong would ''exclude normal multi-dealer list trades that originate as either an electronic OWIC or a BWIC as such protocols result in a competitively negotiated price for each security in the list.'' *See* FIMSAC Recommendation at 3 n.5.

[90] *See* FIF Letter at 3. Specifically, FIF asked whether the following scenario would constitute a portfolio trade: (i) A third-party publishes reference prices for a universe of bonds at a set time each day at 3 p.m.; (ii) at 10 a.m. two firms agree to trade a basket of securities that represents a subset of this universe based upon the as-of-yet unpublished 3 p.m. reference price; and (iii) at 3:30 p.m. the two firms review the prices published at 3 p.m. for the basket constituents and come to consensus on the final price, which is an aggregate of the constituent prices. FIF further asked whether the existence of any offset to the price (*e.g.,* the 3pm reference price plus a fixed markup) would change whether the basket in this scenario would be considered a portfolio trade.

[91] *See* FIX letter at 3.

[92] *See* FIX letter at 2.

commence upon the publication of updated technical specifications and the issuance of FAQs by FINRA, given the significant technical work that will be required to implement the proposal and various issues where the industry will require interpretive guidance from FINRA.[93] SIFMA stated that a significant amount of lead time would be needed before the implementation date for the delayed Treasury spot trade proposal, ''on the order of 18 months or more.'' [94] Bloomberg noted the ''significant change in workflow'' that would be required to implement the delayed Treasury spot proposal, particularly with respect to recording and reporting the time that the spread was agreed.[95] Bloomberg also noted that consumers of TRACE data will need specifications in advance to make changes to systems to ingest the updated data feed and interpret the data.[96] Bloomberg therefore recommended that FINRA provide the industry with ''plenty of time'' to accommodate the changes and that FINRA should conduct outreach with members to determine an appropriate amount of lead time following FINRA's release of FAQs and TRACE messaging specifications needed to code, test and implement the necessary changes.[97] Bloomberg also noted similar implementation issues and made the same recommendation with respect to the portfolio trade aspect of the proposal.[98]

FINRA acknowledges that members reporting to TRACE require an appropriate amount of time to implement the systems and other changes necessary to report the additional information required under the proposed rule change. As noted above, if the Commission approves the proposed rule change, FINRA will announce the effective date(s) of the proposed rule change in a *Regulatory Notice.*[99] FINRA will publish a *Regulatory Notice* announcing the effective date(s) of the proposed amendments pursuant to Rule 6730(d)(4)(H) and (I) no later than 90 days following Commission approval, and the effective date(s) will be no later than 365 days following publication of the *Regulatory Notice.* FINRA will publish a *Regulatory Notice* announcing the effective date of the proposed amendments pursuant to Rule 6730(c)(14) once determined.[100] As is generally the case for TRACE rule changes, FINRA will endeavor to publish updated technical specifications as far as possible in advance of the effective date(s) and will work with members to provide interpretive guidance, where needed.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. In particular, the Commission requests comment on whether the proposal should be expanded to require FINRA members to report, with respect to delayed Treasury spot trades, the actual yield spread (''spread'') between the corporate bond and the U.S. Treasury Security that is agreed between the counterparties; and (2) the CUSIP number (or another identifier) of the specific U.S. Treasury Security that serves as the basis for the spread calculation. Presently, with respect to Treasury spot trades, FINRA is proposing to require only that a member append a new modifier when reporting a delayed Treasury spot trade and the time at which the spread for the delayed Treasury spot trade was agreed upon.

FINRA discussed earlier in this notice that the FIMSAC considered these additional options but ultimately did not recommend them. FINRA also discussed the SIFMA comment to its Regulatory Notice preceding this filing, where SIFMA stated that market observers ''should have enough information from the proposed trade reports to derive an estimate of the spread without requiring reporting of this additional data.'' FINRA also stated that it requested comment on its understanding that most common pricing benchmark used for delayed Treasury spot trades is the on-the-run U.S. Treasury Security with the maturity that corresponds to the maturity of the corporate bond being priced; SIFMA stated that its members share that understanding. Therefore, FINRA has not proposed to require these additional two data elements but stated above that it ''will assess the reported data regarding delayed Treasury spot trades and continue to engage with industry participants regarding whether any future changes may be appropriate to further improve transparency.'' In light of this background, commenters are invited to provide views on the following:

1. How easy or difficult would it be for market observers to ''derive an estimate of the spread'' having only the time that the spread was agreed between the counterparties to the delayed Treasury spot trade? How confident are market observers that their estimates are accurate? Would reporting and public dissemination of the actual spread for each specific delayed Treasury spot trade and the benchmark CUSIP used for the spread be preferable?

2. Do FINRA members who engage in delayed Treasury spot trades keep a record of the agreed upon spread and the benchmark CUSIP for a specific trade in any internal systems? Could FINRA members who engage in delayed Treasury spot trades capture the agreed upon spread and the benchmark CUSIP used for the spread on a specific trade in the same location as the time the spread was agreed to that FINRA is proposing to be reported in this proposal? Whatever the case, please describe the burdens that would be associated with reporting the actual spread and the CUSIP number (or other identifier) of the benchmark U.S. Treasury Security.

3. The current proposal, if approved by the Commission, would require members to add a new modifier to a delayed Treasury spot trade and to report the time at which the spread for the delayed Treasury spot trade was agreed upon. Affected reporting members would have to make systems changes to report these additional data elements for all delayed Treasury spot trades. What would be the incremental burden of the systems changes necessary to report two additional data elements—the agreed upon spread and the CUSIP or other identifier of the benchmark U.S. Treasury Security—at same time? What would be the costs of adding these two additional data elements in the future, as part of a separate systems upgrade, relative to

[93] *See* FIF Letter at 3.

[94] *See* SIFMA Letter at 4.

[95] *See* Bloomberg Letter at 2–3.

[96] *See* Bloomberg Letter at 3.

[97] *See* Bloomberg Letter at 3.

[98] *See* Bloomberg Letter at 5.

[99] *See supra* note 25.

[100] *See supra* note 26.

implementing all four data elements as part of the same upgrade?

4. How confident are market observers that they share the same understanding as the counterparties to a delayed Treasury spot trade of the specific U.S. Treasury Security used as the benchmark? Are there delayed Treasury spot trades where the time to maturity for the corporate bond does not correspond exactly to any U.S. Treasury Security so there is ambiguity as to what U.S. Treasury Security would serve as the benchmark? Is there a clear market convention for benchmarking off-the-run corporate securities for which the maturities fall between two on-the-run Treasury securities (for example, 4-year maturities, 6-year maturities, *etc.*)?

5. Do you believe it would be appropriate for FINRA to disseminate its assumption of the U.S. Treasury Security used as the benchmark for a delayed Treasury spot trade, even if FINRA does not require it to be reported by members? Why or why not?

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–2021–030 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–FINRA–2021–030. 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–2021–030 and should be submitted on or before December 28, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[101]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–26452 Filed 12–6–21; 8:45 am]

BILLING CODE 8011–01–P

[101] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17258 and #17259; Connecticut Disaster Number CT–00054]

Presidential Declaration Amendment of a Major Disaster for the State of Connecticut

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Connecticut (FEMA–4629–DR), dated 10/30/2021.

Incident: Remnants of Hurricane Ida.

Incident Period: 09/01/2021 through 09/02/2021.

DATES: Issued on 12/01/2021.

Physical Loan Application Deadline Date: 12/29/2021.

Economic Injury (EIDL) Loan Application Deadline Date: 08/01/2022.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of Connecticut, dated 10/30/2021, is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans): New Haven.

Contiguous Counties (Economic Injury Loans Only): All contiguous counties have previously been declared.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

James Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2021–26520 Filed 12–6–21; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17147 and #17148; NEW YORK Disaster Number NY–00208]

Presidential Declaration Amendment of a Major Disaster for the State of New York

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 6.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of New York (FEMA–4615–DR), dated 09/05/2021.

Incident: Remnants of Hurricane Ida.

Incident Period: 09/01/2021 through 09/03/2021.

DATES: Issued on 12/01/2021.

Physical Loan Application Deadline Date: 12/06/2021.

Economic Injury (EIDL) Loan Application Deadline Date: 06/06/2022.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of New York, dated 09/05/2021, is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans): Orange

Contiguous Counties (Economic Injury Loans Only):

New York: Sullivan

New Jersey: Sussex

Pennsylvania: Pike

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

James Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2021–26522 Filed 12–6–21; 8:45 am]

BILLING CODE 8026–03–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Conforming Amendment to Product Exclusion and Extensions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation

AGENCY: Office of the United States Trade Representative (USTR).

ACTION: Notice.

SUMMARY: On September 30, 2020, and effective November 30, 2020, U.S. Customs and Border Protection (CBP) issued a notice on the tariff classification of certain nonwoven wipes. To conform with the tariff classification set out in that notice, USTR is making a technical amendment to a product exclusion in the Section 301 investigation of China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation.

DATES: The conforming amendment in the Annex to this notice is effective November 30, 2020. CBP will issue instructions on entry guidance and implementation.

FOR FURTHER INFORMATION CONTACT: For general questions about this notice, contact Associate General Counsel Philip Butler or Assistant General Counsel Rachel Komito at (202) 395–5725. For specific questions on customs classification or implementation of the product exclusion identified in the Annex to this notice, contact *traderemedy@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

On September 30, 2020, CBP issued a notice on the tariff classification of certain nonwoven wipes. *Revocation of Eleven Ruling Letters, Modification of One Ruling Letter and Proposed Revocation of Treatment Relating to the Tariff Classification of Nonwoven Wipes, Customs Bulletin and Decisions,* Vol 54, No. 38, at 58 (Sep. 30, 2020). CPB's notice affects a currently applicable product exclusion for 'disposable cloths of nonwoven textile materials impregnated, coated or covered with organic surface-active preparations for washing the skin, put up for retail sale (described in statistical reporting number 3401.30.5000)' in this Section 301 investigation, as set out at 85 FR 27489 (May 8, 2020), 85 FR 48600 (August 11, 2020), 85 FR 85831 (December 29, 2020), 86 FR 13785 (March 10, 2021), 86 FR 54011 (September 29, 2021), and 86 FR 63438 (November 16, 2021).

B. Technical Amendment to Exclusion

The Annex to this notice conforms an existing product exclusion with the September 2020 revocation of treatment relating to the tariff classification of nonwoven wipes. In particular, the Annex makes technical amendments to U.S. notes 20(iii)(37), 20(qqq)(16) and 20(sss)(iii)(13) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States (HTSUS), as set out in the Annexes to the notices published at 85 FR 48600 (August 11, 2020), 85 FR 85831 (December 29, 2020), 86 FR 13785 (March 10, 2021), 86 FR 54011 (September 29, 2021), and 86 FR 63438 (November 16, 2021). Like all exclusions under this Section 301investigation, this technical correction applies to entries of goods that are not liquidated or to entries that are liquidated but not final.

Annex

A. Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on November 30, 2020 and before 11:59 p.m. eastern daylight time on December 31, 2020, note 20(iii)(37) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States (HTSUS) is amended by deleting ''3401.30.5000'' and by inserting ''3401.30.5000 prior to November 30, 2020; described in statistical reporting number 3401.11.5000 effective November 30, 2020'' in lieu thereof.

B. Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on January 1, 2021 and before 11:59 p.m. eastern daylight time on November 30, 2021, note 20(qqq)(16) to subchapter III of chapter 99 of the HTSUS is amended by deleting ''3401.30.5000'' and by inserting ''3401.11.5000'' in lieu thereof.

C. Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on December 1, 2021 and before 11:59 p.m. eastern daylight time on May 31, 2022, note 20(sss)(iii)(13) to subchapter III of chapter 99 of the HTSUS is amended by deleting ''3401.30.5000'' and by inserting ''3401.11.5000'' in lieu thereof.

Greta Peisch,

General Counsel, Office of the United States Trade Representative.

[FR Doc. 2021–26482 Filed 12–6–21; 8:45 am]

BILLING CODE 3290–F2–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2021–1024]

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Certification of Airports, Part 139

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. Part 139 establishes certification requirements for airports serving scheduled passenger-carrying operations of an air carrier operating aircraft configured for more than 9 passenger seats, as determined by the regulations under which the operation is conducted or the aircraft type certificate issued by a competent civil aviation authority; and unscheduled passenger-carrying operations of an air carrier operating aircraft configured for at least 31 passenger seats, as determined by the regulations under which the operation is conducted or the aircraft type certificate issued by a competent civil aviation authority. This part does not apply to: Airports serving scheduled air carrier operations only by reason of being designated as an alternate airport; airports operated by the United States; airports located in the State of Alaska that only serve scheduled operations of small air carrier aircraft and do not serve scheduled or unscheduled operations of large air carrier aircraft; airports located in the State of Alaska during periods of time when not serving operations of large air carrier aircraft; or heliports.

DATES: Written comments should be submitted by February 7, 2022.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov. Enter docket

number: FAA–2021–1024 into search field.

By email: chel.schweitzer@faa.gov.

FOR FURTHER INFORMATION CONTACT: Chel Schweitzer by email at: *chel.schweitzer@faa.gov*; phone: 202–679–2677.

SUPPLEMENTARY INFORMATION: The collection involves FAA Form 5280–1, Application for Airport Operating Certificate. Every airport that wants to become a certificated Part 139 airport must complete this form, as well as provide a draft Airport Certification Manual (ACM). In addition, currently certificated Part 139 airports must maintain their ACM, as well as keep and maintain records related to training, self-inspection, and other requirements of Part 139.

The collection includes an additional automated tool to assist airports in reporting airport status after an incident, or emergency event, has impacted the airport or surrounding area. The Airport Crisis Response Reporting (ACRR) tool simplifies the reporting process by allowing airports to directly input their airport status into the tool.

These records allow the FAA to verify compliance with Part 139 safety and operational requirements to ensure that the airports meet the minimum safety requirements of Part 139, which in turn enhances the safety of the flying public.

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: 2120–0675.

Title: Certification of Airports, 14 CFR part 139.

Form Numbers: FAA Form 5280–1.

Type of Review: Renewal of an information collection.

Background: The statutory authority to issue airport operating certificates to airports serving certain air carriers and to establish minimum safety standards for the operation of those airports is currently found in Title 49, United States Code (U.S.C.) § 44706, Airport operation certificates. The FAA uses this authority to issue requirements for the certification and operation of certain airports that service commercial air carriers. These requirements are contained in Title 14, Code of Federal Regulation Part 139 (14 CFR part 139), Certification and Operations: Land Airports Serving Certain Air Carriers, as amended. Information collection requirements are used by the FAA to determine an airport operator's compliance with Part 139 safety and operational requirements, and to assist airport personnel to perform duties required under the regulation.

Operators of certificated airports are required to complete FAA Form 5280–1 and develop, and comply with, a written document, an Airport Certification Manual (ACM) that details how an airport will comply with the requirements of Part 139. The ACM shows the means and procedures whereby the airport will be operated in compliance with Part 139, plus other instructions and procedures to help personnel concerned with operation of the airport to perform their duties and responsibilities.

When an airport satisfactorily complies with such requirements, the FAA issues to that facility an airport operating certificate (AOC) that permits an airport to serve air carriers. The FAA periodically inspects these airports to ensure continued compliance with Part 139 safety requirements, including the maintenance of specified records. Both the application for an AOC and annual compliance inspections require operators of certificated airports to collect and report certain operational information. The AOC remains in effect as long as the need exists and the operator complies with the terms of the AOC and the ACM.

The likely respondents to new information requests are those civilian U.S. airport certificate holders who operate airports that serve scheduled and unscheduled operations of air carrier aircraft with more than 10 passenger seats (approximately 520 airports). These airport operators already hold an AOC and comply with all current information collection requirements.

Operators of certificated airports are permitted to choose the methodology to report information and can design their own recordkeeping system. As airports vary in size, operations and complexities, the FAA has determined this method of information collection allows airport operators greater flexibility and convenience to comply with reporting and recordkeeping requirements. 100% of the information may be submitted electronically.

The FAA has an automated system, the Certification and Compliance Management Information System (CCMIS), which allows FAA airport safety and certification inspectors to enter into a national database airport inspection information. This information is monitored to detect trends and developing safety issues, to allocate inspection resources, and generally, to be more responsive to the needs of regulated airports.

The FAA has developed an automated reporting tool, the Airport Crisis Response Reporting (ACRR) tool, which allows airport personnel to directly input status of their airports after an incident, or emergency event, impacts their airport or the surrounding area.

Respondents: Approximately 520 airports.

Frequency: Information collected on occasion.

Estimated Average Burden per Response: 178 hours.

Estimated Total Annual Burden: 92,584 hours.

Issued in Washington, DC, on this date, November 23, 2021.

Anthony M. Butters,

Deputy Manager, Airport Safety and Operations (AAS–300).

[FR Doc. 2021–26426 Filed 12–6–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Release From Federal Grant Assurance Obligations and Land Exchange San Bernardino International Airport, San Bernardino, San Bernardino County, California

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of request to release airport land.

SUMMARY: The Federal Aviation Administration (FAA) is considering a proposal and invites public comment on the application for release of 10.306 acres of airport property from federal Grant Assurance obligations and land exchange at San Bernardino International Airport, San Bernardino, California. San Bernardino International Airport Authority (SBIAA) is requesting a total release from federal obligations on 10.306 acres of SBIAA property, and to authorize an acre-for-acre land exchange between SBIAA and the San Manuel Band of Mission Indians (SMBMI). The property is located approximately 600-feet south of E 3rd Street, north of W St., and approximately 300-feet east of Victoria Street and west of U St.

DATES: Comments must be received on or before January 6, 2022.

ADDRESSES: Comments on the request may be mailed or delivered to the FAA at the following address: Ms. Cathryn Cason, Manager, Los Angeles Airports District Office, Federal Aviation Administration, 777 South Aviation Boulevard, Suite 150, El Segundo, California 90245. In addition, one copy of the comment submitted to the FAA must be mailed or delivered to Mr. Mark Gibbs, Director of Aviation, San Bernardino International Airport Authority, 1601 East 3rd Street, San Bernardino, CA 92408.

SUPPLEMENTARY INFORMATION: The former Norton Air Force Base property was conveyed to SBIAA by the United States Air Force (USAF) in accordance with the Airport Quit Claim Deed as a public benefit transfer pursuant to the sponsorship of the FAA a public use airport. SBIAA assumed the operational responsibility of the Airport on October 15, 1993, and received a lease from the USAF in January 1994. The Airport Quit Claim Deed encompasses the majority of the Airport properties and was delivered to SBIAA on February 12, 1999. The 10.306-acres of subject land identified is not currently required for aeronautical purposes. SBIAA is intending to exchange this property with the San Manuel Band of Mission Indians (SMBMI) on a 10.306-acre-for-acre land exchange. Such use of the land represents a compatible land use that will not interfere with the airport or its operation, thereby protecting the interests of civil aviation. The resulting actions would provide the Airport with ownership control over the primary access road to its general aviation and air cargo areas (Victoria Avenue). SBIAA needs to ensure that the ownership control of this primary access road cannot be compromised.

In accordance with the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), Public Law 106–181 (Apr. 5, 2000; 114 stat. 61), this notice must be published in the **Federal Register** 30 days before the DOT Secretary may waive any condition imposed on a federally obligated airport by surplus property conveyance deeds or grant agreements.

Issued in El Segundo, California on December 2, 2021.

Brian Q. Armstrong,

Manager, Safety and Standards Branch, Airports Division, Western-Pacific Region.

[FR Doc. 2021–26488 Filed 12–6–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice of Funding Opportunity for the Federal-State Partnership for State of Good Repair Program

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of Funding Opportunity (NOFO or notice).

SUMMARY: This notice details the application requirements and procedures to obtain grant funding for eligible projects under the Federal-State Partnership for State of Good Repair Program (Partnership Program). This notice solicits applications for Partnership Program funds made available by the Consolidated Appropriations Act, 2021. The opportunity described in this notice is made available under Assistance Listings Number 20.326, ''Federal-State Partnership for State of Good Repair.''

DATES: Applications for funding under this solicitation are due no later than 5:00 p.m. ET, March 7, 2022. Late or incomplete applications will not be considered for funding. See *Section D* of this notice for additional information on the application process.

ADDRESSES: Applications must be submitted via *www.Grants.gov.* Only applicants who comply with all submission requirements described in this notice and submit applications through *www.Grants.gov* will be eligible for award. For any supporting application materials that an applicant is unable to submit via *www.Grants.gov* (such as oversized engineering drawings), an applicant may submit an original and two (2) copies to Mr. Bryan Rodda, Office of Policy and Planning, Federal Railroad Administration, 1200 New Jersey Avenue SE, Room W38–203, Washington, DC 20590. However, due to delays caused by enhanced screening of mail delivered via the U.S. Postal Service, applicants are advised to use other means of conveyance (such as courier service) to assure timely receipt of materials before the application deadline.

FOR FURTHER INFORMATION CONTACT: For further information related to this notice, please contact Mr. Bryan Rodda, Office of Policy and Planning, Federal Railroad Administration, 1200 New Jersey Avenue SE, Room W38–203, Washington, DC 20590; email: *Bryan.Rodda@dot.gov;* phone: 202–493–0443.

SUPPLEMENTARY INFORMATION: *Notice to applicants:* FRA recommends that applicants read this notice in its entirety prior to preparing application materials. Definitions of key terms used throughout the NOFO are provided in *Section A(2)* below. These key terms are capitalized throughout the NOFO. There are several administrative and specific eligibility requirements described herein with which applicants must comply. Additionally, applicants should note that the required Project Narrative component of the application package may not exceed 25 pages in length.

Table of Contents

A. Program Description
B. Federal Award Information
C. Eligibility Information
D. Application and Submission Information
E. Application Review Information
F. Federal Award Administration Information
G. Federal Awarding Agency Contacts
H. Other Information

A. Program Description

1. Overview

Our nation's rail network is a critical component of the U.S. transportation system and economy. Prior to the coronavirus disease 2019 (COVID–19) pandemic, rail carried over 32.5 million passengers on Amtrak services and approximately 1.6 billion tons of freight valued at over $600 billion each year. The Partnership Program provides a Federal funding opportunity to improve American passenger rail infrastructure to enhance rail safety, reduce the backlog of deferred maintenance for Amtrak or publicly owned or controlled railroad assets, create new opportunities for underserved communities, and invest in projects that support and spur economic growth.

The purpose of the Partnership Program is to fund projects within the United States to repair, replace, or rehabilitate Qualified Railroad Assets to reduce the state of good repair backlog and improve Intercity Passenger Rail performance. Section E of this NOFO provides additional information on these program priorities.

The Partnership Program is authorized in Sections 11103 and 11302 of the Passenger Rail Reform and Investment Act of 2015 (Title XI of the Fixing America's Surface Transportation (FAST) Act, Public Law 114–94 (2015)); codified at 49 U.S.C. 24911, and this NOFO is funded by the Consolidated Appropriations Act, 2021 (Public Law 116–260) (Appropriations Act).[1] The opportunity described in this notice is made available under Assistance

[1] Funds made available under this NOFO are subject to 49 U.S.C. 24911 as it existed on the day of the enactment of the Appropriations Act.

Listings Number 20.326, ''Federal-State Partnership for State of Good Repair.''

Consistent with Biden-Harris Administration priorities, the Department seeks to fund projects under the Partnership Program that address climate change impacts and environmental justice. Projects should include components that reduce emissions, promote energy efficiency, increase resilience, and recycle or redevelop existing infrastructure. This objective is consistent with Executive Order 14008, Tackling the Climate Crisis at Home and Abroad (86 FR 7619). As part of the Department's implementation of that Executive Order, the Department encourages the submission of applications that would direct resources and benefits towards low-income communities, overburdened communities, or communities underserved by affordable transportation.

The Department also seeks to use the Partnership Program to encourage racial equity by investing in projects that proactively address racial equity and barriers to opportunity. Projects should include components that improve or expand transportation options and mitigate the safety risks and detrimental quality of life effects that rail lines can have on communities, particularly low-income areas, and communities of color. This objective supports the Department's strategic goal related to infrastructure, with the potential for significantly enhancing environmental stewardship and community partnerships, and reflects Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (86 FR 7009). Section E describes the climate change, environmental justice, and racial equity considerations further.

The Partnership Program is intended to benefit both railroad assets in the Northeast Corridor (''NEC'') and public or Amtrak-owned or controlled infrastructure, equipment, and facilities located in other areas of the country. Applicants should note that the Partnership Program has distinct eligibility requirements based on project location. In addition to the generally applicable requirements, applicants proposing NEC Projects should specifically review the NEC-specific requirements provided in *Section C(3)*(b), and the Qualified Railroad Asset information provided in *Section D(2)*(a)(vi) while applicants proposing Non-NEC Projects should review the Qualified Railroad Asset information provided in *Section D(2)*(a)(v).

2. Changes From FY 2020 Partnership Program NOFO

This notice updates the FY 2020 Partnership Program NOFO to reflect the Biden-Harris Administration's priorities for creating good-paying jobs, improving safety, applying transformative technology, and explicitly addressing climate change and racial equity as discussed in Section E(1)(c)(ii).

This notice expands the definition of Capital Project, making expenses incidental to the acquisition or construction (including designing, engineering, location surveying, mapping, environmental studies, and acquiring rights-of-way) of a Capital Project eligible for funding independently or in conjunction with proposed funding for construction or acquisition, as directed by the Appropriations Act.

3. Definitions of Key Terms

Terms defined in this section are capitalized throughout this notice.

a. ''Benefit-Cost Analysis'' (or ''Cost-Benefit Analysis'') is a systematic, data-driven, and transparent analysis comparing monetized project benefits and costs, using a no-build baseline and properly discounted present values, including concise documentation of the assumptions and methodology used to produce the analysis, a description of the baseline, data sources used to project outcomes, values of key input parameters, basis of modeling (including spreadsheets, technical memos, etc.), and presentation of the calculations in sufficient detail and transparency to allow the analysis to be reproduced and sensitivity of results evaluated by FRA. Please refer to the Benefit-Cost Analysis (BCA) Guidance for Discretionary Grant Programs prior to preparing a BCA at *https://www.transportation.gov/office-policy/transportation-policy/benefit-cost-analysis-guidance.* In addition, please also refer to the BCA FAQs on FRA's website for rail-specific examples of how to apply the BCA Guidance for Discretionary Grant Programs to Partnership Program applications.

b. ''Capital Project'' means a project primarily intended to replace, rehabilitate, or repair major infrastructure assets utilized for providing Intercity Passenger Rail service, including tunnels, bridges, stations, and other assets, as determined by the Secretary of Transportation; a project primarily intended to improve Intercity Passenger Rail performance, including reduced trip times, increased train frequencies, and higher operating speeds, and other improvements, as determined by the Secretary; and a project for expenses incidental to the acquisition or construction (including designing, engineering, location surveying, mapping, environmental studies, and acquiring rights-of-way) of a project, consistent with 49 U.S.C. 24911(a)(2) and the Appropriations Act.

c. ''Construction'' means the production of fixed works and structures or substantial alterations to such structures or land and associated costs.

d. ''Commuter Rail Passenger Transportation'' means short-haul rail passenger transportation in metropolitan and suburban areas usually having reduced fare, multiple ride, and commuter tickets and morning and evening peak period operations, consistent with 49 U.S.C. 24102(3).

e. ''Final Design (FD)'' means design activities following Preliminary Engineering, and at a minimum, includes the preparation of final Construction plans, detailed specifications, and estimates sufficiently detailed to inform project stakeholders (designers, reviewers, contractors, suppliers, etc.) of the actions required to advance the project from design through completion of Construction.

f. ''Intercity Rail Passenger Transportation'' means rail passenger transportation, except Commuter Rail Passenger Transportation, consistent with 49 U.S.C. 24911(a)(3). In this notice, ''Intercity Passenger Rail'' is an equivalent term to ''Intercity Rail Passenger Transportation.''

g. ''Major Capital Project'' means a Capital Project with an estimated total project cost of $300 million or more.

h. ''National Environmental Policy Act (NEPA)'' is a Federal law that requires Federal agencies to analyze and document the environmental impacts of a proposed action in consultation with appropriate Federal, state, and local authorities, and with the public. NEPA classes of action include an Environmental Impact Statement (EIS), Environmental Analysis (EA) or Categorical Exclusion (CE). The NEPA class of action depends on the nature of the proposed action, its complexity, and the potential impacts. For purposes of this NOFO, NEPA also includes all related Federal laws and regulations including the Clean Air Act, Section 4(f) of the Department of Transportation Act, Section 7 of the Endangered Species Act, and Section 106 of the National Historic Preservation Act. Additional information regarding FRA's environmental processes and requirements are located at *https://www.fra.dot.gov/environment.*

i. ''NEC Project'' means a Capital Project where the Qualified Railroad Assets involved in the project are part of, or in primary use for, the Northeast Corridor (''NEC'').

j. ''Non-NEC Project'' means a Capital Project where the Qualified Railroad Assets involved in the project are not part of, or are not in primary use for, the Northeast Corridor (''NEC'').

k. ''Northeast Corridor'' (''NEC'') means the main rail line between Boston, Massachusetts, and the District of Columbia; the branch rail lines connecting to Harrisburg, Pennsylvania, Springfield, Massachusetts, and Spuyten Duyvil, New York; and facilities and services used to operate and maintain these lines, consistent with 49 U.S.C. 24911(a)(4).

l. ''Preliminary Engineering (PE)'' means engineering design to: (1) Define a project, including identification of all environmental impacts, design of all critical project elements at a level sufficient to assure reliable cost estimates and schedules, (2) complete project management and financial plans, and (3) identify procurement requirements and strategies. The PE development process starts with specific project design alternatives that allow for the assessment of a range of rail improvements, specific alignments, and project designs. PE generally occurs concurrently with NEPA and related analyses, and prior to FD and Construction.

m. A ''Qualified Railroad Asset,'' consistent with 49 U.S.C. 24911(a)(5), means infrastructure, equipment, or a facility that:

i. Is owned or controlled by an eligible applicant;

ii. is contained in the planning document developed under 49 U.S.C. 24904 and for which a cost-allocation policy has been developed under 49 U.S.C. 24905(c), or is contained in an equivalent planning document and for which a similar cost-allocation policy has been developed; and

iii. was not in a State of Good Repair on the date of enactment of the Passenger Rail Reform and Investment Act of 2015 (December 4, 2015).

See *Section D(2)*(a), Project Narrative, for further details about the Qualified Railroad Asset requirements and application submission instructions related to Qualified Railroad Assets.[2]

n. ''State of Good Repair'' means a condition in which physical assets, both individually and as a system, are (A) performing at a level at least equal to that called for in their as-built or as-modified design specification during any period when the life cycle cost of maintaining the assets is lower than the cost of replacing them; and (B) sustained through regular maintenance and replacement programs, consistent with 49 U.S.C. 24102(12).

[2] For any project that includes purchasing intercity passenger rail equipment, applicants are encouraged to use a standardized approach to the procurement, such as the specifications developed by the Next Generation Corridor Equipment Pool Committee or a similarly uniform process.

B. Federal Award Information

1. Available Award Amount

The total funding available for awards under this NOFO is $198,000,000 made available by the Appropriations Act. Should additional Partnership Program funds become available after the release of this NOFO, FRA may elect to award such additional funds to applications received under this NOFO. Any selection and award under this NOFO is subject to the availability of appropriated funds.

2. Award Size

There are no predetermined minimum or maximum dollar thresholds for awards. FRA anticipates making multiple awards with the available funding. Given the limited amount of funding currently available, FRA may not be able to award grants to all eligible applications even if they meet or exceed the stated evaluation criteria (see *Section E,* Application Review Information). Projects may require more funding than is available. FRA encourages applicants to propose a project that has operational independence or a component of such project and that can be completed and implemented with funding under this NOFO as a part of the total project cost together with other, non-Federal sources. (See *Section C(3)*(c) for more information.)

Applicants proposing a Major Capital Project may identify and describe project phases or elements that could be candidates for subsequent Partnership Program funding, if such funding becomes available. Applications for a Major Capital Project that would seek future funds beyond funding made available in this notice should indicate anticipated annual Federal funding requests from this program for the expected duration of the project. FRA may issue Letters of Intent to Partnership Program grant recipients proposing Major Capital Projects under 49 U.S.C. 24911(g); such Letters of Intent would serve to announce FRA's intention to obligate an amount from future available budget authority toward a grant recipient's future project phases or elements. A Letter of Intent is not an obligation of the Federal government and is subject to the availability of appropriations for Partnership Program grants and subject to Federal laws in force or enacted after the date of the Letter of Intent.

4. Award Type

FRA will make awards for projects selected under this notice through grant agreements and/or cooperative agreements. Grant agreements are used when FRA does not expect to have substantial Federal involvement in carrying out the funded activity. Cooperative agreements allow for substantial Federal involvement in carrying out the agreed upon investment, including technical assistance, review of interim work products, and increased program oversight. The term ''grant'' is used throughout this document and is intended to reference funding awarded through a grant agreement, as well as funding awarded through a cooperative agreement. The funding provided under this NOFO will be made available to grantees on a reimbursable basis. Applicants must certify that their expenditures are allowable, allocable, reasonable, and necessary to the approved project before seeking reimbursement from FRA. Additionally, the grantee is expected to expend matching funds at the required percentage concurrent with Federal funds throughout the life of the project. See an example of standard terms and conditions for FRA grant awards at: *https://www.fra.dot.gov/eLib/Details/L19057.* This template is subject to revision.

5. Concurrent Applications

DOT and FRA may be concurrently soliciting applications for transportation infrastructure projects for several financial assistance programs. Applicants may submit applications requesting funding for a particular project to one or more of these programs. In the application for funding under this NOFO, applicants must indicate the other program(s) to which they submitted or plan to submit an application for funding the entire project or certain project components, as well as highlight new or revised information in the application responsive to this NOFO that differs from the previously submitted application(s).

C. Eligibility Information

This section of the notice explains applicant eligibility, cost sharing and matching requirements, project eligibility, and project component

operational independence. Applications that do not meet the requirements in this section will be ineligible for funding. Instructions for submitting eligibility information to FRA are detailed in *Section D* of this NOFO.

1. Eligible Applicants

The following entities are eligible applicants for all projects permitted under this notice:

(1) A State (including the District of Columbia);

(2) a group of States;

(3) an Interstate Compact;

(4) a public agency or publicly chartered authority established by one or more States; [3]

(5) a political subdivision of a State;

(6) Amtrak, acting on its own behalf or under a cooperative agreement with one or more states; or

(7) any combination of the entities described in (1) through (6).

Applications must identify a lead applicant. The lead applicant serves as the primary point of contact for the application, and if selected, as the grantee of the Partnership Program grant award.

To submit a joint application, the lead applicant must identify the joint applicant(s) and include a signed statement from an authorized representative of each joint applicant entity that affirms the entity joins the application. See *Section D(2)* for further instructions about submitting a joint application.

An application submitted by Amtrak and one or more States, whether eligible under (1), (2) or (6) above, must identify the lead applicant and include a signed cooperative agreement between Amtrak and the state(s) consistent with 49 U.S.C. 24911(a)(1)(F). Selection preference will be provided for joint applications, as further discussed in *Section E(1)*(c). Applications may reference entities that are not eligible applicants (*e.g.,* private sector firms) in an application as a partner in project funding or implementation, but ineligible entities do not qualify as lead or joint applicants. FRA will provide selection preference only to joint applications submitted by multiple eligible applicants.

2. Cost Sharing or Matching

The Federal share of total costs for Partnership Program projects funded under this notice shall not exceed 80 percent. FRA will provide selection preference to applications where the proposed Federal share of total project costs is 50 percent or less. The estimated total cost of a project must be based on the best available information, including engineering studies, studies of economic feasibility, environmental analyses, and information on the expected use of equipment and/or facilities. Additionally, in preparing estimates of total project costs, applicants may use FRA's cost estimate guidance documentation, ''Capital Cost Estimating: Guidance for Project Sponsors,'' which is available at: *https://www.fra.dot.gov/Page/P0926.*

The minimum 20 percent non-Federal share may be comprised of public sector (*e.g.,* State or local) or private sector funding. FRA will not consider any Federal financial assistance [4] or any non-Federal funds already expended (or otherwise encumbered) toward the matching requirement, unless compliant with 2 CFR part 200. In-kind contributions, including the donation of services, materials, and equipment, may be credited as a project cost, in a uniform manner consistent with 2 CFR 200.306.

If Amtrak is an applicant, Amtrak may use its ticket and other non-Federal revenues generated from its operations and other sources to satisfy the non-Federal share requirements. Applicants must identify the source(s) of their matching and other funds and must clearly and distinctly reflect these funds as part of the total project cost.

Before applying, applicants should carefully review the principles for cost sharing or matching in 2 CFR 200.306. See Section D(2)(a)(iii) for required application information on non-Federal match and Section E for further discussion of FRA's consideration of matching funds in the review and selection process. FRA will approve pre-award costs consistent with 2 CFR 200.458, as applicable. See *Section D(6).* Cost sharing or matching may be used only for authorized Federal award purposes.

3. Other

a. Project Eligibility

The following rail projects within the United States to replace or rehabilitate Qualified Railroad Assets and improve Intercity Passenger Rail performance are eligible for funding under 49 U.S.C. 24911, the Appropriations Act, and this NOFO:

(1) Capital Projects to replace existing assets in-kind;

(2) Capital Projects to replace existing assets with assets that increase capacity or provide a higher level of service;

(3) Capital Projects to ensure that service can be maintained while existing assets are brought to a State of Good Repair; and

(4) Capital Projects to bring existing assets into a State of Good Repair.

Qualified Railroad Assets, as further defined in *Section A(2),* are owned or controlled by an eligible applicant and may include: Infrastructure, including track, ballast, switches and interlockings, bridges, communication and signal systems, power systems, highway-rail grade crossings, and other railroad infrastructure and support systems used in intercity passenger rail service; stations, including station buildings, support systems, signage, and track and platform areas; equipment, including passenger cars, locomotives, and maintenance-of-way equipment; and facilities, including yards and terminal areas and maintenance shops.

i. Capital Projects, as further defined in *Section A(2),* may include PE, NEPA, Final Design, Construction, or expenses incidental to the acquisition or Construction of a Capital Project. Corridor or project-specific planning studies are not eligible. Pre-Construction activities are eligible for funding independently or in conjunction with proposed funding for construction.

Forms needed for the electronic application process are at *www.Grants.gov.*

b. Post-Selection Requirements

See *Section F(2)* of this notice for post-selection requirements.

4. Unique Entity Identifier and System for Award Management (SAM)

To apply for funding through *Grants.gov*, applicants must be properly registered in SAM before submitting an application, provide a valid unique entity identifier in its application, and continue to maintain an active SAM registration all as described in detail below. Complete instructions on how to register and submit an application can be found at *www.Grants.gov.* Registering with *Grants.gov* is a one-time process; however, it can take up to several weeks for first-time registrants to receive confirmation and a user password. FRA recommends that applicants start the registration process as early as possible to prevent delays that may preclude submitting an application package by the application deadline. Applications will not be accepted after the due date. Delayed registration is not an acceptable justification for a late application.

[3] See Section D(2)(a)(iv) for supporting documentation required to demonstrate eligibility under this eligibility category.

[4] See Section D(2)(a)(iii) for supporting information required to demonstrate eligibility of Federal funds for use as match.

FRA may not make a grant award to an applicant until the applicant has complied with all applicable Data Universal Numbering System (DUNS) and SAM requirements and if an applicant has not fully complied with the requirements by the time the Federal awarding agency is ready to make a Federal award, the Federal awarding agency may determine that the applicant is not qualified to receive a Federal award and use that determination as a basis for making a Federal award to another applicant. (Please note that if a Dun & Bradstreet DUNS number must be obtained or renewed, this may take a significant amount of time to complete). Late applications, including those that are the result of a failure to register or comply with *Grants.gov* applicant requirements in a timely manner, will not be considered. If an applicant has not fully complied with the requirements by the submission deadline, the application will not be considered. To submit an application through *Grants.gov*, applicants must:

a. Obtain a DUNS Number

A DUNS number is required for *Grants.gov* registration. The Office of Management and Budget requires that all businesses and nonprofit applicants for Federal funds include a DUNS number in their applications for a new award or renewal of an existing award. A DUNS number is a unique nine-digit sequence recognized as the universal standard for the government in identifying and keeping track of entities receiving Federal funds. The identifier is used for tracking purposes and to validate address and point of contact information for Federal assistance applicants, grantees, and subrecipients. The DUNS number will be used throughout the grant life cycle. Obtaining a DUNS number is a free, one-time activity. Applicants may obtain a DUNS number by calling 1–866–705–5711 or by applying online at *http://www.dnb.com/us.*

b. Register With the SAM at *www.SAM.gov*

All applicants for Federal financial assistance must maintain current registrations in the SAM database. An applicant must be registered in SAM to successfully register in *Grants.gov*. The SAM database is the repository for standard information about Federal financial assistance applicants, grantees, and subrecipients. Organizations that have previously submitted applications via *Grants.gov* are already registered with SAM, as it is a requirement for *Grants.gov* registration. Please note, however, that applicants must update or renew their SAM registration at least once per year to maintain an active status. Therefore, it is critical to check registration status well in advance of the application deadline. If an applicant is selected for an award, the applicant must maintain an active SAM registration with current information throughout the period of the award, including information on a grantee's immediate and highest level owner and subsidiaries, as well as on all predecessors that have been awarded a Federal contract or grant within the last three years, if applicable. Information about SAM registration procedures is available at *www.sam.gov.*

c. Create a *Grants.gov* Username and Password

Applicants must complete an Authorized Organization Representative (AOR) profile on *www.Grants.gov* and create a username and password. Applicants must use the organization's DUNS number to complete this step. Additional information about the registration process is available at: *https://www.grants.gov/web/grants/applicants/organization-registration.html.*

d. Acquire Authorization for Your AOR From the E-Business Point of Contact (E-Biz POC)

The E-Biz POC at the applicant's organization must respond to the registration email from *Grants.gov* and login at *www.Grants.gov* to authorize the applicant as the AOR. Please note there can be more than one AOR for an organization.

e. Submit an Application Addressing All Requirements Outlined in This NOFO

If an applicant experiences difficulty at any point during this process, please call the *Grants.gov* Customer Center Hotline at 1–800–518–4726, 24 hours a day, 7 days a week (closed on Federal holidays). For information and instructions on each of these processes, please see instructions at: *http://www.grants.gov/web/grants/applicants/apply-for-grants.html.*

5. Submission Dates and Times

Applicants must submit complete applications to *www.Grants.gov* no later than 5:00 p.m. ET, March 7, 2022. Applicants will receive a system-generated acknowledgement of receipt. FRA reviews *www.Grants.gov* information on dates/times of applications submitted to determine timeliness of submissions. Late applications will be neither reviewed nor considered. Delayed registration is not an acceptable reason for late submission. To apply for funding under this announcement, all applicants are expected to be registered as an organization with *Grants.gov*. Applicants are strongly encouraged to apply early to ensure all materials are received before this deadline.

To ensure a fair competition of limited discretionary funds, no late submissions will be reviewed for any reason, including: (1) Failure to complete the *Grants.gov* registration process before the deadline; (2) failure to follow *Grants.gov* instructions on how to register and apply as posted on its website; (3) failure to follow all the instructions in this NOFO; and (4) technical issues experienced with the applicant's computer or information technology environment.

6. Intergovernmental Review

Intergovernmental Review is required for this program. Applicants must contact their State Single Point of Contact to comply with their state's process under Executive Order 12372.

7. Funding Restrictions

Consistent with 2 CFR 200.458, as applicable, FRA will only approve pre-award costs if such costs are incurred pursuant to the negotiation and in anticipation of the grant agreement and if such costs are necessary for efficient and timely performance of the scope of work. Under 2 CFR 200.458, grant recipients must seek written approval from FRA for pre-award activities to be eligible for reimbursement under the grant. Activities initiated prior to the execution of a grant or without FRA's written approval may be ineligible for reimbursement or matching contribution. Cost sharing or matching may be used only for authorized Federal award purposes.

FRA is prohibited under 49 U.S.C. 22905(f) [5] from providing Partnership Program grants for Commuter Rail Passenger Transportation. FRA's interpretation of this provision is informed by the language in 49 U.S.C. 24911, and specifically the definitions of capital project in 49 U.S.C. 24911(a)(2)(A) and (B). FRA's primary intent in funding Partnership Program projects is to make reasonable investments in Capital Projects for Intercity Rail Passenger Transportation. Such projects may be located on shared corridors where Commuter Rail Passenger Transportation and/or freight rail also benefit from the project.

[5] Under 49 U.S.C. 24911(i), Partnership grants are subject to the conditions in 49 U.S.C. 22905.

8. Other Submission Requirements

For any supporting application materials that an applicant cannot submit via *Grants.gov*, such as oversized engineering drawings, an applicant may submit an original and two (2) copies to Mr. Bryan Rodda, Office of Policy and Planning, Federal Railroad Administration, 1200 New Jersey Avenue SE, Room W38–203, Washington, DC 20590. However, due to delays caused by enhanced screening of mail delivered via the U.S. Postal Service, FRA advises applicants to use other means of conveyance (such as courier service) to assure timely receipt of materials before the application deadline. Additionally, if documents can be obtained online, explaining to FRA how to access files on a referenced website may also be sufficient.

Note: Please use generally accepted formats such as .pdf, .doc, .docx, .xls, .xlsx and .ppt, when uploading attachments. While applicants may embed picture files, such as .jpg, .gif, and .bmp in document files, applicants should not submit attachments in these formats. Additionally, the following formats will not be accepted: .com, .bat, .exe, .vbs, .cfg, .dat, .db, .dbf, .dll, .ini, .log, .ora, .sys, and .zip.

D. Application Review Information

1. Criteria

a. Eligibility, Completeness, and Applicant Risk Review

FRA will first screen each application for applicant and project eligibility (eligibility requirements are outlined in *Section C* of this notice), completeness (application documentation and submission requirements are outlined in *Section D* of this notice), applicant risk and the 20 percent minimum non-Federal match in determining whether the application is eligible.

FRA will then consider applicant risk, including the applicant's past performance in developing and delivering similar projects and previous financial contributions, and if applicable, previous competitive grant technical evaluation ratings that the proposed project received under previous competitive grant programs administered by DOT.

b. Evaluation Criteria

FRA will evaluate all eligible and complete applications using the evaluation criteria outlined in this section to determine technical merit and project benefits.

i. *Technical Merit:* FRA will take into account—

(A) The degree to which the tasks and subtasks outlined in the SOW are appropriate to achieve the expected outcomes of the proposed project;

(B) The technical qualifications and demonstrated experience of key personnel proposed to lead and perform the technical efforts, and the qualifications of the primary and supporting organizations to fully and successfully execute the proposed project within the proposed timeframe and budget;

(C) The degree to which the proposed project's business plan considers potential private sector participation in the financing, construction, or operation of the proposed project;

(D) Whether the applicant has, or will have, the legal, financial, and technical capacity to carry out the project; satisfactory continuing control over the use of the equipment or facilities; and the capability and willingness to maintain the equipment or facilities;

(E) The applicant's past performance in developing and delivering similar projects, and previous financial contributions;

(F) Whether the project has completed necessary prerequisites and demonstrates strong project readiness; and

(G) Whether the project is consistent with planning guidance and documents set forth by the Secretary of Transportation or required by law.

ii. *Project Benefits:* FRA will take into account the benefit-cost analysis of the proposed project, including anticipated private and public benefits relative to the costs of the proposed project including—

(A) Effects on system and service performance;

(B) Effects on safety, competitiveness, reliability, trip or transit time, and resilience;

(C) Efficiencies from improved integration with other modes; and

(D) Ability to meet existing or anticipated demand.

c. Selection Criteria

In addition to the eligibility and completeness review and the evaluation criteria outlined in this section, FRA will apply the following selection criteria:

i. FRA will give preference to applications where:

(A) Amtrak is not the sole applicant;

(B) Applications were submitted jointly by multiple eligible applicants; and

(C) The proposed Federal share of total project costs is 50 percent or less.

ii. After applying the above preferences, FRA will take in account the following key DOT objectives:

(A) *Safety.* DOT will assess the project's ability to foster a safe transportation system for the movement of goods and people, consistent with the Department's strategic goal to reduce transportation-related fatalities and serious injuries across the transportation system. Such considerations will include, but are not limited to, the extent to which the project improves safety at highway-rail grade crossings, reduces incidences of rail-related trespassing, and upgrades infrastructure to achieve a higher level of safety.

(B) *Equitable economic strength and improving core assets.* DOT will assess the project's ability to contribute to economic progress stemming from infrastructure investment and associated creation of good jobs with fair wages, labor protections, and the opportunity to join a union. Such considerations will include, but are not limited to, the extent to which the project invests in vital infrastructure assets and provides opportunities for families to achieve economic security through rail industry employment.

(C) *Ensuring investments meet racial equity and economic inclusion goals.* DOT will assess the project's ability to encourage racial equity by investing in projects that proactively address racial equity and barriers to opportunities. Such considerations will include, but are not limited to, the extent to which the project improves or expands transportation options, mitigates the safety risks and detrimental quality of life effects that rail lines can have on communities, and expands workforce development and training opportunities to foster a more diverse rail industry.

(D) *Resilience and addressing climate change.* DOT will assess the project's ability to reduce the harmful effects of climate change and anticipate necessary improvements for preparedness. Such considerations will include, but are not limited to, the extent to which the project reduces emissions, promotes energy efficiency, increases resilience, and recycles or redevelops existing infrastructure.

(E) *Transformation of our nation's transportation infrastructure.* DOT will assess the project's ability to expand and improve the nation's rail network, which needs to balance new infrastructure for increased capacity with proper maintenance of aging assets. Such considerations will include, but are not limited to, the extent to which the project adds capacity to congested corridors, builds new connections or attracts new users to passenger rail, and ensures assets will be improved to a state of good repair.

iii. For NEC Projects, FRA will consider the appropriate sequence and phasing of projects as contained in the

Northeast Corridor capital investment plan developed pursuant to 49 U.S.C. 24904(a).

iv. In determining the allocation of program funds, FRA may also consider geographic diversity, diversity in the size of the systems receiving funding, and the applicant's receipt of other competitive awards.

2. Review and Selection Process

FRA will conduct a four-part application review process, as follows:

a. Screen applications for completeness, eligibility, and applicant risk and consider applicable past performance and previous financial contributions and technical evaluation ratings;

b. Evaluate eligible applications (completed by technical panels applying the evaluation criteria);

c. Review, apply selection criteria and recommend initial selection of projects for the FRA Administrator's review (completed by a non-career Senior Review Team, which includes senior leadership from the Office of the Secretary and FRA); and

d. Select recommended awards for the Secretary's review and approval (completed by the FRA Administrator.)

3. Reporting Matters Related to Integrity and Performance

Before making a Federal award with a total amount of Federal share greater than the simplified acquisition threshold of $250,000 (see 2 CFR 200.88 Simplified Acquisition Threshold), FRA will review and consider any information about the applicant that is in the designated integrity and performance system accessible through SAM (currently the Federal Awardee Performance and Integrity Information System (FAPIIS)). See 41 U.S.C. 2313.

An applicant, at its option, may review information in the designated integrity and performance systems accessible through SAM and comment on any information about itself that a Federal awarding agency previously entered and is currently in the designated integrity and performance system accessible through SAM.

FRA will consider any comments by the applicant, in addition to the other information, in making a judgment about the applicant's integrity, business ethics, and record of performance under Federal awards when completing the review of risk posed by applicants as described in 2 CFR 200.205.

E. Federal Award Administration Information

1. Federal Award Notice

FRA will announce applications selected for funding in a press release and on FRA's website after the application review period. This announcement is FRA's notification to successful and unsuccessful applicants alike. FRA will contact applicants with successful applications after announcement with information and instructions about the award process. This notification is not an authorization to begin proposed project activities. FRA requires satisfaction of applicable requirements by the applicant and a formal agreement signed by both the grantee and the FRA, including an approved scope, schedule, and budget, before obligating the grant. See an example of standard terms and conditions for FRA grant awards at *https://railroads.fra.dot.gov/elibrary/award-administration-and-grant-conditions.* This template is subject to revision.

2. Administrative and National Policy Requirements

In connection with any program or activity conducted with or benefiting from funds awarded under this notice, grantees of funds must comply with all applicable requirements of Federal law, including, without limitation, the Constitution of the United States; the conditions of performance, nondiscrimination requirements, and other assurances made applicable to the award of funds in accordance with regulations of DOT; and applicable Federal financial assistance and contracting principles promulgated by the Office of Management and Budget. In complying with these requirements, grantees, in particular, must ensure that no concession agreements are denied or other contracting decisions made on the basis of speech or other activities protected by the First Amendment. If DOT determines that a grantee has failed to comply with applicable Federal requirements, DOT may terminate the award of funds and disallow previously incurred costs, requiring the grantee to reimburse any expended award funds.

Examples of administrative and national policy requirements include: 2 CFR part 200; procurement standards at 2 CFR part 200 Subpart D—Procurement Standards; 2 CFR 1207.317 and 2 CFR 200.401; compliance with Federal civil rights laws and regulations; disadvantaged business enterprises requirements; debarment and suspension requirements; drug-free workplace requirements; FRA's and OMB's Assurances and Certifications; Americans with Disabilities Act; safety requirements; NEPA; environmental justice requirements; and compliance with 49 U.S.C. 24905(c)(2) for the duration of NEC Projects. Unless otherwise stated in statutory or legislative authority, or appropriations language, all financial assistance awards follow the Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards at 2 CFR part 200 and 2 CFR part 1201.

Assistance under this NOFO is subject to the grant conditions in 49 U.S.C. 22905 including the Buy America requirements, protective arrangements that are equivalent to the protective arrangements established under section 504 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 836) with respect to employees affected by actions taken in connection with the project to be financed in whole or in part by grants under this chapter, the provision deeming operators rail carriers and employers for certain purposes, and grantee agreements with railroad right-of-way owners for projects using railroad rights-of-way (see D.2.b.xi). More information about FRA's Buy America requirements is available at: *https://railroads.dot.gov/legislation-regulations/buy-america/buy-america.*

Grantees must comply with applicable appropriations act requirements and all relevant requirements of 2 CFR part 200. Rights to intangible property under grants awarded under this NOFO are governed in accordance with 2 CFR 200.315. See an example of standard terms and conditions for FRA grant awards at *https://railroads.fra.dot.gov/elibrary/award-administration-and-grant-conditions.* This template is subject to revision.

3. Reporting

a. Progress Reporting on Grant Activity

Each applicant selected for a grant will be required to comply with all standard FRA reporting requirements, including quarterly progress reports, quarterly Federal financial reports, and interim and final performance reports, as well as all applicable auditing, monitoring and close out requirements. Reports may be submitted electronically. Pursuant to 2 CFR 170.210, non-Federal entities applying under this NOFO must have the necessary processes and systems in place to comply with the reporting requirements should they receive Federal funding.

b. Additional Reporting

Applicants selected for funding are required to comply with all reporting requirements in the standard terms and conditions for FRA grant awards including 2 CFR 180.335 and 2 CFR 180.350.

If the Federal share of any Federal award under this NOFO may include more than $500,000 over the period of performance, applicants are informed of the post award reporting requirements reflected in 2 CFR part 200, Appendix XII—Award Term and Condition for Recipient Integrity and Performance Matters.

c. Performance Reporting

Each applicant selected for funding must collect information and report on the project's performance using measures mutually agreed upon by FRA and the grantee to assess progress in achieving strategic goals and objectives. Examples of some rail performance measures are listed in the table below. The applicable measure(s) will depend upon the type of project. Applicants requesting funding for rolling stock must integrate at least one equipment/rolling stock performance measure, consistent with the grantee's application materials and program goals.

Performance measure					
Rail measures	Unit measured	Temporal	Primary strategic goal	Secondary strategic goal	Description
Slow Order Miles	Miles	Annual	State of Good Repair.	Safety	The number of miles per year within the project area that have temporary speed restrictions ("slow orders") imposed due to track condition. This is an indicator of the overall condition of track. This measure can be used for projects to rehabilitate sections of a rail line since the rehabilitation should eliminate, or at least reduce the slow orders upon project completion.
Rail Track Grade Separation.	Count	Annual	Economic Competitiveness.	Safety	The number of annual automobile crossings that are eliminated at an at-grade crossing as a result of a new grade separation.
Passenger Counts.	Count	Annual	Economic Competitiveness.	State of Good Repair.	Count of the annual passenger boardings and alightings at stations within the project area.
Travel Time	Time/Trip.	Annual	Economic Competitiveness.	Quality of Life	Point-to-point travel times between pre-determined station stops within the project area. This measure demonstrates how track improvements and other upgrades improve operations on a rail line. It also helps make sure the railroad is maintaining the line after project completion.
Track Miles	Miles	One Time	State of Good Repair.	Economic Competitiveness.	The number of track miles that exist within the project area. This measure can be beneficial for projects building sidings or sections of additional main line track on a railroad.

d. Federal Awarding Agency Contacts

For further information related to this notice, please contact Mr. Bryan Rodda, Office of Policy and Planning, Federal Railroad Administration, 1200 New Jersey Avenue SE, Room W38–203, Washington, DC 20590; email: *Bryan.Rodda@dot.gov*; phone: 202–493–0443

e. Other Information

All information submitted as part of or in support of any application shall use publicly available data or data that can be made public and methodologies that are accepted by industry practice and standards, to the extent possible. If the application includes information the applicant considers to be a trade secret or confidential commercial or financial information, the applicant should do the following: (1) Note on the front cover that the submission "Contains Confidential Business Information (CBI)"; (2) mark each affected page "CBI"; and (3) highlight or otherwise denote the CBI portions.

The DOT regulations implementing the Freedom of Information Act (FOIA) are found at 49 CFR part 7 Subpart C—Availability of Reasonably Described Records under the Freedom of Information Act which sets forth rules for FRA to make requested materials, information, and records publicly available under FOIA. Unless prohibited by law and to the extent permitted under the FOIA, contents of application and proposals submitted by successful applicants may be released in response to FOIA requests. In addition, following the completion of the selection process and announcement of awards, FRA may publish a list of all applications received along with the names of the applicant organizations and funding amounts requested. Except for information withheld under the previous paragraph, FRA may also make application narratives publicly available or share application information within DOT or with other Federal agencies if FRA determines that sharing is relevant to the respective program's objectives.

Issued in Washington, DC.

Amitabha Bose,

Deputy Administrator.

[FR Doc. 2021–26457 Filed 12–6–21; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2009–0078]

Petition for Extension of Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on November 8, 2021, the American Short Line and Regional Railroad Association (ASLRRA) petitioned the Federal Railroad Administration (FRA) to extend a waiver of compliance from certain provisions of the Federal hours of service laws contained at 49 U.S.C. 21103(a)(4), which, in part, require a train employee to receive 48 hours off duty after initiating an on-duty period

for 6 consecutive days. The relevant FRA Docket Number is FRA–2009–0078.

Specifically, ASLRRA seeks to extend its existing waiver, stating that the waiver has not compromised safety. ASLRRA explains that it is not aware of any incidents attributable to fatigue during the effective period of the waiver on any of the participating railroads. ASLRRA further asserts that the relief has enabled participating railroads to serve their customers efficiently and for employees to enhance their wages. ASLRRA adds that during the current supply chain challenges, the relief allows for small business railroads to have flexibility in operations.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov.*

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted at *www.regulations.gov.* Follow the online instructions for submitting comments.

Communications received by January 21, 2022 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable. Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), the U.S. Department of Transportation (DOT) solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacy-notice* for the privacy notice of regulations.gov.

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety Chief Safety Officer.

[FR Doc. 2021–26424 Filed 12–6–21; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2021–0265]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: LA VIE DASANTE (Sail); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 6, 2022.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2021–0265 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2021–0265 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2021–0265, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: James Mead, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–459, Washington, DC 20590. Telephone 202–366–5723, Email *James.Mead@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel LA VIE DASANTE is:

—*Intended Commercial Use of Vessel:* ''Recreation.''

—*Geographic Region Including Base of Operations:* ''Florida'' (Base of Operations: Daytona Beach, FL)

—*Vessel Length and Type:* 44.8′ Sail

The complete application is available for review identified in the DOT docket as MARAD 2021–0265 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2021–0265 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

* * * * *

By Order of the Acting Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2021–26510 Filed 12–6–21; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2021–0262]

Request for Comments of a Previously Approved Information Collection: Maritime Administration Annual Service Obligation Compliance Report

AGENCY: Maritime Administration, DOT.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Request (ICR) abstracted below is being forwarded to the Office of Management and Budget (OMB) for review and comments. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following information collection was published on August 17, 2021.

DATES: Comments must be submitted on or before January 6, 2022.

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: Danielle Bennett, 202–366–7618, Office of Maritime Labor and Training, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–458, Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Title: Maritime Administration Annual Service Obligation Compliance Report.

OMB Control Number: 2133–0509.

Type of Request: Renewal of a Previously Approved Information Collection.

Abstract: 46 U.S.C. 51306 and 46 U.S.C. 51509 imposes a service obligation on every graduate of the U.S. Merchant Marine Academy and every State maritime academy Student Incentive Payment (SIP) program graduate. This mandatory service obligation is for the Federal financial assistance the graduate received as a student. The obligation consists of (1) maintaining a U.S. Coast Guard merchant mariner credentials with an officer endorsement; (2) serving as a commissioned officer in the U.S. Naval Reserve, the U.S. Coast Guard Reserve or any other reserve unit of an armed force of the United States following graduation from an academy (3) serving as a merchant marine officer on U.S.-flag vessels or as a commissioned officer on active duty in an armed or uniformed force of the United States, NOAA Corps, PHS Corps, or other MARAD approved service; and (4) report annually on their compliance with their service obligation after graduation.

Respondents: Graduates of the U.S. Merchant Marine Academy and State maritime academy Student Incentive Payment (SIP) program graduates.

Affected Public: Individuals and/or Households.

Estimated Number of Respondents: 2,100.

Total Estimated Number of Responses: 2,100.

Frequency of Collection: Annually.

Estimated Time per Respondent: 20 minutes.

Total Estimated Number of Annual Burden Hours: 700.

Public Comments Invited: Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department'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 collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

(Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.93)

By Order of the Acting Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2021–26506 Filed 12–6–21; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2021–0266]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: 2 AUSTINTATIOUS (Sail); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 6, 2022.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2021–0266 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2021–0266 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2021–0266 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: James Mead, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–459, Washington, DC 20590. Telephone 202–366–5723, Email *James.Mead@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel 2 AUSTINTATIOUS is:

—*Intended Commercial Use of Vessel:* ''Passenger for hire crewed charter. Up to 6 paying passengers. Conducting day and short-term crew charter.''

—*Geographic Region Including Base of Operations:* ''South Carolina, Florida, Georgia, Texas'' (Base of Operations: Key West, FL)

—*Vessel Length and Type:* 45′ Sail (Catamaran)

The complete application is available for review identified in the DOT docket as MARAD 2021–0266 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2021–0266 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

* * * * *

By Order of the Acting Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2021–26509 Filed 12–6–21; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2021–0263]

Request for Comments of a Previously Approved Information Collection: U.S. Merchant Marine Academy Candidate Application for Admission

AGENCY: Maritime Administration, DOT.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Request (ICR) abstracted below is being forwarded to the Office of Management and Budget (OMB) for review and comments. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following information collection was published on August 5, 2021.

DATES: Comments must be submitted on or before January 6, 2022.

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: Mike Bedryk, CDR USMS, Director of Admissions, 516.726.5641, U.S. Merchant Marine Academy, 300 Steamboat Road, New York, NY 11024, *www.usmma.edu/admissions.*

SUPPLEMENTARY INFORMATION:

Title: U.S. Merchant Marine Academy Candidate Application for Admission.

OMB Control Number: 2133–0010.

Type of Request: Renewal of a Previously Approved Information Collection.

Abstract: Regulations pertaining to the U.S. Merchant Marine Academy (USMMA) appeared in the **Federal Register** (Vol. 47, No. 98, p. 21811, dated May 20, 1982) as a final rule. Part 310.57(a) of 46 CFR provides for the collection of information from anyone who is a prospect for admission. It states that ''all candidates shall submit an application for admission to the Academy's Admissions Office.'' Thus, the collection of information through the use of a digital application is the primary means by which selections for admission are made. The information collection consists of Part I, the Academic Information Request, Candidate Activities Record, three School Official Evaluation and Biographical Essay and Candidate Fitness Assessment. Part I of the form is completed by individuals wishing to be admitted as students to the U.S. Merchant Marine Academy. The information from the Academic Information Request, Candidate Activities Record, School Official Evaluations and Biographical Essay is used by the USMMA admissions staff and its Candidate Evaluation Board to select the best qualified candidates for the Academy.

Respondents: Individuals desiring to become students at the U.S. Merchant Marine Academy.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 2,000.

Total Estimated Number of Responses: 2,000.

Frequency of Collection: Annually.

Estimated Times per Respondent: 5 hours.

Total Estimated Number of Annual Burden Hours: 10,000.

Public Comments Invited: Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department'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 collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

(Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.93)

* * * * *

By Order of the Acting Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2021–26507 Filed 12–6–21; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2021–0267]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: HOTEL CALIFORNIA (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 6, 2022.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2021–0267 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2021–0267 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2021–0267, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in

nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: James Mead, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–459, Washington, DC 20590. Telephone 202–366–5723, Email *James.Mead@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel HOTEL CALIFORNIA is:

—*Intended Commercial Use of Vessel:* ''Charter vessel for pleasure cruises.''
—*Geographic Region Including Base of Operations:* ''California, Oregon, and Washington'' (Base of Operations: Marina Del Rey, CA)
—*Vessel Length and Type:* 70′ Motor

The complete application is available for review identified in the DOT docket as MARAD 2021–0267 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2021–0267 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

* * * * *

By Order of the Acting Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2021–26511 Filed 12–6–21; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2021–0264]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: BRIE (Sail); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 6, 2022.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2021–0264 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2021–0264 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2021–0264, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in

nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: James Mead, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–459, Washington, DC 20590. Telephone 202–366–5723, Email *James.Mead@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel BRIE is:

—*Intended Commercial Use of Vessel:* ''Day charters, overnight trips, sailing lessons.''

—*Geographic Region Including Base of Operations:* ''Texas, Florida'' (Base of Operations: Kemah, TX)

—*Vessel Length and Type:* 45′ Sail (Catamaran)

The complete application is available for review identified in the DOT docket as MARAD 2021–0264 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2021–0264 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

* * * * *

By Order of the Acting Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2021–26508 Filed 12–6–21; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions.

AGENCY: Office of Foreign Assets Control, Department of the Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of persons whose property and interests in property have been unblocked and have been removed from the list of Specially Designated Nationals and Blocked Persons (SDN List). Additionally, OFAC is publishing an update to the identifying information of one person currently included on the list of Specially Designated Nationals and Blocked Persons.

DATES: See Supplementary Information section for effective date(s).

FOR FURTHER INFORMATION CONTACT: *OFAC:* Associate Director for Global Targeting, tel: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

On December 1, 2021, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are unblocked and they have been removed from the SDN List.

Individuals:

1. AGUDELO VELASQUEZ, Norberto Antonio (a.k.a. ''AMADO''), Guasca, Cundinamarca, Colombia; DOB 20 Aug 1955; POB Colombia; nationality Colombia; citizen Colombia; Cedula No. 4590874 (Colombia) (individual) [SDNTK].

2. AGUILAR RAMIREZ, Gerardo Antonio (a.k.a. ''CESAR''); DOB 20 Sep 1962; POB Colombia; Cedula No. 16148998 (Colombia); alt. Cedula No. 16447616 (Colombia) (individual) [SDNTK].

3. ALBAN BURBANO, Luis Alberto (a.k.a. ALBAN URBANO, Luis Alberto; a.k.a. CALARCA, Marco Leon; a.k.a. CALARCA, Marcos Leon); DOB 16 Aug 1957; POB Cali, Valle, Colombia; Cedula No. 16588328 (Colombia) (individual) [SDNTK].

4. ALCALA CORDONES, Cliver Antonio; DOB 21 Nov 1961; Cedula No. 6097211 (Venezuela); Major General of the Fourth Armored Division of the Venezuelan Army (individual) [SDNTK].

5. ALVIS PATINO, Gentil (a.k.a. LOPEZ, Angel Leopoldo; a.k.a. MARTINEZ VEGA, Juan Jose; a.k.a. PATINO ORTIZ, Alvis; a.k.a. ''CHIGUIRO''; a.k.a. ''GONZALEZ, Ruben''); DOB 04 Jun 1961; POB El Doncello, Caqueta, Colombia; Cedula No. 17669391 (Colombia); alt. Cedula No. 12059198 (Venezuela) (individual) [SDNTK].

6. BALLEN SOLANO, German, Bogota, Colombia; DOB 13 Sep 1958; citizen Colombia; Cedula No. 11254250 (Colombia) (individual) [SDNTK].

7. BOCOTA AGUABLANCA, Gustavo (a.k.a. BOGOTA, Gustavo; a.k.a. ''ESTEVAN''; a.k.a. ''TRIBISU''); DOB 28 Aug 1966; Cedula No. 9466199 (Colombia); alt. Cedula No. 9466833 (Colombia) (individual) [SDNTK].

8. BRICENO SUAREZ, German (a.k.a. SUAREZ ROJAS, Noe; a.k.a. ''GRANOBLES''); DOB 15 Dec 1953; Cedula No. 347943 (Colombia) (individual) [SDNTK].

9. CABANA GUILLEN, Sixto Antonio (a.k.a. ''BIOHO, Domingo''; a.k.a. ''BIOJA, Domingo''); DOB 15 Jun 1955; POB Orihueca Cienaga, Magdalena, Colombia; nationality Colombia; citizen Colombia; Cedula No. 19500634 (Colombia) (individual) [SDNTK].

10. CABRERA, Jose Benito (a.k.a. CABRERA CUEVAS, Jose Benito; a.k.a. ''EL MONO FABIAN''; a.k.a. ''FABIAN RAMIREZ''); DOB 06 Jul 1963; alt. DOB 05 Jul 1965; POB El Paujil, Caqueta, Colombia; Cedula No. 96329309 (Colombia) (individual) [SDNTK].

11. CABRERA DIAZ, Hermilo (a.k.a. CABRERA DIAZ, Ermilo; a.k.a. ''BERTULFO''); DOB 25 Nov 1941; POB Huila, Colombia; nationality Colombia; citizen Colombia; Cedula No. 9680080 (Colombia) (individual) [SDNTK].

12. CADENA COLLAZOS, Francisco Antonio (a.k.a. MEDINA, Oliverio; a.k.a. ''CURA CAMILO''; a.k.a. ''EL CURA''; a.k.a. ''HUESITO''; a.k.a. ''OLIVO''; a.k.a. ''PACHO''), Colombia; Brazil; DOB 01 Jan 1947; citizen Colombia; Cedula No. 4904771 (Colombia); International FARC Commission Member for Brazil (individual) [SDNTK].

13. CAICEDO COLORADO, Abelardo (a.k.a. ''SOLIS ALMEIDA''); DOB 03 Mar 1960; POB Mercaderes, Cauca, Colombia; nationality Colombia; citizen Colombia (individual) [SDNTK].

14. CALDERON DE TRUJILLO, Nubia (a.k.a. ''ESPERANZA''), Colombia; DOB 25 Mar 1956; citizen Colombia; Cedula No. 36159126 (Colombia); International FARC Commission Member for Ecuador (individual) [SDNTK].

15. CALDERON VELANDIA, Nilson (a.k.a. ''VILLA''), Colombia; DOB 18 Jul 1974; POB Mogotes, Santander, Colombia; nationality Colombia; citizen Colombia; Cedula No. 91348897 (Colombia); Passport AK040618 (Colombia) (individual) [SDNTK].

16. CAMACHO BERNAL, Jose Edilberto, Colombia; DOB 28 Feb 1954; POB Venecia, Cundinamarca, Colombia; nationality Colombia; citizen Colombia; Cedula No. 11374416 (Colombia); Passport AI222190 (Colombia) (individual) [SDNTK].

17. CAMACHO RINCON, Juan Manuel, c/o LULU COM, Bogota, Colombia; DOB 16 Feb 1980; citizen Colombia; Cedula No. 6107716 (Colombia) (individual) [SDNTK].

18. CAMARGO, Norbei (a.k.a. CAMARGO, Norbey; a.k.a. TRIANA, Hermer; a.k.a. ''JAMES PATAMALA''; a.k.a. ''JAMES PATAPALO''; a.k.a. ''MUERTA PARADO''); DOB 05 Aug 1965; POB El Paujil, Caqueta, Colombia; nationality Colombia; citizen Colombia; Cedula No. 17702895 (Colombia) (individual) [SDNTK].

19. CARACAS VIVEROS, Oscar (a.k.a. ''EL NEGRO OSCAR''); DOB 15 Nov 1967; POB Colombia; Cedula No. 96351739 (Colombia) (individual) [SDNTK].

20. CARVAJALINO, Jesus Emilio (a.k.a. ''PARIS, Andres''); DOB 15 Mar 1955; POB Bogota, Colombia; Cedula No. 3228737 (Colombia); Passport AC192015 (Colombia) (individual) [SDNTK].

21. CASTILLO RODRIGUEZ, Flor Nelsy, Bogota, Colombia; citizen Colombia; Cedula No. 38260687 (Colombia) (individual) [SDNTK].

22. CONDE RUBIO, Nancy (a.k.a. ''ALEXANDRA RUBIO SILVA''; a.k.a. ''DORIS ADRIANA''; a.k.a. ''LUZ DARY''; a.k.a. ''MARITZA''), Colombia; DOB 02 Sep 1972; alt. DOB 19 Nov 1973; POB Bogota, Colombia; nationality Colombia; citizen Colombia; Cedula No. 20645502 (Colombia) (individual) [SDNTK].

23. CORREDOR IBAGUE, Jose Maria (a.k.a. ''ANGEL ORTIZ''; a.k.a. ''BOYACO''; a.k.a. ''CARLOS ALBERTO HENAO''; a.k.a. ''CHEPE''; a.k.a. ''HECTOR JAIME SANCHEZ''; a.k.a. ''JOSE ADRIAN RODRIGUEZ BUITRAGO''; a.k.a. ''JOSE GILBERTO RODRIGUEZ PEREZ''; a.k.a. ''JOSE LEONEL''), Colombia; DOB 17 Dec 1966; POB Santana, Boyaca, Colombia; nationality Colombia; citizen Colombia; Cedula No. 4241983 (Colombia) (individual) [SDNTK].

24. CUESTA LEON, Josue (a.k.a. ''DON JULIO''; a.k.a. ''EL VIEJO''), Colombia; DOB 26 Jan 1970; POB Ubala, Cundinamarca, Colombia; nationality Colombia; citizen Colombia; Cedula No. 97610086 (Colombia) (individual) [SDNTK].

25. CUEVAS CABRERA, Erminso (a.k.a. ''MINCHO''); DOB 16 Sep 1960; POB El Paujil, Caqueta, Colombia; nationality Colombia; citizen Colombia; Cedula No. 96328518 (Colombia) (individual) [SDNTK].

26. CULMA SUNZ, Bladimir (a.k.a. CULMAN SANZ, Bladimir; a.k.a. ''VLADIMIR''), Colombia; DOB 23 Sep 1979; POB El Castillo, Meta, Colombia; nationality Colombia; citizen Colombia; Cedula No. 86068233 (Colombia) (individual) [SDNTK].

27. DAVALOS TORRES, Jorge, Colombia; DOB 14 Dec 1972; citizen Colombia; Cedula No. 94377215 (Colombia); International FARC Commission Member for Canada (individual) [SDNTK].

28. DEVIA SILVA, Luis Edgar (a.k.a. ''RAUL REYES''); DOB 30 Sep 1948; POB La Plata, Huila, Colombia; Cedula No. 14871281 (Colombia) (individual) [SDNTK].

29. DIAZ OREJUELA, Miguel Angel, c/o CAMBIOS EURO LTDA, Bogota, Colombia; c/o DIZRIVER Y CIA. S. EN C., Bogota, Colombia; DOB 15 May 1963; POB Bogota, Colombia; nationality Colombia; citizen Colombia; Cedula No. 17412428 (Colombia); Passport AI481119 (Colombia) (individual) [SDNTK].

30. FARFAN SUAREZ, Alexander (a.k.a. ''ENRIQUE GAFAS''), Colombia; DOB 12 Feb 1973; POB San Jose del Guaviare, Guaviare, Colombia; nationality Colombia; citizen Colombia; Cedula No. 86007030 (Colombia) (individual) [SDNTK].

31. FONNEGRA ESPEJO, Adolfo, Zurich, Switzerland; Madrid, Spain; DOB 13 Feb 1962; POB Bogota, Colombia; citizen Colombia; Cedula No. 19462357 (Colombia); Passport AN971133 (Colombia) issued 03 Sep 2012 expires 03 Sep 2022 (individual) [SDNTK] (Linked To: ADOLFO FONNEGRA ESPEJO TRADING & INVESTMENT).

32. GALLEGO RUBIO, Maribel (a.k.a. ''MARITZA''; a.k.a. ''MERY''), Colombia; DOB 09 Apr 1984; POB Acacias, Meta, Colombia; nationality Colombia; citizen Colombia; Cedula No. 30946062 (Colombia); Passport AJ834783 (Colombia) (individual) [SDNTK].

33. GARCIA ALBERT, Maria Remedios (a.k.a. ''IRENE''; a.k.a. ''SORAYA''), Spain; DOB 17 Feb 1951; POB Avila, Spain; D.N.I. 00263695–T (Spain); International FARC Commission Member for Spain (individual) [SDNTK].

34. GARCIA MOLINA, Gener (a.k.a. ''GUTIERREZ, Jhon''; a.k.a. ''HERNANDEZ, John''; a.k.a. ''JHON 40''; a.k.a. ''JOHN 40''; a.k.a. ''JOHNNY 40''); DOB 23 Aug 1963; POB San Martin, Meta, Colombia; Cedula No. 17353242 (Colombia) (individual) [SDNTK].

35. GONZALEZ ZAMORANO, Ivan, Zurich, Switzerland; DOB 19 Jul 1983; POB Cali, Colombia; citizen Colombia; Cedula No. 14621505 (Colombia) (individual) [SDNTK].

36. GRANDA ESCOBAR, Rodrigo (a.k.a. ''CAMPOS, Arturo''; a.k.a. ''GALLOPINTO''; a.k.a. ''GONZALEZ, Ricardo''), Avenida Victoria No. 36, Urbanizacion Bolivar La Victoria, Jose Felix Rivas, Estado de Aragua, Venezuela; DOB 09 Apr 1949; POB Frontino, Antioquia, Colombia; Cedula No. 171493523–4 (Ecuador); alt. Cedula No. 19104578 (Colombia); Passport PO16104 (Colombia); Electoral Registry No. 22942118 (Venezuela) (individual) [SDNTK].

37. GUTIERREZ LARA, Liliana Paola, Bogota, Colombia; DOB 16 May 1983; citizen Colombia; Cedula No. 65557064 (Colombia) (individual) [SDNTK].

38. GUTIERREZ LARA, Mario Alejandro, Bogota, Colombia; Cedula No. 93086968 (Colombia) (individual) [SDNTK].

39. GUTIERREZ VERGARA, Luz Mery, Colombia; DOB 26 Apr 1977; POB Ubala, Cundinamarca, Colombia; nationality Colombia; citizen Colombia; Cedula No. 40442724 (Colombia) (individual) [SDNTK].

40. JIMENEZ URREGO, Maria Mercedes, c/o NEGOCIAMOS MCM LTDA, Bogota, Colombia; DOB 16 Jul 1968; citizen Colombia; Cedula No. 51921171 (Colombia) (individual) [SDNTK].

41. JIMENEZ URREGO, Blanca Virginia; DOB 29 May 1960; citizen Colombia; Cedula No. 21030774 (Colombia) (individual) [SDNTK].

42. JURADO PALOMINO, Orlay (a.k.a. ''COMMANDER HERMES''; a.k.a. ''LIBARDO ANTONIO BENAVIDES MONCAYO''), Colombia; DOB 09 Feb 1950; citizen Colombia; Cedula No. 7245990 (Colombia); International FARC Commission Member for Venezuela (individual) [SDNTK].

43. JUVENAL VELANDIA, Jose (a.k.a. MUNOZ ORTIZ, Manuel Jesus; a.k.a. ''IVAN

RIOS''); DOB 19 Dec 1961; POB San Francisco, Putumayo, Colombia; Cedula No. 71613902 (Colombia) (individual) [SDNTK].

44. LEAL GARCIA, Ignacio (a.k.a. ''CAMILO''; a.k.a. ''TUERTO''); DOB 26 Jul 1969; nationality Colombia; citizen Colombia; Cedula No. 96186610 (Colombia) (individual) [SDNTK].

45. LESMES BULLA, Jairo Alfonso (a.k.a. CALDERON, Javier), Colombia; DOB 25 Mar 1947; citizen Colombia; Cedula No. 17164408 (Colombia); International FARC Commission Member for Argentina, Chile, Uruguay, and Paraguay (individual) [SDNTK].

46. LISANDRO LASCARRO, Jose (a.k.a. MUNOZ LASCARRO, Felix Antonio; a.k.a. ''PASTOR ALAPE''); DOB 04 Jun 1959; alt. DOB 1946; POB Puerto Berrio, Antioquia, Colombia; Cedula No. 71180715 (Colombia); alt. Cedula No. 3550075 (Colombia) (individual) [SDNTK].

47. LONDONO ECHEVERRY, Rodrigo (a.k.a. ''TIMOCHENKO''; a.k.a. ''TIMOLEON JIMENEZ''); DOB 22 Jan 1959; alt. DOB 01 Jan 1949; POB Calarca, Quindio, Colombia; Cedula No. 79149126 (Colombia) (individual) [SDNTK].

48. LOPEZ MENDEZ, Luis Eduardo (a.k.a. LOPEZ MENDEZ, Alfonso; a.k.a. ''EFREN ARBOLEDA''); nationality Colombia; citizen Colombia; Cedula No. 96329889 (Colombia) (individual) [SDNTK].

49. LOPEZ PALACIOS, Liliana (a.k.a. LUCIA MARIN, Olga), Colombia; DOB 21 Sep 1961; citizen Colombia; Cedula No. 51708175 (Colombia); International FARC Commission Member for Mexico (individual) [SDNTK].

50. MADRIZ MORENO, Ramon Isidro (a.k.a. ''AMIN''); DOB 04 Apr 1957; Cedula No. 6435192 (Venezuela); Officer, Venezuelan Intelligence Service—SEBIN (individual) [SDNTK].

51. MARIN, Pedro Antonio (a.k.a. MARIN MARIN, Pedro Antonio; a.k.a. ''MANUEL MARULANDA''; a.k.a. ''MANUEL MARULANDA VELEZ''; a.k.a. ''TIROFIJO''); DOB 13 May 1930; POB Genova, Quindio, Colombia; Cedula No. 4870142 (Colombia) (individual) [SDNTK].

52. MATA MATA, Noel (a.k.a. MATTA MATTA, Noel; a.k.a. ''EFRAIN GUZMAN''; a.k.a. ''EL CHUCHO''); DOB 31 Jan 1935; alt. DOB 30 Jan 1935; POB Chaparral, Tolima, Colombia; Cedula No. 4870352 (Colombia) (individual) [SDNTK].

53. MELO PERILLA, Jose Cayetano, c/o CARILLANCA COLOMBIA Y CIA S EN CS, Bogota, Colombia; c/o CARILLANCA S.A., San Jose, Costa Rica; c/o CARILLANCA C.A., Arismendi, Nueva Esparta, Venezuela; c/o PARQUEADERO DE LA 25–13, Bogota, Colombia; c/o AGROPECUARIA SAN CAYETANO DE COSTA RICA LTDA, San Jose, Costa Rica; c/o ARROCERA EL GAUCHO S.A., San Jose, Costa Rica; DOB 07 Nov 1957; POB Ibague, Tolima, Colombia; citizen Colombia; Cedula No. 5882964 (Colombia); Passport 5882964 (Colombia); Residency Number 003–5506420–0100028 (Costa Rica) (individual) [SDNTK].

54. MOLINA CARACAS, Tomas (a.k.a. CASTILLO CORTES, Miguel Angel; a.k.a. MEDINA CARACAS, Tomas; a.k.a. ''ARTURO GUEVARA''; a.k.a. ''EL PATRON'''; a.k.a. ''JORGE MEDINA''; a.k.a. ''NEGRO ACACIO''); DOB 15 Mar 1965; POB Lopez De Micay, Cauca, Colombia (individual) [SDNTK].

55. MOLINA GONZALEZ, Jose Epinemio (a.k.a. MOLINA GONZALEZ, Jose Epimenio; a.k.a. ''DANILO GARCIA''); DOB 18 Nov 1957; POB Icononzo, Tolima, Colombia; nationality Colombia; citizen Colombia; Cedula No. T.I. 57111–01681 (Colombia) (individual) [SDNTK].

56. MONTENEGRO VALLEJOS, Gilma, Colombia; DOB 17 Jul 1969; POB Bogota, Colombia; citizen Colombia (individual) [SDNTK].

57. MORALES LOAIZA, Edilma (a.k.a. ''CAROLINA''; a.k.a. ''GLADYS GOMEZ SOLANO''; a.k.a. ''MARIA OFELIA''; a.k.a. ''MARUCHA''), Colombia; DOB 29 Dec 1974; POB Lejanias, Meta, Colombia; nationality Colombia; citizen Colombia; Cedula No. 40356505 (Colombia) (individual) [SDNTK].

58. OLARTE LOMBANA, Alonso (a.k.a. GUZMAN FLOREZ, Reinel; a.k.a. ''LUIS EDUARDO MARIN''; a.k.a. ''RAFAEL GUTIERREZ''); DOB 07 Nov 1960; alt. DOB 11 Apr 1957; POB Bogota, Colombia; alt. POB Natagaima, Tolima, Colombia; nationality Colombia; citizen Colombia; Cedula No. 18260876 (Colombia) (individual) [SDNTK].

59. OSTAIZA AMAY, Edison Ariolfo, c/o MULTINACIONAL INTEGRAL PRODUCTIVA JOOAMY EMA, Quito, Pichincha, Ecuador; DOB 19 Jul 1975; citizen Ecuador; Cedula No. 1713602009 (Ecuador); Passport 1713602009 (Ecuador) (individual) [SDNTK].

60. OSTAIZA AMAY, Miguel Angel, Ecuador; DOB 08 Dec 1976; POB Ecuador; citizen Ecuador; Cedula No. 1713513834 (Ecuador); Passport 1713513834 (Ecuador) (individual) [SDNTK].

61. OSTAIZA AMAY, Jefferson Omar, c/o MULTINACIONAL INTEGRAL PRODUCTIVA JOOAMY EMA, Quito, Pichincha, Ecuador; DOB 16 Nov 1973; POB Santo Domingo, Ecuador; citizen Ecuador; Cedula No. 1712394947 (Ecuador); Passport 1712394947 (Ecuador) (individual) [SDNTK].

62. PASCUAS SANTOS, Miguel Angel (a.k.a. ''HUMBERTO''; a.k.a. ''SARGENTO PASCUAS''); DOB 28 Apr 1952; POB Tello, Huila, Colombia; nationality Colombia; citizen Colombia; Cedula No. 12160124 (Colombia) (individual) [SDNTK].

63. PAVA GIRALDO, Dora Lilia, c/o COMERCIALIZADORA COLOMBIAN MONEY EXCHANGE LTDA., Bogota, Colombia; DOB 22 Nov 1971; POB Colombia; nationality Colombia; citizen Colombia; Cedula No. 39771709 (Colombia) (individual) [SDNTK].

64. PENA AREVALO, Ana Isabel (a.k.a. ''DONA CHAVA''; a.k.a. ''DONA ELISA''; a.k.a. ''DONA ISA''; a.k.a. ''ISABELA''), Colombia; DOB 24 Aug 1962; POB Pacho, Cundinamarca, Colombia; nationality Colombia; citizen Colombia; Cedula No. 20794356 (Colombia) (individual) [SDNTK].

65. PENA PACHECO, Jose Vicente (Latin: PEÑA PACHECO, Jose Vicente) (a.k.a. PENA PACHECO, Jose Vincente), Zurich, Switzerland; DOB 19 Jul 1968; POB Necocli, Antioquia, Colombia; citizen Colombia; Cedula No. 8188270 (Colombia); alt. Cedula No. 84497137 (Venezuela); Passport AG219114 (Colombia); alt. Passport AJ593373 (Colombia) (individual) [SDNTK] (Linked To: COLOMBIANO LATIN SHOP GMBH).

66. PEREZ CORDOBA, Jose Maria, Bogota, Colombia; Cedula No. 93085488 (Colombia) (individual) [SDNTK].

67. PINEDA PALMERA, Juvenal Ovidio (a.k.a. PALMERA PINEDA, Juvenal Ovidio Ricardo; a.k.a. ''SIMON TRINIDAD''); DOB 30 Jul 1950; POB Bogota, Cundinamarca, Colombia; Cedula No. 12715418 (Colombia); alt. Cedula No. 12751418 (Colombia); alt. Cedula No. 12715416 (Colombia); Passport T757205 (Colombia); alt. Passport AC204175 (Colombia); alt. Passport AH182002 (Colombia) (individual) [SDNTK].

68. QUIMBAYO CABEZAS, Elsa, Bogota, Colombia; citizen Colombia; Cedula No. 65550166 (Colombia) (individual) [SDNTK].

69. RODRIGUEZ CHACIN, Ramon Emilio, Venezuela; DOB 25 Sep 1949; nationality Venezuela; Gender Male; Cedula No. 3169119 (Venezuela); Passport 045723759 (Venezuela); Former Minister of Interior and Justice of Venezuela (individual) [SDNTK].

70. RINCON MOLINA, Myriam, c/o CAMBIOS EL TREBOL, Bogota, Colombia; DOB 29 Jan 1959; POB Girardot, Cundinamarca, Colombia; nationality Colombia; citizen Colombia; Cedula No. 20622294 (Colombia); Passport AK739055 (Colombia) (individual) [SDNTK].

71. RINCON MOLINA, Jose Manuel, Bogota, Colombia; Cedula No. 11299940 (Colombia) (individual) [SDNTK].

72. RODRIGO VEGA, Vlaudin (a.k.a. ''CARLOS VLAUDIN''), Australia; DOB 03 Mar 1960; citizen Chile; Passport J1722726 (Chile); International FARC Commission Member for Australia (individual) [SDNTK].

73. RODRIGUEZ MENDIETA, Jorge Enrique (a.k.a. ''IVAN VARGAS''); DOB 15 Jan 1963; POB Giron, Santander, Colombia; nationality Colombia; citizen Colombia; Cedula No. 91223461 (Colombia) (individual) [SDNTK].

74. ROPERO SUAREZ, Emiro del Carmen (a.k.a. ''RUBEN ZAMORA''); DOB 02 Sep 1962; POB Municipio de Nueva Granada, Norte de Santander, Colombia; nationality Colombia; citizen Colombia; Cedula No. 13461523 (Colombia) (individual) [SDNTK].

75. RUEDA GIL, Camilo (a.k.a. ''EL PAISA''; a.k.a. ''EL PRIMO''; a.k.a. ''MUNECA''), Colombia; DOB 03 Aug 1969; POB Bogota, Colombia; nationality Colombia; citizen Colombia; Cedula No. 79499884 (Colombia); Passport AJ520060 (Colombia) (individual) [SDNTK].

76. SAENZ VARGAS, Guillermo Leon (a.k.a. ''ALFONSO CANO''); DOB 22 Jul 1948; POB Bogota, Cundinamarca, Colombia; Cedula No. 17122751 (Colombia) (individual) [SDNTK].

77. SALINAS PEREZ, Ovidio (a.k.a. ROJAS, Juan Antonio; a.k.a. ''EL EMBAJADOR''; a.k.a. ''JOSE LUIS''), Colombia; DOB 03 Jul 1945; citizen Colombia; Cedula No. 17125959 (Colombia); International FARC Commission Member for Panama (individual) [SDNTK].

78. SERPA DIAZ, Alvaro Alfonso (a.k.a. CERPA DIAZ, Alvaro Alfonso; a.k.a. CERPA DIAZ, Tiberio Antonio; a.k.a. SERPA DIAZ, Alvaro Enrique; a.k.a. ''FELIPE RINCON''); DOB 28 Mar 1959; alt. DOB 09 Oct 1956; POB San Jacinto, Bolivar, Colombia; alt. POB Cali,

Colombia; Cedula No. 6877656 (Colombia) (individual) [SDNTK].

79. SOLARTE CERON, Olidem Romel (a.k.a. SOLARTE CERON, Oliver), Colombia; DOB 05 Feb 1971; citizen Colombia; Cedula No. 18153797 (Colombia) (individual) [SDNTK].

80. SUAREZ ROJAS, Victor Julio (a.k.a. ''MONO JOJOY''; a.k.a. ''OSCAR RIANO''; a.k.a. ''SUAREZ, Luis''); DOB 01 Feb 1949; alt. DOB 02 Jan 1951; alt. DOB 05 Feb 1953; POB Cabrera, Cundinamarca, Colombia; Cedula No. 19208210 (Colombia); alt. Cedula No. 17708695 (Colombia) (individual) [SDNTK].

81. TONCEL REDONDO, Milton De Jesus (a.k.a. ''EL NEGRO''; a.k.a. ''JOAQUIN GOMEZ''; a.k.a. ''ORO CHURCO''; a.k.a. ''USURRIAGA''); DOB 18 Mar 1947; alt. DOB Feb 1949; POB Barrancas, La Guajira, Colombia; alt. POB Ubita, Boyaca, Colombia; Cedula No. 15237742 (Colombia) (individual) [SDNTK].

82. TORRES, Ana Leonor (a.k.a. ''CATA''; a.k.a. ''CATALINA''; a.k.a. ''JULIANA''; a.k.a. ''MARIA''), Colombia; DOB 05 Sep 1961; POB Puerto Lopez, Meta, Colombia; nationality Colombia; citizen Colombia; Cedula No. 21243624 (Colombia) (individual) [SDNTK].

83. TORRES CUETER, Guillermo Enrique (a.k.a. ''JULIAN CONRADO''); DOB 17 Aug 1954; POB Turbaco, Bolivar, Colombia; nationality Colombia; citizen Colombia; Cedula No. 9281858 (Colombia) (individual) [SDNTK].

84. TORRES VICTORIA, Jorge (a.k.a. ''PABLO CATATUMBO''); DOB 19 Mar 1953; POB Cali, Valle, Colombia; Cedula No. 14990220 (Colombia) (individual) [SDNTK].

85. TOVAR PARRA, Ferney (a.k.a. ''DIEGO''; a.k.a. ''FERCHO''); DOB 17 Nov 1966; POB Cartagena del Chaira, Caqueta, Colombia; Cedula No. 17640605 (Colombia) (individual) [SDNTK].

86. TRASLAVINA BENAVIDES, Erasmo (a.k.a. ''ISMARDO MURCIA LOZADA''; a.k.a. ''ISNARDO MURCIA LOZADA''; a.k.a. ''JIMMY GUERRERO''); DOB 19 Jun 1958; POB Guacamayo, Santander, Colombia; nationality Colombia; citizen Colombia; Cedula No. 13642033 (Colombia) (individual) [SDNTK].

87. TREJO FREIRE, Efrain Pablo (a.k.a. TREJOS FREYRE, Pablo), Colombia; DOB 07 Jun 1951; citizen Colombia; Cedula No. 13004986 (Colombia); International FARC Commission Member for Peru (individual) [SDNTK].

88. VARGAS ALBA, Cesar Augusto, c/o COMERCIALIZADORA COLOMBIAN MONEY EXCHANGE LTDA., Bogota, Colombia; DOB 27 Aug 1969; POB Colombia; nationality Colombia; citizen Colombia; Cedula No. 79578481 (Colombia); Passport AI980101 (Colombia) (individual) [SDNTK].

89. VARGAS ALBA, Jorge Leandro (a.k.a. ''EL CANOSO''), c/o COMERCIALIZADORA COLOMBIAN MONEY EXCHANGE LTDA., Bogota, Colombia; DOB 17 Jan 1968; POB Colombia; nationality Colombia; citizen Colombia; Cedula No. 17642230 (Colombia); Passport AI263725 (Colombia) (individual) [SDNTK].

90. VARGAS ARIAS, Jorge Eliecer, c/o COMERCIALIZADORA COLOMBIAN MONEY EXCHANGE LTDA., Bogota, Colombia; Calle 165 No. 25–65 Apartamento 503, Bogota, Colombia; DOB 22 Nov 1952; POB Colombia; nationality Colombia; citizen Colombia; Cedula No. 4894606 (Colombia); Passport 4894606 (Colombia) (individual) [SDNTK].

91. VARGAS PERDOMO, Eugenio (a.k.a. DORNELES DE MENEZES, Francisco; a.k.a. ''CARLOS BOLAS''); DOB 19 Nov 1969; POB Puerto Lopez, Meta, Colombia; Cedula No. 17344616 (Colombia) (individual) [SDNTK].

92. ZABALA PADILLA, Omar Arturo (a.k.a. ZABALA PADILLA, Omar Enrique; a.k.a. ''LUCAS GUALDRON''), Colombia; DOB 11 Jul 1969; POB Bucaramanga, Colombia; nationality Colombia; Cedula No. 91267294 (Colombia); International FARC Commission Member for France, Italy, and Switzerland (individual) [SDNTK].

Entities:

1. ADOLFO FONNEGRA ESPEJO TRADING & INVESTMENT, Badenerstrasse 791, Zurich 8048, Switzerland; Commercial Registry Number CH–020.1.066.499–9 (Switzerland); Company Number CHE–427.006.032 (Switzerland) [SDNTK].

2. AGROPECUARIA SAN CAYETANO DE COSTA RICA LTDA, Centro Comercial El Lago, San Rafael de Escazu, San Jose, Costa Rica; Commercial Registry Number CJ 3–102–285524 (Costa Rica) [SDNTK].

3. ARROCERA EL GAUCHO S.A., De la Embajada de Estados Unidos, 300 metros Norte, 25 metros Este, Rohrmoser, San Jose, Costa Rica; Commercial Registry Number CJ 3101304888 (Costa Rica) [SDNTK].

4. CAMBIOS EL TREBOL, Avenida Calle 26 No 69C–03 Local 214, Bogota, Colombia; Commercial Registry Number 1404087 (Colombia) [SDNTK].

5. CAMBIOS EURO LTDA, Carrera 7 No. 115–60 Local F–109, Bogota, Colombia; NIT # 830102482–6 (Colombia) [SDNTK].

6. CARILLANCA C.A., Arismendi, Nueva Esparta, Venezuela; Registration ID 80081030 (Venezuela) [SDNTK].

7. CARILLANCA COLOMBIA Y CIA S EN CS (f.k.a. AGROPECUARIA SAN CAYETANO S EN CS), Calle 100 No. 60–04, Ofc. 504, Bogota, Colombia; NIT # 800241061–5 (Colombia) [SDNTK].

8. CARILLANCA S.A., De la Iglesia Catolica de Parasito de Moravia, 650 metros al Este, San Jose, Costa Rica; Registration ID CJ 3101104500 (Costa Rica) [SDNTK].

9. COLOMBIANO LATIN SHOP GMBH, Dienerstrasse 72, Zurich 8004, Switzerland; Commercial Registry Number CH–020.4.053.829–6 (Switzerland); Company Number CHE–336.114.192 (Switzerland) [SDNTK].

10. COMERCIALIZADORA COLOMBIAN MONEY EXCHANGE LTDA., Avenida 40 No. 26C–10 Local 304, Villavicencio, Colombia; Calle 82 No. 11–75 Local 164, Bogota, Colombia; Carrera 15 No. 90–36 Local 101, Bogota, Colombia; NIT # 830090469–6 (Colombia) [SDNTK].

11. COMUNICACIONES UNIDAS DE COLOMBIA LTDA (f.k.a. RADIO COMUNICACIONES SUR DEL GUAVIARE LTDA), Calle 38 No. 33–72 Oficina 202, Villavicencio, Colombia; NIT # 822000712–8 (Colombia) [SDNTK].

12. DIZRIVER Y CIA. S. EN C., Carrera 68B No. 78–24 Unidad 23 Interior 5 Apartamento 402, Bogota, Colombia; NIT # 900013642–1 (Colombia) [SDNTK].

13. EXCHANGE CENTER LTDA, Avenida Carrera 19 No. 122–49 Local 13, Bogota, Colombia; Calle 183 No 45–03 Local 328, Bogota, Colombia; NIT # 830003608–2 (Colombia) [SDNTK].

14. INVERSIONES GRANDA RESTREPO Y CIA S.C.S. (a.k.a. INGRANRES), Carrera 4 No. 24–37 Trr. B Apto. 202, Bogota, Colombia; NIT # 830002677–6 (Colombia) [SDNTK].

15. LA MONEDITA DE ORO LTDA, Carrera 7 No. 115–60 Local C227, Bogota, Colombia; NIT # 800149502–9 (Colombia) [SDNTK].

16. LULU COM, Carrera 100 No. 221–12, Bogota, Colombia; Matricula Mercantil No 1783623 (Colombia) [SDNTK].

17. MULTINACIONAL INTEGRAL PRODUCTIVA JOOAMY EMA, Avenida Amazonas 40–80 y Union Nacional De Periodistas, Edificio Puertas del Sol, Piso 6, Quito, Pichincha, Ecuador; RUC # 1792068347001 (Ecuador) [SDNTK].

18. NEGOCIAMOS MCM LTDA, Avenida Calle 26 No. 69C–03, Local 214, Bogota, Colombia; NIT # 830105059–7 (Colombia) [SDNTK].

19. PARQUEADERO DE LA 25–13, Bogota, Colombia; Matricula Mercantil No 1362098 (Colombia); alt. Matricula Mercantil No 1362093 (Colombia) [SDNTK].

20. REVOLUTIONARY ARMED FORCES OF COLOMBIA (a.k.a. FARC; a.k.a. FUERZAS ARMADAS REVOLUCIONARIAS DE COLOMBIA) [SDNTK] [FTO] [SDGT].

Additionally, on December 1, 2021, OFAC updated the SDN List for the following person, whose property and interests in property continue to be blocked under the relevant sanctions authority listed below.

1. BERNAL ROSALES, Freddy Alirio, Caracas, Capital District, Venezuela; DOB 16 Jun 1962; POB San Cristobal, Tachira State, Venezuela; Gender Male; Cedula No. 5665018 (Venezuela); Passport B0500324 (Venezuela); Venezuela's Minister of Urban Agriculture (individual) [SDNTK] [VENEZUELA].

The listing for this previously designated person now appears as follows:

1. BERNAL ROSALES, Freddy Alirio, Caracas, Capital District, Venezuela; DOB 16 Jun 1962; POB San Cristobal, Tachira State, Venezuela; Gender Male; Cedula No. 5665018 (Venezuela); Passport B0500324 (Venezuela); Venezuela's Minister of Urban Agriculture (individual) [VENEZUELA].

Dated: December 1, 2021.

Gregory T. Gatjanis,

Associate Director, Office of Global Targeting, Office of Foreign Assets Control.

[FR Doc. 2021–26484 Filed 12–6–21; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See Supplementary Information section for applicable date(s).

FOR FURTHER INFORMATION CONTACT:

OFAC: Andrea Gacki, Director, tel.: 202–622–2480; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*www.treasury.gov/ofac*).

Notice of OFAC Actions

On December 1, 2021, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

Individuals

1. CARVAJAL BARRIOS, Hugo Armando, Spain; DOB 01 Apr 1960; POB Puerto La Cruz, Venezuela; nationality Venezuela; Gender Male; Cedula No. 8.352.301 (Venezuela) (individual) [VENEZUELA].

Designated pursuant to section 1(a)(ii)(C) of Executive Order 13692 of March 8, 2015, ''Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela'' (''E.O. 13692''), as amended by Executive Order 13857 of January 25, 2019, ''Taking Additional Steps To Address the National Emergency With Respect to Venezuela'' (''E.O. 13857''), for being a current or former official of the Government of Venezuela.

2. FIGUEROA SALAZAR, Amilcar Jesus (a.k.a. ''TINO''), Venezuela; DOB 10 Jul 1954; nationality Venezuela; Gender Male; Cedula No. 3946770 (Venezuela); Passport 31–2006 (Venezuela) (individual) [VENEZUELA].

Designated pursuant to section 1(a)(ii)(C) of E.O. 13692, as amended by E.O. 13857, for being a current or former official of the Government of Venezuela.

3. RANGEL SILVA, Henry de Jesus, Trujillo, Venezuela; DOB 28 Aug 1961; nationality Venezuela; Gender Male; Cedula No. 5.764.952 (Venezuela) (individual) [VENEZUELA].

Designated pursuant to section 1(a)(ii)(C) of E.O. 13692, as amended by E.O. 13857, for being a current or former official of the Government of Venezuela.

Dated: December 1, 2021.

Bradley T. Smith,

Acting Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2021–26512 Filed 12–6–21; 8:45 am]

BILLING CODE 4810–AL–P

FEDERAL REGISTER

Vol. 86 Tuesday,

No. 232 December 7, 2021

Part II

Department of Defense

Department of the Army, Corps of Engineers

33 CFR Part 328

Environmental Protection Agency

40 CFR Part 120

Revised Definition of ''Waters of the United States''; Proposed Rule

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 120

[EPA–HQ–OW–2021–0602; FRL–6027.4–03–OW]

Revised Definition of ''Waters of the United States''

AGENCY: Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) and the Department of the Army (''the agencies'') are publishing for public comment a proposed rule defining the scope of waters protected under the Clean Water Act. This proposal is consistent with the Executive Order signed on January 20, 2021, on ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,'' which directed the agencies to review the agencies' rule promulgated in 2020 defining ''waters of the United States.'' This proposed rule would meet the objective of the Clean Water Act and ensure critical protections for the nation's vital water resources, which support public health, environmental protection, agricultural activity, and economic growth across the United States.

DATES: Comments must be received on or before February 7, 2022. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information on the public hearing.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OW–2021–0602, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: OW-Docket@epa.gov.* Include Docket ID No. EPA–HQ–OW–2021–0602 in the subject line of the message.

Instructions: All submissions received must include Docket ID No. EPA–HQ–OW–2021–0602. Comments received may 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 ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are open to the public by appointment only to reduce the risk of transmitting COVID–19. Our Docket Center staff also continues to provide remote customer service via email, phone, and webform. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Damaris Christensen, Oceans, Wetlands and Communities Division, Office of Water (4504–T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 564–2281; email address: *CWAwotus@epa.gov,* and Stacey Jensen, Office of the Assistant Secretary of the Army for Civil Works, Department of the Army, 108 Army Pentagon, Washington, DC 20310–0104; telephone number: (703) 459–6026; email address: *usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@mail.mil.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Executive Summary
II. Public Participation
  A. Written Comments
  B. Virtual Public Hearings
III. General Information
  A. What action are the agencies taking?
  B. What is the agencies' authority for taking this action?
  C. What are the incremental costs and benefits of this action?
IV. Background
  A. Legal Background
  B. The Agencies' Post-Rapanos Rules
  C. Summary of Stakeholder Outreach
V. Proposed Revised Definition
  A. Basis for Proposed Rule
  B. Concerns With Alternatives
  C. Proposed Rule
  D. Implementation of Proposed Rule
  E. Publicly Available Jurisdictional Information and Permit Data
  F. Placement of the Definition of ''Waters of the United States'' in the Code of Federal Regulations
VI. Summary of Supporting Analyses
VII. Statutory and Executive Order Reviews
  A. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563: Improving Regulation and Regulatory Review
  B. Paperwork Reduction Act (PRA)
  C. Regulatory Flexibility Act (RFA)
  D. Unfunded Mandates Reform Act (UMRA)
  E. Executive Order 13132: Federalism
  F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
  G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
  H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
  I. National Technology Transfer and Advancement Act
  J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

I. Executive Summary

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Public Law 92–500, 86 Stat. 816, as amended, 33 U.S.C. 1251 *et seq.* (Clean Water Act or Act) ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' 33 U.S.C. 1251(a). In doing so, Congress performed a ''total restructuring'' and ''complete rewriting'' of the existing statutory framework, seeking to better protect the quality of the nation's waters. *City of Milwaukee* v. *Illinois,* 451 U.S. 304, 317 (1981). Congress thus intended the 1972 Act to be a bold step forward in providing protections for the nation's waters.

Central to the framework and protections provided by the Clean Water Act is the term ''navigable waters,'' [1] defined in the Act as ''the waters of the United States, including the territorial seas.'' 33 U.S.C. 1362(7). This term establishes the extent of most federal programs to protect water quality under the Act—including, for example, water quality standards, impaired waters and total maximum daily loads, oil spill prevention, preparedness and response programs, state and tribal water quality certification programs, and dredged and fill programs—because such programs apply only to ''waters of the United States.''

As the Supreme Court presciently noted decades ago, defining this term requires the EPA and the U.S. Department of the Army (Army) (together, ''the agencies'') to ''choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: The transition from water to solid

[1] To avoid confusion between the term ''navigable waters'' as defined in the Clean Water Act and its implementing regulations, 33 U.S.C. 1362(7); 33 CFR 328.3 (2014), and the traditional use of the term ''navigable waters'' to describe waters that are, have been, or could be used for interstate or foreign commerce, 33 CFR 328.3(a)(1) (2014), this preamble will refer to the latter as ''traditional navigable waters'' or waters that are ''navigable-in-fact.''

ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious.'' *United States* v. *Riverside Bayview Homes,* 474 U.S. 121, 132 (1985) (''*Riverside Bayview*'').[2]

In the nearly five decades since the Clean Water Act was enacted, the agencies have undertaken the challenge of developing and implementing a durable definition of the term ''waters of the United States'' that draws the line on the *Riverside Bayview* ''continuum'' consistent with the objective of the Act—to restore and maintain the chemical, physical, and biological integrity of the nation's waters—based on science, and refined over the years by extensive experience in implementing the definition in the field. In 2020, however, the agencies issued a rule, called the ''Navigable Waters Protection Rule'' (NWPR), which substantially departed from prior rules defining ''waters of the United States.'' The earlier rules had been based on scientific concepts, implementation experience, and consideration of how the water quality implications of the definitions would advance the Clean Water Act's statutory objective. While the NWPR's interpretation of the statute and case law overlaps in some respects with those prior regulations—for example, its understanding that the statute authorizes the agencies to regulate waters beyond those that are navigable-in-fact—it departed from prior regulations by diminishing the appropriate role of science and Congress's objective in the Clean Water Act. The NWPR provided less protection and could have allowed far more impacts to the nation's waters than any rule that preceded it.

In response to President Joseph R. Biden Jr.'s Executive Order 13990, 86 FR 7037 (January 25, 2021), which directed federal agencies to review certain regulations, EPA and the Army undertook a review of the NWPR. The agencies found that the NWPR did not appropriately consider the water quality impacts of its approach to defining ''waters of the United States,'' in contravention of Congress's objective in the Clean Water Act ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'' and that the rule's reduction in the scope of protected waters could have a potentially extensive and adverse impact on the nation's waters. The agencies' ongoing analyses of waters that fall outside of the Act's protections because of the NWPR support these findings.

Following a federal district court decision vacating the NWPR on August 30, 2021, the agencies halted implementation of the NWPR and began interpreting ''waters of the United States'' consistent with the pre-2015 regulatory regime.[3] [4] Though EPA and the U.S. Army Corps of Engineers (Corps) are not currently implementing the NWPR, the agencies are aware that further developments in litigation over the rule could bring the rule back into effect. For these reasons, among others discussed more fully below, the agencies have decided that prompt replacement of the NWPR through the administrative rulemaking process is vital.

In order to ensure necessary federal protections for the nation's waters, the agencies are proposing to exercise their discretion under the statute to return generally to the familiar pre-2015 definition that has bounded the Act's protections for decades, has been codified multiple times, and has been implemented by every Administration for the last 35 years, from that of Ronald Reagan through Donald Trump, which re-promulgated the pre-2015 regulations. *See In re EPA & Dep't of Def. Final Rule,* 803 F.3d 804, 808 (6th Cir. 2015). The pre-2015 regulations were largely in place for both agencies in 1986 and are thus commonly referred to as ''the 1986 regulations.'' [5]

In this proposed rule the agencies are exercising their discretionary authority to interpret ''waters of the United States'' to mean the waters defined by the longstanding 1986 regulations, with amendments to certain parts of those rules to reflect the agencies' interpretation of the statutory limits on the scope of the ''waters of the United States'' and informed by Supreme Court case law. Thus, in the proposed rule, the agencies interpret the term ''waters of the United States'' to include: Traditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands; most impoundments of ''waters of the United States''; tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments that meet either the relatively permanent standard or the significant nexus standard; wetlands adjacent to impoundments and tributaries, that meet either the relatively permanent standard or the significant nexus standard; and ''other waters'' that meet either the relatively permanent standard or the significant nexus standard. The ''relatively permanent standard'' means waters that are relatively permanent, standing or continuously flowing and waters with a continuous surface connection to such waters. The ''significant nexus standard'' means waters that either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas (the ''foundational waters''). With these amendments to the 1986 regulations, the proposed rule is within the proper scope of the agencies' statutory authority and would restore and maintain the chemical, physical, and biological integrity of the nation's waters.

The proposed rule advances the Clean Water Act's statutory objective as it is based on the best available science concerning the functions provided by upstream tributaries, adjacent wetlands, and ''other waters'' to restore and maintain the water quality of downstream foundational waters. By contrast, the agencies conclude that the NWPR, which this proposed rule would replace, and which found jurisdiction primarily under the relatively permanent standard, established a test for jurisdiction that did not adequately address the impacts of degradation of upstream waters on downstream waters, including traditional navigable waters, and was therefore incompatible with the objective of the Clean Water Act. While

[2] The Supreme Court has twice more addressed the issue of Clean Water Act jurisdiction over ''waters of the United States.'' *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) (''*SWANCC*''); *Rapanos* v. *United States,* 547 U.S. 715 (2006) (''*Rapanos*'').

[3] *See Pascua Yaqui Tribe* v. *EPA,* No. 20–00266 (D. Ariz. Aug. 30, 2021); U.S. EPA, *Current Implementation of Waters of the United States, https://www.epa.gov/wotus/current-implementation-waters-united-states.*

[4] The ''pre-2015 regulatory regime'' refers to the agencies' pre-2015 definition of ''waters of the United States,'' implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.

[5] EPA and the Corps have separate regulations defining the statutory term ''waters of the United States,'' but their interpretations were substantially similar and remained largely unchanged between 1977 and 2015. *See, e.g.,* 42 FR 37122, 37144 (July 19, 1977); 44 FR 32854, 32901 (June 7, 1979). For convenience, the agencies in this preamble will generally cite the Corps' longstanding regulations and will refer to them as ''the 1986 regulations,'' ''the pre-2015 regulations,'' or ''the regulations in place until 2015'' as inclusive of EPA's comparable regulations that were recodified in 1988 and of the exclusion for prior converted cropland both agencies added in 1993.

the ''more absolute position'' taken by the NWPR ''may be easier to administer,'' it has ''consequences that are inconsistent with major congressional objectives, as revealed by the statute's language, structure, and purposes.'' *County of Maui, Hawaii* v. *Hawaii Wildlife Fund,* 140 S. Ct. 1462, 1477 (2020).

In developing the proposed rule, the agencies also considered the statute as a whole, the scientific record, relevant Supreme Court case law, and the agencies' experience and expertise after more than 30 years of implementing the 1986 regulations defining ''waters of the United States,'' including more than a decade of experience implementing those regulations consistent with the Supreme Court's decisions in *Riverside Bayview, SWANCC,* and *Rapanos.* The agencies' interpretation also reflects consideration of the statute as a whole, including section 101(b), which states that ''it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.'' 33 U.S.C. 1251(b). The proposed rule's limits appropriately draw the boundary of waters subject to federal protection by ensuring that where upstream waters significantly affect the integrity of waters and the federal interest is indisputable—the traditional navigable waters, interstate waters, and territorial seas—Clean Water Act programs would apply to ensure that those downstream waters are protected. And where they do not, the agencies would leave regulation to the states and tribes. The proposed rule's relatively permanent and significant nexus limitations are thus based on the agencies' conclusion that together, those standards are consistent with the statutory text, advance the objective of the Act, are supported by the scientific record and Supreme Court case law, and appropriately consider the policies of the Act. In addition, because the proposed rule reflects consideration of the agencies' experience and expertise, as well as updates in implementation tools and resources, it is familiar and implementable.

While there are case-specific determinations that would need to be made under this proposed rule, that was also true under the NWPR and many other regulatory regimes where agencies must balance competing factors. The agencies, moreover, believe that a return to the pre-2015 definition would provide a known and familiar framework for co-regulators and stakeholders. In addition, the clarifications proposed here and the intervening advancements in implementation resources, tools, and scientific support (*see* section V.D.3.d of this preamble) would address some of the concerns raised in the past about timeliness and consistency of jurisdictional determinations under this regulatory regime.

Through this rulemaking process, the agencies will consider all public comments on the proposed rule including changes that improve clarity, implementability, and long-term durability of the definition. The agencies will also consider changes through a second rulemaking that they anticipate proposing in the future, which would build upon the foundation of this proposed rule.

II. Public Participation

A. Written Comments

Submit your comments, identified by Docket ID No. EPA–HQ–OW–2021–0602, at *https://www.regulations.gov* (our preferred method), or via the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. EPA and the Army may publish any comment received to the public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA and the Army 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.*

Due to public health concerns related to COVID–19, the EPA Docket Center and Reading Room are open to the public by appointment only. Our Docket Center staff also continue to provide remote customer service via email, phone, and webform. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

EPA and the Army continue to carefully monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our federal partners so that we can respond rapidly as conditions change regarding COVID–19.

B. Virtual Public Hearings

Please note that because of current CDC recommendations, as well as state and local orders for social distancing to limit the spread of COVID–19, EPA and the Army cannot hold in-person public meetings at this time. The agencies are hosting virtual public hearings on Wednesday, January 12, 2022 from 10 a.m. to 1 p.m. Eastern Time; on Thursday, January 13, 2022 from 2 p.m. to 5 p.m. Eastern Time; and on Tuesday, January 18, 2022 from 5 p.m. to 8 p.m. Eastern Time.

EPA and the Army will begin pre-registering speakers for the hearing upon publication of this document in the **Federal Register**. To register to speak at a specific session of the virtual hearing, please use the online registration forms available at:

1. Wednesday, January 12, 2022—*https://www.eventbrite.com/e/us-epa-and-department-of-the-army-wotus-public-hearing-tickets-211244667487.*
2. Thursday, January 13, 2022—*https://www.eventbrite.com/e/us-epa-and-department-of-the-army-wotus-public-hearing-tickets-211258017417.*
3. Tuesday, January 18, 2022—*https://www.eventbrite.com/e/us-epa-and-department-of-the-army-wotus-public-hearing-tickets-211274536827.*

The last day to pre-register to speak at each session will be, respectively, Friday, January 7, 2022; Monday, January 10, 2022; and Thursday, January 13, 2022. A day before each scheduled session, EPA and the Army will post a general agenda for the hearing that will list pre-registered speakers in approximate order at *https://www.epa.gov/wotus/public-outreach-and-stakeholder-engagement-activities.* People may also register to listen to the public sessions at the registration links above.

To allow more time for speakers, the agencies may prerecord a video introduction and overview of the rule, which will be available on the EPA website above for viewing before the public hearings. EPA and the Army will make every effort to follow the schedule as closely as possible on the day of the hearing, but it is possible that the hearings will run either ahead of schedule or behind schedule.

Each commenter will have three (3) minutes to provide oral testimony. EPA and the Army encourage commenters to

provide the agencies with a copy of their oral testimony electronically by emailing it to *CWAwotus@epa.gov.* EPA and the Army also recommend submitting the text of your oral comments as written comments to the rulemaking docket.

The agencies may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at *https://www.epa.gov/wotus/public-outreach-and-stakeholder-engagement-activities.* While the agencies expect the hearing to go forward as set forth above, please monitor our website or contact *CWAwotus@epa.gov* to determine if there are any updates. EPA and the Army do not intend to publish a document in the **Federal Register** announcing updates.

If you require the services of a translator or special accommodations such as audio description, please pre-register for the hearing with *CWAwotus@epa.gov* and describe your needs a week in advance of each session—respectively, by Wednesday, January 5, 2022; Thursday, January 6, 2022; and Tuesday, January 11, 2022. EPA and the Army may not be able to arrange accommodations without advanced notice.

III. General Information

A. What action are the agencies taking?

In this action, the agencies are publishing a proposed rule defining ''waters of the United States'' in 33 CFR 328.3 and 40 CFR 120.2.

B. What is the agencies' authority for taking this action?

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.,* including sections 301, 304, 311, 401, 402, 404, and 501.

C. What are the incremental costs and benefits of this action?

Because the agencies are not currently implementing the NWPR, the proposed rule would provide protections that are generally comparable to current practice; as such, the agencies find that there would be no appreciable cost or benefit difference. Potential costs and benefits would be incurred as a result of actions taken under existing Clean Water Act programs (*i.e.,* sections 303, 311, 401, 402, and 404) that implement and follow this proposed rule. Entities currently are, and would continue to be, regulated under these programs that protect ''waters of the United States'' under the Clean Water Act.

The agencies prepared the Economic Analysis for the Proposed ''Revised Definition of 'Waters of the United States' '' Rule (''Economic Analysis for the Proposed Rule''), available in the rulemaking docket, for informational purposes to analyze the potential costs and benefits associated with this proposed action. The agencies analyze the potential costs and benefits against two baselines: The current status quo and the vacated NWPR. The analysis is summarized in section VI of this preamble. The agencies' primary estimate is that the proposed rule would have zero impact.

IV. Background

A. Legal Background

1. The Clean Water Act

Before passage of the Clean Water Act, the nation's waters were in ''serious trouble, thanks to years of neglect, ignorance, and public indifference.'' H.R. Rep. No. 92–911, at 753 (1972). Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Public Law 92–500, 86 Stat. 816, as amended, 33 U.S.C. 1251 *et seq.,* with the objective ''to restore and maintain the chemical, physical and biological integrity of the Nation's waters.'' 33 U.S.C. 1251(a). The Act was intended to address longstanding concerns regarding the quality of the nation's waters and the Federal government's ability to respond to those concerns under existing law.

Prior to 1972, the Federal government's authority to control and redress pollution in the nation's waters largely fell to the Corps under the Rivers and Harbors Act of 1899. While much of that statute focused on restricting obstructions to navigation on the nation's major waterways, section 13 of the statute made it unlawful to discharge refuse ''into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water.'' 33 U.S.C. 407. In 1948, Congress enacted the Federal Water Pollution Control Act of 1948, Public Law 80–845, 62 Stat. 1155 (June 30, 1948), to address interstate water pollution, and subsequently amended that statute in 1956, 1961, and 1965. These early versions of the statute that eventually became known as the Clean Water Act encouraged the development of pollution abatement programs, required states to develop water quality standards, and authorized the Federal government to bring enforcement actions to abate water pollution. However, these authorities proved inadequate to address the decline in the quality of the nation's waters. *See City of Milwaukee* v. *Illinois,* 451 U.S. 304, 310 (1981).

As a result, in 1972, Congress performed ''a 'total restructuring' and 'complete rewriting' of the existing'' statutory framework. *City of Milwaukee,* 451 U.S. at 317 (quoting legislative history of 1972 amendments). The Clean Water Act, which was passed as an amendment to the Federal Water Pollution Control Act, was described by its supporters as the first truly comprehensive federal water pollution legislation. The ''major purpose'' of the Clean Water Act was ''to establish a comprehensive long-range policy for the elimination of water pollution.'' S. Rep. No. 92–414, at 95 (1971), 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–1, p. 1511 (1971) (emphasis added). ''No Congressman's remarks on the legislation were complete without reference to [its] 'comprehensive' nature.'' *City of Milwaukee,* 451 U.S. at 318. In passing the 1972 amendments, Congress ''intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.'' *United States* v. *Riverside Bayview Homes,* 474 U.S. 121, 133 (1985) (''*Riverside Bayview*''); *see also Int'l Paper Co.* v. *Ouellette,* 479 U.S. 481, 486 n.6 (1987).

One of the Clean Water Act's principal tools to protect the integrity of the nation's waters is section 301(a), which generally prohibits ''the discharge of any pollutant by any person'' without a permit or other authorization under the Act. The terms ''discharge of a pollutant'' and ''discharge of pollutants'' are defined broadly to include ''any addition of any pollutant to navigable waters from any point source.'' 33 U.S.C. 1362(12). And ''navigable waters'' means ''the waters of the United States, including the territorial seas.'' *Id.* at 1362(7). Although Congress opted to carry over the term ''navigable waters'' from prior versions of the Federal Water Pollution Control Act, Congress broadened the definition

of ''navigable waters'' to encompass all ''waters of the United States.'' *Id.* Indeed, in finalizing the 1972 amendments, the conferees specifically deleted the word ''navigable'' from the definition of ''waters of the United States'' that had originally appeared in the House version of the Act. S. Conf. Rep. No. 92–1236, at 144 (1972). Further, the Senate Report stated that ''navigable waters'' means ''the navigable waters of the United States, portions thereof, *tributaries thereof,* and includes the Territorial Seas and the Great Lakes.'' S. Rep. No. 92–414, at 77 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3742–43 (emphasis added). The Senate Report accompanying the 1972 Act also explained that ''[w]ater moves in hydrologic cycles and it is essential that the discharge of pollutants be controlled at the source.'' *Id.*

The definition of ''waters of the United States'' affects most Clean Water Act programs—including water quality standards, impaired waters and total maximum daily loads, oil spill prevention, preparedness and response programs, the state and tribal water quality certification programs, National Pollutant Discharge Elimination System (NPDES) programs, and dredge and fill programs—because such programs apply only to ''waters of the United States.'' Some Clean Water Act programs are implemented by the Federal government, and others are implemented by state or tribal governments where the statute provides a direct grant of authority to the state or authorized tribe or provides an option for the state or authorized tribe to take on those programs. States and tribes may additionally implement, establish, or modify their own programs under state or tribal law to manage and regulate waters independent of the Clean Water Act.

Under Clean Water Act section 303(d) and EPA's implementing regulations, states are required to assemble and evaluate all existing and readily available water quality-related data and information and to submit to EPA every two years a list of impaired waters that require total maximum daily loads (TMDLs). For waters identified on a 303(d) list, states establish TMDLs for all pollutants preventing or expected to prevent attainment of water quality standards. Section 303(d) applies to ''waters of the United States'' and ''non-jurisdictional'' waterbodies are not required to be assessed or otherwise identified as impaired; TMDL restoration plans likewise apply to ''waters of the United States.''

Clean Water Act section 311 and the Oil Pollution Act (OPA) of 1990 authorize the Oil Spill Liability Trust Fund (OSLTF) to reimburse costs of assessing and responding to oil spills to ''waters of the United States'' or adjoining shorelines. The OSLTF allows an immediate response to a spill, including containment, countermeasures, cleanup, and disposal activities. The OSLTF is not available to reimburse costs incurred by states or tribes to clean up spills and costs related to business and citizen impacts (*e.g.,* lost wages and damages) for spills affecting waters not subject to Clean Water Act jurisdiction. EPA also lacks authority to take enforcement actions based on spills solely affecting waters not subject to Clean Water Act jurisdiction.

The scope of facilities required to prepare oil spill prevention and response plans is also affected by the definition of ''waters of the United States.'' EPA-regulated oil storage facilities with storage capacities greater than 1,320 gallons (except farms) that have a reasonable expectation of an oil discharge to ''waters of the United States'' or adjoining shorelines are required to prepare and implement spill prevention plans. High-risk oil storage facilities that meet certain higher storage thresholds and related harm factors are required to prepare and submit oil spill preparedness plans to EPA for review. The U.S. Coast Guard and Department of Transportation also require oil spill response plans under their respective authorities. However, Clean Water Act section 311 spill prevention and preparedness plan requirements do not apply to a facility if there is no reasonable expectation that an oil discharge from a facility could reach a jurisdictional water or adjoining shoreline.

Clean Water Act section 401 provides that a Federal agency cannot issue a permit or license for an activity that may result in a discharge to ''waters of the United States'' until the state or tribe where the discharge would originate has granted or waived water quality certification. As a result, section 401 certification provides states and authorized tribes an opportunity to address the proposed aquatic resource impacts of federally-issued permits and licenses. The definition of ''waters of the United States'' affects where federal permits are required and thus where section 401 certification applies.

Under section 402 of the Clean Water Act, a National Pollutant Discharge Elimination System (NPDES) permit is required where a point source discharges a pollutant to a ''water of the United States.''

The Clean Water Act section 404 permitting program addresses the discharge of dredged or fill material from a point source into ''waters of the United States,'' unless the activity is exempt from Clean Water Act section 404 regulation (*e.g.,* certain farming, ranching, and forestry activities). Section 404 requires a permit before dredged or fill material may be discharged to ''waters of the United States.'' Where Clean Water Act jurisdiction does not apply, no section 404 permits are required for dredged or fill activities in those waters or features.

States and tribes play a vital role in the implementation and enforcement of these and other Clean Water Act programs. Section 101(b) of the Act established that ''it is the policy of Congress to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.'' 33 U.S.C. 1251(b). All states and 74 tribes have authority to implement section 401 water quality certification programs. Currently 47 states and one territory have authority to administer all or portions of the section 402 NPDES program for ''waters of the United States.'' All states and 46 tribes have established water quality standards pursuant to section 303 of the Act, which form a legal basis for limitations on discharges of pollutants to ''waters of the United States.''

Moreover, consistent with the Clean Water Act, states and tribes retain authority to implement their own programs to protect the waters in their jurisdiction more broadly and more stringently than the Federal government. Under section 510 of the Clean Water Act, unless expressly stated, nothing in the Clean Water Act precludes or denies the right of any state or tribe to establish more protective standards or limits than the Clean Water Act.[6] Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economic

[6] Congress has provided for eligible tribes to administer Clean Water Act programs over their reservations and expressed a preference for tribal regulation of surface water quality on reservations to ensure compliance with the goals of the statute. *See* 33 U.S.C. 1377; 56 FR 64876, 64878–79 (December 12, 1991). In addition, tribes may establish more protective standards or limits under tribal law that may be more stringent than the federal Clean Water Act. Where appropriate, references to states in this document may also include eligible tribes.

well-being but which may be outside the scope of the Clean Water Act.

In 1977, Congress considered and rejected a legislative proposal that would have redefined and limited the waters subject to the Corps' permitting authority under section 404 of the Clean Water Act to only navigable-in-fact waters and their adjacent wetlands. In 1975, the Corps had extended the scope of ''waters of the United States'' to encompass, in a phased approach, non-navigable tributaries, wetlands adjacent to primary navigable waters, intermittent rivers, streams, tributaries, and certain other categories of waters. 40 FR 31325–31326 (1975). In reaction to that broadened definition, Congress considered a proposal to limit the geographic reach of section 404, but it was defeated in the Senate and eliminated by the Conference Committee. H.R. Conf. Rep. No. 95–830, at 97–105 (1977). As the Supreme Court explained in *Riverside Bayview,* ''efforts to narrow the definition of 'waters' were abandoned; the legislation as ultimately passed, in the words of Senator Baker, 'retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act.' '' 474 U.S. at 136–137; *see also* 123 Cong. Rec. 26718 (1977) (remarks of Senator Baker: ''Continuation of the comprehensive coverage of this program is essential for the protection of the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.'').

Rather than alter the geographic reach of section 404 in 1977, Congress instead amended the statute by exempting certain activities—for example, certain agricultural and silvicultural activities—from the permit requirements of section 404. *See* 33 U.S.C. 1344(f). The amendments also authorized the use of general permits to streamline the permitting process. *See id.* at 1344(e). Finally, the 1977 Act established for the first time a mechanism by which a state, rather than the Corps, could assume responsibility for implementing the section 404 permitting program, but only for waters ''other than'' traditional navigable waters and their adjacent wetlands. *Id.* at 1344(g)(1). Three states have since assumed the section 404 program.

The fact that a resource is a ''water of the United States'' does not mean that activities such as farming, construction, infrastructure development, or resource extraction, cannot occur in or near the resource at hand. The Clean Water Act exempts a number of activities from permitting or from the definition of ''point source,'' including agricultural storm water and irrigation return flows. *See id.* at 1342(*l*)(2), 1362(14). As discussed above, since 1977 the Clean Water Act in section 404(f) has exempted many normal farming activities from the section 404 permitting requirement, including seeding, harvesting, cultivating, planting, and soil and water conservation practices, among other activities. *Id.* at 1344(f). The scope of ''waters of the United States'' does not affect these statutory exemptions.

In addition, permits are routinely issued under sections 402 and 404 of the Clean Water Act. The permitting authority, which is most often a state agency for the section 402 NPDES program and the Corps in the context of section 404, generally works with permit seekers to ensure that activities can occur without harming the integrity of the nation's waters.

Effluent limitations serve as the primary mechanism in NPDES permits for controlling discharges of pollutants to receiving waters, and include technology-based effluent limitations and water quality-based effluent limitations. These limits, which are typically numeric, generally specify an acceptable level of a pollutant or pollutant parameter in a discharge (for example, a certain level of bacteria). The permittee may choose which technologies to use to achieve that level. Some permits contain certain ''best management practices'' (BMPs) which are actions or procedures to prevent or reduce the discharge of pollution to ''waters of the United States'' (for example, stormwater control measures for construction activities).

In issuing section 404 permits, the Corps or authorized state works with the applicant to avoid, minimize, or compensate for any unavoidable impacts to ''waters of the United States.'' Permit applicants show that steps have been taken to avoid impacts to wetlands, streams, and other aquatic resources; that potential impacts have been minimized; and that compensatory mitigation will be provided for all remaining unavoidable impacts. For most discharges that will have only minimal adverse effects, a general permit (*e.g.,* a ''nationwide'' permit) may be suitable. General permits are issued on a nationwide, regional, or state basis for particular categories of activities. While some general permits require the applicant to submit a pre-construction notification to the Corps, others allow the applicant to proceed with no formal notification. The general permit process eliminates individual review and allows certain activities to proceed with little or no delay, provided that the general or specific conditions for the general permit are met. For example, minor road construction activities, utility line backfill, and minor discharges for maintenance are activities in ''waters of the United States'' that can be considered for a general permit. States and tribes also have a role in section 404 decisions, through state program general permits, water quality certification, or program assumption.

Under any regulation defining ''waters of the United States,'' property owners may obtain from the Corps jurisdictional determinations whether waters on their property are subject to the Clean Water Act. The Corps' regulations provide that a jurisdictional determination consists of ''a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) or a written determination that a waterbody is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*).'' *See* 33 CFR 331.2. These jurisdictional determinations can be obtained at no charge to the property owners. *See* 33 CFR 325.1 (omitting mention of fees for jurisdictional determinations) and Regulatory Guidance Letter 16–01 (2016) (stating that such determinations are issued as a ''public service'').

2. The 1986 Regulations Defining ''Waters of the United States''

In 1973, EPA published regulations defining ''navigable waters'' broadly to include traditional navigable waters; tributaries of traditional navigable waters; interstate waters; and intrastate lakes, rivers, and streams used in interstate commerce. 38 FR 13528, 13528–29 (May 22, 1973). The Corps published regulations in 1974 defining the term ''navigable waters'' to mean ''those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.'' 39 FR 12115, 12119 (April 3, 1974); 33 CFR 209.120(d)(1) (1974); *see also* 33 CFR 209.260(e)(1) (1974) (explaining that ''[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor'').

Several federal courts then held that the Corps had given ''waters of the

United States'' an unduly restrictive reading in its regulations implementing Clean Water Act section 404. *See, e.g., United States* v. *Holland,* 373 F. Supp. 665, 670–676 (M.D. Fla. 1974). EPA and the House Committee on Government Operations agreed with the decision in *Holland.*[7] In *Natural Resources Defense Council, Inc.* v. *Callaway,* 392 F. Supp. 685, 686 (D.D.C. 1975) (''*Callaway*''), the court held that in the Clean Water Act, Congress had ''asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the [Federal] Water [Pollution Control] Act, the term ['navigable waters'] is not limited to the traditional tests of navigability.'' The court ordered the Corps to publish new regulations ''clearly recognizing the full regulatory mandate of the [Federal] Water [Pollution Control] Act.'' *Id.*

In response to the district court's order in *Callaway,* the Corps promulgated interim final regulations providing for a phased-in expansion of its section 404 jurisdiction. 40 FR 31320 (July 25, 1975); *see* 33 CFR 209.120(d)(2) and (e)(2) (1976). The interim regulations revised the definition of ''waters of the United States'' to include, *inter alia,* waters (sometimes referred to as ''isolated waters'') that are not connected by surface water or adjacent to traditional navigable waters. 33 CFR 209.120(d)(2)(i) (1976).[8] On July 19, 1977, the Corps published its final regulations, in which it revised the 1975 interim regulations to clarify many of the definitional terms. 42 FR 37122 (July 19, 1977). The 1977 final regulations defined the term ''waters of the United States'' to include, *inter alia,* ''isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.'' 33 CFR 323.2(a)(5) (1978); *see also* 40 CFR 122.3 (1979).[9]

In 1986, the Corps consolidated and recodified its regulatory provisions defining ''waters of the United States'' for purposes of implementing the section 404 program. *See* 51 FR 41216–17 (November 13, 1986). These regulations reflected the interpretation of both agencies. While EPA and the Corps also have separate regulations defining the statutory term ''waters of the United States,'' their interpretations, reflected in the 1986 regulations, have been identical and remained largely unchanged from 1977 to 2015. *See* 42 FR 37122, 37124, 37127 (July 19, 1977).[10] EPA's comparable regulations were recodified in 1988 (53 FR 20764, June 6, 1988), and both agencies added an exclusion for prior converted cropland in 1993 (58 FR 45008, 45031, August 25, 1993). For convenience, the agencies in this preamble will generally cite the Corps' longstanding regulations and will refer to ''the 1986 regulations'' as inclusive of EPA's comparable regulations and the 1993 addition of the exclusion for prior converted cropland.

The 1986 regulations define ''waters of the United States'' as follows (33 CFR 328.3 (2014)) [11]:

The term waters of the United States means:

1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

2. All interstate waters including interstate wetlands;

3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

a. Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

b. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

c. Which are used or could be used for industrial purposes by industries in interstate commerce;

4. All impoundments of waters otherwise defined as waters of the United States under this definition;

5. Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

6. The territorial seas;

7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

8. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of Clean Water Act (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Note that these categories in the 1986 regulations may be referred to by this numbering system (for example, (a)(1) through (a)(8) waters) throughout this preamble. *See* sections I.C.3 and I.C.4 of the Economic Analysis for the Proposed Rule for a comparison of regulatory categories between the NWPR and this proposed rule.

3. U.S. Supreme Court Decisions

The U.S. Supreme Court first addressed the scope of ''waters of the United States'' protected by the Clean

[7] EPA expressed the view that ''the *Holland* decision provides a necessary step for the preservation of our limited wetland resources,'' and that ''the [*Holland*] court properly interpreted the jurisdiction granted under the [Clean Water Act] and Congressional power to make such a grant.'' *See* section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Pub. Works, 94th Cong., 2d Sess. 349 (1976) (letter dated June 19, 1974, from Russell E. Train, Administrator of EPA, to Lt. Gen. W.C. Gribble, Jr., Chief of Corps of Engineers). Shortly thereafter, the House Committee on Government Operations discussed the disagreement between the two agencies (as reflected in EPA's June 19 letter) and concluded that the Corps should adopt the broader view of the term ''waters of the United States'' taken by EPA and by the court in *Holland. See* H.R. Rep. No. 93–1396, at 23–27 (1974). The Committee urged the Corps to adopt a new definition that ''complies with the congressional mandate that this term be given the broadest possible constitutional interpretation.'' *Id.* at 27 (internal quotation marks omitted).

[8] Phase I, which was immediately effective, included coastal waters and traditional inland navigable waters and their adjacent wetlands. 40 FR 31321, 31324, 31326 (July 25, 1975). Phase II, which took effect on July 1, 1976, extended the Corps' jurisdiction to lakes and certain tributaries of Phase I waters, as well as wetlands adjacent to the lakes and certain tributaries. *Id.* Phase III, which took effect on July 1, 1977, extended the Corps' jurisdiction to all remaining areas encompassed by the regulations, including ''intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters.'' *Id.* at 31325; *see also* 42 FR 37124 (July 19, 1977) (describing the three phases).

[9] An explanatory footnote published in the Code of Federal Regulations stated that ''[p]aragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce.'' 33 CFR 323.2(a)(5), at 616 n.2 (1978).

[10] Multiple provisions in the Code of Federal Regulations contained the definition of the phrases ''waters of the United States'' and ''navigable waters'' for purposes of implementing the Clean Water Act, 33 U.S.C. 1362(7), and other water pollution protection statutes such as the Oil Pollution Act, 33 U.S.C. 2701(21). Some EPA definitions were added after 1986, but each conformed to the 1986 regulations except for variations in the waste treatment system exclusion. *See, e.g.,* 55 FR 8666 (March 8, 1990); 73 FR 71941 (November 26, 2008).

[11] There are some variations in the waste treatment system exclusion across EPA's regulations defining ''waters of the United States.'' The placement of the waste treatment system and prior converted cropland exclusions also varies in EPA's regulations.

Water Act in *United States* v. *Riverside Bayview Homes,* 474 U.S. 121 (1985) (''*Riverside Bayview*''), which involved wetlands adjacent to a traditional navigable water in Michigan. In a unanimous opinion, the Court deferred to the Corps' judgment that adjacent wetlands are ''inseparably bound up with the 'waters' of the United States,'' thus concluding that ''adjacent wetlands may be defined as waters under the Act.'' *Riverside Bayview,* 474 U.S. at 134, 139. The Court observed that the broad objective of the Clean Water Act to restore the integrity of the nation's waters ''incorporated a broad, systemic view of the goal of maintaining and improving water quality . . . . Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' '' *Id.* at 132–33 (citing S. Rep. 92–414). The Court then stated: ''In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into 'navigable waters,' see CWA [sections] 301(a), 404(a), 502(12), 33 U.S.C. [sections] 1311(a), 1344(a), 1362(12), the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import.'' *Id.* at 133.

The Court also recognized that ''[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: The transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious.'' *Id.* at 132. The Court then deferred to the agencies' interpretation: ''In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.'' *Id.* at 134.

The Court went on to note that to achieve the goal of preserving and improving adjacent wetlands that have significant ecological and hydrological impacts on traditional navigable waters, it was appropriate for the Corps to regulate all adjacent wetlands, even though some might not have any impacts on traditional navigable waters. *Id.* at 135 n.9. Indeed, the Court acknowledged that some adjacent wetlands might not have significant hydrological and biological connections with navigable waters, but concluded that the Corps' regulation was valid in part because such connections exist in the majority of cases. *Id.*

The Court deferred to the Corps' definition of ''adjacent'': ''The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.' '' The Court expressly reserved the question of whether the Act applies to ''wetlands that are not adjacent to open waters.'' *Id.* at 131 n.8.

The Supreme Court again addressed the issue of Clean Water Act jurisdiction over ''waters of the United States'' in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) (''*SWANCC*''). In *SWANCC,* the Court (in a 5–4 opinion) held that the use of ''isolated'' non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal authority under the Clean Water Act. The Court noted that in *Riverside Bayview* it had ''found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the ''waters'' of the United States' '' and that ''[i]t was the significant nexus between the wetlands and 'navigable waters' that informed [the Court's] reading of the Clean Water Act'' in that case. *Id.* at 167.

While recognizing that in *Riverside Bayview* it had found the term ''navigable'' to be of limited import, the Court in *SWANCC* noted that the term ''navigable'' could not be read entirely out of the Act. *Id.* at 172. The Court stated: ''We said in *Riverside Bayview Homes* that the word 'navigable' in the statute was of 'limited import' and went on to hold that [section] 404(a) extended to non-navigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'' *Id.* at 172 (internal citations omitted).

The Court found that the exercise of Clean Water Act regulatory authority over discharges into the ponds, on the grounds that their use by migratory birds is within the power of Congress to regulate activities that in the aggregate have a substantial effect on interstate commerce, raised questions. *Id.* at 173. The Court explained that ''[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result,'' *id.* at 172, and that this is particularly true ''where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power,'' *id.* at 173 (citing *United States* v. *Bass,* 404 U.S. 336, 349 (1971)). The Court thus construed the Clean Water Act to avoid the constitutional questions related to the scope of federal authority authorized therein. *Id.* at 174.

Five years after *SWANCC,* the Court again addressed the Clean Water Act term ''waters of the United States'' in *Rapanos* v. *United States,* 547 U.S. 715 (2006) (''*Rapanos*''). *Rapanos* involved two consolidated cases in which the Act had been applied to wetlands adjacent to non-navigable tributaries of traditional navigable waters. All members of the Court agreed that the term ''waters of the United States'' encompasses some waters that are not navigable in the traditional sense. *Id.* at 731 ((Scalia, J., plurality opinion) (''We have twice stated that the meaning of 'navigable waters' in the Act is broader than the traditional understanding of that term, *SWANCC,* 531 U.S. at 167, 121 S. Ct. 675, 148 L. Ed. 2d 576; *Riverside Bayview,* 474 U.S. at 133, 106 S. Ct. 455, 88 L. Ed. 2d 419.'')).

A four-Justice plurality in *Rapanos* interpreted the term ''waters of the United States'' as covering ''relatively permanent, standing or continuously flowing bodies of water,'' *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a ''continuous surface connection'' to such water bodies, *id.* (Scalia, J., plurality opinion). The *Rapanos* plurality noted that its reference to ''relatively permanent'' waters did ''not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,'' or ''*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.'' *Id.* at 732 n.5 (emphasis in original).

Justice Kennedy's concurring opinion took a different approach that was based

in the Court's *SWANCC* opinion. Justice Kennedy concluded that ''to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made.'' *Id.* at 759 (citing *SWANCC,* 531 U.S. at 167, 172). He concluded that wetlands possess the requisite significant nexus if the wetlands ''either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' '' *Id.* at 780. Justice Kennedy's opinion notes that to be jurisdictional, such a relationship with traditional navigable waters must be more than ''speculative or insubstantial.'' *Id.*

The four dissenting Justices in *Rapanos,* who would have affirmed the court of appeals' application of the agencies' regulation to find jurisdiction over the waters at issue, also concluded that the term ''waters of the United States'' encompasses, *inter alia,* all tributaries and wetlands that satisfy ''either the plurality's [standard] or Justice Kennedy's.'' *Id.* at 810 & n.14 (Stevens, J., dissenting). The four dissenting Justices stated: ''The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. The Corps' resulting decision to treat these wetlands as encompassed within the term 'waters of the United States' is a quintessential example of the Executive's reasonable interpretation of a statutory provision.'' *Id.* at 788 (citation omitted).

In addition to joining the plurality's opinion, Chief Justice Roberts issued his own concurring opinion noting that the agencies ''are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer,'' and the agencies thus have ''plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority'' under the Clean Water Act. *Id.* at 758.

Neither the plurality nor the concurring opinions in *Rapanos* invalidated any of the regulatory provisions defining ''waters of the United States.''

4. Post-Rapanos Appellate Court Decisions

The earliest post-*Rapanos* decisions by the United States Courts of Appeals focused on which standard to apply in interpreting the scope of ''waters of the United States''—the plurality's or Justice Kennedy's. Chief Justice Roberts anticipated this question and cited *Marks* v. *United States,* 430 U.S. 188 (1977) in his concurring opinion to *Rapanos* as applicable precedent. *Marks* v. *United States* provides that ''[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds.'' The dissenting Justices in *Rapanos* also spoke to future application of the divided decision. While Justice Stevens stated that he assumed Justice Kennedy's significant nexus standard would apply in most instances, the dissenting Justices noted that they would find the Clean Water Act extended to waters meeting either the relatively permanent standard articulated by Justice Scalia or the significant nexus standard described by Justice Kennedy. *Rapanos,* 547 U.S. at 810 & n.14 (Stevens, J., dissenting).

Since *Rapanos,* every court of appeals to have considered the question has determined that the government may exercise Clean Water Act jurisdiction over at least those waters that satisfy the significant nexus standard set forth in Justice Kennedy's concurrence. None has held that solely the plurality's relatively permanent standard may be used to establish jurisdiction. Some have held that the government may establish jurisdiction under either standard. The Eleventh Circuit has held that only Justice Kennedy's standard applies. *Precon Dev. Corp.* v. *U.S. Army Corps of Eng'rs,* 633 F.3d 278 (4th Cir. 2011); *see also United States* v. *Donovan,* 661 F.3d 174 (3d Cir. 2011); *United States* v. *Bailey,* 571 F.3d 791 (8th Cir. 2009); *United States* v. *Cundiff,* 555 F.3d 200 (6th Cir. 2009); *United States* v. *Lucas,* 516 F.3d 316 (5th Cir. 2008); *N. Cal. River Watch* v. *City of Healdsburg,* 496 F.3d 993 (9th Cir. 2007) (superseding the original opinion published at 457 F.3d 1023 (9th Cir. 2006)); *United States* v. *Robison,* 505 F.3d 1208 (11th Cir. 2007); *United States* v. *Johnson,* 467 F.3d 56 (1st Cir. 2006); *United States* v. *Gerke Excavating, Inc.,* 464 F.3d 723 (7th Cir. 2006).

5. Post-Rapanos Implementation of the 1986 Regulations

For nearly a decade after *Rapanos,* the agencies did not revise their regulations but instead determined jurisdiction under the 1986 regulations consistent with the two standards established in *Rapanos* (the relatively permanent standard and the significant nexus standard) and by using guidance issued jointly by the agencies. *See* U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos* v. *United States & Carabell v. United States* (June 5, 2007), superseded December 2, 2008 (the ''*Rapanos* Guidance'').

Under the *Rapanos* Guidance,[12] the agencies concluded that Clean Water Act jurisdiction exists if a water meets either the relatively permanent standard or the significant nexus standard. The agencies' assertion of jurisdiction over traditional navigable waters and their adjacent wetlands remained unchanged by *Rapanos.* Under the relatively permanent standard, the guidance stated that the agencies would assert jurisdiction over: Non-navigable tributaries of traditional navigable waters that typically flow year-round or have continuous flow at least seasonally; and wetlands that directly abut such tributaries. *Id.* at 4–7. The guidance states that the agencies will determine jurisdiction under the significant nexus standard for the following waters: Non-navigable tributaries that are not relatively permanent, wetlands adjacent to non-navigable tributaries that are not relatively permanent, and wetlands adjacent to but not directly abutting a relatively permanent non-navigable tributary. *Id.* at 8–12. The agencies generally did not assert jurisdiction over non-wetland swales or erosional features (*e.g.,* gullies and small washes characterized by low volume or infrequent or short duration flow) or ditches (including roadside ditches) excavated wholly in and draining only uplands and that did not carry a relatively permanent flow of water. *Id.* at 11–12.

B. The Agencies' Post-Rapanos Rules

Since 2015, EPA and the Army have finalized three rules revising the definition of ''waters of the United States.''

[12] The agencies note that the guidance ''does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances.'' *Rapanos* Guidance at 4 n.17.

1. The 2015 Clean Water Rule

On June 29, 2015, EPA and the Army published the ''Clean Water Rule: Definition of 'Waters of the United States,' '' 80 FR 37054 (June 29, 2015). The 2015 Clean Water Rule's definition of ''waters of the United States'' established three categories: (A) Waters that are categorically ''jurisdictional by rule'' (without the need for additional analysis); (B) waters that are subject to case-specific analysis to determine whether they are jurisdictional; and (C) waters that are categorically excluded from jurisdiction. *Id.* at 37054. Waters considered ''jurisdictional by rule'' included (1) traditional navigable waters; (2) interstate waters, including interstate wetlands; (3) the territorial seas; (4) impoundments of waters otherwise identified as jurisdictional; (5) tributaries of the first three categories of ''jurisdictional by rule'' waters; and (6) waters adjacent to a water identified in the first five categories of ''jurisdictional by rule'' waters, including ''wetlands, ponds, lakes, oxbows, impoundments, and similar waters.'' Finally, all exclusions from the definition of ''waters of the United States'' in the pre-2015 regulations were retained, and several exclusions reflecting agency practice or based on public comment were added to the regulation for the first time.[13]

2. The 2019 Repeal Rule

On February 28, 2017, Executive Order 13778 ''Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule,'' directed EPA and the Army to review the 2015 Clean Water Rule for consistency with the policy outlined in section 1 of the order and to issue a proposed rule rescinding or revising the 2015 rule as appropriate and consistent with law. 82 FR 12497 (March 3, 2017). The Executive Order also directed the agencies to ''consider interpreting the term 'navigable waters' . . . in a manner consistent with'' Justice Scalia's opinion in *Rapanos. Id.*

Consistent with this directive, after notice and comment, on October 22, 2019, the agencies published a final rule repealing the 2015 Clean Water Rule and recodifying the 1986 regulations without any changes to the regulatory text. 84 FR 56626 (October 22, 2019).

3. The 2020 Navigable Waters Protection Rule

Three months later, on January 23, 2020, the agencies signed another final rule—the Navigable Waters Protection Rule: Definition of ''Waters of the United States'' (NWPR)—that for the first time defined ''waters of the United States'' based generally on Justice Scalia's plurality test from *Rapanos.* The NWPR was published on April 21, 2020, and went into effect on June 22, 2020. 85 FR 22250 (April 21, 2020). The NWPR interpreted the term ''the waters'' within ''the waters of the United States'' to ''encompass relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters.'' *Id.* at 22273. Specifically, the rule established four categories of jurisdictional waters: (1) The territorial seas and traditional navigable waters; (2) tributaries of such waters; (3) certain lakes, ponds, and impoundments of jurisdictional waters; and (4) wetlands adjacent to other jurisdictional waters (other than jurisdictional wetlands). *Id.* at 22273.

The NWPR defined the scope of each of these four categories. The territorial seas and traditional navigable waters were defined consistent with the agencies' longstanding interpretations of those terms. A ''tributary'' was defined as a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a territorial sea or traditional navigable water in a typical year either directly or indirectly through other tributaries, jurisdictional lakes, ponds, or impoundments, or adjacent wetlands. A tributary was required to be perennial or intermittent in a typical year. The term ''tributary'' included a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch is perennial or intermittent and contributes surface water flow to a traditional navigable water or territorial sea in a typical year. *Id.* at 22251. The definition did not include ephemeral features, which were defined as surface waters that flow only in direct response to precipitation, including ephemeral streams, swales, gullies, rills, and pools. *Id.*

The NWPR defined ''lakes and ponds, and impoundments of jurisdictional waters'' as ''standing bodies of open water that contribute surface water flow in a typical year to a territorial sea or traditional navigable water either directly or through a tributary, another jurisdictional lake, pond, or impoundment, or an adjacent wetland.'' *Id.* A lake, pond, or impoundment of a jurisdictional water did not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through certain artificial or natural features. The NWPR also defined a lake, pond, or impoundment of a jurisdictional water inundated by flooding from a jurisdictional water in a typical year as jurisdictional. *Id.*

As for wetlands, the NWPR interpreted ''adjacent wetlands'' to be those wetlands that abut jurisdictional waters and those non-abutting wetlands that are (1) ''inundated by flooding'' from a jurisdictional water in a typical year, (2) physically separated from a jurisdictional water only by certain natural features (*e.g.,* a berm, bank, or dune), or (3) physically separated from a jurisdictional water by an artificial structure that ''allows for a direct hydrologic surface connection'' between the wetland and the jurisdictional water in a typical year. *Id.* at 22251. Wetlands that do not have these types of connections to other waters were not jurisdictional.

The NWPR expressly provided that waters that do not fall into one of these jurisdictional categories are not considered ''waters of the United States.'' *Id.* Moreover, waters within these categories, including traditional navigable waters and the territorial seas, were not ''waters of the United States'' if they also fit within the NWPR's broad exclusions. *See id.* at 22325 (''If the water meets any of the[ ] exclusions, the water is excluded even if the water satisfies one or more conditions to be a [jurisdictional] water.'').[14] The rule excluded groundwater, including groundwater drained through subsurface drainage systems; ephemeral features; diffuse stormwater runoff and directional sheet flow over upland; ditches that are not traditional navigable waters, tributaries, or that are not constructed in adjacent wetlands, subject to certain limitations; prior converted cropland; artificially irrigated areas; artificial lakes and ponds; water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to

[13] In February 2018, the agencies issued a rule that added an applicability date of February 6, 2020 to the 2015 Clean Water Rule. 83 FR 5200 (February 6, 2018) (''Applicability Date Rule''). The Applicability Date Rule was challenged in several district court actions and on August 16, 2018—a mere six months after the rule had been issued—the rule was vacated and enjoined nationwide. *See South Carolina Coastal Conservation League* v. *Pruitt,* 318 F. Supp. 3d 959 (D.S.C. Aug. 16, 2018); *see also Puget Soundkeeper All.* v. *Wheeler,* No. 15–01342 (W.D. Wash. Nov. 26, 2018) (vacating the Applicability Date Rule nationwide).

[14] The NWPR's exclusion for ditches, however, explicitly did not encompass ditches that are traditional navigable waters or jurisdictional tributaries. 33 CFR 328.3(b)(5).

mining or construction activity; pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel; stormwater control features constructed or excavated in upland or in non-jurisdictional waters; groundwater recharge, water reuse, and wastewater recycling structures constructed or excavated in upland or in non-jurisdictional waters; and waste treatment systems.

4. Legal Challenges to the Rules

Starting with the 2015 Clean Water Rule, the agencies' rulemakings to revise the definition of ''waters of the United States'' have been subject to multiple legal challenges.

Multiple parties sought judicial review of the 2015 Clean Water Rule in various district and circuit courts. On January 22, 2018, the Supreme Court, in a unanimous opinion, held that rules defining the scope of ''waters of the United States'' are subject to direct review in the district courts. *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.,* 138 S. Ct. 617 (2018). Several of those district court cases remain pending.[15] While the 2015 Clean Water Rule went into effect in some parts of the country in August 2015, due to multiple injunctions [16] and later rulemakings, the 2015 Clean Water Rule was never implemented nationwide.

A number of pending cases involve claims against the NWPR. On August 30, 2021, the U.S. District Court for the District of Arizona remanded the NWPR and vacated the rule. *Pascua Yaqui Tribe* v. *EPA,* No. 4:20–cv–00266, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021). The court found that ''[t]he seriousness of the Agencies' errors in enacting the NWPR, the likelihood that the Agencies will alter the NWPR's definition of 'waters of the United States,' and the possibility of serious environmental harm if the NWPR remains in place upon remand, all weigh in favor of remand with vacatur.'' *Id.* at *5. On September 27, 2021, the U.S. District Court for the District of New Mexico also issued an order vacating and remanding the NWPR. *Navajo Nation* v. *Regan,* No. 2:20–cv–00602 (D.N.M. Sept. 27, 2021). In vacating the rule, the court agreed with the reasoning of the *Pascua Yaqui* court that the NWPR suffers from ''fundamental, substantive flaws that cannot be cured without revising or replacing the NWPR's definition of 'waters of the United States.''' Slip. op. at 6. Six courts also remanded the NWPR without vacatur or without addressing vacatur.[17]

At this time, 14 cases are pending challenging the agencies' rules defining ''waters of the United States,'' including the 2015 Clean Water Rule, 2019 Repeal Rule, and the NWPR.[18] Some of these cases challenge only one of the rules, while others challenge two or even all three rules in the same lawsuit. See section I.A of the Technical Support Document for a comprehensive history of the effects of the litigation surrounding the 2015 Clean Water Rule, 2019 Repeal Rule, and the NWPR.

5. 2021 Executive Order and Review of the Navigable Waters Protection Rule

On January 20, 2021, President Biden signed Executive Order 13990, entitled ''Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,'' which provides that ''[i]t is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.'' 86 FR 7037 (published January 25, 2021, signed January 20, 2021). The order ''directs all executive departments and agencies (agencies) to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis.'' *Id.* at section 2(a). ''For any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions.'' *Id.* The order also revoked Executive Order 13778 of February 28, 2017 (Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ''Waters of the United States'' Rule), which had initiated development of the NWPR.

In conformance with Executive Order 13990, the agencies reviewed the NWPR to determine if it is aligned with the principles laid out therein:

Science: Science plays a critical role in understanding how to protect the integrity of our nation's waters. As discussed in detail below, *see* section V.B.3 of this preamble, the NWPR did not properly consider the extensive scientific evidence demonstrating the interconnectedness of waters and their downstream effects, thereby undermining Congress's objective to restore and maintain the chemical, physical, and biological integrity of the nation's waters. The NWPR's definition of ''waters of the United States'' does not adequately consider the way pollution moves through waters or the way filling in a wetland affects downstream water resources.

Climate: Science has established that human and natural systems have been extensively impacted by climate change. Climate change can have a variety of impacts on water resources in particular. *See* Technical Support Document section III.C. For instance, a warming climate is already increasing precipitation in many areas (*e.g.,* the Northeast and Midwest), while decreasing precipitation in other areas (*e.g.,* the Southwest). Climate change can also increase the intensity of

[15] *See, e.g., North Dakota* v. *EPA,* No. 15–00059 (D.N.D.); *Ohio* v. *EPA,* No. 15–02467 (S.D. Ohio); *Southeastern Legal Found.* v. *EPA,* No. 15–02488 (N.D. Ga.).

[16] *See, e.g., North Dakota* v. *EPA,* 127 F. Supp. 3d 1047 (D.N.D. 2015) (preliminary injunction barring implementation of the 2015 Clean Water Rule in 13 states); *Georgia* v. *Pruitt,* 326 F. Supp. 3d 1356 (S.D. Ga. June 6, 2018) (same as to 11 states); *Texas* v. *EPA,* No. 3:15–cv–162, 2018 WL 4518230 (S.D. Tex. Sept. 12, 2018) (same as to 3 states). See section I.A of the Technical Support Document for the Proposed ''Revised Definition of 'Waters of the United States'' Rule (''Technical Support Document''; located in the docket for this action), for a comprehensive history of the effects of the litigation against the 2015 Clean Water Rule.

[17] Order, *Pueblo of Laguna* v. *Regan,* No. 1:21–cv–00277, ECF No. 40 (D.N.M. Sept. 21, 2021) (declining to reach issue of vacatur in light of the *Pascua* decision); Order, *California* v. *Wheeler,* No. 3:20–cv–03005, ECF No. 271 (N.D. Cal. Sept. 16, 2021) (same); *Waterkeeper All.* v. *Regan,* No. 3:18–cv–03521, ECF No. 125 (N.D. Cal. Sept. 16, 2021) (same); Order, *Conservation Law Found.* v. *EPA,* No. 1:20–cv–10820, ECF No. 122 (D. Mass. Sept. 1, 2021) (same); Order, *S.C. Coastal Conservation League* v. *Regan,* No. 2:20–cv–01687, ECF No. 147 (D.S.C. July 15, 2021) (remanding without vacating); Order, *Murray* v. *Wheeler,* No. 1:19–cv–01498, ECF No. 46 (N.D.N.Y. Sept. 7, 2021) (same).

[18] *Pascua Yaqui Tribe* v. *EPA,* No. 20–00266 (D. Ariz.); *Colorado* v. *EPA,* No. 20–01461 (D. Colo.); *Am. Exploration & Mining Ass'n* v. *EPA,* No. 16–01279 (D.D.C.); *Envtl. Integrity Project* v. *Regan,* No. 20–01734 (D.D.C.); *Se. Stormwater Ass'n* v. *EPA,* No. 15–00579 (N.D. Fla.); *Se. Legal Found.* v. *EPA,* No. 15–02488 (N.D. Ga.); *Chesapeake Bay Found.* v. *Regan,* Nos. 20–1063 & 20–1064 (D. Md.); *Navajo Nation* v. *Regan,* No. 20–00602 (D.N.M.); *N.M. Cattle Growers' Ass'n* v. *EPA,* No. 19–00988 (D.N.M.); *North Dakota* v. *EPA,* No. 15–00059 (D.N.D.); *Ohio* v. *EPA,* No. 15–02467 (S.D. Ohio); *Or. Cattlemen's Ass'n* v. *EPA,* No. 19–00564 (D. Or.); *S.C. Coastal Conservation League* v. *Regan,* No. 19–03006 (D.S.C.); *Puget Soundkeeper All.* v. *EPA,* No. 20–00950 (W.D. Wash.); *Wash. Cattlemen's Ass'n* v. *EPA,* No. 19–00569 (W.D. Wash.).

precipitation events, including storms, and runoff from these storms can impair water quality as pollutants deposited on land wash into water bodies. Changes in streamflow, snowmelt timing, snowpack accumulation, and the size and frequency of heavy precipitation events can also cause river floods to become larger or more frequent than they used to be in some places. Climate change also affects streamflow characteristics like the magnitude and timing of flows, in part due to changes in snowpack magnitude and seasonality. As the climate continues to change, many historically dry areas are likely to experience less precipitation and increased risk of drought associated with more frequent and intense heatwaves, which can cause streams and wetlands to become drier, negatively affecting both water supplies and water quality. Lower streamflow and groundwater levels can also increase events such as wildfires, which can alter water quality and impact wetlands and their functions. A warming climate can also result in increased and more variable temperatures in streams, leading to fish kills and negatively affecting other aquatic species that can live only in colder water. Finally, rising sea levels associated with climate change are inundating low-lying wetlands and dry land and further contributing to coastal flooding and erosion.

Although water resources are vulnerable to the effects of climate change, they perform a variety of functions that can help restore ecological function of other water resources in light of climate change (*i.e.,* contribute to climate resiliency) and mitigate the negative effects of climate change on other water resources including traditional navigable waters, interstate waters, and the territorial seas. For instance, wetlands inside and outside of floodplains are well-known to store large volumes of floodwaters, thereby protecting downstream watersheds from potential flooding. Coastal wetlands can also help buffer storm surges, which are becoming more frequent due to climate change. Additionally, small streams are particularly effective at retaining and attenuating floodwaters. As natural filters, wetlands help purify and protect the quality of other waters, including drinking water sources—a function which is more important than ever as intense precipitation events spurred on by a changing climate mobilize sediment, nutrients, and other pollutants. Biological communities and geomorphic processes in small streams and wetlands break down leaves and other organic matter, burying and sequestering a portion of that carbon that could otherwise be released to the atmosphere and lead to continued negative effects on water resources.

The NWPR did not appropriately acknowledge or take account of the effects of a changing climate on the chemical, physical, and biological integrity of the nation's waters. For example, its rolling thirty-year approach to determining a ''typical year'' does not allow the agencies flexibility to account for the effects of a rapidly changing climate, including positive trends in temperature, increasing storm events, and extended droughts (*see* section V.B.3.c of this preamble). The NWPR also excluded ephemeral streams and their adjacent wetlands in the arid West from the definition of ''waters of the United States.'' These aquatic systems are increasingly critical to protecting and maintaining downstream integrity as the climate in that region continues to get hotter and drier, but with altered monsoon seasons with fewer but more intense storms that contribute to flashy hydrology (*i.e.,* higher runoff volume, leading to more rapidly rising and falling streamflow over shorter periods of time).

Section V.A.2.c.iv of this preamble contains a discussion of how the agencies believe that climate change can be appropriately considered in implementing the proposed rule.

Environmental Justice: The agencies recognize that the burdens of environmental pollution and climate change often fall disproportionately on population groups of concern (*e.g.,* minority, low-income, and indigenous populations as specified in Executive Order 12898). Numerous groups have raised concerns that the NWPR had disproportionate impacts on tribes and indigenous communities.[19] The NWPR decreased the scope of Clean Water Act jurisdiction across the country, including in geographic regions where regulation of waters beyond those covered by the Act is not authorized under current state or tribal law (*see* section V.B.3.d of this preamble). Absent regulations governing discharges of pollutants into previously jurisdictional waters, population groups of concern where these waters are located may experience increased water pollution and impacts from associated increases in health risk.

Further, the NWPR categorically excluded ephemeral streams from jurisdiction, which disproportionately impacts tribes and population groups of concern in the arid West. Tribes may lack the authority and often the resources to regulate waters within their boundaries, and they may also be affected by pollution from adjacent jurisdictions.[20] Therefore, the change in jurisdiction under the NWPR may have disproportionately exposed tribes to increased pollution and health risks.

After completing the review and reconsidering the record for the NWPR, on June 9, 2021, the agencies announced their intention to revise or replace the rule. The factors the agencies found most relevant in making this decision are: The text of the Clean Water Act; Congressional intent and the objective of the Clean Water Act; Supreme Court precedent; the current and future harms to the chemical, physical, and biological integrity of the nation's waters due to the NWPR; concerns raised by stakeholders about the NWPR, including implementation-related issues; the principles outlined in the Executive Order; and issues raised in ongoing litigation challenging the NWPR. EPA and the Army concluded that the NWPR did not appropriately consider the effect of the revised definition of ''waters of the United States'' on the integrity of the nation's waters, and that the rule threatened the loss or degradation of waters critical to the protection of traditional navigable waters, among other concerns.

C. Summary of Stakeholder Outreach

EPA held a series of stakeholder meetings during the agencies' review of the NWPR, including specific meetings in May 2021 with industry, environmental organizations, agricultural organizations, and state associations. On July 30, 2021, the

[19] *See, e.g.,* Tribal Consultation Comment Letter from President Jonathan Nez and Vice President Myron Lizer, Navajo Nation, October 4, 2021 (''The Navajo Nation relies greatly on all its surface waters, including ephemeral, intermittent, and perennial surface waters. The Navajo Nation currently lacks the resources to implement CWA permitting and other programs necessary to maintain and protect water quality and relies on the Agencies to fill that need. Therefore, any new WOTUS rule must not reduce the scope of the waters that the Agencies can protect, or it will have 'disproportionately high and adverse human health or environmental effects' on the Navajo Nation.''), and Tribal Consultation Comment Letter from Clarice Madalena, Interim Director, Natural Resources Department, Pueblo of Jemez, October 4, 2021 (''The combination of these factors—[desert] hydrology and the geographic location of Native communities—means that the Navigable Waters Rule had the effect of disparately stripping Clean Water Act protections from areas with higher Native populations. This means that the Rule disproportionately harmed Native American communities. This discriminatory impact violates the principles of environmental justice'' (citations omitted). *See, also,* section V.B.3.d of this preamble and the Technical Support Document.

[20] *See supra* at note 18.

agencies signed a **Federal Register** notice that announced a schedule for initial public meetings to hear from interested stakeholders on their perspectives on defining ''waters of the United States'' under the Clean Water Act and how to implement the definition. 86 FR 41911 (August 4, 2021). The agencies also announced their intent to accept written pre-proposal recommendations from members of the public for a 30-day period beginning on August 4, 2021, and concluding on September 3, 2021. The agencies received over 32,000 recommendation letters from the public, which can be found in the pre-proposal docket (Docket ID EPA–HQ–OW–2021–0328). The agencies also announced their plans for future engagement opportunities, including geographically focused roundtables to provide for broad, transparent, regionally focused discussions among a full spectrum of stakeholders. The **Federal Register** notice articulated several specific issues that the agencies are particularly interested in receiving feedback on, including implementation of previous regulatory regimes; regional, state, and tribal interests; identification of relevant science; environmental justice interests; climate implications; the scope of jurisdictional waters such as tributaries, jurisdictional ditches, and adjacent features; and exclusions from jurisdiction.

The agencies also have engaged state and local governments over a 60-day federalism consultation period during development of this proposed rule, beginning with an initial federalism consultation meeting on August 5, 2021, and concluding on October 4, 2021. Additional information about the federalism consultation can be found in section VII.E of this preamble and in the report summarizing consultation and additional outreach to state and local governments, available in the docket (Docket ID No. EPA–HQ–OW–2021–0602) for this proposed rule. On September 29, October 6, and October 20, 2021, the agencies hosted virtual meetings with states focused on implementation of prior ''waters of the United States'' regulatory regimes.

The agencies received input from a wide variety of states and local governments through virtual meetings, consultation letters, and recommendation letters submitted to the public docket. Many of these groups encouraged meaningful dialogue between the states, local governments, and the agencies, and identified implementation challenges with determining the jurisdiction of waters under the pre-2015 regulatory regime. States and local governments stressed the need for guidance, training, and tools early in the process to help with implementing any revised definition of ''waters of the United States.'' A few also requested the agencies to consider a delayed effective date for revised definitions of ''waters of the United States'' to give state and local partners time to revise and develop new policies. Many state and local governments emphasized the variability of water resources across the United States and supported regionalized criteria for determining jurisdictional waters. Some of these groups noted the importance of strong Federal standards and the regulation of interstate waters, since pollutants from upstream states can enter waters within their borders.

States and local governments held divergent views on the agencies' plans to revert to the pre-2015 regulatory regime, and on which water resources should be considered ''waters of the United States.'' Some supported the NWPR and recommended the agencies generally retain and revise that rule. These state and local entities believed that the NWPR provided a clear definition for ''waters of the United States,'' maintained a balance between federal and state jurisdiction, and appropriately excluded waters that should not be subject to the Clean Water Act. Others supported the agencies' current rulemaking efforts as they thought the NWPR was not protective enough and did not account for the complexities of the hydrologic cycle, importance of ephemeral waters, or the connections among waters on the landscape. State and local governments held differing opinions on how the criteria for jurisdiction of ephemeral streams, ditches, tributaries, and wetlands should be determined, and which resources should be included in the scope of the Clean Water Act.

Several state and local governments recommended consideration of climate change and environmental justice concerns in any new rulemaking effort. Some emphasized that isolated wetlands and ephemeral streams are important in reducing flooding during extreme weather events and that the agencies should consider this importance in the rulemaking. Others acknowledged the impacts of climate change but stated that other programs and legislation are more appropriate ways to address climate change. Some state and local governments also noted that NWPR excluded wetlands that are important to minority and low-income communities and that future rulemaking needs to consider environmental justice issues.

The agencies also initiated a tribal consultation and coordination process on July 30, 2021. The agencies engaged tribes over a 66-day tribal consultation period during development of this proposed rule that concluded on October 4, 2021, including two consultation kick-off webinars and meetings. The agencies received consultation comment letters from 24 tribes and three tribal organizations and held three leader-to-leader consultation meetings and two staff-level meetings with tribes at their request. The agencies anticipate that consultation meetings with additional tribes will be held with tribes during the rulemaking process. Many tribes and tribal organizations expressed support for the agencies' efforts to replace the NWPR. One tribe did not support the agencies' efforts to revise the definition of ''waters of the United States,'' stating tribal sovereignty concerns and concerns that the agencies might exceed the power of Congress under the Commerce Clause. Some tribes stated that the NWPR disadvantaged tribes because unlike states, many tribes lack the resources to enforce a definition of ''tribal waters'' that is broader than the definition of ''waters of the United States.'' Several tribes also stated that they rely on the Federal government to permit discharges of pollutants into waters on their lands and do not have the resources to administer their own permitting programs. Some tribes spoke of the importance of protecting ephemeral streams, which were eliminated from jurisdiction under the NWPR, as well as for wetlands that were excluded under the NWPR. Several tribes spoke about the need to include ''waters of the tribe'' into the definition of ''waters of the United States'' Several tribes stated support for furthering environmental justice with the proposed rule, noting that the agencies failed to undertake an environmental justice analysis for the NWPR. Some tribes also supported the need to account for climate change in the definition of ''waters of the United States.'' Additional information about the tribal consultation process can be found in section VII.F of this preamble and the Summary of Tribal Consultation and Coordination, which is available in the docket for this proposed rule. On October 7, 13, 27, and 28, 2021, the agencies hosted virtual dialogues with tribes focused on implementation of prior ''waters of the United States'' regulatory regimes.

Consistent with the August 4, 2021 **Federal Register** notice, the agencies held six public meeting webinars on

August 18, August 23, August 25 (specifically for small entities), August 26, August 31, and September 2, 2021. At these pre-proposal webinars, the agencies provided a brief presentation and sought input on the agencies' intent to revise the definition of ''waters of the United States'' and the specific issues included in the outreach **Federal Register** notice described above. The agencies heard from stakeholders representing a diverse range of interests, positions, suggestions, and recommendations.

The agencies have received a variety of recommendations during this pre-proposal outreach process. The agencies received broad support for robust stakeholder outreach and the development of a rule that is consistent with Supreme Court precedent. Stakeholders disagreed about whether states and tribes could or would fill any perceived gap in permitting introduced by the NWPR's decreased scope of jurisdiction, with some stakeholders providing examples of environmental harms caused by the NWPR. Some stakeholders expressed support for a science-based rule, including stakeholders who believed the NWPR did not adequately consider the agencies' scientific record. Most stakeholders who provided input supported a clear, implementable rule that is easy for the public to understand, and the agencies received feedback that the significant nexus standard and typical year analysis were challenging to implement under prior regulatory regimes.

Many stakeholders also emphasized the importance of regional geographic variability across the United States, and some stakeholders suggested that the agencies consider regionally specific criteria for jurisdictional waters. Some stakeholders emphasized the importance of climate change considerations in any new rulemaking effort, while other stakeholders stated that climate change cannot be used as a tool to expand jurisdictional authority. Some stakeholders explicitly supported the consideration of impacts to minority and low-income communities in developing a revised definition of ''waters of the United States'' and asserted that the NWPR did not consider impacts to these communities.

Stakeholders also provided feedback on which water resources should be considered jurisdictional as ''waters of the United States.'' For instance, some stakeholders supported a jurisdictional category for interstate waters, while others opposed such a category. Stakeholders differed in whether they supported the criteria for jurisdictional tributaries, wetlands, and ditches under the pre-2015 regulatory regime, 2015 Clean Water Rule, or NWPR. Some stakeholders suggested that the agencies should enhance clarity by using physical indicators, functional characteristics, or surface water flow as jurisdictional criteria. Some stakeholders asserted that the agencies should exclude most ditches from the definition of ''waters of the United States,'' while others stated that the agencies should instead include ditches as jurisdictional if they function as tributaries or have other connections to other hydrologic features in the watershed. Some stakeholders indicated that impoundments and ''other waters'' are not appropriate categories of jurisdictional waters, while others suggested regulating a broad spectrum of open waters.

Stakeholders expressed different views about which exclusions are important and should be included in a revised definition of ''waters of the United States.'' Many stakeholders noted that the waste treatment system exclusion and prior converted cropland exclusion should be retained, and some stakeholders expressed support for other exclusions such as stormwater control features and artificial lakes and ponds. As described in section V.C.8 of this preamble, the agencies are proposing to retain the waste treatment system exclusion and prior converted cropland exclusion from the 1986 regulations and have specified in the preamble that certain other waters are generally not considered ''waters of the United States.'' Stakeholders also had divergent views on whether ephemeral streams should be categorically excluded from the definition of ''waters of the United States'' or evaluated as tributaries. As described in section V.C.5 of this preamble, the agencies are not proposing to exclude ephemeral streams but are instead proposing that ephemeral streams that meet the significant nexus standard be jurisdictional as tributaries.

The agencies have considered the input that they received as part of the consultation processes and other opportunities for pre-proposal recommendations. The proposed rule, discussed in section V of this preamble, seeks to balance the considerations and concerns of co-regulators and stakeholders. The agencies welcome feedback on this proposed rule through a public hearing and the 60-day public comment period initiated through publication of this action. The agencies will consider all comments received during the comment period on this proposal, and this consideration will be reflected in the final rule and supporting documents.

V. Proposed Revised Definition

A. Basis for Proposed Rule

In this proposed rule, the agencies are exercising their discretionary authority to interpret ''waters of the United States'' to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits on the scope of the ''waters of the United States'' informed by Supreme Court precedent. The agencies propose to interpret the term ''waters of the United States'' to include: Traditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands; most impoundments of ''waters of the United States''; tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments, that meet either the relatively permanent standard or the significant nexus standard; wetlands adjacent to impoundments and tributaries, that meet either the relatively permanent standard or the significant nexus standard; and ''other waters'' that meet either the relatively permanent standard or the significant nexus standard.

The proposed rule advances the Clean Water Act's statutory objective to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'' section 101(a), as it is based on the best available science concerning the functions provided by upstream tributaries, adjacent wetlands, and ''other waters'' to restore and maintain the water quality of downstream foundational waters. In developing the proposed rule, the agencies also considered the statute as a whole, relevant Supreme Court case law, and the agencies' experience and expertise after more than 30 years of implementing the longstanding 1986 regulations defining ''waters of the United States,'' including more than a decade of experience implementing those regulations consistent with the decisions in *Riverside Bayview, SWANCC,* and *Rapanos* collectively. This proposed interpretation also reflects consideration of provisions of the Act including section 101(b) which states that ''[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources'' because the limitations

reflect consideration of both the comprehensive nature and objective of the Clean Water Act and avoid assertions of jurisdiction that raise federalism concerns. Determining where to draw the boundaries of federal jurisdiction to ensure that the agencies achieve Congress's objective while preserving and protecting the responsibilities and rights of the states is a matter of judgment assigned by Congress to the agencies. The proposed rule's relatively permanent and significant nexus limitations appropriately draw this boundary by ensuring that where upstream waters significantly affect the integrity of the traditional navigable waters, interstate waters, and territorial seas, Clean Water Act programs will apply to ensure that those downstream waters are protected, and where they do not, the agencies will leave regulation to the states and tribes. These limitations are thus based on the agencies' conclusion that together those standards are consistent with the statutory text, advance the objective of the Act, are supported by the scientific record, and appropriately consider the objective in section 101(a) of the Act and the policy in section 101(b). In addition, because the proposed rule reflects consideration of the agencies' experience and expertise, as well as updates in implementation tools and resources, it is familiar and implementable.

For all these reasons, the proposed rule would achieve the agencies' goals of quickly and durably protecting the quality of the nation's waters. Quickly, because the regulatory framework is familiar to the agencies and stakeholders and supporting science is available along with confirmatory updates; and durably, because the foundation of the rule is the longstanding regulations amended to reflect the agencies' interpretation of appropriate limitations on the geographic scope of the Clean Water Act that is consistent with case law, the Act, and the best available science. The proposal would protect the quality of the nation's waters by restoring the important protections for jurisdictional waters provided by the Clean Water Act, including not only protections provided by the Act's permitting programs, but also protections provided by programs ranging from water quality standards and total maximum daily loads to oil spill prevention, preparedness and response programs, to the state and tribal water quality certification programs.

The proposed rule is based on the agencies' interpretation of the Clean Water Act, and the proposed rule's protection of water resources advances both the goals of the Act and the goals identified in the Executive Order, including: Listening to the science; improving public health and protecting our environment; ensuring access to clean water; limiting exposure to dangerous chemicals and pesticides; holding polluters accountable, including those who disproportionately harm communities of color and low-income communities; and bolstering resilience to the impacts of climate change.

1. The Proposed Rule Is Within the Agencies' Discretion Under the Act

The Clean Water Act delegates authority to the agencies to interpret the term ''navigable waters'' and its statutory definition ''waters of the United States,'' and agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation. Given the regulatory and litigation history described above, there can be little disagreement that both terms under the Clean Water Act are ambiguous and that therefore the agencies have generous leeway to provide the considered and reasonable interpretation of the terms provided in this proposal. Indeed, the Supreme Court has twice held that the Act's terms ''navigable waters'' and ''waters of the United States'' are ambiguous and, therefore, that the agencies have delegated authority to reasonably interpret this phrase in the statute.

First, in *Riverside Bayview,* the Supreme Court deferred to and upheld the agencies' interpretation of the Act to protect wetlands adjacent to navigable-in-fact bodies of water, relying on the familiar *Chevron* standard that ''[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress.'' 474 U.S. at 131 (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–45 (1984)). Second, in *Rapanos,* all Justices found ambiguity in the terms—albeit to varying degrees. In his concurring opinion, Justice Kennedy referenced ''ambiguity in the phrase 'navigable waters.' '' 547 U.S. at 780. So did the dissenting Justices. *See id.* at 796 (''[G]iven the ambiguity inherent in the phrase 'waters of the United States,' the Corps has reasonably interpreted its jurisdiction[.]'') (Stevens, J., dissenting); *id.* at 811–12 (''Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review).'') (Breyer, J., dissenting). The plurality also agreed that the term ''is in *some* respects ambiguous.'' *Id.* at 752.

Ambiguity in a statute represents ''delegations of authority to the agency to fill the statutory gap in reasonable fashion.'' *Nat'l Cable & Telecomm. Ass'n* v. *Brand X internet Servs.,* 545 U.S. 967, 980 (2005). As the Supreme Court explained in *Riverside Bayview,* Congress delegated a ''breadth of federal regulatory authority'' and expected the agencies to tackle the ''inherent difficulties of defining precise bounds to regulable waters.'' 474 U.S. at 134. And, in concurring with the *Rapanos* plurality opinion, Chief Justice Roberts emphasized the breadth of the agencies' discretion in defining ''waters of the United States'' through rulemaking, noting that ''[g]iven the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the [agencies] would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority'' under the Clean Water Act. 547 U.S. at 758 (Roberts, C.J., concurring). Indeed, the agencies' interpretations under the Act, Chief Justice Roberts emphasized, are ''afforded generous leeway by the courts.'' *Id.*

In addition, agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (''*Fox*''); *Motor Vehicle Manufacturers Ass'n of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 42 (1983) (''*State Farm*''); *see also Encino Motorcars, LLC* v. *Navarro,* 136 S. Ct. 2117, 2125 (2016) (''Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.''). Such a decision need not be based upon a change of facts or circumstances. A revised rulemaking based ''on a reevaluation of which policy would be better in light of the facts'' is ''well within an agency's discretion.'' *Nat'l Ass'n of Home Builders* v. *EPA,* 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (citing *Fox,* 556 U.S. at 514–15).

As discussed further in section V.B.3 of this preamble, the agencies have reviewed the NWPR and determined that the rule should be replaced. The proposed rule properly considers the objective of the Act, is consistent with the text and structure of the Act and

Supreme Court precedent, and is supported by the best available science.

2. The Proposed Rule Advances the Objective of the Clean Water Act

The proposed rule is grounded in the Act's objective ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'' 33 U.S.C. 1251(a). The proposed rule advances the Act's objective by defining ''waters of the United States'' to include waters that significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas and waters that are relatively permanent or that have a continuous surface connection to such waters. Those limitations also ensure that the agencies will not assert jurisdiction where the effect is not significant. The proposed rule is supported by the best available science on the functions provided by upstream waters, including wetlands, to restore and maintain the integrity of foundational waters because it recognizes that upstream waters can have significant effects and enables the agencies to make science-informed decisions about such effects. The proposed rule thus retains the familiar categories of waters in the 1986 regulations—traditional navigable waters, interstate waters, ''other waters,'' impoundments, tributaries, the territorial seas, and adjacent wetlands—while proposing to add, where appropriate, a requirement that waters also meet either the significant nexus standard or the relatively permanent standard.

a. The Objective of the Clean Water Act To Protect Water Quality Must Be Considered When Defining ''Waters of the United States''

A statute must be interpreted in light of the purposes Congress sought to achieve. *See, e.g., Dickerson* v. *New Banner Institute, Inc.,* 460 U.S. 103, 118 (1983). Thus, the agencies must consider the objective of the Clean Water Act in interpreting the scope of the statutory term ''waters of the United States.'' The objective of the Clean Water Act is ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' 33 U.S.C. 1251(a). To thus adequately consider the Act's statutory objective, a rule defining ''waters of the United States'' must consider its effects on the chemical, physical, and biological integrity of the nation's waters. And—as the text and structure of the Act, supported by legislative history and Supreme Court decisions, make clear—chemical, physical, and biological integrity refers to water quality.

The Act begins with the objective in section 101(a) and establishes numerous programs all designed to protect the integrity of the nation's waters, ranging from permitting programs and enforcement authorities, to water quality standards and effluent limitations guidelines, to research and grant provisions.

One of the Clean Water Act's principal tools in protecting the integrity of the nation's waters is section 301(a), which prohibits ''the discharge of any pollutant by any person'' without a permit or other authorization under the Act. Other substantive provisions of the Clean Water Act that apply to ''navigable waters'' and are designed to meet the statutory objective include the section 402 NPDES permit program, the section 404 dredged and fill permit program, the section 311 oil spill prevention and response program, the section 303 water quality standards and total maximum daily load programs, and the section 401 state and tribal water quality certification process, as discussed above. Each of these programs is designed to protect water quality and, therefore, further the objective of the Act. The question of federal jurisdiction is foundational to most programs administered under the Clean Water Act. *See* section IV.A.1 of this preamble.[21]

Two recent Supreme Court Clean Water Act decisions, *County of Maui, Hawaii* v. *Hawaii Wildlife Fund,* 140 S. Ct. 1462, 1476 (2020) (''*Maui*'') and *Nat'l Ass'n of Mfrs.* v. *Dep't of Defense,* 138 S. Ct. 617, 624 (2018) (''*National Association of Manufacturers*''), affirm that Congress used specific language in the definitions of the Act in order to meet the objective of the Act, that the definition of ''waters of the United States'' is fundamental to meeting the objective of the Act, and, therefore, that the objective of the Act must be considered in interpreting the term ''waters of the United States.''

In *Maui,* the Supreme Court instructed that ''[t]he object in a given scenario will be to advance, in a manner consistent with the statute's language, the statutory purposes that Congress sought to achieve.'' 140 S. Ct. at 1476. The Court, in recognizing that Congress's purpose to '' 'restore and maintain the . . . integrity of the Nation's waters' '' is ''reflected in the language of the Clean Water Act,'' also found that ''[t]he Act's provisions use specific definitional language to achieve this result,'' noting that among that definitional language is the phrase ''navigable waters.'' *Id.* at 1468–69.[22] Thus, in accordance with *Maui,* in interpreting the ''specific definitional language'' of the Clean Water Act, the agencies must consider whether they are advancing the statutory purposes Congress sought to achieve.

In *National Association of Manufacturers,* the Court confirmed the importance of considering the objective of the Clean Water Act when interpreting the specific definitional language of the Act, and in particular when interpreting the definitional language ''waters of the United States.'' The Court identified section 301's prohibition on unauthorized discharges as one of the Act's principal tools for achieving the objective and then identified ''waters of the United States'' as key to the scope of the Act: ''Congress enacted the Clean Water Act in 1972 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' [33 U.S.C.] 1251(a). One of the Act's principal tools in achieving that objective is [section] 1311(a), which prohibits 'the discharge of any pollutant by any person,' except in express circumstances. . . . Because many of the Act's substantive provisions apply to 'navigable waters,' the statutory phrase 'waters of the United States' circumscribes the geographic scope of the Act in certain respects.'' 138 S. Ct. 617, 624. Thus, consideration of the objective of the Act is of particular importance when defining the foundational phrase ''waters of the United States.''

Many other Supreme Court decisions confirm the importance of considering the Act's objective. When faced with questions of statutory interpretation on the scope of the Clean Water Act, many Supreme Court decisions begin with the

[21] Additional provisions are also designed to achieve the Act's statutory objective and use its specific language, including the definition of ''pollution,'' which the Act defines as ''the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.'' 33 U.S.C. 1362(19).

[22] The Court explained:

The Act's provisions use specific definitional language to achieve this result. First, the Act defines ''pollutant'' broadly, including in its definition, for example, any solid waste, incinerator residue, '' 'heat,' '' '' 'discarded equipment,' '' or sand (among many other things). § 502(6), 86 Stat. 886. Second, the Act defines a ''point source'' as '' 'any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged,' '' including, for example, any '' 'container,' '' '' 'pipe, ditch, channel, tunnel, conduit,' '' or '' 'well.' '' § 502(14), *id.,* at 887. Third, it defines the term ''discharge of a pollutant'' as '' 'any addition of any pollutant to navigable waters [including navigable streams, rivers, the ocean, or coastal waters] from any point source.' '' § 502(12), *id.,* at 886.

Maui, 140 S. Ct. at 1469.

objective of the Act and examine the relevant question through that lens. *See, e.g., PUD No. 1 of Jefferson Cty* v. *Washington Dep't of Ecology,* 511 U.S. 700, 704 (1994) (interpreting the scope of Clean Water Act section 401 and finding that the Act ''is a comprehensive water quality statute designed to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,' '' that ''[t]he Act also seeks to attain 'water quality which provides for the protection and propagation of fish, shellfish, and wildlife,' '' and that ''[t]o achieve these ambitious goals, the Clean Water Act establishes distinct roles for the Federal and State Governments''); *EPA* v. *California ex rel. State Water Resources Control Bd.,* 426 U.S. 200, 203, 205 n.12 (1976) (''In 1972, prompted by the conclusion of the Senate Committee on Public Works that 'the Federal water pollution control program . . . has been inadequate in every vital aspect,' Congress enacted the [Clean Water Act], declaring 'the national goal that the discharge of pollutants into the navigable waters be Eliminated by 1985.''); *Arkansas* v. *Oklahoma,* 503 U.S. 91 (1992) (reviewing the scope of EPA's authority to issue a permit affecting a downstream state and finding that the Act ''anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters' ''); *S.D. Warren Co.* v. *Maine Bd. of Envtl. Protection,* 126 S. Ct. 1843, 1852–53 (2006) (interpreting the scope of ''discharge'') (''Congress passed the Clean Water Act to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,' 33 U.S.C. [section] 1251(a)''); *Int'l Paper Co.* v. *Ouellette,* 479 U.S. 481, 492–93 (1987) (''Congress intended the 1972 Act amendments to 'establish an all-encompassing program of water pollution regulation.' . . . The Act applies to all point sources and virtually all bodies of water, and it sets forth the procedures for obtaining a permit in great detail. . . . Given that the Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact pre-empts an action based on the law of an affected State.'').

Along with *Maui* and *National Association of Manufacturers,* these cases confirm that, for purposes of a rulemaking revising the definition of ''waters of the United States,'' the agencies must consider the rule's effect on the chemical, physical, and biological integrity of the nation's waters—*i.e.,* the quality of those waters. The Supreme Court in *Riverside Bayview* explained the inherent link between the Act's objective and water quality: ''This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: As the House Report on the legislation put it, 'the word ''integrity'' . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained.' '' 474 U.S. at 132 (citations omitted).

Indeed, the Clean Water Act is replete with 90 references to water quality—from the goals set forth in furtherance of meeting the statutory objective to the provisions surrounding research, effluent limitations, and water quality standards. *See, e.g.,* 33 U.S.C. 1251(a)(2) (''[I]t is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved''), 1254(b)(6) (providing that the Administrator shall collect ''basic data on chemical, physical, and biological effects of varying water quality''), 1311(b)(1)(C) (requiring permits to have limits as stringent as necessary to meet water quality standards), 1313(c) (providing that water quality standards ''shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this [Act]''). And Congress was clear that ''[t]he development of information which describes the relationship of pollutants to water quality is essential for carrying out the objective of the Act.'' S. Rep. No. 92–414 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3716. *See also id.* at 3717 (''Water quality is intended to refer to the biological, chemical and physical parameters of aquatic ecosystems, and is intended to include reference to key species, natural temperature and current flow patterns, and other characteristics which help describe ecosystem integrity. . . . The criteria will allow the translation of the narrative of the general objective of the Act to specific and precise parameters.''); *id.* at 3742 (''The Committee has added a definition of pollution to further refine the concept of water quality measured by the natural chemical, physical and biological integrity.''). As the Sixth Circuit explained shortly after the 1972 enactment of the Clean Water Act: ''It would, of course, make a mockery of [Congress's] powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.'' *United States* v. *Ashland Oil & Transp. Co.,* 504 F.2d 1317, 1326 (6th Cir. 1974).

To be clear, the agencies do not interpret the objective of the Clean Water Act to be the only factor relevant to determining the scope of the Act. Rather, in light of the precise definitional language of the definitions in the Act, the importance of water quality to the statute as a whole, and *Maui* and other Supreme Court decisions affirming that consideration of the objective of the Act is important in defining the scope of the Act, the agencies conclude that consideration of the objective of the Act for purposes of a rule defining ''waters of the United States'' must include substantive consideration of the effects of a revised definition on the integrity of the nation's waters. As discussed further below, the proposed rule properly considers and advances the objective of the Act because it focuses on the effects of upstream waters including wetlands on traditional navigable waters, interstate waters, and the territorial seas, and is supported by the best available science on those water quality effects.

b. The Proposed Rule Builds Upon the 1986 Regulations, Which Were Designed To Advance the Objective of the Act

The 1986 regulations—which are substantially the same as the 1977 regulations—represented the agencies' interpretation of the Clean Water Act in light of its objective and their scientific knowledge about aquatic ecosystems. The 1986 regulations were designed to advance the objective of the Act and are thus a reasonable foundation upon which to build the proposed rule. In this proposed rule, the agencies are exercising their discretionary authority to interpret ''waters of the United States'' to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' interpretation of the statutory limits on the scope of the ''waters of the United States'' informed by Supreme Court decisions and the scientific record.

The best available science as discussed below confirms that the 1986 regulations remain a reasonable foundation for a definition of ''waters of the United States'' that furthers the water quality objective of the Clean Water Act. *See* Technical Support Document. This section describes the agencies' historic rationale for the 1986 regulations and its regulatory categories

and describes the latest science that supports the conclusion that the categories of waters identified in the 1986 regulations, such as tributaries, adjacent wetlands, and ''other waters,'' provide functions that restore and maintain the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

The agencies' historic regulations, which became the 1986 regulations, were based on the agencies' scientific and technical judgment about which waters needed to be protected to restore and maintain the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. For more than 40 years, EPA and the Corps recognized the need to protect ''the many tributary streams that feed into the tidal and commercially navigable waters . . . since the destruction and/or degradation of the physical, chemical, and biological integrity of each of these waters is threatened by the unregulated discharge of dredged or fill material.'' 42 FR 37121, 37123. The agencies further recognized that the nation's wetlands are ''a unique, valuable, irreplaceable water resource. . . . Such areas moderate extremes in waterflow, aid in the natural purification of water, and maintain and recharge the ground water resource.'' EPA, Protection of Nation's Wetlands: Policy Statement, 38 FR 10834 (May 2, 1973). In *Riverside Bayview,* the Supreme Court acknowledged that the agencies were interpreting the Act consistent with its objective and based on their scientific expertise:

> In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.

474 U.S. at 134.

As the Corps stated in promulgating the 1977 definition, ''[t]he regulation of activities that cause water pollution cannot rely on . . . artificial lines, however, but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of . . . part of the aquatic system . . . will affect the water quality of the other waters within that aquatic system.'' 42 FR 37128. Thus, the proposed rule includes the categories long identified by the agencies as affecting the water quality of traditional navigable waters, interstate waters, and the territorial seas, including tributaries, adjacent wetlands, impoundments, and ''other waters.''

For example, the agencies have long construed the Act to include tributaries as ''waters of the United States.'' The Corps explained in 1977 that its regulations necessarily encompassed ''the many tributary streams that feed into the tidal and commercially navigable waters'' because ''the destruction and/or degradation of the physical, chemical, and biological integrity of each of these waters is threatened by the unregulated discharge of dredged or fill material.'' *Id.* at 37123.

Construing ''waters of the United States'' to include tributaries of traditional navigable waters, interstate waters, the territorial seas, and impoundments of ''waters of the United States'' is consistent with the discussion of tributaries in the Act's legislative history. The Senate Report accompanying the 1972 Act states that ''navigable waters'' means ''the navigable waters of the United States, portions thereof, *tributaries thereof,* and includes the territorial seas and the Great Lakes.'' S. Rep. No. 92414, at 77 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3742 (emphasis added). Furthermore, Congress recognized that Clean Water Act jurisdiction must extend broadly because ''[w]ater moves in hydrologic cycles and it is essential that [the] discharge of pollutants be controlled at the source.'' *Id.* Congress thus restated that ''reference to the control requirements must be made to the navigable waters, portions thereof, *and their tributaries.*'' *Id.* at 3743 (emphasis added).

As discussed below and further in the Technical Support Document, the best available science supports the 1986 regulations' conclusions about the importance of tributaries to the water quality of downstream foundational waters: Tributaries provide natural flood control, recharge groundwater, trap sediment, store and transform pollutants from fertilizers, decrease high levels of chemical contaminants, recycle nutrients, create and maintain biological diversity, and sustain the biological productivity of downstream rivers, lakes, and estuaries.

With the 1986 regulations, the agencies determined that wetlands adjacent to navigable waters generally play a key role in protecting and enhancing water quality: ''Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system. For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.'' 42 FR 37128; *see also* 38 FR 10834.

In *Riverside Bayview,* the Supreme Court deferred to the agencies' judgment that adjacent wetlands provide valuable functions for downstream waters:

> [T]he Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion. In addition, adjacent wetlands may ''serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species.'' . . . [W]e cannot say that the Corps' judgment on these matters is unreasonable . . . .

474 U.S. at 134–35 (citations omitted). The Supreme Court then unanimously held that ''a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation.'' *Id.* at 135.

As discussed below and further in the Technical Support Document, the best available science supports the 1986 regulations' conclusions about the functions provided by adjacent wetlands to downstream traditional navigable waters, interstate waters, and the territorial seas, namely that adjacent wetlands provide valuable flood control and water quality functions including interruption and delay of the transport of water-borne contaminants over long distances, retention of sediment, prevention and mitigation of drinking water contamination, and assurance of drinking water supply.

The 1986 regulations also included ''other waters'' based on their effects on water quality and their effects on interstate commerce. 42 FR 37128. As discussed below and further in section IV.D of the Technical Support Document, the best available science also shows that ''other waters''—such as depressional wetlands, open waters, and peatlands—can provide important hydrologic (*e.g.,* flood control), water quality, and habitat functions which vary as a result of the diverse settings in which they exist across the country and which can have downstream effects on larger rivers, lakes, and estuaries, particularly when considered collectively with other non-floodplain wetlands on the landscape. The

functions that ''other waters'' provide include storage of floodwater, recharge of ground water that sustains river baseflow, retention and transformation of nutrients, metals, and pesticides, export of organisms to downstream waters, and habitats needed for aquatic and semi-aquatic species that also utilize streams.

While the 1986 regulations are a reasonable foundation upon which to build the proposed rule, the agencies are exercising their discretionary authority to interpret ''waters of the United States'' to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' interpretation of the statutory limits on the scope of the ''waters of the United States'' informed by Supreme Court decisions as discussed in section V.A.3 of this preamble.

c. The Proposed Rule Properly Considers the Objective by the Act Because It Is Informed by the Best Available Science on Water Quality

As noted above, the agencies propose to interpret the term ''waters of the United States'' to include: Traditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands; most impoundments of ''waters of the United States''; tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments, that meet either the relatively permanent standard or the significant nexus standard; wetlands adjacent to impoundments and tributaries, that meet either the relatively permanent standard or the significant nexus standard; and ''other waters'' that meet either the relatively permanent standard or the significant nexus standard. The proposal is supported by the best available science on the functions provided by upstream waters, including wetlands, that are important for the chemical, physical, and biological integrity of foundational waters. The agencies' proposal is supported by a wealth of scientific knowledge. The scientific literature extensively illustrates the effects tributaries, wetlands adjacent to impoundments and tributaries, and ''other waters'' can and do have on the integrity of downstream traditional navigable waters, interstate waters, and the territorial seas. The relevant science on the relationship and downstream effects of streams, wetlands, and open waters has advanced considerably in recent years, and confirms the agencies' longstanding view that these waters can be subject to jurisdiction. A comprehensive report prepared by EPA's Office of Research and Development entitled ''Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence'' [23] (hereafter the Science Report) in 2015 synthesized the peer-reviewed science. Since the release of the Science Report, additional published peer-reviewed scientific literature has strengthened and supplemented the report's conclusions. The agencies have summarized and provided an update on more recent literature and scientific support for this section in the Technical Support Document section II.

Again, in the proposed rule, the agencies are not including all tributaries, adjacent wetlands, and ''other waters'' as jurisdictional waters. Rather, the agencies are concluding that proposing these longstanding, familiar categories of waters as subject to the relatively permanent or significant nexus jurisdictional standards is consistent with the best available science because waters in these categories can have significant effects on downstream foundational waters, and are therefore proposing to restore them from the 1986 regulations. The agencies are also proposing to add the relatively permanent and significant nexus standards based on their conclusion that together those standards are consistent with the statutory text, advance the objective and policies of the Act, and are supported by the scientific record. Indeed, the agencies are not reaching any conclusions, categorical or otherwise, about which tributaries, adjacent wetlands (other than those adjacent to traditional navigable waters, interstate waters, or the territorial seas), or ''other waters'' meet either the relatively permanent or the significant nexus standard. Instead, the proposal enables the agencies to make science-informed determinations of whether or not a water that falls within these categories meets either jurisdictional standard and is therefore a ''water of the United States,'' on a case-specific basis.

The agencies also reiterate their previous conclusion that significant nexus is not a purely scientific determination. 80 FR 37054, 37060 (June 29, 2015). As the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the Clean Water Act and science does not provide bright line boundaries with respect to where ''water ends'' for purposes of the Clean Water Act. *Riverside Bayview,* 474 U.S. at 132–33. This section summarizes the best available science in support of the longstanding categories of the 1986 regulation, and in support of the proposed rule and the agencies' conclusion that the proposal advances the objective of the Clean Water Act. This section reflects the scientific consensus on the strength of the effects that upstream tributaries, adjacent wetlands, and ''other waters'' can and do have on downstream foundational waters. However, a significant nexus determination requires legal, technical, and policy judgment, as well as scientific considerations, for example, to assess the significance of any effects. Section V.D of this preamble discusses the agencies' approaches to making case-specific relatively permanent and significant nexus determinations under the proposed rule.

Thus, while the agencies are not proposing to establish that any tributaries, adjacent wetlands (other than those wetlands adjacent to traditional navigable waters, interstate waters, and the territorial seas), or ''other waters'' are jurisdictional without the need for further assessment, they are proposing a rule that, based on the scientific record, identifies those categories of waters as subject to jurisdiction under the Clean Water Act under either the relatively permanent or significant nexus standard.

i. Tributaries Can Provide Functions That Restore and Maintain the Chemical, Physical, and Biological Integrity of Downstream Traditional Navigable Waters, Interstate Waters, and the Territorial Seas

Tributaries play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream foundational waters. *See* Technical Support Document section IV.A. Tributaries slow and attenuate floodwaters; provide functions that help maintain water quality; trap and transport sediments; transport, store and modify pollutants; and sustain the biological productivity of downstream mainstem waters. Tributaries can provide these functions whether they are natural, modified, or constructed and whether they are perennial, intermittent, or ephemeral.

All tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to larger downstream waters via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported. Streams, even where seasonally dry, are

[23] U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Final Report), EPA/600/R–14/475F (2015), *available at https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414.*

the dominant source of water in most rivers, rather than direct precipitation or groundwater input to mainstem river segments. Within stream and river networks, headwater streams make up most of the total channel length. The smallest streams represent an estimated three-quarters of the total length of stream and river channels in the United States.[24] Because of their abundance and location in the watershed, small streams offer the greatest opportunity for exchange between the water and the terrestrial environment.

In addition, compared with the humid regions of the country, stream and river networks in arid regions have a higher proportion of channels that flow ephemerally or intermittently. For example, in Arizona, most of the stream channels—96% by length—are classified as ephemeral or intermittent. The functions that streams provide to benefit downstream waters occur even when streams flow less frequently, such as intermittent or ephemeral streams. For example, ephemeral headwater streams shape larger downstream river channels by accumulating and gradually or episodically releasing stored materials such as sediment and large woody debris.[25] Due to the episodic nature of flow in ephemeral and intermittent channels, sediment and organic matter can be deposited some distance downstream in the arid Southwest in particular, and then moved farther downstream by subsequent precipitation events. Over time, sediment and organic matter continue to move downstream and influence larger downstream waters. These materials help structure downstream river channels by slowing the flow of water through channels and providing substrate and habitat for aquatic organisms.

Stream and wetland ecosystems also process natural and human sources of nutrients, such as those found in leaves that fall into streams and those that may flow into creeks from agricultural fields. Some of this processing converts the nutrients into more biologically useful forms. Other aspects of the processing store nutrients, thereby allowing their slow and steady release and preventing the kind of short-term glut of nutrients that can cause algal blooms in downstream rivers or lakes. Small streams and their associated wetlands play a key role in both storing and modifying potential pollutants, ranging from chemical fertilizers to rotting salmon carcasses, in ways that maintain downstream water quality. Inorganic nitrogen and phosphorus, the main chemicals in agricultural fertilizers, are essential nutrients not just for plants, but for all living organisms. However, in excess or in the wrong proportions, these chemicals can harm natural systems and humans. Larger rivers process excess nutrients much more slowly than smaller streams. Loss of nutrient retention capacity in headwater streams is known to cause downstream water bodies to contain higher concentrations and loads of nitrogen and phosphorus. In freshwater ecosystems, eutrophication, the enriching of waters by excess nitrogen and phosphorus, reduces water quality in streams, lakes, estuaries, and other downstream water bodies. One obvious result of eutrophication is the excessive growth of algae. Too much algae clouds previously clear streams, such as those favored by trout. Algal blooms not only reduce water column visibility, but the microbial decay of algal blooms reduces the amount of oxygen dissolved in the water, sometimes to a degree that causes fish kills. Fish are not the only organisms harmed by eutrophication: Some of the algae species that grow in eutrophic waters generate tastes and odors or are toxic—a clear problem for stream systems, reservoirs, and lakes that supply drinking water for municipalities or that are used for swimming and other contact-recreational purposes. In addition, increased nitrogen and phosphorus and associated algal blooms can injure people and animals. Algal blooms can also lead to beach closures. In addition to causing algal blooms, eutrophication changes the natural community composition of aquatic ecosystems by altering environmental conditions.

Recycling organic carbon contained in dead plants and animals is another crucial function provided by headwater streams and wetlands. Ecological processes that transform inorganic carbon into organic carbon and recycle organic carbon are the basis for every food web on the planet. In freshwater ecosystems, much of the recycling happens in small streams and wetlands, where microorganisms transform everything from leaf litter and downed logs to dead salamanders into food for other organisms in the aquatic food web, including salmon. Like nitrogen and phosphorus, carbon is essential to life but can be harmful to freshwater ecosystems if it is present in excess or in the wrong chemical form. If all organic material received by headwater streams and wetlands went directly downstream, the glut of decomposing material could deplete oxygen in downstream rivers, thereby damaging and even killing fish and other aquatic life. The ability of headwater stream ecosystems to transform organic matter into more usable forms helps maintain healthy downstream ecosystems.

Microorganisms in headwater stream systems use material such as leaf litter and other decomposing material for food and, in turn, become food for other organisms. For example, fungi that grow on leaf litter become nutritious food for invertebrates that make their homes on the bottom of a stream, including mayflies, stoneflies, and caddis flies. These animals provide food for larger animals, including birds such as flycatchers and fish such as trout. The health and productivity of downstream traditional navigable waters, interstate waters, or the territorial seas depend in part on processed organic carbon delivered by upstream headwater systems.

To be clear, the agencies recognize that *SWANCC* held that the use of ''isolated'' non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the Clean Water Act. Consideration of biological functions does not constitute an assertion of jurisdiction over a water based solely on its use by migratory birds; rather, the agencies would consider biological functions for purposes of significant nexus determinations under the proposed rule only to the extent that the functions provided by tributaries, adjacent wetlands, and ''other waters'' significantly affect the biological integrity of the downstream traditional navigable waters, interstate waters, or the territorial seas. For example, to protect Pacific and Atlantic salmon in traditional navigable waters (and their associated commercial and recreational fishing industries), headwater streams must be protected because Pacific and

[24] The actual proportion may be much higher because this estimate is based on the stream networks shown on the U.S. Geological Survey (USGS) National Hydrography Dataset, which does not show all headwater streams.

[25] Videos of ephemeral streams flowing after rain events in the Southwest highlight how effective ephemeral streams can be in transporting woody debris (*e.g.,* tree branches) and sediment downstream during the rainy season. *See, e.g.,* U.S. Department of Agriculture, Agricultural Research Service, *Multiflume Runoff Event August 1, 1990, https://www.tucson.ars.ag.gov/unit/WGWebcam/WalnutGulchWebcam.htm;* U.S. Geological Survey, *Post-fire Flash Flood in Coronado National Memorial, Arizona* (August 25, 2011), *https://www.youtube.com/watch?v=qJ8JxBZt6Ws;* Santa Clara Pueblo Fire/Rescue/EMS Volunteer Department, Greg Lonewolf, *#4 Santa Clara Pueblo Flash Flood Event 01 Sept 2013* (April 14, 2017), *https://www.youtube.com/watch?v=nKOQzkRi4BQ;* Rankin Studio, *Amazing Flash Flood/Debris Flow Southern Utah HD* (July 19, 2019), *https://www.youtube.com/watch?v=_yCnQuILmsM.*

Atlantic salmon require both freshwater and marine habitats over their life cycles and therefore migrate along river networks, providing one of the clearest illustrations of biological connectivity. Many Pacific salmon species spawn in headwater streams, where their young grow for a year or more before migrating downstream, live their adult life stages in the ocean, and then migrate back upstream to spawn. Even where they do not provide direct habitat for salmon themselves, ephemeral streams may contribute to the habitat needs of salmon by supplying sources of cold water that these species need to survive (*i.e.,* by providing appropriate physical conditions for cold water upwelling to occur at downstream confluences), transporting sediment that supports fish habitat downstream, and providing and transporting food for juveniles and adults downstream. These species thereby create a biological connection along the entire length of the river network and functionally help to maintain the biological integrity of the downstream traditional navigable water. Many other species of anadromous fish—that is fish that are born in freshwater, spend most of their lives in saltwater, and return to freshwater to lay eggs—as well as species of freshwater fish like rainbow trout and brook trout also require small headwater streams to carry out life cycle functions.

Based on the importance of the functions that can be provided by tributaries to foundational waters, the agencies' proposal to interpret the Clean Water Act to protect tributaries where those tributaries meet either the relatively permanent standard or the significant nexus standard reflects proper consideration of the objective of the Act and the best available science.

ii. Adjacent Wetlands Provide Functions That Restore and Maintain the Chemical, Physical, and Biological Integrity of Downstream Traditional Navigable Waters, Interstate Waters, and the Territorial Seas

Adjacent wetlands provide valuable flood control and water quality functions that affect the chemical, physical, and biological integrity of downstream foundational waters including interruption and delay of the transport of water-borne contaminants over long distances; retention of sediment; retention and slow release of flood waters; and prevention and mitigation of drinking water contamination and assurance of drinking water supply. *See* Technical Support Document section IV.B.

Because adjacent wetlands retain sediment and augment streamflow via the gradual release of groundwater or water flowing just beneath the solid surface, wetland loss correlates with increased need for dredging and unpredictability of adequate streamflow for navigation. The Supreme Court has recognized the importance of the physical integrity of upstream tributaries in overcoming sedimentation hazards to navigation. *United States* v. *Rio Grande Dam Irrigation Co.,* 174 U.S. 690 (1899). Headwater wetlands are located where erosion risk is highest and are therefore best suited to recapture and stabilize manageable amounts of sediment that might enter traditional navigable waters, interstate waters, or the territorial seas. Adjacent wetlands naturally serve to recapture and stabilize sediment carried by streams and rivers in times when flood flow distributes water across a floodplain.

Adjacent wetlands affect the integrity of downstream waters by retaining stormwater and slowly releasing floodwaters that could otherwise negatively affect the condition or function of downstream waters. The filling or draining of wetlands, including those that are close to the stream network, reduces water storage capacity in a watershed and causes runoff from rainstorms to overwhelm the remaining available water conveyance system. The resulting stream erosion and channel downcutting quickly drains the watershed as surface water leaves via incised (deeper) channels. Disconnecting the incised channel from the wetlands leads to more downstream flooding. As the adjacent wetlands remain disconnected, riparian vegetation and wetland functions are reduced. Because less water is available in groundwater and wetlands for slow release to augment streamflow during dry periods, the filling or draining of wetlands can make the timing and extent of navigability on some waterways less predictable during dry periods. Therefore, the filling or draining of adjacent wetlands, including headwater wetlands, can interfere with the ability to maintain navigability on the nation's rivers and harbors and can lead to flooding in larger downstream waters.

The loss of wetlands adjacent to tributaries of navigable waters, interstate waters, and the territorial seas can also result in notable reductions in drinking water supply and quality. Over 225 million people are served by nearly 15,000 public water systems using surface water such as streams, rivers, lakes, tributaries, and surface-water storage impoundments as a primary source of water. Though drinking water supplied through public water supplies is regulated by the Safe Drinking Water Act, many water suppliers also rely on source water protection efforts, as the quality of the drinking water source is dependent on the protection of its upstream waters. Discharge of agricultural, industrial, sanitary, or other waste into any surface water may pose a public health risk downstream. For example, excessive upstream discharge may overwhelm a public water system filtration unit, allowing microbial pathogens into the drinking water system. EPA's Science Advisory Board cited drinking water contamination by pathogens as one of the most important environmental risks. Drinking water treatment to address microbial pathogens has little effect on many toxic chemicals, metals, and pesticides discharged into streams, drainage ditches, canals, or other surface waters. Conserving wetlands in source water protection areas can help protect water quality, recharge aquifers, and maintain surface water flow during dry periods.

Adjacent wetlands have an important role in improving source water quality, due to their strategic location as buffers for other water bodies and their filtration of surface water. Detention of water and its associated constituents by wetlands allows the biochemical uptake and/or breakdown of contaminants, and the destruction of pathogens. A wide and dense distribution of adjacent wetlands protects and mitigates against contaminant discharges. The water detention capacity of adjacent wetlands also allows for the storage and gradual release of surface waters that may supply public water system intakes during times of drought. In either case, this detention substantially improves both the supply and quality of drinking water. For example, wetlands conservation is a crucial feature of the low-cost New York City municipal water system, which provides high-quality drinking water to millions of people through watershed protection, including of adjacent wetlands, of its source waters rather than extensive treatment.

Based on the importance of the functions that are provided by adjacent wetlands to foundational waters, the agencies' proposal to interpret the Clean Water Act to protect adjacent wetlands where those adjacent wetlands meet either the relatively permanent standard or the significant nexus standard reflects proper consideration of the objective of the Act and the best available science.

iii. ''Other waters'' Can Provide Functions That Restore and Maintain the Chemical, Physical, and Biological Integrity of Downstream Traditional Navigable Waters, Interstate Waters, and the Territorial Seas

''Other waters''—examples of which include, but are not limited to, intrastate lakes, wetlands, prairie potholes, playa lakes, streams that are not tributaries, and natural ponds—can provide important functions which affect the chemical, physical, and biological integrity of downstream foundational waters. *See* Technical Support Document section IV.D. These functions are particularly valuable when considered cumulatively across the landscape or across different watershed/sub-watershed scales and are similar to the functions that adjacent wetlands provide, including water storage to control streamflow and mitigate downstream flooding; interruption and delay of the transport of water-borne pollutants (such as excess nutrients and contaminants) over long distances; and retention of sediment. These functions can be important to the physical integrity of downstream foundational waters. For non-floodplain wetlands and open waters lacking a channelized surface or regular shallow subsurface connection, generalizations from the available literature about their specific effects on downstream waters are difficult because information on both function and connectivity is needed, and thus case-specific analysis of their effects on downstream waters is appropriate from both a scientific and policy perspective.

''Other waters'' individually span the gradient of connectivity identified in the Science Report; they can be open waters located in the riparian area or floodplain of traditional navigable waters, interstate waters, and the territorial seas (*e.g.,* oxbow lakes) and otherwise be physically proximate to the stream network (similar to adjacent wetlands) or they can be open waters or wetlands that are fairly distant from the network. They can be connected to downstream foundational waters via confined surface or subsurface connections (including channels, pipes, and culverts), unconfined surface connections, shallow subsurface connections, deeper groundwater connections, biological connections, or spillage. They can also provide additional functions such as storage and mitigation of peak flows, natural filtration by biochemical uptake and/or breakdown of contaminants, and in some locations, high volume aquifer recharge that contributes to the baseflow in downstream waters. The strength of functions provided by ''other waters'' on downstream waters will vary depending on the type and degree of connection (*i.e..,* from highly connected to highly isolated) to downstream waters and landscape features such as proximity to stream networks and to ''other waters'' with similar characteristics that function as a group to influence jurisdictional downstream waters.

Since the publication of the Science Report in 2015, the published literature has expanded scientific understanding and quantification of functions that ''other waters'' perform that affect the integrity of traditional navigable waters, interstate waters, and the territorial seas, particularly in the aggregate. The more recent literature (*i.e.,* 2014-present, as some literature from 2014 and 2015 may not have been included in the Science Report) has determined that non-floodplain wetlands can have demonstrable hydrologic and biogeochemical downstream effects, such as decreasing peak flows, maintaining baseflows, and performing nitrate removal, particularly when considered cumulatively.

Oxbow lakes and other lakes and ponds that are in close proximity to the stream network, located within floodplain or riparian areas, or that are connected via surface and shallow subsurface hydrology to the stream network or to other ''waters of the United States'' also perform critical chemical, physical, and biological functions that affect downstream foundational waters. Like adjacent wetlands, these waters individually and collectively affect the integrity of downstream waters by acting as sinks that retain floodwaters, sediments, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters. They also provide important habitat for aquatic species to forage, breed, and rest.

Some ''other waters'' are wetlands that are located too far from other jurisdictional waters to be considered ''adjacent.'' The specific distance may vary based on the characteristics of the aquatic resources being evaluated, but they are often located outside of the riparian area or floodplain, lack a confined surface or shallow subsurface hydrologic connection to jurisdictional waters, or exceed the minimum distances necessary for aquatic species that cannot disperse overland to utilize both the subject waters and the waters in the broader tributary network. Some ''other waters'' may be too removed from the stream network or from jurisdictional waters to have significant effects on downstream traditional navigable waters, interstate waters, or the territorial seas. However, particularly when considered in the aggregate, some ''other waters'' can, in certain circumstances, have strong chemical, physical, and biological connections to and effects on foundational waters. Sometimes it is their relative isolation from the stream network (*e.g.,* lack of a hydrologic surface connection) that contributes to the important effect that they have downstream; for example, depressional non-floodplain wetlands lacking surface outlets can function individually and cumulatively to retain and transform nutrients, retain sediment, provide habitat, and reduce or attenuate downstream flooding, depending on site-specific conditions such as landscape characteristics (*e.g.,* slope of the terrain, permeability of the soils).

Based on the functions that can be provided by ''other waters'' to traditional navigable waters, interstate waters, and the territorial seas, the agencies' proposal to assess ''other waters'' to determine whether they meet either the relatively permanent standard or the significant nexus standard reflects proper consideration of the objective of the Act and the best available science.

The agencies' use of the best available science to interpret the scope of ''waters of the United States'' is a change from the NWPR. In the NWPR's preamble, the agencies stated: ''While science informs the agencies' interpretation'' of the phrase ''waters of the United States,'' ''science cannot dictate where to draw the line between Federal and State or tribal waters, as those are legal distinctions.'' 85 FR 22271, April 21, 2020; *see also id.* at 22314 (''the line between Federal and State waters is a legal distinction, not a scientific one''). In this proposal, the agencies agree that science alone cannot dictate where to draw the line defining ''waters of the United States.'' But science is critical to attaining Congress's objective to restore and maintain the chemical, physical, and biological integrity of the nation's waters: Only by relying upon scientific principles to understand the way waters affect one another can the agencies know whether they are achieving that objective. Drawing the line without regard to science risks nullifying Congress's objective altogether. And because the agencies believe that the definition of ''waters of the United States'' should advance the objective of the Act and that objective is focused on restoring and maintaining water quality, *see* section V.A.2 of this preamble, the best available science is of far more importance to the agencies' proposed

rule than it was in the NWPR. Moreover, the agencies have concluded that the NWPR was not informed by the science, but rather was inconsistent with the best available science in substantially important ways. *See* section V.B.3 of this preamble.

iv. The Significant Nexus Standard Allows for Consideration of the Effects of Climate Change on Water Resources Consistent With the Best Available Science

The significant nexus standard allows for the agencies to consider a changing climate when evaluating if upstream waters significantly affect foundational waters. This is because the significant nexus standard is based on the science of the strength of the effects that upstream tributaries, adjacent wetlands, and ''other waters'' can and do have on downstream foundational waters, and so implementation of the standard can adapt to changing climatic conditions. For example, a lake that dries up from warming temperatures due to climate change and no longer has a surface hydrologic connection to downstream waters might become non-jurisdictional, whereas another lake that previously had limited surface hydrologic connectivity might have increased hydrologic connectivity with higher precipitation conditions under a changing climate.

In addition, the significant nexus standard allows the agencies to consider the functions of streams, wetlands, and open waters that support the resilience of the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas to climate change. For example, as more intense and frequent storms and other shifts in precipitation cause floods to increase in frequency and volume in some areas of the United States, a significant nexus determination can evaluate the strength of the effect of runoff storage in wetlands, open waters, and headwater tributaries in mitigating increased flood risk associated with climate change in downstream foundational waters. In addition, as drought leads to decreased baseflows in foundational waters in other areas of the country, the transmission of flows into alluvial or regional aquifer storage through tributaries and wetlands can mitigate for these climate change-related conditions, and those benefits to downstream traditional navigable waters or interstate waters can be assessed as part of a significant nexus analysis. Changes in flow in tributaries caused by climate change will also be relevant to the relatively permanent standard, but that standard may not allow the agencies to take into account the contribution of upstream waters to the resilience of the integrity of downstream waters.

As discussed in section V.C.10 of this preamble, the agencies believe that there are climate benefits that streams, wetlands, and open waters provide that are not related to restoring or maintaining the integrity of downstream traditional navigable waters, interstate waters, or the territorial seas, such as carbon sequestration. Those functions would not be considered under this rule because they are not directly related to the chemical, physical, and biological integrity of downstream waters. However, considering a changing climate when conducting jurisdictional decisions by considering on a case-by-case basis the functions of aquatic resources that contribute to the resilience of the integrity of downstream foundational waters to climate change is consistent with the policy and goals of the Clean Water Act, case law, and the policy goals of this administration as articulated in Executive Order 13990.

3. The Proposed Rule Establishes Limitations That Together Are Consistent With the Statutory Text, Supported by the Scientific Record, and Informed by Relevant Supreme Court Decisions

In this proposed rule, the agencies are exercising their discretionary authority to interpret ''waters of the United States'' to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' interpretation of the statutory limits on the scope of the ''waters of the United States'' informed by Supreme Court decisions. The proposed rule's relatively permanent and significant nexus limitations are based on the agencies' conclusion that together those standards are consistent with the statutory text, are supported by the scientific record, and appropriately consider the objective in section 101(a) of the Act and the policy in section 101(b). Moreover, these fact-dependent, science-informed approaches to jurisdiction are not unique under the Clean Water Act.

At the outset, the agencies think it is useful to lay out the areas where the agencies agree with the statutory interpretation and case law laid out in the NWPR. The agencies agree that ''[b]y the time the 1972 amendments were enacted, the Supreme Court had held that Congress' authority over the channels of interstate commerce was not limited to regulation of the channels themselves but could extend to activities necessary to protect the channels,'' 85 FR 22263, April 21, 2020 (citing *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.,* 313 U.S. 508, 523 (1941)), and that ''Congress had in mind a broader scope of waters subject to CWA jurisdiction than waters traditionally understood as navigable,'' *id.; see also id.* at 22267 (recognizing that ''[t]he plurality and Justice Kennedy both recognized the jurisdictional scope of the CWA is not restricted to traditional navigable waters'' in *Rapanos*). In fact, it would be impossible to achieve Congress's objective if the scope of authority were constrained to waters traditionally understood as navigable because those channels cannot be protected without protecting the tributaries that flow into them and wetlands adjacent to them. *Cf. United States* v. *Ashland Oil & Transp. Co.,* 504 F.2d 1317, 1326 (6th Cir. 1974) (''It would, of course, make a mockery of [Congress's] powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.''). The Supreme Court has explained both that the term ''navigable'' in the defined term ''navigable waters'' has ''limited import,'' *Riverside Bayview,* 474 U.S. at 133, and also that by using the term ''navigable,'' ''Congress had in mind as its authority for enacting the CWA[ ] [i]ts traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made,'' *SWANCC,* 531 U.S. at 172. As the agencies did in the NWPR, the agencies interpret this to mean that the *object* of federal protection is foundational waters, and that jurisdiction encompasses (and is limited to) those tributaries, wetlands, and open waters that are necessary to protect the foundational waters.[26]

The agencies also agree that ''there must be a limit to that authority and to what water is subject to federal jurisdiction,'' 85 FR 22263, April 21, 2020, that where to draw that limit is ambiguous, and that ''Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows,'' *id.* at 22264 (quoting *Nat'l Cable & Telecomm. Ass'n* v. *Brand X*

[26] Unlike the NWPR, the agencies now interpret the foundational waters to include ''interstate waters.'' See section V.C.2 of this preamble.

internet Servs., 545 U.S. 967, 982 (2005)). In determining that limit, the agencies generally continue to believe that the determination of jurisdiction with regard to wetlands adjacent to tributaries ''must be made using a basic two-step approach that considers (1) the connection of the wetland to the tributary; and (2) the status of the tributary with respect to downstream traditional navigable waters'' and that the concept of a ''connectivity gradient'' is useful. *Id.* at 22267, 22271. Similarly, for tributaries, the agencies agree that ''contribution of flow to and connection'' matters. *Id.* at 22267. At bottom, the agencies agree that the Supreme Court has indicated that the limit should relate to the ''significant effects'' of or ''significant nexus'' between that water and traditional navigable waters, interstate waters, and the territorial seas, *id* at 22263–64 (discussing Supreme Court case law, although as explained in section V.A.3.a of this preamble, the NWPR in fact removed the significant nexus test without considering an alternative approach to protecting waters that significantly affect downstream traditional navigable waters). Finally, the agencies agree that the Supreme Court has ''call[ed] into question the agencies' authority to regulate nonnavigable, isolated, intrastate waters that lack a sufficient connection to traditional navigable waters,'' *id.* at 22269, and this proposal would not assert jurisdiction over such waters.[27]

a. The Relatively Permanent Standard and the Significant Nexus Standard Together Advance the Objective of the Act

The proposed rule's utilization of both the relatively permanent standard and the significant nexus standard gives effect to the Act's broad terms and environmentally protective aim as well as its limitations. *See Rapanos,* 547 U.S. at 767–69 (observing ''the evident breadth of congressional concern for protection of water quality and aquatic ecosystems'' and referring to the Act as ''a statute concerned with downstream water quality'') (Kennedy, J., concurring) (citations omitted); *Riverside Bayview,* 474 U.S. at 133 (''Congress chose to define the waters covered by the Act broadly.''). The agencies, however, are proposing that it is the significant nexus standard that advances the objective of the Act because it is linked to effects on downstream water quality while establishing a reasonable limitation on the scope of jurisdiction by requiring those links to be significant. The relatively permanent standard is administratively useful as an example of a subset of waters that will virtually always have the requisite nexus, but, on its own, is insufficiently protective to meet the objective of the Clean Water Act.

The agencies have consistently construed *Rapanos* to mean that a water is jurisdictional under the Clean Water Act if it meets either the relatively permanent standard or the significant nexus standard. The NWPR, however, interpreted the statute to *primarily* find waters jurisdictional only if they met the relatively permanent standard, as specifically interpreted in the NWPR. The NWPR argued that it reflected both the plurality and Kennedy opinions, which it characterized as having ''sufficient commonalities . . . to help instruct the agencies on where to draw the line between Federal and State waters.'' 85 FR 22268, April 21, 2020. The opinions have important differences, however. Justice Kennedy looked to the existence of a significant nexus between waters at issue and downstream traditional navigable waters, whereas the plurality held that ''waters of the United States'' is limited to ''relatively permanent'' waters connected to traditional navigable waters, and wetlands with a ''continuous surface connection'' with those waters. *Rapanos,* 547 U.S. at 742. Justice Kennedy rejected these two limitations in the plurality as ''without support in the language and purposes of the Act or in our cases interpreting it.'' *Id.* at 768; *see also id.* at 776 (''In sum the plurality's opinion is inconsistent with the Act's text, structure, and purpose.''). Yet the plurality's limitation of jurisdiction to ''relatively permanent waters'' and those with a ''continuous surface connection'' to those waters pervades the NWPR. *See* 85 FR 22338–39; 33 CFR 328.3(a), (c)(1), (c)(6), and (c)(12). The NWPR disregards the significant nexus standard, *see generally* 85 FR 22338–39; 33 CFR 328.3, and, in doing so, restricted the scope of the statute using limitations Justice Kennedy viewed as anathema to the purpose and text of the Clean Water Act.

The agencies propose to reject the NWPR's interpretation as inconsistent with the objective of the Clean Water Act, the science, and the case law, and instead to propose an interpretation whereby if a water meets either standard, it falls within the protections of the Clean Water Act. This section first discusses why the significant nexus test is consistent with the Act and the best available science; then explains why the relatively permanent standard is administratively useful, but limiting the scope of jurisdiction to waters meeting the relatively permanent standard is insufficient to meet the objective of the Clean Water Act; and finally, explains that fact-based standards for determining Clean Water Act jurisdiction are reasonable and not unique to the definition of ''waters of the United States.''

i. The Significant Nexus Test Is Consistent With the Act and the Best Available Science

The significant nexus standard advances the objective of the Act because it is linked to effects on downstream water quality while establishing a reasonable limitation on the scope of jurisdiction. The significant nexus standard reasonably effectuates the text of 33 U.S.C. 1362(7), which defines ''navigable waters.'' The requirement that a significant nexus exist between upstream waters, including wetlands and ''navigable waters in the traditional sense'' fulfills ''the need to give the term 'navigable' some meaning.'' *Rapanos,* 547 U.S. at 779 (Kennedy, J., concurring). With the significant nexus standard, the proposed rule is properly focused on protecting the foundational waters clearly protected by the Clean Water Act. The significant nexus is thus consistent with the text of the Act, with scientific principles and supported by the best available science, with the Act's legislative history, and with case law.

Congress was focused on water quality when it enacted the Clean Water Act and established its objective, as discussed in section V.A.2 of this preamble. The significant nexus standard is derived from the objective of the Act and thus also focused on water quality and specifically focused on the water quality of the foundational waters. As described more fully in section V.A.2.c of this preamble, *supra,* the

[27] The NWPR criticized the agencies' prior practice as insufficiently attentive to the concerns raised by the Supreme Court in *SWANCC* regarding jurisdiction over the ''other waters'' category defined in (a)(3) of the regulatory definition that was at issue in *SWANCC. Id.* at 22264. This criticism is inaccurate. Cognizant of the Supreme Court's direction in *SWANCC* and to ensure that any assertion of authorities over (a)(3) waters is consistent with the Court's precedents, since *SWANCC,* the agencies have required that before exercising jurisdiction over an (a)(3) water field staff get approval from headquarters. 68 FR 1991 (January 15, 2003). As a practical matter, and as discussed in more detail below, section V.C.3 of this preamble, field staff have rarely, if ever, sought such approval and therefore the agencies have not asserted jurisdiction over (a)(3) waters. But (a)(3) waters can have significant effects on foundational waters and, when they do, jurisdiction is proper and would not implicate the constitutional concerns expressed by the Court in *SWANCC* for the reasons explained herein.

significant nexus standard is consistent with scientific principles about the aquatic ecosystem: Upstream waters can significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters, interstate waters, and the territorial seas. Therefore, assessing the effects that waters have on downstream foundational waters when considered, alone or in combination with other similar waters in a region, is a reasonable means of identifying those waters necessary to protect in order to advance the objective of the Act.

A significant nexus analysis is consistent with the framework through which scientists assess a river system—examining how the components of the system (*e.g.,* wetlands, tributaries), in the aggregate (in combination), in the region, contribute and connect to the river (significantly affect the chemical, physical, or biological integrity of foundational waters). Indeed, the significant nexus standard in the proposed rule reflects the type of analysis in the Science Report by describing the components of a river system and watershed; the types of physical, chemical, and biological connections that link those components; the factors that influence connectivity at various temporal and spatial scales; and methods for quantifying connectivity. The structure and function of rivers are highly dependent on the constituent materials stored in and transported through them. Most of these materials originate from either the upstream river network or other components of the river system and then are transported to the river by water movement or other mechanisms. Further, the significant nexus standard is supported by the Science Report's discussion of connectivity, a foundational concept in hydrology and freshwater ecology. *See also* Technical Support Document.

Connectivity is the degree to which components of a system are joined, or connected, by various transport mechanisms and is determined by the characteristics of both the physical landscape and the biota of the specific system. Connectivity serves to demonstrate the ''nexus'' between upstream water bodies and the downstream traditional navigable water, interstate water, or the territorial sea and, while the scientific literature does not use the term ''significant'' in the same manner used by the Supreme Court, the literature does provide information on the strength of the effects on the chemical, physical, and biological functioning of the downstream water bodies that permits the agencies to judge when an effect is significant such that a water, alone or in combination, should be protected by the Clean Water Act in order to meet the objective of the Act. The Science Report presents evidence of connections for various categories of waters, evaluated singly or in combination, which affect downstream waters and the strength of those effects. The connections and mechanisms discussed in the Science Report include: Transport of physical materials and chemicals such as water, wood, sediment, nutrients, pesticides, and mercury; functions that jurisdictional adjacent waters perform, such as storing and cleansing water; and movement of organisms. Again, the significant nexus standard, under which waters are assessed alone or in combination for the functions they provide downstream, is consistent with the foundational scientific framework and concepts of hydrology.

The agencies' use of scientific principles to determine the scope of ''waters of the United States'' is consistent with the Supreme Court's approach in *Maui.* The Court also looked to scientific principles to inform its interpretation of the Clean Water Act's jurisdictional scope, noting: ''[m]uch water pollution does not come from a readily identifiable source. See 3 Van Nostrand's Scientific Encyclopedia, at 5801 (defining 'Water Pollution'). Rainwater, for example, can carry pollutants (say, as might otherwise collect on a roadway); it can pollute groundwater, and pollution collected by unchanneled rainwater runoff is not ordinarily considered point source pollution.'' 140 S. Ct. at 1471. The Court further observed that ''[v]irtually all water, polluted or not, eventually makes its way to navigable water. This is just as true for groundwater. See generally 2 Van Nostrand's Scientific Encyclopedia 2600 (10th ed. 2008) (defining 'Hydrology').'' *Id.* at 1470. The Court then enumerated a series of factors relevant to determining whether a discharge is jurisdictional under the Act, many of which are scientifically based, including the nature of the material through which the pollutant travels and the extent to which the pollutant is diluted or chemically changed as it travels. *Id.* at 1476–77.

In carefully considering the objective of the Act and the best available science, the proposed rule's incorporation of the significant nexus standard is consistent with the legislative history of the Clean Water Act. The Supreme Court has noted that ''some Members of this Court have consulted legislative history when interpreting *ambiguous* statutory language.'' *Bostock* v. *Clayton County, Georgia,* 140 S. Ct. 1731, 1749 (2020). In *Bostock,* the Court stated further that ''while legislative history can never defeat unambiguous statutory text, historical sources can be useful for a different purpose: Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context. And we must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally. To ferret out such shifts in linguistic usage or subtle distinctions between literal and ordinary meaning, this Court has sometimes consulted the understandings of the law's drafters.'' *Id.* at 1750.

Bills introduced in 1972 in both the House of Representatives and the Senate defined ''navigable waters'' as ''the navigable waters of the United States.'' *See* 2 Environmental Policy Div., Library of Congress, *Legislative History of the Water Pollution Control Act Amendments of 1972* at 1069, 1698 (1973). The House and Senate Committees, however, expressed concern that the definition might be given an unduly narrow reading. Thus, the House Report observed: ''One term that the Committee was reluctant to define was the term 'navigable waters.' The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent. The Committee fully intends that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.'' H.R. Rep. No. 92–911, at 131 (1972).

The Senate Report stated that ''[t]hrough a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'' S. Rep. No. 92–414, at 77 (1971). The Conference Committee deleted the word ''navigable'' from the definition of ''navigable waters,'' broadly defining the term to include ''the waters of the United States.'' The Conference Report explained that the definition was intended to repudiate earlier limits on the reach of federal water pollution efforts: ''The conferees fully intend that the term 'navigable waters' be given the broadest possible

constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.'' S. Conf. Rep. No. 92–1236, at 144 (1972).

The significant nexus standard is also consistent with prior Supreme Court decisions, and with every circuit decision that has gleaned a rule of law from that precedent. For example, in *Riverside Bayview,* the Court deferred to the agencies' interpretation: ''In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.'' 474 U.S. at 134. In *Rapanos,* Justice Kennedy stated of the Court in *Riverside Bayview* ''the Court indicated that 'the term ''navigable'' as used in the Act is of limited import,' 474 U.S., at 133, [and] it relied, in upholding jurisdiction, on the Corps' judgment that 'wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water,' *id.,* at 135.'' 547 U.S. at 779 (Kennedy, J., concurring). ''The implication,'' Justice Kennedy observed, ''was that wetlands' status as 'integral parts of the aquatic environment'—that is, their *significant nexus* with navigable waters—was what established the Corps' jurisdiction over them as waters of the United States.'' *Id.* (emphasis added); *see also id.* at 780 (''[W]etlands' ecological functions vis-á-vis other covered waters are the basis for the Corps' regulation of them.''). The Court in *SWANCC* also characterized its decision in *Riverside Bayview* as informed by the ''significant nexus between the wetlands and 'navigable waters.' '' 531 U.S. at 167.

In *Rapanos,* Justice Kennedy reasoned that *Riverside Bayview* and *SWANCC* ''establish the framework for'' determining whether an assertion of regulatory jurisdiction constitutes a reasonable interpretation of ''navigable waters,'' finding that ''the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act,'' and ''[a]bsent a significant nexus, jurisdiction under the Act is lacking.'' 547 U.S. at 767. Justice Kennedy also identified many of the same valuable functions of wetlands identified in the Science Report:

> Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular. To give just one example, *amici* here have noted that nutrient-rich runoff from the Mississippi River has created a hypoxic, or oxygen-depleted, ''dead zone'' in the Gulf of Mexico that at times approaches the size of Massachusetts and New Jersey. Brief for Association of State Wetland Managers et al. 21–23; Brief for Environmental Law Institute 23. Scientific evidence indicates that wetlands play a critical role in controlling and filtering runoff. See, *e.g.,* OTA 43, 48–52; R. Tiner, In Search of Swampland: A Wetland Sourcebook and Field Guide 93–95 (2d ed. 2005); Whitmire & Hamilton, Rapid Removal of Nitrate and Sulfate in Freshwater Wetland Sediments, 34 J. Env. Quality 2062 (2005).

Id. at 777–78.

The agencies are mindful of the Supreme Court's decision in *SWANCC* regarding the specific Commerce Clause authority Congress was exercising in enacting the Clean Water Act. The Court noted that the statement in the Conference Report for the Act that the conferees ''intend that the term 'navigable waters' be given the broadest possible constitutional interpretation,'' S. Conf. Rep. No. 92–1236, at 144 (1972), signifies Congress's intent with respect to its exertion of its commerce power over navigation and no more. In light of the ambiguous nature of the phrase ''waters of the United States,'' the agencies have found the legislative history concerning the intent of Congress regarding the scope of the Act's protections under its power over navigation confirms the reasonableness of the proposed rule. The rule would ensure that all waters that either alone or in combination significantly affect the integrity of traditional navigable waters, interstate waters, or the territorial seas are protected under the Clean Water Act. The Supreme Court has long held that authority over traditional navigable waters is not limited to either protection of navigation or authority over only the traditional navigable water. Rather, ''the authority of the United States is the regulation of commerce on its waters . . . [f]lood protection, watershed development, [and] recovery of the cost of improvements through utilization of power are likewise parts of commerce control.'' *United States* v. *Appalachian Electric Power Co.,* 311 U.S. 377, 426 (1940); *see also Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.,* 313 U.S. 508, 525–526 (1941) (''[J]ust as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries. . . . [T]he exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce.''). Again, to quote the Sixth Circuit after the 1972 enactment of the Clean Water Act: ''It would, of course, make a mockery of [Congress's] powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.'' *United States* v. *Ashland Oil & Transp. Co.,* 504 F.2d 1317, 1326 (6th Cir. 1974). The significant nexus standard included in the proposed rule remains well within the bounds of *SWANCC.*

ii. The Relatively Permanent Standard Is Administratively Useful, but Insufficient To Meet the Objective of the Clean Water Act

The agencies also conclude that federal protection is appropriate where a water meets the relatively permanent standard. Waters that meet this standard are an example of a subset of waters that will virtually always have the requisite connection to downstream traditional navigable waters, interstate waters, or the territorial seas, and therefore properly fall within the Clean Water Act's scope. However, the relatively permanent standard is insufficient as the sole standard for geographic jurisdiction under the Clean Water Act as it is inconsistent with the Act's text and objective and runs counter to the science.

Science supports that tributaries of traditional navigable waters with relatively permanent, standing, or continuously flowing water and wetlands and relatively permanent open waters with continuous surface connections to such relatively permanent waters perform important functions that either individually or cumulatively with similarly situated waters in the region have substantial effects on the chemical, physical, or biological integrity of downstream foundational waters. *See* Technical Support Document section IV.A. For example, perennial and seasonally intermittent tributaries contribute consistent flow to downstream foundational waters, and with that flow export nutrients, sediment, and food resources, contaminants, and other

materials that can both positively (*e.g.,* by contributing to downstream baseflow, providing food for aquatic species, contributing to downstream aquatic habitat) and negatively (*e.g.,* if exporting too much sediment, runoff, or nutrients or if exporting pollutants) affect the integrity, including the water quality, of those larger downstream waters. In addition, wetlands with a continuous surface connection to such relatively permanent waters can attenuate floodwaters, trap sediment, and process and transform nutrients that might otherwise reach downstream traditional navigable waters, interstate waters, or the territorial seas. The relatively permanent standard is useful because it generally requires less information gathering and assessment and because it focuses on flow and includes wetlands with a continuous surface connection. As such, while both the significant nexus and relatively permanent standards require fact-specific inquiries before determining whether a water is a ''water of the United States,'' the relatively permanent standard will generally require less assessment.

Standing alone as the sole test for Clean Water Act jurisdiction, the relatively permanent standard is insufficient. The standard's apparent exclusion of major categories of waters from the protections of the Clean Water Act, specifically with respect to tributaries that are not relatively permanent (such as ephemeral streams) and adjacent wetlands that do not have a continuous surface water connection to other jurisdictional waters, is inconsistent with the Act's text and objective and runs counter to the science demonstrating how such waters can affect the integrity of downstream waters, including traditional navigable waters, interstate waters, and territorial seas. The NWPR, for example, excluded federal jurisdiction over the many ephemeral tributaries that regularly and directly provide sources of freshwater to the sparse traditional navigable waters in the arid Southwest, such as portions of the Gila River.

As discussed in section V.A.2.c of this preamble, there is overwhelming scientific information demonstrating the effects ephemeral streams can have on downstream waters and the effects wetlands can have on downstream waters when they do not have a continuous surface connection. The science is clear that aggregate effects of ephemeral streams ''can have substantial consequences on the integrity of the downstream waters'' and that the evidence of such downstream effects is ''strong and compelling.'' Science Report at 6–10, 6–13. EPA's Science Advisory Board (SAB) Review of the draft Science Report explained that ephemeral streams ''are no less important to the integrity of the downgradient waters'' than perennial or intermittent streams. Letter from SAB to Gina McCarthy, Administrator, EPA (Oct. 17, 2014) (''SAB Review'') at 22–23, 54 fig. 3. The agencies also find no exclusion of waters that are not relatively permanent in the text of the statute. *Rapanos,* 547 U.S. at 770 (''To be sure, Congress could draw a line to exclude irregular waterways, but nothing in the statute suggests it has done so.'') (Kennedy, J., concurring).

The science is also clear that wetlands may significantly affect downstream waters when they have other types of surface connections, such as wetlands that overflow and flood jurisdictional waters or wetlands with less frequent surface water connections due to long-term drought; wetlands with shallow subsurface connections to other protected waters; or other wetlands proximate to jurisdictional waters. Such wetlands provide a number of functions, including water storage that can help reduce downstream flooding, recharging groundwater that contributes to baseflow of downstream rivers, improving water quality through processes that remove, store, or transform pollutants such as nitrogen, phosphorus, and metals, and serving as unique and important habitats including for aquatic species that also utilize larger downstream waters. *See, e.g.,* Science Report at 4–20 to 4–38. For example, adjacent, interdunal wetlands separated from the Atlantic Ocean only by beach dunes would not meet the relatively permanent standard, but provide numerous functions, including floodwater storage and attenuation, storage and transformation of sediments and pollutants, and important habitat for species that utilize both the wetlands and the ocean, that significantly affect the Atlantic Ocean (both a traditional navigable water and territorial sea).

In addition, the agencies see no basis in the text or the science to exclude waters from Clean Water Act jurisdiction based solely on the continuous surface connection requirement. As discussed in section V.A.2.a of this preamble, the objective of the Act is to restore and maintain the water quality of the nation's waters. Nowhere does the Act refer to a continuous surface connection, and the imposition of such a limitation would not account for the science regarding how upstream waters and wetlands affect downstream foundational waters. As discussed above in this section and in the Technical Support Document, the science supports that wetlands and open waters that lack a continuous surface connection to relatively permanent waters can individually and cumulatively have more than a speculative or insubstantial effect on the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, or the territorial seas. As a scientific matter, the agencies agree with Justice Kennedy that the Clean Water Act intends to protect waters that do not meet the relatively permanent standard, where such waters have a significant nexus. *Rapanos,* 547 U.S. at 773–74 (''Needless to say, a continuous connection is not necessary for moisture in wetlands to result from flooding—the connection might well exist only during floods.'') (Kennedy, J., concurring); *see also id* at 775 (''In many cases, moreover, filling in wetlands separated from another water by a berm can mean that floodwater, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways. With these concerns in mind, the Corps' definition of adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.'').

While the relatively permanent standard is administratively useful and includes waters that have important effects on downstream water quality, the standard excludes many waters that properly fall within the Act's protections. As a result, the proposed rule's incorporation of both *Rapanos* standards represents a reasonable interpretation of broad and ambiguous statutory text and a permissible way for the agencies to fulfill their congressionally delegated responsibility to interpret ''waters of the United States'' in a manner that advances the objective of the Act.

iii. Fact-Based Standards for Determining Clean Water Act Jurisdiction Are Reasonable

Finally, while a fact-dependent jurisdictional analysis of whether a water meets either the relatively permanent standard or the significant nexus standard does not necessarily provide categorical certainty, case-specific determinations of the scope of Clean Water Act jurisdiction are not unique. In the Supreme Court's most recent decision addressing a question about the jurisdictional scope of the Clean Water Act, although not the scope of ''waters of the United States,'' the Court established a standard for

determining jurisdiction that, like the significant nexus standard, does not establish bright lines marking the bounds of federal jurisdiction and instead requires an inquiry focused on the specific facts at issue and guided by the purposes Congress sought to achieve under the Act. In *Maui,* the Supreme Court considered whether discharges to groundwater that reach navigable waters are jurisdictional under the Act and thus subject to the Act's section 402 permitting program. The Court held that ''the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge.*'' *Maui,* 140 S. Ct. at 1476. The Court explained that ''[w]e think this phrase best captures, in broad terms, those circumstances in which Congress intended to require a federal permit.'' *Id.* The Court further explained that, in applying its broadly worded standard, ''[t]he object in a given scenario will be to advance, in a manner consistent with the statute's language, the statutory purposes that Congress sought to achieve.'' *Id.* The Court recognized that the difficulty with its approach was that ''it does not, on its own, clearly explain how to deal with middle instances,'' but reasoned that ''there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language.'' *Id.* The Court enumerated a series of factors relevant to determining whether a discharge is the ''functional equivalent'' of direct discharge, including the time between when the discharge occurs and when the pollutants reach the navigable water, the distance the pollutants travel to the navigable water, the nature of the material through which the pollutant travels, the extent to which the pollutant is diluted or chemically changed as it travels, the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, the manner by or area in which the pollutant enters the navigable waters, and the degree to which the pollution (at that point) has maintained its specific identity. *Id.* at 1476–77.

The Supreme Court's ''functional equivalent'' standard has several key characteristics in common with the significant nexus standard and the agencies' approach in the proposed rule. Both standards require an analysis focused on the specific facts at issue in a particular instance. The ''functional equivalent'' standard requires consideration of facts related to the discharge at issue, the geologic substrate through which the discharges travels, the location and nature of the receiving water, and other factors. Likewise, the significant nexus standard requires consideration of scientific principles of upstream functions and effects on the integrity of downstream waters and facts related to the specific waters at issue. Indeed, the agencies have proposed a list of factors that would be considered when assessing whether waters ''significantly affect'' foundational waters that is similar in nature to the factors identified by the Court for making a ''functional equivalent'' assessment. *See* section V.C.10 of this preamble. The relatively permanent standard also requires inquiry into specific facts about particular tributaries and wetlands, although the inquiry generally requires less information gathering and assessment than the significant nexus standard. The Court in *Maui* also explicitly rejected EPA's suggested approach which established a bright line that categorically excluded all discharges to groundwater regardless of whether they reached navigable waters and instead adopted the ''functional equivalent'' analysis. 140 S. Ct. at 1474–75. Likewise, the significant nexus standard also does not necessarily establish bright lines with respect to determining which waters have a sufficient impact on downstream traditional navigable waters, interstate waters, or the territorial seas, in contrast to the NWPR which categorically excluded all ephemeral waters in spite of their impact on the chemical, physical, and biological integrity of downstream foundational waters.

Finally, both the functional equivalent standard and the significant nexus standard should be applied while keeping in mind the purposes of the Act. As the Court explained in *Maui,* ''[t]he underlying statutory objectives also provide guidance. Decisions should not create serious risks either of undermining state regulation of groundwater or of creating loopholes that undermine the statute's basic federal regulatory objectives.'' *Id.* at 1477. Likewise, Justice Kennedy explained that when assessing the existence of a ''significant nexus'' between wetlands and navigable waters, ''[t]he required nexus must be assessed in terms of the statute's goals and purposes.'' *Rapanos,* 547 U.S. at 779.

The agencies recognize that in both *Rapanos* and *Maui* the Supreme Court was clear that the agencies could promulgate regulations that further refine the case-specific jurisdictional tests. The agencies' goal with this proposed rule is to return to the familiar and longstanding framework that will ensure Clean Water Act regulatory protections, informed by relevant Supreme Court decisions. The agencies also anticipate developing another rule that builds upon the regulatory foundation of this rule with the benefit of additional stakeholder engagement and which could, among many issues, consider more categorical approaches to jurisdiction.

b. The Proposed Rule Reflects Full and Appropriate Consideration of the Water Quality Objective in Section 101(a) and the Policies Relating to Responsibilities and Rights of States and Tribes Under Section 101(b) of the Act

The proposed rule reflects consideration of the statute as a whole, including the objective of the Act and the policies of the Act with respect to the role of states and tribes. As discussed in section V.A.2.a of this preamble, the agencies must consider the objective of the Clean Water Act in interpreting the scope of the statutory term ''waters of the United States.'' In this proposed rule, the agencies also consider the entire statute, including section 101(b) of the Clean Water Act, which provides that it is Congressional policy to preserve the primary responsibilities and rights of states ''to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority'' under the Clean Water Act. 33 U.S.C. 1251(b). Determining where to draw the boundaries of federal jurisdiction to both ensure that the agencies achieve Congress's objective while preserving and protecting the responsibilities and rights of the states is a matter of judgment assigned by Congress to the agencies.

The agencies find that the proposed rule both advances the objective of the Act in section 101(a) and respects the role of states and tribes in 101(b).[28] The proposed rule appropriately draws the boundary of waters subject to federal protection by extending, and limiting, it to the protection of upstream waters that significantly affect the integrity of waters where the federal interest is indisputable—the traditional navigable waters, interstate waters, and territorial seas. Waters that do not implicate federal interest in these foundational

[28] While Clean Water Act section 101(b) does not specifically identify tribes, the policy of preserving states' sovereign authority over land and water use is equally relevant to ensuring the primary authority of tribes to address pollution and plan the development and use of tribal land and water resources.

waters are left entirely to state and tribal protection and management.

The scope and boundaries of the proposed definition therefore reflect the agencies' considered judgment of both the Act's objective in section 101(a) and the Congressional policy relating to states' rights and responsibilities under section 101(b). In several key respects, the agencies' consideration and weighing of these provisions in this rulemaking differs from the agencies' approach in the NWPR. Those differences and the bases for them follow.

i. Consideration of Sections 101(a) and 101(b) in the NWPR

In promulgating the NWPR, the agencies gave predominant weight to consideration of the policy in section 101(b), citing it frequently in its rationale for the rule generally. For example, the agencies stated: ''The agencies interpret the policy of Congress, set forth in section 101(b), as relevant to all aspects of the implementation of the CWA, both implementing federally-established standards as well as the scope of waters subject to such standards and regulatory programs.'' 85 FR 22269, April 21, 2020. The agencies also opined on the relationship between its consideration of section 101(a) and 101(b): ''In developing an appropriate regulatory framework for the final rule, the agencies recognize and respect the primary responsibilities and rights of States to regulate their land and water resources as reflected in CWA section 101(b). The oft-quoted objective of the CWA to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,' . . . must be implemented in a manner consistent with Congress' policy directives to the agencies.'' *Id.* The NWPR ultimately concluded that the rule ''appropriately balances . . . the objective of the Act and the policy of Congress set forth in CWA sections 101(a) and 101(b), respectively.'' *Id.* at 22277.

Beyond relying on section 101(b) for the agencies' overall approach to the rulemaking, the NWPR relied specifically on section 101(b) as a basis for the rule's line-drawing between jurisdictional and non-jurisdictional waters. For example, with regard to tributaries, the agencies stated that limiting jurisdiction to waters that contribute surface flow to traditional navigable waters in a typical year ''better balances the CWA's objective in section 101(a) with the need to respect State and tribal authority over land and water resources as mandated by Congress in section 101(b).'' *Id.* at 22287. The agencies contended, moreover, that excluding ephemeral waters from jurisdiction ''respect[s] State and Tribal land use authority over features that are only episodically wet during and/or following precipitation events.'' *Id.* at 22319. With regard to wetlands, the agencies similarly relied upon ''limitations on federal authority embodied in CWA section 101(b)'' as a justification for excluding subsurface hydrologic connectivity as a basis for determining what constitutes an adjacent wetland. *Id.* at 22313.

ii. Consideration of Sections 101(a) and 101(b) in Developing the Proposed Rule

The agencies have carefully considered sections 101(a) and 101(b) as well as the agencies' analysis and application of these provisions in promulgating the NWPR. As discussed below, based on the text of section 101(b), the structure of section 101 and the Act as a whole, Supreme Court precedent, and the history of federal water pollution laws enacted by Congress up through the 1972 Amendments, the agencies believe that the proposed rule reflects fuller and more appropriate consideration of sections 101(a) and 101(b) than the agencies undertook in promulgating the NWPR.

As a threshold matter, the agencies agree that the policy in section 101(b) is both important and relevant to the agencies' defining an appropriate scope of ''waters of the United States.'' Consistent with the text of the statute and as emphasized by the Supreme Court, federal jurisdiction under the Clean Water Act has limits. As explained above, Clean Water Act jurisdiction encompasses (and is limited to) those waters that significantly affect the indisputable federal interest in the protection of the foundational waters that prompted Congress to enact the various incarnations of the Act—*i.e.,* traditional navigable waters, interstate waters, and the territorial seas. And consistent with the section 101(b) policy, where protection (or degradation) of waters do not implicate this federal interest, such waters fall exclusively within state or tribal regulatory authority, should they choose to exercise it.

The agencies' considered view at this time differs, however, in certain important respects from how the NWPR considered section 101(b). As the above statements make clear, section 101(b) was not simply a relevant consideration for the NWPR, but a key lynchpin of both the overall regulatory approach and the rule's specific definitions of jurisdictional waters. In the agencies' view, the better reading of section 101(b) does not support the heavy weight accorded to it by the NWPR for either its overall approach nor its specific definitions.

(1) The Text of Section 101(b)

First, the agencies believe that the NWPR's reading of section 101(b) fails to align with the better reading of the text of section 101(b). For example, the agencies stated in support of the NWPR that ''[i]n developing an appropriate regulatory framework for the final rule, the agencies recognize and respect the primary responsibilities and rights of States to *regulate* their land and water resources as reflected in CWA section 101(b).'' 85 FR 22269, April 21, 2020 (emphasis added). However, this appears to be a restatement of the first sentence of section 101(b), which actually states:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act.

The NWPR read this provision as essentially agnostic (or even in opposition) to preventing pollution and meeting the objective of Act. *See, e.g.,* 85 FR 22270, April 21, 2020 (''States are free to evaluate the most effective means of addressing their waters and may weigh the costs and benefits of doing so.''). The agencies believe the better reading of this provision is found in the text of section 101(b), as a recognition of states' authority to ''*prevent, reduce, and eliminate* pollution'' and provide support for the Administrator's exercise of his authority to advance the objective of the Act. Indeed, section 101(b)'s text is plainly focused on environmental protection (''prevent, reduce, and eliminate pollution,'' ''including restoration, preservation and enhancement[] of land and water resources'').

Section 101(b) further recognizes the very important role that the states play in achieving the Act's objective. ''Pollution'' is a defined term in the Act that means ''man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water'' (section 502(19)) and has a broader scope than the ''discharge of a pollutant'' subject to regulatory jurisdiction under the Clean Water Act (*e.g.,* nonpoint sources of pollution). The agencies believe that Congress's use of the broad term ''pollution'' in section

101(b) indicates that the policy in this section is intended to recognize and preserve, among other things, states' authority to prevent, reduce, and eliminate all kinds of pollution, including pollution falling outside the scope of federal regulatory authority. Importantly, this includes all non-point sources, which indisputably may (and do) significantly affect the integrity of foundational waters. The agencies' proposed definition of ''waters of the United States'' does not implicate, let alone impinge, on such state authorities.

The first sentence of section 101(b) also refers to states' ''*primary*'' role in preventing, reducing, and eliminating pollution—a word that is not incompatible with overlapping federal and state authority over waters which, under the proposed rule, implicate core federal interests. Thus, the text of section 101(b) need not be read, and in the agencies' view is best not read, as a general policy in favor of preserving for states a zone of exclusive regulatory authority based on federalism principles ''to choose whether or not to regulate'' regardless of the impact of those decisions on achievement of the Act's objective. *See* 85 FR 22270, April 21, 2020.

In developing the proposed rule, the agencies also considered the language in section 101(b) referring to states' rights and responsibilities ''to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.'' Planning the development, use, and protection of land and water resources is indisputably a traditional state function (*e.g.,* zoning, allocation and administration of water rights, exercise of eminent domain, preservation of lands and waters). Congress's recognition of the states' primary role in this domain does not state or even suggest a policy to limit Clean Water Act jurisdiction over waters, as would be covered under the proposed rule, implicating the core federal interest in protecting traditional navigable waters, interstate waters and the territorial seas.

Indeed, any implication to the contrary is dispelled by the remainder of section 101(b), which, among other things, expressly recognizes states' role in administering the federal permitting programs under section 402 of the Act:

> It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

Thus, in the agencies' view, the text of section 101(b) as a whole reflects not a general policy of deference to state regulation to the exclusion of Federal regulation, but instead a policy focused on preserving the responsibilities and rights of states to work to achieve the objective of the Act by preventing, reducing and eliminating pollution generally, including, but not limited to, through their authority over any source of pollution subject to state law, consulting with the Administrator in the exercise of his Clean Water Act authority, and implementing the Act's regulatory permitting programs, in partnership and with technical and financial support from the Federal government.

In the preamble to the NWPR, the agencies criticized prior statements they had made as taking an unduly narrow view of section 101(b) ''as limited to implementation of the Act's regulatory programs by States and State authority to impose conditions on 'waters of the United States.''' 85 FR 22269, April 21, 2020. As indicated above, the agencies now view the policy in section 101(b) as encompassing a broad understanding of states' roles in preventing, reducing, and eliminating pollution, and as explained above, the proposed rule reflects due consideration of this provision.

The agencies' interpretation and consideration of section 101(b) in this rulemaking is consistent with Supreme Court precedent. The Supreme Court has described, on numerous occasions, section 101(b) as creating a partnership between the federal and state governments, in which the states administer programs under federally mandated standards and are allowed to set even more stringent standards. *See Arkansas* v. *Oklahoma,* 503 U.S. at 144 (describing ''partnership between the States and the Federal government'' to meet 101(a) objective of Federal government setting pollutant discharge limitations and States implementing water quality standards for water bodies themselves); *Int'l Paper Co.* v. *Ouellette,* 479 U.S. at 489–90 (explaining 101(b) as allowing Federal government to delegate administration of point source pollution permits to states and allowing states to establish more stringent discharge limitations than federal requirements); *City of Milwaukee,* 451 U.S. at 341 (describing 101(b) as creating ''shared authority between the Federal Government and the Individual States'' that allows for the states to set more stringent standards than necessary by federal law); *Colorado Public Interest Group,* 426 U.S. at 16, n.13 (describing 101(b) as providing states authority to develop permit programs and establishing standards more stringent than the Clean Water Act).

(2) Relationship Between Sections 101(a) and 101(b)

The agencies have also carefully considered the policy in section 101(b) as it relates to the Act's objective in section 101(a) and have reconsidered how the agencies considered these two provisions in promulgating the NWPR.

In the preamble to the final NWPR, the agencies stated: ''The oft-quoted objective of the CWA to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,' . . . must be implemented in a manner consistent with Congress' policy directives to the agencies.'' 85 FR 22269, April 21, 2020. As discussed above, the agencies gave section 101(b) predominant weight, and relied upon it as the basis for the rule's line-drawing between jurisdictional and non-jurisdictional waters. Upon further review and reconsideration, while the agencies agree with the view in the NWPR that section 101(b) is relevant to a rulemaking defining ''waters of the United States'' (and have given the provision due consideration, as discussed above), the agencies are giving greater weight to section 101(a) than did the NWPR, and conclude that section 101(b) is better read as supporting Congress's objective in the Clean Water Act than in tension with it.

The Clean Water Act's structure makes clear that section 101(a) is the foundational purpose of the statute that must be achieved. First, section 101(a) is the opening section of the statute and is labelled the ''objective'' of the Act. The agencies interpret its placement and its simple, declarative, and overarching statement as a powerful expression by Congress that merits significant weight in defining the scope of jurisdiction for all of the Clean Water Act's regulatory programs. In contrast, section 101(b) is one of four Congressional policies contained in section 101; the other three relate to seeking to ensure foreign countries take action to prevent, reduce, and eliminate pollution; reducing paperwork, duplication, and government delays; and state authority to allocate quantities of water within their jurisdictions. *See* 33 U.S.C. 1251(c), (f) and (g). The agencies believe that the prominently placed and single expression of the Act's overarching objective in section 101(a) merits greater weight in the agencies' decision-making than one of the four Congressional

policies expressed in section 101 which, while important, appear subordinate to the objective—particularly given the statutory text and structure.

The remainder of the Act's text also demonstrates how important this objective was to Congress. As the NWPR accurately stated, the objective in section 101(a) is ''oft-quoted'' 85 FR 22269, April 21, 2020. In the Clean Water Act itself, Congress refers to the objective of the Act approximately a dozen times, including in sections 122, 217, 301, 302, 304, 305, 308, 318, 402, 405, 505, 516, 518, 601, and 603. The repeated reference to section 101(a) highlights the importance of the Act's objective to the statute as a whole, supporting the agencies' giving significant weight to this provision. Section 101(b), in contrast, is not referred to elsewhere in the Act.

Indeed, while the NWPR read section 101(b) in isolation from the rest of the Clean Water Act, reviewing the statute as a whole reveals that Congress itself gave direction to the agencies on how it expected them to achieve section 101(a)'s objective and implement section 101(b)'s policy. Following section 101, the remainder of the Act provides extensive and detailed instruction on how Congress expected its objective, goals, and policies to be met through the Act. Specifically, with regard to its objective and goals in section 101(a), Congress laid out a series of detailed programs (*e.g.,* the section 303 water quality standards program, the section 402 discharge elimination program, and the section 404 dredge and fill program) designed to meet that objective. So too, Congress gave detailed instructions on how it intended to apply its policy of preserving the primary role of the states. Specifically, as referenced explicitly in section 101(b), it authorized states to implement the key permitting programs under sections 402 and 404 of the Act—*i.e.,* their authority to assume administration of the federal regulatory program for discharges of pollutants under sections 402(b) and 404(g). The Clean Water Act likewise delineates a role for states in implementing numerous other Clean Water Act programs central to achieving the Act's objective, including the water quality standards program and impaired waters and total maximum daily load program in section 303. Section 401 grants primary authority to states and authorized tribes to grant, deny, or waive certification of proposed federal licenses or permits that may discharge into ''waters of the United States'' within their borders. And under section 510, unless expressly stated, nothing in the Clean Water Act precludes or denies the right of any state or tribe to establish more protective standards or limits than the Act. As described above, the Clean Water Act further assigns exclusive authority to the states to regulate non-point sources.

Thus, the agencies choose not to read the policy of section 101(b) as essentially a free-floating instruction or license for the agencies to interpret or implement other sections of the Act in a manner that impedes achievement of its overall objective, in particular definitional provisions like ''waters of the United States'' which are central to administration of the entire statute and therefore achieving that objective. To the contrary, Congress itself defined the contours of how it expected the agencies to both achieve its object in section 101(a) and implement its policy in section 101(b) through the rest of the provisions of the Act. Notably, a narrow definition of ''waters of the United States'' would not uniformly boost state authority, as the NWPR suggested, as that definition is foundational to the scope of all of these programs in which the states are assigned authority. Indeed, with regard to section 401, a narrow definition would actually *limit* states' ability to protect waters within their borders.

Finally, section 101(a) has also been ''oft-quoted'' by the courts, including the U.S. Supreme Court. *See, e.g., National Association of Manufacturers,* 138 S. Ct. at 624 (''Congress enacted the Clean Water Act in 1972 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' 33 U.S.C. 1251(a).''); *see supra* section V.A.2 of this preamble (summarizing Supreme Court case law surrounding the Act's statutory objective).

The agencies' careful balancing of 101(a) and 101(b) in the proposed rule is also informed by and consistent with the Court in *SWANCC,* which noted that ''Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources. . . .' 33 U.S.C. [section] 1251(b). We thus read the statute as written to avoid the significant constitutional and federalism questions.'' U.S. 531 at 174. Justice Kennedy further explained in *Rapanos:* ''In *SWANCC,* by interpreting the Act to require a significant nexus with navigable waters, the Court avoided applications—those involving waters without a significant nexus—that appeared likely, as a category, to raise constitutional difficulties and federalism concerns.'' 547 U.S. at 776. Likewise here, the proposed rule—by limiting jurisdiction only to those waters that significantly affect the integrity of waters where the federal interest is indisputable (traditional navigable waters, interstate waters, and the territorial seas)—would avoid constitutional and federalism concerns.

In sum, taking into account the prominence, text, repeated statutory references to section 101(a), the Supreme Court's highlighting of the central importance of this provision, and the fact that the vast majority of the rest of the Clean Water Act is primarily aimed towards meeting this objective, the agencies accord this section significant weight, and greater weight than the due consideration it has given section 101(b) in developing the proposed rule.

(3) Statutory History

Finally, in considering sections 101(a) and 101(b) for purposes of interpreting the scope of ''waters of the United States,'' the agencies believe it is important to consider the statutory history that gave rise to this structure. Indeed, the agencies recognize that in passing the Federal Water Pollution Control Act Amendments of 1972, Congress was not acting on a blank slate—it was amending existing law that had primarily provided for states to establish water quality standards for a subset of waters. Water Quality Act of 1965, Public Law 89–234, 79 Stat. 903 (1965). Congress found the previous statute's focus on states' establishment and administration of water quality standards insufficient for the task of upgrading and protecting the quality of America's waters because states were lagging in establishing such standards and there was ''an almost total lack of enforcement.'' S. Rep. 92–414, S. Rep. 92–414 (1971) at 3671, 72. The Clean Water Act was enacted to address these shortcomings after ''two of the important rivers [in the Sixth] circuit, the Rouge River in Dearborn, Michigan, and the Cuyahoga River in Cleveland, Ohio, reached a point of pollution by flammable materials in the last ten years that they repeatedly caught fire.'' *United States.* v. *Ashland Oil & Transp. Co.,* 504 F.2d 1317, 1326 (6th Cir. 1974).

With the 1972 Amendments, Congress adopted an entirely new approach to water pollution control—a prohibition of discharges of pollutants unless authorized by the Act and a new, comprehensive, federal regulatory scheme grounded in technology-based effluent standards applied uniformly across industries of the same type. ''The Committee recommends the change to effluent limits as the best available mechanism to control water pollution.

With effluent limits, the Administrator can require the best control technology.'' S. Rep. 92–414 at 3675. Congress further indicated that the Clean Water Act was intended to ''restore Federal-State balance to the permit system. Talents and capacities of those States whose own programs are superior are to be called upon to administer the permit system within their boundaries. The Administrator is to suspend his activity, insofar as the permit system is concerned, in these States.'' *Id.* . Congress also viewed the prohibition on discharges of pollutants unless authorized under the Act as ''establish[ing] a direct link between the Federal government and each industrial source of discharge into the navigable waters.'' *Id.* Thus, Congress viewed the Clean Water Act as a change from previous laws that centered on states and state water quality standards to a system based on a prohibition of discharges of pollutants to waters unless permitted in accordance with a federal regulatory scheme and technology standards established by EPA. States and tribes play a vital role in the implementation and enforcement of the Clean Water Act and the proposed rule proposes limitations after carefully considering how best to identify those waters for which protections were better left to the states.

Thus, in passing the 1972 Amendments, Congress itself acted to rebalance its approach to protecting water quality—shifting from a statutory scheme dependent on state action to one rooted in a federal foundation, providing a uniform floor of water quality protection and leaving space for states to choose whether to regulate more stringently. *See Dubois* v. *U.S. Dep't of Agriculture,* 102 F.3d 1273, 1300 (1st Cir. 1996) (''Simply put, the CWA provides a federal floor, not a ceiling, on environmental protection.''). Yet, in interpreting section 101(b) as serving to limit the scope of the Federal government's authority in favor of state authority, the NWPR turned Congress's scheme in the 1972 Amendments—in which it purposefully sought to give the Federal government a greater role in water quality protection—on its head. Unlike the NWPR, which did not consider the Act's statutory history in its read of section 101(b), the agencies here interpret section 101(b) in the context of this history and Congress's deliberate choice to restructure the statute to move away from its previous reliance on state-led water pollution control.

The Supreme Court has also long recognized that Congress, in enacting the Clean Water Act, ''intended the 1972 Act amendments to 'establish an all-encompassing program of water pollution regulation.''' *Int'l Paper Co.* v. *Ouellette,* 479 U.S. 481, 492–93 (1987); *see, e.g., PUD No. 1 of Jefferson Cty* v. *Washington Dep't of Ecology,* 511 U.S. 700, 704 (1994) (interpreting the scope of Clean Water Act section 401 and finding that the Act ''is a comprehensive water quality statute designed to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,''' that ''[t]he Act also seeks to attain 'water quality which provides for the protection and propagation of fish, shellfish, and wildlife,''' and that ''to achieve these ambitious goals, the Clean Water Act establishes distinct roles for the Federal and State Governments''); *EPA* v. *California ex rel. State Water Resources Control Bd.,* 426 U.S. 200, 203, 205 n.12 (1976) (''In 1972, prompted by the conclusion of the Senate Committee on Public Works that 'the Federal water pollution control program . . . has been inadequate in every vital aspect,' Congress enacted the [Clean Water Act] declaring 'the national goal that the discharge of pollutants into the navigable waters be Eliminated by 1985.''). In the context of the scope of ''waters of the United States,'' the Court stated that Congress ''intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.'' *Riverside Bayview,* 474 U.S. 121, 133. More recently, the Supreme Court in *Maui* noted that:

> Congress' purpose as reflected in the language of the Clean Water Act is to '''restore and maintain the integrity of the Nation's waters,' '' [section] 101(a), 86 Stat. 816. Prior to the Act, Federal and State Governments regulated water pollution in large part by setting water quality standards. *See EPA* v. *California ex rel. State Water Resources Control Bd.,* 426 U.S. 200, 202–203, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976). The Act restructures federal regulation by insisting that a person wishing to discharge any pollution into navigable waters first obtain EPA's permission to do so. *See id.,* at 203–205, 96 S.Ct. 2022; *Milwaukee* v. *Illinois,* 451 U.S. 304, 310–311, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981).

140 S. Ct. at 1468.

With respect to states' responsibilities and rights under section 101(b), Justice Kennedy in *Rapanos* cited state *amici* briefs which ''note[d], among other things, that the Act protects downstream States from out-of-state pollution that they cannot themselves regulate.'' 547 U.S. at 777. Indeed, the Supreme Court has recognized that this is an important aspect of the Clean Water Act's passage. *City of Milwaukee* involved alleged discharges of inadequately treated sewage from Milwaukee, Wisconsin sewer systems directly into Lake Michigan, which also borders Illinois. The Supreme Court noted that prior to passage of the Clean Water Act, these discharges would have had to be resolved through litigation, in which the courts must apply ''often vague and indeterminate nuisance concepts and maxims of equity jurisprudence.'' 451 U.S. at 317. The Clean Water Act, however, replaced this unpredictable and inefficient approach with ''a comprehensive regulatory program supervised by an expert administrative agency.'' *Id.*

Yet, an overly narrow definition of jurisdictional waters—such as that under the NWPR (including the NWPR's removal from jurisdiction the longstanding category of interstate waters) —threatens a return to pre-1972 days excluding from federal protection waters that significantly affect foundational waters and risks removing from the statutory scheme instances of interstate pollution the 1972 amendments were designed to address. In response to concerns expressed by commenters regarding protection of downstream states from out-of-state pollution, the agencies in the NWPR simply stated: ''The CWA provides a number of opportunities for the EPA to mediate disputes among states, though the remedies available for cross-boundary water pollution disputes over non-jurisdictional waters depends upon the parties and the issues of the case. As they do today, under the final rule remedies for pollution disputes among states that do not implicate CWA sections 319(g), 401, or 402 would likely derive from federal common law under the Supreme Court's original jurisdiction. Remedies for disputes between a state and a public or private party would likely derive from state or federal common law and be heard by state or federal courts.'' NWPR, Response to Comments, Topic 1 Legal Arguments at 26. But directing states and other parties to utilize state or federal common law to resolve such disputes overlooks ''Congress' intent in enacting the [1972] Amendments . . . to establish an all-encompassing program of water pollution regulation,'' *City of Milwaukee,* 451 U.S. at 318, and that ''the need for such an unusual exercise of lawmaking by federal courts disappears'' when Congress passes legislation that ''speak[s] directly'' to the question at issue, as Congress did in

passing the Clean Water Act. *Id.* at 317–18.

By proposing regulations interpreting the Act to cover waters that meet the relatively permanent standard or the significant nexus standard, the agencies have reasonably interpreted the Act to protect those waters necessary to protect the integrity of downstream traditional navigable waters, interstate waters, and the territorial seas while leaving regulatory authority over all other waters exclusively to the states. This interpretation respects the statutory history that gave rise to the Act and gives effect to the comprehensive nature of the Clean Water Act, its objective, and the many programs affected by the scope of ''waters of the United States'' designed to meet that objective, along with other important policies of the Act, while ensuring that states have sole authority over waters with no or insignificant connection to the foundational waters clearly protected by the Clean Water Act.

(4) The Definitions of Jurisdictional Waters in the Proposed Rule Reflect Appropriate Consideration of Sections 101(a) and 101(b) of the Act

As discussed elsewhere, the proposed rule includes definitions of tributaries, adjacent wetlands, and ''other waters'' that meet the relatively permanent or significant nexus standards (*see* section V.C of this preamble). The proposed rule advances the Act's objective by helping restore and maintain the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and territorial seas—waters of longstanding and indisputable federal interest—by protecting them from degradation of upstream waters that significantly affect them. At the same time, consistent with section 101(b), the proposed rule recognizes, preserves, and protects states' rights and responsibilities subject to the policy in section 101(b) of the Act by leaving within their purview all waters that do not significantly affect the foundational waters of paramount federal interest. The specific jurisdictional lines in the proposed rule demarcating jurisdictional from non-jurisdictional waters therefore bear a relationship to the nature and extent of federal and state interests at play; this line-drawing highlights the agencies' deliberate and due consideration of sections 101(a) and 101(b) in developing the proposed rule.

The agencies believe that the jurisdictional line-drawing reflected in the proposed rule better aligns with these statutory provisions than the NWPR. As noted previously, the preamble to the final NWPR cited section 101(b) as a justification, in part, for its specific definitions of jurisdictional tributaries and adjacent wetlands. One of the most environmentally significant decisions in the NWPR was its categorical exclusion of all ephemeral streams from Clean Water Act jurisdiction. The agencies cited section 101(b) as a basis for this exclusion as ''respecting State and Tribal land use authority over features that are only episodically wet during and/or following precipitation events.'' 85 FR 22319. The agencies' explanation, however, does not link the agencies' line-drawing to the text or purpose of section 101(b). Nor do the agencies, at this time, see any linkage between the flow regime of ephemeral waters and the nature or extent of state authorities referenced in section 101(b). Indeed, as discussed elsewhere, available science unequivocally demonstrates that ephemeral tributaries can implicate the important federal interest in the protection of the integrity of traditional navigable waters, interstate waters, and territorial seas. Likewise, in categorically excluding ephemeral waters, the agencies in the NWPR cite section 101(a), but again do not explain how their decision relates to or advances the Act's objective. 85 FR 22277, April 21, 2020. In contrast, informed by the policy in section 101(b) and the Act's objective in section 101(a), the proposed role appropriately distinguishes between jurisdictional and non-jurisdictional tributaries based on whether a tributary implicates core federal interests, in which case it is covered by the rule, or fails to do so, in which case its protection and management is left to states and tribes.

The NWPR similarly relied upon section 101(b) as a basis for its definition of adjacent wetlands, in particular the decision to exclude from consideration subsurface hydrologic connection between a wetland and an adjacent water when determining jurisdiction, stating: ''[B]alancing the policy in CWA section 101(a) with the limitations on federal authority embodied in CWA section 101(b), the agencies are finalizing the definition of 'adjacent wetlands' that does not include subsurface hydrologic connectivity as a basis for determining adjacency.'' *Id.* at 22313. Again, the NWPR does not explain how excluding consideration of subsurface hydrologic connections relates to or derives from section 101(b), and the agencies do not now discern such a linkage. And as with the definition of tributaries, the NWPR does not explain how this choice relates to or advances the objective of the Act. In contrast, the proposed rule's approach to adjacent wetlands, like its approach to jurisdictional tributaries, gives due consideration to the policy in section 101(b) and the objective in section 101(a) by tethering jurisdiction to whether the wetland implicates foundational waters with a demonstrated federal interest.

4. The Proposed Rule Is Both Familiar and Implementable

The agencies have extensive experience implementing the 1986 regulations. In addition, the scientific and technical information available to inform the significant nexus analysis and identify waters that meet the relatively permanent standard has markedly improved over time and become more easily available since the agencies first started implementing both standards. The agencies are taking comment on a range of implementation options discussed in section V.D of this preamble that would further inform the public as to the agencies' intended practice for asserting jurisdiction under the proposed rule.

Since the Court's decision in *Rapanos,* the agencies have gained more than a decade of experience implementing the 1986 regulations consistent with the relatively permanent standard and the significant nexus standard under three different presidential Administrations, beginning with the *Rapanos* Guidance issued in 2007. Even after the agencies promulgated the 2015 Clean Water Rule, they continued to implement the 1986 regulations consistent with the *Rapanos* Guidance in certain states in response to court decisions enjoining the 2015 Clean Water Rule in various parts of the country.

The agencies repromulgated the 1986 regulations in the 2019 Repeal Rule and implemented those rules nationwide until June 22, 2020, when the NWPR became effective. The agencies explained that with the 2019 Repeal Rule, they intended to ''restore the regulatory text that existed prior to the 2015 Rule'' and that the agencies would ''implement the pre-2015 Rule regulations informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.'' 84 FR 56626, October 22, 2019. The agencies concluded that ''[the] final rule will provide greater regulatory certainty and national consistency while the agencies consider public comments on the proposed [2020 Rule].'' *Id.* at 56660. To further justify a return to the 1986 framework, the agencies noted that ''[t]he agencies, their

coregulators, and the regulated community are . . . familiar with the pre-2015 Rule regulatory regime and have amassed significant experience operating under those pre-existing regulations. Agency staff in particular have developed significant technical expertise in implementing the 1986 regulations.'' *Id.* The 2019 Repeal Rule would thus ''provide greater certainty by reinstating nationwide a longstanding regulatory framework that is familiar to and well understood by the agencies, States, Tribes, local governments, regulated entities, and the public.'' *Id.* at 56661. Indeed, a number of regulators and regulated parties alike expressed support for returning to the pre-2015 regulations, as implemented following *SWANCC* and *Rapanos,* due in part to their experience and familiarity with that regime.[29]

Further, in responding to comments asserting that the agencies should not return to the pre-2015 regulatory regime because that regime would reduce regulatory certainty compared to the 2015 Clean Water Rule due to the prior regime's reliance on case-specific significant nexus determinations, the agencies explained that ''[f]ollowing the Supreme Court's decisions in *SWANCC* and *Rapanos* . . . the Corps published a guidebook to assist district staff in issuing approved jurisdictional determinations. In particular, the guidebook outlines procedures and documentation used to support significant nexus determinations. This guidebook has been and continues to be publicly available and will continue to serve as a resource in issuing jurisdictional determinations under this final rule.'' [30] *Id.* at 56660. Even after the NWPR's June 22, 2020 effective date, the agencies continued to implement the 2019 Repeal Rule consistent with the *Rapanos* Guidance in Colorado until April 2021 due to litigation barring implementation of the NWPR in that state.

In addition to the past three presidential Administrations, courts have also found that the 1986 regulations, implemented consistent with the *Rapanos* standards, provide an appropriate regulatory framework by which to implement the Act. Indeed, in staying the 2015 Rule nationwide, the Sixth Circuit found that returning to the ''familiar, if imperfect, pre-Rule regime'' was the best path forward pending judicial review of the 2015 Rule. *In re EPA & Dep't of Def. Final Rule,* 803 F.3d 804, 808 (6th Cir. 2015). In doing so, the court recognized that it needed to reinstate the pre-2015 regulatory *regime*—not the 1986 regulations alone—to properly preserve the status quo. *See id.* at 806 (finding that ''the status quo at issue is the pre-[2015 Rule] regime of federal-state collaboration that has been in place for several years, following the Supreme Court's decision in *Rapanos*''). Likewise, in vacating the NWPR, the Arizona district court reinstated the pre-2015 regulatory regime, noting that the regime ''is familiar to the Agencies and industry alike.'' *See Pascua Yaqui Tribe,* 2021 WL 3855977, at *5.

The agencies acknowledge that a return to the pre-2015 regime would result in the need for case-specific analyses for certain jurisdictional determinations, potentially raising some timeliness and consistency issues that the agencies' rules in 2015 and 2020 were designed, in part, to reduce. However, the NWPR both fails to advance the Act's statutory objective and introduces new implementation uncertainties, including its own case-specific typical year analysis for most categories of jurisdictional waters. In contrast, the proposed rule is both consistent with the Act's statutory text and purposes and is longstanding and familiar to regulated parties and regulators alike. Moreover, all definitions of ''waters of the United States'' require some level of case-specific analysis, and implementation of the proposed rule will be aided by improved and increased scientific and technical information and tools that both the agencies and the public can use to determine whether waters are ''waters of the United States'' (*see* section V.D of this preamble). Accordingly, the agencies have concluded the proposed rule is consistent with the Clean Water Act and the best available science as well as familiar and implementable.

Through the various rulemakings and court decisions relating to the definition of ''waters of the United States'' since the *Rapanos* decision in 2006, the agencies have continued implementing the 1986 regulations consistent with the *Rapanos* standards nationwide or in numerous states across the country for various periods of time. This experience has allowed the agencies to further develop expertise in implementing this regime. The agencies, most often the Corps, have made hundreds of thousands of Clean Water Act approved jurisdictional determinations since the issuance of the 2008 *Rapanos* Guidance. Of those, approximately 36,000 have required a case-specific significant nexus determination. The agencies have made such determinations in every state in the country as well as in the U.S. territories.

With field staff located in 38 Corps District offices and 10 EPA regional offices, the agencies have over a decade of nationwide experience in making decisions regarding jurisdiction under the 1986 regulations consistent with the relatively permanent standard and the significant nexus standard as interpreted by the *Rapanos* Guidance. These individual determinations have been made affirmatively for waters ranging from an ephemeral stream that flows directly into a traditional navigable water used extensively for recreational boating and fishing, to wetlands directly touching a perennial tributary, to an intermittent stream that provides flow to a drinking water source, to a group of floodplain wetlands that provide important protection from floodwaters to downstream communities alongside the traditional navigable water, to headwater mountain streams that provide high quality water that supplies baseflow and reduces the harmful concentrations of pollutants in the main part of the river below. The agencies have also made many findings of no jurisdiction under the 1986 regulations when they concluded the waters in question did not meet either the relatively permanent standard or the significant nexus standard as implemented by the *Rapanos* Guidance. This includes individual determinations for a small non-relatively permanent stream without any adjacent wetlands miles from the nearest downstream traditional navigable water, for a small wetland adjacent to a non-relatively permanent water that together did not have a case specific significant nexus under the guidance, and for a roadside ditch constructed in and draining uplands that lacked relatively permanent flow.

Through this experience, the agencies developed wide-ranging technical expertise in assessing the hydrologic flowpaths along which water and materials are transported and transformed that determine the degree of chemical, physical, or biological connectivity and effects to downstream

[29] *See, e.g.,* comments submitted by American Water Works Association (August 13, 2018) (Docket ID: EPA–HQ–OW–2017–0203–15559); comments submitted by North Dakota's Department of Agriculture (July 25, 2018) (Docket ID: EPA–HQ–OW–2017–0203–15541); comments submitted by the Office of the Governor of Utah (August 9, 2018) (Docket ID: EPA–HQ–OW–2017–0203–15202) (''Recodification of the regulations that existed prior to the 2015 Rule will provide continuity and certainty for regulated entities, States, the agencies' staff, and the American public.'').

[30] For convenience, EPA decisions on jurisdiction are referred to as jurisdictional determinations throughout this document, but such decisions are not approved jurisdictional determinations as defined and governed by the Corps regulations at 33 CFR 331.2.

waters. The agencies have also become deeply familiar with the variations in climate, geology, and terrain within and among watersheds and over time that affect the functions (such as the removal or transformation of pollutants) performed by streams, open waters, and wetlands for downstream traditional navigable waters, interstate waters, or the territorial seas. The Corps can complete jurisdictional determinations at no charge to the landowner or project proponent upon their request.

The agencies utilize many tools and many sources of information to help support decisions on jurisdiction, including U.S. Geological Survey (USGS) and state and local topographic maps, aerial photography, satellite imagery, soil surveys, National Wetland Inventory maps, floodplain maps, watershed studies, scientific literature and references, and field work. As discussed further in section V.D.3.d of this preamble, these tools have undergone significant technological advances, and become increasingly available, since the *Rapanos* decision. For example, USGS and state and local stream maps and datasets, aerial photography, gage data, watershed assessments, monitoring data, and field observations are often used to help assess the contributions of flow of tributaries, including intermittent and ephemeral streams, to downstream traditional navigable waters, interstate waters, or the territorial seas. Similarly, floodplain and topographic maps from federal, state, and local agencies, modeling tools, and field observations can be used to assess how wetlands are storing floodwaters that might otherwise affect the integrity of downstream waters. Further, the agencies utilize the large body of scientific literature regarding the functions of tributaries, including tributaries with ephemeral, intermittent, and perennial flow, and of wetlands and open waters to inform their significant nexus analyses. In addition, the agencies have experience and expertise from decades of making decisions on jurisdiction that considered hydrology, ordinary high water mark (OHWM) and its associated indicators (*see* section V.C.9.d of this preamble), biota, and other technical factors in implementing Clean Water Act programs. The agencies' immersion in the science, along with the practical expertise developed through case-specific determinations across the country for more than a decade, have helped the agencies determine which waters have a significant nexus and where to draw boundaries demarking the ''waters of the United States.''

Regulated entities and other interested parties also have significant experience with the 1986 regulations and the two *Rapanos* standards. While the agencies have been developing their expertise in implementing this regime, so have state and tribal co-regulators and regulated entities that may be subject to the Act's reach, including technical consultants that advise regulated entities on whether they may be subject to Clean Water Act requirements, and interested citizens who may play an important role in the Act's permitting process.

Due in part to the familiarity of this regime, the proposed rule would not undermine significant reliance interests in an alternative regime, including the NWPR. The Supreme Court has held that agencies' changes in position do not require any reasons ''more substantial than those required to adopt a policy in the first instance.'' *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 514 (U.S. 2009). The Court acknowledges that if an agency's ''prior policy has engendered serious reliance interests,'' the agencies must not ignore them, but must provide a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy. *Id.* at 515. However, the Court emphasizes that even in the case of serious reliance interests, further justification is not required ''by the mere fact of policy change.'' *Id.* at 516.

The proposal does not implicate serious reliance interests because, first, the agencies are proposing to codify a rule similar to the definition currently being implemented nationwide. Therefore, no stakeholders are currently relying on the implementation of an alternative definition, including the NWPR. As discussed in section VI of this preamble, the proposed rule would restore a regime that is generally comparable to current practice, and there would be no appreciable cost or benefit difference between the proposed rule and the regulatory regime that the agencies are currently implementing. Second, members of the public, states, and tribes have been aware that the agencies might reconsider the NWPR for nearly a year and have had many opportunities to share their views with the agencies. President Biden indicated on his first day in office, following the issuance of Executive Order 13990, that this administration would be reviewing the NWPR and deciding whether to revise or replace the rule. See section IV.B.5 of this preamble. On June 9, 2021, the agencies announced their intention to revise or replace the rule. The agencies subsequently embarked on an extensive stakeholder outreach process, including public meetings and state and tribal consultation. See section IV.C of this preamble. The agencies received over 32,000 recommendation letters from the public during its pre-proposal outreach. Third, the NWPR was only in effect for 14 months and was subject to multiple legal challenges during that entire time. Finally, as discussed in this section, members of the public are familiar with the proposed rule's regulatory framework thereby minimizing the potential disruption of a change. Regardless, even if serious reliance interests were at issue, which they are not, this proposed rule provides a thorough and reasoned explanation for the changed definition of ''waters of the United States.''

For all of these reasons, the agencies are now once again proposing to return the definition of ''waters of the United States'' to its longstanding and familiar definition reflected in the 1986 regulations, amended to reflect the agencies' current view of the limitations on their jurisdiction informed by relevant Supreme Court decisions.

B. Concerns With Alternatives

In promulgating a rule to repeal existing regulations, agencies must address and consider alternative ways of achieving the relevant statute's objectives and must provide adequate reasons to abandon those alternatives. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 48 (1983). As discussed below, the agencies have thoroughly considered alternatives to the proposed rule and have concluded that the proposed rule is the best path forward to meet the agencies' goals to promulgate a rule that advances the objective of the Clean Water Act, is consistent with Supreme Court decisions, is supported by the best available science, and promptly and durably restores vital protections to the nation's waters. The agencies have reconsidered the policies, interpretations, and conclusions of the NWPR and for the reasons articulated in this preamble are changing their approach. *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009).

1. 2015 Clean Water Rule

The agencies are not proposing to repromulgate the 2015 Clean Water Rule. While the proposed rule utilizes the best available science in support of the conclusion that the proposed rule would advance the objectives of the Act, the proposed rule is not, as aspects of the 2015 Rule were, based on categorical significant nexus determinations. Rather, the proposed rule restores the

longstanding and familiar categories of the 1986 regulations and proposes jurisdictional limitations based on both the relatively permanent standard and the significant nexus standard.

The 2015 Clean Water Rule, while designed to advance the objective of the Clean Water Act, is not the best alternative to meet the policy goals of the agencies: To promptly restore the protections of the longstanding regulations and avoid current and future harms to important aquatic resources, consistent with the best available science and the agencies' determination of the statutory limits on the scope of the ''waters of the United States.'' In particular, the procedural status of the 2015 Rule in light of the complex litigation surrounding it means that re-adoption of the rule would not meet the agencies' policy goal of promptly ensuring necessary protections for the nation's waters.

Indeed, litigation over the 2015 Rule previously led to different definitions of ''waters of the United States'' being in effect in different parts of the country. At this time, the 2015 Clean Water Rule remains subject to preliminary injunctions barring implementation of the rule in roughly half the states in the country. See section I.A of the Technical Support Document for more information on the status of the definition of ''waters of the United States'' in effect at different times across the country based on the litigation over the 2015 Rule.

2. 2019 Repeal Rule

As discussed in section V.A of this preamble, the agencies agree with the concept in the 2019 Repeal Rule of returning to the pre-2015 regulatory framework as a means of restoring a longstanding and familiar regulatory regime. Indeed, like the 2019 Repeal Rule, the proposed rule seeks to return generally to the longstanding regulations that existed prior to the 2015 Clean Water Rule.[31] Unlike the 2019 Repeal Rule, however, the proposed rule would restore those regulations with necessary limitations to ensure the definition of ''waters of the United States'' reflects consideration of the agencies' statutory authority under the Clean Water Act and of relevant Supreme Court decisions.

Additionally, the agencies have significant concerns regarding the legal rationale underpinning the 2019 Repeal Rule. In particular, the agencies are concerned that the interpretation of relevant Supreme Court case law in the 2019 Repeal Rule is flawed and thereby led to an erroneous assessment of the legality of the 2015 Clean Water Rule. *See, e.g.,* 84 FR 56638–52, October 22, 2019. The agencies' reading of the Clean Water Act in the 2019 Repeal Rule is also inconsistent with the agencies' considered interpretation, at this time, of the Act. For these reasons, the agencies find that the 2019 Repeal Rule is not an appropriate alternative to the proposed rule.

3. NWPR

The agencies have also evaluated the NWPR as an alternative to the proposed rule. After carefully considering the NWPR in light of the text, objective, and legislative history of the Act, Supreme Court case law, the best available scientific information, and the agencies' experience in implementing the NWPR for over a year, the agencies do not believe the NWPR is a suitable alternative to the proposal.

a. The NWPR Fails To Advance the Objective of the Clean Water Act

The agencies do not consider the NWPR to have advanced the statutory objective of the Clean Water Act, which the Supreme Court recently emphasized is an important aspect of defining the jurisdictional scope of the Act. *See, e.g., Maui,* 140 S. Ct. 1462, 1468–69 (emphasizing the importance of considering the Clean Water Act's objective when determining the scope of the Act and finding that ''[t]he Act's provisions use specific definitional language to achieve this result,'' including the phrase ''navigable waters''). Consistent with the Supreme Court's opinion in *Maui,* a rule defining ''waters of the United States'' must consider its effects on the chemical, physical, and biological integrity of the nation's waters. And—as the text and structure of the Act, supported by legislative history and Supreme Court decisions, make clear—chemical, physical, and biological integrity refers to water quality.

The agencies do not view the objective of the Clean Water Act as the only factor relevant to determining the scope of the Act. Rather, the agencies have concluded that consistent with the text, structure, and legislative history of the Act, as well as *Maui* and the other Supreme Court decisions addressing ''waters of the United States,'' and with general principles of administrative law, the agencies must give substantial consideration of the effects of a revised definition of ''waters of the United States'' on the integrity of the nation's waters.

The agencies view the failure of the NWPR to advance the Act's objective as an important factor in their choice not to propose a rule based on the NWPR. One critical example of the NWPR's failure to advance the objective of the Act is its removal of the significant nexus test without considering an alternative approach to protecting waters that significantly affect downstream traditional navigable waters. The significant nexus inquiry reflects and furthers the objective of the Clean Water Act by allowing for a scientific evaluation of the effect of wetlands, tributaries, and other features on downstream waters. For that reason, evolving forms of this inquiry have been present in *Riverside Bayview, SWANCC,* and Justice Kennedy's concurring opinion in *Rapanos.* The NWPR ''eliminate[d]'' the significant nexus test, 85 FR 22325, April 21, 2020, and failed to replace it with an alternative approach that furthered the objective of the Act.

To be clear, the Supreme Court's interpretations of the scope of ''waters of the United States'' do not require adoption of a significant nexus test. The Supreme Court has held that its interpretation of a statutory term only binds the agency in future rulemakings if it has stated that ''its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.'' *Brand X internet Services,* 545 U.S. at 982. The term ''waters of the United States'' is no such ''unambiguous term.'' ''Waters of the United States'' can be subject to many interpretations and the agencies have ''generous leeway'' in interpreting it. *Rapanos,* 547 U.S. at 758 (Roberts, C.J., concurring in the judgment.)

While the agencies were not bound to adopt the significant nexus standard, the failure of the NWPR to adopt any standard for jurisdiction that adequately addresses the effects of degradation of upstream waters on downstream waters, including traditional navigable waters, fails to advance the Act's objective. For example, the NWPR categorically excluded ephemeral features without appropriately considering scientific information about their important effects on the integrity of downstream traditional navigable waters. In addition, in limiting the scope of protected wetlands to those that touch or demonstrate evidence of a regular surface water connection to other jurisdictional waters, the NWPR failed

[31] 2019 Repeal Rule, Response to Comments at 9 (''The agencies find that reinstating the longstanding and familiar pre-2015 Rule regulatory regime will provide regulatory certainty in this interim period . . . .''), 15 (''[T]his final rule to recodify the 1986 regulations will provide greater regulatory certainty and nationwide consistency while the agencies consider public comments on the proposed revised definition of ''waters of the United States.'').

to appropriately consider the many effects of other categories of wetlands on downstream waters. For example, an ephemeral stream that flows directly into the Rio Grande (a traditional navigable water) and an adjacent wetland separated from the Mississippi River (a traditional navigable water) by an artificial levee and that lacks a direct hydrologic surface connection to the river in a typical year are non-jurisdictional under the NWPR but have significant effects on traditional navigable waters.

The NWPR's assertion that it considered the objective of the Act because Clean Water Act and non-Clean Water Act state, tribal, and local efforts ''collectively pursue the objective'' does not reflect consideration of the objective as intended by Congress. The agencies contended in adopting the NWPR that the drastic reduction in the scope of Clean Water Act jurisdiction pursues the objective of the Act because it would be combined with the Clean Water Act's non-regulatory programs as well as state, tribal, and local efforts. The NWPR explained: ''The CWA's longstanding regulatory permitting programs, coupled with the controls that States, Tribes, and local entities choose to exercise over their land and water resources, will continue to address the discharge of pollutants into waters of the United States, and the CWA's non-regulatory measures will continue to address pollution of the nation's waters generally. These programs and measures collectively pursue the objective of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters.'' 85 FR 22269, April 21, 2020.

The agencies agree with the NWPR's position that the Clean Water Act's non-regulatory measures, such as grantmaking and technical assistance authorities, advance the objective the Act. However, the agencies do not view these authorities as limiting the scope of ''waters of the United States,'' or as relevant to determining whether a definition of ''waters of the United States'' advances the objective of the Act. The non-regulatory Clean Water Act programs that the NWPR cites complement and support the permitting programs at the core of the Act, as opposed to limiting its scope. For example, the NWPR cited the Act's provisions to address pollution into key waters in its discussion, including the Great Lakes, 33 U.S.C. 1258, the Chesapeake Bay, *see id.* at 1267(a)(3), Long Island Sound, *see id.* at 1269(c)(2)(D), and Lake Champlain, *see id.* at 1270(g)(2). These resources are ''waters of the United States'' to which regulatory programs apply, and the technical assistance and grants in the cited sections assist states and others in achieving the requirements of the Act, but do not limit the regulatory programs' scope.

The agencies disagree, however, with NWPR's assertion that the rule's reduction in regulatory scope achieved the objective of the Act based in part on the impacts of non-Clean Water Act programs. As discussed in section V.A.3.B of this preamble, the Clean Water Act's fundamental innovation in 1972 was ''to establish an all-encompassing program of water pollution regulation,'' *Int'l Paper Co.* v. *Ouellette,* 479 U.S. 481, 492–93 (1987). The definition of ''waters of the United States'' establishes the scope of that program. The agencies therefore believe it is appropriate to consider whether the definition of the scope of waters to which the Act's water pollution regulations apply helps to achieve that objective. Thus, the NWPR's statement that the rule ''pursues'' the objective of the Act if Clean Water Act and non-Clean Water Act programs are viewed in ''combination,'' is not consistent with the better reading of text and structure of the Act, its legislative history, or Supreme Court decisions concerning the effect of enactment of the Clean Water Act in 1972, nor does it fulfill the agencies' obligation to consider the objective of the Act by assessing the water quality effects of revising the definition of ''waters of the United States.''

In sum, based on the text, structure, and history of the statute, the relevant and available science, Supreme Court case law, and the agencies' technical expertise and experience, the agencies have determined that the NWPR is not a suitable alternative to the proposed rule because it fails to achieve the objective of the Act. The NWPR does not establish either the significant nexus test or an alternative standard that advances the objective of the Clean Water Act by protecting waters, including upstream ephemeral tributaries and wetlands, where they have a significant effect on the integrity of downstream traditional navigable waters, interstate waters, and the territorial seas and does not appropriately value the importance of federal programs in achieving the objective of the Act.

b. The NWPR is Inconsistent With the Best Available Scientific Information

The NWPR's exclusion of major categories of waters from the protections of the Act, specifically in the definitions of ''tributary'' and ''adjacent wetlands,'' runs counter to the scientific record demonstrating how such waters can affect the integrity of downstream waters. Specifically, its categorical exclusion of ephemeral features and large categories of wetlands is inconsistent with the scientific record before the agencies. In addition, the NWPR's limits on the scope of protected wetlands to those that touch or demonstrate evidence of a regular surface water connection to other jurisdictional waters were counter to the ample scientific information demonstrating the effects of wetlands on downstream waters when they have other types of connections.

First, the definition of the term ''tributary'' in the NWPR categorically excluded ephemeral streams from the regulatory protections of the Act, contrary to scientific information emphasizing the vital role these streams can play in protecting the integrity of downstream waters. The science is clear that aggregate effects of ephemeral streams ''can have substantial consequences on the integrity of the downstream waters'' and that the evidence of such downstream effects is ''strong and compelling,'' as discussed above. Science Report at 6–10, 6–13. EPA's SAB Review of the draft Science Report explains that ephemeral streams ''are no less important to the integrity of the downgradient waters'' than perennial or intermittent streams. SAB Review at 22–23, 54 fig. 3. While in the arid Southwest, features flow into downstream waters less frequently than they do in the wetter East, the Science Report emphasizes that short duration flows through ephemeral streams can transport large volumes of water to downstream rivers. Science Report at 6–10. For instance, the report notes that ephemeral streams supplied 76% of flow to the Rio Grande following a large rainstorm. *Id.* at 3–8. The SAB Review emphasizes that the ''cumulative effects'' of ephemeral flows in arid landscapes can be ''critical to the maintenance of the chemical, physical, and biological integrity'' of downstream waters. SAB Review at 22.

Similarly, the NWPR's definition of ''adjacent wetlands'' excluded many categories of wetlands that can play a vital role in protecting the integrity of waters to which they are connected, including traditional navigable waters. In defining ''adjacent wetlands,'' the NWPR limited the scope of wetlands protected by the Clean Water Act's regulatory programs to those that either abut or have evidence of certain surface water connections to other protected waters in a typical year. 85 FR 22340, April 21, 2020. Specifically, the rule

encompassed wetlands that (i) abut, meaning to touch, another jurisdictional water; (ii) are flooded by a jurisdictional water in a typical year; (iii) are separated from a jurisdictional water only by a natural feature, such as a berm, which provides evidence of a direct surface hydrological connection with that water; or (iv) are separated from a jurisdictional water only by an artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the water in a typical year. *Id.* As with the tributary definition, the NWPR stated that the definition of ''adjacent wetlands'' is ''informed by science.'' *Id.* at 22314. Yet the NWPR's limits on the scope of protected wetlands to those that touch or demonstrate evidence of a regular surface water connection to other jurisdictional waters were counter to the ample scientific information before the agencies demonstrating the effects of wetlands on downstream waters when they have other types of surface connections, such as wetlands that overflow and flood jurisdictional waters or wetlands with less frequent surface water connections due to long-term drought; wetlands with shallow subsurface connections to other protected waters; or other wetlands proximate to jurisdictional waters. *See Rapanos,* 547 U.S. at 786 (Kennedy, J., concurring in the judgment) (''[g]iven the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of a hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system.'') *Id.* at 786.

Indeed, the overwhelming scientific information before the agencies weighs decisively against proposing the definition of ''adjacent wetlands'' in the NWPR. Available scientific information demonstrates the significant effects of categories of newly excluded wetlands on the chemical, physical, and biological integrity of downstream traditional navigable waters. For example, whereas the NWPR provided that wetlands flooded by jurisdictional waters are only protected if the flooding occurs in a ''typical year,'' the Science Report stated that wetlands that are ''rarely'' or ''infrequently'' flooded by streams and rivers can be ''highly connected'' to those waters and have ''long-lasting effects'' on them. Science Report at 4–39. The Science Report noted that effects ''critical to maintaining the health of the river'' result from large floods that provide ''infrequent connections'' with more distant wetlands. *Id.* Reflecting these concerns, the October 16, 2019 SAB Draft Commentary on the proposed NWPR stated that the narrow definition of ''adjacent wetlands'' in the NWPR as it was proposed ''departs from established science.'' The agencies have weighed these statements and in light of the information about the importance of ''infrequently'' flooded wetlands to downstream waters, the agencies believe that the NWPR's exclusion of wetlands that lack the limited, specific types of surface water connections to other jurisdictional waters in a typical year lacked scientific support.

The SAB's assessment of the NWPR proposal recognized that the proposed rule was not consistent with the scientific information in the record, including the Draft Science Report that the SAB had previously reviewed. SAB Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act (February 27, 2020). The 2020 SAB Commentary emphasized that the proposal does not ''fully incorporate the body of science on connectivity'' that the SAB had reviewed in the Draft Science Report and offers ''no scientific justification for disregarding the connectivity of waters accepted by current hydrological science.'' *Id.* at 2.

The NWPR stated that the ''agencies' decisions in support of this final rule have been informed by science.'' 85 FR 22288, April 21, 2020. For example, the scientific information that the NWPR cited as a basis for excluding ephemeral tributaries is the concept of a ''connectivity gradient.'' *Id.,* citing the SAB Review. The NWPR referred to the SAB Review's recommendation that the agencies recognize that connectivity occurs along a gradient allowing for variation in chemical, physical, and biological connections. *Id.,* citing the SAB Review at 3. The NWPR asserted that there is a ''decreased'' likelihood that waters with ''less than perennial or intermittent'' flow, *i.e.,* ephemeral streams, will affect the chemical, physical, and biological integrity of downstream waters. *Id.*

Upon careful review, however, the agencies have concluded that the NWPR's conclusion takes the SAB's recommendation out of context and is inconsistent with the information in the SAB Review as a whole. The agencies recognize that the SAB explained that the connectivity gradient the NWPR cited was just a hypothetical example [32] meant to illustrate just one aspect of connectivity—hydrological, or physical connectivity—and sheds no light on the many other ways that features connect to and affect downstream waters. According to the SAB itself, the only scientific information the agencies provided in support of categorically excluding ephemeral features does not fully represent the discussion in the cited SAB Review and runs counter to key elements of the scientific record before the agencies. *Id.*

The NWPR also stated that the line it draws between regulated and non-regulated wetlands, which excludes large categories of wetlands previously covered by the Act, is ''informed by science.'' 85 FR 22314, April 21, 2020. The NWPR cited statements from the SAB Review to the effect that wetlands situated alongside other waters are likely to be connected to those waters, whereas ''those connections become less obvious'' as the distance ''increases.'' *Id.,* citing the SAB Review at 55; *see also id.* at 22314, citing the SAB Review at 60 (''[s]patial proximity is one important determinant [influencing the connections] between wetlands and downstream waters''). In addition, the NWPR cited a statement in the Science Report that explained, ''areas that are closer to rivers and streams have a higher probability of being connected than areas farther away.'' *Id.* at 22314, citing the Science Report at ES–4.[33]

Despite these citations, the NWPR's definition of adjacent is not based on proximity, but instead on factors that are distinct from proximity—*e.g.,* a ''direct hydrologic connection,'' or a ''continuous surface [water] connection.'' *See id.* at 22340. Thus, the NWPR's definition of ''adjacent wetlands'' may exclude wetlands a dozen feet away from jurisdictional waters (therefore proximate under any reasonable interpretation of the term) if they are separated by a levee that does not convey flow in a typical year, but include wetlands much further away so long as they are inundated by flooding from the jurisdictional water in a typical year.

c. The NWPR Is Difficult To Implement and Yields Inconsistent Results

In addition to the above concerns, the agencies' experience implementing the NWPR for over a year made clear that foundational concepts underlying much of the NWPR are confusing and difficult to implement in the way the NWPR required. While any rule that draws lines between jurisdictional waters and

[32] The figure cited is captioned in part as ''*Hypothetical illustration* of connectivity gradient and potential consequences to downstream waters.'' SAB Review at 54 (emphasis added). Nowhere in its review does the SAB review indicate that this is the actual or only connectivity gradient.

non-jurisdictional waters will involve some implementation challenges, the agencies have found the challenges imposed by the NWPR to be impracticable in important respects. Based on the agencies' experience, the NWPR does not ''provide[] clarity and predictability for Federal agencies, States, Tribes, the regulated community, and the public.'' *See* 85 FR 22252, April 21, 2020. More importantly, the challenges that the NWPR imposes to establish jurisdiction for features that it appears to define as jurisdictional and that significantly affect the integrity of downstream waters further undermine the NWPR's viability as an alternative to the proposed rule.

i. ''Typical Year'' Metric

The ''typical year'' is a concept fundamental to many of the NWPR's definitions. *Id.* at 22273. Under the rule, tributaries and lakes, ponds, and impoundments of jurisdictional waters are only jurisdictional if they have certain surface water connections with a traditional navigable water or territorial sea at least once in a typical year. 33 CFR 328.3(c)(6), (12). Two categories of wetlands only meet the adjacency test for jurisdiction if they have a surface water connection with other jurisdictional waters once in a typical year. *Id.* at (c)(1). As a scientific matter, the concept of ''typical year conditions,'' including precipitation normalcy, may be relevant to ensuring that certain surface water connections in natural streams are not being observed under conditions that are unusually wet or dry. In terms of implementation, the concept of precipitation normalcy is valid in certain contexts, such as to inform determinations as to the presence of a wetland. However, in many important contexts, available tools, including the tools the NWPR recommends, cannot reliably demonstrate the presence of surface water connections in a typical year, which are a necessary element of most categories of jurisdictional waters under the NWPR. However, ''typical year conditions'' are often irrelevant to the extent of flow in many human-altered streams, including effluent-dependent streams, and the NWPR did not explain why human-altered hydrology should be subject to the same typical year requirement as natural streams. These challenges undermine the NWPR's claim that it enhances the ''predictability and consistency of Clean Water Act programs . . .'' *See* 85 FR 22250, April 21, 2020.

Identifying the presence of a surface water connection in a typical year can be difficult and sometimes impossible, as such connections are often not apparent from visual field observation alone. For example, on the day of a visit to an intermittent stream that flows only several months or several weeks a year, it is very unlikely that an observer would see a surface water connection to a downstream jurisdictional water. Similarly, though many ponds or wetlands may be frequently inundated, those in arid areas may be inundated only a few times every year, and sometimes the inundation occurs on a single day or within a matter of hours. While these waters satisfy the NWPR's jurisdictional test, agency staff would probably not be able to determine that they do, given how unlikely they would be to observe it. The difficulty of finding in a field visit the direct hydrologic connections under any interpretation of typical year permissible under the NWPR is exacerbated by the fact that the NWPR discourages reliance on field indicators. *See, e.g., id.* at 22292 (''The agencies . . . conclude that physical indicators of flow, absent verification of the actual occurrence of flow, may not accurately represent the flow classifications required for tributaries under this rule.'').

Given the insufficiency of visual field observations to assess the presence of a surface water connection as specified in the NWPR, agency staff must often expend substantial time and resources to try to obtain ancillary data to determine flow conditions at a particular site in a typical year. Hydrologic modeling tools and advanced statistical analyses could be employed where sufficient flow data are available, but often data needed to conduct such an analysis is limited or lacking altogether, especially for smaller streams. Few streams across the country have hydrologic gages that continuously measure flow, as most such gages are located on larger rivers with perennial flow.

For the same reasons that agency staff are unlikely to witness the specific surface water connections required under the NWPR during a site visit in dry regions or during the dry season, available aerial photographs, which are often taken just once per year or once every other year, are also very unlikely to capture evidence of this surface water connection between a stream and a downstream traditional navigable water or territorial sea. High-resolution satellite imagery can potentially provide additional coverage, but availability and usability vary across the country, depending on access, update intervals, cloud cover, and land cover (*i.e.,* vegetation or trees that obscure aerial views of stream channels, requiring the use of advanced tools to detect features of interest or the presence of water). Moreover, as the NWPR acknowledges, ''characteristics of tributaries may not be visible in aerial photographs'' taken during periods of ''high shrub or tree cover,'' 85 FR 22299, April 21, 2020. New satellites are expected to surmount some of these issues in the future, but as this information is not yet available, regulators could not use it to inform jurisdictional decisions under the NWPR. Although any definition of ''waters of the United States'' requires the use of remote tools like interpretation of aerial or satellite imagery, the NWPR made it more challenging to use these resources because of that rule's typical year criteria and the burden of proof to demonstrate that the requirement is met.

The same difficulties create challenges in detecting surface hydrologic connections that meet the NWPR's definition of ''adjacent wetlands'' or ''lakes and ponds, and impoundments of jurisdictional waters.'' Demonstrating that a wetland, lake, pond, or impoundment is inundated by flooding once in a typical year would require a field visit or a high-quality aerial photograph or satellite image coinciding with the exact time that the hydrologic connection (flooding) occurs from a tributary to a wetland, lake, pond, or impoundment. The NWPR's standard of inundation by flooding in a typical year is not tied to any more commonly calculated flood interval, such as flood recurrence intervals, and the agencies are not aware of any tool capable of collecting the type of inundation data the NWPR requires. Determining that inundation by flooding occurs in a typical year is therefore extremely difficult, and sometimes impossible. Demonstrating that an artificial feature allows for a direct hydrologic surface connection between a wetland and a tributary in a typical year poses similar obstacles, requiring either auspiciously timed field visits, aerial photography, or high-resolution satellite imagery, or data that the agencies may not be able to access, such as construction plans or operational records for an artificial levee.

The NWPR suggests the agencies ''will generally use'' precipitation data from the National Oceanic and Atmospheric Administration (NOAA) to help determine the presence of a surface water connection in a typical year, *see* 85 FR 22274, April 21, 2020, but the methodology described in the NWPR preamble for determining precipitation in a typical year makes it difficult to use these data to inform jurisdiction. NOAA precipitation totals over the three

months prior to a site observation are compared to precipitation totals observed over the preceding 30 years to determine if rainfall was wetter than normal, drier than normal, or normal (''typical''). Using the methodology in the preamble of the NWPR, only 40% of observations over a rolling 30-year period of record are considered ''normal,'' while 30% of observations are considered to be ''wetter than normal'' and 30% of observations are considered to be ''drier than normal.'' If surface water flow was observed during normal or dry conditions, the agencies can have higher confidence that the surface water observations represent flow in a ''typical year.'' However, if flow was observed during the 30% of conditions that are ''wetter than normal,'' the surface water observations do not reveal whether flow would occur during a typical year. And if flow was *not* observed, precipitation data from the previous three months do not indicate whether flow might occur in that particular water feature under typical year conditions at a different point in the year. Therefore, if a site visit is conducted when surface water flow is not present, the agencies' suggested approach for evaluating whether a feature meets the typical year test often does not provide meaningful and relevant information upon which the agencies could reasonably rely to make accurate determinations of jurisdiction. Under any regulatory regime, the agencies use a weight of evidence approach to determine jurisdiction, but the NWPR typical year requirement places onerous and in many instances arbitrary constraints on the data that can be used as evidence.

Use of NOAA precipitation data to assess whether surface water flow occurs in a typical year for purposes of the NWPR presents other implementation challenges. The data rely on reports from weather stations that are sometimes at a different elevation from the site in question, or far away from the site, so that their indications as to whether precipitation at a given site is normal, wetter than normal, or drier than normal can be inaccurate. More importantly, the typical year concept as applied to the NWPR does not account for the increasing number of recurrent heatwaves, droughts, storms, and other extreme weather events in many parts of the country, which can have profound impacts on local and regional streamflow. Although the concept of ''typical year'' in the NWPR factors in long-term climatic changes over time to some degree by considering a thirty-year rolling period of data, *see* 33 CFR 328.3(c)(13), the NWPR does not allow the agencies flexibility to consider other time intervals when appropriate to reflect effects of a rapidly changing climate, including positive trends in temperature, increasing storm events, and extended droughts. In response to more rapid recent changes in climate, NOAA has developed alternative approaches for estimating climate normals, including seasonal averages computed using shorter, annually-updated averaging periods for temperature (10-year seasonal average) and total precipitation (15-year seasonal average). The rolling thirty-year approach to determining typical year in the NWPR does not allow the agencies to use these updated methods.

The NWPR notes that the agencies can look to sources of information other than site visits, aerial photographs, and precipitation data to assess whether a feature has surface water flow in a typical year. It identifies the Web-based Water-Budget Interactive Modeling Program, Climate Analysis for Wetlands Tables, and the Palmer Drought Severity Index, 85 FR 22275, April 21, 2020, but all of these only look at climate-related conditions generally and have well documented limitations. These methods, which provide information useful in many other contexts, often do not specifically answer the jurisdictional questions established by the NWPR. For example, they do not address whether surface water flow might connect a particular stream to a downstream traditional navigable water or territorial sea, whether a particular wetland is inundated by or connected to a jurisdictional water as required under the NWPR, or how uncertainties associated with their application at different locations and in different months affect the accuracy of condition estimates. Precipitation is an important factor but other information is also relevant to streamflow and surface water connections in particular waters, including the abundance of and contributions of flow from wetlands, upgradient streams, and open waters in the watershed, evapotranspiration rates, water withdrawals including groundwater pumping, and other climatic conditions. Yet collecting this information from a variety of sources and interpreting it can be extremely time- and resource-intensive and may require special expertise that in many cases may not be feasible given available agency staff and resources. While the agencies have substantial experience using a weight of evidence approach to determine jurisdiction, the ''typical year'' requirement makes it significantly more difficult to interpret available data and narrows the scope of data that can be used to determine jurisdiction.

Finally, the challenges presented by determining the presence of surface water flow in a typical year are even greater when evaluating a tributary at a distance from the downstream traditional navigable water or territorial sea. Even streams that flow perennially or intermittently often travel many miles prior to reaching the closest traditional navigable water or territorial sea, meaning many downstream reaches may need to be assessed. Under the NWPR, any ephemeral reaches along that pathway that do not carry surface water flow once in a typical year would render all upstream waters non-jurisdictional. *Id.* at 22277. The need to assess lengthy tributary systems pursuant to this provision of the rule imposes an extraordinarily high burden of proof on the agencies to assess surface water flow in a typical year along the flow path, and the longer the pathway, the less feasible the analysis.

ii. Determining Adjacency

The NWPR provides that wetlands are ''adjacent'' when they: (1) Abut a traditional navigable water or territorial sea; a tributary; or a lake, pond, or impoundment of a jurisdictional water; (2) are inundated by flooding from one of these waters in a typical year; (3) are physically separated from one of these waters only by a natural berm, bank, dune, or similar natural feature; or (4) are physically separated from one of these waters only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the water in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature. *Id.* at 22338; 33 CFR 328.3(c)(1). In practice, agency staff have found several of these criteria for adjacency extremely difficult to implement in certain circumstances.

First, agency staff have found it difficult to distinguish between natural and artificial barriers for purposes of determining adjacency. The NWPR for the first time establishes separate tests for adjacency depending on whether the barrier between the wetland and jurisdictional water is ''natural'' or ''artificial''; if a barrier is artificial, it must allow for a direct hydrological surface connection in a typical year in order for a wetland to be adjacent, whereas no such showing is necessary for natural barriers. 33 CFR 328.3(c)(1)(iv). However, many barriers between wetlands and jurisdictional

waters were built decades or even a century earlier, and determining whether they were originally natural or artificial can be extremely challenging, even if inspected in person, as artificial features that are left alone often naturalize over time. It sometimes requires extensive research into historical records, and those records may not be available at all. Furthermore, some barriers may be both artificial and natural. Artificial levees and other barriers are frequently built on top of natural berms. Given the distinct regulatory consequences that flow from whether a barrier is ''artificial'' or ''natural,'' the NWPR requires the agencies to make determinations that are difficult or in some cases not possible.

The artificial barrier provision also leads to absurd results. For example, under the fourth way to meet the adjacency definition, a wetland may be jurisdictional if it is separated from a jurisdictional water by an artificial structure, such as a levee, that allows for a direct hydrologic surface connection in a typical year through a culvert. However, the same wetland would not be jurisdictional if there was no levee present, even if there was a direct hydrological surface connection in a typical year through a culvert (assuming the wetland did not meet another criterion for adjacency). The NWPR therefore establishes that certain wetlands with a direct hydrologic surface connection to a jurisdictional water are *only* jurisdictional due to the presence of an artificial barrier. This discrepancy bears no relationship to the actual connections between the features at issue and makes no scientific or practical sense.

Finally, the provision establishing that a wetland is ''adjacent'' if a jurisdictional water inundates it by flooding in a typical year is also extremely difficult to implement. *See* 33 CFR 328.3(c)(1)(ii). Inundation by flooding in a typical year is not a metric that is normally recorded either by implementing agencies or the regulated community. Available models generally focus on flood recurrence intervals, which do not necessarily correspond to the likelihood of inundation by flooding in a given or typical year. Indeed, the NWPR acknowledges that inundation by flooding in a typical year could correspond to a variety of flood recurrence intervals depending on location, climate, season, and other factors. 85 FR 22311, April 21, 2020. Given the absence of existing records of inundation by flooding, determining whether inundation by flooding has occurred in a typical year is extremely difficult in many circumstances.

Compounding the challenge, the NWPR provides that wetlands can be jurisdictional if they are inundated by flooding from a jurisdictional water in a typical year—but inundation in the other direction, *from* the wetlands *to* the jurisdictional water, is not grounds for jurisdiction. Not only is there no compelling scientific or legal basis for distinguishing between inundation *of* the wetland as opposed to inundation *from* the wetland, *see Riverside Bayview,* 474 U.S. at 134 (upholding the Corps' assertion of jurisdiction over ''wetlands that are not flooded by adjacent waters [but] may still tend to drain into those waters''), but determining whether the limited available photographs or other evidence of inundation reflects flooding in one direction as opposed to another compounds the difficulty in evaluating whether this standard is met. The same challenges apply to determining whether lakes, ponds, or impoundments of jurisdictional waters are inundated by flooding in a typical year, one basis for demonstrating Clean Water Act jurisdiction over these features. 85 FR 22338, April 21, 2020; 33 CFR 328.3(c)(vi).

iii. Ditches

Among other requirements, the NWPR provides that a ditch [34] is jurisdictional as a tributary if it was originally built in a tributary or adjacent wetland, as those terms are defined in the NWPR, and emphasizes that the agencies bear the burden of proof to determine that a ditch was originally constructed in a tributary or adjacent wetland. 33 CFR 328.3(a)(2), (c)(12); 85 FR 22299, April 21, 2020. In other words, in order to find a ditch jurisdictional, the agencies must demonstrate that a ditch was (1) originally constructed in a stream (2) that, at the time of construction, had perennial or intermittent flow and (3) a surface water connection to a downstream traditional navigable water or territorial sea (4) in a ''typical year.'' Alternatively, the agencies must show that a ditch was (1) originally constructed in a wetland (2) that either abutted or had certain surface hydrologic connections to a jurisdictional water (3) in a ''typical year,'' in order to demonstrate that the ditch is jurisdictional. Americans have been building ditches, straightening streams, and draining wetlands for hundreds of years. Therefore, to determine whether a ditch is jurisdictional under the NWPR, the agencies must address all of the implementation challenges discussed in the preceding sections involved in determining surface water connections and wetland adjacency in a typical year—but often for ditches built fifty, one hundred, or several hundred years ago. To the extent that sparse evidence is available to demonstrate a surface water connection in a typical year for tributaries using tools available today, evidence is even more difficult to find when looking so far back in time. States have approached the agencies seeking assistance in assessing the jurisdictional status of ditches, but the agencies are often unable to provide significant help given the burdens imposed by the NWPR's ditch definition.

The NWPR also provides that ditches are jurisdictional if they relocate a tributary, as that term is defined in the rule, 85 FR 22341, April 21, 2020, 33 CFR 328.3(a)(2), (c)(12), but this standard as defined is also often extremely difficult to assess. The NWPR explains that a relocated tributary is ''one in which an *entire portion* of the tributary may be moved to a different location.'' 85 FR 22290, April 21, 2020. In other words, the NWPR appears to require a ditch to divert 100% of the tributary's flow to meet the ''relocate a tributary'' test. While prior rules have defined relocated tributaries as jurisdictional, the requirement that the entire portion be relocated is new and has created significant implementation challenges. As a practical matter, when a tributary is relocated it often reroutes just a portion to the ditch. Assessing whether a ditch relocated 100% of a tributary's flow, however, as opposed to 80% or 50% of its flow, is extremely difficult and may not be possible in some circumstances. By establishing a jurisdictional standard that is extremely difficult to meet, the NWPR effectively removes from the protections of the Clean Water Act large numbers of ditches that function as tributaries and that significantly affect the integrity of downstream traditional navigable waters, interstate waters, and the territorial seas. As is the case with tributaries, lakes and ponds, impoundments, and wetlands, the NWPR's impracticable approach to ditches makes it extremely difficult to find that many waters subject to the NWPR are actually jurisdictional, further undermining the viability of the

[34] Ditches perform many of the same functions as natural tributaries. For example, like natural tributaries, ditches that are part of the stream network convey water that carries nutrients, pollutants, and other constituents, both good and bad, to downstream traditional navigable waters, interstate waters, and the territorial seas.

NWPR as an alternative to the proposed rule.

d. The NWPR Has Significantly Reduced Clean Water Act Protections Over Waters

The failure of the NWPR to achieve the objective of the Act, as well as its inconsistency with science and the challenges it presents in implementation, have had real-world consequences. The agencies have found that substantially fewer waters are protected by the Clean Water Act under the NWPR compared to previous rules and practices. It is important to note that the definition of ''waters of the United States'' affects most Clean Water Act programs designed to restore and maintain water quality—including not only the NPDES and dredged and fill permitting programs, but water quality standards, impaired waters and total maximum daily loads, oil spill prevention, preparedness and response programs, and the state and tribal water quality certification programs—because such programs apply only to ''waters of the United States.'' While the NWPR was enacted with the expressed intent to decrease the scope of federal jurisdiction, the agencies now believe the actual decrease in water resource protections has been more pronounced than the qualitative predictions in the NWPR preamble and supporting documents anticipated and acknowledged to the public. This data supports the agencies' conclusion that the NWPR is not a suitable alternative to the proposed rule.

i. Jurisdictional Determination and Permitting Data Show a Large Drop in the Scope of Waters Protected Under the Clean Water Act.

Through an evaluation of jurisdictional determinations completed by the Corps between 2016 and 2021,[35] EPA and the Army have identified consistent indicators of a substantial reduction in waters protected by the NWPR (*see* Technical Support Document section III.B.ii for additional discussion on methods and results of the agencies' analyses). These indicators include an increase in the number and proportion of jurisdictional determinations completed where aquatic resources were found to be non-jurisdictional, an increase in determinations made by the Corps that no Clean Water Act section 404 permit is required for specific projects, and an increase in requests for the Corps to complete approved jurisdictional determinations (AJDs) rather than preliminary jurisdictional determinations (PJDs), which treat a feature as jurisdictional. These trends all reflect the narrow scope of jurisdiction in the NWPR's definitions. Additionally, the agencies believe these indicators account for only a fraction of the NWPR's impacts, because many project proponents do not need to seek any form of jurisdictional determinations for waters that the NWPR categorically excludes, such as ephemeral streams, and the Corps does not have purview over such projects and does not track them. A closer look at each of these indicators will help demonstrate some of the more pronounced impacts of the NWPR on foundational waters of this country than was identified for the public in the NWPR and its supporting documents. As explained in detail above, when a water falls outside the scope of the Act, that means, among other things, that no federal water quality standards will be established, and no federal permit will be required to control the discharge of pollutants or fill into such waters. And by virtue of the fact that the NWPR's scope means that for many waters entities do not even need to seek a jurisdictional determination, it is impossible to fully understand the scope of degradation to foundational waters caused by the NWPR's definition.

Consistent with Executive Order 13990, EPA and Army staff have reviewed jurisdictional determinations as recorded in the Corps' internal regulatory management database, referred to as the ORM2 database (*see supra* note 30), to identify any noticeable trends in jurisdictional determinations under the past recent rules defining ''waters of the United States.'' The agencies found within the AJDs completed under the NWPR, the probability of finding resources to be non-jurisdictional also increased precipitously. Of the 9,399 AJDs completed by the Corps during the first twelve months in which the NWPR was in effect,[36] the agencies found approximately 75% of AJDs completed had identified non-jurisdictional water resources and approximately 25% of AJDs completed identified jurisdictional waters.[37] Conversely, when the 1986 regulations and applicable guidance were in effect during the previous five years (including following the 2019 recodification of those regulations), significantly more jurisdictional waters were identified in AJDs than compared to the first twelve months of the NWPR. During similar 1-year calendar intervals when the 1986 regulations and applicable guidance were in effect, approximately 27% to 45% of AJDs completed identified non-jurisdictional aquatic resources, with percentages varying between each of the different periods, and 55% to 72% of AJDs identified jurisdictional resources.[38]

[35] A jurisdictional determination is a written Corps determination that a water is subject to regulatory jurisdiction under section 404 of the Clean Water Act (33 U.S.C. 1344) or a written determination that a water is subject to regulatory jurisdiction under section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*). Jurisdictional determinations are identified as either preliminary or approved, and both types are recorded in determinations through an internal regulatory management database, called Operation and Maintenance Business Information Link, Regulatory Module (ORM2). This database documents Department of the Army authorizations under Clean Water Act section 404 and Rivers and Harbors Act section 10, including permit application processing and jurisdictional determinations. This database does not include aquatic resources that are not associated with a jurisdictional determination or alternatives to jurisdictional determinations (such as delineation concurrences or ''No jurisdictional determination required'' findings, where the Corps finds that a jurisdictional determination is not needed for a project), or permit request or resource impacts that are not associated with a Corps permit or enforcement action. An approved jurisdictional determination (AJD) is an official Corps document stating the presence or absence of ''waters of the United States'' on a parcel or a written statement and map identifying the limits of ''waters of the United States'' on a parcel. A preliminary jurisdictional determination (PJD) is a non-binding written indication that there may be ''waters of the United States'' on a parcel; an applicant can elect to use a PJD to voluntarily waive or set aside questions regarding Clean Water Act jurisdiction over a particular site and thus move forward assuming all waters will be treated as jurisdictional without making a formal determination.

[36] These AJDs were completed by the Corps between the NWPR's effective date of June 22, 2020 and June 21, 2021.

[37] This excludes drylands and waters identified as being jurisdictional only under section 10 of the Rivers and Harbors Act. In addition, under the NWPR, a single AJD in the Corps' database can include both affirmative and negative jurisdictional determinations. Under prior regulatory regimes, the Corps' database was structured such that a single AJD could be either affirmative, or negative, but not both. To account for this change in the structure of the database, a NWPR jurisdictional determination that includes both affirmative and negative jurisdictional resources was normalized and counted as two separate AJDs, one affirmative and one negative. The total number of AJDs considered after this process was carried out was 9,399. Prior to this normalization, the total number of AJDs considered was 7,769. More details on this can be found in the Technical Support Document section III.B.ii.

[38] The time periods evaluated were June 22, 2016 to June 21, 2017; June 22, 2017 to June 21, 2018; and December 23, 2019 to June 21, 2020. The date ranges here constitute periods of time when the 1986 regulations (including the 2019 Repeal Rule's recodification of those regulations) and applicable guidance were in effect nationally. Because the proposed rule is marking a return to prior longstanding practice, 2015 Clean Water Rule determinations were left out of this analysis.

The change from a range of 27% to 45% non-jurisdictional AJD findings prior to the NWPR to 75% non-jurisdictional findings following issuance of the NWPR indicates that significantly fewer waters are protected by the Clean Water Act under the NWPR (*see* Technical Support Document section III.B.ii for additional discussion).

When evaluating the effect of the NWPR on the number of jurisdictional individual aquatic resources (as opposed to the AJDs completed), the agencies found a similar significant reduction in protections. Within the first twelve months of implementation of the NWPR, the Corps documented the jurisdictional status of 48,313 individual aquatic resources or water features through AJDs completed between June 22, 2020, and June 21, 2021; of these individual aquatic resources, approximately 75% were found to be non-jurisdictional by the Corps. More specifically, 70% of streams and wetlands evaluated were found to be non-jurisdictional, including 11,044 ephemeral features (mostly streams) and 15,675 wetlands that did not meet the NWPR's revised adjacency criteria (and thus are non-jurisdictional under the NWPR). Ditches were also frequently found to be non-jurisdictional (4,706 individual exclusions), which is likely the result of the narrowed definition of a relocated tributary under the NWPR. By comparison, only 45% of aquatic resources were found to be non-jurisdictional during similar year-long calendar intervals between 2016 and 2020 under the 1986 regulations implemented consistent with Supreme Court case law.[39] The agencies anticipate that this increase in non-jurisdictional determinations, to a level of approximately 75% of water bodies being non-jurisdictional under the NWPR as opposed to only 45% under the prior regulations, would reduce the integrity of the nation's waters.

Of particular concern to the agencies is the NWPR's disproportionate effect on arid regions of the country, which are dominated by ephemeral stream systems. The Corps' data show that in New Mexico, of the 263 streams assessed via AJDs in the first twelve months of implementation of the NWPR (*i.e.,* between June 22, 2020, to June 21, 2021), 100% were found to be non-jurisdictional ephemeral resources.[40] In Arizona, of the 1,525 streams assessed in AJDs in the first year of implementation of the NWPR, 1,518, or 99.5%, were found to be non-jurisdictional ephemeral resources. While the Corps found high percentages of streams in Arizona to be non-jurisdictional between 2016 and 2020, the NWPR resulted in a ten-fold increase in the total number of individual resources documented as non-jurisdictional in AJDs.

For example, the average annual number of individual stream resources considered in AJDs in Arizona between 2016–2020 was 147 (of which 138 were determined non-jurisdictional), compared to 1,525 stream reaches assessed under the NWPR (of which 1,521 were determined non-jurisdictional accounting for all exclusions). The number of stream reaches assessed in Arizona also dominated the number of evaluations completed nationally under the NWPR, which is incongruent with the geographic extent of water resources in this country. The number of stream reaches assessed in Arizona constituted 9% of the total stream reaches assessed nationally and 13% of the ephemeral reaches assessed nationally over the first twelve months in which the NWPR was implemented.[41] This increase in the number of streams assessed and found to be non-jurisdictional in Arizona under the NWPR highlights the disproportionate impacts this rule had on water resource protection in this state and in similar arid regions of this country.

The number of individual stream reaches considered under PJDs also declined precipitously in these states under the NWPR, while many more streams were evaluated and determined to be non-jurisdictional through AJDs. As mentioned previously, project proponents who request an AJD obtain an official Corps document stating the presence or absence of ''waters of the United States'' on a parcel or a written statement and map identifying the limits of ''waters of the United States'' on a parcel. In contrast, an applicant can elect to use a PJD to voluntarily waive or set aside questions regarding Clean Water Act jurisdiction over a particular site and thus move forward assuming all waters will be treated as jurisdictional without making a formal determination. There are time savings and sometimes cost savings associated with requesting a PJD in lieu of an AJD. However, proportionally fewer PJDs being requested under the NWPR indicate that fewer project proponents are requesting that aquatic resources on their project site be treated as if they are jurisdictional.

In Arizona, the annual average number of individual stream reaches considered under PJDs and similar alternatives to AJDs between 2016 to 2020 was 941, while under the NWPR in 2020–2021 it was only 45.[42] When looking at the total number of individual streams reaches over time, under the NWPR Arizona experienced an approximate 95% decrease in individual stream reaches being considered via PJDs and a 9-fold increase in individual stream reaches being considered via AJDs, compared to pre-2015 regulatory practice. Similar metrics for New Mexico show an 84% decrease in individual streams being considered via PJDs and a 28-fold increase in individual streams being considered via AJDs under the NWPR. Based on averages for non-jurisdictional streams from 2016–2020 compared to non-jurisdictional streams under the NWPR, there has been a 10-fold increase in non-jurisdictional findings for streams in Arizona and a 36-fold increase in non-jurisdictional findings for streams in New Mexico following implementation of the NWPR. Compounding resource losses, eliminating these streams from jurisdiction under the NWPR also typically eliminated jurisdiction over wetlands which otherwise might meet adjacency criteria.

The NWPR also significantly reduced the number of Clean Water Act section 404 permits required for dredging and filling activity nationwide. The Corps has identified at least 368 projects from June 22, 2020 to June 21, 2021 through its ORM2 database that would have needed a Clean Water Act section 404 permit pre-NWPR, but no longer did under the NWPR's definition of ''waters of the United States.''[43] Moreover, in comparing 2020–2021 to similar annual data from 2016 to 2020 from

[39] Based on the average annual percentage of non-jurisdictional findings.

[40] These non-jurisdictional ephemeral resources are predominantly ephemeral streams, but a small portion may be swales, gullies, or pools.

[41] There were a total of 16,787 stream reaches assessed via AJDs nationwide between June 22, 2020 and June 21, 2021.

[42] The AJD values associated with the NWPR fall outside of the 95% confidence interval calculated for annual data from 2016–2020. Note that in New Mexico and Arizona, the 2015 Clean Water Rule was never implemented due to litigation stays. The PJD values associated with the NWPR do not fall outside of the 95% confidence interval calculated for annual data from 2016–2020; this is likely a product of scale. See the Technical Support Document section III.B.ii for more analysis.

[43] This tracking method only applies when 100% of jurisdiction is lost under NWPR (*i.e.,* if even 1 aquatic resource out of 100 that is proposed to be impacted remains jurisdictional, this method is not used). Additionally, this tracking method has not been implemented uniformly across the United States, and is likely under-representative even for those cases in which 100% of jurisdiction was lost under the NWPR.

implementation of the 1986 regulations consistent with Supreme Court case law, there was on average an increase of over 100% in the number of projects determined to not require section 404 permits under the Clean Water Act due to activities not occurring in ''waters of the United States'' or activities occurring in waters that were deemed no longer ''waters of the United States'' due to the NWPR. The number of projects that did not require a section 404 permit under the NWPR was likely much greater than these numbers indicate because project proponents did not need to notify the Corps if they had already received an AJD that concluded waters in the review area were not ''waters of the United States,'' and because many project proponents may not have sought a jurisdictional determination or applied for a permit at all if they believed their aquatic resources were non-jurisdictional under the NWPR. Many projects could have occurred without consultation with the Corps due to the NWPR's narrow definition of ''waters of the United States'' and expansive non-jurisdictional categories. Therefore, while the Corps' ORM2 data shed light on the trend and magnitude of impacts to the scope of jurisdiction under the NWPR, it is fair to assume that these impacts are a significant underestimate.[44]

ii. States and Tribes Did Not Fill the Regulatory Gap Left by the NWPR

Some stakeholders have argued that the diminished scope of ''waters of the United States'' would not necessarily reduce protections for waters as a practical matter, because states, tribes, and local entities may regulate discharges even in the absence of Clean Water Act regulation. *See* section V.A.3.b of this preamble. This perspective is consistent with the NWPR's emphasis that, in the face of a narrower scope of ''waters of the United States,'' ''the controls that States, Tribes, and local entities choose to exercise over their land and water resources . . .'' would help to achieve the objective of the Act. 85 FR 22259, April 21, 2020. Yet while some states and tribes regulate ''waters of the state'' or ''waters of the tribe'' more broadly than the federal government under their own laws, many newly non-jurisdictional waters under the NWPR were in states and on tribal lands that do not regulate waters beyond those covered by the Clean Water Act. Under the NWPR, discharges into these waters could have occurred without any restriction.

As discussed in the Economic Analysis for the Proposed Rule, many states and tribes do not regulate waters more broadly than the Clean Water Act requires. Economic Analysis, Chapter II; NWPR Economic Analysis at 30–31. Contrary to the predictions made in the NWPR Economic Analysis, during the year in which the NWPR was in effect, the net change made by states was deregulatory in nature. Two states which had previously protected state waters beyond the scope of ''waters of the United States'' removed these expansive protections, whereas no states that had previously lacked these broader protections established them. *See* NWPR Economic Analysis at 39–41 (estimating that certain states are likely to continue their current permitting practices for dredged and fill material) and the Economic Analysis for the Proposed Rule Chapter II (indicating that two of those states sought to reduce the scope of state clean water protections after the NWPR was finalized, and none of them sought to expand protections.).

The agencies understand that revising state regulations and/or laws takes time and the agencies do not know how some states might have responded if the NWPR had been in place for more than a year, but the agencies have no basis to expect that more states that currently lack protections beyond the NWPR federal floor would have established them. Indeed, the External Environmental Economics Advisory Committee (E–EEAC) has stated that the model that the NWPR used to forecast state responses to that rule was overly optimistic with respect to the likelihood that states would address a federal regulatory gap, in part based on the agencies' failure to fully consider states' responses to past changes to the definition of ''waters of the United States'' (*i.e.,* only two states directly changed regulations in response to the decision in *SWANCC* that the use of ''isolated'' non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal authority under the Clean Water Act, and the agencies' significant resulting change in implementation of the Act). *See* E–EEAC Report on the Repeal of the Clean Water Rule and its Replacement with the Navigable Waters Protection Rule to Define Waters of the United States (WOTUS) 5–6, *available at https://www.e-eeac.org/wotusreport.*

The agencies are also not aware of any tribes that expanded their clean water protections to compensate for a reduction in protections under the NWPR. During the agencies' tribal consultation and coordination for this rulemaking process, tribes overwhelmingly indicated that they lack the independent resources and expertise to protect their waters and therefore rely on Clean Water Act protections. *See* section IV.C of this preamble and the Summary of Tribal Consultation and Coordination, available in the docket for this proposed rule. This feedback is consistent with the concerns expressed during the NWPR rulemaking process. *See, e.g.,* 85 FR 22336–22337, April 21, 2020 (''many Tribes may lack the capacity to create a tribal water program under tribal law, to administer a program, or to expand programs that currently exist. Other tribes may rely on the Federal government for enforcement of water quality violations'').

Given the limited authority of many states and tribes to regulate waters more broadly than the Federal government, the narrowing of federal jurisdiction would mean that discharges into the newly non-jurisdictional waters would in many cases no longer be subject to regulation, including permitting processes and mitigation requirements designed to protect the chemical, physical, and biological integrity of the nation's waters. The agencies have heard concerns from a broad array of stakeholders, including states, tribes, scientists, and non-governmental organizations, that corroborated the agencies' data and indicated that the NWPR's reduction in the jurisdictional scope of the Clean Water Act would cause significant environmental harms. Ephemeral streams and their associated wetlands, wetlands that do not meet the NWPR's revised adjacency criteria, and other aquatic resources not protected by the NWPR provide numerous ecosystem services. The absence of protections for such resources and any subsequent unregulated and unmitigated impacts to such resources would have caused cascading, cumulative, and substantial downstream harm, including damage

[44] Requests for AJDs and the jurisdictional dispositions of the aquatic resources evaluated as part of those AJDs are imperfect measures of activities that might affect those jurisdictional or non-jurisdictional aquatic resources. The AJD data in the Corps ORM2 database generally contain only records for situations in which landowners or project proponents have requested jurisdictional determinations from the Corps or that are associated with an enforcement action, and thus do not represent all aquatic resources that exist within the United States. The proportion and specific types of aquatic resources evaluated for jurisdiction via AJDs varies both geographically and also from year to year. In addition, the ORM2 data collected from AJDs conducted under different regulatory regimes have some metrics that are not directly comparable. Notwithstanding these limitations, the volume of ORM2 data on AJDs and associated aquatic resources is quite large and is tracked in a reasonably accurate fashion, and thus provides a reasonable estimate of overall trends and conditions on the ground. It represents the best data available to the agencies at this time.

connected to water supplies, water quality, flooding, drought, erosion, and habitat integrity, thereby undermining the objective of the Clean Water Act (*see* section V.A.2 of this preamble). *See Pascua Yaqui* v. *EPA,* no. 4:20–cv–00266, slip op. at 9–10 (citing evidence that the agencies and plaintiffs provided of a ''substantial reduction in waters covered under the NWPR'' as demonstrating ''the possibility of serious environmental harm'' that weighed in favor of vacating the rule.); *see also Navajo Nation* v. *Regan,* no. 2:20–cv–00602, slip op. at 6–7 (citing the same reduction particularly '''an increase in determinations by the Corps that waters are non-jurisdictional,' including excluded ephemeral resources, 'and an increase in projects for which CWA Section 404 permits are no longer required,''' as weighing in favor of vacatur).

In conclusion, the agencies do not believe the NWPR is a suitable alternative to the proposed rule because it failed to advance the objective of the Act, including through its elimination of the significant nexus standard and the absence of any alternative standard that would protect the chemical, physical, and biological integrity of the nation's waters; it is inconsistent with scientific information about protecting water quality; its implementation proved confusing, difficult, and often infeasible; and it drastically reduced the numbers of waters protected by the Clean Water Act, including waters that affect the integrity of downstream traditional navigable waters, interstate waters, and the territorial seas.

C. Proposed Rule

The agencies are proposing to restore the longstanding, familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits on the scope of the ''waters of the United States'' informed by Supreme Court case law. Therefore, this proposed rule retains the structure of the agencies' 1986 definition of ''waters of the United States,'' and the text of that definition where revisions are not warranted. Continuity with the 1986 regulations will minimize confusion and provide regulatory stability for the public, the regulated community, and the agencies, while protecting the nation's waters. Each aspect of the proposed rule will be discussed in more detail below.

The implementation section V.D of this preamble identifies features that the agencies have, as a matter of practice, generally not asserted jurisdiction over and the agencies propose to continue implementing the regulations consistent with that longstanding interpretation and practice. In addition, the agencies note that Congress has exempted or excluded certain discharges from the Clean Water Act or from specific permitting requirements. The proposed rule also would not affect any of the exemptions, including exemptions from section 404 permitting requirements provided by section 404(f), such as those for normal farming, ranching, and silviculture activities. 33 U.S.C. 1344(f); 40 CFR 232.3; 33 CFR 323.4. The proposed rule would not affect the existing statutory or regulatory exemptions or exclusions from section 402 NPDES permitting requirements, such as for agricultural stormwater discharges and return flows from irrigated agriculture, or the status of water transfers. 33 U.S.C. 1342(l)(1), (l)(2); 33 U.S.C. 1362(14); 40 CFR 122.3(f), 122.2. In addition, where waters are covered by the Clean Water Act, the agencies have adopted measures to simplify compliance with the Act such as general permits and tools for expediting the permitting process (*e.g.,* mitigation banks, in-lieu fee programs, and functional/conditional assessment tools). The agencies intend to continue to develop general permits and simplified procedures to ensure that projects, particularly those that offer environmental or public benefits, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies have highlighted areas throughout the proposal where they are seeking comment on specific aspects of the revised definition of ''waters of the United States'' and implementation of that definition. The agencies are also generally seeking comment from the public on all aspects of this proposal to support development of the final rule.

1. Traditional Navigable Waters

The proposed rule retains the provision in the 1986 regulations that defines ''waters of the United States'' to include ''all waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.'' 33 CFR 328.3(a)(1) (2014); 40 CFR 122.2 (2014); 40 CFR 230.3(s)(1) (2014). Such waters are often referred to as ''traditional navigable waters.'' With respect to traditional navigable waters, the text of the 1986 regulations and the text of the NWPR are identical. The agencies are not proposing to amend this longstanding text defining ''traditional navigable waters.''

The NWPR maintained the categories of traditional navigable waters and the territorial seas in the definition of ''waters of the United States,'' but consolidated these two categories into a single paragraph in the regulatory text in order to streamline the text. 85 FR 22280, April 21, 2020. Because the 1986 regulations kept the traditional navigable waters provisions and the territorial seas provisions separate, this proposed rule does as well. The agencies are seeking comment, however, on whether it would be useful to similarly streamline the proposed rule by consolidating the traditional navigable waters, interstate waters, and the territorial seas provisions into one provision since under the 1986 regulations and the proposed rule the jurisdictional status of the other categories of waters relies on their connection to a traditional navigable water, interstate water, or the territorial seas (and, where required, meeting either the relatively permanent or the significant nexus standard). The agencies also seek comment on whether consolidation would cause confusion regarding the consistency of the proposed rule with the 1986 regulations, because such a change would require corresponding changes to cross references and the numbering of other provisions.

Supreme Court decisions have not questioned the inclusion of traditional navigable waters in the definition of ''waters of the United States.'' *E.g., SWANCC,* 531 U.S. 159, 172 (''[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: Its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'').

The agencies also are making no changes to their longstanding guidance on traditional navigable waters for purposes of Clean Water Act jurisdiction. Waters will continue to be considered traditional navigable waters, and thus jurisdictional under this provision of the proposed rule, if they:

- Are subject to section 9 or 10 of the Rivers and Harbors Act of 1899;
- have been determined by a federal court to be navigable-in-fact under federal law;
- are waters currently being used for commercial navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments);
- have historically been used for commercial navigation, including commercial waterborne recreation; or

• are susceptible to being used in the future for commercial navigation, including commercial waterborne recreation.

See ''U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, Appendix D, 'Traditional Navigable Waters''' (hereinafter, ''Appendix D''). The NWPR also continued use of Appendix D, stating ''because the agencies have not modified the definition of 'traditional navigable waters,' the agencies are retaining Appendix D to help inform implementation of that provision of this final rule.'' 85 FR 22281, April 21, 2020.[45] However, after the NWPR was promulgated the agencies issued a coordination memo that created some confusion. ''U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) Process for Elevating and Coordinating Specific Draft Determinations under the Clean Water Act (CWA)'' (hereinafter ''TNW Coordination Memo''). The memorandum established an implementation process by which the agencies elevate to their headquarters for coordination certain case-specific and stand-alone Clean Water Act traditional navigable water determinations concluding a water is ''susceptible to use'' solely based on evidence of recreation-based commerce. *Id.* On November 17, 2021, the TNW Coordination Memo was rescinded. Regardless of any confusion caused by the TNW Coordination Memo, the Supreme Court has been clear that ''[e]vidence of recreational use, depending on its nature, may bear upon susceptibility of commercial use.'' *PPL Montana* v. *Montana,* 565 U.S. 576, 600–01 (2012) (in the context of navigability at the time of statehood and quoting *Appalachian Elec. Power Co.,* 311 U.S. at 416 (''[P]ersonal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation''); *Utah,* 283 U.S. at 82 (fact that actual use has ''been more of a private nature than of a public, commercial sort . . . cannot be regarded as controlling'')).

2. Interstate Waters

The proposed rule would restore the longstanding categorical protections for interstate waters, regardless of their navigability, that were established by the earliest predecessors to the 1972 Clean Water Act and remained in place until the promulgation of the NWPR. Interstate waters are waters of the several states and therefore unambiguously ''waters of the United States.'' Categorical protection of interstate waters is the interpretation of the Clean Water Act that is most consistent with the text of the statute, including section 303(a), its purpose and history, Supreme Court case law, and the agencies' charge to implement a ''comprehensive regulatory program'' that protects the chemical, physical, and biological integrity of the nation's waters.

Until 1972, the predecessors of the Clean Water Act explicitly protected interstate waters independent of their navigability. The 1948 Water Pollution Control Act declared that the ''pollution of interstate waters'' and their tributaries is ''a public nuisance and subject to abatement.'' 33 U.S.C. 466a(d)(1) (1952) (codifying Pub. L. 80–845 section 2(d)(1), 62 Stat. 1156 (1948)). Interstate waters were defined without reference to navigability: ''all rivers, lakes, and other waters that flow across, or form a part of, State boundaries.'' 33 U.S.C. 466i(e) (1952) (codifying Pub. L. 80–845 section 10(e), 62 Stat. 1161 (1948)).

In 1961, Congress broadened the 1948 statute and made the pollution of ''interstate or navigable waters'' subject to abatement, retaining the definition of ''interstate waters.'' 33 U.S.C. 466g(a) (1964) (codifying Pub. L. 87–88 section 8(a), 75 Stat. 204, 208 (1961)). In 1965, Congress required states to develop water quality standards for ''interstate waters or portions thereof within such State.'' 33 U.S.C. 1160(c)(1) (1970) (codifying Pub. L. 89–234 section 5, 79 Stat. 903, 907 (1965)); *see also* 33 U.S.C. 1173(e) (1970) (retaining definition of ''interstate waters''). In the 1972 Act, Congress abandoned the ''abatement'' approach initiated in the 1948 statute in favor of a focus on permitting for discharges of pollutants.

The NWPR asserted that Congress' replacement of the term ''navigable or interstate waters'' with ''navigable waters'' in 1972 was an ''express rejection'' of the regulation of interstate waters as an independent category, reflecting Congress' intent to protect interstate waters only to the extent that they are navigable. 85 FR 22583, April 21, 2020. In support of its rationale, the NWPR cited the order of the U.S. District Court for the Southern District of Georgia remanding the 2015 Clean Water Rule. *Id.;* citing *Georgia* v. *Wheeler,* 418 F. Supp. 3d 1336 (S.D. Ga. 2019). That order found that the categorical inclusion of interstate waters exceeds the agencies' authority under the Clean Water Act because it ''reads the term navigability out of the CWA,'' and would assert jurisdiction over waters that are not navigable-in-fact and otherwise have no significant nexus to any other navigable-in-fact water. *Id.* at 1358–59. The court also found the standard overly broad because it would result in Clean Water Act jurisdiction over tributaries, adjacent waters, and case-by-case waters based on their relationship to non-navigable interstate waters. *Id.* at 1359–60.

The agencies view the interpretation of the agencies' authority over interstate waters articulated in the NWPR and in *Georgia* v. *Wheeler* as inconsistent with both the text and the history of the Clean Water Act, as well as Supreme Court case law. While the term ''navigable waters'' is ambiguous in some respects, interstate waters are waters that are clearly covered by the plain language of the definition of ''navigable waters.'' Congress defined ''navigable waters'' to mean ''the waters of the United States, including the territorial seas.'' The Supreme Court has recognized that ''the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State.'' *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 282 (1981). Interstate waters are, by their very nature, waters of the ''several States,'' U.S. Const. section 8, and, consequently, waters ''of the United States.'' The Clean Water Act reflects Congress' recognition that the degradation of water resources in one state may cause significant harms in states other than that in which the pollution occurs.

In addition, the text of the 1972 Act specifically addresses ''interstate waters'' regardless of their connection to navigability. The 1972 statute retains the term ''interstate waters'' in 33 U.S.C. 1313(a), a provision added in 1972, which provides that pre-existing water quality standards for ''interstate waters'' remain in effect unless EPA determined that they were inconsistent with any applicable requirements of the pre-1972 version of the Act. That plain language is a clear indication that Congress

[45] Appendix D is an attachment to the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook that was published in 2007 concurrently with the 2007 *Rapanos* Guidance, *available at https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2316.* The *Rapanos* Guidance was updated in 2008, but Appendix D has remained unchanged since 2007. Appendix D notes (at page 1) that ''EPA and the Corps are providing this guidance on determining whether a water is a 'traditional navigable water' for purposes of the *Rapanos* Guidance, the Clean Water Act (CWA), and the agencies' CWA implementing regulations.'' Appendix D operates in tandem with the *Rapanos* Guidance, along with other agency resources, to assist in guiding field implementation of Clean Water Act jurisdictional determinations.

intended the agencies to continue to protect the water quality of interstate waters without reference to their navigability. Excluding ''interstate waters'' as an independent category of Clean Water Act jurisdiction disregards the plain language of section 303(a).

The Supreme Court has concluded that the 1972 amendments ''were not merely another law 'touching interstate waters,' '' but rather ''occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.'' *City of Milwaukee* v. *Illinois,* 451 U.S. 304, 317 (1981). Thus, the 1972 amendments superseded the federal common law of nuisance as a means to protect interstate waters in favor of a statutory ''all-encompassing program of water pollution regulation,'' *id.* at 318, and they did not curtail the scope of protected waters.

Even if the text and history of the statute and Supreme Court case law interpreting the Act do not unambiguously resolve the issue, the situation addressed by the Supreme Court in the *City of Milwaukee* cases highlights the reasonableness of the agency's interpretation that the Clean Water Act protects interstate waters. The *City of Milwaukee* litigation involved alleged discharges of inadequately treated sewage from Milwaukee, Wisconsin sewer systems directly into Lake Michigan, which also borders Illinois. As the Supreme Court noted, prior to passage of the Clean Water Act, these discharges would have had to be resolved through litigation, in which the courts must apply ''often vague and indeterminate nuisance concepts and maxims of equity jurisprudence.'' *Id.* at 317. The Clean Water Act, however, replaced this unpredictable and inefficient approach with ''a comprehensive regulatory program supervised by an expert administrative agency.'' *Id.* The Court in *Arkansas* v. *Oklahoma* also stated in the context of an NPDES permit for a discharge of pollutants to interstate waters that while the Clean Water Act may place some limits on downstream states' participation in the permitting process, those limits ''do not in any way constrain the EPA's authority to require a point source to comply with downstream water quality standards.'' 503 U.S. at 106.

The potential for interstate harm, and the consequent need for federal regulation, is particularly clear with respect to water bodies that span more than one state. The alternative interpretation would leave interstate waters that do not fall within any other provisions in the definition of ''waters of the United States'' without federal protection and parties in different states to resolve concerns about upstream discharges in non-jurisdictional waters through litigation using ''often vague and indeterminate nuisance concepts and maxims of equity jurisprudence.'' *City of Milwaukee,* 451 U.S. at 317; 85 FR 22286, April 21, 2020. Restoration of longstanding protections for interstate waters, regardless of whether they are navigable-in-fact, would enable the agencies to efficiently and effectively address interstate water quality issues. The agencies interpret interstate waters to encompass all waters that Congress has sought to protect since 1948: all rivers, lakes, and other waters that flow across, or form a part of, state boundaries. Pub. L. 80–845, sec. 10, 62 Stat. 1155, at 1161 (1948). These waters need not meet the relatively permanent standard or significant nexus standard. See Technical Support Document section I.B. for further discussion of interstate waters.

Interstate waters may be streams, lakes or ponds, or wetlands. Under this provision of the proposed rule, consistent with the pre-2015 regulatory regime, the agencies would consider lakes, ponds, and similar lentic (or still) water features, as well as wetlands, crossing state boundaries jurisdictional as interstate waters in their entirety. For streams and rivers, including impoundments, the agencies would determine the upstream and downstream extent of the stream or river crossing a state boundary or serving as a state boundary that should be considered the ''interstate water.'' One method of determining the extent of a riverine ''interstate water'' is the use of stream order. Stream order is a common, longstanding scientific concept of assigning whole numbers to indicate the branches of a stream network. Under this method, for rivers and streams the ''interstate water'' would extend upstream and downstream of the state boundary for the entire length that the water is of the same stream order. For interstate waters that are lakes and ponds or wetlands, the entire lake, pond, or wetland could be considered the interstate water through the entirety of its delineated extent. The agencies are requesting comment on this approach or others for implementing the interstate waters provision of the proposed rule. For instance, if a water serves as the state boundary, the entire length of the river that serves as the boundary could be considered the appropriate extent of the interstate water.

The agencies are seeking comment on whether interstate waters should encompass waters that flow across, or form a part of, boundaries of federally recognized tribes because these waters flow across, or form a part of, state boundaries. *See* Public Law 80–845, sec. 10, 62 Stat. 1155, at 1161 (1948). In comments submitted to the agencies as part of the tribal consultation and coordination process for this proposed rule, several tribes and tribal organizations stated that interstate waters should include waters that border upon or traverse tribal lands, both between and from state to tribe (or vice versa) and between and from one tribe to another (in instances where tribal lands are adjacent to each other). The agencies are also interested in comments on whether and how to identify what constitutes a tribal boundary for purposes of interstate waters under the Clean Water Act, for example, boundaries associated with the term ''Indian country'' as defined at 18 U.S.C. 1151 or reservation boundaries.

3. Other Waters

The agencies are proposing to retain the ''other waters'' category from the 1986 regulations in the definition of ''waters of the United States,'' but with changes informed by relevant Supreme Court precedent. Under the 1986 regulations, ''other waters'' (such as intrastate rivers, lakes, and wetlands that are not otherwise jurisdictional under other sections of the rule) could be determined to be jurisdictional if the use, degradation, or destruction of the water could affect interstate or foreign commerce. The proposed rule amends the 1986 regulations to delete all of the provisions referring to authority over activities that ''could affect interstate or foreign commerce'' and replace them with the relatively permanent and significant nexus standards the agencies have developed based on their best judgment and relevant Supreme Court case law. The proposed rule provides that ''other waters'' meet the relatively permanent standard if they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a traditional navigable water, interstate water, or the territorial seas. The proposed rule also provides that ''other waters'' meet the significant nexus standard if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas. Thus, the proposed rule would provide for case-specific analysis of waters not addressed by any other provision of the definition to determine whether they are ''waters of the United

States'' under the relatively permanent or significant nexus standards. In light of agency guidance discussed below, the agencies have not in practice asserted jurisdiction over ''other waters'' based on the 1986 regulations' provision since *SWANCC.* Section V.D of this preamble solicits comment on this practice and other implementation approaches for this provision of the proposed rule.

The text of the 1986 regulations reflected the agencies' interpretation at the time, based primarily on the legislative history of the Act, that the jurisdiction of the Clean Water Act extended to the maximum extent permissible under the Commerce Clause of the Constitution. *SWANCC* did not invalidate the 1986 regulations' ''other waters'' provision or any other parts of the 1986 regulations' definition of ''waters of the United States.'' Based on that case and subsequent Supreme Court decisions, the agencies conclude that asserting jurisdiction over non-navigable, intrastate ''other waters'' based solely on whether the use, degradation, or destruction of the water could affect interstate or foreign commerce pushes the scope of the Clean Water Act beyond the limitations intended by Congress. The proposal is consistent with many of the concerns the agencies identified in guidance issued in 2003 (discussed further below). In addition, the proposed rule reflects consideration of the principles the NWPR identified as foundational to the Court's opinion in *SWANCC. See* 85 FR 22265, April 21, 2020 (''the reasoning in the SWANCC decision stands for key principles related to federalism and the balancing of the traditional power of States to regulate land and water resources within their borders with the need for national water quality regulation.'').

The proposed rule would replace the interstate commerce test with the relatively permanent and significant nexus standards because, as discussed in section V.A of this preamble, those standards are consistent with the text of the Clean Water Act, advance the objective of the Act, and are consistent with relevant decisions of the Supreme Court. Waters that do not fall within one of the more specific categories identified in the proposed rule may still meet either the relatively permanent or significant nexus standard. For example, a lake that is not a tributary and is not a wetland may have a continuous surface connection to a traditional navigable water, and the ''other waters'' provision as proposed would allow for such a water to be evaluated for jurisdiction. This is consistent with Supreme Court precedent. As the *Rapanos* plurality concluded, ''relatively permanent, standing or continuously flowing bodies of water,'' 547 U.S. at 739, that are connected to traditional navigable waters, *id.* at 742, and waters with a ''continuous surface connection'' to such water bodies, *id.* (Scalia, J., plurality opinion), are ''waters of the United States'' under the relatively permanent standard. And as Justice Kennedy concluded, *SWANCC* held that ''to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made.'' *Id.* at 759 (citing *SWANCC,* 531 U.S. at 167, 172).

The agencies note that in 2003, they issued a Joint Memorandum regarding *SWANCC. See* 68 FR 1991, 1995 (January 15, 2003) (''*SWANCC* Guidance''). In the guidance, the agencies stated that in view of *SWANCC,* neither agency would assert Clean Water Act jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting Clean Water Act jurisdiction rests on the factors listed in the ''Migratory Bird Rule.'' In the preamble to the 1986 regulations, the agencies had stated that ''waters of the United States'' include waters ''[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties,'' as well as waters ''[w]hich are or would be used as habitat by other migratory birds which cross state lines.'' 51 FR 41216–17 (November 13, 1986). That preamble language became known as the ''Migratory Bird Rule.'' In addition to ending use of the ''Migratory Bird Rule,'' the *SWANCC* Guidance also stated that, cognizant of the Supreme Court's direction in *SWANCC,* with respect to *all* waters subject to the ''other waters'' provision, ''field staff should seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters, including permitting and enforcement actions.'' 68 FR 1996 (January 15, 2003). The *Rapanos* Guidance ''[did] not address *SWANCC* nor does it affect the Joint Memorandum regarding that decision issued by the General Counsels of EPA and the Department of the Army on January 10, 2003.'' *Rapanos* Guidance at 4 n.19. As a result of the *SWANCC* Guidance's directive to field staff, field staff have not in practice sought Headquarters approval and the agencies have not asserted jurisdiction over waters based on the ''other waters'' provision of the 1986 regulations since then.

The ''other waters'' provision in the 1986 regulations contains a non-exclusive list of water types that could be jurisdictional under this provision if they are not jurisdictional under the other provisions of the definition: ''[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds.'' The agencies are not proposing to change this language. Rather, the agencies are proposing to replace the Commerce Clause-based standard for determining jurisdiction with the relatively permanent and significant nexus standards. It is important to note that the list of water types does not reflect a conclusion that these waters are necessarily jurisdictional; rather the list is simply meant to inform the public of types of waters that can be jurisdictional if they meet the requisite test (under the proposal, either the relatively permanent standard or the significant nexus standards), even though they do not fall within the other provisions of the proposed rule. The list led to confusion in the past when it was sometimes incorrectly read as an exclusive list. There has also been confusion about some of the listed water types; for example, the list includes intermittent streams and was meant to allow for jurisdictional evaluation of intermittent streams that do not fall within the other categories (such as intermittent streams that are not tributaries to a traditional navigable water, interstate water, or territorial sea but which under the 1986 regulations could affect interstate commerce and under the proposed rule could meet the significant nexus standard) and not to imply that intermittent streams were not jurisdictional under the tributary provision of the 1986 regulations.

The agencies are seeking comment on whether it would be helpful to the public to delete the list of water types or to otherwise provide more clarity to the list of water types in the regulation. For instance, the agencies could delete the list of water types in the ''other waters'' provision of the 1986 regulations and simply state in the rule that the ''other waters'' category includes ''all other intrastate waters (including wetlands)'' that meet either the relatively permanent standard or the significant nexus standard. However, removing the list of water types would not be meant to imply that any of the water types listed in the 1986 regulations are *not* subject to jurisdiction under this provision of the proposed rule if they meet either the relatively permanent standard or the significant nexus standard. The agencies

also solicit comment on whether the final rule should add or delete particular water types from the list.

In the NWPR, the category of waters most analogous to the ''other waters'' category was the category for lakes, ponds, and impoundments of jurisdictional waters that met certain tests. Because those limitations on the scope of jurisdiction were not related to the effects of other waters on the water quality of foundational waters, the agencies are proposing an approach based in the relatively permanent and significant nexus standards.

4. Impoundments

The proposed rule retains the provision in the 1986 regulations that defines ''waters of the United States'' to include impoundments of ''waters of the United States'' with one change. Waters that are determined to be jurisdictional under the ''other waters'' provision would be excluded from this provision under the proposed rule.

The Supreme Court has confirmed that damming or impounding a ''water of the United States'' does not make the water non-jurisdictional. *See S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.,* 547 U.S. 370, 379 n.5 (2006) (''[N]or can we agree that one can denationalize national waters by exerting private control over them.''). While the definition of ''waters of the United States'' was not before the Court in *S.D. Warren,* the Court's conclusion supports the agencies' longstanding interpretation of the Clean Water Act that a ''water of the United States'' remains a ''water of the United States'' even if it is impounded, as reflected in the 1986 regulations and continued in this proposal. The Ninth Circuit has similarly found that ''it is doubtful that a mere man-made diversion would have turned what was part of the waters of the United States into something else and, thus, eliminated it from national concern.'' *United States* v. *Moses,* 496 F.3d 984, 988 (9th Cir. 2007), *cert. denied,* 554 U.S. 918 (2008).

The agencies are proposing to exclude impoundments of waters that are determined to be jurisdictional under the ''other waters'' provision. This proposal is practical: as discussed in sections V.C.5 and 7 below, the agencies are proposing that the ''tributaries'' category not include tributaries of ''other waters'' and the adjacent wetlands category not include wetlands adjacent to ''other waters.'' This change reflects the agencies' consideration of the jurisdictional concerns and limitations of *SWANCC* and *Rapanos.* The agencies have concluded that a provision that authorizes consideration of jurisdiction over tributaries that meet the relatively permanent or significant nexus standard when assessed based simply on connections to ''other waters'' would have too tenuous a connection to traditional navigable waters, interstate waters, or the territorial seas. The proposed rule retains the provisions of the 1986 regulations under which tributaries and adjacent wetlands to impoundments may be determined to be jurisdictional. The proposed change ensures that the impoundment of an ''other water'' does not change the jurisdictional status of tributaries or adjacent wetlands to it. This change reflects the agencies' consideration of the jurisdictional concerns and limitations of *SWANCC* and *Rapanos.* To be clear, an impoundment of an ''other water'' could still meet the relatively permanent standard or the significant nexus standard under the ''other waters'' provision; the impoundment simply would not retain its jurisdictional status under this impoundment provision.

Impoundments of jurisdictional waters were not addressed in the *Rapanos* decision and thus were not directly addressed by the agencies in the *Rapanos* Guidance. Under the proposed rule and pre-2015 practice, impounding waters can create traditional navigable waters, even if the waters that are impounded are not themselves traditional navigable waters. In addition, under the proposed rule impounding a water can create a relatively permanent water, even if the water that is being impounded is a non-relatively permanent water. For purposes of implementation, relatively permanent waters include waters where water is standing or ponded at least seasonally.

In the NWPR, the agencies changed their longstanding position that impoundments of jurisdictional waters remain jurisdictional and added new requirements for impoundments of jurisdictional waters to be considered ''waters of the United States.'' Specifically, under the NWPR, impoundments of jurisdictional waters had to either contribute surface water flow to a downstream jurisdictional water in a typical year or be inundated by flooding from a jurisdictional water in a typical year. In support of the NWPR's position that impounding a jurisdictional water could potentially create a non-jurisdictional feature, the agencies stated that ''the agencies are aware of no decision of the Supreme Court that has ruled that the indelibly navigable principle applies to all waters of the United States, although the principle does apply to certain traditional navigable waters or any decision that would prohibit the United States from consenting to defederalization of a water by a lawfully issued section 404 permit.'' 85 FR 22303, April 21, 2020.

The agencies disagree that jurisdiction over impoundments of ''waters of the United States'' reflects application of the principle of indelible navigability. The indelible navigation principle is applicable to Rivers and Harbors Act jurisdiction, not Clean Water Act jurisdiction, and holds that sudden or man-made changes to a water body or its navigable capacity do not alter the extent of Rivers and Harbors Act jurisdiction, and thus the area occupied or formerly occupied by that water body will always be subject to Rivers and Harbors Act jurisdiction even when the area is no longer a water.[46] The agencies are not aware of any statement relying on that concept as the justification for its longstanding position that impoundments of ''waters of the United States'' remain ''waters of the United States'' for Clean Water Act purposes, absent a legally authorized change of jurisdictional status under a Clean Water Act permit (such as a section 404 permit authorizing creation of an excluded waste treatment system).

In departing from the agencies' longstanding position regarding the jurisdictional status of impoundments, the NWPR also stated that the agencies were unaware of any judicial decision ''that would prohibit the United States from consenting to defederalization of a water by a lawfully issued section 404 permit.'' 85 FR 22303, April 21, 2020. As noted above, the agencies recognize that a lawfully issued section 404 permit, with any accompanying appropriate and practicable mitigation, can authorize filling of a ''water of the United States'' such that it is no longer a ''water of the United States.'' The ''impoundment'' provision of the definition of ''waters of the United States'' simply retains jurisdiction over ''waters of the United States'' that are naturally or artificially impounded. If the impoundment occurs pursuant to a section 404 permit and the permit

[46] This principle has been incorporated in the Corps' definition of ''navigable waters of the United States'' for purposes of the Rivers and Harbors Act: ''A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which may impede or destroy navigable capacity.'' 33 CFR 329.4. The rule is expanded upon in 33 CFR 329.9 and 329.13: ''an area will remain 'navigable in law,' even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change.'' EPA has no such regulations for purposes of implementing the Clean Water Act.

authorizes the removal of the resulting impoundment from jurisdiction, such as in the case of the creation of a waste treatment system excluded from the ''waters of the United States'' by regulation, the impoundment would no longer be jurisdictional pursuant to this provision. On the flip side, an impoundment of a water that is not a ''water of the United States'' could become jurisdictional if, for example, the impounded water becomes navigable-in-fact and is thus covered under the traditional navigable waters provision of the rule.

Asserting Clean Water Act jurisdiction over impoundments also aligns with the scientific literature, as well as the agencies' scientific and technical expertise and experience, which confirm that impoundments have chemical, physical, and biological effects on downstream waters through surface or subsurface hydrologic connections. *See* Technical Support Document section IV.C. Indeed, berms, dikes, and similar features used to create impoundments typically do not block all water flow. Even dams, which are specifically designed and constructed to impound large amounts of water effectively and safely, generally do not prevent all water flow, but rather allow seepage under the foundation of the dam and through the dam itself. *See, e.g.,* International Atomic Energy Agency (''All dams are designed to lose some water through seepage.''); U.S. Bureau of Reclamation (''All dams seep, but the key is to control the seepage through properly designed and constructed filters and drains.''); Federal Energy Regulatory Commission 2005 (''Seepage through a dam or through the foundations or abutments of dams is a normal condition.''). Further, as an agency with expertise and responsibilities in engineering and public works, the Corps extensively studies water retention structures like berms, levees, and earth and rock-fill dams. The agency has found that all water retention structures are subject to seepage through their foundations and abutments. *See, e.g.,* U.S. Army Corps of Engineers 1992 at 1–1; U.S. Army Corps of Engineers 1993 at 1–1; U.S. Army Corps of Engineers 2004 at 6–1.

That said, there may be circumstances where an impoundment authorized under a section 404 permit completely and permanently severs surface or subsurface hydrologic connections. *See* ''U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook,'' at 58. The agencies are considering whether there are certain types of impoundments—such as the example in the preceding sentence—that should be assessed under the ''other waters'' provision of the regulation. The agencies are seeking comment on this approach and accompanying implementation issues.

5. Tributaries

The proposed rule retains the tributary provision of the 1986 regulations, updated to reflect consideration of relevant Supreme Court decisions. The 1986 regulations defined ''waters of the United States'' to include tributaries of traditional navigable waters, interstate waters, ''other waters,'' or impoundments. The proposed rule defines ''waters of the United States'' to include tributaries of traditional navigable waters, interstate waters, impoundments, or the territorial seas if the tributary meets either the relatively permanent standard or the significant nexus standard. The agencies solicit comment on all aspects of the tributary provision in this proposed rule.

The 1986 regulations include tributaries to interstate waters. Since interstate waters, like traditional navigable waters and the territorial seas, are foundational waters protected by the Clean Water Act, the agencies are proposing to protect them in a similar manner by providing that tributaries that meet either the relatively permanent standard or the significant nexus standard in relation to an interstate water are jurisdictional under the proposed rule. Ample scientific information makes clear that the health and productivity of rivers and lakes, including interstate waters, depends upon the functions provided by upstream tributaries. As discussed in section V.A.2.c of this preamble, tributaries, adjacent wetlands, and ''other waters'' that are relatively permanent or that have a significant nexus to downstream waters, including interstate waters, have important beneficial effects on those waters, and polluting or destroying these tributaries, adjacent wetlands, or ''other waters'' can harm downstream jurisdictional waters.

The agencies are proposing to delete the cross reference to ''other waters'' as a water to which tributaries may connect to be determined ''waters of the United States.'' This change reflects the agencies' consideration of the jurisdictional concerns and limitations of *SWANCC* and *Rapanos.* The agencies have concluded that a provision that authorizes consideration of jurisdiction over tributaries that meet the relatively permanent or significant nexus standard when assessed based simply on connections to ''other waters'' would have too tenuous a connection to traditional navigable waters, interstate waters, or the territorial seas. Rather, any such streams that are tributaries to jurisdictional ''other waters'' could be assessed themselves under the ''other waters'' category to determine if they meet the relatively permanent or significant nexus standard. Thus, a tributary to, for example, a lake that meets the significant nexus standard under the ''other waters'' provision could not be determined to be jurisdictional simply because it significantly affects the physical integrity of the lake; rather, the tributary would need to be assessed under the ''other waters'' provision for whether it significantly affects a traditional navigable water, interstate water, or the territorial seas.

Additionally, the agencies are proposing to add the territorial seas to the list of waters to which tributaries may connect to constitute a jurisdictional tributary because the territorial seas are explicitly protected by the Clean Water Act and are a type of traditional navigable water. The agencies are unaware of a legal basis for the 1986 regulation's failure to include the term ''territorial seas'' in the original tributaries provision of the rule. The proposed rule clarifies that tributaries to the territorial seas where they meet either the relatively permanent standard or the significant nexus standard fall within the definition of ''waters of the United States.'' The territorial seas are explicitly covered by the Clean Water Act and they are also traditional navigable waters, so it is reasonable to protect tributaries to the territorial seas that meet either the relatively permanent standard or the significant nexus standard for the same reasons as tributaries to traditional navigable waters are covered.

Finally, the agencies are retaining the 1986 regulations' coverage of tributaries to impoundments, updated to include the requirement that the tributaries meet either the relatively permanent or significant nexus standard. As discussed above, the agencies' longstanding interpretation of the Clean Water Act is that a ''water of the United States'' remains a ''water of the United States'' even if it is impounded. Since the impoundment does not ''defederalize'' the ''water of the United States,'' *see S.D. Warren* at 379 n. 5, the agencies similarly interpret the Clean Water Act to continue to protect tributaries that fall within the tributary provision of the proposed rule upstream from the jurisdictional impoundment.

The agencies' longstanding interpretation of tributary for purposes

of Clean Water Act jurisdiction includes not only rivers and streams, but also lakes and ponds that flow directly or indirectly to downstream traditional navigable waters, interstate waters, the territorial seas, or impoundments of jurisdictional waters. *See* ''U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook,'' at 8, 9. They may be at the headwaters of the tributary network (*e.g.,* a lake with no stream inlets that has an outlet to the tributary network) or farther downstream from the headwaters (*e.g.,* a lake with both a stream inlet and a stream outlet to the tributary network). Once a water is determined to be a tributary, under the proposed rule the tributary must meet either the relatively permanent or significant nexus standards to be jurisdictional. Implementation of those standards is addressed in section V.D of this preamble.

Finally, the 1986 regulations do not contain a definition of tributary, and the agencies are not proposing a definition in this rule. However, the agencies have decades of experience implementing the 1986 regulations. The agencies' longstanding interpretation of tributary for purposes of the definition of ''waters of the United States'' includes natural, man-altered, or man-made water bodies that flow directly or indirectly into a traditional navigable water, interstate water, or the territorial seas. *See Rapanos* Guidance at 6. Given the extensive human modification of watercourses and hydrologic systems throughout the country, it is often difficult to distinguish between natural watercourses and watercourses that are wholly or partly manmade or man-altered. Because natural, man-altered, and manmade tributaries provide many of the same functions, especially as conduits for the movement of water and pollutants to other tributaries or directly to traditional navigable waters, interstate waters, or the territorial seas, the agencies have interpreted the 1986 regulations to cover such tributaries. The OHWM, a term unchanged since 1977, *see* 41 FR 37144 (July 19, 1977); and 33 CFR 323.3(c) (1978), defines the lateral limits of jurisdiction in non-tidal waters, provided the limits of jurisdiction are not extended by adjacent wetlands.

The agencies are proposing a different approach to tributaries than the NWPR's interpretation of that term. The NWPR defined ''tributary'' as a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a territorial sea or traditional navigable water in a typical year either directly or indirectly through other tributaries, jurisdictional lakes, ponds, or impoundments, or adjacent wetlands. A tributary was required to be perennial or intermittent in a typical year. 85 FR 22251, April 21, 2020. The agencies are proposing an alternative to the NWPR's approach to tributaries for the reasons discussed in this section and in section V.B.3 of this preamble. The definition of ''tributary'' in the NWPR failed to advance the objective of the Clean Water Act and was inconsistent with scientific information about the important effects of ephemeral tributaries on the integrity of downstream traditional navigable waters. In addition, key elements of the NWPR's definition of tributary were extremely difficult to implement. All of these deficiencies are reflected in significant losses of federal protections on the ground. *See* section V.B.3 of this preamble.

6. Territorial Seas

The Clean Water Act, the 1986 regulations, and the NWPR all include ''the territorial seas'' as a ''water of the United States.'' This proposed rule makes no changes to that provision, and would retain the territorial seas provision near the end of the list of jurisdictional waters, consistent with the 1986 regulations.

The Clean Water Act defines ''navigable waters'' to include ''the territorial seas'' at section 502(7). The Clean Water Act then defines the ''territorial seas'' in section 502(8) as ''the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.''

7. Adjacent Wetlands

As discussed further in section V.C.9.b of this preamble, in this proposed rule, the agencies are retaining the definition of ''adjacent'' unchanged from the 1986 regulations, which defined ''adjacent'' as follows: ''The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands.'' In addition to retaining the definition of ''adjacent'' from the 1986 regulations, the proposed rule adds language to the adjacent wetlands provision regarding which adjacent wetlands can be considered ''waters of the United States'' to reflect the relatively permanent and significant nexus standards. As such, adjacent wetlands that would be jurisdictional under the proposed rule include wetlands adjacent to traditional navigable waters, interstate waters, or the territorial seas; wetlands adjacent to relatively permanent, standing, or continuously flowing impoundments or tributaries and that have a continuous surface connection to such waters; and wetlands adjacent to impoundments or tributaries that meet the significant nexus standard when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of foundational waters.

Under the proposed rule, the agencies would continue, as they did under the 1986 regulations and the *Rapanos* Guidance, to assert jurisdiction over wetlands adjacent to traditional navigable waters without need for further assessment. Indeed, the *Rapanos* decision did not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are ''waters of the United States.'' *See Rapanos,* 547 U.S. at 780 (Kennedy, J., concurring) (''As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.''), *id.* at 810 (Stevens, J. dissenting) (''Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met.''); *see also Riverside Bayview,* 474 U.S. 121, 134 (''[T]he Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.''); *Rapanos* Guidance at 5. Moreover, ample scientific information makes clear that the health and productivity of rivers and lakes, including foundational waters, depends upon the functions provided by upstream tributaries, adjacent wetlands, and ''other waters.''

Under the proposed rule the agencies would also define ''waters of the United States'' to include wetlands adjacent to the territorial seas as they did under the 1986 regulations without need for further assessment; the territorial seas are categorically protected under the

Clean Water Act and are a type of traditional navigable water.

The 1986 regulations also include wetlands adjacent to interstate waters and since interstate waters, like traditional navigable waters and the territorial seas, are foundational waters protected by the Clean Water Act, under the proposed rule the agencies would define ''waters of the United States'' to include wetlands adjacent to interstate waters without need for further assessment.

The proposed rule also would add the relatively permanent standard and the significant nexus standard to the 1986 regulations' adjacent wetlands provisions for wetlands adjacent to impoundments and tributaries. The relatively permanent standard and the significant nexus standard are independent of each other and this provision in the proposed rule is structured so that jurisdiction over wetlands adjacent to jurisdictional waters would be determined using the same standard under which the impoundment or tributary would be determined to be jurisdictional. For example, a wetland adjacent to a relatively permanent tributary must have a continuous surface connection to the tributary to be jurisdictional under the relatively permanent standard. Similarly, under the significant nexus standard an adjacent wetland and a tributary would be assessed for whether the waters either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of foundational waters. Wetlands adjacent to relatively permanent tributaries but that lack a continuous surface connection to such waters would then be assessed under the significant nexus, along with the tributary.

The agencies are proposing to delete the cross reference to ''other waters'' as a water to which wetlands may be adjacent to be determined ''waters of the United States.'' This change reflects the agencies' consideration of the jurisdictional concerns and limitations of *SWANCC* and *Rapanos.* The agencies have concluded that a provision that authorizes consideration of jurisdiction over adjacent wetlands that meet the relatively permanent or significant nexus standard when assessed based simply on connections to ''other waters'' would have too tenuous a connection to traditional navigable waters, interstate waters, or the territorial seas. Rather, any such wetlands that are adjacent to jurisdictional ''other waters'' could be assessed themselves under the ''other waters'' category to determine if they meet the relatively permanent or significant nexus standard. Thus, a wetland adjacent to, for example, a lake that meets the significant nexus standard under the ''other waters'' provision could not be determined to be jurisdictional simply because it significantly affects the physical integrity of the lake; rather, the wetland would need to be assessed under the ''other waters'' provision for whether it significantly affects a traditional navigable water, interstate water, or the territorial seas.

Finally, the agencies are retaining the 1986 regulations' coverage of wetlands adjacent to impoundments and wetlands adjacent to tributaries to impoundments, updated to include the requirement that the wetlands meet either the relatively permanent or significant nexus standard. As discussed above, the agencies' longstanding interpretation of the Clean Water Act is that a ''water of the United States'' remains a ''water of the United States'' even if it is impounded. Since the impoundment does not ''defederalize'' the ''water of the United States,'' *see S.D. Warren* 379 n.5, the agencies similarly interpret the Clean Water Act to continue to protect wetlands adjacent to the jurisdictional impoundment and adjacent to jurisdictional tributaries to the impoundment.

For wetlands adjacent to impoundments of jurisdictional waters, such waters were not addressed in the *Rapanos* decision and thus were not addressed by the agencies in the *Rapanos* Guidance. Under the proposed rule, the agencies would assess if the impoundment (*i.e.,* the water identified in paragraph (a)(4) of the proposed rule) itself is or is not a relatively permanent, standing, or continuously flowing body of water. If it is, the agencies would assess if the adjacent wetlands have a continuous surface connection with the impoundment. Wetlands adjacent to relatively permanent impoundments and that lack a continuous surface connection to the impoundment and wetlands adjacent to non-relatively permanent impoundments would be considered under the significant nexus standard. The agencies are soliciting comment on the approach in the proposed rule for wetlands adjacent to impoundments and if they should instead consider alternative approaches for wetlands adjacent to impoundments, such as determining which jurisdictional standard should apply based on the water that is being impounded (*e.g.,* if a non-relatively permanent tributary is impounded, the agencies would assess the wetlands adjacent to the impoundment under the significant nexus standard, even if the impoundment itself contains standing water at least seasonally).

Finally, the agencies retain in the proposed rule the parenthetical from the 1986 regulations that limited the scope of jurisdictional adjacent wetlands under (a)(7) to wetlands adjacent to waters ''(other than waters that are themselves wetlands).'' Under this provision, a wetland is not jurisdictional simply because it is adjacent to another adjacent wetland. *See Universal Welding & Fabrication, Inc.* v. *United States Army Corps of Engineers,* 708 Fed. Appx. 301 (9th Cir. 2017) (''Despite the subject wetland's adjacency to another wetland, the Corps determined that its regulatory authority was not precluded by the parenthetical language within [section] 328.3(a)(7), which it interpreted as prohibiting the exercise of jurisdiction over a wetland only if based upon that wetland's adjacency to another wetland.''). The provision has created confusion, as some have argued that a wetland that is indeed adjacent to a jurisdictional tributary should not be determined to be a ''water of the United States'' simply because another adjacent wetland was located between the adjacent wetland and the tributary. Some have even suggested that the parenthetical flatly excluded all wetlands that are adjacent to other wetlands, regardless of any other considerations. These interpretations are inconsistent with the agencies' intent and longstanding interpretation of the parenthetical. *Id.* at 303 (holding the Corps' interpretation is ''the most reasonable reading of the regulation's text'' and ''[t]o the extent that Plaintiff argues that all wetlands adjacent to other wetlands fall outside the Corps' regulatory authority, regardless of their adjacency to a non-wetland water that would otherwise render them jurisdictional, we conclude that this reading is unsupported by the regulation's plain language.''). In addition, under the 1986 regulations and longstanding practice, wetlands adjacent to an interstate wetland or wetlands adjacent to tidal wetlands, which are traditional navigable waters, are jurisdictional. Because this provision has caused confusion at times for the public and the regulated community, the agencies are requesting comment on whether to remove the parenthetical ''(other than waters that are themselves wetlands)'' because it is confusing and unnecessary.

The agencies are proposing a different approach to adjacent wetlands than the NWPR's interpretation of that term. The NWPR defined ''adjacent wetlands'' to be those wetlands that abut

jurisdictional waters and those non-abutting wetlands that are (1) ''inundated by flooding'' from a jurisdictional water in a typical year, (2) physically separated from a jurisdictional water only by certain natural features (*e.g.,* a berm, bank, or dune), or (3) physically separated from a jurisdictional water by an artificial structure that ''allows for a direct hydrologic surface connection'' between the wetland and the jurisdictional water in a typical year. 85 FR 22251, April 21, 2020. Wetlands that do not have these types of connections to other waters were not jurisdictional.

The agencies are not proposing the NWPR's approach to adjacent wetlands for the reasons discussed in this section and in section V.B.3 of this preamble. Specifically, the definition of ''adjacent wetlands'' in the NWPR failed to advance the objective of the Clean Water Act and was inconsistent with scientific information about the important effects of wetlands that do not abut jurisdictional waters and that lack evidence of surface water to such waters on the integrity of downstream foundational waters. In addition, key elements of that definition were extremely difficult to implement. These deficiencies are reflected in significant losses of federal protections on the ground. *See* section V.B.3 of this preamble.

8. Exclusions

The agencies are also proposing to repromulgate two longstanding exclusions from the definition of ''waters of the United States'': the exclusion for prior converted cropland and the exclusion for waste treatment systems. These longstanding exclusions from the definition provide important clarity.[47] The agencies are not proposing to codify the list of exclusions established by the NWPR or the 2015 Clean Water Rule, as they view the two proposed regulatory exclusions as most consistent with the goal of this proposed rule to return to the familiar and longstanding framework that will ensure Clean Water Act protections, informed by relevant Supreme Court decisions. Moreover, as discussed in section V.D.1.b of this preamble, the agencies would expect to implement the proposed rule consistent with longstanding practice, pursuant to which they have generally not asserted jurisdiction over certain other features. The agencies solicit comment on this approach to codifying and implementing exclusions.

a. Prior Converted Cropland

The proposed rule would repromulgate the regulatory exclusion for prior converted cropland first codified in 1993, which provided that prior converted cropland is ''not 'waters of the United States,''' and that ''for purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA,'' notwithstanding any other Federal agency's determination of an area's status. 58 FR 45008, 45036. This proposal would restore longstanding and familiar practice under the pre-2015 regulatory regime and generally maintain consistency between the agencies' implementation of the Clean Water Act and the U.S. Department of Agriculture's (USDA) implementation of the Food Security Act, providing certainty to farmers seeking to conserve and protect land and waters pursuant to federal law.

The concept of prior converted cropland originates in the wetland conservation provisions of the Food Security Act of 1985, 16 U.S.C. 3801 *et seq.* These provisions were intended to disincentivize the conversion of wetlands to croplands. Under the Food Security Act wetland conservation provisions, farmers who convert wetlands to make possible the production of an agricultural commodity crop lose eligibility for certain USDA program benefits. If a farmer had converted wetlands to cropland prior to December 23, 1985, then the land is considered prior converted cropland and the farmer does not lose eligibility for benefits. USDA defines prior converted cropland for Food Security Act purposes in its regulations at 7 CFR part 12. *See* 7 CFR 12.2(a) and 12.33(b).

In 1993, EPA and the Corps codified an exclusion for prior converted croplands from the definition of ''waters of the United States'' regulated pursuant to the Clean Water Act. The exclusion stated, ''[w]aters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.'' 58 FR 45008, 45036; 33 CFR 328.3(a)(8) (1994); 40 CFR 230.3(s) (1994). The preamble stated that EPA and the Corps would interpret prior converted cropland consistent with the definition in the National Food Security Act Manual (NFSAM) published by the USDA Soil Conservation Service, now known as USDA's Natural Resource Conservation Service (NRCS). 58 FR 45031. It cited USDA's definition of prior converted cropland to mean ''areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible. PC [prior converted] cropland is inundated for no more than 14 consecutive days during the growing season and excludes pothole or playa wetlands.'' *Id.*

The purpose of the exclusion, as EPA and the Corps explained in the 1993 preamble, was to ''codify existing policy,'' as the agencies had not been implementing the Act to include prior converted cropland, and to ''help achieve consistency among various federal programs affecting wetlands.'' *Id.* The preamble further stated that excluding prior converted cropland from ''waters of the United States'' was consistent with protecting aquatic resources because ''[prior converted cropland] has been significantly modified so that it no longer exhibits its natural hydrology or vegetation. Due to this manipulation, [prior converted] cropland no longer performs the functions or has values that the area did in its natural condition. PC cropland has therefore been significantly degraded through human activity and, for this reason, such areas are not treated as wetlands under the Food Security Act. Similarly, in light of the degraded nature of these areas, we do not believe that they should be treated as wetlands for the purposes of the CWA.'' *Id.* at 45032.

The 1993 preamble stated that, consistent with the NFSAM, an area would lose its status as prior converted cropland if the cropland is ''abandoned,'' meaning that crop production ceases and the area reverts to a wetland state. *Id.* at 45033. Specifically, the preamble states that prior converted cropland that now

[47] The agencies note that they have never interpreted groundwater be a ''water of the United States'' under the Clean Water Act. *See, e.g.,* 80 FR 37099–37100 (explaining that the agencies have never interpreted ''waters of the United States'' to include groundwater); 85 FR 22278, April 21, 2020 (explaining that the agencies have never interpreted ''waters of the United States'' to include groundwater). The proposed rule makes no change to that longstanding interpretation. This interpretation was recently confirmed by the U.S. Supreme Court. *Maui,* 140 S.Ct. at 1472 (''The upshot is that Congress was fully aware of the need to address groundwater pollution, but it satisfied that need through a variety of state-specific controls. Congress left general groundwater regulatory authority to the States; its failure to include groundwater in the general EPA permitting provision was deliberate.'') While groundwater itself is not a ''water of the United States,'' discharges of pollutants to groundwater that reach a jurisdictional surface require a NPDES permit where the discharge through groundwater is the ''functional equivalent'' of a direct discharge from the point source into navigable waters. *Maui,* 140 S.Ct. at 1468.

meets wetland criteria will be considered abandoned unless ''once in every five years it has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes, or pasture production.'' *Id.* at 45034.

Three years later, the Federal Agriculture Improvement and Reform Act of 1996 amended the Food Security Act and changed this ''abandonment'' principle, replacing it with a new approach referred to as ''change in use.'' *See* Public Law 104–127, 110 Stat. 888 (1996). Under the 1996 amendments, an area retains its status as prior converted cropland for purposes of the wetland conservation provisions so long as it continues to be used for agricultural purposes. H.R. Conf. Rep. No. 104–494, at 380 (1996). EPA and the Corps did not address the 1996 amendments in rulemaking. In 2005, the Corps and NRCS issued a joint Memorandum to the Field in an effort to again align the Clean Water Act section 404 program with the Food Security Act by adopting the principle that a wetland can lose prior converted cropland status following a ''change in use.'' [48] The Memorandum stated, ''[a] certified PC determination made by NRCS remains valid as long as the area is devoted to an agricultural use. If the land changes to a non-agricultural use, the PC determination is no longer applicable and a new wetland determination is required for CWA purposes.'' It defined ''agricultural use'' as ''open land planted to an agricultural crop, used for the production of food or fiber, used for haying or grazing, left idle per USDA programs, or diverted from crop production to an approved cultural practice that prevents erosion or other degradation.''

One district court set aside the Corps' adoption of change in use on the grounds that it was a substantive change in Clean Water Act implementation that the agencies had not issued through notice and comment rulemaking. *New Hope Power Co.* v. *U.S. Army Corps of Eng'rs,* 746 F. Supp. 2d 1272, 1282 (S.D. Fla. 2010). The court explained, ''prior to issuance of the policy, prior converted cropland that was shifted to non-agricultural use was treated as exempt. Following [its issuance], the opposite was true.'' *Id.* Following *New Hope Power,* the agencies did not implement change in use in areas subject to the court's jurisdiction.

The NWPR provided a definition of prior converted cropland for purposes of the Clean Water Act for the first time since 1993. Generally speaking, the NWPR's approach to prior converted cropland significantly reduced the likelihood that prior converted cropland will ever lose its excluded status. The NWPR provided that an area remains prior converted cropland for purposes of the Clean Water Act unless the area is abandoned and has reverted to wetlands, defining abandonment to occur when prior converted cropland ''is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years.'' 85 FR 22339, April 21, 2020; 33 CFR 328.3(c)(9). The NWPR then presented a broad interpretation of ''agricultural purposes,'' including but not limited to crop production, haying, grazing, idling land for conservation uses (such as habitat; pollinator and wildlife management; and water storage, supply, and flood management); irrigation tailwater storage; crawfish farming; cranberry bogs; nutrient retention; and idling land for soil recovery following natural disasters such as hurricanes and drought. 85 FR 22321, April 21, 2020. Under the NWPR, prior converted cropland maintained its excluded status if it is used at least once in the five years preceding a jurisdictional determination for any of these agricultural purposes. Given the breadth of ''agricultural purposes'' under the NWPR, former cropland that reverts to wetlands otherwise meeting the definition of ''waters of the United States'' could maintain its excluded prior converted cropland status simply by, for example, being grazed or idled for habitat conservation once in five years. These wetlands could then be filled without triggering any Clean Water Act regulatory protection.

The NWPR's imprecise language in defining prior converted cropland for purposes of the Clean Water Act potentially extended prior converted cropland status far beyond those areas USDA considers prior converted cropland for purposes of the Food Security Act. Specifically, USDA's regulation defining prior converted cropland refers to conversion that makes possible production of an ''agricultural commodity,'' which provides for annual tilling of the soil, while the NWPR defined prior converted cropland to encompass any area used to produce an ''agricultural product,'' a term not used in the regulations that therefore introduces significant ambiguity and further distinguishes the Clean Water Act's prior converted cropland exclusion from USDA's approach. *Compare* 7 CFR 12.2(a) *with* 33 CFR 328.3(c)(9). The NWPR's definition provided that the agencies would recognize prior converted cropland designations made by USDA, 33 CFR 328.3(c)(9), but the list of examples that the NWPR provided for ''agricultural product'' suggests the term is significantly broader than the USDA's exclusion for land used for ''commodity crops.'' The absence of a definition for the term ''agricultural product'' or any explanation as to how it is different from a ''commodity crop'' undermined transparency and the original purpose of the exclusion, which was to help achieve consistency among various federal programs affecting wetlands. *See* 58 FR 45031.

The proposed rule would restore the exclusion's original purpose of maintaining consistency among federal programs addressing wetlands, while furthering the objective of the Clean Water Act. *Id.* at 45031–32. As was the case between 1993 and promulgation of the NWPR, the agencies propose that, for purposes of the Clean Water Act exclusion, a landowner may demonstrate that a water retains its prior converted cropland status through a USDA prior converted cropland certification. *See id.* at 45033 (''recognizing [NRCS]'s expertise in making these [prior converted] cropland determinations, we will continue to rely generally on determinations made by [NRCS].''). The agencies' proposal would maintain the provision promulgated in 1993 that EPA retains final authority to determine whether an area is subject to the requirements of the Clean Water Act. Moreover, by limiting the implementation of the exclusion to areas with a USDA prior converted cropland certification, the exclusion would only encompass significantly degraded waters that no longer perform the functions of the waters in their natural condition. *See id.* at 45032. The proposal would therefore align the exclusion with the objective of the Clean Water Act, to restore and maintain the integrity of the nation's waters, consistent with the agencies' intent in 1993.

The agencies request comment as to whether any other changes could enhance consistency between the prior converted cropland status under the Food Security Act and the exclusion of prior converted cropland under the Clean Water Act, while effectuating the goals of the Clean Water Act. One way of increasing consistency could be to implement the text of the original prior

[48] This 2005 joint Memorandum was rescinded on January 28, 2020. *See https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/4288.*

converted cropland exclusion consistent with USDA's current and longstanding approach, outlined in USDA's final rule addressing the Highly Erodible Land and Wetland Conservation provisions of the Food Security Act of 1985. 85 FR 53137 (August 28, 2020). Pursuant to this approach, cropland would lose its exclusion if it ''changes use,'' as USDA interprets that term. *See* 61 FR 47036 (September 6, 1996); 7 CFR 12.30(c)(6) (''As long as the affected person is in compliance with the wetland conservation provision of this part, and as long as the area is devoted to the use and management of the land for production of food, fiber, or horticultural crops, a certification made under this section will remain valid and in effect until such time as the person affected by the certification requests review of the certification by NRCS.''). This approach would fulfill the exclusion's purpose of ensuring consistency among federal programs affecting wetlands. *See* 58 FR 45031. Alternatively, the agencies request comment as to whether to implement the exclusion consistent with the interpretation in the 1993 preamble, under which an area only loses its prior converted cropland status if the cropland is ''abandoned,'' meaning that commodity crop production ceases and the area reverts to a wetland state. *See id.* at 45033. Under this approach, an area that has been designated as prior converted cropland and has not reverted to a wetland state (meaning the area would not meet the definition of wetland) would not become a ''water of the United States'' regardless of agricultural activity. However, an area which has been designated as prior converted cropland and has reverted to a wetland state could be reviewed for a potential loss of the exclusion status under the Clean Water Act. The following scenarios provide examples of the way in which the exclusion could cease following either ''abandonment'' or ''change in use.''

First, if the agencies were to apply the abandonment principle, the reverted wetland area would only regain jurisdictional status if:

(1) The area had not been used for the production of an agricultural commodity, or the area had not been used and would continue to not be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes, or pasture production, at least once in every five years and

(2) the area reverts to a wetland that meets the definition of ''waters of the United States.''

Under the abandonment principle, if an agricultural producer with an area designated as prior converted cropland fails to produce an agricultural commodity, or the area fails to be used in rotation as described above, for a period of six years, and the prior converted cropland area reverts to wetland, the wetland would lose the benefit of the exclusion and discharges of a pollutant to the wetland would be subject to regulation under the Clean Water Act if it meets the definition of ''waters of the United States'' and activities taking place on it are not otherwise exempt. In a second example of abandonment, if an agricultural producer with an area designated as prior converted cropland produces an agricultural commodity two years prior to selling its property for a residential development, the area retains its prior converted cropland designation even if it reverts to wetlands that would otherwise meet the definition of ''waters of the United States.'' In this example, discharges of dredged or fill material from the construction of the residential development into the wetlands which occurred within the three years remaining out of the five-year timeframe allowed before the abandonment provision would be triggered would not require authorization under Clean Water Act section 404.

Alternatively, if the agencies were to apply the change in use principle in the second example scenario above, the reverted wetland area could regain jurisdictional status if it were subject to a change in use, meaning the area is no longer available for production of an agricultural commodity, and if the reverted wetland met the definition of ''waters of the United States.'' In that scenario, if an agricultural producer with an area certified by NRCS as prior converted cropland produces an agricultural commodity two years prior to selling their property for a residential development, the prior converted cropland designation would no longer apply when the area is no longer available for the production of an agricultural commodity crop. If the prior converted cropland area reverts to wetlands and meets the definition of ''waters of the United States'' the discharge of dredged or fill material from the construction of the residential development would require authorization under Clean Water Act section 404. The agencies hope this discussion and set of examples will illuminate the differences between interpreting the prior converted cropland designation to cease upon abandonment as opposed to change in use, to allow for input to best inform the agencies' path forward.

The agencies solicit comment on alternative approaches to the prior converted cropland exclusion as well, including retaining the definition of prior converted cropland in the NWPR. While the agencies have concerns with that definition, as discussed above, the agencies request comment with regard to those concerns and whether they should nonetheless retain the NWPR's interpretation that prior converted cropland retains its designation so long as it has been used for agricultural purposes at least once in the preceding five years, and that agricultural purposes include crop production, haying, grazing, idling land for conservation uses (such as habitat; pollinator and wildlife management; and water storage, supply, and flood management); irrigation tailwater storage; crawfish farming; cranberry bogs; nutrient retention; and idling land for soil recovery following natural disasters like hurricanes and drought. Finally, the agencies request comment as to whether certain specific types of documentation aside from USDA certification should be considered sufficient to demonstrate that an area is prior converted cropland.

b. Waste Treatment System Exclusion

The agencies are also proposing to retain the waste treatment system exclusion from the 1986 regulations and return to the longstanding version of the exclusion that the agencies have implemented for decades. Specifically, the proposed rule provides that ''[w]aste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act are not waters of the United States.'' This language is the same as the agencies' 1986 regulation's version of the waste treatment system exclusion, with a ministerial change to delete the exclusion's cross-reference to a definition of ''cooling ponds'' that no longer exists in the Code of Federal Regulations, and the addition of a comma that clarifies the agencies' longstanding implementation of the exclusion as applying only to systems that are designed to meet the requirements of the Act.[49]

EPA first promulgated the waste treatment system exclusion in a 1979

[49] The NWPR defined a waste treatment system as ''all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).'' 85 FR 22339, April 21, 2020.

notice-and-comment rulemaking revising the definition of ''waters of the United States'' in the agency's NPDES regulations. 44 FR 32854 (June 7, 1979). A ''frequently encountered comment'' was that ''waste treatment lagoons or other waste treatment systems should not be considered waters of the United States.'' *Id.* at 32858. EPA agreed, except as to cooling ponds that otherwise meet the criteria for ''waters of the United States.'' *Id.* The 1979 revised definition of ''waters of the United States'' thus provided that ''waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.'' *Id.* at 32901 (40 CFR 122.3(t) (1979)).

The following year, EPA revised the exclusion, but again only in its NPDES regulations, to clarify its application to treatment ponds and lagoons and to specify the type of cooling ponds that fall outside the scope of the exclusion. 45 FR 33290, 33298 (May 19, 1980). EPA further decided to revise this version of the exclusion to clarify that ''treatment systems created in [waters of the United States] or from their impoundment remain waters of the United States,'' while ''[m]anmade waste treatment systems are not waters of the United States.'' *Id.* The revised exclusion read: ''[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR [section] 423.11(m) which also meet the criteria of this definition) are not waters of the United States.'' The provision further provided that the exclusion ''applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.'' 45 FR 33424 (40 CFR 122.3).

Two months following this revision, EPA took action to ''suspend[ ] a portion'' of the waste treatment system exclusion in its NPDES regulations in response to concerns raised in petitions for review of the revised definition of ''waters of the United States.'' 45 FR 48620 (July 21, 1980). EPA explained that industry petitioners objected to limiting the waste treatment system exclusion to manmade features, arguing that the revised exclusion ''would require them to obtain permits for discharges into existing waste treatment systems, such as power plant ash ponds, which had been in existence for many years.'' *Id.* at 48620. The petitioners argued that ''[i]n many cases, . . . EPA had issued permits for discharges from, not into, these systems.'' *Id.* Agreeing that the regulation ''may be overly broad'' and ''should be carefully re-examined,'' EPA announced that it was ''suspending [the] effectiveness'' of the sentence limiting the exclusion to manmade bodies of water. *Id.* EPA then stated that it ''intend[ed] promptly to develop a revised definition and to publish it as a proposed rule for public comment,'' after which the agency would decide whether to ''amend the rule, or terminate the suspension.'' *Id.*

In 1983, EPA republished the waste treatment system exclusion in its NPDES regulations with a note explaining that the agency's July 1980 action had ''suspended until further notice'' the sentence limiting the exclusion to manmade bodies of water, and that the 1983 action ''continue[d] that suspension.'' 48 FR 14146, 14157 (April 1, 1983) (40 CFR 122.2) (1984). EPA subsequently omitted the exclusion's suspended sentence altogether in revising the definition of ''waters of the United States'' in other parts of the Code of Federal Regulations. *See, e.g.,* 53 FR 20764, 20774 (June 6, 1988) (revising EPA's section 404 program definitions at 40 CFR 232.2).

Separately, the Corps published an updated definition of ''waters of the United States'' in 1986. This definition contained the waste treatment system exclusion, but it likewise did not include the exclusion's suspended sentence: ''Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.'' 51 FR 41250 (November 13, 1986); 33 CFR 328.3 (1987).

Later revisions to the definition of cooling ponds rendered the exclusion's cross-reference to 40 CFR 123.11(m) outdated. *See* 47 FR 52290, 52291, 52305 (November 19, 1982) (revising regulations related to cooling waste streams and deleting definition of cooling ponds). In this rulemaking, the agencies are proposing to delete this obsolete cross-reference, consistent with other recent rulemakings addressing the definition of ''waters of the United States.'' [50]

The proposed rule also deletes the suspended sentence in EPA's NPDES regulations limiting application of the exclusion to manmade bodies of water. The suspended sentence, which appeared only in the version of the waste treatment system exclusion contained in EPA's NPDES regulations (40 CFR 122.2) prior to the NWPR, states: ''This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.'' As discussed above, EPA suspended this sentence limiting application of the exclusion in 1980. As a result, EPA has *not* limited application of the waste treatment system exclusion to manmade bodies of water for over four decades. The proposed rule maintains the NWPR's deletion of the suspended sentence in EPA's NPDES regulations and is thus consistent with the other versions of the exclusion found in EPA's and the Corps' 1986 regulations and EPA's decades-long practice implementing the exclusion under the 1986 regulations.

Indeed, for decades, both agencies have not limited application of the exclusion to manmade bodies of water. This longstanding approach to excluding waste treatment systems—including those that are *not* manmade bodies of water—is a reasonable and lawful exercise of the agencies' authority to determine the scope of ''waters of the United States,'' *see Ohio Valley Envtl. Coal.* v. *Aracoma Coal Co.,* 556 F.3d 177, 212 (4th Cir. 2009) (upholding the waste treatment system exclusion as a lawful exercise of the agencies' ''authority to determine which waters are covered by the CWA''). For all of these reasons, the agencies are proposing to delete the suspended sentence referenced above. The agencies solicit comment on this approach.

Further, consistent with the 1986 regulations, the proposed rule provides that a waste treatment system must be ''designed to meet the requirements of the Clean Water Act.'' A waste treatment system may be ''designed to meet the requirements of the Clean Water Act'' where, for example, it is constructed pursuant to a Clean Water Act section 404 permit, *Ohio Valley Envtl. Coalition* v. *Aracoma Coal Co.,* 556 F.3d 177, 214–15 (4th Cir. 2009), or where it is ''incorporated in an NPDES permit as part of a treatment system,'' *N. Cal. River Watch* v. *City of Healdsburg,* 496 F.3d 993, 1001 (9th Cir. 2007).

To be clear, the exclusion does not free a discharger from the need to comply with the Clean Water Act for pollutants discharged *from* a waste treatment system to a water of the

[50] 85 FR 22250, 22325 (April 21, 2020) (''One ministerial change [to the waste treatment system exclusion] is the deletion of a cross-reference to a definition of ''cooling ponds'' that no longer exists in the Code of Federal Regulations.''); 80 FR 37054, 37097 (June 29, 2015) (''One ministerial change [to the waste treatment system exclusion] is the deletion of a cross-reference in the current language to an EPA regulation that no longer exists.'').

United States; only discharges *into* the waste treatment system are excluded from the Act's requirements. As such, any entity would need to comply with the Clean Water Act by obtaining a section 404 permit for a new waste treatment system constructed in ''waters of the United States,'' and a section 402 permit for discharges of pollutants from a waste treatment system into ''waters of the United States.'' Further, consistent with the agencies' general practice implementing the exclusion, under the proposed rule, a waste treatment system that is abandoned or otherwise ceases to serve the treatment function for which it was designed would not continue to qualify for the exclusion and could be deemed jurisdictional if it otherwise meets the proposed rule's definition of ''waters of the United States.''

The agencies are aware of concerns raised by some stakeholders that features subject to the waste treatment system exclusion could be used by any party to dispose waste or discharge pollutants with abandon. In this proposal, the agencies are clarifying that for waters that would otherwise meet the proposed rule's definition of ''waters of the United States,'' the agencies' intent, consistent with prior practice, is that the waste treatment system exclusion is generally available only to the permittee using the system for the treatment function for which such system was designed. Relatedly, the agencies are also clarifying that, consistent with the agencies' longstanding practice, a waste treatment system does not sever upstream waters from Clean Water Act jurisdiction. In other words, discharges into those upstream waters remain subject to Clean Water Act requirements and thus may require a section 402 permit.[51] The agencies request comment on whether to add language to the regulatory text of the waste treatment system exclusion clarifying these aspects of the exclusion.

9. Other Definitions

The proposed rule contains a number of defined terms unchanged from the 1986 regulations. Some of the terms appeared only in the Corps' regulations, but in the 2019 Rule and the NWPR, the agencies included these definitions in both agencies' regulations. The agencies are not proposing to amend the definitions of ''wetland,'' ''high tide line,'' ''ordinary high water mark,'' and ''tidal water'' from the 1986 regulations, but to provide additional clarity and consistency in comparison to the 1986 regulations, the proposed rule would include all the defined terms in EPA's regulations, where such definitions are not already contained. Only the definition of the term ''adjacent'' was amended in the NWPR; the agencies are proposing to define the term unchanged from the 1986 regulations. This section briefly describes the definitions and their history and implementation. See section V.D of this preamble for further discussion on implementation.

a. Wetlands

The proposed rule makes no changes to the definition of ''wetlands'' contained in the NWPR, which made no changes to the 1986 regulations and defined ''wetlands'' as ''those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.'' The agencies are not proposing to amend this definition.

b. Adjacent

The proposed rule defines the term ''adjacent'' with no changes from the 1986 regulations as ''bordering, contiguous, or neighboring. Wetlands separated from other 'waters of the United States' by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.' '' This is a longstanding and familiar definition that is supported by Supreme Court case law and science. *See, e.g., Riverside Bayview,* 474 U.S. 121, 134 (''. . . the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.''). The Supreme Court has noted that adjacent wetlands under this definition are not limited to only those that exist as a result of ''flooding or permeation by water having its source in adjacent bodies of open water,'' and that wetlands may affect the water quality in adjacent waters even when those waters do not actually inundate the wetlands. *Id.* at 134–35. As discussed in section V.C.7 of this preamble and consistent with the pre-2015 regulatory regime, to be jurisdictional under the adjacent wetlands provision of the proposed rule, wetlands must meet this definition of adjacent *and* either be adjacent to a traditional navigable water, interstate water, or territorial sea *or* otherwise fall within the adjacent wetlands provision and meet either the relatively permanent standard or the significant nexus standard. See section V.D of this preamble for further discussion on implementation.

The NWPR substantially narrowed the definition of ''adjacent'' based primarily on the *Rapanos* plurality standard. The NWPR interprets ''adjacent wetlands'' to be those wetlands that abut jurisdictional waters and those non-abutting wetlands that are (1) ''inundated by flooding'' from a jurisdictional water in a typical year, (2) physically separated from a jurisdictional water only by certain natural features (*e.g.,* a berm, bank, or dune), or (3) physically separated from a jurisdictional water by an artificial structure that ''allows for a direct hydrologic surface connection'' between the wetland and the jurisdictional water in a typical year. 85 FR 22251, April 21, 2020. Wetlands that do not have these types of connections to other jurisdictional waters are not jurisdictional under the NWPR. The NWPR's limits on the scope of protected wetlands to those that touch or demonstrate evidence of a regular surface water connection to other jurisdictional waters are inconsistent with the scientific information in the record demonstrating the effects of wetlands on the integrity of downstream waters when they have other types of surface connections, such as wetlands that overflow and flood jurisdictional waters or wetlands with less frequent surface water connections due to long-term drought; wetlands with shallow subsurface connections to other protected waters; or other wetlands proximate to jurisdictional waters. As discussed in section V.B.3.d of this preamble, within the first year of implementation of the NWPR, 70% of streams and wetlands evaluated were found to be non-jurisdictional, including 15,675 wetlands that did not meet the NWPR's revised adjacency criteria. The agencies anticipate that this increase in determinations of wetlands to be non-jurisdictional as compared to prior regulations could reduce the integrity of the nation's waters (*see* section V.B.3.d of this preamble), particularly in the absence of comparable state, tribal, or local regulations and associated efforts to avoid, minimize, or compensate for impacts to aquatic resources regulated under such programs.

[51] *See, e.g.,* Memorandum of Non-Concurrence with Jurisdictional Determinations POA–1992–574 & POA–1992–574–Z (October 25, 2007), *available at https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll5/id/1454* (''EPA and the Corps agree that the agencies' designation of a portion of waters of the U.S. as part of a waste treatment system does not itself alter CWA jurisdiction over any waters remaining upstream of such system.'').

Proposing the longstanding definition of ''adjacent'' is consistent with *Riverside Bayview* and Justice Kennedy's opinion in *Rapanos,* as well as with scientific information indicating that wetlands meeting this definition provide important functions that contribute to the integrity of traditional navigable waters, interstate waters, and territorial seas. See section V.A of this preamble. The agencies are proposing to retain the provision of this definition from the 1986 regulations that includes wetlands separated from other ''waters of the United States'' by man-made dikes or barriers, natural river berms, beach dunes and the like. The Supreme Court in *Riverside Bayview* deferred to the agencies' interpretation of the Clean Water Act to include adjacent wetlands. *Riverside Bayview,* 474 U.S. at 135 (''the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water. . . . [W]e therefore conclude that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act''). Justice Kennedy stated: ''In many cases, moreover, filling in wetlands separated from another water by a berm can mean that floodwater, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways. With these concerns in mind, the Corps' definition of adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.'' *Rapanos* at 775.

Wetlands separated from other ''waters of the United States'' by man-made dikes or barriers, natural river berms, or beach dunes generally continue to have a hydrologic connection to downstream waters. This is because constructed dikes or barriers, natural river berms, beach dunes, and the like typically do not block all water flow. This hydrologic connection can occur via seepage or over-topping, where water from the nearby traditional navigable water, interstate water, the territorial seas, impoundment, or tributary periodically overtops the berm or other similar feature. Water can also overtop a natural berm or artificial dike and flow from the wetland to the water to which it is adjacent.

River berms, natural levees, and beach dunes are all examples of features that are formed by natural processes and do not isolate adjacent wetlands from the streams, lakes, or tidal waters that form them. River berms, natural levees, and the wetlands and waters behind them are part of the floodplain. Natural levees are discontinuous, which allows for a hydrologic connection to the stream or river via openings in the levees and thus the periodic mixing of river water and backwater. Beach dunes are formed by tidal or wave action, and the wetlands that establish behind them experience a fluctuating water table seasonally and yearly in synchrony with sea or lake level changes. The terms earthen dam, dike, berm, and levee are used to describe similar constructed structures whose primary purpose is to help control flood waters. Such man-made levees and similar structures also do not isolate adjacent wetlands.

In addition, adjacent wetlands separated from a jurisdictional water by a natural or man-made berm serve many of the same functions as other adjacent wetlands. There are also other important considerations, such as chemical and biological functions provided by the wetland. For instance, adjacent waters behind berms can still serve important water quality functions, serving to filter pollutants and sediment before they reach downstream waters. Wetlands behind berms, where the system is extensive, can help reduce the impacts of storm surges caused by hurricanes. Such adjacent wetlands, separated from waters by berms and the like, maintain ecological connection with those waters. For example, wetlands behind natural and artificial berms can provide important habitat for aquatic and semi-aquatic species that utilize both the wetlands and the nearby water, including for basic food, shelter, and reproductive requirements. Though a berm may reduce habitat functional value and may prevent some species from moving back and forth from the wetland to the nearby jurisdictional water, many species remain able to utilize both habitats despite the presence of such a berm, and in some cases, the natural or artificial barrier can serve the purpose of providing extra refuge from predators or for rearing young or other life cycle needs.

Thus, the longstanding definition of ''adjacent'' reasonably advances the objective of the Act. To be jurisdictional under the proposed rule, however, wetlands must meet this definition of adjacent *and* either be adjacent to a traditional navigable water, interstate water, or territorial sea *or* otherwise fall within the adjacent wetlands provision and meet either the relatively permanent standard or the significant nexus standard.

c. High Tide Line

The proposed rule makes no changes to the definition of ''high tide line'' contained in the NWPR, which made no changes to the 1986 regulations and defines the term ''high tide line'' as ''the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency, but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.'' The agencies are not proposing to amend this definition. This definition has been in place since 1977 (*see* 42 FR 37144, July 19, 1977; and 33 CFR 323.3(c) (1978)), and like the definitions discussed above, is a well-established definition that is familiar to regulators, environmental consultants, and the scientific community. This term defines the landward limits of jurisdiction in tidal waters when there are no adjacent non-tidal ''waters of the United States.'' 51 FR 41206, 41251 (November 13, 1986).

d. Ordinary High Water Mark

The proposed rule makes no changes to the definition of ''ordinary high water mark'' (''OHWM'') contained in the NWPR, which made no changes to the 1986 regulations and defines OHWM as ''that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.'' This term, unchanged since 1977, *see* 41 FR 37144 (July 19, 1977) and 33 CFR 323.3(c) (1978), defines the lateral limits of jurisdiction in non-tidal waters, provided the limits of jurisdiction are not extended by adjacent wetlands. When adjacent wetlands are present, Clean Water Act jurisdiction extends beyond the OHWM

to the limits of the adjacent wetlands. *Id.;* Regulatory Guidance Letter (RGL) 05–05 (December 7, 2005) at 1. The agencies are not proposing to amend this definition. Establishing the presence of a non-tidal traditional navigable water's OHWM can be informed by remote sensing and mapping information.

e. Tidal Water

The proposed rule makes no changes to the definition of ''tidal water'' contained in the NWPR, which made no changes to the 1986 regulations, and defines the term ''tidal water'' as ''those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.'' Although the term ''tidal waters'' was referenced throughout the Corps' 1977 regulations, including the preamble (*e.g., see* 42 FR 37123, 37128, 37132, 37144, 37161, July 19, 1977), it was not defined in regulations until 1986. As explained in the preamble to the 1986 regulations, this definition is consistent with the way the Corps has traditionally interpreted the term. 51 FR 41217, 41218 (November 13,1986). The agencies are not proposing to amend this definition.

10. Significantly Affect

The proposed rule defines the term ''significantly affect'' for purposes of determining whether a water meets the significant nexus standard to mean ''more than speculative or insubstantial effects on the chemical, physical, or biological integrity of'' a traditional navigable water, interstate water, or the territorial seas. Waters, including wetlands, would be evaluated either alone, or in combination with other similarly situated waters in the region,[52] based on the functions the evaluated waters perform. The proposal also identifies specific ''factors'' that will be considered when assessing whether the ''functions'' provided by the water, alone or in combination, are more than speculative or insubstantial. The factors include readily understood criteria (*e.g.,* distance, hydrologic metrics, and climatological metrics) that influence the types and strength of chemical, physical, or biological connections and associated effects on those downstream foundational waters. The functions can include measurable indicators (*e.g.,* nutrient recycling, runoff storage) that are tied to the chemical, physical, and biological integrity of foundational waters. The definition of ''significantly affect'' is derived from the objective of the Clean Water Act, and is informed by and consistent with Supreme Court case law. It is also informed by the agencies' technical and scientific judgment and supported by the best available science regarding what waters must be protected to achieve the Clean Water Act's objective. The proposed definition recognizes that not all waters have the requisite connection to foundational waters sufficient to be determined jurisdictional.

The significant nexus standard that would be established by the proposed rule is carefully constructed to fall within the bounds of the Clean Water Act. First, the standard is limited to consideration of effects on downstream traditional navigable waters, interstate waters, and the territorial seas. Second, the standard is limited to effects only on the three statutorily identified aspects of those foundational waters: Chemical, physical, or biological integrity. Third, the standard cannot be met by merely speculative or insubstantial effects on those aspects of those foundational waters. Thus, the agencies must assess a particular water and determine whether, based on the factual record, relevant scientific data and information, and available tools, the water, alone or combination, has a more than speculative or insubstantial effect on the chemical, physical, or biological integrity of a specific foundational water.

This section explains the proposed definition and its consistency with the *Rapanos* Guidance, then explains how the proposed definition is consistent with the best available science and case law, and, finally, provides examples of functions that are not relevant to the significant nexus standard and waters that have not met the significant nexus standard under the pre-2015 regulatory regime.

The proposed definition is consistent with the pre-2015 regulatory regime. Under the *Rapanos* Guidance, the agencies evaluate whether waters ''are likely to have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of a traditional navigable water.'' *Rapanos* Guidance at 11.

In evaluating a water individually or in combination with other similarly situated waters for the presence of a significant nexus to a traditional navigable water, interstate water, or the territorial seas, the agencies consider factors that influence the types and strength of the chemical, physical, or biological connections and associated effects on those downstream waters. The agencies are proposing to include in the definition of ''significantly affect'' the factors to be considered in assessing the strength of the effects: (1) The distance from a jurisdictional water, (2) the distance from the downstream traditional navigable water, interstate water, or territorial sea, (3) hydrologic factors, including subsurface flow, (4) the size, density, and/or number of waters that have been determined to be similarly situated (and thus can be evaluated in combination), and (5) climatological variables such as temperature, rainfall, and snowpack. The agencies are seeking comment on this list of factors and whether there are other factors that influence the types and strength of the chemical, physical, or biological connections and associated effects on those downstream waters the agencies should consider.

These factors influence the strength of the connections and associated effects that streams, wetlands, and open waters have on the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and territorial seas and are not the functions themselves that the agencies might consider as part of a significant nexus standard. These factors also cannot be considered in isolation, but rather must be considered together and in the context of the case-specific analysis. For example, the likelihood of a connection with associated significant effects is generally greater with increasing number and size of the aquatic resource or resources being considered and decreasing distance from the identified foundational water as well as with increased density of the waters that can be considered in combination as similarly situated waters. However, the agencies also recognize that in watersheds with fewer aquatic resources, even a small number or low density of similarly situated waters can have disproportionate effects on downstream foundational waters. Hydrologic factors include volume (or magnitude), duration, timing, rate, and frequency of flow, size of the watershed or subwatershed, and surface and shallow subsurface hydrologic connections. The presence of a surface

[52] For example, under the *Rapanos* Guidance, the agencies consider the flow and functions of the reach of a tributary that is the same stream order (*i.e.,* from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream) together with the functions performed by all the wetlands adjacent to that tributary in evaluating whether a significant nexus is present. *Rapanos* Guidance at 10. The agencies are taking comment on other approaches to ''similarly situated'' and ''in the region'' in section V.D.2.b.ii of this preamble.

or shallow subsurface hydrologic connection, as well as increased frequency, volume, or duration of such connections, can increase the chemical, physical (*i.e.,* hydrologic), or biological impact that a water has on downstream foundational waters. In other situations, streams with low duration but a high volume of flow can significantly affect downstream foundational waters by transporting large volumes of water, sediment, and woody debris that help maintain the integrity of those larger downstream waters. The lack of hydrologic connections can also contribute to the strength of effects for certain functions such as floodwater attenuation or the retention and transformation of pollutants. Climatological factors like temperature, rainfall, and snowpack in a given region can influence the agencies' consideration of the effects of subject waters on downstream foundational waters by providing information about expected hydrology and the expected seasonality of connections and associated effects. The agencies are seeking comment on whether these factors are sufficiently clear or if further explanation or examples would be useful.

The agencies are also taking comment on whether it would be useful to add to the definition of ''significantly affect'' a specific list of functions of upstream waters to assess when making a significant nexus determination. The *Rapanos* Guidance identified some relevant functions upstream waters can provide including temperature regulation, sediment trapping and transport, nutrient recycling, pollutant trapping, transformation, filtering and transport, retention and attenuation of floodwaters and runoff, contribution of flow, provision of habitat for aquatic species that also live in foundational waters (*e.g.,* for refuge, feeding, nesting, spawning, or rearing young), and provision and export of food resources for aquatic species located in foundational waters. Evaluation of such functions is consistent with the agencies' implementation of the pre-2015 regulatory regime. *See Rapanos* Guidance at 8, 9. Under the pre-2015 regulatory regime, a water did not need to perform all of the listed functions. *See* U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook. If a water, either alone or in combination with similarly situated waters, performs one function, and that function has a more than speculative or insubstantial impact on the integrity of a traditional navigable water, interstate water, or the territorial seas, that water would have a significant nexus.

These functions identified in the *Rapanos* Guidance that can be provided by tributaries, wetlands, and open waters are keyed to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Water temperature is a critical factor governing the distribution and growth of aquatic life in downstream waters. Sediment storage and export via streams to downstream waters is important for maintaining the physical river network, including the formation of channel features. Nutrient recycling results in the uptake and transformation of large quantities of nitrogen and other nutrients that otherwise would be transported directly downstream, thereby decreasing impairments of downstream waters. Streams, wetlands, and open waters improve water quality through the assimilation and sequestration of pollutants, including chemical contaminants such as pesticides and metals that can degrade downstream water integrity. Small streams and wetlands are particularly effective at retaining and attenuating floodwaters. This function can reduce flood peaks downstream and can also maintain downstream river baseflows. Streams, wetlands, and open waters are the dominant sources of water in most rivers. Streams, wetlands, and open waters supply downstream waters with organic matter which supports biological activity throughout the river network and provide life-cycle dependent aquatic habitat for species located in foundational waters.

Consistent with the pre-2015 regulatory regime, the agencies are also proposing that a water may be determined to be a ''water of the United States'' when it ''significantly affects'' any one form of chemical, physical, or biological integrity of a downstream traditional navigable water, interstate water, or the territorial seas. Congress intended the Clean Water Act to ''restore and maintain'' all three forms of ''integrity,'' section 101(a), so if any one is compromised then that is contrary to the statute's stated objective. It would contravene the plain language of the statute and subvert the objective if the Clean Water Act only protected waters upon a showing that they had effects on every attribute of the integrity of a traditional navigable water, interstate water, or the territorial sea. As the agencies stated in the *Rapanos* Guidance: ''Consistent with Justice Kennedy's instruction, EPA and the Corps will apply the significant nexus standard in a manner that restores and maintains any of these three attributes of traditional navigable waters.'' *Rapanos* Guidance at 10, n.35 and surrounding text.

The proposed rule's definition of ''significantly affect'' also is consistent with the conclusions of the Science Report. *See* Technical Support Document section IV.E. The Science Report concluded that watersheds are integrated at multiple spatial and temporal scales by flows of surface water and ground water, transport and transformation of physical and chemical materials, and movements of organisms. Further, the Science Report stated, although all parts of a watershed are connected to some degree—by the hydrologic cycle or dispersal of organisms, for example—the degree and downstream effects of those connections vary spatially and temporally, and are determined by characteristics of the physical, chemical, and biological environments and by human activities. Those spatial and temporal variations are reflected in the agencies' proposed requirement that ''significantly affect'' means more than speculative or insubstantial, in the functions the agencies evaluate, and in the factors they use to evaluate those functions. The proposed rule's provision for waters to be assessed either alone, or in combination with other similarly situated waters in the region is consistent with the Science Report, which gave as an example that the amount of water or biomass contributed by a specific ephemeral stream in a given year might be small, but the aggregate contribution of that stream over multiple years, or by all ephemeral streams draining that watershed in a given year or over multiple years, can have substantial consequences on the integrity of the downstream waters. Similarly, the downstream effect of a single event, such as pollutant discharge into a single stream or wetland, might be negligible but the cumulative effect of multiple discharges could degrade the integrity of downstream waters. The agencies are seeking comment on how to implement this aspect of the proposed rule in section V.D.2.b of this preamble.

The agencies' definition of the term ''significantly affect'' in the proposed rule is also informed by and consistent with Supreme Court case law. The definition reflects that not all waters have a requisite connection to foundational waters sufficient to be determined jurisdictional. Under the significant nexus standard, to be jurisdictional, waters, alone or in combination with other similarly situated waters in the region, must

significantly affect the chemical, physical, or biological integrity of a downstream traditional navigable water, interstate water, or territorial sea, and significantly affect means more than ''speculative or insubstantial.'' *Rapanos,* at 780. The agencies propose to define ''significantly affect'' in precisely those terms.

The facts in the cases before the justices further inform the scope of the proposed definition. Justice Kennedy was clear that ''[m]uch the same evidence should permit the establishment of a significant nexus with navigable-in-fact waters, particularly if supplemented by further evidence about the significance of the tributaries to which the wetlands are connected.'' *Id.* at 784. The agencies recognize that ''more than speculative or insubstantial'' is not a bright line definition, but as the Supreme Court has recently recognized in *Maui,* the scope of Clean Water Act jurisdiction does not always lend itself to bright lines: ''In sum, we recognize that a more absolute position . . . may be easier to administer. But, as we have said, those positions have consequences that are inconsistent with major congressional objectives, as revealed by the statute's language, structure, and purposes.'' *Maui,* 140 S Ct. at 1477. Because of the factual nature of the connectivity inquiry, any standard will require some case-specific factual determinations. The NWPR acknowledged that ''[a]s to simplicity and clarity, the agencies acknowledge that field work may frequently be necessary to verify whether a feature is a water of the United States.'' 85 FR 22270, April 21, 2020. But, like the Court in *Maui,* the agencies have proposed factors to be used in assessing the strength of the effects on downstream foundational waters and have identified the functions they will consider in making significant nexus determinations under the proposed rule. This approach is consistent with major congressional objectives, as revealed by the statute's language, structure, and purposes.[53]

It is also important to note that the agencies' significant nexus standard in the proposed rule is carefully tailored so that only particular types of functions provided by upstream waters can be considered. Wetlands, streams, and open waters are well-known to provide a wide variety of functions that translate into ecosystem services. A significant nexus analysis, however, is limited to an assessment of only those functions that have a nexus to the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. Therefore, there are some very important functions provided by wetlands, tributaries, and ''other waters'' that will not be considered by the agencies when making jurisdictional decisions under the proposed rule because they do not have a sufficient nexus to downstream waters.

For example, for purposes of a jurisdictional analysis under the significant nexus standard, the agencies will not be taking into account the carbon sequestration benefits that aquatic resources like wetlands provide. Provision of habitat for non-aquatic species, such as migratory birds, and endemic aquatic species would not be considered as part of a significant analysis under the proposed rule.[54] Furthermore, the agencies would not consider soil fertility in terrestrial systems, which is enhanced by processes in stream and wetland soils and non-floodplain wetlands that accumulate sediments, prevent or reduce soil erosion, and retain water on the landscape, benefiting soil quality and productivity in uplands. There are also a wide variety of functions that streams, wetlands, and open waters provide that translate into ecosystem services that benefit society that would not be considered in a significant nexus analysis under the proposed rule. These include recreation (*e.g.,* fishing, hunting, boating, and birdwatching), production of fuel, forage, and fibers, extraction of materials (*e.g.,* biofuels, food, such as shellfish, vegetables, seeds, nuts, rice), plants for clothes and other materials, and medical compounds from wetland and aquatic plants or animals. While these ecosystem services can contribute to the economy, they are not relevant to a significant nexus analysis that the agencies would conduct under the proposed rule.

The agencies have more than a decade of experience implementing the significant nexus standard by making determinations of whether a water alone or in combination with similarly situated waters has a more than speculative or insubstantial effect. In their experience many waters under the proposed rule will not have a significant nexus to downstream foundational waters, and thus will not be jurisdictional under the Act, and the agencies under current practice routinely conclude that there is no significant nexus. The following are examples of waters that the agencies found to not have a significant nexus and determined to be non-jurisdictional under the pre-2015 regulatory regime. The agencies are citing these samples to provide an indication of waters that would likely not be jurisdictional under the proposed rule, though they recognize that the significant nexus determination is case-specific.

Examples of waters that were determined not to have a significant nexus to downstream foundational waters and that were non-jurisdictional under the pre-2015 regulatory regime, and which therefore would likely not be jurisdictional under the proposed rule, are a linear stream in Ohio, hundreds of feet long, which is miles from a traditional navigable water and does not provide any significant functions for that water; an ephemeral stream in Ohio in an agricultural field, which loses bed and bank and flows into an upland swale; and ditches in California that were created from uplands, drain only uplands, and that do not carry a relatively permanent flow of water.

Examples of wetlands that have been determined not to meet the significant nexus standard and therefore to be non-jurisdictional under the pre-2015 regulatory regime and would likely not be jurisdictional under the proposed rule include wetlands or open waters that drain into upland areas, such as emergent wetlands in Idaho that drain into upland swales that terminate in a closed basin upland area; wetlands in Wisconsin surrounded by uplands that do not exchange surface water or have ecological connections with the nearest tributary; wetlands in Ohio surrounded by upland that have no connections to any apparent surface water channel or to a jurisdictional water; and a non-navigable lake in Oregon contained within a valley and that lacks surface hydrologic connections to the river network. Other wetlands determined not meet the significant nexus standard include an emergent wetland in Alaska

[53] Through rulemaking the agencies could make some categorical jurisdictional determination based on standards and factors that are consistent with the Act's objective. *See Riverside Bayview* at 135, n.9 (''If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand.''); *see also Rapanos* at 780–81 (Kennedy, J.) (''Through regulations or adjudication, the Corps may choose to identify categories of tributaries that . . . are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.'').

[54] As the agencies have discussed, consideration of biological functions such as provision of habitat is relevant for purposes of significant nexus determinations under the proposed rule only to the extent that the functions provided by tributaries, adjacent wetlands, and ''other waters'' significantly affect the biological integrity of a downstream foundational water.

surrounded by development that severed any hydrologic connections between the wetland and a nearby wetland complex and lake; wetlands in Washington separated by potential jurisdictional waters by thousands of feet of well-drained soils as well as impervious surfaces; a large forested wetland in Washington separated by the nearest jurisdictional waters by residential and commercial developments on a topography that would preclude flows into these waters and with no identified ecological connections; a wetland in Oregon surrounded by a concrete and cinder block wall, preventing any flows into downstream waters; and a wetland in Arkansas separated from other wetlands and surrounded by uplands.

While in most of these examples, the tributary, wetland, or lake may well have had some effect on traditional navigable waters, interstate waters, or the territorial seas, the agencies concluded that those effects were not significant and so concluded that jurisdiction did not lie under the Clean Water Act. See implementation section V.D of this preamble for more information on significant nexus determinations.

D. Implementation of Proposed Rule

The agencies are proposing to return to the longstanding definition of ''waters of the United States'' that two other Administrations have codified over the years, updated to reflect consideration of the intervening Supreme Court decisions. This section first discusses features over which the agencies generally did not assert jurisdiction under the preambles, guidance, and practice of the pre-2015 regulatory regime. The agencies intend to continue generally not asserting jurisdiction over such features. Then the agencies explain the *Rapanos* Guidance and how they have determined jurisdiction under the two *Rapanos* standards for various categories of waters under the pre-2015 regulatory regime and solicit comment on potential alternative approaches for applying the *Rapanos* standards. The agencies then discuss the implementation tools and resources available for making such determinations. The agencies welcome comment on all of these topics, including the availability and efficacy of all of the tools and resources discussed. The agencies intend to issue an updated ''Approved Jurisdictional Determination'' form and instruction manual upon promulgating a final rule to aid the public and field staff in determining which waters are ''waters of the United States'' under the final rule. The agencies may provide additional guidance in the final rule based on public input received on this proposal.

1. Generally Not Considered ''waters of the United States''

Under the pre-2015 regulatory regime, the waters described below were generally not considered ''waters of the United States'' even though they were not explicitly excluded by regulation. The agencies intend to continue this longstanding approach and are soliciting comment on this approach for the proposed rule. The preamble to the 1986 regulations states that the agencies ''generally do not consider [these] waters to be 'Waters of the United States.' '' 51 FR 41217. The preamble further stated that ''the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are 'waters of the United States.' '' *Id.* In practice, the agencies have not generally asserted jurisdiction over such waters and would continue to implement the proposed rule consistent with this practice.

Even when not themselves considered jurisdictional waters subject to the Clean Water Act, the features described below (*e.g.,* certain ditches, swales, gullies, erosional features) may either be relevant to a ''water of the United States'' jurisdictional analysis or otherwise be subject to the Clean Water Act. The features may still contribute to a surface hydrologic connection relevant for asserting jurisdiction (*e.g.,* between an adjacent wetland and a jurisdictional water). *Rapanos* Guidance at 12. In addition, these waters may function as point sources (*i.e.,* ''discernible, confined, and discrete conveyances''), such that discharges of pollutants to other waters through these features could require a Clean Water Act section 402 or 404 permit. Discharges to these waters may be subject to other Clean Water Act regulations (*e.g.,* Clean Water Act section 311). *Id.*

a. Certain Ditches

Under the agencies' longstanding approach to determining which waters are ''waters of the United States,'' certain ditches are generally not considered ''waters of the United States.'' The preamble to the 1986 regulations explains that ''[n]on-tidal drainage and irrigation ditches excavated on dry land'' are generally not considered ''waters of the United States.'' 51 FR 41217. The agencies shifted this approach slightly in the *Rapanos* Guidance and explained that ''ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States.'' *Rapanos* Guidance at 11–12. The agencies explained that these features are generally not considered ''waters of the United States'' ''because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.'' *Id.*

The agencies intend to continue implementing the approach to ditches described in the *Rapanos* Guidance. This approach is more consistent with the relatively permanent standard than the approach in the preamble to the 1986 regulations. Consistent with previous practice, ditches constructed wholly in uplands and draining only uplands with ephemeral flow would generally not be considered ''waters of the United States.''

Also consistent with previous practice, the agencies would typically assess a ditch's jurisdictional status based on whether it could be considered a tributary (and, consistent with previous practice, would not assess whether the ditch was jurisdictional under the ''other waters'' provision). The implementation section below includes discussion on the application of relevant reach under the *Rapanos* Guidance, and the agencies solicit comment on potential alternative approaches (*see* section V.D.2.b.ii.1.b of this preamble), such as whether relevant reaches can be distinguished based on a change from relatively permanent flow to non-relatively permanent flow. The agencies acknowledge that for ditches in particular there may be scenarios that make identification of relevant reach especially challenging and encourage stakeholders to identify and discuss these situations in their comments on relevant reach. The agencies specifically request comment regarding whether the interpretation of relevant reach for ditches should consider any particular factors for situations where ditches are tidal, are treated as tributaries, or contain wetlands.

In some situations, ditches with wetland characteristics have been considered jurisdictional as adjacent wetlands. In most cases, such ditches have been constructed in adjacent wetlands and would be considered part of that larger adjacent wetland. However, consistent with previous practice, wetlands that develop entirely within the confines of a ditch that was excavated in and wholly draining only uplands that does not carry a relatively permanent flow would be considered

part of that ditch and generally would not be considered ''waters of the United States.''

Where a ditch is jurisdictional, the agencies have historically taken the position that the ditch can be both a ''water of the United States'' and a point source and are proposing to reinstate this position. For example, in 1975, the General Counsel of EPA issued an opinion interpreting the Clean Water Act: ''it should be noted that what is prohibited by section 301 is *'any addition of any pollutant* to navigable waters from any point source.' It is therefore my opinion that, even should the finder of fact determine that any *given* irrigation ditch is a navigable water, it would still be permittable as a point source where it discharges into another navigable water body, provided that the other point source criteria are also present.'' *In re Riverside Irrigation District,* 1975 WL 23864 at *4 (emphasis in original). The opinion stated that ''to define the waters here at issue as navigable waters and use that as a basis for exempting them from the permit requirement appears to fly directly in the face of clear legislative intent to the contrary.'' *Id.* Further, in *Rapanos,* Justice Kennedy and the dissent rejected the conclusion that because the word ''ditch'' was in the definition of ''point source'' a ditch could never be a water of the United States: ''certain water bodies could conceivably constitute both a point source and a water.'' 547 U.S. at 772 (Kennedy, J., concurring); *see also id.* at 802 (Stevens, J., dissenting) (''The first provision relied on by the plurality—the definition of ''point source'' in 33 U.S.C. [section] 1362(14)—has no conceivable bearing on whether permanent tributaries should be treated differently from intermittent ones, since 'pipe[s], ditch[es], channel[s], tunnel[s], conduit[s], [and] well[s]' can all hold water permanently as well as intermittently.'').

The agencies recognize that this position is different than the position in the NWPR, which stated that a ditch is either a water of the United States or a point source. 85 FR 22297, April 21, 2020. The NWPR justified this position by noting that the Clean Water Act defines ''point sources'' to include ditches and that the plurality opinion in *Rapanos* stated that ''[t]he definitions thus conceive of 'point sources' and 'navigable waters' as separate and distinct categories. The definition of 'discharge' would make little sense if the two categories were significantly overlapping.'' 547 U.S. at 735–36 (Scalia, J., plurality), NWPR Response to Comments, section 6 at 12–13. The NWPR, however, did not address that even this statement in the plurality opinion in *Rapanos* acknowledges that there may be some overlap between point sources and ''waters of the United States'' as indicated by its finding that the two categories should not be ''significantly'' overlapping. *Id.* Moreover, there is no indication in the text of the Clean Water Act that ditches that meet that plain language definition of a point source cannot also be a ''water of the United States.'' The agencies therefore believe that their longstanding, historic view that a ditch can be both a point source and a water of the United States is the better interpretation.

b. Certain Other Features

In addition to the ditches described above, the agencies have generally not asserted jurisdiction over certain other features under the pre-2015 regulatory regime and the agencies intend to continue the practice for these features. The preamble to the 1986 regulations explains that these other waters include: Artificially irrigated areas which would revert to upland if the irrigation ceased; artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons; and waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of ''waters of the United States.'' 51 FR 41217. In the *Rapanos* Guidance, the agencies added an additional category to this list, explaining that ''[s]wales or erosional features (*e.g.,* gullies, small washes characterized by low volume, infrequent, or short duration flow) are generally not waters of the United States.'' *Rapanos* Guidance at 11–12. The agencies explained that these features are generally not ''waters of the United States'' ''because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.'' *Id.*

Swales and gullies are generally not jurisdictional, and these features differ from ephemeral streams because they lack indicators of an OHWM, whereas ephemeral streams typically have at least one indicator of an OHWM. Ephemeral streams are jurisdictional where they are tributaries and have a significant nexus to downstream waters. Colloquial terminology may differ across the country; for example, some streams in the arid West are known as ''gullies'' but are in fact ephemeral streams because they have at least one indicator of an OHWM.

2. Determining Jurisdiction Under the Relatively Permanent Standard and the Significant Nexus Standard

In this section, the agencies explain how they have determined jurisdiction under the relatively permanent standard and significant nexus standard for various categories of waters under the pre-2015 regulatory regime. The agencies describe how each standard has been implemented consistent with the *Rapanos* Guidance, *SWANCC* Guidance, and other aspects of longstanding practice where not addressed explicitly by the guidances. The agencies then solicit comment on implementing the standards consistent with the pre-2015 regulatory regime as well as potential alternative approaches for applying the relatively permanent and significant nexus standards. Additionally, the agencies solicit comment on whether the implementation approaches adequately account for expected changes in climate, and whether alternative approaches to implementing the relatively permanent standard and significant nexus standard should be considered.

a. ''Waters of the United States'' Under the Relatively Permanent Standard

i. Approaches Under the Pre-2015 Regulatory Regime

(1) Background

Under the relatively permanent standard, relatively permanent tributaries and adjacent wetlands that have a continuous surface connection to such tributaries are jurisdictional under the Clean Water Act as ''waters of the United States.'' Under the *Rapanos* Guidance, the agencies assert jurisdiction over tributaries as ''relatively permanent'' waters where the waters typically (*e.g.,* except due to drought) flow year-round or have a continuous flow at least seasonally (*e.g.,* typically three months). *Rapanos* Guidance at 6–7 (citing 126 S Ct. at 2221 n.5 (Justice Scalia, plurality opinion) (explaining that ''relatively permanent'' does not necessarily exclude waters ''that might dry up in extraordinary circumstances such as drought'' or ''seasonal rivers, which contain continuous flow during some months of the year but no flow during dry

months''). The agencies also assert jurisdiction over adjacent wetlands that have a continuous surface connection to a relatively permanent, non-navigable tributary. *Id.* at 6–7.

(2) Tributaries

Under the *Rapanos* Guidance, ''relatively permanent'' tributaries include perennial streams that typically flow year-round and intermittent streams that have continuous flow at least seasonally. However, ''relatively permanent'' tributaries do not include ephemeral streams that flow only in response to precipitation and intermittent streams which do not have continuous flow at least seasonally. Importantly, under the *Rapanos* Guidance, some intermittent streams are considered ''relatively permanent'' and some are not. Scientists, including agency staff, have used the terms ''perennial,'' ''intermittent,'' and ''ephemeral'' for decades to characterize tributary flow classifications.

Under the *Rapanos* Guidance, a ''tributary'' includes ''the entire reach of the stream that is of the same order (*i.e.,* from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream).'' *Id.* at 6, n. 24. The flow characteristics of a particular tributary generally are evaluated at the farthest downstream limit of such tributary (*i.e.,* the point the tributary enters a higher order stream). *Id.* However, for purposes of determining whether the tributary is relatively permanent, where data indicate the flow regime at the downstream limit is not representative of the entire tributary (*e.g.,* where data indicate the tributary is relatively permanent at its downstream limit but not for the majority of its length, or vice versa), the flow regime that best characterizes the entire tributary is used. A primary factor in making this determination is the relative lengths of segments with differing flow regimes. *Id.* The agencies stated that it is reasonable to characterize the entire tributary in light of the Supreme Court's observation that the phrase ''navigable waters'' generally refers to ''rivers, streams, and other hydrographic features.'' *Citing Rapanos* at 734, quoting *Riverside Bayview,* 474 U.S. at 131. The entire reach of a stream is a reasonably identifiable hydrographic feature.

(3) Wetlands

Under the pre-2015 regime, the agencies utilize the *Rapanos* Guidance to determine where adjacent wetlands have a continuous surface connection with a relatively permanent, non-navigable tributary. The *Rapanos* Guidance notes that these wetlands are a subset of the broader definition of ''adjacent'' wetlands. The plurality opinion indicates that ''continuous surface connection'' is a ''physical connection requirement.'' *Rapanos* Guidance at 6, *citing Rapanos* at 754. Accordingly, under the *Rapanos* Guidance, a continuous surface connection exists between a wetland and a relatively permanent, non-navigable tributary where the wetland directly abuts the tributary (*e.g.,* they are not separated by uplands, a berm, dike, or similar feature). *Rapanos* Guidance at 7, *citing Rapanos* at 751, n. 13 (referring to ''our physical-connection requirement''). A continuous surface connection does not require surface water to be continuously present between the wetland and the tributary. *Rapanos Guidance* at 7, n.28, *citing* 33 CFR 328.3(b) and 40 CFR 232.2 (defining wetlands as ''those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions'').

In some circumstances, the United States has determined that a continuous surface connection can include a physical connection such as a non-jurisdictional ditch that connects the adjacent wetland to the relatively permanent tributary. *United States* v. *Cundiff,* 555 F.3d at 213 (holding wetlands were jurisdictional under the plurality where plaintiff created a continuous surface connection by digging ditches to enhance the acid mine drainage into the creeks and away from his wetlands; ''it does not make a difference whether the channel by which water flows from a wetland to a navigable-in-fact waterway or its tributary was manmade or formed naturally''). Generally, the agencies completed significant nexus analyses on adjacent wetlands with such connections.

The term ''adjacent'' has been defined in agency regulations since 1986 to mean ''bordering, contiguous, or neighboring.'' Wetlands separated from other ''waters of the United States'' by man-made dikes or barriers, natural river berms, beach dunes and the like are ''adjacent wetlands'' (*see* section V.C.7 of this preamble). Under the *Rapanos* Guidance, the agencies consider wetlands ''adjacent'' if one of following three criteria is satisfied. First, there is an unbroken surface or shallow subsurface connection to jurisdictional waters and this hydrologic connection maybe intermittent. Second, they are physically separated from jurisdictional waters by man-made dikes or barriers, or natural breaks (*e.g.,* river berms, beach dunes). Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters and therefore, will not generally require a case-specific demonstration of an ecologic interconnection. *Rapanos* Guidance at 5–6.

As stated above, under the *Rapanos* Guidance the agencies assert jurisdiction over wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary. These wetlands are a subset of adjacent wetlands previously discussed that must have a continuous surface connection with the tributary. This physical connection requires that the wetland not be separated from the relatively permanent, non-navigable tributary by uplands, a berm, dike, or other similar feature. Although a constant hydrologic connection is not required, there must be a continuous surface connection on the landscape for these wetlands to be jurisdictional under this standard.

It is important to note that under the pre-2015 regulatory regime, features such as uplands, a berm, dike, or similar feature that separate a wetland from a relatively permanent, non-navigable tributary may not be continuous. For example, an upland levee that separates a wetland from a relatively permanent, non-navigable tributary may have gaps along the length of the levee that provide for a connection between the wetlands and the tributary. In such cases under the pre-2015 regulatory regime, this type of connection would satisfy the physical connection requirement.

ii. Other Potential Approaches To Implementing the Relatively Permanent Standard

The agencies are seeking comment on whether they should implement the relatively permanent standard in the proposed rule consistent with the pre-2015 regulatory regime described above and if so whether there are clarifications or other issues to be addressed. In addition, the agencies are seeking comment on other options for making jurisdictional determinations under the relatively permanent standard.

(1) Tributaries

The *Rapanos* Guidance limits the scope of relatively permanent tributaries to perennial tributaries and certain

intermittent tributaries. The agencies could interpret relatively permanent waters more generally to include perennial tributaries and all intermittent tributaries. With such an interpretation, the agencies could use an approach to ''perennial,'' ''intermittent,'' and ''ephemeral'' as the NWPR did and could specify that the agencies generally intend to consider perennial and intermittent tributaries as relatively permanent waters in light of their characteristics and flow, but ephemeral tributaries would not be considered relatively permanent. Such an approach would not limit intermittent tributaries under the relatively permanent standard to only those that have continuous flow at least seasonally (*e.g.,* typically three months). The agencies could clarify that intermittent streams under the relatively permanent standard may flow less than three months (*e.g.,* streams that flow ''continuously during certain times of the year,'' similar to the language in the NWPR), as certain intermittent streams may flow for shorter periods of time but are still distinct from ''ephemeral'' streams.

The *Rapanos* Guidance does not explicitly address whether intermittent flow must come from particular sources (*e.g.,* groundwater, snowpack melt, effluent flow, or upstream contributions of flow) under the relatively permanent standard. The agencies solicit comment about whether the final rule should clarify the required sources of intermittent flow, and what those sources of flow should be. For instance, the NWPR clarified that intermittent flow must occur more than in direct response to precipitation, and the NWPR explained that could mean, for example, seasonally when the groundwater table is elevated or when snowpack melts. The NWPR differentiated between ephemeral flows driven by ''snowfall,'' and intermittent flows driven by ''snowpack melt,'' where snowpack was defined as ''layers of snow that accumulate over extended periods of time in certain geographic regions or at high elevation (*e.g.,* in northern climes or mountainous regions).'' Alternatively, the final rule could allow for regionally specific interpretations of intermittent flow sources to allow for flexible implementation of the rule.

This proposed rule does not provide specific definitions for tributary flow classifications, including the terms ''perennial,'' ''intermittent,'' and ''ephemeral.'' The agencies are seeking comment on whether they should define these flow classifications in the final rule. Any specific definitions would depend in part on how the agencies describe intermittent tributaries under the relatively permanent standard in the final rule, including the scope of intermittent tributaries and any description of required sources of flow. For example, if the agencies interpret the relatively permanent standard to include all perennial and intermittent tributaries and decide to include groundwater and snowpack melt as appropriate sources of intermittent flow, the agencies could use the same definitions as the NWPR:

- The term ''perennial'' means surface water flowing continuously year-round.
- The term ''intermittent'' means surface water flowing continuously during certain times of the year and more than in direct response to precipitation (*e.g.,* seasonally when the groundwater table is elevated or when snowpack melts).
- The term ''ephemeral'' means surface water flowing or pooling only in direct response to precipitation (*e.g.,* rain or snow fall).

Alternatively, the agencies could interpret the relatively permanent standard using modified definitions of these terms.

(2) Wetlands

In some circumstances, the United States has concluded that a non-jurisdictional ditch or other such feature can serve as a physical connection that maintains a continuous surface connection between a wetland and a relatively permanent water. *See United States* v. *Cundiff.* The agencies seek comment on whether to provide guidance on when specific features (*e.g.,* ditches, culverts, pipes, or swales) can serve as physical connections that can maintain a continuous surface connection between a wetland and a relatively permanent water.

(3) Open Waters

The agencies do not discuss in the *Rapanos* Guidance the assessment of open waters such as lakes and ponds under the relatively permanent waters standard. As discussed above, the agencies' longstanding position, reflected in the U.S. Army Corps of Engineers Jurisdictional Determination Instructional Guidebook, is that tributaries for purposes of the definition of ''waters of the United States'' include lakes and ponds that flow directly or indirectly to downstream traditional navigable waters, interstate waters, or the territorial seas. *See* U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, at 8, 9. In practice, the agencies have asserted jurisdiction over relatively permanent tributary lakes and ponds. The agencies are soliciting comment on whether they should explicitly explain this implementation approach in the final rule.

The agencies do not address the ''other waters'' category in the *Rapanos* Guidance with respect to either the relatively permanent standard or the significant nexus standard. The proposed rule adds both standards to the ''other waters'' category. The agencies are soliciting comment on whether they should take an approach to assessing jurisdiction over non-tributary open waters under the relatively permanent standard that is similar to the approach described in the *Rapanos* Guidance for assessing jurisdiction over adjacent wetlands with a continuous surface connection to relatively permanent waters. Under such an approach, the agencies would assert jurisdiction over relatively permanent open waters that have a continuous surface connection with a relatively permanent, non-navigable tributary. The agencies note that some such lakes and ponds are jurisdictional under the NWPR when they are inundated by flooding from a jurisdictional water in a typical year.

b. ''Waters of the United States'' Under the Significant Nexus Standard

ii. Approaches Under the Pre-2015 Regulatory Regime

(1) Background

The significant nexus standard as clarified by Justice Kennedy's opinion in *Rapanos* is: ''wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos* at 780. The agencies in the *Rapanos* Guidance use the significant nexus standard for determining jurisdiction over certain adjacent wetlands and tributaries. As discussed above, the proposed rule would add the significant nexus standard to the ''other waters,'' tributary, and adjacent wetland categories in the 1986 regulations. In the *Rapanos* Guidance, the agencies explain: ''While Justice Kennedy's opinion discusses the significant nexus standard primarily in the context of wetlands adjacent to non-navigable tributaries, his opinion also addresses Clean Water Act jurisdiction over tributaries themselves. Justice Kennedy states that, based on the Supreme Court's decisions in *Riverside Bayview*

and *SWANCC,* 'the connection between a non-navigable *water or wetland* may be so close, or potentially so close, that the Corps may deem the *water or wetland* a ''navigable water'' under the Act.''' *Rapanos* Guidance at 9, *citing Rapanos* at 767 (emphasis added in *Rapanos* Guidance).

(2) Scope of Significant Nexus Analysis

In the *Rapanos* Guidance, the agencies assess tributaries and their adjacent wetlands together and state: ''In considering how to apply the significant nexus standard, the agencies have focused on the integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands, which determines in part their contribution to restoring and maintaining the chemical, physical and biological integrity of the Nation's traditional navigable waters. The ecological relationship between tributaries and their adjacent wetlands is well documented in the scientific literature and reflects their physical proximity as well as shared hydrological and biological characteristics. The flow parameters and ecological functions that Justice Kennedy describes as most relevant to an evaluation of significant nexus result from the ecological inter-relationship between tributaries and their adjacent wetlands.'' *Rapanos Guidance* at 9.

Under the *Rapanos* Guidance, when performing a significant nexus analysis, the first step is to determine the relevant reach of the tributary being assessed, even when the subject water may only include a wetland. Under the guidance, a tributary is the entire reach of the stream that is of the same order (*i.e.,* from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). The guidance states that for purposes of demonstrating a connection to traditional navigable waters, it is appropriate and reasonable to assess the flow characteristics of the tributary at the point at which water is in fact being contributed to a higher order tributary or to a traditional navigable water. As discussed above, the agencies' longstanding position is that tributaries for purposes of the definition of ''waters of the United States'' include lakes and ponds that flow directly or indirectly to downstream traditional navigable waters, interstate waters, or the territorial seas. *See* ''U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook,'' at 8, 9. In practice, the agencies have asserted jurisdiction over tributary lakes and ponds that meet the significant nexus standard.

After establishing the relevant reach of the tributary, under the *Rapanos* Guidance the agencies then determine if the tributary has any adjacent wetlands. Where a tributary has no adjacent wetlands, the agencies consider the flow characteristics and functions of only the tributary itself in determining whether such tributary has a significant effect on the chemical, physical and biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas. *Rapanos* Guidance at 10. If the tributary has adjacent wetlands, the significant nexus evaluation needs to recognize the ecological relationship between tributaries and their adjacent wetlands, and their closely linked role in protecting the chemical, physical, and biological integrity of downstream traditional navigable waters. *Id.* at 10.

Under the *Rapanos* Guidance the agencies consider the flow and functions of the tributary together with the functions performed by all the wetlands adjacent to the tributary in evaluating whether a significant nexus is present. This approach reflects the agencies' interpretation in the *Rapanos* Guidance of Justice Kennedy's term ''similarly situated'' to include all wetlands adjacent to the same tributary. Under this approach, where it is determined that a tributary and its adjacent wetlands collectively have a significant nexus with traditional navigable waters, the tributary and all of its adjacent wetlands are jurisdictional. *Id.* at 10.

In addition, the *Rapanos* Guidance states that certain ephemeral waters in the arid West are distinguishable from the geographic features like non-jurisdictional swales and erosional features, where such ephemeral waters are tributaries and they have a significant nexus to downstream traditional navigable waters. For example, in some cases these ephemeral tributaries may serve as a transitional area between the upland environment and the traditional navigable waters. The guidance explains that during and following precipitation events, ephemeral tributaries collect and transport water and sometimes sediment from the upper reaches of the landscape downstream to the traditional navigable waters. These ephemeral tributaries may provide habitat for wildlife and aquatic organisms in downstream traditional navigable waters. These biological and physical processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters. *Id.* at 12. In practice, the agencies have regulated some but not all ephemeral tributaries evaluated under the significant nexus standard under the pre-2015 regulatory regime.

(3) Assessment of a Significant Nexus

To implement the *Rapanos* Guidance, the agencies instruct field staff evaluating the significant nexus of a tributary and its adjacent wetlands to evaluate all available hydrologic information (*e.g.,* gage data, precipitation records, flood predictions, historic records of water flow, statistical data, personal observations/records, etc.) and physical indicators of flow including the presence and characteristics of a reliable OHWM when assessing significant nexus. *Rapanos* Guidance at 10. The use of relevant geographic water quality data in conjunction with site-specific data produced from improved field sampling methodology and hydrologic modelling are important for understanding the chemical, physical, and biological functions provided by tributaries and their adjacent wetlands and their effects on downstream traditional navigable waters.

While EPA regions and Corps districts must exercise judgment to identify the OHWM on a case-by-case basis, the regulations identify the factors to be applied. These regulations have been further explained in RGL 05–05, and the Corps continues to improve regulatory practices across the country through ongoing research and the development of regional and national OHWM delineation procedures. The agencies will apply the regulations, RGL 05–05, and applicable OHWM delineation manuals and take other steps as needed to ensure that the OHWM identification factors are applied consistently nationwide. *Rapanos* Guidance at 10–11, n. 36.

In the *Rapanos* Guidance, the agencies identify numerous functions provided by tributaries and wetlands that are relevant to the significant nexus determination. The duration, frequency, and volume of flow in a tributary, and subsequently the flow in downstream traditional navigable waters, is directly affected by the presence of adjacent wetlands that hold floodwaters, intercept sheet flow from uplands, and then release waters to tributaries in a more even and constant manner. Wetlands may also help to maintain more consistent water temperature in tributaries, which is important for some

aquatic species; adjacent wetlands trap and hold pollutants that may otherwise reach tributaries (and downstream traditional navigable waters) including sediments, chemicals, and other pollutants. Tributaries and adjacent wetlands provide habitat (*e.g.,* refuge, feeding, nesting, spawning, or rearing young) for many aquatic species that also live in traditional navigable waters. *Id.* at 9. Under the *Rapanos* Guidance, the agencies take into account other relevant considerations, including the functions performed by the tributary together with the functions performed by any adjacent wetlands.

Another specific consideration from the *Rapanos* Guidance is the extent to which the tributary and adjacent wetlands have the capacity to carry pollutants (*e.g.,* petroleum wastes, toxic wastes, sediment) or flood waters to traditional navigable waters, or to reduce the amount of pollutants or flood waters that would otherwise enter traditional navigable waters. *Id.* at 11; *citing Rapanos* at 782, *citing Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.,* 313 U.S. 508, 524–25 (1941) (''Just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries.'').

The agencies under the *Rapanos* Guidance also evaluate ecological functions performed by the tributary and any adjacent wetlands which affect downstream traditional navigable waters, such as the capacity to transfer nutrients and organic carbon vital to support downstream foodwebs (*e.g.,* macroinvertebrates present in headwater streams convert carbon in leaf litter making it available to species downstream), habitat services such as providing spawning areas for recreationally or commercially important species in downstream waters, and the extent to which the tributary and adjacent wetlands perform functions related to maintenance of downstream water quality such as sediment trapping. *Rapanos* Guidance at 11. In the context of the *Rapanos* Guidance, ecological functions were meant to represent the suite of chemical, physical, and biological functions performed by the waters being assessed that affect downstream traditional navigable waters.

To demonstrate effects on physical integrity of downstream waters, the agencies have used evidence of physical connections, such as flood water or sediment retention (flood prevention). Indicators of hydrologic connections between the water being evaluated and jurisdictional waters may also provide evidence of a physical connection. In addition, relevant considerations for physical connectivity could include rain intensity, duration of rain events or wet season, soil permeability, distance of hydrologic connection between the water and the traditional navigable water, and depth from surface to water table, all of which may indicate evidence of connection to stream baseflows, and any preferential flowpaths.

Evidence of a significant effect on the chemical integrity of foundational waters has been found by identifying the properties of the water(s) under evaluation in comparison to the traditional navigable water; signs of retention, release, or transformation of nutrients or pollutants; and the effect of landscape position on the strength of the connection to the nearest jurisdictional water and through those waters to a traditional navigable water. Relevant considerations for chemical connectivity could include hydrologic connectivity, surrounding land use and land cover, the landscape setting, and deposition of chemical constituents (*e.g.,* acidic deposition).

To determine whether a water has a significant effect on the biological integrity of traditional navigable waters, interstate waters, or territorial seas, the agencies have identified biological factors or uses present in the relevant stream reach, and then evaluated the effects of these factors or uses on the downstream waters. Examples of biological factors and uses include: Resident aquatic or semi-aquatic species present in the water being evaluated, the tributary system, and downstream traditional navigable waters (*e.g.,* fish, amphibians, aquatic and semi-aquatic reptiles, aquatic birds, benthic macroinvertebrates); whether those species show life-cycle dependency on the identified aquatic resources (foraging, feeding, nesting, breeding, spawning, use as a nursery area, etc.); and whether there is reason to expect presence or dispersal around the water being evaluated, and if so, whether such dispersal extends to the tributary system or beyond or from the tributary system to the water being evaluated. In addition, relevant factors influencing biological connectivity and effects could include species' life history traits, species' behavioral traits, dispersal range, population sizes, timing of dispersal, distance between the water being evaluated and a traditional navigable water, the presence of habitat corridors or barriers, and the number, area, and spatial distribution of habitats. Under such an approach, non-aquatic species or species such as non-resident migratory birds do not demonstrate a life cycle dependency on the identified aquatic resources and are not evidence of a significant nexus.

As discussed in section V.C.10 of this preamble, the agencies' proposed definition of ''significantly affect'' at paragraph (g) includes a list of factors that the agencies will consider when assessing the significance of the effect of a function. These factors are consistent with the approach the agencies used in assessing significant nexus under the *Rapanos* Guidance, and the agencies are soliciting comment on whether to include these or other factors, as well as whether to include functions identified in the *Rapanos* Guidance or other functions in the proposed rule or in approaches for implementing the rule.

ii. Other Potential Approaches To Implementing the Significant Nexus Standard

The agencies solicit comment on how to apply the significant nexus standard in the field, including whether they should implement the significant nexus standard in the proposed rule consistent with the *Rapanos* Guidance for all waters under the proposed rule that require a significant nexus evaluation—*i.e.,* certain ''other waters,'' non-relatively permanent tributaries, and certain adjacent wetlands (*i.e.,* waters identified in paragraphs (a)(3)(ii), (a)(5)(ii), (a)(7)(iii) of the proposed rule). Should the agencies implement the significant nexus standard consistent with the *Rapanos* Guidance, the agencies are seeking comment on whether there are clarifications or other issues to be addressed to improve that implementation approach. The agencies are also seeking comment on other approaches to implementing the significant nexus standard, such as a broader, science-based approach to some aspects of a significant nexus analysis or an approach that tailors the scope of a significant analysis based on facts like the geographic region or type of water being assessed, as discussed below.

(1) Scope of Significant Nexus Analysis for Adjacent Wetlands and Tributaries

Under the significant nexus standard, waters possess the requisite significant nexus if they ''either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.''' *Rapanos* at 780. These significant nexus analyses underpin

determinations of jurisdiction for certain categories of waters under the proposed rule. However, several terms in this standard were not defined in *Rapanos.* The agencies are soliciting comment on approaches for implementing the proposed rule, including regarding (1) which waters are ''similarly situated,'' and thus should be analyzed in combination, in (2) the ''region,'' for purposes of a significant nexus analysis, and (3) the types of functions that should be analyzed to determine if waters significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. Discussion of the alternative approaches regarding relevant functions is in section V.D.2.b.ii.2 of this preamble.

a. Similarly Situated Waters

As discussed above, the *Rapanos* Guidance interpreted ''similarly situated'' to mean a tributary and its adjacent wetlands. The agencies could implement the final rule consistent with this approach or take an approach that interprets which waters are ''similarly situated'' differently than the *Rapanos* Guidance. One such approach would be to interpret ''similarly situated'' in terms of particular waters that are providing common, or similar, functions for downstream waters such that it is reasonable to consider their effect together. Such an approach could consider tributaries to be similarly situated with other tributaries, adjacent wetlands to be similarly situated with adjacent wetlands, and ''other waters'' to be similarly situated with ''other waters'' (*e.g.,* lakes and ponds with similar functions and geographic position on the landscape). Another approach would be to consider similarly situated waters to be tributaries of the same flow regime (for example, assessing an ephemeral stream in combination with other ephemeral streams in the region). The agencies could also consider tributaries of the same stream order to be similarly situated (for example, assessing all first order streams in combination with other first order streams in the region).

The agencies note that the best available science supports evaluating the connectivity and effects of streams, wetlands, and open waters to downstream waters in a cumulative manner in context with other streams, wetlands, and open waters. *See* Technical Support Document.

b. In the Region

The agencies could implement the scope of the significant nexus analysis (what is considered ''in the region'') consistent with the *Rapanos* Guidance, which relied on a concept of a relevant ''reach'' of a tributary—defined as the entire reach of the stream that is of the same order (*i.e.,* from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). *Rapanos* Guidance at 10.

Alternatively, the agencies could implement what is considered ''in the region'' for significant nexus evaluations with an approach different from that in the *Rapanos* Guidance. For example, the relevant reach for purposes of considering what is ''in the region'' for a significant nexus evaluation could be implemented the way the term ''reach'' was interpreted in the NWPR, meaning a section of a stream or river along which similar hydrologic conditions exist, such as discharge, depth, area, and slope. 85 FR 22290, April 21, 2020. Under the NWPR's approach, a reach can be any length of a stream or river, but for implementation purposes that length is bounded by similar flow characteristics. Similarly, the agencies could implement the ''relevant reach'' to incorporate the entire length of the stream that is of the same flow regime (*i.e.,* relatively permanent and non-relatively permanent flow, or perennial, intermittent, and ephemeral flow). For example, if a perennial tributary becomes intermittent and then ephemeral and then perennial again, it may be viewed as four separate relevant reaches (*e.g.,* perennial reach, intermittent reach, ephemeral reach, perennial reach). Alternatively, the agencies could use an approach that is substantially similar to the *Rapanos* Guidance but that identifies the relevant reach based on certain hydrologic or geomorphic characteristics. For instance, the relevant reach of a tributary could rely on factors identified in stream field assessments and monitoring protocols such as the similarity of the channel's substrate or geomorphic classification. Additional factors identified through field observations or remote-sensing could also be used to determine the extent of a tributary's relevant reach such as the presence of natural features like bedrock outcrops or valley confinements, and non-natural features like culverts or road crossings, which can modify or influence hydrologic characteristics and geomorphic processes. Aerial and satellite imaging, National Hydrography Dataset (NHD) Plus High Resolution data, and high resolution digital elevation models could be used to evaluate whether hydrologic and geomorphic conditions within a channel are similar enough to be defined as the relevant reach of a tributary. Another option is for the agencies to interpret a tributary for purposes of the significant nexus analysis to be the entire length of a stream based on maps or best professional judgment.

There are also a range of approaches for determining the ''region'' in which waters to be assessed lie and which could allow for a more regionalized approach to significant nexus assessments. For example, the region could be sub-watersheds or the watershed defined by where a tributary and its upstream tributaries drain into a traditional navigable water, interstate water, or the territorial seas. If the watershed draining to the traditional navigable water, interstate water, or territorial sea is too large, the watershed could be evaluated at a subwatershed scale (*e.g.,* at the hydrologic unit code (HUC) 8, 10, or 12 watershed scale). Alternatively, the watershed could be considered just the watershed of the relevant reach (*i.e.,* catchment), and the relevant reach could be determined using the options described above. Another option is for the watershed to be delineated from the downstream-most point of the relevant reach—that is, the region would be the watershed that drains to and includes the relevant reach in question. Many existing spatial analysis tools based on watershed frameworks and elevation models can be used to delineate watersheds quickly and reliably in most parts of the country.

Other options for determining a ''region'' in which similarly situated waters would be considered cumulatively could include a narrower interpretation such as waters within a contiguous area of land with relatively homogeneous soils, vegetation, and landform (*e.g.,* plain, mountain, valley, etc.) providing similar functions such as habitat, water storage, sediment retention, and pollution sequestration. This approach would be highly case specific and rely on the use of resources such as soil surveys and possibly watershed assessment reports to determine those waters that are similarly situated within a region.

More broadly, ''region'' could be interpreted to mean an ecoregion which serves as a spatial framework for the research, assessment, management, and monitoring of ecosystems and ecosystem components. Ecoregions are areas where ecosystems (and the type, quality, and quantity of environmental resources) are generally similar (*see https://www.epa.gov/eco-research/ecoregions*). Ecoregions are identified by

analyzing the patterns and composition of biotic and abiotic phenomena that affect or reflect differences in ecosystem quality and integrity.[55] [56] These phenomena include geology, landforms, soils, vegetation, climate, land use, wildlife, and hydrology. Under the ecoregion approach, similarly situated waters would be considered cumulatively within an ecoregion (*see, e.g., https://www.epa.gov/eco-research/ecoregions-north-america*). The scale of ecoregion (*e.g.,* Level I, Level II, Level III, or Level IV ecoregions identified by EPA in North America) used for determining the ''region'' could be quite broad, such as the 12 different Level I ecological regions in the continental United States or narrower like the 105 different Level III ecological regions in the continental United States or the 967 Level IV ecoregions in the conterminous United States. Because Level I ecoregions are quite large, considerations of similarly situated waters at the Level I ecoregion scale could potentially obscure the measurable effects of a single aquatic resource on a downstream traditional navigable water, interstate water, or territorial sea. However, the scale of the similarly situated analysis within an ecoregion could be refined using the smaller Level III or Level IV ecoregions which allow local characteristics to be identified and are more specifically oriented towards environmental management strategies. Under this approach in a jurisdictional analysis, scientific literature describing or studying characteristics of the Level III or Level IV ecoregions could be used to inform the evaluation of specific ecological functions performed by similarly situated waters. A benefit of using this approach is that ecoregions are spatial datasets which have been, or could be, incorporated into many existing spatial analysis tools and mapping platforms. In addition, stakeholders have called for acknowledging regional differences in the definition of ''waters of the United States,'' and an ecoregion approach could allow for such consideration in implementation.

In addition to ecoregions, other methods of mapping boundaries where similarly situated waters could be considered cumulatively for a significant nexus analysis would be to rely on hydrologic landscape regions or physiographic groupings. Hydrologic landscape regions are groups of watersheds that are clustered together on the basis of similarities in land-surface form, geologic texture, and climate characteristics.[57] Hydrologic landscape regions are based on a concept that reflects fundamental hydrologic processes that are expected to affect water quality and other environmental characteristics. Based on a commonly used method to delineate hydrologic landscape regions that was developed by the USGS, there are 20 regions that cover the entire United States.[58] This method could present similar challenges as the Level I ecoregion approach described above, whereby the hydrologic landscape region scale obscures the measurable effects of single aquatic resources. Alternatively, the agencies could rely on well-established physiographic divisions based on topography, geology, and geomorphology, including the eight physiographic regions across the contiguous United States, the 25 physiographic provinces within those regions, or the 85 physiographic sections within those regions (available at *https://water.usgs.gov/GIS/metadata/usgswrd/XML/physio.xml*).

(2) Other Waters

The agencies seek comment on potential approaches to address a significant nexus analysis for waters under the ''other waters'' provision of the proposed rule. As discussed in section V.C.3 of this preamble, ''other waters'' were not addressed by the *Rapanos* Guidance. The agencies could adopt the approach used in the *SWANCC* Guidance, whereby field staff were directed to seek approval from agency headquarters before asserting jurisdiction over isolated waters that are intrastate and non-navigable. *See* 68 FR at 1996, January 15, 2003. As a matter of practice since the issuance of the *SWANCC* Guidance, the Corps has not asserted jurisdiction over such ''other waters.'' The agencies would not be precluded as a legal matter from asserting jurisdiction over ''other waters'' under this proposed rule, which would retain the ''other waters'' provision from the 1986 regulations and add the relatively permanent and significant nexus standards, but following the *SWANCC* Guidance approach would require an additional approval process before the agencies asserted jurisdiction. The agencies could also modify the prior approach by identifying a subsection of ''other waters'' that could be determined jurisdictional without headquarters' authorization, such as lakes and ponds which meet the definition of ''adjacent,'' but do not fall within the adjacent wetlands provision because they are open waters, not wetlands (*e.g.,* oxbow lakes and ponds).

''Other waters'' that meet the definition of ''adjacent'' could be treated like adjacent wetlands under the *Rapanos* Guidance. Under such an approach, the agencies could adopt the same interpretation of ''similarly situated'' that is used to complete a significant nexus determination for adjacent wetlands (*see* section V.D.2.b.ii.1 of this preamble), or the agencies could adopt a different interpretation of ''similarly situated'' that is specifically applicable to ''other waters.''

The various options for implementing significant nexus are not mutually exclusive and the agencies are interested in any other approaches for assessing significant nexus under the proposed rule, particularly approaches that utilize existing science-based tools and resources to assist in predictability and ease of implementation for the public and the agencies.

3. Resources for Making Jurisdictional Determinations

Many field-based and remote tools and sources of data are available to determine Clean Water Act jurisdiction under the proposed rule. In some cases, a property owner may be able to determine whether a property includes a ''water of the United States'' based on observation or experience. In other cases, a property owner may seek assistance from a consultant to assess the jurisdictional status of features on their property. Property owners may also seek a jurisdictional determination from the Corps, which provides jurisdictional determinations as a public service. When conducting a jurisdictional determination, the Corps will review any documentation that a property owner, or consultant, provides to assist in making a jurisdictional determination. EPA staff also regularly assess the jurisdictional status of waters in implementing Clean Water Act programs. The agencies expect that EPA and Corps staff, as well as private consultants, would be the primary users of the tools and sources of remote data described below, and they have ample

[55] Omernik, J.M. 1987. Ecoregions of the conterminous United States. Map (scale 1:7,500,000). Annals of the Association of American Geographers 77(1):118–125.

[56] Omernik, J.M. 1995. Ecoregions: A spatial framework for environmental management. In: Biological Assessment and Criteria: Tools for Water Resource Planning and Decision Making. Davis, W.S. and T.P. Simon (eds.), Lewis Publishers, Boca Raton, FL. p. 49–62.

[57] Winter, T.C., 2001. The concept of hydrologic landscapes: Journal of the American Water Resources Association, v. 37, p. 335–349.

[58] Wolock, D.M. 2003. Hydrologic landscape regions of the United States (No. 2003–145). US Geological Service.

experience in using them from prior regulatory regimes.

The resources covered in this section include tools for identifying relatively permanent tributaries (section V.D.3.a of this preamble); tools for identifying wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments of jurisdictional waters, or tributaries (section V.D.3.b of this preamble); and tools for applying a significant nexus standard (section V.D.3.c of this preamble). This section presents a non-exclusive list of tools that the agencies have used in the past and will continue to use to assist in making jurisdictional decisions, but other tools could also be used to determine jurisdiction. The agencies have also identified a number of recent advancements in the data, tools, and methods that can be used to make jurisdictional decisions (section V.D.3.d of this preamble).

a. Identifying Relatively Permanent Tributaries

Relatively permanent tributaries include rivers, streams, and other hydrographic features with standing or flowing bodies of water, and may also include certain lakes and ponds. These features can be identified on the landscape using various remote sensing resources such as USGS stream gage data (available at *https://waterdata.usgs.gov/nwis/rt*), USGS topographic maps (available at *https://www.usgs.gov/core-science-systems/ngp/tnm-delivery/topographic-maps*), high-resolution elevation data and associated derivatives (*e.g.,* slope or curvature metrics), Federal Emergency Management Agency (FEMA) flood zone maps (available at *https://msc.fema.gov/portal/home*), NRCS soil maps (available at *https://websoilsurvey.sc.egov.usda.gov/App/WebSoilSurvey.aspx*), NHD data, National Wetland Inventory (NWI) data, maps and geospatial datasets from state, tribal, or local governments, and/or aerial or satellite imagery. For example, tributaries are observable in aerial imagery and high-resolution satellite imagery by their topographic expression, characteristic linear and curvilinear patterns, dark photographic tones, or the presence of riparian vegetation. USGS topographic maps often include different symbols to indicate mapped hydrographic features such as perennial and intermittent tributaries (*see* ''Topographic Map Symbols,'' available at *https://pubs.usgs.gov/gip/TopographicMapSymbols/topomapsymbols.pdf*). Due to limitations associated with some remote tools, field verification for accuracy may be necessary, and some examples of field indicators will be discussed in more detail below.

Under the *Rapanos* Guidance, tributaries may be considered relatively permanent if they typically flow year-round or have continuous flow at least seasonally (*e.g.,* typically three months). A key factor that the agencies typically consider when assessing the length and timing of expected ''seasonal'' flows is the geographic region. The time period, including length, constituting ''seasonal'' varies across the country due to many relevant factors including climate, hydrology, topography, soils, and other conditions. For example, in parts of the southeastern United States (Southeast), precipitation is distributed somewhat uniformly throughout the year, but increased evapotranspiration during the growing season can reduce surficial ground water levels and lead to reduced or absent surface flows late in the growing season (*e.g.,* late summer or early autumn). Consequently, ''seasonal'' flows in the Southeast may typically occur in the winter or early spring. In other areas, snowmelt drives streamflow more than rainfall, with seasonal flow coinciding with warming temperatures typically in the spring or early summer. In addition, the agencies have found that two months of continuous flow, for example, is considered ''seasonal'' flow in certain regions of the country and can be sufficient to support a relatively permanent designation.[59] Sources of information that can facilitate the evaluation of seasonal flow from snowmelt are NOAA national snow analyses maps (available at *https://www.nohrsc.noaa.gov/nsa/*), NRCS sources (available at *https://www.wcc.nrcs.usda.gov/snow/*), or use of hydrographs to indicate a large increase in stream discharge due to the late spring/early summer thaws of melting snow. The agencies have experience evaluating seasonal flow and will continue to use multiple tools, including remote and field-based indicators to inform decisions.

While not providing explicit flow classifications (*e.g.,* perennial, intermittent, or ephemeral), various remote or desktop tools can help the agencies and the public better understand streamflow and inform determinations of flow classifications. These tools include local maps, StreamStats by the USGS (available at *https://streamstats.usgs.gov/ss/*), Probability of Streamflow Permanence (PROSPER) by the USGS, which provides streamflow permanence probabilities during the summer for stream reaches in the Pacific Northwest (available at *https://www.usgs.gov/centers/wy-mt-water/science/probability-streamflowpermanence-prosper*), and NRCS hydrologic tools and soil maps. Other tools include regional desktop tools that provide for the hydrologic estimation of a discharge sufficient to generate intermittent or perennial flow (*e.g.,* a regional regression analysis or hydrologic modeling), or modeling tools using drainage area, precipitation data, climate, topography, land use, vegetation cover, geology, and/or other publicly available information. Some models that are developed for use at the reach scale may be localized in their geographic scope.

Remote or desktop tools can also illustrate the relative permanence of flow. Aerial photographs showing visible water on multiple dates can provide evidence of the sufficient frequency and duration of surface flow to facilitate a potential flow classification. Aerial photographs may also show other indicators commonly used to identify the presence of an OHWM (*see* definition of OHWM in section V.C.9.d of this preamble and *https://www.erdc.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/486085/ordinary-high-water-mark-ohwm-research-development-and-training/*). These may include the destruction of terrestrial vegetation, the absence of vegetation in a channel, and stream channel morphology with evidence of scour, material sorting, and deposition. These indicators from aerial photographs can be correlated to the presence of USGS stream data to support a potential flow classification for a tributary. In addition to aerial photographs, desktop tools, such as a regional regression analysis and the Hydrologic Modeling System (HEC–HMS), provide for the hydrologic estimation of stream discharge in tributaries under regional conditions. The increasing availability of light detection and ranging (LIDAR) derived data can also be used to help implement this proposed rule. Where LIDAR data have been processed to create elevation data such as a bare earth model, detailed depictions of the land surface are available and subtle elevation changes can indicate a tributary's bed and banks and channel morphology. Visible linear and curvilinear incisions on a bare earth model can help inform the potential

[59] *See, e.g.,* Memorandum to Assert Jurisdiction for NWP–2007–945 (January 23, 2008), *available at https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll5/id/1437.*

flow regime of a water in greater detail than aerial photography interpretation alone. Several tools (*e.g.,* TauDEM, Whitebox, GeoNet) can assist in developing potential stream networks based on contributing areas, curvature, and flowpaths using GIS. Potential LIDAR-indicated tributaries can be correlated with aerial photography or high-resolution satellite imagery interpretation and USGS stream gage data, to reasonably conclude the presence of an OHWM and shed light on the potential flow regime.

Field indicators for the region can be used to verify desktop assessments of the relative permanence of a tributary, when necessary. Geomorphic indicators could include active/relict floodplain, substrate sorting, clearly defined and continuous bed and banks, depositional bars and benches, and recent alluvial deposits. Hydrologic indicators might include wrack/drift deposits, hydric soils, or water-stained leaves. Biologic indicators could include aquatic mollusks, crayfish, benthic macroinvertebrates, algae, and wetland or submerged aquatic plants. Regionalized streamflow duration assessment methods (SDAMs) that use physical and biological field indicators, such as the presence of hydrophytic vegetation and benthic macroinvertebrates, can also be used to determine the flow duration class of a tributary as perennial, intermittent, or ephemeral (*e.g.,* the Streamflow Methodology for Identification of Intermittent and Perennial Streams and Their Origins, developed by the North Carolina Division of Water Quality, available at *http://portal.ncdenr.org/c/document_library/get_file?uuid=0ddc6ea1-d736-4b55-8e50-169a4476de96&groupId=38364*). EPA, the Corps, and the State of Oregon developed a regionalized SDAM that has been validated for use throughout the Pacific Northwest (available at *http://www.epa.gov/measurements/streamflow-duration-assessment-method-pacific-northwest*). EPA and the Corps have also developed a beta SDAM for the arid West (available at *https://www.epa.gov/streamflow-duration-assessment/beta-streamflow-duration-assessment-method-arid-west*) and are working to develop additional regionalized SDAMs in other parts of the country. Flow duration classifications can then be used to assist in determining the relative permanence of the tributary. Ultimately, multiple indicators, data points, and sources of information may be used to determine flow classification.

b. Identifying Wetlands Adjacent to Traditional Navigable Waters, Interstate Waters, Territorial Seas, Impoundments, or Tributaries

Before determining if a wetland is jurisdictional, the agencies first determine if the wetland in question meets the definition of ''wetlands'' (*see* section V.C.9.a of this preamble). As under prior regimes, wetlands are identified in the field in accordance with Corps' 1987 Wetland Delineation Manual and applicable regional delineation manuals. Field work is often necessary to confirm the presence of a wetland and to accurately delineate its boundaries. However, in addition to field observations on hydrology, vegetation, and soils, remote tools and resources can be used to support the identification of a wetland, including USGS topographic maps (*available at https://www.usgs.gov/core-science-systems/ngp/tnm-delivery/topographic-maps*), NRCS soil maps and properties of soils including flood frequency and duration, ponding frequency and duration, hydric soils, and drainage class (available at *https://websoilsurvey.sc.egov.usda.gov/App/WebSoilSurvey.aspx* or via the NRCS Soil Survey Geographic Database (SSURGO) available at *https://catalog.data.gov/dataset/soil-survey-geographic-database-ssurgo*), aerial or high-resolution satellite imagery, high-resolution elevation data (*e.g., https://apps.nationalmap.gov/downloader/#/*), and NWI maps (available at *https://www.fws.gov/wetlands/data/mapper.html*).

Once a feature is identified as a wetland, if the wetland itself is not a traditional navigable water (*i.e.,* it is not a tidal wetland) or an interstate water, the agencies assess whether it is adjacent to a traditional navigable water, interstate water, territorial sea, jurisdictional impoundment, or jurisdictional tributary. A variety of remote tools can help to assess adjacency, including maps, high-resolution elevation data, aerial photographs, and high-resolution satellite imagery. For example, USGS topographic maps, elevation data, and NHD data may identify a physical barrier or illustrate the location of the traditional navigable water, interstate water, territorial sea, jurisdictional impoundment, or jurisdictional tributary; the wetland's proximity to the jurisdictional water; and the nature of topographic relief between the two aquatic resources. Aerial photographs or high-resolution satellite imagery may illustrate hydrophytic vegetation from the boundary (*e.g.,* ordinary high water mark for non-tidal waters or high tide line for tidal waters) of the traditional navigable water, interstate water, territorial sea, jurisdictional impoundment, or jurisdictional tributary to the wetland boundary, or the presence of water or soil saturation. NRCS soil maps may identify the presence of hydric soil types, soil saturation, or potential surface or subsurface hydrologic connections. Additionally, methods that overlay depressions on the landscape with hydric soils and hydrophytic vegetation can be used to identify likely wetlands and hydrologic connections. NWI maps may identify that the wetlands are near the traditional navigable water, interstate water, territorial sea, jurisdictional impoundment, or jurisdictional tributary. Field work can help confirm the presence and location of the OHWM or high tide line of the traditional navigable water, interstate water, territorial sea, jurisdictional impoundment, or jurisdictional tributary and can provide additional information about the wetland's potential adjacency to that water (*e.g.,* by traversing the landscape from the traditional navigable water, interstate water, territorial sea, jurisdictional impoundment, or jurisdictional tributary to the wetland and examining topographic and geomorphic features, as well as hydrologic and biologic indicators). Wetlands adjacent to traditional navigable waters, interstate waters, or the territorial seas do not need further analysis to determine if they are ''waters of the United States.''

For a wetland adjacent to relatively permanent, non-navigable tributaries and relatively permanent impoundments of jurisdictional waters, similar remote tools and resources as those described above may be used to identify if the wetland has a continuous surface connection to such waters. The tools and resources most useful for addressing this standard are those that reveal breaks in the surface connection between the wetland and the relatively permanent water, such as separations by uplands, or a berm, dike, or similar feature. For example, USGS topographic maps may show topographic highs between the two features, or simple indices can be calculated based on topography to indicate where these connectivity breaks occur. FEMA flood zone or other floodplain maps may indicate constricted floodplains along the length of the tributary channel with physical separation of flood waters that could indicate a break. High-resolution elevation data can illustrate topographic highs between the two features that

extend along the tributary channel. Aerial photographs or high-resolution satellite imagery may illustrate upland vegetation along the tributary channel between the two features, or bright soil signatures indicative of higher ground. NRCS soil maps may identify mapped linear, upland soil types along the tributary channel. Field work may help to confirm the presence and location of the relatively permanent, non-navigable tributary's OHWM. In addition, field work may confirm whether there is a continuous physical connection between the wetland and the relatively permanent, non-navigable tributary, or identify breaks that may sever the continuous surface connection (*e.g.,* by traversing the landscape from the tributary to the wetland and examining topographic and geomorphic features, as well as hydrologic and biologic indicators).

For adjacent wetlands that lack a continuous surface connection to jurisdictional relatively permanent tributaries or jurisdictional relatively permanent impoundments or that are adjacent to non-relatively permanent tributaries, the agencies will conduct a significant nexus analysis to assess if the wetlands are jurisdictional. Tools to assess if the adjacent wetlands significantly affect foundational waters are discussed in section V.D.3.c of this preamble.

c. Applying the Significant Nexus Standard

The agencies have used many tools and sources of information to assess significant effects on the chemical, physical, and biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas. Some tools and resources that the agencies have used to provide and evaluate evidence of a significant effect on the physical integrity of foundational waters include USGS stream gage data, floodplain maps, statistical analyses, hydrologic models and modeling tools such as USGS's StreamStats (available at *https://streamstats.usgs.gov/ss/*) or the Corps' Hydrologic Engineering Centers River System Analysis System (HEC–RAS), physical indicators of flow such as the presence and characteristics of a reliable OHWM with a channel defined by bed and banks, or other physical indicators of flow including such characteristics as shelving, wracking, water staining, sediment sorting, and scour, information from NRCS soil surveys, precipitation and rainfall data, and NRCS snow telemetry (SNOTEL) data or NOAA national snow analyses maps.

To evaluate the evidence of a significant effect on the biological integrity of foundational waters, the agencies and practitioners have used tools and resources such as: population survey data and reports from federal, state, and tribal resource agencies, natural history museum collections databases, bioassessment program databases, fish passage inventories, U.S. Fish and Wildlife Service (FWS) Critical Habitat layers, species distribution models, and scientific literature and references from studies pertinent to the distribution and natural history of the species under consideration.

Tools and resources that provide and evaluate evidence of a significant effect on the chemical integrity of foundational waters include data from USGS water quality monitoring stations, state, tribal, and local water quality reports, water quality monitoring and assessment databases, EPA's How's My Waterway (available at *https://www.epa.gov/waterdata/hows-my-waterway*), which identifies Clean Water Act section 303(d) listed waters, water quality impairments, and total maximum daily loads, watershed studies, stormwater runoff data or models, EPA's NEPAssist (available at *https://www.epa.gov/nepa/nepassist*), which provides locations and information on wastewater discharge facilities and hazardous-waste sites, the National Land Cover Database (NLCD), and scientific literature and references from studies pertinent to the parameters being reviewed. EPA has developed a web-based interactive water quality and quantity modeling system (Hydrologic and Water Quality System, HAWQS; available at *https://www.epa.gov/waterdata/hawqs-hydrologic-and-water-quality-system*) that is being used to assess cumulative effects of wetlands on other waters they may drain into. Additional approaches to quantifying the hydrologic storage capacity of wetlands include statistical models, such as pairing LIDAR-based topography with precipitation totals. Both statistical and process-based models have been used to quantify the nutrient filtering capabilities of non-floodplain wetlands, and in some cases to assess the effects of non-floodplain wetland nutrient removal, retention, or transformation on downstream water quality. Evaluations of a significant effect on the chemical integrity of a traditional navigable water, interstate water, or territorial sea may include qualitative reviews of available information or incorporate quantitative analysis components including predictive transport modeling.

A variety of modeling approaches can be used to quantify the connectivity and cumulative effects of wetlands, including non-floodplain wetlands, on other waters. Some examples include the Soil and Water Assessment Tool (SWAT, available at *https://swat.tamu.edu/*), the Hydrologic Simulation Program in Fortran (*see https://www.epa.gov/ceam/hydrological-simulation-program-fortran-hspf*), and DRAINMOD for Watersheds (DRAINWAT, available at *https://www.bae.ncsu.edu/agricultural-water-management/drainmod/*). Other examples of models applicable to identifying effects of wetlands on downstream waters include the USGS hydrologic model MODFLOW (available at *https://www.usgs.gov/mission-areas/water-resources/science/modflow-and-related-programs?qt-science_center_objects=0#qt-science_center_objects*) and the USGS flow simulation model VS2DI (available at *https://www.usgs.gov/software/vs2di-version-13*).

d. Advancements in Implementation Data, Tools, and Methods

Since the *Rapanos* decision, there have been dramatic advancements in the data, tools, and methods used to make jurisdictional determinations, including in the digital availability of information and data. In 2006, when the agencies began to implement the *Rapanos* and *Carabell* decisions, there were fewer implementation tools and support resources to guide staff in defensible jurisdictional decision-making under the relatively permanent and significant nexus standards. Agency staff were forced to heavily rely on information provided in applicant submittals and available aerial imagery to make jurisdictional decisions or to schedule an in-person site visit to review the property themselves. The U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook encouraged practitioners to utilize maps, aerial photography, soil surveys, watershed studies, scientific literature, previous jurisdictional determinations for the review area, and local development plans to complete accurate jurisdictional decisions or analysis. For more complicated situations or decisions involving significant nexus evaluations, the Guidebook encouraged practitioners to identify and evaluate the functions relevant to the significant nexus by incorporating literature citations and/or references from studies pertinent to the parameters being reviewed. For significant nexus decisions specifically, the Guidebook

instructed Corps field staff to consider all available hydrologic information (*e.g.,* gage data, precipitation records, flood predictions, historic records of water flow, statistical data, personal observations/records, etc.) and physical indicators of flow including the presence and characteristics of a reliable OHWM.

The Corps also issued Regulatory Guidance Letter (RGL) No. 07–01 [60] in 2007 that laid out principal considerations for evaluating the significant nexus of a tributary and its adjacent wetlands which included the volume, duration, and frequency of flow of water in the tributary, proximity of the tributary to a traditional navigable water, and functions performed by the tributary and its adjacent wetlands. This RGL highlighted wetland delineation data sheets, delineation maps, and aerial photographs as important for adequate information to support all jurisdictional decision-making. Gathering the data necessary to support preliminary or approved jurisdictional decisions was often time consuming for staff and the regulated public, and there were not many nationally available repositories for much of the information that the agency staff utilized in decision-making, particularly during the first years of implementing of the guidance. Despite these challenges, the agencies and others in the practitioner community gained significant collective experience implementing the relatively permanent and significant nexus standards from 2006 to 2015.

Since 2015, there have been dramatic improvements to the quantity and quality of water resource information available on the internet. The agencies can use online mapping tools to determine whether waters are connected or sufficiently close to a water of the United States, and new user interfaces have been developed that make it easier and quicker to access information from a wide variety of sources. Furthermore, some information used to only be available in hard-copy paper files, including water resource inventories and habitat assessments, and many of these resources have been made available online or updated with new information. An overview of several tools and data that have been developed or improved since 2015 can help demonstrate how the agencies are now able to make case-specific evaluations more quickly and consistently than ever before.

Advancements in geographic information systems (GIS) technology and cloud-hosting services have led to an evolution in user interfaces for publicly available datasets frequently used in jurisdictional decision-making such as the NWI, USGS NHD, soil surveys, aerial imagery and other geospatial analysis tools like USGS StreamStats. Not only are the individual datasets more easily accessible to users, but it has also become much easier for users to quickly integrate these various datasets using desktop or online tools like map viewers to consolidate and evaluate the relevant data in one visual platform. The EPA Watershed Assessment, Tracking, and Environmental Results System (WATERS) GeoViewer is an example of a web mapping application that provides accessibility to many spatial dataset layers like NHDPlus and watershed reports for analysis and interpretation. Other websites like the Corps' Jurisdictional Determinations and Permits Decision site and webservices like EPA's Enforcement and Compliance History Online (ECHO) Map Services allow users to find geospatial and technical information about Clean Water Act section 404 and NPDES permitted discharges. Information on approved jurisdictional determinations finalized by the Corps is also available on the Corps' Jurisdictional Determinations and Permit Decisions site and EPA's Clean Water Act Approved Jurisdictional Determinations website.

The data that are available online have increased in quality as well as quantity. The NHD has undergone extensive improvements in data availability, reliability, and resolution since 2015, including the release of NHDPlus High Resolution datasets for the conterminous U.S. and Hawaii, with Alaska under development. One notable improvement in NHD data quality is that the flow-direction network data is much more accurate than in the past. Improvements have also been made to the NWI website and geospatial database, which has served as the primary source of wetland information in the United States for many years. In 2016, NWI developed a more comprehensive dataset (NWI Version 2) that is inclusive of all surface water features in addition to wetlands. The agencies can use this dataset to help assess potential hydrologic connectivity between waterways and wetlands in support of jurisdictional decisions. For example, the NWI Version 2 dataset can be used in part to help the agencies identify wetlands that do not meet the definition of adjacent (''other waters''). This NWI Version 2 dataset provides more complete geospatial data on surface waters and wetlands than has been available in the past and provides a more efficient means to make determinations of flow and water movement in surface water basins and channels, as well as in wetlands.

The availability of aerial and satellite imagery has improved dramatically since 2015, which is used to observe the presence or absence of flow and identify relatively permanent flow in tributary streams and hydrologic connections to waters. The agencies often use a series of aerial and satellite images, spanning multiple years and taken under normal climatic conditions, to determine the flow classification for a tributary, as a first step to determine if additional field-based information is needed to determine the flow classification. The growth of the satellite imagery industry through services such as DigitalGlobe (available at *https://discover.digitalglobe.com/*) in addition to resources for aerial photography and imagery, such as USGS EarthExplorer (available at *https://earthexplorer.usgs.gov/*) and National Aeronautics and Space Administration (NASA) Earth Data (available at *https://earthdata.nasa.gov/*) have reduced the need to perform as many field investigations to verify Clean Water Act jurisdiction, though some of these services charge a fee for use. The USGS Landsat Level-3 Dynamic Surface Water Extent (DSWE) product (available at *https://www.usgs.gov/core-science-systems/nli/landsat/landsat-dynamic-surface-water-extent?qt-science_support_page_related_con=0#qt-science_support_page_related_con*) is a specific example of a tool that may be useful for identifying surface water inundation on the landscape in certain geographic areas.

Similarly, the availability of LIDAR data has increased in availability and utility for determining Clean Water Act jurisdiction. Where LIDAR data have been processed to create a bare earth model, detailed depictions of the land surface reveal subtle elevation changes and characteristics of the land surface, including the identification of tributaries. LIDAR-indicated tributaries can be correlated with aerial photography interpretation to reasonably conclude the presence of a channel with relatively permanent flow in the absence of a field visit. The agencies have been using such remote sensing and desktop tools to assist with identifying jurisdictional tributaries for many years, and such tools are particularly critical where data from the

[60] It should be noted that RGL No. 07–01 was later superseded by RGL 08–02 and RGL 16–01, neither of which addressed significant nexus evaluations.

field are unavailable or a field visit is not possible. High-resolution LIDAR data are becoming more widespread for engineering and land use planning purposes.

Since 2015, tools have been developed that automate some of the standard practices the agencies rely on to assist in determinations. One example of this automation is the Antecedent Precipitation Tool (APT), which was released to the public in 2020 and had been used internally by the agencies prior to its public release. The APT is a desktop tool developed by the Corps and is commonly used by the agencies to help determine whether field data collection and other site-specific observations occurred under normal climatic conditions. In addition to providing a standardized methodology to evaluate normal precipitation conditions (''precipitation normalcy''), the APT can also be used to assess the presence of drought conditions, as well as the approximate dates of the wet and dry seasons for a given location. As discussed in section V.B.3 of this preamble, above, precipitation data are often not useful in providing evidence as to whether a surface water connection exists in a typical year, as required by the NWPR. However, the agencies have long used the methods employed in the APT to provide evidence that wetland delineations are made under normal circumstances or to account for abnormalities during interpretation of data. The development and public release of the APT has accelerated the speed at which these analyses are completed, standardized methods, which reduces errors, and enabled more people to perform these analyses themselves, including members of the public. The APT will continue to be an important tool to support jurisdictional decision-making.

Site visits are still sometimes needed to perform on-site observations of surface hydrology or collect field-based indicators of relatively permanent flow (*e.g.,* the presence of riparian vegetation, or certain aquatic macroinvertebrates). The methods and instruments used to collect field data have also improved since 2015, such as the development of rapid, field-based SDAMs that use physical and biological indicators to determine the flow duration class of a stream reach. The agencies have previously used existing SDAMs developed by federal and state agencies to identify perennial, intermittent, or ephemeral streams, and will continue to use these tools whenever they are determined to be a reliable source of information for the specific water feature of interest. The agencies are currently working to develop region-specific SDAMs for nationwide coverage, which will promote consistent implementation across the United States in a manner that accounts for differences between each ecoregion. Additional information on the agencies' efforts to develop SDAMs is available at *https://www.epa.gov/streamflow-duration-assessment.*

E. Publicly Available Jurisdictional Information and Permit Data

The agencies intend to work to enhance information that is already available to the public on jurisdictional determinations. The Corps maintains a website at *https://permits.ops.usace.army.mil/orm-public* that presents information on the Corps' approved jurisdictional determinations and Clean Water Act section 404 permit decisions. Similarly, EPA maintains a website at *https://watersgeo.epa.gov/cwa/CWA-JDs/* that presents information on approved jurisdictional determinations made by the Corps under the Clean Water Act since August 28, 2015. These websites will incorporate approved jurisdictional determinations made under the revised definition of ''waters of the United States.'' EPA also maintains on its website information on certain dischargers permitted under Clean Water Act section 402, including the Permit Compliance System and Integrated Compliance Information System database (*https://www.epa.gov/enviro/pcs-icis-overview*), as well as the EnviroMapper (*https://enviro.epa.gov/enviro/em4ef.home*), and How's My Waterway (*https://www.epa.gov/waterdata/hows-my-waterway*). The agencies also intend to provide links to the public to any guidance, forms, or memoranda of agreement relevant to the definition of ''waters of the United States.''

EPA and the Army have also been working with other federal agencies on improving aquatic resource mapping and modeling, including working with the Department of Interior (DOI) to better align their regulatory needs with DOI's existing processes and national mapping capabilities. EPA, USGS, and FWS have a long history of working together to map the nation's aquatic resources. The agencies will continue to collaborate with DOI to enhance the NHD, NWI, and other products to better map the nation's water resources while enhancing the utility of such geospatial products to the Clean Water Act programs that EPA and the Corps implement.

F. Placement of the Definition of ''Waters of the United States'' in the Code of Federal Regulations

The definition of ''waters of the United States'' had historically been placed in eleven locations in the Code of Federal Regulations (CFR). For the sake of simplicity, in the NWPR, the agencies codified the definition of ''waters of the United States'' in only two places in the CFR—in Title 33 of the CFR, which implements the Corps' statutory authority, at 33 CFR 328.3, and in Title 40, which generally implements EPA's statutory authority, at 40 CFR 120.2. In the sections of the CFR where EPA's definition previously existed, 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 230.3, 232.2, 300.5, 302.3, 401.11, and Appendix E to 40 CFR part 300, the NWPR cross-references the newly created section of the regulations containing the definition of ''waters of the United States.'' The agencies placed EPA's definition of ''waters of the United States'' in a previously unassigned part of 40 CFR and stated that the change in placement had no implications on Clean Water Act program implementation; rather, the placement made it clearer to members of the public that there is a single definition of ''waters of the United States'' applicable to the Clean Water Act and its implementing regulations. 85 FR 22328–29, April 21, 2020. The agencies agree with this approach and propose no change to the placement of the definition of ''waters of the United States.'' As the agencies indicated in the NWPR, the placement of the definition in two locations, at 33 CFR 328.3 and 40 CFR 120.2, increases convenience for the reader but has no substantive implications for the scope of Clean Water Act jurisdiction. 85 FR 22328, April 21, 2020.

The agencies are proposing to delete the definition of ''navigable waters'' at 120.2 and to add it to the ''purpose and scope'' of part 120 at 40 CFR 120.1. The agencies are also proposing to add additional clarifying text to the ''purpose and scope'' at 40 CFR 120.1. The agencies intend this to be an editorial and clarifying change and not a substantive change from EPA's regulations at 40 CFR 120. The agencies believe that this minor revision adds consistency between EPA's regulations at 40 CFR 120 and the Corps' regulations defining ''waters of the United States'' at 33 CFR 328.3. As a result of this non-substantive revision, the agencies' definitions would have parallel numerical and alphabetical subsections, providing clarity for the public. The Corps similarly includes the

definition of ''navigable waters'' within 33 CFR 328.1, which contains the purpose of the Corps' regulations at part 328. The agencies propose to retain the same definition of ''navigable waters'' within 40 CFR 120.1 as the term is defined at section 502(7) of the Clean Water Act and as it was defined in the NWPR at 40 CFR 120.2, which is ''the waters of the United States, including the territorial seas.''

The agencies solicit comment on their deletion of the definition of ''navigable waters'' at 40 CFR 120.2 and adding it instead with the ''purpose and scope'' at 40 CFR 120.1.

VI. Summary of Supporting Analyses

This section provides an overview of the supporting analyses for the proposed rule. Additional detail on these analyses is contained in and described more fully in the Economic Analysis for the Proposed Rule and the Technical Support Document for the Proposed Rule. Copies of these documents are available in the docket for this proposed action.

This proposed rule establishing the definition of ''waters of the United States'' by itself imposes no costs or benefits. Potential costs and benefits would only be incurred as a result of actions taken under existing Clean Water Act programs (*i.e.,* sections 303, 311, 401, 402, and 404) that would not otherwise be modified by this proposed rule. Entities currently are, and would continue to be, regulated under these programs that protect ''waters of the United States'' from pollution and destruction. Each of these programs may subsequently impose costs as a result of implementation of their specific regulations.

While the rule imposes no costs and generates no benefits under the primary baseline, the agencies nonetheless analyzed its benefits and costs relative to a secondary baseline and have prepared an illustrative economic analysis to provide the public with information on the potential benefits and costs associated with various Clean Water Act programs that could result under a state of the world without the proposed rule that would have the NWPR still in effect. The agencies prepared this economic analysis pursuant to the requirements of Executive Orders 12866 and 13563 to provide information to the public.

Two courts have vacated the NWPR and since then, the agencies have been implementing the pre-2015 regulatory regime, which is very similar to the proposed rule. While the NWPR has been vacated, the agencies have chosen to provide additional information to the public and have considered two baselines in the Economic Analysis for the Proposed Rule: A primary baseline of the pre-2015 regulatory regime, and a secondary baseline of the NWPR. Because the agencies are not currently implementing the NWPR, the proposed rule would not depart in material respects from current practice; as such, the agencies find that the proposed rule generally maintains the legal status quo such that there would be no appreciable costs or benefits in comparison to the primary baseline of the pre-2015 regulatory regime.

The agencies use the NWPR as a secondary baseline to provide information to the public on the estimated differential effects of the proposed rule in comparison to the NWPR. The agencies estimated that the NWPR would result in an increase in non-jurisdictional findings in jurisdictional determinations compared to prior regulations and practice, and that compared to the NWPR, the proposed rule would define more waters as within the scope of the Clean Water Act.

Under the primary baseline, there are no costs or benefits as the regulatory scope between the presently implemented pre-2015 regulatory regime is approximately the same as the proposed rule. Comparatively, under the secondary NWPR baseline, quantified benefits for the 404 program are estimated to be between $376 and $590 million annually, while costs are estimated to be between $109 and $276 million annually. The analysis of estimated costs and benefits of the proposed rule is contained in the Economic Analysis for the Proposed Rule and is available in the docket for this action.

The agencies recognize that the burdens of environmental pollution and climate change often fall disproportionately on population groups of concern (*e.g.,* minority, low-income, and indigenous populations as specified in Executive Order 12898) and are quantifying impacts to these groups in the Economic Analysis for the Proposed Rule. Compared to the average population, these groups are more likely to experience water-related environmental and social stressors like contaminated drinking water, limited access to clean water, and inadequate water infrastructure—all of which increase their likelihood of being exposed to pollutants. In addition to external stressors, behavioral and cultural characteristics of these groups, like engaging in subsistence fishing and consuming higher rates of fish from polluted waters, increases their vulnerability to pollution. Taken together, these environmental, social, and behavioral factors often increase these groups' risk of experiencing negative health outcomes because of their exposure to environmental contaminants.

Climate change will exacerbate the existing risks faced by population groups of concern as identified by Executive Order 12898, in addition to giving rise to new risks and challenges, and such impacts are generally greater for disadvantaged communities. In particular, risks like sea level rise, flooding, and drought can all have disproportionate effects on these communities. Because of existing environmental and social stressors and their reliance on natural resources that may be negatively impacted by climate change (*e.g.,* fish and other aquatic life that provide income or food), these communities may be less able to mitigate and adapt to the effects of climate change.

The NWPR decreased the scope of Clean Water Act jurisdiction across the country, including in geographic regions where regulation of waters beyond those covered by the Act is not authorized under current state or tribal law (*see* section V.B.3 of this preamble). Absent regulations governing discharges of pollutants into previously jurisdictional waters, communities composed of groups of concern where these waters are located may experience increased water pollution and impacts from associated increases in health risk. Further, the NWPR categorically excluded ephemeral streams from jurisdiction, which disproportionately impacts tribes and communities of concern in the arid West. Tribes may lack the authority and often the resources to regulate waters within their boundaries, and may also be affected by pollution from adjacent jurisdictions. Therefore, the change in jurisdiction under the NWPR may have disproportionately exposed tribes to increased pollution and health risks. In this proposed rule the agencies affirm their commitment to assessing the impacts of a revised definition of ''waters of the United States'' on population groups of concern.

For the proposed rule, consistent with Executive Order 12898 and Executive Order 14008 on ''Tackling the Climate Crisis at Home and Abroad'' (86 FR 7619; January 27, 2021), the agencies examined whether the change in benefits from the reinstatement of the pre-2015 practice may be differentially distributed among population groups of concern in the affected areas when compared to the secondary baseline of

the NWPR. In determining the potential for concerns in affected areas, the agencies considered the following factors in this analysis: Population characteristics, proximity to effects of the proposed rule, and selected indicators of vulnerability to environmental risk. The results of the agencies' analysis are presented in the Economic Analysis for the Proposed Rule. The change between the pre-2015 regulatory regime and NWPR in the number of impacted waters was approximated using Corps AJD and permit data. The analysis showed that for most of the HUC 12 wetlands and affected waters impacted by the proposed rule, there was no evidence of potential environmental justice concerns warranting further analysis; for a select set of HUC 12 wetlands and impacted waters, potential environmental justice concerns may exist, and additional analyses may be warranted. Additionally, analyses assessing the potential for impacts on tribes found an overlap in several states between tribal land and HUC 12 watersheds with relatively large wetland and affected waters changes, warranting further analysis. In the final rule, the agencies plan to expand upon the environmental justice analysis by including additional indicators of vulnerability to environmental risk in screening for potential environmental justice concerns and by adding illustrative case studies to evaluate localized impacts for areas where the need for additional analyses was identified.

The Technical Support Document provides additional legal, scientific, and technical discussion for issues raised in this proposed rule. Appendix A of the Technical Support Document contains a glossary of terms used in the document. Appendix B of the Technical Support Document contains the references cited in the document. Appendix C of the Technical Support Document is a list of citations that have been published since the 2015 Science Report and that contain findings relevant to the report's conclusions. Appendix D is the legal definition of ''traditional navigable waters'' (Appendix D from the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook).

VII. Statutory and Executive Order Reviews

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

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

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket for this action. The agencies prepared an economic analysis of the potential costs and benefits associated with this action. This analysis, the Economic Analysis for the Proposed ''Revised Definition of 'Waters of the United States' '' Rule, is available in the docket for this action and briefly summarized in section VI of this preamble.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because it does not contain any information collection activities. However, this action may change terms and concepts used by EPA and Army to implement certain programs. The agencies thus may need to revise some of their collections of information to be consistent with this action.

C. Regulatory Flexibility Act (RFA)

The agencies certify that this proposed rule will not have a significant economic impact on a substantial number of small entities under the RFA. This rule would codify a regulatory regime generally comparable to the one currently being implemented nationwide due to the vacatur of the 2020 definition of ''waters of the United States.'' On this basis alone, the proposed rule would not impose any requirements on small entities. Additionally, the agencies note that the proposed rule does not ''subject'' any entities of any size to any specific regulatory burden. It is designed to clarify the statutory term ''navigable waters,'' defined as ''waters of the United States,'' which defines the scope of Clean Water Act jurisdiction 33 U.S.C. 1362(7). The scope of Clean Water Act jurisdiction is informed by the text, structure and history of the Clean Water Act and Supreme Court case law, including the geographical and hydrological factors identified in *Rapanos* v. *United States,* 547 U.S. 715 (2006). None of these factors are readily informed by the RFA. *See, e.g., Cement Kiln Recycling Coal.* v. *EPA,* 255 F.3d 869 (D.C. Cir. 2001) (''[T]o require an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.''); *Michigan* v. *EPA,* 213 F.3d 663, 688–89 (D.C. Cir. 2000) (holding that the RFA imposes ''no obligation to conduct a small entity impact analysis of effects'' on entities which it regulates only ''indirectly''); *Am. Trucking Ass'n* v. *EPA,* 175 F.3d 1027, 1045 (D.C. Cir. 1999) (''[A]n agency may justify its certification under the RFA upon the ''factual basis'' that the rule does not directly regulate any small entities.''); *Mid-Tex Elec. Co-op, Inc.* v. *FERC,* 773 F.2d 327, 343 (D.C. Cir. 1985) (''Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.'').

Nevertheless, the agencies recognize that the scope of the term ''waters of the United States'' is of great national interest, including within the small business community. In light of this interest, the agencies sought early input from representatives of small entities while formulating a proposed definition of this term, including holding a public meeting dedicated to hearing feedback from small entities on August 25, 2021 (*see https://www.epa.gov/wotus/2021-waters-united-states-public-meeting-materials*). A variety of small entities such as farmers and ranchers, environmental and conservation non-profits, as well as building, consulting, and brewing businesses provided their input on both the policies under discussion in the proposed rulemaking and their interest in additional outreach and engagement with small entities, including their desire for a SBREFA panel. The agencies have addressed this feedback in the preamble relating to these topics and in the discussion above.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The proposed definition of ''waters of the United States'' applies broadly to Clean Water Act programs. The action imposes no enforceable duty on any state, local, or tribal governments, or the private sector.

E. Executive Order 13132: Federalism

Under the technical requirements of Executive Order 13132 (64 FR 43255, August 10, 1999), the agencies have determined that this proposed rule may have federalism implications but believe that the requirements of the Executive Order will be satisfied, in any event.

The agencies believe that a revised definition of ''waters of the United States'' may be of significant interest to state and local governments. Consistent with the agencies' policies to promote communications between the Federal government and state and local governments, EPA and the Army consulted with representatives of state and local governments early in the process of developing the proposed rule to permit them to have meaningful and timely input into its development.

Consulting with state and local government officials, or their representative national organizations, is an important step in the process prior to proposing regulations that may have federalism implications under the terms of Executive Order 13132. The agencies engaged state and local governments over a 60-day federalism consultation period during development of this proposed rule, beginning with the initial federalism consultation meeting on August 5, 2021, and concluding on October 4, 2021. Twenty intergovernmental organizations, including eight of the ten organizations identified in EPA's 2008 Executive Order 13132 Guidance, attended the initial Federalism consultation meeting, as well as 12 associations representing state and local governments. Organizations in attendance included the following: National Governors Association, National Conference of State Legislatures, United States Conference of Mayors, National League of Cities, National Association of Counties, National Association of Towns and Townships, County Executives of America, Environmental Council of the States, Association of State Wetland Managers, Association of State Drinking Water Administrators, National Association of State Departments of Agriculture, Western States Water Council, National Association of Clean Water Agencies, National Rural Water Association, National Association of Attorneys General, National Water Resources Association, National Municipal Stormwater Alliance, Western Governors' Association, American Water Works Association, and Association of Metropolitan Water Agencies. All letters received by the agencies during this consultation may be found in the docket (Docket ID No. EPA–HQ–OW–2021–0602) for this proposed rule.

These meetings and the letters provided by representatives provide a wide and diverse range of interests, positions, comments, and recommendations to the agencies. The agencies have prepared a report summarizing their consultation and additional outreach to state and local governments and the results of this outreach. A copy of the draft report is available in the docket (Docket ID. No. EPA–HQ–OW–2021–0602) for this proposed rule.

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

This action may have tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law.

EPA and the Army consulted with tribal officials under the *EPA Policy on Consultation and Coordination with Indian Tribes* and the *Department of the Army American Indian and Alaska Native Policy* early in the process of developing this regulation to permit them to have meaningful and timely input into its development.

The agencies initiated a tribal consultation and coordination process before proposing this rule by sending a ''Notification of Consultation and Coordination'' letter on July 30, 2021, to all 574 tribes federally recognized at that time. The letter invited tribal leaders and designated consultation representatives to participate in the tribal consultation and coordination process. The agencies engaged tribes over a 66-day tribal consultation period during development of this proposed rule, including via two webinars on August 19, 2021, and August 24, 2021, in which the agencies answered questions directly from tribal representatives and heard their initial feedback on the agencies' rulemaking effort. The agencies met with two tribes at a staff-level and with two tribes at a leader-to-leader level. Additional consultations may be requested and scheduled after the rule is proposed. All letters received by the agencies during this consultation may be found in the docket (Docket ID. No. EPA–HQ–OW–2021–0602) for this proposed rule. The agencies have prepared a report summarizing the consultation and further engagement with tribal nations. This report (Docket ID. No. EPA–HQ–OW–2021–0602) is available in the docket for this proposed rule.

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

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

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

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

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

EPA and Army believe that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

The documentation for this decision is contained in in the Economic Analysis for the Proposed Rule, which can be found in the docket for this action.

List of Subjects

33 CFR Part 328

Administrative practice and procedure, Environmental protection, Navigation (water), Water pollution control, Waterways.

40 CFR Part 120

Environmental protection, Water pollution control, Waterways.

Jaime A. Pinkham,

Acting Assistant Secretary of the Army (Civil Works), Department of the Army.

Michael S. Regan,

Administrator, Environmental Protection Agency.

Title 33—Navigation and Navigable Waters

For the reasons set out in the preamble, title 33, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

■ 1. The authority citation for part 328 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 2. Revise § 328.3 to read as follows:

§ 328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) *Waters of the United States* means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds:

(i) That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1), (a)(2), (a)(5)(i), or (a)(6) of this section; or

(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition, other than impoundments of waters identified under paragraph (a)(3) of this section;

(5) Tributaries of waters identified in paragraph (a)(1), (2), (4), or (6) of this section:

(i) That are relatively permanent, standing or continuously flowing bodies of water; or

(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to the following waters (other than waters that are themselves wetlands):

(i) Waters identified in paragraph (a)(1), (2), or (6) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(4) or (a)(5)(i) of this section and with a continuous surface connection to such waters; or

(iii) Waters identified in paragraph (a)(4) or (a)(5)(ii) of this section when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section;

(8) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act are not waters of the United States; and

(9) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(b) *Wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) *Adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ''adjacent wetlands.''

(d) *High tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(e) *Ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(f) *Tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(g) *Significantly affect* means more than speculative or insubstantial effects on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section. When assessing whether the effect that the functions waters have on waters identified in paragraph (a)(1), (2), or (6) of this section is more than speculative or insubstantial, the agencies will consider:

(1) The distance from a water of the United States;

(2) The distance from a water identified in paragraph (a)(1), (2), or (6) of this section;

(3) Hydrologic factors, including shallow subsurface flow;

(4) The size, density, and/or number of waters that have been determined to be similarly situated; and

(5) Climatological variables such as temperature, rainfall, and snowpack.

Title 40—Protection of Environment

For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 120—DEFINITION OF WATERS OF THE UNITED STATES

■ 3. The authority citation for part 120 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 4. Revise § 120.1 to read as follows:

§ 120.1 Purpose and scope.

This part contains the definition of ''waters of the United States'' for purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations. EPA regulations implementing the Clean Water Act use the term ''navigable waters,'' which is defined at section 502(7) of the Clean Water Act as ''the waters of the United States, including the territorial seas,'' or the term ''waters of the United States.'' In light of the statutory definition, the definition in this section establishes the scope of the terms ''waters of the United States'' and ''navigable waters'' in EPA's regulations.

■ 5. Revise § 120.2 to read as follows:

§ 120.2 Definitions.

For the purposes of this part, the following terms shall have the meanings indicated:

(a) *Waters of the United States* means:

(1) All waters which are currently used, or were used in the past, or may

be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds:

(i) That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1), (a)(2), (a)(5)(i), or (a)(6) of this section; or

(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition, other than impoundments of waters identified under paragraph (a)(3) of this section;

(5) Tributaries of waters identified in paragraph (a)(1), (2), (4), or (6) of this section:

(i) That are relatively permanent, standing or continuously flowing bodies of water; or

(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to the following waters (other than waters that are themselves wetlands):

(i) Waters identified in paragraph (a)(1), (2), or (6) of this section; or

(ii) Relatively permanent, standing, or continuously flowing bodies of water identified in paragraph (a)(4) or (a)(5)(i) of this section and with a continuous surface connection to such waters; or

(iii) Waters identified in paragraph (a)(4) or (a)(5)(ii) of this section when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section;

(8) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act are not waters of the United States; and

(9) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(b) *Wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) *Adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ''adjacent wetlands.''

(d) *High tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(e) *Ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(f) *Tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(g) *Significantly affect* means more than speculative or insubstantial effects on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section. When assessing whether the effect that the functions waters have on waters identified in paragraph (a)(1), (2), or (6) of this section is more than speculative or insubstantial, the agencies will consider:

(1) The distance from a water of the United States;

(2) The distance from a water identified in paragraph (a)(1), (2), or (6) of this section;

(3) Hydrologic factors, including shallow subsurface flow;

(4) The size, density, and/or number of waters that have been determined to be similarly situated; and

(5) Climatological variables such as temperature, rainfall, and snowpack.

[FR Doc. 2021–25601 Filed 12–6–21; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL REGISTER

Vol. 86 Tuesday,

No. 232 December 7, 2021

Part III

Department of Transportation

48 CFR Chapter 12

Streamline and Update the Department of Transportation Acquisition Regulation (TAR Case 2020–001); Proposed Rule

DEPARTMENT OF TRANSPORTATION

48 CFR Chapter 12

RIN 2105–AE26

Streamline and Update the Department of Transportation Acquisition Regulation (TAR Case 2020–001)

AGENCY: Department of Transportation.

ACTION: Proposed rule.

SUMMARY: The Department of Transportation (DOT) is proposing to amend and update its Transportation Acquisition Regulation (TAR). Under this initiative, all parts of the regulation were reviewed to streamline the regulation, to revise or remove policy that has been superseded by changes in the Federal Acquisition Regulation (FAR), to remove procedural guidance that is internal to DOT and move it to the Transportation Acquisition Manual (TAM) as appropriate, and to incorporate new regulations or policies required to implement or supplement the FAR to execute DOT's unique mission and responsibilities. The TAM will incorporate portions of the internal procedural guidance removed from the TAR, as well as other internal agency acquisition policy. This rulemaking revises the entire TAR.

DATES: Comments must be received on or February 7, 2022 to be considered in the formulation of the final rule.

ADDRESSES: Written comments may be submitted through *www.Regulations.gov;* by mail or hand-delivery to Docket Management System, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Please identify the docket number DOT–OST–2020–0017 at the beginning of your comments and indicate they are submitted in response to ''RIN 2105–AE26—Streamline and Update the Department of Transportation Acquisition Regulation (TAR Case 2020–001).'' All comments will be available on *www.Regulations.gov.* You may review the public docket containing comments to the proposed regulation in person in the Dockets Office, by calling the front desk at (202) 366–9317 or (202) 366–9826 to make an appointment. The Dockets Office is on the Green Line, Navy Yard-Ballpark Metro Stop at the Department of Transportation's address above. Upon arrival, please call the Front Desk at (202) 366–9317 or (202) 366–9826 to retrieve an escort.

FOR FURTHER INFORMATION CONTACT: Ms. LaWanda Morton-Chunn, Procurement Analyst, Acquisition Policy, Oversight & Business Strategies (M–61), Office of the Senior Procurement Executive (OSPE), Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, (202) 366–2267. This is not a toll-free telephone number.

SUPPLEMENTARY INFORMATION:

Background

This rulemaking is being taken under the authority of the Office of Federal Procurement Policy (OFPP) Act which provides the authority for an agency head to authorize the issuance of agency acquisition regulations that implement or supplement the FAR. The OFPP Act, as codified in 41 U.S.C. 1702, provides the authority for the FAR and for the issuance of agency acquisition regulations consistent with the FAR. This authority ensures that Government procurements are handled fairly and consistently, that the Government receives overall best value, and that the Government and contractors both operate under a known set of rules.

DOT has determined that changes to the TAR are necessary to align it to the FAR. DOT conducted a comprehensive review of the 2005 edition of the TAR with the goal of updating obsolete coverage, streamlining policies and procedures where applicable consistent with current guidance, and implementing new internal policies applicable to the DOT acquisition workforce. As a result, the TAR Integrated Project Team (IPT) under the direction of the Senior Procurement Executive and composed of representatives from DOT's operating administrations (OAs) and agency stakeholders, have participated in a complete revision of the TAR.

This proposed rule reflects changes made to implement and/or supplement the FAR. The TAR has been substantially revised and streamlined to update references to obsolete policies, procedures and organizations; and incorporate electronic links to references such as provisions of the FAR. Revisions to the TAR are necessary to incorporate additional policies, solicitation provisions, or contract clauses that implement and supplement the FAR to satisfy DOT mission needs, and to incorporate changes in dollar and approval thresholds, definitions, and DOT position titles and offices. The reissued TAR would correct inconsistencies, remove redundant and duplicate material already covered by the FAR, delete outdated material or information, and appropriately renumber TAR text, clauses and provisions where required to comport with FAR format, numbering and arrangement. All amendments, revisions, and removals have been reviewed and concurred with by a TAR revision team from each of the OAs and key agency stakeholders. This effort will create a 2021 edition of the TAR.

Currently, DOT is tracking a number of new FAR case proposed and final rules, as well as Executive Orders (E.O.s) and directives that the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) are reviewing for potential impact to the FAR system. The Executive Orders include E.O. 13985, ''Advancing Racial Equity and Support for Underserved Communities Through the Federal Government'' (86 FR 7009; Jan. 25, 2021), E.O. 14005, ''Ensuring the Future is Made in All of America by All of America's Workers'' (86 FR 7475; Jan. 28, 2021), and E.O. 14008, ''Tackling the Climate Crisis at Home and Abroad'' (86 FR 7619; Feb. 1, 2021). If and when FAR cases and proposed rules are drafted and FAR final rules are published, DOT intends to examine each of these for impact to the TAR and any updates that may be required to maintain the TAR. DOT is institutionalizing an ongoing, sustained TAR refreshment process, so that as FAR proposed and final rules, E.O.s, and other directives are issued, DOT will initiate new TAR cases to bring the regulation in alignment and to avoid duplication, as necessary. DOT will examine any FAR final rules that become effective and will take into consideration such FAR changes, as appropriate, in subsequent rulemakings. When needed, DOT will also consider use of an advanced notice of public rulemaking (ANPRM) to obtain public input as the agency implements rulemaking to address new and emerging issues that may be identified by the Councils or by DOT as a result of E.O.s and other directives. DOT will use this public input to inform how DOT implements such guidance in the TAR.

The TAR uses the regulatory structure and arrangement of the FAR, and headings and subject areas are broken up consistent with the FAR content. The TAR is divided into subchapters, parts (each of which covers a separate aspect of acquisition), subparts, sections, and subsections.

When Federal agencies acquire supplies and services using appropriated funds, the purchase is governed by the FAR, set forth at Title 48 Code of Federal Regulations (CFR), chapter 1, parts 1 through 53, and the agency regulations that implement and supplement the FAR. The TAR is set forth at Title 48 CFR, chapter 12, parts 1201 to 1253.

DOT is proposing to revise the TAR to add new policy or regulatory requirements and to remove any guidance that is applicable only to DOT's internal operating processes or procedures. Codified acquisition regulations may be amended and revised only through rulemaking.

Discussion and Analysis

DOT proposes to make the following changes to the TAR as a part of its updating and streamlining initiative. For procedural guidance cited below that is proposed to be deleted from the TAR, each section cited for removal has been considered for inclusion in DOT's internal agency operating procedures in accordance with FAR 1.301(a)(2). Similarly, delegations of authorities that are removed from the TAR will be included in the TAM as internal agency guidance.

We propose to revise the following parts of the TAR, 48 CFR chapter 12: Parts 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1211, 1213, 1215, 1216, 1217, 1219, 1222, 1223, 1227, 1228, 1231, 1232, 1233, 1235, 1236, 1237, 1239, 1242, 1246, 1247, 1252, and 1253.

We propose to add two parts to the TAR: 1209—Contractor Qualifications, and 1212—Acquisition of Commercial Items.

And, to streamline the TAR and improve its use and benefit to the public, small businesses, and the DOT acquisition workforce, we propose to remove the following two parts from the TAR: 1214—Sealed Bidding, and 1245—Government Property, and which would also move internal procedural guidance still applicable to the TAM, and/or remove outdated and unnecessary text or policy redundant to the FAR.

We propose to revise the authority citations cited in each TAR part to reflect as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

We propose to remove the reference to Public Law 113–76, the Consolidated Appropriations Act of 2014, because it is unnecessary to describe the authority of the Secretary of Transportation, as delegated to the Senior Procurement Executive, to issue agency specific acquisition regulations. The authority for agencies to issue agency-specific supplements to the FAR is already set forth in Title 41, Public Contracts and is the more common reference for Federal agency or departmental acquisition regulation authority.

We propose to remove the citation to 41 U.S.C. 418(b) as it is outdated.

We propose to include a reference to 41 U.S.C. 1121(c)(3). This provision states that the authority of an executive agency under another law to prescribe policies, regulations, procedures, and forms for procurement is subject to the authority conferred in section 1121, as well as other sections of Title 41.

We propose to add an authority citation for 41 U.S.C. 1702 which addresses the acquisition planning and management responsibilities of DOT's Senior Procurement Executive.

And we propose to revise the citation currently shown as ''(FAR) 48 CFR 1.3'' to reflect the standard FAR drafting convention citation of ''48 CFR 1.301–1.304.''

Any other proposed changes to authorities are shown under the individual parts below.

Throughout the proposed rule (including in the discussion of each proposed revised TAR part), whenever DOT indicates that it proposes to revise and update the citation(s) to the FAR and TAR, it is for the purpose of comporting with FAR Drafting Guidelines convention and style, and in accordance with FAR 1.105–2, Arrangement of regulations, that specifies how the FAR and by extension the TAR is to be referenced within the body of the regulation. References to revising and updating citations are to either correct the current citations, correct any FAR or TAR references to a more suitable citation, or add appropriate FAR or TAR citations where necessary.

TAR Part 1201—Federal Acquisition Regulations System

We propose to revise the authority citations for part 1201, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

In subpart 1201.1, Purpose, Authority, Issuance, we propose to revise 1201.101, Purpose, to expand discussion of how DOT's internal operational procedures are included in the TAM.

We propose to add 1201.102–70, DOT Statement of guiding principles for Department of Transportation Acquisition System, to provide the vision and mission of the TAR, as well as the role of the Office of the Senior Procurement Executive (OSPE) and its responsibility to establish DOT's acquisition policies and procedures.

We propose to revise 1201.104, Applicability, to update the citation to the FAR and TAR to comport with FAR Drafting Guidelines convention and style and in accordance with FAR 1.105–2, Arrangement of regulations, as well to remove an outdated agency organizational reference.

We propose to revise 1201.105, Issuance, and 1201.105–1, Publication and code arrangement, to update the citation to the FAR and TAR references, and to provide a new internet website link where the DOT's online version of the TAR can be accessed.

In 1201.105–2, Arrangement of regulations, we propose to also revise the FAR and TAR references, and to remove DOT Operating Administration (OA) acronyms which are unnecessary in this section and duplicative of the OA acronyms already provided in the TAR under 1202.101, Definitions. And at 1201.105–2(c)(3) we also propose to implement FAR 1.105–2(c)(3) by including more detail on the appropriate references and citations to the TAR for the public and the DOT acquisition workforce to ensure proper citation when referencing the TAR, as well as ensure appropriate usage within DOT specific clauses and provisions.

In 1201.105–3, Copies, we propose to revise the text to provide current methods of acquiring copies of the TAR and links to where DOT's posted version of the TAR and Transportation Acquisition Circulars (TACs) are located on the DOT website.

We propose to revise 1201.106, OMB approval under the Paperwork Reduction Act (PRA), to update current procedures on information collection and recordkeeping requirements to reflect that details concerning any OMB approved control numbers are contained in the TAM. This comports with the style convention benchmarked with other key FAR agency supplements including the Department of Defense Federal Acquisition Regulation Supplement (DFARS). This helps streamline the TAR to remove administrative details on DOT TAR-related OMB control numbers, when issued for PRA related information collections, which are available at *reginfo.gov*. The public may also conduct online searches of DOT-related OMB approved information collection requests (ICRs) at *reginfo.gov.*

In subpart 1201.2, Administration, we propose to revise section 1201.201–1, The two councils, to spell out the acronym SPE to reflect ''Senior Procurement Executive'' who is responsible for providing a DOT representative to the Civilian Agency Acquisition Council (CAAC).

In subpart 1201.3—Agency Acquisition Regulations, we propose to revise 1201.301, Policy, to make grammatical corrections to the text, as well as to revise citations to the FAR and TAR references. In addition, we propose to revise policy under this section regarding Operating

Administration (OA) acquisition regulations to clarify that the SPE approval is required for OA supplemental regulations to the TAR and to state that if approved by the SPE, a rule shall be prepared by the Office of the Senior Procurement Executive and published in the **Federal Register** in accordance with FAR 1.501.

In 1201.301–70, Amendment of TAR 48 CFR chapter 12, we propose to retitle the section to read: ''Amendment of the Transportation Acquisition Regulation'' to comport with FAR Drafting Convention style. We also propose to update the address for the OSPE where recommended changes to the TAR may be sent, to include providing a new email address, and to provide updated procedures to follow when submitting proposed TAR recommendations.

In 1201.301–71, Effective date, we propose to change the title of the section to read: ''Effective dates for Transportation Acquisition Circulars'' to more accurately reflect the subject matter covered. We also propose to revise the underlying text to provide clarity to the effective dates set forth in TACs to make clear that any new or revised provisions, clauses, procedures, or forms must be included in solicitations, contracts or modifications issued thereafter whenever effect dates indicate the policy or procedures are ''effective upon receipt,'' ''upon a specified date,'' or that changes set forth in the document are ''to be used upon receipt.'' We also propose to revise the text to clarify that unless expressly directed by statute or regulation, solicitations in process or negotiations that are complete when a TAC is issued are not required to include or insert new requirements, forms, clauses, or provisions. We also propose to provide that the chief of the contracting office must determine that it is in the best interest of the Government to exclude the new information and to set forth the requirement that a determination and findings must be included in the contract file to document that determination.

In 1201.301–72, TAC numbering, we propose to revise the title of the section to reflect ''Transportation Acquisition Circular numbering'' to more accurately reflect the subject matter covered. We also propose to revise the underlying text to spell out acronyms and update a cited example for the public.

In 1201.304, Agency control and compliance procedures, DOT is proposing to remove internal procedures that more appropriately belong in the TAM, and to correct TAR citation references.

In subpart 1201.470, Deviations from the FAR and TAR, we propose to revise the subpart number from 1201.4–70 to 1201.470 to reflect the updated numbering convention to indicate DOT is supplementing the FAR. In 1201.403, Individual deviations, and 1201.404, Class deviations, we propose to correct capitalization and add an acronym for the head of the contracting activity (HCA); make grammatical corrections to the text; and revise citations to FAR and TAR references.

In subpart 1201.6, Career Development, Contracting Authority and Responsibilities, we propose to revise the title to make a minor punctuation correction. We propose to add coverage under subpart 1201.6 by adding 1201.602–2, Responsibilities, which would specify that each DOT OA is responsible for establishing Contracting Officer's Representative (COR) nomination and appointment procedures consistent with the DOT Acquisition Workforce Career Development Program. This would delegate this responsibility to the appropriate organizational level to ensure the most effective and efficient oversight of the process. In 1201.602–3, Ratification of unauthorized commitments, DOT is making no change to the existing text that provides DOT policy that procurement decisions shall be made only by Government officials having authority to carry out such acquisitions.

In 1201.603, General, we propose to revise the text to expand on the responsibility delegated to each DOT OA for appointment of contracting officers that support the individual OA's mission. It establishes the requirement for each HCA to appoint a Chief of the Contracting Office (COCO) for each OA and further delegates to the HCA the authority to select, appoint, and terminate the appointment of contracting officers within the OA. It would also further specify that the HCA may re-delegate the contracting officer appointment authority to a level no lower than that of the COCO.

In subpart 1201.6 we also propose to add a new section 1201.604–70, Contract clause, which provides the prescription for contracting officers to insert the clause at 1252.201–70, Contracting Officer's Representative, in solicitations and contracts that are identified as other than firm-fixed-price, and to insert the clause as well in firm-fixed-price solicitations and contracts when appointment of a contracting officer's representative is anticipated.

TAR Part 1202—Definitions of Words and Terms

We propose to revise the authority citations for part 1202, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

In subpart 1202.1, Definitions, we propose to renumber section 1202.1 to read 1202.101 to accurately implement FAR 2.101.

In the newly renumbered 1202.101, Definitions, we propose to add two definitions reflecting frequently used new titles, and to revise existing definitions to correct citations, add acronyms, to reorder definitions alphabetically in the section, and to reorder current DOT Operating Administrations and existing components. We propose to add definitions for: Agency Advocate for Competition and Chief Financial Officer (CFO). We also propose to revise the definition for Head of the Contracting Activity (HCA) to identify an alternate HCA-level for the Great Lakes St. Lawrence Seaway Development Corporation (GLS) OA. All HCAs are members of the Senior Executive Service, except for the HCA within the GLS, who must be an individual no lower than one level above the COCO.

In subpart 1202.70, internet Links, we propose to revise the title of the subpart to read: ''Abbreviations'' as it would more accurately reflect the subject matter of the supplementary subpart since the text is revised; it would also remove a reference to citing corresponding internet addresses. The intent of the subpart is to provide commonly used abbreviations or acronyms rather than internal instructions on how to cite to the internet within the body of the TAR. In the revised text we are proposing to add sixteen commonly used abbreviations or acronyms in common use through the TAR to ensure a common understanding and usage when utilized within individual TAR parts.

TAR Part 1203—Improper Business Practices and Personal Conflicts of Interest

We propose to revise the authority citations for part 1203, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

In subpart 1203.1, Safeguards, we propose the revise the text at 1203.101–3, Agency regulations, to reference

DOT's Supplemental Standards of Ethical Conduct for Employees of the DOT at 5 CFR part 6001 and state that the standards apply to all DOT employees.

In subpart 1203.2, Contractor Gratuities to Government Personnel, we propose to revise 1203.203, Reporting suspected violations of the Gratuities clause, to correct punctuation and to provide the updated address where each DOT Operating Administrations' appointed Chief of the Contracting Office (COCO) is required to report suspected violations to the Office of the Inspector General. In 1203.204, Treatment of violations, we propose to revise the text to make one FAR reference citation revision.

In subpart 1203.3, Reports of Suspected Antitrust Violations, we propose to revise 1203.301, General, and 1203.303, Reporting suspected antitrust violations, to correct the TAR citations, and in 1203.303, we would remove the word ''also'' after ''shall'' in the first sentence so that it would read: ''The same procedures contained in 1203.203 shall be followed . . .''.

In subpart 1203.4, Contingent Fees, we propose to revise 1203.405, Misrepresentations or violations of the Covenant Against Contingent Fees, to clarify the procedures for reporting the attempted or actual exercise of improper influence, misrepresentation of a contingent fee arrangement, or other violations of the Covenant Against Contingent Fees.

In subpart 1203.5, Other Improper Business Practices, and 1203.502–2, Subcontractor kickbacks, we propose to add the statutory reference of 41 U.S.C. chapter 87, Kickbacks, to clarify DOT's procedures for reporting a violation of subcontractor kickbacks.

We propose to add language at subpart 1203.7, Voiding and Rescinding Contracts, in 1203.703, Authority, to state that the head of the contracting activity (HCA) is authorized by the Secretary of Transportation to declare void and rescind contracts and other transactions listed in Public Law 87–849 in which there has been a final conviction for bribery, conflict of interest, or any other violation of 18 U.S.C. 201–224, and that the Head of the Operating Administration is authorized to make determinations in accordance with FAR 3.703(b)(2).

We also propose to add coverage under subpart 1203.9, Whistleblower Protections for Contractor Employees, and in 203.906, Remedies, that would provide that the HCA is authorized to make determinations and take actions under FAR 3.906(a), and to take actions under FAR 3.906(b).

TAR Part 1204—Administrative Matters

We propose to revise the authority citations for part 1204, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

We propose to revise the title of the part to ''Administrative and Information Matters'' to comport with the FAR and reflect the updated title of the part.

In subpart 1204.1, Contract Execution, we are correcting the FAR reference in 1204.103 to a standard drafting convention.

We propose to add coverage in subpart 1204.5, Electronic Commerce in Contracting, and 1204.502, Policy, to state that DOT's policy preference is to use electronic signatures, records, and communication methods in lieu of paper transactions whenever practicable.

In subpart 1204.8, Government Contract Files, we propose to add section 1204.801, General, to state that the Chief of the Contracting Office (COCO) is designated as the head of each office performing contracting and contract administration functions and to state that the Chief Financial Officer (CFO) of the Operating Administration (OA) is designated as the head of the office performing paying functions.

We propose to add 1204.804, Closeout of contract files, as a section title with no text to provide ease of reference to the FAR implemented paragraph and subject matter.

In 1204.804–570, Supporting closeout documents, we propose to revise the section to update FAR citation references and to spell out a reference to a Department of Defense form, DD Form 882, Report of Inventions and Subcontracts, which is currently authorized for use by DOT and contractors to report inventions and subcontracts.

We propose to add subpart 1204.9, Taxpayer Identification Number Information, and 1204.903, Reporting contact information to the IRS, to authorize the Senior Procurement Executive (SPE) to report certain information, including Taxpayer Identification Number (TIN) data to the IRS.

We propose to add subpart 1204.13, Personal Identity Verification, including 1204.1301, Policy, to state that DOT follows National Institute of Standards and Technology (NIST) Federal Information Processing Standards (FIPS) Publication (PUB) Number 201–2, Personal Identity Verification (PIV) of Federal Employees and Contractors, or NIST issued successor publications, and OMB implementation guidance for personal identity verification, for all affected contractor and subcontractor personnel when contract performance requires contractors to have routine physical access to a Federally-controlled facility and/or routine logical access to a Departmental/Federally-controlled information system. We propose to also add 1204.1303, Contract clause, which would prescribe clause 1252.204–70, Contractor Personnel Security and Agency Access, in solicitations and contracts (including task orders, if appropriate), exceeding the micro-purchase threshold when contract performance requires contractors to have the access described.

We propose to add subpart 1204.17, Service Contracts Inventory, and 1204.1703, Reporting requirements, to identify DOT's agency reporting responsibilities and to set forth that the Office of the Senior Procurement Executive (OSPE) is responsible for compiling and submitting the DOT annual inventory to OMB and for posting and publishing the inventory consistent with FAR 4.1703(b)(2).

TAR Part 1205—Publicizing Contract Actions

We propose to revise the authority citations for part 1205, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

In subpart 1205.1, Dissemination of Information, we propose to revise 1205.101, Methods of disseminating information, to update the current address of the DOT Office of Small and Disadvantaged Business Utilization and to provide an updated website address where the Procurement Forecast summary is published.

In subpart 1205.4, Release of Information, we propose to revise 1205.402, General public, to clarify when DOT, upon request, will furnish the general public with information on proposed contracts and contract awards. We propose to add coverage at 1205.403, Requests from Members of Congress, which would authorize the head of the contracting activity (HCA) to approve the release of certain contract information to Members of Congress under FAR 5.403.

We propose to add coverage at subpart 1205.6, Publicizing Multi-Agency Use Contracts, and 1205.601, Governmentwide database of contracts, which would state the Operating Administration's (OA) head of the

contracting activity is responsible for complying with the requirements of FAR 5.601(b) to submit the cognizant OA's information to the referenced databases.

TAR Part 1206—Competition Requirements

We propose to revise the authority citations for part 1206, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

We propose to add coverage at subpart 1206.2, Full and Open Competition After Exclusion of Sources, and 1206.202, Establishing or maintaining alternative sources, which would delegate to the head of the contracting activity (HCA) the authority to exclude a particular source from a contract action to establish or maintain an alternative source under the conditions listed in FAR 6.202(a). The HCA would also be delegated authority to approve a Determination and Findings (D&F) in support of a contract action awarded under the authority of FAR 6.202(a).

We propose to add coverage at subpart 1206.3, Other Than Full and Open Competition. In 1206.302–1, Only one responsible source and no other supplies or services will satisfy agency requirements, the HCA would be authorized to determine that only specified makes and models of technical equipment and parts will satisfy the agency's needs under FAR 6.302–1(b)(4). In 1206.302–7, Public interest, the Secretary of DOT would reserve the authority to approve other than full and open competition when full and open competition is not in the public interest, and require the contracting officer to prepare a justification to support the determination and to include the justification and Secretary's determination in the file.

In subpart 1206.5, Advocates for Competition, we propose to revise the title of the subpart from ''Competition Advocates'' to read: ''Advocates for Competition'' to conform with the FAR. In 1206.501, Requirement, we would revise the section to update the title of the Agency Advocate for Competition which would remain the Deputy Assistant Secretary for Administration.

TAR Part 1207—Acquisition Planning

We propose to revise the authority citations for part 1207, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

In subpart 1207.3, Contractor Versus Government Performance, we propose to remove section 1207.302, General, in its entirely as unnecessary and to revise 1207.305, Solicitation provision and contract clause, to properly cite the TAR.

TAR Part 1209—Contractor Qualifications

We propose to revise the authority citations for part 1209, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

We propose to add TAR Part 1209, Contractor Qualifications, to include three subparts—1209.4, 1209.5, and 1209.6.

In subpart 1209.4, Debarment, Suspension, and Ineligibility, we propose to add coverage to provide DOT's policies and procedures on debarment, suspensions, and ineligibility and contractors' due process rights.

We propose to add 1209.403, Definitions, which would provide notice that DOT's Suspending and Debarring Official (SDO) means the individual designated responsibility as authorized by the Secretary of DOT to impose procurement suspensions and debarments, exclusions, and other related matters pursuant to FAR part 9. Each OA and the Office of the Secretary of Transportation (OST) has separately appointed SDOs. The SPE serves as the SDO for OST. A list of the OA appointed SDOs is maintained on the OSPE website. It also includes a definition for DOT Order 4200.5G as DOT's internal procedures for Suspension and Debarment, and Ineligibility Policies that implements TAR subpart 1209.4, to include the procedures described under the subpart. This section also provides a definition for the Senior Accountable Official (SAO) for Suspension and Debarment. At DOT, the SAO means the Senior Procurement Executive (SPE), as delegated by the Secretary of DOT, with responsibility for all suspensions and debarments within DOT. The SAO sets forth departmental standards for suspension and debarment policies and procedures, excluding the Office of Inspector General (OIG). We also propose to add a definition for Suspension and Debarment Coordinator (SDC) which means the program manager for the Suspension and Debarment Program at each OA and Office of the Secretary of Transportation. The SDC advises the SDO. The SDC coordinates all materials for presentation to the Suspending and Debarring Official for proposed suspension or debarment activities, enters information regarding any administrative agreement into the Federal Awardee Performance and Integrity Information System (FAPIIS), and enters information regarding suspensions and debarments into *SAM.gov*.

In 1209.405, Effect of listing, DOT is proposing coverage to provide notice that the SDO is authorized to make a written determination of compelling reasons to solicit offers from, award contracts to, or consent to subcontract with contractors debarred, suspended, or proposed for debarment that have an active exclusion record in the System for Award Management (SAM). We also add language that the SDO is authorized to make a written determination that a compelling reason exists to consider a bid or offer from a contractor who name or company is included on the listing in SAM, as well as to consider proposals, quotations, or offers received from any listed contractor that has an active exclusion record in SAM. It would provide that such proposals, quotations, or offers may be evaluated for award or included in the competitive range, and, if applicable and as authorized by the SDO, that discussions may conducted with a listed offeror as set forth in FAR 9.405(e)(3).

In 1209.405–1, Continuation of current contracts, we propose to add language that notwithstanding the suspension, proposed debarment, or debarment of a contractor, contracting officers may continue contracts or subcontracts in existence at the time the contractor was suspended, proposed for debarment, or debarred, if authorized by the SDO and the SDO makes a written determination of the same. The SDO would be delegated the authority on behalf of the Secretary of DOT to make the written determination required under FAR 9.405–1(b).

In 1209.405–2, Restrictions on subcontracting, we propose to add language that the SDO is delegated the authority on behalf of the Secretary of DOT to authorize contracting officers to consent to subcontracts with contractors debarred, suspended, or proposed for debarment as required by FAR 9.405–2(a).

In 1209.406, Debarment, and 1209.406–1, General, we propose to add language to identify the OST Suspending and Debarring Official (SDO) and OA-appointed SDO as the debarring official (see 1209.403) who is authorized to continue business

dealings between the agency and a contractor that is debarred or proposed for debarment under FAR 9.406–1(c), except under FAR 23.506(e). The SDO is required to make a written determination of compelling reasons justifying the continued business dealings. The SDO's authority would include debarments from contracts for the purchase of Federal personal property pursuant to the Federal Management Regulation at 41 CFR 102–117.295.

In 1209.406–3, Procedures, we propose to add language to set forth DOT's detailed procedures for debarments and to require that contracting officers and contracting activities shall comply with DOT Order 4200.5G, Suspension and Debarment, and Ineligibility Policies, and this subpart to include the following procedures—

Investigation and referral—who may refer an individual or contractor for debarment, including the responsibility of the SDO to refer matters to the DOT Office of Inspector General. It would require reporting information, to include specific information concerning the Operating Administration (OA) and activity making the report; the name and address of the contractor (including the members of the board, principal officers, partners, owners and managers), known affiliates, subsidiaries or parent firms; specific information concerning the contract (including description of supplies/services, amount, percentage of completion, amount paid to contractor, etc.) and the same information on affiliates' contracts; summary of evidence; the estimate of damage sustained by the Government; the recommendations of the contracting officer whether to suspend or debar the contractor, whether to apply limitations to the suspension or debarment, the period of any recommended debarment, and whether to continue any current contractors; and to provide copies of each pertinent contract, witness statements or affidavits, copies of investigative reports, certified copies of indictments, judgments, and sentencing actions; and any other appropriate exhibits or documents.

Decision-making process—the requirement for the SDC in conjunction with the contracting officer to prepare a recommendation and draft notice of proposed debarment for the SDO's consideration.

Notice of proposal to debar—the requirement for DOT to send the notice of proposed debarment to the last known address of the individual or contractor, the individual or contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other means that allows for confirmation of delivery to include by mail, to the last known street address, to the last known facsimile numbers, or to the last known email address. In the case of a contractor, the proposed procedures would permit sending the notice of proposed debarment to the contractor, any partner, principal, officer, director, owner or co-owner, or joint venture; to the contractor's identified counsel for purposes of administrative proceedings; or to the contractor's agent for the service of process. If sent by email, it shall be sent to the last known email addresses for all three, if known. Additionally, for each specifically named affiliate, the notice shall be sent to the affiliate itself, the affiliate's identified counsel for purposes of the administrative proceedings, or the affiliate's agency for service of process. If sent by email, it shall be sent to the last known email addresses for all three, if known. DOT's procedures would also require the appropriate parties are listed as excluded in the System for Award Management (SAM) in accordance with FAR 9.404.

Debarring official's decision—DOT's procedures would provide that if DOT does not receive a reply from the contractor within 30 calendar days after sending the notice of proposed debarment, the SDC shall prepare a recommendation in conjunction with the contracting officer and refer the case to the SDO for a decision on whether to debar based on the information available. The procedures also establish that If DOT receives a reply from the contractor within 30 calendar days after sending the notice of proposed debarment, the SDC in conjunction with the cognizant contracting officer shall consider the information in the reply before the SDC makes their recommendation to the SDO. The SDO reviews submittals, case documents and acts in accordance with DOT Order 4200.5G and the General DOT Guidelines for Suspension and Debarment, paragraph 12c. It would also provide for the contractor to have an opportunity to appear before the SDO to present information or argument, in person or through a representative and to supplement oral presentations with written information and argument. Further, it would provide that DOT shall conduct the proceeding in an informal manner and without requirement for a transcript. It also sets forth that if the SDO agrees there is a genuine dispute of material facts, the SDO shall conduct a fact-finding or refer the dispute to a designee for resolution pursuant to 1209.470, Fact-finding procedures. The SDC shall provide the contractor or individual the disputed material fact(s). If the proposed debarment action is based on a conviction or civil judgment, or if there are no disputes over material facts, or if any disputes over material facts have been resolved pursuant to 1209.470, Fact-finding procedures, the SDO would be required to make a decision on the basis of all information available including any written findings of fact submitted by the designated fact finder, and oral or written arguments presented or submitted to the SDO by the contractor.

Notice of debarring official's decision—DOT's procedures would provide that for actions processed under FAR 9.406 where no suspension is in place and where a fact-finding proceeding is not required, DOT would make the final decision on the proposed debarment within 30 business days after receipt of any information and argument submitted by the contractor, unless the SDO extends this period for good cause. The SDO may use flexible procedures to allow a contractor to present matters in opposition via telephone of internet.

In 1209.406–4, Period of debarment, we propose to add coverage that the SDC in conjunction with the contracting officer may submit a recommendation to the SDO to extend the period of debarment imposed under FAR 9.406, amend its scope, or reduce the period of debarment.

In 1209.407, Suspension, and 1209.407–1, General, we propose to add language to state that the SDO is the suspending official under the Federal Management Regulation at 41 CFR 102–117.295 (see FAR 9.407–1) and to authorize the SDO to make a written determination of compelling reasons justifying continuing business dealings between the agency and a contractor that is suspended.

In 1209.407–3, Procedures, we propose to add coverage to require that contracting officers and contracting activities shall comply with DOT Order 4200.5G, Suspension and Debarment, and Ineligibility Policies, and this subpart to include the following procedures—

Investigation and referral—who may refer an individual or contractor for suspension, including the responsibility of the SDC, and the SDO's responsibility to refer matters involving possible criminal or fraudulent activities, to the DOT Office of Inspector General.

Decision-making process—the requirement for the SDC to prepare a recommendation and draft notice of

suspension for the SDO's consideration. The SDC creates a case in the DOT Suspension and Debarment Tracking System as set forth in DOT Order 4200.5G.

Notice of suspension—the requirement for DOT to send the notice of suspension to the last known address of the individual or contractor, the individual or contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other means that allows for confirmation of delivery, to include by mail, to the last known street address, to the last known facsimile numbers, or to the last known email address. In the case of a contractor, the proposed procedures would permit sending the notice of suspension to the contractor, any partner, principal, officer, director, owner or co-owner, or joint venture; to the contractor's identified counsel for purposes of administrative proceedings; or to the contractor's agent for the service of process. If sent by email, it shall be sent to the last known email addresses for all three, if known. Additionally, for each specifically named affiliate, the notice shall be sent to the affiliate itself, the affiliate's identified counsel for purposes of the administrative proceedings, or the affiliate's agency for service of process. If sent by email, it shall be sent to the last known email addresses for all three, if known. DOT's procedures would also require the appropriate parties to be listed as excluded in SAM in accordance with FAR 9.404. The procedures would provide, upon request of the contractor suspended, an opportunity for the contractor to appear before the SDO to present information or argument, in person or through a representative. The contractor may supplement the oral presentation with written information and argument. Further, it would provide that DOT shall conduct the proceeding in an informal manner and without requirement for a transcript. It also sets forth that if the SDO finds the contractor's or individual's submission in opposition to the suspension raises a genuine dispute over facts material to the suspension, or for the purposes of FAR 9.407–3(b)(2), Decision making process, in actions not based on an indictment, the SDC shall submit to the SDO the information establishing the dispute of material facts. If the SDO agrees there is a genuine dispute of material facts, the SDO would be required to conduct a fact-finding proceeding or refer the dispute to a designee for resolution pursuant to 1209.470, Fact-finding procedures. The SDC would also be required to provide the contractor or individual the disputed material fact(s) in advance of the fact-finding proceeding in the event the contractor would like to add to the record prior to the decision of the SDO. The procedures would also provide that if the suspension is based on a conviction or civil judgment, or if there are no disputes over material facts, or if any disputes over material facts have been resolved pursuant to 1209.470, Fact-finding procedures, the SDO would be required to make a decision on the basis of all information available including any written findings of fact submitted by the designated fact finder, and oral or written arguments presented or submitted by the contractor. The contractor would be permitted to supplement the oral presentation with written information and argument. The proceeding would be conducted in an informal manner and without requirement for a transcript.

Suspending official's decision—DOT's procedures would provide that the SDO may appoint a designee to conduct a fact-finding and provide a report containing the results of the fact-finding. The SDO reviews submittals, case documents and acts in accordance with DOT Order 4200.5G and the General DOT Guidelines for Suspension and Debarment, paragraph 12c. The SDO may use flexible procedures to allow a contractor to present matters in opposition via telephone of internet. The SDO would be required to notify the contractor of the decision whether to impose a suspension.

In 1209.470, Fact-finding procedures, we propose to add language to provide DOT's procedures which would be used to resolve genuine disputes of material fact pursuant to 1209.406–3 and 1209.407–3 of proposed part 1209, for both debarments and suspensions. This section further sets forth coverage on—

Date for fact-finding hearing—normally to be held within 30 business days after the SDC, on behalf of the SDO as the designated debarring official, notifies the contractor or individual that the SDO has determined that a genuine dispute of material fact(s) exists.

Opportunity to present evidence—both the Government's representative and the contractor would have an opportunity to present evidence relevant to the genuine dispute(s) of material fact identified by the SDO. The contractor or individual would be permitted to appear in person or through counsel at the fact-finding hearing and should address all defenses, contested facts, admissions, remedial actions taken, and, if a proposal to debar is involved, mitigating and aggravating factors. The contractor or individual would be able to submit documentary evidence, present witnesses, and confront any person the agency presents.

Testimony of witnesses—would permit witnesses to testify in person, and sets forth that such witnesses would be subject to cross-examination. The fact-finding proceeding is an informal evidentiary hearing, during which the Rules of Evidence and Civil Procedure do not apply. Hearsay evidence would be permitted to be presented and would be given appropriate weight by the fact-finder.

Transcripts of proceedings—the hearings would be transcribed and a copy of the transcript would be required to be made available, at cost, to the contractor upon request, unless the contractor and the factfinder, by mutual agreement, waive the requirement for a transcript.

Fact-finder determination—the fact-finder shall prepare written finding(s) of fact by a preponderance of the evidence for proposed debarments, and by adequate evidence for suspensions. A copy of the findings of fact would be required to be provided to the SDO, the Government's representative, and the contractor or individual. The SDO would be required to consider the written findings of fact when making their decision regarding the suspension or proposed debarment.

A new section 1209.471, Appeals, is added to specify that based on the decision of the SDO, the respondent may elect to request reconsideration of the SDO's final decision to debar or to request modification of the debarment by reducing the time period or narrowing the scope of the debarment. The request must be in writing and supporting with documentation. A suspended or debarred individual or entity may also seek judicial review after exhausting all administrative remedies.

In subpart 1209.5, Organizational and Consultant Conflicts of Interest, and 1209.507, Solicitation provisions and contract clause, and 1209.507–270, Contract clauses, we propose to add a prescription for two clauses—1252.209–70, Organizational and Consultant Conflicts of Interest, and 1252.209–71, Limitation of Future Contracting. These are required to provide notice to contractors of the requirement to identify and mitigate potential organizational and consultant conflicts of interest, as well as to provide notice to contractors that an acquisition may give rise to a potential organizational conflict of interest and to set forth

restrictions on future contracting that pertains to such conflict(s).

In subpart 1209.6, Contractor Team Arrangements, and 1209.602, General, we propose to add coverage that requires offerors to disclose teaming arrangements as a part of any offer and for contracting officers to evaluate such teaming arrangements as a part of overall prime contractor responsibility, as well as under the technical and/or management approach evaluation factor where applicable. This provides clarity to DOT on the composition of teaming arrangements when offerors are proposing on DOT solicitations and ensures the Government has the necessary information to consider when conducting proposal evaluations.

TAR Part 1211—Describing Agency Needs

We propose to revise the authority citations for part 1211, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

We propose to remove subpart 1211.11, Selecting and Developing Requirements, and 1211.101, Order of precedence for requirements documents, and move any current required coverage to the TAM as internal DOT procedural guidance not having a significant effect beyond the internal operating procedures of DOT.

We propose to revise subpart 1211.2, Using and Maintaining Requirements Documents, by adding the section title 1211.204, Solicitation provisions and contract clauses, with no text, and by revising the title of 1211.204–70, Solicitation provisions and contract clauses, to read ''Contract clauses'' to more appropriately describe the content.

TAR Part 1212—Acquisition of Commercial Items

We propose to revise the authority citations for part 1212, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

We propose to add coverage at TAR part 12, Acquisition of Commercial Items, and 1212.301, Solicitation provisions and contract clauses for the acquisition of commercial items. The section would authorize the use of specific DOT provisions and clauses in acquisitions of commercial items when required by the individual provision or clause prescription. This authorizes DOT contracting officers use of unique DOT provisions and clauses for the acquisition of commercial items, as prescribed elsewhere in the TAR, when required to protect the Government's interests in accordance with FAR 12.301(f).

TAR Part 1213—Simplified Acquisition Procedures

We propose to revise the authority citations for part 1213, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

We propose to revise subpart 1213.71 by redesignating subpart 1213.71 to 1213.70, and retaining the title, ''Department of Transportation Procedures for Acquiring Training Services.'' We propose to redesignate and renumber section 1213.7100 and 1213.7101 to 1213.7000, Applicability, and 1213.7001, Solicitation provision and contract clause, respectively. We propose to revise the text at the renumbered 1213.7000, to update it to correct TAR citations in accordance with standard FAR drafting conventions. At 1213.7001, we propose to revise the text to remove the notice regarding the certification of training requirements as an internal DOT determination that is not appropriate to include within the body of the TAR, and to correct TAR citations to standard FAR drafting conventions.

TAR Part 1214—Sealed Bidding

We propose to remove TAR part 1214, Sealed Bidding, and Reserve the part as the coverage currently contained at 1214.302, Bid submission, contains obsolete practices that are no longer required and for which the FAR has adequate coverage.

TAR Part 1215—Contracting by Negotiation

We propose to revise the authority citations for part 1215, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

We propose to remove subpart 1215.2, Solicitation and Receipt of Proposals and Information, and 1215.207, Handling proposals and information, as internal DOT procedural guidance not having a significant effect beyond the internal operating procedures of DOT. Any coverage would be considered and revised, as appropriate, for inclusion in the TAM.

In subpart 1215.6, Unsolicited Proposals, we propose to remove the coverage at 1215.602, Policy, as unnecessary.

In 1215.603, General, we propose to revise the text to remove the first sentence as redundant to the FAR and to update the text to provide clarity and to correct TAR citations to standard FAR drafting conventions.

We propose to revise 1215.604, Agency points of contact, to remove the existing paragraph (a) as unnecessary and redundant, and to update the text in the current paragraph (b), renumber it as paragraph (a), and provide an updated web address for interested parties to learn more about DOT and the mission of each Operating Administration.

We also propose to revise 1215.606, Agency procedures, to remove paragraph (a) as internal DOT procedural guidance not having a significant effect beyond the internal operating procedures of DOT. Any coverage would be considered and revised, as appropriate, for inclusion in the TAM. We propose to redesignate paragraph (b) as undesignated and to remove the last sentence that pertains only to DOT employees who might receive an unsolicited proposal to forward it to the contracting office. As this is internal DOT guidance, it is would be removed from the TAR and considered for inclusion in the TAM. Lastly, we've added more pertinent information for the public that the assigned DOT contracting office will review and evaluate the proposal within 30 calendar days, if practicable, in accordance with FAR 15.606–1, Receipt and initial review, to inform the offeror of the reasons for rejection and the proposed disposition of the unsolicited proposal.

Finally, we propose to remove 1215.606–1, Receipt and initial review, as internal DOT procedural guidance not having a significant effect beyond the internal operating procedures of DOT. Notice to the public under 1215.606 provides DOT's target to review the proposal within 30 calendar days, and to inform the offeror as noted above. Any coverage would be considered and revised, as appropriate, for inclusion in the TAM.

TAR Part 1216—Types of Contracts

We propose to revise the authority citations for part 1216, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

In subpart 1216.2, Fixed-Price Contracts, we propose to revise 1216.203–70, Solicitation provision, to

correct the TAR citation to standard FAR drafting conventions.

In subpart 1216.4, Incentive Contracts, we propose to revise 1216.406–70, DOT contract clauses, to correct TAR citations to standard FAR drafting conventions, and to revise the title of clause 1252.216–72 in paragraph (b) from ''Performance Evaluation Plan'' to ''Award Fee Plan'' to align with the new revised clause title set forth in part 1252.

In subpart 1216.5, Indefinite-Delivery Contracts, we propose to revise 1216.505, Ordering, to renumber the implementing paragraph from (b)(5) to (b)(8), and to update the title for the Advocate for Competition to comport with the FAR.

In subpart 1216.6, Time-and-Materials, Labor-Hour, and Letter Contracts, we propose to revise 1216.603–4, Contract clauses, to correct the TAR citation to standard FAR drafting conventions.

TAR Part 1217—Special Contracting Methods

We propose to revise the authority citations for part 1217, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

In subpart 1217.70, we propose to correct the title to add a hyphen between ''Fixed'' and ''Price'' to read: Fixed-Price Contracts for Vessel Repair, Alteration or Conversion.

We propose to revise 1217.7001, Clauses, to correct TAR citations to standard FAR drafting conventions, and to revise paragraph (b) to identify the title of each prescribed clause to be used in solicitations and contracts for vessel repair, alteration or conversion. We also propose to revise paragraph (c) to identify the title of the clause, and to remove paragraphs (d) and (e) as duplicative and unnecessary.

TAR Part 1219—Small Business Programs

We propose to revise the authority citations for part 1219, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

We propose to revise the part to substantially update to current DOT policies and procedures regarding implementation of DOT's small business programs. In subpart 1219.2, Policies, we propose to revise 1219.201, General policy, paragraph (c), to clarify that the Director, Office of Small and Disadvantaged Business Utilization (OSDBU) shall be a member of the Senior Executive Service and appointed by the Secretary of DOT. And we propose to add paragraph (d) to implement FAR 19.201(d) to specify that the responsible HCA for each OA shall appoint a Small Business Specialist (SBS) to carry out the duties and functions specified in the FAR. And we provide a link to DOT's OSDBU website that contains DOT's list of SBS.

We propose to add coverage at 1219.201–70, Procurement goals for small business, to supplement the FAR at FAR 1219.201 and require that each DOT contracting activity in consultation with the OSDBU on behalf of the Secretary establish annual goals for opportunities for small businesses to participate in the activity's contracts and subcontracts.

At 1219.202, Specific policies, we propose to add policy that the OSDBU is responsible for reviewing procurement strategies and subcontracting efforts, establishing review thresholds, and making recommendations to further the implementation of part 1219.

We propose to add coverage at 1219.202–70, Procurement Forecast, to provide information to the public and to provide the website where DOT's Operating Administrations will publish procurement forecasts annually.

We propose to add coverage at subpart 1219.4, Cooperation with the Small Business Administration, and 1219.401, General, to implement DOT's policy that the OSDBU Director will be the primary point of contact with the U.S. Small Business Administration and facilitate the formulation of policies to ensure maximum practicable opportunities are available to small business concerns in prime and subcontracting opportunities.

We propose to add subpart 1219.5, Set-Asides for Small Business, and 1219.501, General; 1219.502–8, Rejecting Small Business Administration recommendations; and 1219.502–9, Withdrawing or modifying small business set-asides. This new proposed language would implement the FAR and DOT's requirement that set-aside decisions will be documented utilizing DOT Form 4250.1, and to require contracting officers to coordinate with the OSDBU if they reject a recommendation of the Small Business Administration (SBA) procurement center representative. It would also specify the procedures to be followed when withdrawing or modifying small business set-asides, including providing appropriate notice to the small business specialist, the SBA procurement center representative, and the OSDBU. Additionally, the new language would specify the role of the Chief of the Contracting Office (COCO) if the agency small business representative does not agree to a withdrawal or modification of a set-aside.

We propose to add coverage at subpart 1219.7, The Small Business Subcontracting Program, and 1219.705, Responsibilities of the contracting officer under the subcontracting assistance program, and 1219.705–6, Post-award responsibilities of the contracting officer, to identify that the DOT OSDBU is responsible for acknowledging receipt of, or rejecting, the Summary Subcontracting Report (SSR) in the Electronic Subcontracting Reporting System (eSRS).

In subpart 1219.8, Contracting with the Small Business Administration (The 8(a) Program), we propose to revise 1219.800, General, to update paragraph (f) with current DOT information on the SBA and DOT Partnership Agreement delegating SBA's contract execution and administrative functions to DOT and requiring that contracting officers shall follow the alternate procedures in this subpart, as applicable, to award 8(a) contracts under the partnership agreement.

We propose to remove 1219.811–3, Contract clauses, and 1219.812, Contract administration, as obsolete and redundant to existing FAR coverage.

We propose to remove subpart 1219.10, Small Business Competitiveness Demonstration Program, and 1219.1003, Purpose, and 1219.1005, Applicability, and the Appendix A in the part as obsolete and unnecessary coverage.

We propose to add coverage at subpart 1219.70, DOT Mentor-Protégé Program, and 1219.7000, General, to provide DOT's policies and procedures for participation in DOT's Mentor-Protégé Program, a current website for the DOT OSDBU, the office that administers the program on behalf of the Secretary.

TAR Part 1222—Application of Labor Laws to Government Acquisitions

We propose to revise the authority citations for part 1222, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

We propose to revise coverage under subpart 1222.1, Basic Labor Policies, and specifically 1222.101–70, Admittance of union representatives to DOT installations, paragraph (b), to

make clear that whenever a union representative is denied entry to a work site, the person denying entry shall make a written report to the labor advisor for the applicable Operating Administration (OA) or to the DOT labor coordinator, the Office of General Counsel, Office of General Law, within the Office of the Secretary of Transportation. The requirement remains the same as previously codified, but the revision more clearly identifies the labor advisor of the OA at the beginning of the list of DOT officials who are required to be notified in writing by the Government official who denies entry to the work site.

We propose to revise 1222.101–71, Contract clauses, to correct TAR citations to standard FAR drafting conventions.

We propose to remove in its entirety subpart 1222.4, Labor Standards for Contracts Involving Construction, and the underlying sections 1222.406, Administration and enforcement, and 1222.406–9, Withholding from or suspension of contract payments. This subpart contains internal operating procedures that will be revised and updated and moved to the TAM, to include removal of the use of DOT Form 4220.7, Employee Claim for Wage Restitution. DOT proposes removal because this form would not be processed through a contractor but be handled outside of the TAR and in accordance with DOL rules.

We propose to add subpart 1222.8, Equal Employment Opportunity, and section 1222.810–70, Contract clause. In 1222.810–70, the clause 1252.222–72, Contractor Cooperation in Equal Employment Opportunity and Anti-Harassment Investigations, is prescribed to provide definitions of terms to provide common meaning, and to require contractors to cooperate with DOT in investigations of Equal Employment Opportunity (EEO) and Anti-Harassment complaints after referral to the OFCCP and/or the Equal Employment Opportunity Commission (EEOC).

TAR Part 1223—Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace

We propose to revise the authority citations for part 1223, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

In subpart 1223.3, Hazardous Material Identification and Material Safety Data, we propose to revise 1223.303, Contract clause, to correct the TAR citation to standard FAR drafting conventions.

In subpart 1223.70, Safety Requirements for Selected DOT Contracts, we propose to revise 1223.7000, Contract clauses, to correct TAR citations to standard FAR drafting conventions, and to update the clause to indicate that DOT regulations and any OA specific procedures apply.

TAR Part 1224—Protection of Privacy and Freedom of Information

We propose to revise the authority citations for part 1224, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

In subpart 1224.1, Protection of Individual Privacy, we propose to revise 1224.102–70, General, to update for clarity DOT's general policies on records maintained in a Privacy Act system of records and the prohibition against release except by the Government or at the Government's direction, irrespective of whether the Government or a contractor acting on behalf of the Government is maintaining the records.

In subpart 1224.2, Freedom of Information Act, we propose to revise 1224.203, Policy, to provide an updated internet address for DOT's FOIA website.

TAR Part 1227—Patents, Data, and Copyrights

We propose to revise the authority citations for part 1227, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

In subpart 1227.3, Patent Rights Under Government Contracts, and 1227.304, Procedures, we propose to revise the underlying section 1227.304–5, Appeals, to renumber it to 1227.304–4 to align with the FAR. We also propose to revise the text to make it clearer regarding which requirements or actions apply to contractors; to update and correct TAR citations to standard FAR drafting conventions; and to cite the correct FAR 27.304–4, Appeals, citation in lieu of FAR 27.304–5.

In 1227.305, Administration of patent rights clauses, we propose to revise the underlying section 1227.305–4, Conveyance of invention rights acquired by the Government, to retitle it correctly as, ''Protection of invention disclosures,'' to align with the FAR, and to make a minor revision to incorporate the word ''Department of Defense'' before the referenced DD Form 882, Report of Inventions and Subcontracts, which DOT permits contractors to use to report inventions made during contract performance and at contract completion.

TAR Part 1228—Bonds and Insurance

We propose to revise the authority citations for part 1228, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

In subpart 1228.1, Bonds and Other Financial Protections, we proposed to remove 1228.106–1, Bonds and bond related forms, in its entirety as coverage is unnecessary as it is duplicative of current FAR requirements.

We propose to revise 1228.106–470, Contract clause—notification of payment bond protection, which would revise the title to more appropriately reflect FAR drafting convention and to move it up in placement earlier in the subpart in lieu of its current placement after 1228.106–70 and 1228.106–71. This section prescribes a clause at 1252.228–74, Notification of Payment Bond Protection, in solicitations and contracts when payment bonds are required.

We also propose to add 1228.106–6, Furnishing information, which provides notice to the public that the requirement for a copy of the contract, when furnishing a copy of a payment bond and contract in accordance with FAR 28.106–6(b), may be satisfied by furnishing a .pdf of the contract's first pages which show the contract number and date, the contractor's name and signature, the contracting officer's signature, and the description of the contract work. It also provides notice that the fee for furnishing the requested certified copies shall be determined in accordance with the DOT Freedom of Information Act regulation, 49 CFR part 7, and 1224.203.

We propose to remove in its entirety the previous 1228.106–6, Furnishing of information, as internal operating procedures for contracting officers that will be revised and updated and moved to the TAM.

We propose to revise 1228.106–70, Execution and administration of bonds, to make a minor administrative punctuation edit. We also propose to revise 1228.106–71, Performance and payment bonds for certain contracts, and 1228.106–7100, Waiver. The revisions would amend paragraph (a) to update the name and title of cited Bond statute (formerly Miller Act), and to remove unnecessary additional citations. The revisions would also

remove paragraph (b) in its entirety as internal operating procedures intended only for contracting officers that are unnecessary to include in the TAR, but will be examined and revised as appropriate and moved to the TAM if necessary.

We propose to revise 1228.106–7101, Exception, to correct TAR citations to standard FAR drafting conventions.

We also propose to move the previously titled 1228.106–470, Contract clause, in the order of the subpart as noted above, and to revise the title to Contract clause—notification of payment bond protection.

In subpart 1228.3, Insurance, we propose to revise 1228.306, Insurance under fixed-price contracts, and the underlying section 1228.306–70, Contracts for lease of aircraft, which would make a number of administrative corrections and substantive updates to provide clarity, to include the following:

- Corrections to TAR citations to standard FAR drafting conventions;
- Minor corrections to grammar and punctuation;
- Removal of the first sentence in paragraph (b) as unnecessary;
- Removal of paragraph (c) in its entirety;
- Renumbering paragraph (d) as (b) and by adding correct ancillary subparagraph numbers in accordance with FAR drafting convention;
- Adding a new paragraph (c) to provide more specific prescription information concerning how the use of clause 1252.228–72, Risk and Indemnities, as prescribed in a new paragraph (d), shall be used in short-term or intermittent-use leases, to protect the Government for damage caused by operation of the aircraft in such short-term leases;
- Adding a new paragraph (d), which specifically would prescribe clause 1252.228–72, Risk and Indemnities, in contracts for out-service flight training or lease of aircraft when the Government will have exclusive use of the aircraft for a period of less than thirty days; and
- Adding a new paragraph (e) that would require that for any contract for out-service flight training, the contracting officer shall include a clause stating substantially that the contractor's personnel shall always, during the course of training, be in command of the aircraft and that at no time shall other personnel be permitted to take command of the aircraft. This would also require that during the performance of a contract for out-service flight training for DOT, whether the instruction to DOT personnel is in leased, contractor-provided, or Government-provided aircraft, contractor personnel shall always, during the entirety of the course of training and operation of the aircraft, remain in command of the aircraft. At no time shall Government personnel or other personnel be permitted to take command of the aircraft. This prescribes the clause at 1252.228–73, Command of Aircraft, in any solicitation and contract for out-service flight training, whether performed utilizing DOT-leased aircraft, contractor-provided aircraft, or Government-provided aircraft.

We propose to revise 1228.307–1, Group insurance plans, to clarify that contractors shall provide plans required by FAR 28.307–1(a) to the contracting officer for approval, and to remove the last sentence as outdated guidance and more appropriate as internal operating procedures and if needed, would be moved to the TAM.

We also propose to revise 1228.311–1, Contract clause, to correct the TAR citation to standard FAR drafting convention.

TAR Part 1231—Contract Cost Principles and Procedures

We propose to revise the authority citations for part 1231, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

In subpart 1231.2, Contracts with Commercial Organizations, we propose to revise 1231.205–32, Precontract costs, to renumber the section as 1231.205–3270 to more accurately reflect FAR drafting convention and that the TAR is supplementing FAR 31.205–32, and to revise the title to read: ''Precontract costs—incurrence of costs.'' We also propose to make minor edits to clarify the language, incorporate use of active voice, and to correct the TAR citation to standard FAR drafting convention.

TAR Part 1232—Contract Funding

We propose to revise the authority citations for part 1232, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

We propose to revise TAR part 1232 overall to add two new subparts—1232.7 and 1232.70, and to redesignate, renumber and retitle the existing subpart 1232.70 as 1232.9, as discussed further in this section of the preamble.

We propose to add subpart 1232.7, Contract Funding, to address needed guidance for contracting officers and the public as to when incremental funding is available for use during a Continuing Resolution (CR), with the following underlying sections:

1232.770, Incremental funding during a Continuing Resolution, as a section heading only with no text.

1232.770–1, Scope of section, to outline the scope of the subpart for using incremental funding for fixed-price, time-and-material and labor-hour contracts during a period in which funds are provided to the DOT and its operating administrations under a CR, and to authorize HCAs to develop necessary supplemental internal procedures and guidance to advise offerors and contractors of such policies and procedures.

1232.770–2, Definition, would provide a common definition for use in the subpart of ''Continuing Resolution.''

1232.770–3, General, provides general policy regarding what a CR provides funding for and general information.

1232.770–4, Policy, would provide DOT's policy for when a fixed-price, time-and-materials or labor-hour contract or order for commercial or non-commercial severable services may be incrementally funded.

1232.770–5, Limitations, would provide that the policy does not apply to contract actions using funding that are not covered by the CR.

1232.770–6, Procedures, details certain procedures that apply when such incremental funding is authorized, and actions that the contracting officer is required to take if a contract will receive no further funds in accordance with the clause 1252.232–71, Limitation of Government's Obligation.

1232.770–7, Clause, prescribes that contracting officers shall insert the clause at 1252.232–71, Limitation of Government's Obligation in certain solicitations and contracts, and that the contracting officer is required to insert information required in paragraphs (a) and (b) of the clause. It also would permit the contracting officer to revise certain paragraphs of the clause, as well as varying notification periods and percentages for when contractors must make certain notification to the Government. The 30-day period specified in the standard clause may be varied from up to 90 days, and the 75 percent specified in the standard clause may be varied from 75 up to 85 percent.

We propose to redesignate, renumber and retitle subpart 1232.70, Contract Payments, as subpart 1232.9, Prompt Payment, to align with the FAR. We propose to revise 1232.7002, Invoice and voucher review and approval, to renumber and retitle it to read: 1232.905–70, Payment documentation and process—form of invoice, to align it

properly under FAR 32.905 as supplemental agency-specific policy. We also propose to revise the text to cite a current FAR citation, and to retitle the two Appendices as follows: ''Appendix A to Part 1232, Instructions for Completing the SF 1034,'' to ''Table 1232–1, Instructions for Completing the SF 1034,'' and ''Appendix B to Part 1232, Instructions for Completing the SF 1035,'' to ''Table 1232–2, Instructions for Completing the SF 1035,'' respectively. The instructions in the tables are largely the same as previously codified with only minor editorial, administrative, or formatting changes.

We propose to add subpart 1232.70, Electronic Invoicing Requirements, to provide DOT's policies and procedures for submitting and processing payment requests in electronic form, with the following underlying sections:

1232.7000, Scope of subpart.

1232.7001, Definition, to provide a common meaning to the definition of ''payment request.''

1232.7002, Electronic payment requests—invoices, which would outline DOT's requirements and exceptions for when payments must be submitted electronically, alternate procedures, and details on the DOT electronic invoicing system—DELPHI eInvoicing and the specific *iSupplier* module.

1232.7003, Payment system registration, which provides the requirement for contractors to submit payment requests in electronic form unless directed by the contracting officer. It would also specifically exempt purchases paid with a Governmentwide commercial purchase card.

1232.7003–1, Electronic authentication, which provides information on utilizing the General Services Administration (GSA) credentialing platform, *www.login.gov.*

1232.7004, Waivers, which provides a website for vendors to access DOT's DELPHI eInvoicing system for procedures or directs them to contact the Contracting Officer's Representative for procedures.

1232.7005, Contract clause, which prescribes clause 1252.232–70, Electronic Submission of Payment Requests, in solicitations and contracts exceeding the micro-purchase threshold, except those for which the contracting officer has directed or approved otherwise under 1232.7002, and those paid with a Governmentwide commercial purchase card.

TAR Part 1233—Protests, Disputes, and Appeals

We propose to revise the authority citations for part 1233, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

In subpart 1233.2, Disputes and Appeals, we propose to revise 1233.211, Contracting officer's decision, to remove the existing text in its entirety as outdated since DOT no longer has its own Board of Contract Appeals. The Civilian Board of Contract Appeals (CBCA) was established on January 6, 2006 by the National Defense Authorization Act for FY2006, Public Law 109–163. Section 847 of the Act vests the CBCA with jurisdiction over claims that previously would have been filed before the boards of contract appeals of individual agencies. We propose to add new coverage at paragraph (a)(4)(v), specifying contracting officer's actions on claims, including a tailored statement for DOT contracting officers to insert in the contracting officer's decision, and where to file, a key CBCA website providing information on how to file, and alternative procedures for small claims, those involving a small business concern, or accelerated procedures for claims of $100,000 or less. This substantially follows that set forth in FAR 33.211(a)(4)(v), but provides specific language reflecting the fact that DOT utilizes the CBCA.

We propose to revise 1233.214, Alternative dispute resolution (ADR), to—

- Make minor administrative, grammatical, or formatting revisions for clarity;
- Retain only the sentence, ''In resolution of a formal claim,'' under paragraph (c)(3), and relocate the remainder of the text to a new paragraph (d)(1);
- Require in the new paragraph (d)(1) that for all matters filed with the CBCA, the CBCA ADR procedures shall be used; and
- Renumber paragraph (d) as (d)(2).

TAR Part 1235—Research and Development Contracting

We propose to revise the authority citations for part 1235, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

We propose to revise 1235.003, Policy, to update FAR citations to comport with FAR drafting convention in paragraph (b), to add clarifying language, and to add paragraph (c), Recoupment, which would provide that DOT recoupment not otherwise required by law shall be conducted in accordance with OA procedures.

We propose to add 1235.010–70, Scientific and technical reports—acquisition, publication and dissemination, to specify that DOT's policy for the acquisition, publishing format, and dissemination of scientific and technical reports is established in DOT Order 1700.18B, Acquisition, Publication and Dissemination of DOT Scientific and Technical Reports.

We propose to add 1235.011–70, Contract clause, to prescribe clause 1252.235–71, Technology Transfer, in all solicitations and contracts for experimental, developmental, or research work, and to add 1235.012, Patent rights, to implement FAR 35.012 and to provide that such patent rights would also be in accordance with any Operating Administration (OA) implementing procedures.

We also propose to renumber ''subpart 1235.70, Research Misconduct,'' to 1235.070, Research misconduct, and remove any reference to a ''subpart'' to align the TAR with the FAR, which has no subparts in FAR part 35. We also propose to add paragraph (a) to set forth the applicability and DOT's policy on scientific integrity, and to add paragraph (b) to provide a definition of research misconduct.

We propose to renumber 1235.7000, Contract clause, to 1235.070–1, Contract clause, and to update the clause prescription and TAR citation to comport with FAR drafting convention.

TAR Part 1236—Construction and Architect-Engineer Contracts

We propose to revise the authority citations for part 1236, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

In subpart 1236.5, Contract Clauses, we propose to revise 1236.570, Special precautions for work at operating airports, to correct the TAR citation to standard FAR drafting convention.

TAR Part 1237—Service Contracting

We propose to revise the authority citations for part 1237, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

In subpart 1237.1, Service Contracts—General, we propose to update 1237.110, Solicitation provision and contract clauses, to renumber and retitle it to 1237.110–70, Contract clauses, to more appropriately comport with FAR drafting and numbering convention, as well as to correct the TAR citations to standard FAR drafting convention.

In subpart 1237.70, Procedures for Acquiring Training Services, we propose to revise the title of the subpart to remove ''Department of Transportation'' as unnecessary so that it now reads: Procedures for Acquiring Training Services. We propose to revise 1237.7000, Policy, to add to the list of data that that prospective contractors are required to certify by adding specifically ''resumes, for example,'' to denote additional types of information that would be required to be certified, in lieu of the more general, ''etc.''. We propose to revise 1237.7001, Certification of data; 1237.7002, Applicability; and 1237.7003, Solicitation provision and contract clause, to correct TAR citations to reflect standard FAR drafting convention. In 1237.7003, we are making a minor revision to the title to replace ''provisions'' with ''provision'' as only one unique TAR provision is prescribed.

TAR Part 1239—Acquisition of Information Technology

We propose to revise the authority citations for part 1239, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

We propose to substantially revise TAR part 1239 to add six new subparts—1239.2, 1239.70, 1239.71, 1239.72, 1239.73, and 1239.74, as well as to substantively revise subpart 1239.1 to specify additional policy and procedures. These changes are intended to reflect that within the Federal government, acquiring information technology and information-technology-related supplies, services, and systems, including information technology-related services and information security, continues to be an evolving area as new Federal laws and requirements are established. DOT needs to ensure that the TAR appropriately identifies these requirements so potential offerors and contractors understand them and are able to appropriately address them when proposing on DOT acquisitions. Further, DOT needs to ensure its information and information systems are appropriately protected and that contractors comply with contract requirements.

We propose to add 1239.000, Scope of part, to reflect specific areas TAR part 1239 encompasses, to include—

- Software management and development;
- Section 508 standards and compliance for contracts;
- Information security and incident response reporting;
- Protection of data about individuals;
- Cloud computing;
- Technology modernization and upgrade/refreshment; and
- Record management.

We propose to add 1239.002, Definitions, to provide common meaning for three terms when used in the part to include: Information, information system, and media.

In subpart 1239.1, General, we propose to add sections 1239.101–70, Policy—software management and development; 1239.101–70–1, Scope; 1239.101–70–2, Definitions; and 1239.101–70–3, Policy.

Section 1239.101–70, Policy—software management and development, adds coverage under 1239.101–70–1, Scope, to identify that the subpart applies to all acquisitions of products or services supporting the development or maintenance of software. It would also add four definitions to provide standard meaning and usage to the terms application, programming software, software, and system software as used in the subpart; and in 1239.101–70–3, Policy, to provide departmental policy that applies to all acquisitions of products or services supporting the development or maintenance of software. We also propose to renumber and retitle 1239.70, Solicitation provision and contract clause, to 1239.106–70, Contract clauses, to better comport and align with the FAR, and to prescribe two clauses—1252.239–70, Security Requirements for Unclassified Information Technology Resources, and 1252.239.71, Information Technology Security Plan and Accreditation, in all solicitations and contracts exceeding the micro-purchase threshold that include information technology services.

We propose to add subpart 1239.2, Electronic and Information Technology, including sections 1239.201, Scope of subpart; 1239.203, Applicability; and 1239.203–70, Information and communication technology accessibility standards—contract clause and provision, which would apply to the acquisition of Electronic and Information Technology (EIT) supplies and services. The term ''EIT'' as would be used in this subpart is intended to refer to Information and Communication Technology (ICT) and any successor terms used to describe such technology. It concerns the access to and use of information and data, by both Federal employees with disabilities and members of the public with disabilities in accordance with FAR 39.201. This implements DOT policy on Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d) as it applies to contracts and acquisitions. Subpart 1239.2 would prescribe two clauses for all contracts and orders: 1252.239–92, Information and Communication Technology Accessibility Notice; and 1252.239–93, Information and Communication Technology Accessibility.

We propose to add subpart 1239.70, Information Security and Incident Response Reporting, to include sections 1239.7000, Security incident response; 1239.7001, Definitions; 1239.7002, Policy; and 1239.7003, Contract Clauses, which would apply to contracts and subcontracts requiring contractors and subcontractors to safeguard DOT sensitive data that resides in or transits through covered contractor information systems by applying specified network security requirements. It also requires reporting of cyber incidents. It would provide seven definitions and provide common meaning for terms used in the subpart—adequate security, contractor attributional/proprietary information, contractor information system, DOT sensitive data, cyber incident, rapid report, and technical information. DOT's policy requires contractors and subcontractors to provide adequate security on all contractor information systems that will collect, use, process, store, or disseminate DOT sensitive data and to report cyber incidents directly to DOT via a unique number 24 hours-a-day, 7 days-a-week, 365 days a year ($24 \times 7 \times 365$) within two (2) hours of discovery. It would also require reporting by lower-tier subcontractors. The policy details specific reporting requirements. It also would set forth the requirement for the reporting of cyber incidents, if existing safeguards have ceased to function or new or unanticipated threats or hazards are discovered by either the Government or contractor, the discoverer shall immediately bring the situation to the attention of the other party. It would require reporting in accordance with the clause 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting. And the policy further details that support services contracts supporting Government activities may be involved in forensic analysis, damage assessment, or other services that

require access to data from another contractor and would be subject to restrictions on the use and disclosure of reported information. In 1239.7003, Contract clauses, three clauses are prescribed:

1252.239–72, Compliance with Safeguarding DOT Sensitive Data Controls, that would require the contracting officer to insert the clause in all solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, except for solicitations solely for the acquisition of commercially available off-the-shelf (COTS) items.

1252.239–73, Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information, that would require the contracting officer to insert the clause in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, for services that include support for the Government's activities related to safeguarding DOT sensitive data and cyber incident reporting.

1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting, that would require the contracting officer to insert the clause in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, except for solicitations and contracts solely for the acquisition of COTS items.

We propose to add subpart 1239.71, Protection of Data About Individuals, including sections 1239.7100, Scope; 1239.7101, Definitions; 1239.7102, Policy; 1239.7103, Responsibilities; and 1239.7104, Contract clause, that would include policy on Privacy Act and data protection considerations for DOT contracts. Data protection requirements are in addition to provisions concerning the general protection of individual privacy (see FAR subpart 24.1) and privacy in the acquisition of information technology (see FAR 39.105). In 1239.7101, Definitions, DOT would provide eight definitions to provide common meaning for terms used in the subpart—data protection, breach, information security, integrity, confidentiality, availability, Personally Identifiable Information (PII), and privacy incident. And in 1239.7102, Policy, DOT would require that data protection is provided for information and information systems in accordance with current policies, procedures, and statutes, to include a specific list. 1239.7103, Responsibilities, requires the contracting officer to include appropriate data protection requirements in all contracts and other acquisition-related documents for DOT information created, collected, displayed, used, processed, stored, transmitted, and disposed of by contractors. In particular, DOT requires that contracting officers ensure all contracts with contractors maintaining information systems containing PII contain the appropriate clauses as may be required by the Federal Acquisition Regulation (FAR) and other OMB and agency memorandums and directives, to ensure that PII under the control of the contractor is maintained in accordance with Federal law and DOT policy. In 1239.7104, Contract clause, the clause 1252.239–75, DOT Protection of Information About Individuals, PII and Privacy Risk Management Requirements, is prescribed. Contracting officers shall insert the clause in solicitations and contracts involving contractor performance of data protection functions and for contracts involving the design, development, or operation of an information system with access to personally identifiable information as described in DOT Order 1351.18, Privacy Risk Management, and DOT Order 1351.37, Departmental Cyber Security Policy.

We propose to add subpart 1239.72, Cloud Computing, including sections 1239.7200, Scope of subpart; 1239.7201, Definitions; 1239.7202, Policy; 1239.7203, DOT FedRAMP specific requirements; and 1239.7204, Contract clauses, that would prescribe DOT policies and procedures for the acquisition of cloud computing services.

In 1239.7201, Definitions, DOT would provide four definitions to provide common meaning for terms used in the subpart—authorizing official, cloud computing, Government data, and Government-related data.

In 1239.7202, Policy, DOT would provide that DOT entities shall acquire cloud computing services using commercial terms and conditions consistent with Federal law, and DOT's needs, including those requirements specified in the subpart. It would require contracting officers to carefully review commercial terms and conditions and consult counsel to ensure the terms and conditions are consistent with Federal law, regulations, and DOT's needs. Except as provided in 1239.7202, the contracting officer shall only award a contract to acquire cloud computing services from a cloud service provider (*e.g.,* contractor or subcontractor, regardless of tier) that has been granted provisional authorization by the General Services Administration (GSA) Federal Risk and Authorization Management Program (FedRAMP), and meets the security requirements set out by the DOT Chief Information Officer (CIO), at the level appropriate to the requirement to provide the relevant cloud computing services. Section 1239.7202 would also prescribe that when contracting for cloud computing services, the contracting officers shall ensure certain listed information is provided by the requiring activity (*e.g.,* Government data and Government-related data descriptions; data ownership, licensing, delivery and disposition instructions, etc.). Section 1239.7202 would also provide that: (1) Cloud computing service providers are required to maintain within the 50 states, the District of Columbia, or outlying areas of the United States, all Government data that is not physically located on DOT premises, unless otherwise authorized by the DOT CIO; and (2) that the contracting officer shall provide written approval to the contractor when the contractor is permitted to maintain Government data at a location outside the 50 States, the District of Columbia, and outlying areas of the United States.

In 1239.7203, DOT's FedRAMP specific requirements are provided, to include validated cryptography for secure communications; digital signature cryptography—authentication, data integrity, and non-repudiation; audit record retention for cloud service providers; cloud identification and authentication (organizational users) multi-factor authentication; identification and authentication (non-organizational users); incident reporting timeframes; media transport requirements; personnel screening—background investigations; and minimum personnel security requirements to include U.S. citizenship and clearance.

In 1239.7204, Contract clauses, several clauses are prescribed to be inserted in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial items, for information technology services involving cloud computing services. The clauses, which are set forth in part 1252, are based on Federal FedRAMP standard framework language to be used in solicitations and contracts where FedRAMP requirements exist:

- 1252.239–76, Cloud Computing Services.
- 1252.239–77, Data Jurisdiction.
- 1252.239–78, Validated Cryptography for Secure Communications.
- 1252.239–79, Authentication, Data Integrity, and Non-Repudiation.

- 1252.239–80, Audit Record Retention for Cloud Service Providers.
- 1252.239–81, Cloud Identification and Authentication (Organizational Users) Multi-Factor Authentication.
- 1252.239–82, Identification and Authentication (Non-Organizational Users).
- 1252.239–83, Incident Reporting Timeframes.
- 1252.239–84, Media Transport.
- 1252.239–85, Personnel Screening—Background Investigations.
- 1252.239–86, Boundary Protection—Trusted internet Connections.
- 1252.239–87, Protection of Information at Rest.
- 1252.239–88, Security Alerts, Advisories, and Directives.

We propose to add subpart 1239.73, Technology Modernization and Upgrades/Refreshment, including sections 1239.7300, Scope of subpart; 1239.7301, Definitions; 1239.7302, Policy; 1239.7303, Contract clauses, that would prescribe DOT's policies and procedures for incorporating technology modernization, upgrades and refreshment into acquisitions involving information technology products or services supporting the development of applications, information systems, or system software. In 1239.7301, Definitions, DOT would add five definitions to provide common meaning for terms used in the subpart—application, modernization, system software, refresh, and upgrade. In 1239.7302, Policy, DOT would require contracting officers to ensure all documents involving the acquisition of development or maintenance of DOT applications, systems, infrastructure, and services will contain the appropriate clauses as may be required by the Federal Acquisition Regulation (FAR) and other Federal authorities, to ensure that information system modernization is prioritized accordance with Federal law, OMB Guidance, and DOT policy. And in 1239.7303, Contract clauses, two clauses as described in part 1252 are prescribed that require contracting officers to insert them into solicitations and contracts when the contractor or a subcontractor, at any tier, will develop or maintain information systems, applications, infrastructure, or services: 1252.239–89, Technology Modernization; and 1252.239–90, Technology Upgrades/Refreshment.

We propose to add subpart 1239.74, Records Management, including sections 1239.7400, Scope of subpart; 1239.7401, Definitions; 1239.7402, Policy; and 1239.7403, Contract clause, to prescribes DOT's policies for records management requirements for contractors who create, work with, or otherwise handle Federal records, regardless of the medium in which the records exist. In 1239.7401, Definition, we include a key definition of ''federal record'' as used in the subpart, to provide common meaning. As defined in 44 U.S.C. 3301, ''federal record'' means all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them. The term ''Federal record'' would include all DOT records, and applies to records created, received, or maintained by contractors pursuant to a DOT contract; it may include deliverables and documentation associated with deliverables; it does not include personal materials.

In section 1239.7402, Policy, DOT details key requirements, to include compliance, applicability, records maintenance, and unauthorized disclosure. This is necessary to ensure contractors fully understand the requirement to comply with all applicable records management laws and regulations, as well as National Archives and Records Administration (NARA) records policies, including but not limited to the Federal Records Act (44 U.S.C. chapters 21, 29, 31, 33), NARA regulations at 36 CFR Chapter XII Subchapter B, and policies associated with the safeguarding of records covered by Privacy Act of 1974 (5 U.S.C. 552a). These policies include the preservation of all records, regardless of form or characteristics, mode of transmission, or state of completion. Contractors would be required to notify the contracting officer within two hours of discovery of any inadvertent or unauthorized disclosures of information, data, documentary materials, records or equipment. Contractors would be required to ensure that the appropriate personnel, administrative, technical, and physical safeguards are established to ensure the security and confidentiality of the information, data, documentary material, records and/or equipment accessed, maintained, or created, is properly protected. Additionally, contractors would not be permitted to remove material from Government facilities or systems, or facilities or systems operated or maintained on the Government's behalf, without the express written permission of the contracting officer or contracting officer's representative. It would also set forth requirements for returning information to DOT when no longer required, and what security measures to follow, and prohibit contractors from creating or maintaining any records containing any non-public DOT information that are not specifically tied to or authorized by the contract. In 1239.239–91, Records Management, we propose to prescribe one clause, 1239.239–91, Records Management, that the contracting officer would be required to insert it in all solicitations and contracts involving services where contractors or subcontractors and their employees or associates collect, access, maintain, use or disseminate or otherwise handle Federal records.

TAR Part 1242—Contract Administration and Audit Services

We propose to revise the authority citations for part 1242, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

We propose to add four subparts to TAR part 1242—subparts 1242.1, 1242.2, 1242.3, and 1242.15, and to remove one subpart—1242.70.

We propose to add subpart TAR 1242.1, Contract Audit Services, to include sections 1242.101, Contract audit responsibilities; 1242.102–70, Assignment of contract audit services; and 1242.170, Contract clause.

In 1242.101, Contract audit responsibilities, the regulations would provide that DOT policy allows for private certified public accounting firms to be used to provide audit services as described in FAR 42.101 to DOT contracting officers when procurement schedule demands cannot be met by the Defense Contract Audit Agency (DCAA) or the agency with audit cognizance. In 1242.103, Assignment of contract audit services, DOT would permit contracting officers to acquire audit services from private certified public accountant (CPA) firms when the responsible audit agency declines providing the needed services. In 1242.170, Contract clause, we propose to prescribe clause 1252.242–74, Contract Audit Support, as described in TAR part 1252, that would require contracting officers to insert the clause in solicitation and contracts when other than firm-fixed-price contracts are contemplated.

We propose to add subpart TAR 1242.2, Contract Administration Services, to include section 1242.270,

Contract clauses. Three clauses currently prescribed in subpart 1242.70, Contract Administration Clauses, would be moved to section 1242.270 to better align with the FAR and to comport with FAR drafting convention and numbering:

1252.242–70, Dissemination of Information–Educational Institutions, that would permit contracting officers to use 1252.242–70 in lieu of the clause at 1252.242–72, Dissemination of Contract Information, in DOT research contracts with educational institutions, except contracts that require the release or coordination of information.

1252.242–71, Contractor Testimony, that would require contracting officers to insert the clause in all solicitations and contracts issued by the National Highway Traffic Safety Administration (NHTSA) and would permit other Operating Administrations to use the clause as deemed appropriate.

1252.242–72, Dissemination of Contract Information, that would permit the contracting officer to insert the clause in all DOT contracts except contracts that require the release or coordination of information.

We propose to add subpart TAR 1242.3, Contract Administration Office Functions, to include section 1242.302, Contract administration functions, to implement FAR 42.302(a). In this subpart, DOT would authorize contracting officers to: (1) Perform the functions identified in FAR 42.302(a)(5), (9), (11), and (12) with the assistance of the cognizant government auditing agency, if assigned and available to provide support in a timely manner; or (2) use the audit services of a CPA firm to perform these functions. DOT contracting officers would be authorized to use this authority if a cognizant Federal agency has not performed the functions.

Additionally, in 1242.302(a)(13) we propose to implement DOT's procedures for FAR 42.302(a)(13), to set forth that the assignment of contract administration to a Defense Contract Management Agency (DCMA) office by the contracting officer does not affect the designation of the paying office unless a transfer of DOT funds to the agency of the Contract Administration Office (CAO) is effected, and the funds are converted to the CAO agency's account for payment purposes. DOT's policy and procedures would also require that the CAO, the contracting officer, or the designated contract specialist in the contracting office review and approve the invoices and vouchers under the assigned contracts, and would further specify that the review and approval of invoices under cost-reimbursement and time-and-materials type contracts cannot be delegated to the Contracting Officer's Representative (COR). This is useful information for the public to understand which DOT Government officials will be reviewing and approving invoices, and that such reviews on certain types of contracts cannot be delegated to the COR.

We propose to add subpart TAR 1242.15, Contractor Performance Information, to include section 1242.1503, Procedures, to provide that each Operating Administration is responsible for assigning responsibility and management accountability for the completeness of past performance submissions as required in FAR 42.1503(a).

And, DOT proposes to remove subpart 1242.70, Contract Administration Clauses and its underlying section 1242.7000, Contract clauses. This corrects an error in placement to better align with the subject matter in the FAR and comports with FAR drafting convention and numbering. The clauses previously in this subpart are proposed to be revised and moved to subpart 1242.2, Contract Administration Services.

TAR Part 1245—Government Property

As a part of DOT's initiative to streamline the TAR and make it more effective, efficient, and transparent, we propose to remove the entirety of TAR Part 1245, Government Property, to include the underlying subpart 1245.5, Management of Government Property in the Possession of Contractors, and sections 1245.505, Records and reports of Government Property; 1245.505–14, Reports of Government Property; 1245.505–70, Contract clauses; 1245.508–2, Reporting results of inventories; and 1245.511, Audit of property control system. The information is outdated and not in accordance with the FAR. DOT has determined that the clause 1252.245–70, Government Property Reports, is unnecessary and has eliminated the requirement for contractors to report property in its possession on a unique DOT Form since the FAR permits contractors to report it using standard commercial practices. The prescribed form, DOT F 4220.43, Contractor Report of Government Property, is obsolete and has been proposed for removal as described in the section on TAR part 1253.

TAR Part 1246—Quality Assurance

We propose to revise the authority citations for part 1246, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

We propose to revise subpart 1246.1, General, and section 1246.101–70, Additional definitions, to add the introductory sentence, ''As used in this subpart—'' to align with standard FAR and TAR drafting styles, and to correct a FAR citation to reflect standard FAR drafting convention, and to substantively revise only the definition for ''Major acquisition.'' Previously, DOT had referred to the TAM, an internal document, for the definition. DOT proposes to provide the common definition of the term in the TAR to ensure clarity.

In subpart 1246.7, Warranties, we propose to revise 1246.705, Limitations, and 1245.706, Warranty terms and conditions, to revise the numbering and title of the sections to comport with standard FAR drafting guidelines and numbering to supplement the FAR and to make only minor editorial, formatting, and FAR citation corrections to comport with FAR drafting guidelines. We propose to revise and retitle 1246.705, Limitations, to 1246.705–70, Limitations—restrictions, to more accurately supplement the FAR. We also propose to remove paragraph (b) as unnecessary and therefore remove the numbering for (a) And we propose to revise and retitle 1245.706, Warranty terms and conditions, to 1246.706–70, Warranty terms and conditions—requirements, to also more accurately supplement the FAR.

TAR Part 1247—Transportation

We propose to revise the authority citations for part 1247, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

We propose to revise subpart 1247.5, Ocean Transportation by U.S.-Flag Vessels and section 1247.506, Procedures, to update the name of the office and address of the Maritime Administration (MARAD) Office of Cargo and Commercial Sealift.

TAR Part 1252—Solicitation Provisions and Contract Clauses

We propose to revise the authority citations for part 1252, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

We propose to revise subpart 1252.1, Instructions for Using Provisions and

Clauses, by revising section 1252.101 as follows:

• Renumber the section as 1252.101–70 to reflect that this section supplements the FAR and correct capitalization of the title to conform with FAR Drafting Guidelines so the title reads as ''Using part 1252.''

• Remove the current ''(b) *Numbering.*'' nomenclature so it is unlettered and adding text to introduce the section topic.

• Remove paragraph (2)(i), *Provisions or clauses that supplement the FAR,* heading as unnecessary for the section.

• Renumber existing paragraphs (b)(2)(i)(A), and (B), as ''(a)'' and ''(b)'', and the subparagraphs accordingly to conform with FAR 1.105–2(b)(2) numbering conventions and to provide updated FAR citation references.

We propose to revise subpart 1252.2, Text of Provisions and Clauses, as follows:

We propose to add clause 1252.201–70, Contracting Officer's Representative, to provide the text of the clause prescribed by 1201.604–70. This states the contracting officer may designate Government personnel to act as the Contracting Officer's Representative (COR) to perform certain specific functions under the contract and that the contracting officer will provide a written notice of such designation to the contractor within five working days after contract award, or for construction, not less than five working days prior to giving the contractor the notice to proceed.

We propose to add clause 1252.204–70, Contractor Personnel Security and Agency Access, to provide the text prescribed by 1204.1303. This clause provides certain key definitions as used in the clause to provide common meaning to the terms. It outlines specific risk and sensitivity level designations and associated levels of processing; details that contractor employees may be required to obtain security clearances in certain instances; outlines the requirement for contractors to pre-screen contractor employees and details some of those instances where DOT may decline to grant agency access to a contractor employee in some instances, for example, due to conviction of a felony, a crime of violence, or a misdemeanor involving moral turpitude. The clause further outlines the requirements as pertains to citizenship status, background investigation and adjudication issues, and when agency access may be denied. It also outlines the identification card application process and that the COR will be the DOT ID card sponsor and point of contact for the contractor's application for a DOT ID card. The proposed clause outlines identification card custody and control requirements to include notification requirements when a contractor employee's status changes or if the card is lost or stolen, and further details the requirement to flow down the clause to any subcontracts at any tier that require the subcontractor or subcontractor's employees to have access to DOT facilities, sensitive information, information systems or other resources. This clause is required to ensure compliance with existing Federal laws and directives and to ensure DOT facilities, sensitive information, information systems or other resources are protected and that contractors and their employees who require access understand the critical requirements.

We propose to add clause 1252.209–70, Organizational and Consultant Conflicts of Interest, to provide the text prescribed by 1209.507–270(a). This clause would require that an offeror shall identify in its proposal, quote, bid or any resulting contract, any potential or actual Organizational and Consultant Conflicts of Interest (OCCI) as described in FAR subpart 9.5. This includes actual or potential conflicts of interests of proposed subcontractors. If an offeror identifies in its proposal, quote, bid or any resulting contract, a potential or actual conflict of interest the offeror would be required to submit an Organizational and Consultant Conflicts of Interest Plan (OCCIP) to the contracting officer. The clause would also provide that if a prime contractor or subcontractor breaches any of the OCCI restrictions, or does not disclose or misrepresents any relevant facts concerning its conflict of interest, the government may take appropriate action, including terminating the contract, in additional to any remedies that may be otherwise permitted by the contract or operation of law. This clause is required to ensure compliance with FAR subpart 9.5.

We propose to add clause 1252.209–71, Limitation of Future Contracting, which would provide the text prescribed by 1209.507–270(b). The clause would provide notice to contractors that the contracting officer has determined that the acquisition may give rise to a potential organizational conflict of interest which the contracting officer would identify to the public so that potential contractors can make a considered judgment on whether they can offer or bid on the solicitation and prepare, as needed, for any organizational conflicts of interest mitigation strategies. As a result, contractors would be put on notice that there would potentially be restrictions on future contracting as a result of performing certain tasks under the contract. The clause would help DOT ensure that the public is fully on notice of any potential Organizational Conflicts of Interests that may arise and that might limit participation on future work at DOT as a result of work under the contract.

We propose to revise clause 1252.211–70, Index for Specifications, to correct capitalization in the title and to correct the TAR citation in the clause.

We propose to revise provision 1252.216–70, Evaluation of Offers Subject to an Economic Price Adjustment Clause, to make minor administrative corrections in the title, the TAR citation, and grammar.

We propose to revise clause 1252.216–71, Determination of Award Fee, to make minor administrative corrections in the title, the TAR citation, and grammar, as well as to substitute the name of ''Award Fee Plan'' in lieu of ''Performance Evaluation Plan'' in paragraph (b).

We propose to revise clause 1252.216–72, to change the title from ''Performance evaluation plan'' to ''Award Fee Plan,'' and to accordingly make the same changes in paragraphs (a), (b), and (c) of the clause, as well as minor formatting and editorial changes in the clause.

We propose to revise clause 1252.216–73, Distribution of Award Fee, to make minor administrative corrections in the title and the TAR citation, and to correct capitalization of words in the text of the clause. It would also update the requirement in paragraph (b) that the reserve shall not exceed 15 percent of the total base fee and potential award fee or $150,000, whichever is less. The increase to $150,000 from the ''$100,000'' amount now reflected in the CFR is to recognize that a general increase in some dollar thresholds may be appropriate since the last revision of this clause.

We propose to revise clause 1252.216–74, Settlement of Letter Contract, to make minor administrative corrections in the title and the TAR citation.

We propose to revise clause 1252.217–70, Guarantee, to make minor administrative corrections in the title and the TAR citation, and other minor editorial corrections, and to add in paragraph (a) the phrase, ''in accordance with the contract terms and conditions'' and to delete the phrase, ''to the satisfaction of the Contracting Officer'' to more specifically reflect back to the contract requirements. This will help ensure clarity in the event any work

performed or materials furnished by the contractor prove defective or deficient within 60 days from the date of redelivery of the vessel(s). In such cases, the contractor, as directed by the contracting officer and at its own expense, shall correct and repair the deficiency ''in accordance with the contract terms and conditions.''

We propose to revise clause 1252.217–71, Delivery and Shifting of Vessel, to make minor administrative corrections in the title and the TAR citation.

We propose to revise clause 1252.217–72, Performance, to make minor administrative corrections in the title and the FAR and TAR citations, and to correct the name of the FAR clause in paragraph (c)(3).

We propose to revise clause 1252.217–73, Inspection and Manner of Doing Work, to make minor administrative corrections in the title and the FAR and TAR citations, and to correct the name of the FAR clause in paragraph (e)(7), and update to the current usage of Contracting Officer's Representative (COR) in lieu of the older ''COTR'' in paragraph (e)(9), as well as other minor grammatical and administrative corrections that do not change the substance of the clause.

We propose to revise clause 1252.271–74, Subcontracts, to make to make minor administrative corrections in the TAR citation referencing the prescription.

We propose to revise clause 1252.271–75, Lay Days, to make to make minor administrative corrections in the title and the TAR citation referencing the prescription.

We propose to revise clause 1252.217–76, Liability and Insurance, to make to make minor administrative corrections in the title and the TAR citation referencing the prescription.

We propose to revise clause 1252.217–77, Title, to make to make minor administrative corrections in the title and the TAR citation referencing the prescription, and to correct the last word in paragraph (b) to read ''equipment'' in lieu of ''equipments.''

We propose to revise clause 1252.217–78, Discharge of Liens, to make to make minor administrative corrections in the title and the TAR citation referencing the prescription.

We propose to revise clause 1252.217–79, Delays, to make to make minor administrative corrections in the TAR citation referencing the prescription.

We propose to revise clause 1252.217–80, Department of Labor Safety and Health Regulations for Ship Repair, to change the word in the title from ''Repairing'' to ''Repair'', and to correct the TAR citation referencing the prescription.

We propose to remove clause 1252.219–71, Section 8(a) Direct Awards, in its entirety as unnecessary and duplicative of the FAR.

We propose to remove clause 1252.219–72, Notification of Competition Limited to Eligible 8(a) Concerns—Alternate III, in its entirety as unnecessary and duplicative of the FAR.

We propose to revise clause 1252.222–70, Strikes or Picketing Affecting Timely Completion of the Contract Work, to make to make minor administrative corrections in the title and the TAR citation referencing the prescription.

We propose to revise clause 1252.222–71, Strikes or Picketing Affecting Access to a DOT Facility, to make to make minor administrative corrections in the title and the TAR citation referencing the prescription.

We proposed to add clause 1252.222–72, Contractor Cooperation in Equal Employment Opportunity and Anti-Harassment Investigations, which adds definitions to provide common meaning to three terms as used in the clause. It would require that in addition to complying with the clause at FAR 52.222–26, Equal Opportunity, the Contractor shall, in good faith, cooperate with the Department of Transportation in investigations of Equal Employment Opportunity (EEO) complaints processed pursuant to 29 CFR part 1614 as well as internal Anti-Harassment investigations. It would also provide that failure to cooperate could be potential grounds for termination for cause or default, and it requires flowdown of the clause in all subcontracts, at any tier.

We propose to revise clause 1252.223–70, Removal or Disposal of Hazardous Substances—Applicable Licenses and Permits, to make to make minor administrative corrections in the title, the TAR citation referencing the prescription, and make minor editorial formatting changes in the clause.

We propose to revise clause 1252.223–71, Accident and Fire Reporting, to make minor administrative corrections in the title and the TAR citation referencing the prescription, and other minor administrative editorial corrections, as well as to remove in paragraph (b)(1) two outdated reference to ''by telegram or facsimile transmission'' to instead state that reports of accidents or fires resulting in a death, hospitalization of five or more persons, or destruction of Government-owned or leased property (either real or personal), the total value of which is estimated at $100,000 or more, shall be reported immediately by telephone to the Contracting Officer or his/her authorized representative and shall be confirmed in writing within 24 hours to the Contracting Officer.

We propose to revise clause 1252.223–72, Protection of Human Subjects, to make minor administrative corrections in the title and the TAR citation referencing the prescription, to correct a FAR citation in paragraph (g), and to update the clause to indicate that DOT regulations and any OA specific procedures apply.

We propose to revise clause 1252.223–73, Seat Belt Use Policies and Programs, to make minor administrative corrections in the title and the TAR citation referencing the prescription, to update the name of the safety campaigns now in use by DOT—''Click It or Ticket'', and to provide updated website information, as well as make other minor grammatical corrections.

We propose to revise clause 1252.228–70, Loss of or Damage to Leased Aircraft, to make minor administrative corrections in the title and the TAR citation referencing the prescription, as well as to make other minor editorial corrections.

We propose to revise clause 1252.228–71, Fair Market Value of Aircraft, to make minor administrative corrections in the title and the TAR citation referencing the prescription, as well as to make other minor editorial corrections, and to add the reference to clause number 1252.228–70 to the cited clause title, ''Loss of or Damage to Leased Aircraft,'' to conform with FAR drafting conventions.

We propose to revise clause 1252.228–72, Risk and Indemnities, to make minor administrative corrections in the title and the TAR citation referencing the prescription.

We propose to add clause 1252.228–73, Command of Aircraft, to require that during the performance of a contract for out-service flight training for DOT, whether the instruction to DOT personnel is in leased, contractor-provided, or Government-provided aircraft, contractor personnel shall always, during the entirety of the course of training and during operation of the aircraft, remain in command of the aircraft. At no time shall other personnel be permitted to take command of the aircraft.

We propose to renumber clause 1252.228–73 to 1252.228–74, and to revise the title to read ''Notification of Payment Bond Protection,'' in lieu of ''Notification of Miller Act payment bond protection'' to comport with the

current reference to the older ''Miller Act'' statute, to correct the TAR citation referencing the prescription, as well as to make other minor editorial corrections that would also update the correct title for the ''Miller Act'' statute to ''Bonds statute'' in paragraphs (a) and (b). We propose to add a new paragraph (c) to add subcontract flowdown requirements requiring prime contractors to insert this notice clause in all first-tier subcontracts and to require the clause to be subsequently flowed down by all first-tier subcontractors to all subcontractors, at any tier.

We propose to revise clause 1252.231–70, Date of Incurrence of Costs, to make minor administrative corrections in the title, the TAR citation referencing the prescription and to make minor editorial formatting changes.

We propose to add clause 1252.232–70, Electronic Submission of Payment Requests, that would provide four definitions to establish a common meaning when used in the clause; provide notice to contractors that electronic payment requests are required, with exceptions; specify the processing system DOT uses and the *iSupplier* (DELPHI) system and login address that would be used to submit such electronic invoices; invoice requirements to receive payment; specify payment registration system procedures; and specify how waivers are processed and exceptions and alternate payment procedures for DOT. This clause is required to be inserted into DOT contracts to ensure contractors and vendors are aware of electronic invoice processing requirements and how to submit and process invoices to ensure payment under DOT contracts.

We propose to add clause 1252.232–71, Limitation of Government's Obligation, that would permit contracting officers, if funding is not currently available to fully fund the contract due to the Government operating under a continuing resolution to incrementally fund items if listed in a table contained in the clause. The clause outlines the parameters of the incremental funding, to include a requirement that the contractor provide notice to the contracting officer in writing when work will reach the point at which the total amount payable by the Government, including any cost for termination for convenience, will approximate 85 percent of the total amount then allotted to the contract for performance of the item(s) identified. The clause also cautions that nothing in the clause shall be construed as authorization of voluntary services whose acceptance is otherwise prohibited under 31 U.S.C. 1342. This clause is necessary to permit DOT contracting officers to proceed with performance during periods of continuing resolutions if partial funds are available and provide a mechanism to incrementally fund the contract. This clause was benchmarked with other Federal agencies who have similarly authorized this type of incremental funding.

We propose to revise clause 1252.235–70, Research Misconduct, to make minor administrative corrections in the title and the TAR citation referencing the prescription, and to make other minor grammatical and editorial non-substantive edits in the clause to comport with FAR drafting convention. Further, we propose to add a paragraph (i) to the clause to add subcontract flowdown language to require the contractor to include the clause in all subcontracts that involve research.

We propose to add clause 1252.235–71, Technology Transfer, to provide the text of the clause prescribed by 1235.011–70. The clause would require the contractor to develop a Technology Transfer Plan in accordance with the statement of work and to receive approval by the contracting officer prior to the initiation of any work under the contract. It details the minimum requirements for the plan, as well as a requirement to periodically update the plan at least once every six months via a Technology Transfer Report, and also details the minimum information for the report. DOT requires this clause to obtain essential information on the output of research so that the Government can efficiently identify reporting requirements and leverage research in which DOT invests. This provides clarity to the public prior to commencement of work under a cognizant research contract so that the contractor can appropriate identify and track information prior to commencement of the effort.

We propose to revise clause 1252.236–70, Special Precautions for Work at Operating Airports, to make minor administrative corrections in the title and the TAR citation referencing the prescription, and to make other minor grammatical and editorial non-substantive edits in the clause to comport with FAR drafting convention.

We propose to revise clause 1252.237–70, Qualifications of Contractor Employees, to make minor administrative corrections in the title and the TAR citation referencing the prescription; to make other minor grammatical and editorial non-substantive edits in the clause to comport with FAR drafting convention; and to remove paragraphs (f) and (g) because it is duplicative of other DOT or FAR clauses or contains outdated information. We also propose to make substantive edits to paragraphs (b) and (e). In paragraph (b), we are providing clarity to the need to protect sensitive information and the requirement for contractors to train contractor employees who are authorized to access sensitive information, and detail the requirement for the contractor to provide information to assist the Government in determining an individual's suitability to have an authorization to access DOT information and information systems. In paragraph (e), we removed subparagraphs (e)(1) and (2) in their entirety to streamline the paragraph to state that the contractor shall ensure that contractor employees are citizens of the United States of America or non-citizens who have been lawfully admitted for permanent residence or employment (indicated by immigration status) as evidenced by U.S. Citizenship and Immigration Services (USCIS) documentation. DOT also proposes to add a new paragraph (f) to describe an updated subcontract flowdown requirement requiring the contractor to include the clause in subcontracts whenever clause 1252.237–70 is included in the prime contractor's contract.

We propose to revise section 1252.237–71, Certification of Data, to make minor administrative corrections in the title and the TAR citation referencing the prescription, and to remove the ''NOTICE'' paragraph text preceding paragraph (a) as it contains an internal DOT determination and reference to an outdated memorandum that is unnecessary and inappropriate to include within the body of the provision. We proposed to add in paragraph (b) ''or for cause'' after ''termination for default'' when stating that offerors submitting inaccurate data to the Department of Transportation may subject the offeror, its subcontractors, employees or its representatives to prosecution for false statements pursuant to 18 U.S.C. 1001 and/or enforcement action for false claims or statements, or termination for default or for cause under any contract resulting from its offer, and/or debarment or suspension. In paragraph (c), we propose to add the phrase, ''and submit such certification(s) with its offer'' after the existing sentence so that it now reads: The offeror agrees to obtain a similar certification from its subcontractors and submit such certification(s) with its offer.

We propose to revise clause 1252.237–72, Prohibition on

Advertising, to make minor administrative corrections in the title and the TAR citation referencing the prescription.

We propose to revise clause 1252.237–73, Key Personnel, to make minor administrative corrections in the title and the TAR citation referencing the prescription, as well as minor grammatical corrections and formatting of contracting officer insert instructions in the text.

We propose to revise clause 1252.239–70, Security Requirements for Unclassified Information Technology Resources, in its entirety, to make substantive revisions to the clause to clarify that the contractor shall be responsible for information technology security for all systems connected to a DOT network or operated by the contractor for DOT, regardless of location. It provides examples of tasks that require security provisions. The clause requires a contractor to develop, provide, implement, and maintain an IT Security Plan that would describe the processes and procedures the contractor will follow to ensure appropriate security of IT resources developed, processed, or used under the contract. It requires the contractor to submit written proof of IT security accreditation to the contracting officer and requires, on an annual basis, the contractor to verify in writing that the IT Security Plan remains valid. It also requires contractor personnel to be screened and trained, and that contractors shall provide the Government access to the Contractor's and subcontractors' facilities, installations, operations, documentation, databases and personnel used in performance of the contract. The Contractor shall provide access to enable a program of IT inspection (to include vulnerability testing), investigation and audit (to safeguard against threats and hazards to the integrity, availability and confidentiality of DOT data or to the function of information technology systems operated on behalf of DOT), and to preserve evidence of computer crime. The contractor is also required to flow down the clause to all subcontracts as specified in the clause. This revision is necessary to update DOT information system and security requirements to meet current Federal Governmentwide requirements.

We propose to revise clause 1252.239–71, Information Technology Security Plan and Accreditation, to make minor administrative corrections in the title and the TAR citation referencing the prescription, to use the word ''shall'' in lieu of ''must'' in regards to the requirement that all offers submitted in response to the solicitation shall address the approach for completing the security plan and accreditation requirements, and to add the name of the title of the referenced clause 1252.239–70, Security Requirements for Unclassified and Sensitive Information Technology Resources.

We propose to add clause 1252.239–72, Compliance with Safeguarding DOT Sensitive Data Controls, that would require contractors to implement security requirements contained in clause 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting, for all DOT sensitive data on all Contractor information systems that support the performance of the contract. This clause would exclude contractor information systems not part of an information technology service or system operated on behalf of the Government. The offeror would be required to represent that it will implement the security requirements specified by National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171 ''Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations.'' This clause would also specify procedures when the contractor proposes to vary from any security requirements specified by NIST SP 800–171. This clause would ensure compliance with NIST SP 800–171 requirements imposed throughout the Federal Government.

We propose to add clause 1252.239–73, Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information, as prescribed by 1239.7003(b), to provide six definitions that would establish common meaning for terms used in the clause. The clause identifies certain restrictions and conditions that apply to any information the contractor receives or creates in the performance of the contract, and it would set forth that a breach of obligations or restrictions under the contract may subject a contractor to criminal, civil, administrative, and contractual penalties and other appropriate remedies and civil actions for damages and other appropriate remedies by a third party that may report a cyber incident under the clause. It would also require flowdown in subcontracts.

We propose to add clause 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting, as prescribed in 1239.7003(c). The clause would provide 14 key definitions that would establish common meaning and usage for the terms as used in the clause and outlines the requirement for a contractor to provide adequate security on all covered contractor information systems. The clause details the minimum adequate security requirements; details that if the contractor intends to use an external cloud service provider to store, process, or transmit any DOT sensitive data in performance of this contract, the contractor shall require and ensure that the cloud service provider meets security requirements equivalent to those established by the Government for the Federal Risk and Authorization Management Program (FedRAMP) Moderate baseline (*https://www.fedramp.gov/resources/documents/*) and that the cloud service provider complies with requirements in paragraphs (c) through (h) of the clause for cyber incident reporting, malicious software, media preservation and protection, access to additional information and equipment necessary for forensic analysis, and cyber incident damage assessment. The clause outlines in paragraphs (k) and (j) when certain information is authorized to be released outside of DOT. It would require that notwithstanding the safeguarding and cyber incident reporting required by the clause, the contractor retains responsibility for other safeguarding or cyber incident reporting pertaining to its unclassified information systems as required by other applicable clauses of a contract, or as a result of other applicable U.S. Government statutory or regulatory requirements. The clause would also require flowdown to subcontracts as required by paragraph (o). Subcontractors would be required to notify the prime contractor (or next higher-tier subcontractor) when submitting a request to vary from a NIST SP 800–171 security requirement to the contracting officer, and to provide the incident report number, automatically assigned by DOT, to the prime contractor (or next higher-tier subcontractor) as soon as practicable, when reporting a cyber incident to DOT as required by the clause.

We propose to add clause 1252.239–75, DOT Protection of Information About Individuals, PII, and Privacy Risk Management Requirements, as prescribed by 1239.7104. The clause outlines the requirement for contractors to comply with all applicable Federal law, guidance, and standards, as well as DOT policies pertaining to the protection of Personally Identifiable Information (PII), to the extent the contractor creates, maintains, acquires, discloses, uses, or has access to PII under the contract. The clause would require action on the part of the

contractor or the Government when there are unanticipated threats to bring the situation to the attention of the other party. The clause also contains requirements with respect to compliance with the Privacy Act of 1974, including DOT implementing regulations at 49 CFR part 10, as well as the requirement to protect Privacy Act records, to execute a confidentiality agreement, and to surrender records when required. The clause outlines the requirement to comply with NIST FIPS 140–2 and FIPS 199 to protect sensitive information, actions that are required in the event of a breach to include reporting breaches involving PII directly to DOT at a centrally manned reporting number within two hours of discovery, the obligation to information employees and associates of the obligations contained in the clause, training requirements for such individuals, and the requirement to flowdown the clause to all subcontracts.

We propose to add clauses 1252.239–76 through 1252.239–88 to comply with clause requirements outlined for Federal agencies in accordance with the Federal Risk and Authorization Management Program (FedRAMP), a government-wide program that provides a standardized approach to security assessment, authorization, and continuous monitoring for cloud products and services:

We propose to add clause 1252.239–76, Cloud Computing Services, as prescribed in 1239.7204(a). The clause outlines requirements contractors must comply with when cloud computing services are used to provide information technology services in the performance of the contract. The clause provides nine key definitions for terms used in the clause to provide common meaning and understanding. It would require contractors to receive permission to use cloud computing services under the contract if the offer did not provide or anticipate such use. It would require contractors to implement and maintain administrative, technical, and physical safeguards and controls with the security level and services required in accordance with the DOT Order 1351.37, Departmental Cybersecurity Policy, and the requirements of DOT Order 1351.18, Departmental Privacy Risk Management Policy. It would also require the contractor to maintain all Government data not physically located on DOT premises within the United States, the District of Columbia, and all territories and possessions of the United States, unless the contractor receives written notification from the contracting officer to use another location, in accordance with DOT Policy. The clause outlines how DOT will determine the security classification level for the cloud system, the requirement to comply with certain FedRAMP standards, and the requirement to implement privacy and security safeguards. The clause provides that the Government may perform manual or automated audits, scans, reviews, or other inspections of the vendor's IT environment being used to provide or facilitate services for the Government. The clause also outlines limitations on access to and use and disclosure of Government data and Government-related data; cloud computing services cyber incident reporting; spillage; malicious software; media preservations and protection requirements; access to additional information or equipment necessary for forensic analysis; cyber incident damage assessment activities; and subcontract flowdown requirements. This clause would ensure compliance with Federal-wide FedRAMP requirements and cloud computing services standards and to ensure contractors who perform such work for DOT are aware of the requirements.

We propose to add clause 1252.239–77, Data Jurisdiction, as prescribed by 1239.7204(b), that would require contractors to identify all data centers that the data at rest or data backup will reside, including primary and replicated storage. It would also require the contractor to ensure that all data centers not physically located on DOT premises reside within the United States, the District of Columbia, and all territories and possessions of the United States, unless otherwise authorized by the DOT CIO.

We propose to add clause 1252.239–78, Validated Cryptography for Secure Communications, as prescribed by 1239.7204(c), that would require a contractor to use only cryptographic mechanisms that comply with certain levels of FIPS 140–2 using a fill-in. It would also require that external transmission or dissemination of certain Government information to or from a Government computer must be encrypted.

We propose to add clause 1252.239–79, Authentication, Data Integrity, and Non-Repudiation, as prescribed in 1239.7204(d), that would require the contractor to provide a cloud service system that provides for origin authentication, data integrity, and signer non-repudiation.

We propose to add clause 1252.239–80, Audit Record Retention for Cloud Service Providers, as prescribed in 1239.7204(e), that would require the contractor to manage their electronic records in accordance with 36 CFR1236.20 and 1236.22, as well as other standards, including NARA Bulletin 2008–05, July 31, 2008, Guidance concerning the use of email archiving applications to store email. It would also require the contractor to maintain records to retain functionality and integrity throughout the records' full lifecycle.

We propose to add clause 1252.239–81, Cloud Identification and Authentication (Organizational Users) Multi-Factor Authentication, as prescribed in 1239.7204(f), that would require a contractor to support a secure, multi-factor method of remote authentication and authorization to identified Government Administrators that will allow Government-designated personnel the ability to perform management duties on the system.

We propose to add clause 1252.239–82, Identification and Authentication (Non-Organizational Users), as prescribed in 1239.7204(g), that would require contractors to support a secure, multi-factor method of remote authentication and authorization to identified Contractor Administrators that will allow Contractor designated personnel the ability to perform management duties on the system as required by the contract.

We propose to add clause 1252.239–83, Incident Reporting Timeframes, as prescribed in 1239.7204(h), that would require contractors to report all computer security incidents to the DOT Security Operations Center (SOC) in accordance with Subpart 1239.70—Information Security and Incident Response Reporting. It also requires contractors and subcontractors are required to report cyber incidents directly to DOT via the DOT SOC 24 hours-a-day, 7 days-a-week, 365 days a year.

We propose to add clause 1252.239–84, Media Transport, as prescribed in 1239.7204(i), that would require the contractor to document activities associated with the transport of DOT information stored on digital and non-digital media and employ cryptographic mechanisms to protect the confidentiality and integrity of this information during transport outside of controlled areas. And it would also require that DOT or other Federal agency sensitive or third-party provided information that resides on mobile/portable devices (*e.g.,* USB flash drives, external hard drives, and SD cards) must be encrypted.

We propose to add clause 1252.239–85, Personnel Screening—Background Investigations, as prescribed in 1239.7204(j), that would require contractors to provide support

personnel who are U.S. persons maintaining a NACI clearance or greater in accordance with OMB memorandum M–05–24, Section C. The clause also outlines the requirement that contractor employees with access to DOT systems containing sensitive information may be required to obtain security clearances (*i.e.,* Confidential, Secret, or Top Secret), and provides how such investigations and documentation will be processed.

We propose to add clause 1252.239–86, Boundary Protection—Trusted Internet Connections, as prescribed in 1239.7204(k), that would require contractors to ensure that Federal information, other than non-sensitive information, being transmitted from Federal government entities to external entities using cloud services is inspected by Trusted Internet Connections (TIC) processes or that all external connections be routed through a Trusted Internet Connection (TIC).

We propose to add clause 1252.239–87, Protection of Information at Rest, as prescribed in 1239.7204(l). The clause would require contractors to provide security mechanisms for handling data at rest and in transit in accordance with FIPS 140–2 and contains a contracting officer fill-in for the encryption standard.

We propose to add clause 1252.239–88, Security Alerts, Advisories, and Directives, as prescribed in 1239.7204(m). The clause would require contractors to provide a list of contractor personnel, identified by name and role, who are assigned system administration, monitoring, and/or security responsibilities and are designated to receive security alerts, advisories, and directives, as well as a similar list of individuals responsible for the implementation of remedial actions associated with them.

We propose to add clause 1252.239–89, Technology Modernization, as prescribed in 1239.7303(a), that would, after contract award and when applicable, permit the Government to solicit and the contractor to propose independently, a modernization approach to the hardware, software, specifications, or other requirements of the contract. This would be permitted to increase efficiencies (both system and process level), reduce costs, strengthen the cyber security posture, or for any other purpose which presents an advantage to the Government. The clause outlines proposal requirements, the process for withdrawal of a proposal not adopted by contract modification within the period specified in the proposal, as well as requirements for product testing, contract modification issuance and use of change orders.

We propose to add clause 1252.239–90, Technology Upgrades/Refreshment, as prescribed in 1239.7303(b). This clause would, after issuance of the contract, allow the Government to solicit, and encourage the Contractor to propose independently, technology improvements to the hardware, software, specifications, or other requirements of the contract. These improvements may be proposed to save money, to improve performance, to save energy, to satisfy increased data processing requirements, or for any other purpose that presents a technological advantage to the Government. The clause provides the requirement for a price or cost proposal to be included with the proposed changes for evaluation, and the minimum information required to be submitted to the contracting officer. It also provides that the Government may wish to test and evaluate any item(s) proposed and provides the procedures the Government will follow.

We propose to add clause 1252.239–91, Records Management, as prescribed in 1239.7403, that would provide requirements for contractors to comply with all applicable records management laws and regulations, as well as National Archives and Records Administration (NARA) records policies, including but not limited to the Federal Records Act (44 U.S.C. chapters 21, 29, 31, 33), NARA regulations at 36 CFR Chapter XII Subchapter B, and those policies associated with the safeguarding of records covered by Privacy Act of 1974 (5 U.S.C. 552a). These policies include the preservation of all records, regardless of form or characteristics, mode of transmission, or state of completion. The clause outlines the applicability of the data that falls under the purview of the clause, records maintenance requirements and custody responsibilities, restrictions related to unauthorized disclosure, and the requirement that the contractor shall not create or maintain any records containing any non-public DOT information that are not specifically authorized by the contract. It also provides information on rights in data under the contract which are set forth in specific clauses prescribed by FAR part 27 and included in the contract, and requires that contractors must make any assertion of copyright in the data or other deliverables under the contract and substantiate such assertions; requires contractors to mark any data to which contractors assert any rights; requires contractors to mark any data to which contractors assert any rights; provides training requirements for contractor employees and subcontractors; and requires flowdown of the clause in all subcontracts.

We propose to add provision 1252.239–92, Information and Communication Technology Accessibility Notice, as prescribed in 1239.203–70(a), that would provide notice to potential offerors that any offeror responding to this solicitation must comply with established DOT Information and Communication Technology (ICT) (formerly known as Electronic and Information (EIT)) accessibility standards. Information about Section 508 is available at *https://www.section508.gov/* or *https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-section-508-standards.* The provision provides notice that to facilitate the Government's determination whether proposed ICT supplies and services meet applicable Section 508 accessibility standards, offerors must submit appropriate Section 508 Checklists, in accordance with the checklist completion instructions. The purpose of the checklists is to assist DOT acquisition and program officials in determining whether proposed ICT supplies or information, documentation and services support conform to applicable Section 508 accessibility standards. The provision states that Section 508 accessibility standards applicable to the solicitation are stated in the clause at 1252.239–81, Information and Communication Technology Accessibility. This was benchmarked based on similar clauses at other agencies and ensures that DOT provides the public notice of important Section 508 requirements and how offerors must submit information.

We propose to add clause 1252.239–94, Information and Communication Technology Accessibility, as prescribed in 1239.203–70(b), that would provide a key definition for the term ''Electronic and Information Technology (EIT) to provide common meaning as used in the clause and state that it is intended to refer to Information and Communication Technology (ICT) and any successor terms used to describe such technology. The clause would require that all EIT supplies, information, documentation and services support developed, acquired, maintained or delivered under the contract or order must comply with the Information and Communication Technology (ICT) Standards and Guidelines (see 36 CFR parts 1193 and 1194). It also states that Section 508 accessibility standards applicable to the contract or order are identified in the

Specification, Statement of Work, or Performance Work Statement. The clause also provides that in the event a modification to the contract or order adds new ICT supplies or services or revises the type of, or specifications for, supplies or services, the contracting officer may require that the contractor submit a completed Section 508 Checklist and any other additional information necessary to assist the Government in determining that the ICT supplies or services conform to Section 508 accessibility standards. It also provides that if the contract is an indefinite-delivery type contract, a Blanket Purchase Agreement or a Basic Ordering Agreement, the task/delivery order requests that include ICT supplies or services will define the specifications and accessibility standards for the order.

We propose to revise clause 1252.242–70, Dissemination of Information—Educational Institutions, to make minor administrative corrections in the title and to the TAR citation referencing the prescription to comport with FAR drafting convention.

We propose to revise clause 1252.242–71, Contractor Testimony, to make minor administrative corrections in the title and to the TAR citation referencing the prescription to comport with FAR drafting convention.

We propose to revise clause 1252.242–72, Dissemination of Contract Information, to make minor administrative corrections in the title and to the TAR citation referencing the prescription to comport with FAR drafting convention.

We propose to remove clause 1252.242–73, Contracting officer's technical representative, as the clause has been revised and moved to TAR part 1201 as 1252.201–70, Contracting Officer's Representative.

We propose to add clause 1252.242–70, Contract Audit Support, as prescribed in 1242.170, that would set forth that the Government may at its sole discretion utilize certified public accountant(s) to provide contract audit services in lieu of the cognizant government audit agency to accomplish the contract administration requirements of FAR parts 32 and 42 under the terms and conditions of the contract. It would prohibit disclosure of proprietary financial data or use of such data for any purpose other than to perform the required audit services. And it would also detail that when the Government utilizes such contract audit support under the contract, access to accounting systems, records and data is required to be provided to the audit services contractor like that provided to the cognizant government auditor. This would provide the necessary notice to the contractor that would permit such non-Government auditors to be utilized.

We propose to remove clause 1252.245–70, Government property records. The prescription was removed at 1245.505–70 because the requirement is outdated and in conflict with the updated FAR part 45. The updated FAR part 45 provides that contractors may submit property reports using standard commercial practice, and the cited DOT Form 4220.43, Contractor Report of Government Property, is not required to be utilized. This results in potential savings to contractors who may use existing standard commercial practices and eliminates the requirement to use a specialized Government form.

We propose to add subpart 1252.3, Provision and Clause Matrix, and the section 1252.301, Solicitation provisions and contract clauses (Matrix). This section states the TAR matrix is not published in the CFR. It is available on the *Acquisition.gov* website at *https://www.acquisition.gov/TAR.* This is comparable to the FAR, which also does not incorporate a matrix in the CFR. The matrix is a tool that explains how and when prescribed provisions and clauses may be utilized in accordance with the FAR or TAR, but is not codified and is not policy.

We propose to remove the TAR Provision and Clause Matrix, which is currently reflected in the TAR part 1252 as an Appendix.

TAR Part 1253—Forms

We propose to revise the authority citations for part 1253, for the reasons set forth in the discussion and analysis section, to read as follows: 5 U.S.C. 301; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

We propose to revise subpart 1253.2, Prescription of Forms, and section 1253.204, Administrative matters, to renumber the section and title as 1253.204–70, Administrative matters—agency specific forms, to make minor administrative correction to the TAR citation referencing the form prescriptions and in the body of the text to comport with FAR drafting conventions, and to make other non-substantive editorial edits.

We propose to remove section 1253.222, Application of labor laws to Government acquisitions, which would remove the prescription for the use of Form DOT F 4220.7, Employee Claim for Wage Restitution from the TAR. The requirement for use of this form is currently set forth in subpart 1222.4, Labor Standards for Contracts Involving Construction, and the underlying sections 1222.406, Administration and Enforcement, and 1222.406–9, Withholding from or suspension of contract payments. These provisions are also proposed for removal. Form DOT F 4220.7 would only be used if an employee raises an issue with lack of payment of wages by a contractor. DOT would investigate, with the Department of Labor and in accordance with the policies and procedures referenced in FAR 22.406–8—22.406–9. The form would not be submitted to or through a contractor and thus is unnecessary as part of the TAR. Removal from the TAR of these provisions, and thus the requirement to use Form DOT F 4220.7, does not impact the rights of employees or the requirement for the Government to investigate labor standards violations in accordance with the FAR as cited, nor for a DOT contracting officer to properly take action under the contract to withhold funds as the investigation warrants. The form would only be required and used outside of the Government—contractor communication channels and directly with the affected employee(s) to help them receive payment for any wages adjudicated as owed. This scenario would only come into play if the wage issues are not resolved by the contracting officer and the contractor under the contract. It is a form the Government uses to pay Government funds directly to employees when an investigation finds wages are due and a contractor does not act under the contract to remedy the issue. In this instance, the form would be used to provide funds from the U.S. Treasury directly to the affected employee. Thus, the process involving use of Form DOT F 4220.7 is outside of the TAR.

We propose to add 1253.227, Patents, data, and copyrights, as a section title with no text, and to revise 1253.227, Conveyance of invention rights acquired by the Government, to renumber the section and title as 1253.227–3, Patent rights under Government contracts, which more accurately conveys where in the TAR the applicable forms fit within TAR part 1227. The revisions would make minor administrative corrections to the TAR citation referencing the form prescriptions and to the body of the text to comport with FAR drafting convention. We also propose to update the form where the public may obtain a DD Form 882, Report of Inventions and Subcontracts, that is authorized for use under DOT contracts.

We propose to remove 1253.245–70 Report of Government property, because the form prescribed in the section is no longer in use. For DOT to require its use

would be conflict with FAR part 45. This results in potential savings to contractors who may use existing standard commercial practices and eliminates the requirement to use a specialized Government form.

In subpart 1253.3, Illustration of Forms, we propose to revise the subpart by retitling the subpart to read: ''Forms Used in Acquisitions'' to comport with FAR subpart 53.3. We also propose to revise 1253.303, Agency forms, to renumber it as 1253.303–70, and retitle it as ''DOT agency forms.''

We propose to remove the ''Appendix to Subpart 1253.3 of Part 1253'' as unnecessary, to revise the text to clarify how the public may access DOT agency forms, and to provide an updated website for the Office of the Senior Procurement Executive.

We propose to add the Table header, ''Table 1253–1—Forms Use in DOT Acquisitions'' above the existing table of DOT forms. In this table we propose to remove the following rows, the reference to the forms, and the related .pdf and word document links:

The second row and form titled, Employee Claim for Wage Restitution,'' 4220.7 as the form prescription is removed in 1253.222, Application of labor laws to Government acquisitions;

The third row and form titled, ''Contractor Report of Government Property,'' 4220.43, as the prescription is removed in 1253.245–70 Report of Government property; and

The last row and the form titled, ''Report of Inventions and Subcontracts and Instructions, DD Form 882. The Department of Defense maintains their own accessible public-facing website where the form can be obtained as indicated in the proposed section 1253.227–3.

Regulatory Reviews

Executive Order 12866 and 13563

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts, and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The Office of Information and Regulatory Affairs has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action, and has determined that this rule is not a significant regulatory action under E.O. 12866.

DOT's impact analysis can be found as a supporting document at *http://www.regulations.gov,* usually within 48 hours after the rulemaking document is published.

Paperwork Reduction Act

This proposed rule includes provisions constituting collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) that require approval by the Office of Management and Budget (OMB). Accordingly, under 44 U.S.C. 3507(d), DOT has submitted a copy of this rulemaking action to OMB for its review.

OMB assigns control numbers to collections of information it approves. DOT 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. DOT is describing 12 collections of information proposed in this rule under the TAR, 48 CFR part 1252, Solicitation Provisions and Contract Clauses, that are related to 48 CFR part 1239, Acquisition of Information Technology:

- 48 CFR 1252.239–70, Security Requirements for Unclassified Information Technology Resources.
- 48 CFR 1252.239–72, Compliance with Safeguarding DOT Sensitive Data Controls.
- 48 CFR 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting.
- 48 CFR 1252.239–75, DOT Protection of Information About Individuals, PII, and Privacy Risk Management Requirements.
- 48 CFR 1252.239–76, Cloud Computing Services.
- 48 CFR 1252.239–77, Data Jurisdiction.
- 48 CFR 1252.239–80, Audit Record Retention for Cloud Service Providers.
- 48 CFR 1252.239–83, Incident Reporting Timeframes.
- 48 CFR 1252.239–85, Personnel Screening—Background Investigations.
- 48 CFR 1252.239–88, Security Alerts, Advisories, and Directives.
- 48 CFR 1252.239–89, Technology Modernization.
- 48 CFR 1252.239–90, Technology Upgrades/Refreshments.

If OMB does not approve the collections of information as requested, DOT will immediately remove the provisions containing a collection of information or take such other action as is directed by OMB.

Comments on the collections of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Transportation, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies sent by mail or hand delivery to the U.S. Department of Transportation, Office of the Chief Information Officer, Attn: Claire Barrett, Room E31–312, 1200 New Jersey Avenue SE, Washington, DC 20590; or email to *claire.barrett@dot.gov;* and email to *www.regulations.gov.* Comments should indicate that they are submitted in response to ''RIN 2105–AE26—Streamline and Update the Department of Transportation Acquisition Regulation (TAR Case 2020–001).''

OMB is required to make a decision concerning the collections of information contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the proposed rule.

The Department considers comments by the public on proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collections 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.

TAR Part 1239 related collections of information: Individual summaries of collection of information, description of need for information and proposed use of information, along with supporting estimated data are described below. The total estimates related to PRA and information collection burden on the public for the proposed rule, to include the estimated burden hours, average number of respondents, total estimated

annual responses, and total estimated annual reporting and recordkeeping burden are provided below:

Total estimated burden hours: 2,006.

Estimated average number of respondents: 2,200.

Total estimated annual responses: 2,511.

Total estimated annual cost to all respondents (reporting and recordkeeping burden): $66,398.60 (2,006 hours at $33.10 per hour). The Bureau of Labor Statistics (BLS) gathers information on full-time wage and salary workers. According to the latest (May 2019) available BLS data, the mean hourly wage is $33.10 on BLS wage code—''15–1231 Computer Network Support Specialists.'' This information was taken from the following website: *https://www.bls.gov/oes/current/oes151231.htm.*

Summary of Total Cost of ICR to Public

Clause	Burden hours	Average number resp.	Average annual resp.	OPM hourly rate	Total annual cost
1252.239–70	422	844	844	$33.10	$13,968.20
1252.239–72	21	41	41	33.10	695.10
1252.239–74	52	104	104	33.10	1,721.20
1252.239–75	622	311	622	33.10	20,588.20
1252.239–76	54	36	36	33.10	1,787.40
1252.239–77	71	142	142	33.10	2,350.10
1252.239–80	54	36	36	33.10	1,787.40
1252.239–83	18	36	36	33.10	595.80
1252.239–85	71	142	142	33.10	2,350.10
1252.239–88	71	142	142	33.10	2,350.10
1252.239–89	440	293	293	33.10	14,564.00
1252.239–90	110	73	73	33.10	3,641.00
Total	2,006	2,200	2,511		
Total Cost to All Respondents (Sum of all costs of all clauses)					66,398.60

The twelve clauses containing collections of information are described below:

1252.239–70, Security Requirements for Unclassified Information Technology Resources

The collection of information contained in section 1239.106–70, Contract clauses, and part 1252 at proposed clause 1252.239–70, is described immediately following this paragraph.

Summary of Collection of Information

We propose the use of 1252.239–70, Security Requirements for Unclassified Information Technology Resources, as prescribed at 1239.106–70, Contract clauses.

Proposed revised TAR clause 1252.239–70, Security Requirements for Unclassified Information Technology Resources, is required in all solicitations and contracts for Information Technology (IT) services and is intended to protect DOT information and information technology by requiring contractors to be responsible for information technology security for all systems connected to a DOT network or operated by the contractor for DOT, regardless of location. This clause is applicable to all or any part of the contract that includes information technology resources or services in which the contractor has physical or electronic access to DOT information that directly supports the mission of DOT. DOT would use the information collection requirements to assess the contractor's compliance with specific Federal and DOT IT security requirements. The information collection requirement is necessary to ensure DOT information and information systems are adequately protected.

Description of Need for Information and Proposed Use of Information

Under Public Law 113–283, Federal Information Security Modernization Act of 2014, each agency of the Federal Government must provide security for the information and information systems that support the operations and assets of the agency, including those provided or managed by another agency, contractor, or other source.

To comply with Public Law 113–283, Federal Information Security Modernization Act of 2014, DOT developed clause 1252.239–70, Security Requirements for Unclassified Information Technology Resources. The clause contains the following information collection requirements: An IT Security Plan within 30 days after contract award, and IT Security Accreditation and accompanying documents within 6 months of contract award to include a Final Security Plan, a Risk Assessment, a Security Test and Evaluation Plan, and a Disaster Recovery/Continuity of Operations Plan.

Total Burden Hours: 422.

Average Number of Respondents: 844.

Average Annual Responses: 844.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ By 60 min/hour	Number of burden hours
844	1	30		422

Note: DOT has estimated the number of respondents based on identified NAICS codes reflecting previous contract awards averaged over the last three fiscal years—FY 2017, FY 2018, and FY 2019 where the clause may be required. DOT estimates that in the future for a typical contract performance period estimated of five years, the majority of the information collection requirements might be required in one of the years and thus estimates 20% of the total average of contract awards represents the potential pool of number of respondents who might submit an information collection requirement (ICR) response as shown below.

NAICS code: (as shown below)	(Respondents) Contract award actions (average 3 FY)
518210	196
541511	1,243
541512	911
541513	357
541519	1,355
561621	158
Total	4,220

Basis for estimated number of respondents: Number of NAICS code contract actions = 4220 × 20% estimated number of annual respondents (based on typical five-year period of performance and ICR would be submitted in first year of contract) = 844.

1252.239–72, Compliance With Safeguarding DOT Sensitive Data Controls

The collection of information contained in section 1239.7003, Contract clauses, and part 1252 at proposed clause 1252.239–72, is described immediately following this paragraph.

Summary of Collection of Information

We propose the use of 1252.239–72, Compliance with Safeguarding DOT Sensitive Data Controls, as prescribed at 1239.7003, Contract clauses.

New proposed TAR clause 1252.239–72, Compliance with Safeguarding DOT Sensitive Data Controls, requires contractors to provide to the Government the submittal and approval(s) of current or previous NIST 800–171 Variance requests and approvals.

Clause 1252.239–72, Compliance with Safeguarding DOT Sensitive Data Controls, is required to implement security requirements contained in clause 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting, for DOT sensitive data on Contractor information systems that support the performance of the contract. If the Offeror proposes to vary from any security requirements specified by NIST SP 800–171 in effect at the time the solicitation is issued or as authorized by the Contracting Officer, the Offeror shall submit to the Contracting Officer, for consideration by the DOT Chief Information Officer (CIO), a written explanation of—(1) Why a particular security requirement is not applicable; or (2) How the Contractor will use an alternative, but equally effective, security measure to satisfy the requirements of NIST SP 800–171. DOT would use the information collection requirements to assess the contractor's compliance with specific Federal and DOT IT security requirements. The information is necessary to ensure DOT information and information systems are adequately protected.

Description of Need for Information and Proposed Use of Information

Under Public Law 113–283, Federal Information Security Modernization Act of 2014, each agency of the Federal Government must provide security for the information and information systems that support the operations and assets of the agency, including those provided or managed by another agency, contractor, or other source. To comply with Public Law 113–283, Federal Information Security Modernization Act of 2014, DOT developed clause 1252.239–72, Compliance with Safeguarding DOT Sensitive Data Controls.

Total Burden Hours: 21.

Average Number of Respondents: 41.

Average Annual Responses: 41.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ By 60 min/hour	Number of burden hours
41	1	30		21

Note: DOT has estimated the number of respondents based on identified NAICS codes reflecting previous contract awards averaged over the last three fiscal years—FY 2017, FY 2018, and FY 2019 where the clause may be required. DOT estimates that in the future for a typical contract performance period estimated of five years, the majority of the information collection requirements might be required in one of the years and thus estimates 2% of the total average of contract awards represents the potential pool of number of respondents who might submit an information collection requirement (ICR) response as shown below principally pertaining to cyber incidents.

NAICS code: (as shown below)	(Respondents) contract award actions (average 3 FY)
518210	196
541199	12
541513	357
541618	60
541990	932
541110	335
561499	22
561621	158
	2,072

Basis for estimated number of respondents: Number of NAICS code contract actions = 2072 × 2% estimated number of annual respondents might submit a NIST 800–171 variance request or approval ICR = 41.

1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting

The collection of information contained in section 1239.7003, Contract clauses, and part 1252 at proposed clause 1252.239–74, is described immediately following this paragraph.

Summary of Collection of Information

We propose the use of 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting, as prescribed at 1239.7003, Contract clauses.

New proposed TAR clause 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting, requires contractors to provide to the Government—

- Submittal and approval(s) of current or previous NIST 800–171 Variance requests and approvals, along with subcontractor reporting of the same;
- Cyber incident reporting and assessment; and subcontractor reporting of the same;
- Submittal of malicious software; and
- Submittal of media images of known information systems and relevant monitoring/packet capture data.

Clause 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting, requires that contractors shall provide adequate security on all covered contractor information systems. To provide adequate security, the contractor shall implement, at a minimum, information security protections set forth in the clause. DOT would use the information collection requirements to assess the contractor's compliance with specific Federal and DOT IT security requirements. The information is necessary to ensure DOT information and information systems are adequately protected.

Description of Need for Information and Proposed Use of Information

Under Public Law 113–283, Federal Information Security Modernization Act of 2014, each agency of the Federal Government must provide security for the information and information systems that support the operations and assets of the agency, including those provided or managed by another agency, contractor, or other source. To comply with Public Law 113–283, Federal Information Security Modernization Act of 2014, DOT developed clause 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting.

Total Burden Hours: 52.

Average Number of Respondents: 104.

Average Annual Responses: 104.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ By 60 min/hour	Number of burden hours
104	1	30		52

NAICS code: (as shown below)	(Respondents) contract award actions (average 3 FY)
518210	196
541199	12
541513	357
541618	60
541990	932
541110	335
561499	22
561621	158
	2,072

Basis for estimated number of respondents: Number of NAICS code contract actions = 2072 × 5% estimated number of annual respondents might submit a NIST 800–171 variance request or approval ICR or report and submittal of cyber incidents and associated submittals = 104.

1252.239–75, DOT Protection of Information About Individuals, PII, and Privacy Risk Management Requirements

The collection of information contained in section 1239.7104, Contract clause, and part 1252 at proposed clause 1252.239–75, is described immediately following this paragraph.

Summary of Collection of Information

We propose the use of 1252.239–75, DOT Protection of Information About Individuals, PII, and Privacy Risk Management Requirements, as prescribed at 1239.7104, Contract clause.

New proposed TAR clause 1252.239–75, DOT Protection of Information About Individuals, PII, and Privacy Risk Management Requirements, contains the following information collection requirements from the public:

- Notification/reporting of non-compliance with DOT data protection standards with respect to Personally Identifiable Information (PII).
- Notification of new or unanticipated threats or hazards, or if existing safeguards have ceased to function.
- Execution and submittal of confidentiality agreements (protection of PII).
- Notification and secure return of PII to Government when any part of PII, in any form, the Contractor obtains from or behalf of DOT ceases to be required by Contractor or upon termination of contract, within ten (10) business days; or, at DOT's written request to destroy, un-install and/or remove all copies of such PII and provide certification that PII has been returned, or remove or destroyed; and subcontractor certification of return of all records within 30 days of subcontractor's completion of services.

• Breach reporting; and subcontractor breach reporting.

• Notification of subcontractor access to PII.

Clause 1252.239–75, DOT Protection of Information About Individuals, PII, and Privacy Risk Management Requirements, requires any contractor under a DOT contract that creates, maintains, acquires, discloses, uses, or has access to PII in furtherance of the contract, to comply with all applicable Federal law, guidance, and standards and DOT policies pertaining to its protection. The clause requires contractors to comply with the Privacy Act of 1974, 5 U.S.C. 552a, DOT implementing regulations (49 CFR part 10), and DOT policies issued under the Act in the design, development, and/or operation of any system of records on individuals to accomplish a DOT function when the contract specifically identifies the work that the contractor is to perform. It imposes certain information collection requirements, reporting, and submissions as outlined above. DOT would use the information collection requirements to assess the contractor's compliance with specific Federal and DOT IT security requirements. The information is necessary to ensure DOT information and information systems are adequately protected.

Description of Need for Information and Proposed Use of Information

Under Public Law 113–283, Federal Information Security Modernization Act of 2014, each agency of the Federal Government must provide security for the information and information systems that support the operations and assets of the agency, including those provided or managed by another agency, contractor, or other source.

To comply with Public Law 113–283, Federal Information Security Modernization Act of 2014, DOT developed clause 1252.239–75, DOT Protection of Information About Individuals, PII, and Privacy Risk Management Requirements.

Total Burden Hours: 622.

Average Number of Respondents: 311.

Average Annual Responses: 622.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ By 60 min/hour	Number of burden hours
311	2	60		622

Note: DOT has estimated the number of respondents based on identified NAICS codes reflecting previous contract awards averaged over the last three fiscal years—FY 2017, FY 2018, and FY 2019 where the clause may be required. DOT estimates that in the future for a typical contract performance period only 15% of the total average of contract awards represents the potential pool of number of respondents who might deal with PII and are required to submit an information collection requirement (ICR) response, as shown below.

NAICS code: (as shown below)	(Respondents) contract award actions (average 3 FY)
518210	196
541199	12
541513	357
541618	60
541990	932
541110	335
561499	22
561621	158
	2,072

Basis for estimated number of respondents: Number of NAICS code contract actions = 2072 × 15% estimated number of annual respondents might submit a ICRs under this clause = 311.

1252.239–76, Cloud Computing Services

The collection of information contained in section 1239.7204, Contract clauses, and part 1252 at proposed clause 1252.239–76, is described immediately following this paragraph.

Summary of Collection of Information

We propose the use of 1252.239–76, Cloud Computing Services, as prescribed at 1239.7204, Contract clauses.

New proposed TAR clause 1252.239–76, Cloud Computing Services, contains the following information collection requirements from the public:

• Notification of new or unanticipated threats or hazards, or if existing safeguards have ceased to function.

• Providing results of vendor-conducted scans or audits.

• Cyber incident reporting and assessment.

• Malicious software submittal.

• Media images of known information systems and relevant monitoring/packet capture data.

Clause 1252.239–76, Cloud Computing Services, requires contractors to implement and maintain administrative, technical, and physical safeguards and controls with the security level and services required in accordance with DOT Order 1351.37, Departmental Cybersecurity Policy, and the requirements of DOT Order 1351.18, Departmental Privacy Risk Management Policy. It requires cyber incident reporting and notification of threats and hazards, and submittal of associated scans, malicious software, and media images.

Description of Need for Information and Proposed Use of Information

Under Public Law 113–283, Federal Information Security Modernization Act of 2014, each agency of the Federal Government must provide security for the information and information systems that support the operations and assets of the agency, including those provided or managed by another agency, contractor, or other source. DOT would use the information collection

requirements to assess the contractor's compliance with specific Federal and DOT IT security requirements. The information is necessary to ensure DOT information and information systems are adequately protected.

Total Burden Hours: 54.

Average Number of Respondents: 36.

Average Annual Responses: 36.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ By 60 min/hour	Number of burden hours
36	1	90		54

Note: DOT has estimated the number of respondents based on identified NAICS codes reflecting previous contract awards averaged over the last three fiscal years—FY 2017, FY 2018, and FY 2019 where the clause may be required. DOT estimates that in the future for a typical contract performance period estimated of five years, the majority of the information collection requirements might be required in one of the years and thus estimates 5% of the total average of contract awards represents the potential pool of number of respondents who might submit an information collection requirement (ICR) response as shown below principally pertaining to cyber incidents and related reporting requirements.

NAICS code: (as shown below)	(Respondents) contract award actions (average 3 FY)
518210	196
541513	357
561621	158
	711

Basis for estimated number of respondents: Number of NAICS contract actions = 711 × 5% estimated number of annual respondents might submit an ICR or report and submittal of cyber incidents and associated submittals = 36.

1252.239–77, Data Jurisdiction

The collection of information contained in section 1239.7204, Contract clauses, and part 1252 at proposed clause 1252.239–77, is described immediately following this paragraph.

Summary of Collection of Information

We propose the use of 1252.239–77, Data Jurisdiction, as prescribed at 1239.7204, Contract clauses.

New proposed TAR clause 1252.239–77, Data Jurisdiction, contains the following information collection requirements from the public:

- Identifying all data centers that data at rest or data back-up resides, including primary and replicated storage.

Clause 1252.239–77, Data Jurisdiction, requires the contactor to identify all data centers that the data at rest or data backup will reside, including primary and replicated storage. The Contractor shall ensure that all data centers not physically located on DOT premises reside within the United States, the District of Columbia, and all territories and possessions of the United States, unless otherwise authorized by the DOT CIO.

Description of Need for Information and Proposed Use of Information

Under Public Law 113–283, Federal Information Security Modernization Act of 2014, each agency of the Federal Government must provide security for the information and information systems that support the operations and assets of the agency, including those provided or managed by another agency, contractor, or other source. DOT would use the information collection requirements to assess the contractor's compliance with specific Federal and DOT IT security requirements. The information is necessary to ensure DOT information and information systems are adequately protected.

Total Burden Hours: 71.

Average Number of Respondents: 142.

Average Annual Responses: 142.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ By 60 min/hour	Number of burden hours
142	1	30		71

NAICS code: (as shown below)	(Respondents) contract award actions (average 3 FY)
518210	196
541513	357
561621	158
	711

Basis for estimated number of respondents: Number of NAICS code contract actions = 711 × 20% estimated number of annual respondents might submit an ICR under the clause = 142.

1252.239–80, Audit Record Retention for Cloud Service Providers

The collection of information contained in section 1239.7204, Contract clauses, and part 1252 at proposed clause 1252.239–80, is described immediately following this paragraph.

Summary of Collection of Information

We propose the use of 1252.239–80, Audit Record Retention for Cloud Service Providers, as prescribed at 1239.7204, Contract clauses.

New proposed TAR clause 1252.239–80, Audit Record Retention for Cloud Service Providers, contains the following information collection requirements from the public:

• Transfer of permanent records to NARA or deletion of temporary records and reporting of same.

Clause 1252.239–80, Audit Record Retention for Cloud Service Providers, requires contractors to support a system in accordance with the requirement for Federal agencies to manage their electronic records in accordance with 36 CFR 1236.20 and 1236.22, including but not limited to capabilities such as those identified in DoD STD–5015.2 V3, Electronic Records Management Software Applications Design Criteria Standard, NARA Bulletin 2008–05, July 31, 2008, Guidance concerning the use of email archiving applications to store email, and NARA Bulletin 2010–05 September 08, 2010, Guidance on Managing Records in Cloud Computing Environments. The clause requires transfer of permanent records to NARA or deletion of temporary records and reporting of same.

Description of Need for Information and Proposed Use of Information

Under Public Law 113–283, Federal Information Security Modernization Act of 2014, each agency of the Federal Government must provide security for the information and information systems that support the operations and assets of the agency, including those provided or managed by another agency, contractor, or other source. DOT would use the information collection requirements to assess the contractor's compliance with specific Federal and DOT IT security requirements. The information is necessary to ensure DOT information and information systems are adequately protected.

Total Burden Hours: 54.

Average Number of Respondents: 36.

Average Annual Responses: 36.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60 min/hour	Number of burden hours
36	1	90		54

NAICS code: (as shown below)	(Respondents) contract award actions (average 3 FY)
518210	196
541513	357
561621	158
	711

Basis for estimated number of respondents: Number of NAICS code contract actions = 711 × 5% estimated number of annual respondents might submit an ICR under the clause = 36.

1252.239–83, Incident Reporting Timeframes

The collection of information contained in section 1239.7204, Contract clauses, and part 1252 at proposed clause 1252.239–83, is described immediately following this paragraph.

Summary of Collection of Information

We propose the use of 1252.239–83, Incident Reporting Timeframes, as prescribed at 1239.7204, Contract clauses.

New proposed TAR clause 1252.239–83, Incident Reporting Timeframes, contains the following information collection requirements from the public:

• Cyber incident reporting.

Clause 1252.239–83, Incident Reporting Timeframes, requires contractors to report all computer security incidents to the DOT Security Operations Center (SOC) in accordance with Subpart 1239.70—Information Security and Incident Response Reporting and provides specific points of contact and phone numbers to report cyber incidents.

Description of Need for Information and Proposed Use of Information

Under Public Law 113–283, Federal Information Security Modernization Act of 2014, each agency of the Federal Government must provide security for the information and information systems that support the operations and assets of the agency, including those provided or managed by another agency, contractor, or other source. DOT would use the information collection requirements to assess the contractor's compliance with specific Federal and DOT IT security requirements. The information is necessary to ensure DOT information and information systems are adequately protected.

Total Burden Hours: 18.

Average Number of Respondents: 36.

Average Annual Responses: 36.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60 min/hour	Number of burden hours
36	1	30		18

NAICS code: (as shown below)	(Respondents) contract award actions (average 3 FY)
518210	196
541513	357
561621	158
	711

Basis for estimated number of respondents: Number of NAICS code contract actions = 711 × 5% estimated number of annual respondents might submit an ICR under the clause = 36.

1252.239–85, Personnel Screening—Background Investigations

The collection of information contained in section 1239.7204, Contract clauses, and part 1252 at proposed clause 1252.239–85, is described immediately following this paragraph.

Summary of Collection of Information

We propose the use of 1252.239–85, Personnel Screening—Background Investigations, as prescribed at 1239.7204, Contract clauses.

New proposed TAR clause 1252.239–85, Personnel Screening—Background Investigations, contains the following information collection requirements from the public:

- Furnish documentation reflecting favorable adjudication of background investigations.

Clause 1252.239–85, Personnel Screening—Background Investigations, requires contractors provide support personnel who are U.S. persons maintaining a NACI clearance or greater in accordance with OMB memorandum M–05–24, Section C. Contractors must also furnish documentation reflecting favorable adjudication of background investigations for all personnel supporting the system.

Description of Need for Information and Proposed Use of Information

Under Public Law 113–283, Federal Information Security Modernization Act of 2014, each agency of the Federal Government must provide security for the information and information systems that support the operations and assets of the agency, including those provided or managed by another agency, contractor, or other source. DOT would use the information collection requirements to assess the contractor's compliance with specific Federal and DOT IT security requirements. The information is necessary to ensure DOT information and information systems are adequately protected.

Total Burden Hours: 71.

Average Number of Respondents: 142.

Average Annual Responses: 142.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60 min/hour	Number of burden hours
142	1	30		71

NAICS code: (as shown below)	(Respondents) contract award actions (average 3 FY)
518210	196
541513	357
561621	158
	711

Basis for estimated number of respondents: Number of NAICS code contract actions = 711 × 20% estimated number of annual respondents might submit an ICR under the clause = 142.

1252.239–88, Security Alerts, Advisories, and Directives

The collection of information contained in section 1239.7204, Contract clauses, and part 1252 at proposed clause 1252.239–88, is described immediately following this paragraph.

Summary of Collection of Information

We propose the use of 1252.239–88, Security Alerts, Advisories, and Directives as prescribed at 1239.7204, Contract clauses.

New proposed TAR clause 1252.239–88, Security Alerts, Advisories, and Directives, contains the following information collection requirements from the public:

- Provide list of personnel assigned system administration, monitoring, and/or security responsibilities and designated to receive security alerts, advisories, and directives, as well as a list of those personnel responsible for implementation of remedial actions associated with them.

Description of Need for Information and Proposed Use of Information

Under Public Law 113–283, Federal Information Security Modernization Act of 2014, each agency of the Federal Government must provide security for the information and information systems that support the operations and assets of the agency, including those provided or managed by another agency, contractor, or other source. DOT would use the information collection requirements to assess the contractor's compliance with specific Federal and DOT IT security requirements. The information is necessary to ensure DOT

information and information systems are adequately protected.

Total Burden Hours: 71.
Average Number of Respondents: 142.
Average Annual Responses: 142.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60 min/hour	Number of burden hours
142	1	30		71

NAICS code: (as shown below)	(Respondents) contract award actions (average 3 FY)
518210	196
541513	357
561621	158
	711

Basis for estimated number of respondents: Number of NAICS code contract actions = 711 × 20% estimated number of annual respondents might submit an ICR under the clause = 142.

1252.239–89, Technology Modernization

The collection of information contained in section 1239.7303, Contract clauses, and part 1252 at proposed clause 1252.239–89, is described immediately following this paragraph.

Summary of Collection of Information

We propose the use of 1252.239–89, Technology Modernization, as prescribed at 1239.7303, Contract clauses.

New proposed TAR clause 1252.239–89, Technology Modernization, contains the following information collection requirements from the public:

- Submittal of price or cost proposals for modernization approach.

Clause 1252.239–89, Technology Modernization, encourages the contractor to propose independently a modernization approach to the hardware, software, specifications, or other requirements of the contract. This modernization approach may be proposed to increase efficiencies (both system and process level), reduce costs, strengthen the cyber security posture, or for any other purpose which presents an advantage to the Government. The clause requires the contractor to submit a price or cost proposal to the Contracting Officer for evaluation.

Description of Need for Information and Proposed Use of Information

Under Public Law 113–283, Federal Information Security Modernization Act of 2014, each agency of the Federal Government must provide security for the information and information systems that support the operations and assets of the agency, including those provided or managed by another agency, contractor, or other source.

To comply with Public Law 113–283, Federal Information Security Modernization Act of 2014, DOT developed clause 1252.239–89, Technology Modernization. DOT would use the information collection requirements to assess the contractor's proposal(s), the comparative advantages and disadvantages of the existing contract requirement and the proposed change; itemized requirements of the contract that must be changed; an estimate of the changes in performance and price or cost; and potential delivery schedule impact(s). The information is needed by the Government to adequately evaluate the proposals and negotiate any contract modification terms and conditions, to include cost or price.

Total Burden Hours: 440.
Average Number of Respondents: 293.
Average Annual Responses: 293.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60 min/hour	Number of burden hours
293	1	90		440

Note: DOT has estimated the number of respondents based on identified NAICS code reflecting previous contract awards averaged over the last three fiscal years—FY 2017, FY 2018, and FY 2019 where the clause may be required. DOT estimates that in the future for a typical contract performance period estimated of five years, the majority of the information collection requirements might be required in one of the years and thus estimates 20% of the total average of contract awards represents the potential pool of number of respondents who might submit an information collection requirement (ICR) response as shown below.

NAICS code: (as shown below)	(Respondents) contract award actions (average 3 FY)
518210	196
541512	911
541513	357
	1,464

Basis for estimated number of respondents: Number of NAICS code contract actions = 1,464 × 20% estimated number of annual respondents (based on typical five-year period of performance and ICR might be requested or submitted in one of the five total possible years of the contract) = 293.

1252.239–90, Technology Upgrades/Refreshments

The collection of information contained in section 1239.7303, Contract clauses, and part 1252 at proposed clause 1252.239–90, is described immediately following this paragraph.

Summary of Collection of Information

We propose the use of 1252.239–90, Technology Upgrades/Refreshments, as prescribed at 1239.7303, Contract clauses.

New proposed TAR clause 1252.239–90, Technology Upgrades/Refreshments, contains the following information collection requirements from the public:

- Submittal of price or cost proposals for upgrade/refreshment approach.

Clause 1252.239–90, Technology Upgrades/Refreshments, encourages contractors to propose independently technology improvements to the hardware, software, specifications, or other requirements of the contract. These improvements may be proposed to save money, to improve performance, to save energy, to satisfy increased data processing requirements, or for any other purpose that presents a technological advantage to the Government. The clause requires the contractor to submit a price or cost proposal to the Contracting Officer for evaluation.

Description of Need for Information and Proposed Use of Information

Under Public Law 113–283, Federal Information Security Modernization Act of 2014, each agency of the Federal Government must provide security for the information and information systems that support the operations and assets of the agency, including those provided or managed by another agency, contractor, or other source.

To comply with Public Law 113–283, Federal Information Security Modernization Act of 2014, DOT developed clause 1252.239–90, Technology Upgrades/Refreshments. DOT would use the information collection requirements to assess the contractor's proposal(s), the comparative advantages and disadvantages of the existing contract requirement and the proposed change; itemized requirements of the contract that must be changed; an estimate of the changes in performance and price or cost; and potential delivery schedule impact(s). The information is needed by the Government to adequately evaluate the proposals and negotiate any contract modification terms and conditions, to include cost or price.

Total Burden Hours: 110.

Average Number of Respondents: 73.

Average Annual Responses: 73.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60 min/hour	Number of burden hours
73	1	90		110

NAICS code: (as shown below)	(Respondents) contract award actions (average 3 FY)
518210	196
541512	911
541513	357
	1,464

Basis for estimated number of respondents: Number of NAICS code contract actions = 1,464 × 5% estimated number of annual respondents (based on typical five-year period of performance and ICR might be requested or submitted in one of the five total possible years of the contract) = 73.

Regulatory Flexibility Act

DOE expects that the overall impact of the proposed rule would benefit small businesses because DOT proposes to update the TAR to, among other things, revise outdated information, remove extraneous procedural information that applies only to DOT's internal operating procedures, and remove policy or procedures duplicative of FAR requirements. Any additional costs associated with the rule, such as costs to implement the substantive new and revised requirements concerning information technology (IT) security provisions of the Federal Information Security Management Act of 2002 (FISMA), (Title III of the E-Government Act of 2002 (E-Gov Act)), can be factored into the contract price. On this basis, the Secretary hereby certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of sections 603 and 604 do not apply.

While on the basis of the foregoing, DOT has determined that the agency is not required to prepare an Initial Regulatory Flexibility Analysis (IRFA), DOT has prepared an IRFA that is summarized here. Comments are solicited from small businesses and other interested parties and will be considered in the development of the final rule.

Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis has been prepared consistent with 5 U.S.C. 603.

1. *Description of the reasons why the action is being taken.*

This proposed rule would amend the Transportation Acquisition Regulation (TAR) to implement updates to the TAR, remove extraneous procedural information that applies only to DOT's internal operating procedures, and remove policy or procedures duplicative of FAR requirements. The proposed rule also includes substantive new and revised requirements concerning information technology (IT) security provisions of the Federal Information Security Management Act of 2002 (FISMA), (Title III of the E-Government Act of 2002 (E-Gov Act)). FISMA

requires agencies to identify and provide information security protections commensurate with security risks to Federal information collected or maintained for the agency and information systems used or operated on behalf of an agency by a contractor. The Federal Regulatory Council (FAR Council) contemplated in their previous FAR rules on IT that subsequent supplemental policy-making at the agency level may have some impact on small business entities, because FISMA requires that agencies establish IT security policies commensurate with agency risk and potential for harm and that meet certain minimum requirements. The impact on small entities was understood to be variable depending on the agency implementation. Based on a review of the potential impact on small business entities, DOT has determined that the requirements specified in the rule are inherent to successful performance on any Federal contract.

2. *Succinct statement of the objectives of, and legal basis for, the rule.*

In addition to updating the TAR to remove outdated information, remove extraneous procedural information that applies only to DOT's internal operating procedures, and to remove policy or procedures duplicative of FAR requirements, the rule implements the IT security provisions of the FISMA. Section 301 of FISMA (44 U.S.C. 3544) requires that contractors be held accountable to the same security standards as Government employees when collecting or maintaining information or using or operating information systems on behalf of an agency. Security is to be considered during all phases of the acquisition life cycle. FISMA requires that agencies establish IT security policies commensurate with agency risk and potential for harm and that meet certain minimum requirements. Agencies are further required, through the Chief Information Officer (CIO) or equivalent, to assure compliance with agency security policies. The law requires that contractors and Federal employees be subjected to the same requirements in accessing Federal IT systems and data.

3. *Description of and, where feasible, estimate of the number of small entities to which the rule will apply.*

To estimate the number of small businesses who could potentially be impacted by the rule, DOT identified contract award actions across key North American Industry Classification System (NAICS) codes that could be affected for three fiscal years—FY 2017, 2018, and 2019 as set forth in the table below. DOE focused on businesses who could be impacted by the proposed revisions to part 1239, Acquisition of Information Technology, because of the potential costs resulting from the associated Paperwork Reduction Act information collection burdens (though as noted above, DOT ultimately pays those costs as part of the contract).

NAICS	NAICS description	FY 2017	FY 2018	FY 2019	Total	Average
518210	Data Processing, Hosting, and Related Services	172	177	238	587	196
541199	All Other Legal Services	9	12	15	36	12
541511	Custom Computer Programming Services	896	1,964	870	3,730	1,243
541512	Computer Systems Design Services	754	942	1,036	2,732	911
541513	Computer Facilities Management Services	385	358	329	1,072	357
541519	Other Computer Related Services	1,270	1,440	1,355	4,065	1,355
541618	Other Management Consulting Services	86	53	40	179	60
541990	All Other Professional, Scientific, and Tech. Svcs	947	1,002	848	2,797	932
561110	Office Administrative Services	373	352	279	1,004	335
561499	All Other Business Support Services	20	20	25	65	22
561621	Security Systems Services	187	142	146	475	158
	Total	5,099	6,462	5,181	16,742	5,581

As shown, DOT awarded over 16,742 contracts for IT or IT-related services during FY 2017 through FY 2019. To estimate the number of small businesses potentially impacted by the rule, DOT notes that in FY 2019, the department achieved a 37.12% goal of overall awards to all small business concerns across all NAICS and all operating administrations. Using this figure to project the potential impact to small business entities who may be affected by the rule, the Department estimates that these businesses could be awarded 10%–25% of such work, or up to 4,186 contracts awarded to small businesses.

4. *Description of projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.*

The revised record keeping and reporting requirements and estimated impacts are described in the Paperwork Reduction Act (PRA) section of the rule.

5. *Identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the rule.*

The rule does not duplicate, overlap, or conflict with any other Federal rules.

6. *Description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule on small entities.*

DOT considered whether any other alternatives would reduce the impact on small businesses but concluded that the proposed rule was necessary for consistency with the FAR, for FISMA compliance, and to ensure the information security and integrity of DOT information and information systems.

Comments on the Economic Impacts of the Rule

DOT has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. DOT will consider comments from small entities concerning the affected TAR parts, to include 1239 that pertains to IT. Interested parties should cite 5 U.S.C 601, *et seq.* and reference RIN 2105–AE26—Streamline and Update the Department of Transportation Acquisition Regulation (TAR Case 2020–001), in comments on the certification or the IRFA presented in this proposed rule.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the

private sector, of $100 million or more (adjusted annually for inflation) in any one year. DOE has determined that this proposed rule would have no such effect on State, local, and tribal governments or on the private sector. Therefore, the analytical requirements of UMRA do not apply.

List of Subjects in 48 CFR Chapter 12

Government procurement, Conflict of interest, Small business, Labor, Copyright, Inventions and patents, Insurance, Surety bonds, Accounting, Government property, Warranties, Transportation.

Signing Authority

Date Approved: October 20, 2021.

Polly E. Trottenberg,

Deputy Secretary, Department of Transportation.

For the reasons set out in the preamble, DOT proposes to revise 48 CFR chapter 12 to read as follows:

CHAPTER 12—DEPARTMENT OF TRANSPORTATION

SUBCHAPTER A—GENERAL

Sec.
1200 [RESERVED]
1201 Federal Acquisition Regulations System.
1202 Definitions of Words and Terms.
1203 Improper Business Practices and Personal Conflicts of Interest.
1204 Administrative and Information Matters.

SUBCHAPTER B—ACQUISITION PLANNING

1205 Publicizing Contract Actions.
1206 Competition Requirements.
1207 Acquisition Planning.
1209 Contractor Qualifications.
1211 Describing Agency Needs.
1212 Acquisition of Commercial Items.

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

1213 Simplified Acquisition Procedures.
1214 [RESERVED]
1215 Contracting by Negotiation.
1216 Types of Contracts.
1217 Special Contracting Methods.

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

1219 Small Business Programs.
1222 Application of Labor Laws to Government Acquisitions.
1223 Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace.
1224 Protection of Privacy and Freedom of Information.

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

1227 Patents, Data, and Copyrights.
1228 Bonds and Insurance.
1231 Contract Cost Principles and Procedures.
1232 Contract Financing.
1233 Protests, Disputes, and Appeals.

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

1234 [RESERVED]
1235 Research and Development Contracting.
1236 Construction and Architect-Engineer Contracts.
1237 Service Contracting.
1239 Acquisition of Information Technology.
1241 [RESERVED]

SUBCHAPTER G—CONTRACT MANAGEMENT

1242 Contract Administration and Audit Services.
1245 [RESERVED]
1246 Quality Assurance.
1247 Transportation.

SUBCHAPTER H—CLAUSES AND FORMS

1252 Solicitation Provisions and Contract Clauses.
1253 Forms.
1254–1299 [RESERVED]

PART 1201—FEDERAL ACQUISITION REGULATIONS SYSTEM

Sec.

Subpart 1201.1—Purpose, Authority, Issuance

1201.101 Purpose.
1201.102–70 DOT statement of guiding principles for Department of Transportation Acquisition System.
1201.104 Applicability.
1201.105 Issuance.
1201.105–1 Publication and code arrangement.
1201.105–2 Arrangement of regulations.
1201.105–3 Copies.
1201.106 OMB approval under the Paperwork Reduction Act.

Subpart 1201.2—Administration

1201.201 Maintenance of the FAR.
1201.201–1 The two councils.

Subpart 1201.3—Agency Acquisition Regulations

1201.301 Policy.
1201.301–70 Amendment of the Transportation Acquisition Regulation.
1201.301–71 Effective dates for Transportation Acquisition Circulars or TAR Notices.
1201.301–72 Transportation Acquisition Circular numbering.
1201.304 Agency control and compliance procedures.

Subpart 1201.470—Deviations From the FAR and TAR

1201.403 Individual deviations.
1201.404 Class deviations.

Subpart 1201.6—Career Development, Contracting Authority, and Responsibilities

1201.602 Contracting officers.
1201.602–2 Responsibilities.
1201.602–3 Ratification of unauthorized commitments.
1201.603 Selection, appointment, and termination of appointment of contracting officers.
1201.603–1 General.
1201.604 Contracting Officer's Representative (COR).
1201.604–70 Contract clause.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1201.1—Purpose, Authority, Issuance

1201.101 Purpose.

The Department of Transportation (DOT), Transportation Acquisition Regulation (TAR), establishes uniform acquisition policies and procedures that implement and supplement the Federal Acquisition Regulation (FAR). The TAR provides regulatory or policy instruction when coverage is needed for DOT-specific subject matter not covered in the FAR. The TAR also includes policy statements that DOT considers important to both internal and external TAR audiences. The Transportation Acquisition Manual (TAM) contains internal operating procedures, providing supplementary guidance and instructions for carrying out FAR and TAR requirements.

1201.102–70 DOT statement of guiding principles for the Department of Transportation Acquisition System.

(a) *Vision.* The TAR applies to all Department acquisitions unless otherwise excluded by statute. DOT strives to make its acquisition process effective, efficient, and transparent, and to embody fairness and government-wide best practices.

(b) *Mission.* The TAR is a key component of DOT's acquisition process and is designed to provide clear and current regulatory and policy oversight to supplement or support implementation of the FAR.

(c) *Role of the Office of the Senior Procurement Executive.* The Office of the Senior Procurement Executive (OSPE) applies leadership and best-in-industry acquisition practices to establish acquisition policies and procedures. The OSPE supports the DOT's mission by providing timely, effective, and ethical business policies, practices, products, innovative programs, strategies, and services.

1201.104 Applicability.

(a) Applicable statutes, the FAR, Title 48, Chapter 1, and the TAR, 48 CFR, Chapter 12, apply to all acquisitions within the Department unless otherwise specifically excluded by statute, the FAR, or the TAR.

(b) The following order of precedence applies to resolve any question of

applicability concerning an acquisition regulation or a procedure found within the TAR, or the TAM which comprises the Department's internal operating procedures and guidance—

(1) U.S. Statutes;

(2) The FAR;

(3) The TAR;

(4) DOT Orders; and

(5) The TAM.

(c) The Maritime Administration may depart from the requirements of the FAR and TAR as authorized by 40 U.S.C. 113(e)(15), but shall adhere to those regulations to the maximum extent practicable. Deviations from the FAR or TAR requirements shall be documented according to Maritime Administration procedures or in each contract file, as appropriate.

(d) The FAR, TAR, and TAM do not apply to the Federal Aviation Administration as provided by 49 U.S.C. 40110(d).

(e) For purposes of the FAR, TAR, and TAM, the Office of the Assistant Secretary for Research and Technology shall have the same authority as an Operating Administration as defined in 1202.1, and the Assistant Secretary for Research and Technology shall have the same authority as a Head of the Operating Administration as defined in 1202.1.

1201.105 Issuance.

1201.105–1 Publication and code arrangement.

(a) The TAR is published or available in—

(1) The **Federal Register**;

(2) Cumulative form in the CFR; and

(3) Online via the internet at *https://www.acquisition.gov/tar.*

(b) The TAR is issued as chapter 12 of Title 48 of the CFR.

1201.105–2 Arrangement of regulations.

(a) *General.* The TAR, which encompasses both Department and Operating Administration (OA)/Office of the Assistant Secretary for Research and Technology (OST–R)-specific guidance (*see* subpart 1201.3), conforms with the arrangement and numbering system prescribed by FAR 1.104. Guidance that is OA-specific contains the OA's acronym directly after the heading.

(b) *Numbering*—(1) *Department-wide guidance.* (i) The numbering illustrations at FAR 1.105–2(b) apply to the TAR.

(ii) Coverage within the TAR is identified by the prefix ''12'' followed by the complete TAR citation. For example, 1201.201–1(b).

(iii) Coverage in the TAR that supplements the FAR will use part, subpart, section and subsection numbers ending in ''70'' through ''89'' (*e.g.,* 1201.301–70). A series of numbers beginning with ''70'' is used for provisions and clauses.

(iv) Coverage in the TAR, other than that identified with a ''70'' or higher number, that implements the FAR uses the identical number sequence and caption of the FAR segment being implemented, which may be to the paragraph level. Paragraph numbers and letters are not always shown sequentially, but may be shown by the specific FAR paragraph implemented. For example, TAR 1201.201–1 contains only paragraph (b) because only this paragraph, correlated with the FAR, is implemented in the TAR.

(2) *Operating Administration-unique guidance.* Supplementary material for which there is no counterpart in the FAR or TAR shall be identified using chapter, part, subpart, section, or subsection numbers of ''90'' and higher.

(c) *References and citations.* The Department of Transportation Acquisition Regulation may be referred to as the TAR. Cross reference to the FAR in the TAR will be cited by ''FAR'' followed by the FAR numbered citation, and cross reference to the TAM in the TAR will be cited by ''TAM'' followed by the TAM numbered citations. References to specific citations within the TAR will be referenced by the numbered citation only, *e.g.,* 1201.105–3.

(3) Using the TAR coverage at 1201.105–2(b) as a typical illustration, reference to the—

(i) Part would be ''TAR part 1201'' outside the TAR and ''part 1201'' within the TAR.

(ii) Subpart would be ''TAR subpart 1201.1'' outside the TAR and ''subpart 1201.1'' within the TAR.

(iii) Section would be ''TAR 1201.105'' outside the TAR and ''1201.105'' within the TAR.

(iv) Subsection would be ''TAR 1201.105–1'' outside the TAR and ''1201.105–1'' within the TAR.

(v) Paragraph would be ''TAR 1201.105–1(b)'' outside the TAR and ''1201.105–1(b)'' within the TAR.

1201.105–3 Copies.

(a) Copies of the TAR as published in **Federal Register** and as set forth in the CFR may be purchased from the Government Publishing Office (GPO), U.S. Government Online Bookstore on the internet at *https://bookstore.gpo.gov/.*

(b) The TAR and Transportation Acquisition Circulars (TACs) are available on the internet at *https://www.acquisition.gov.*

1201.106 OMB approval under the Paperwork Reduction Act.

The information collection and recordkeeping requirements contained in the TAR have been approved by the Office of Management and Budget (OMB). Details concerning any TAR related OMB approved control numbers are specified in the TAM.

Subpart 1201.2—Administration

1201.201 Maintenance of the FAR.

1201.201–1 The two councils.

(b) The Senior Procurement Executive is responsible for providing a DOT representative to the Civilian Agency Acquisition Council (CAAC).

Subpart 1201.3—Agency Acquisition Regulations

1201.301 Policy.

(a)(1) *Acquisition regulations.* (i) *Department-wide acquisition regulations.* The Department of Transportation's (DOT's) Senior Procurement Executive (SPE) is the individual having authority to issue or authorize the issuance of agency regulations that implement or supplement the FAR to include agency-unique policies, procedures, contract clauses, solicitation provisions, and forms that govern the contracting process. This authority is re-delegated from the Assistant Secretary for Administration to the SPE.

(ii) *Operating Administration (OA) acquisition regulations.* OA supplemental acquisition regulations proposed to be inserted in the TAR as a TAR supplement regulation shall be reviewed and approved by the SPE. If approved by the SPE, the Office of the Senior Executive will prepare the rule for publication in the **Federal Register** in accordance with FAR 1.501. OA regulations may be more restrictive or require higher approval levels than those required by the TAR unless otherwise specified.

(2) *Acquisition procedures.* The SPE issues or authorizes the issuance of internal agency guidance at any organizational level. DOT internal operating procedures are contained in the TAM. OA procedures necessary to implement or supplement the FAR, TAR, or TAM may be issued by the head of the contracting activity (HCA), who may delegate this authority to any organizational level deemed appropriate. OA procedures may be more restrictive or require higher approval levels than those permitted by the TAM unless otherwise specified.

(b) The authority of the agency head under FAR 1.301(b) to establish

procedures to ensure that agency acquisition regulations are published for comment in the **Federal Register** in conformance with the procedures in FAR subpart 1.5 is delegated to the Office of the General Counsel, Assistant General Counsel for Regulation.

1201.301–70 Amendment of the Transportation Acquisition Regulation.

(a) Changes to the TAR may be the result of recommendations from internal DOT personnel, other Government agencies, or the public. Proposed changes shall be submitted in the following format to the Office of the Senior Procurement Executive (OSPE), 1200 New Jersey Avenue SE, Washington, DC 20590 or *DOTAcquisitionPolicy@dot.gov:*

(1) *Problem.* Succinctly state the problems created by current TAR language and describe the factual or legal reasons necessitating regulatory change.

(2) *Recommendation.* Identify the recommended change by using the current language (if applicable) and striking through the proposed deleted words with a horizontal line. Insert proposed language in bold and brackets. If the change is extensive, reflect proposed deleted language in strikethrough and proposed new or revised language with complete paragraphs in bold and brackets.

(3) *Discussion.* Explain why the change is necessary and how it will solve the problem. Address any cost or administrative impact on Government activities, offerors, and contractors, to include potential impact to small businesses. Provide any other information and documents, such as statutes, legal decisions, regulations, and reports, that may be helpful.

(4) *Point of contact.* Provide a point of contact who can answer questions regarding the recommendation.

(b) The TAR is maintained by the SPE through the TAR/TAM change process. This process consists of input from various DOT elements including representatives from DOT OAs specifically designated to formulate Departmental acquisition policies and procedures.

(c) Transportation Acquisition Circular (TAC). TACs (*see* 1201.301–72) will be used to publish the TAR throughout DOT.

1201.301–71 Effective dates for Transportation Acquisition Circulars (TACs).

(a) *Effective dates set forth in TACs.* Unless otherwise stated in the body of TACs, statements to the effect that the policy or procedures are ''effective upon receipt,'' ''upon a specified date,'' or that changes set forth in the document are ''to be used upon receipt,'' mean that any new or revised provisions, clauses, procedures, or forms must be included in solicitations, contracts or modifications issued thereafter.

(b) *Effective dates for in-process acquisitions.* Unless expressly directed by statute or regulation, solicitations in process or negotiations that are completed when a TAC is issued are not required to include or insert new requirements, forms, clauses, or provisions, as may be set forth in a TAC. However, the chief of the contracting office must determine that it is in the best interest of the Government to exclude the new information and the determination and findings must be included in the contract file.

1201.301–72 Transportation Acquisition Circular numbering.

Transportation Acquisition Circulars (TACs) will be numbered consecutively on a fiscal year basis beginning with number ''01'' prefixed by the last two digits of the fiscal year (*e.g.,* TACs 21–01 and 21–02 indicate the first two TACs issued in fiscal year 2021).

1201.304 Agency control and compliance procedures.

(a) DOT shall control the proliferation of acquisition regulations and any revisions thereto (except as noted in paragraph (b) of this section) by using an internal TAR change process.

(b) Specific OA-unique regulations will not be processed through the TAR/TAM change process but shall be reviewed by OA legal counsel and submitted to the OSPE for review and approval. (*See* 1252.101 for additional instructions pertaining to provisions and clauses.)

Subpart 1201.470—Deviations from the FAR and TAR

1201.403 Individual deviations.

The head of the contracting activity (HCA), or designee with a rank that is no lower than that of a Senior Executive Service (SES) official, may authorize individual deviations to the FAR and TAR, unless FAR 1.405(e) applies.

1201.404 Class deviations.

The SPE may authorize and approve class deviations from the FAR and TAR, unless FAR 1.405(e) applies.

Subpart 1201.6—Career Development, Contracting Authority, and Responsibilities

1201.602 Contracting officers.

1201.602–2 Responsibilities.

(d) Each DOT OA is responsible for establishing Contracting Officer's Representative (COR) nomination and appointment procedures consistent with the DOT Acquisition Workforce Career Development Program.

1201.602–3 Ratification of unauthorized commitments.

(b) *Policy.* DOT policy requires that all procurement decisions shall be made only by Government officials having authority to carry out such acquisitions. Procurement decisions made by other than authorized personnel are contrary to Departmental policy and may be considered matters of serious misconduct on the part of the employee making an unauthorized commitment. Disciplinary action against an employee who makes an unauthorized commitment may be considered.

1201.603 Selection, appointment, and termination of appointment for contracting officers.

1201.603–1 General.

Each DOT OA is responsible for appointing its contracting officers. Each HCA shall appoint one Chief of the Contracting Office (COCO) for each OA. Individuals designated as COCOs are considered contracting officers and shall be appointed by their respective HCA. The HCA may select, appoint, and terminate the appointment of contracting officers. The HCA may re-delegate this authority to a level no lower than that of the COCO.

1201.604 Contracting Officer's Representative (COR).

1201.604–70 Contract clause.

The contracting officer shall insert the clause at 1252.201–70, Contracting Officer's Representative, in solicitations and contracts that are identified as other than firm-fixed-price, and for firm-fixed-price solicitations and contracts when appointment of a contracting officer's representative is anticipated.

PART 1202—DEFINITIONS OF WORDS AND TERMS

Sec.

Subpart 1202.1—Definitions

1202.101 Definitions.

Subpart 1202.70—Abbreviations

1202.7000 General.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1202.1—Definitions

1202.101 Definitions.

Agency Advocate for Competition means the Deputy Assistant Secretary for Administration.

Agency, Federal agency or *Executive agency,* as used in the TAR, means the Department of Transportation (DOT).

Chief Financial Officer (CFO) is the principal fiscal advisor to the Secretary of DOT responsible for providing leadership, advice, and guidance in the development, implementation, and administration of DOT's budget, financial management, and performance management.

Chief Information Officer is the principal information technology (IT), cyber security, privacy, and records management advisor to the Secretary, and is the final authority on these matters within the Department.

Chief of the Contracting Office (COCO) means the individual(s) responsible for managing the contracting office(s) within an Operating Administration.

Contracting activity includes all the contracting offices within an Operating Administration and is the same as the term ''procuring activity.''

Contracting officer means an individual authorized by virtue of their position or by appointment to perform the functions assigned by the Federal Acquisition Regulation (FAR), the Transportation Acquisition Regulation (TAR), and Transportation Acquisition Manual (TAM).

Department of Transportation (DOT) means, when referring to the various suborganizations and components of DOT, all of the Operating Administrations, as defined in the TAR/TAM, included within DOT.

Head of the agency or *Agency head* for Departmental procurement means the Deputy Secretary except for acquisition actions that, by the terms of a statute or delegation, must be done specifically by the Secretary of Transportation.

Head of the contracting activity (HCA) means the individual responsible for managing the contracting offices within an Operating Administration who is a member of the Senior Executive Service except for the HCA within the Great Lakes St. Lawrence Seaway Development Corporation (GLS), which shall be an individual no lower than one level above the COCO. The term HCA is the same as the term Head of the procuring activity.

Head of the Operating Administration (HOA) means the individual appointed by the President to manage the [DOT] operating administration.

Operating Administration (OA) means the following components of DOT—

(1) Federal Aviation Administration (FAA) (FAA) is exempt from FAR, TAR and TAM pursuant to the Department of Transportation and Related Agencies Appropriations Act, 1996, Public Law 104–50);

(2) Federal Highway Administration (FHWA);

(3) Federal Motor Carrier Safety Administration (FMCSA);

(4) Federal Railroad Administration (FRA);

(5) Federal Transit Administration (FTA);

(6) Maritime Administration (MARAD);

(7) National Highway Traffic Safety Administration (NHTSA);

(8) Office of the Secretary of Transportation (OST);

(9) Pipeline and Hazardous Materials Safety Administration (PHMSA);

(10) Great Lakes St. Lawrence Seaway Development Corporation (GLS); and

(11) Office of the Assistant Secretary for Research and Technology (OST–R).

Small Business Specialist (SBS) means the individual appointed by each HCA to assist the Director, Office of Small and Disadvantaged Business Utilization in carrying out the purpose of the Small Business Act.

Senior Procurement Executive (*SPE*) means the Director of the Office of the Senior Procurement Executive.

Subpart 1202.70—Abbreviations

1202.7000 General.

The following abbreviations or acronyms may be used throughout the TAR and the agency's associated internal policies and procedures in the TAM—

CFO Chief Financial Officer
CIO Chief Information Officer
COCO Chief of the Contracting Office
COR Contracting Officer's Representative
D&F Determination and Findings
FOIA Freedom of Information Act
HCA Head of the Contracting Activity
HOA Head of the Operating Administration
J&A Justification and Approval
OA Operating Administration
OIG Office of the Inspector General
OSDBU Office of Small and Disadvantaged Business Utilization
PCR Procurement Center Representative
RFP Request for Proposal
SBA Small Business Administration
SBS Small Business Specialist
SPE Senior Procurement Executive

PART 1203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Sec.

Subpart 1203.1—Safeguards

1203.101–3 Agency regulations.

Subpart 1203.2—Contractor Gratuities to Government Personnel

1203.203 Reporting suspected violations of the Gratuities clause.
1203.204 Treatment of violations.

Subpart 1203.3—Reports of Suspected Antitrust Violations

1203.301 General.
1203.303 Reporting suspected antitrust violations.

Subpart 1203.4—Contingent Fees

1203.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

Subpart 1203.5—Other Improper Business Practices

1203.502–2 Subcontractor kickbacks.

Subpart 1203.7—Voiding and Rescinding Contracts

1203.703 Authority.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1203.1—Safeguards

1203.101–3 Agency regulations.

(a) Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR part 2635, and the Supplemental Standards of Ethical Conduct for Employees of the Department of Transportation, 5 CFR part 6001 apply to all DOT employees.

Subpart 1203.2—Contractor Gratuities to Government Personnel

1203.203 Reporting suspected violations of the Gratuities clause.

(a) Suspected violations of the Gratuities clause shall be reported to the contracting officer responsible for the acquisition (or the Chief of the Contracting Office (COCO) if the contracting officer is suspected of the violation). The contracting officer (or COCO) shall obtain from the person reporting the violation, and any witnesses to the violation, the following information—

(1) The date, time, and place of the suspected violation;

(2) The name and title (if known) of the individual(s) involved in the violation; and

(3) The details of the violation (*e.g.,* the gratuity offered or intended) to

obtain a contract or favorable treatment under a contract.

(b) The person reporting the violation and witnesses (if any) should be requested to sign and date the information certifying that the information furnished is true and correct. The COCO shall report suspected violations to the Office of the Inspector General (OIG), 1200 New Jersey Avenue SE, Washington, DC 20590, with a copy to General Counsel and the OA's Chief Counsel.

1203.204 Treatment of violations.

(a) The HCA is authorized to determine whether a Gratuities clause violation has occurred. If the HCA has been personally and substantially involved in the procurement, Government legal counsel advice should be sought to determine if a substitute for the HCA should be designated.

(b) The COCO shall ensure that the contractor is afforded the hearing procedures required by FAR 3.204(b). Government legal counsel should be consulted regarding the appropriateness of the hearing procedures.

(c) If the HCA determines that the alleged gratuities violation occurred during the ''conduct of an agency procurement'', the COCO shall consult with Government legal counsel regarding the approach for appropriate processing of either the Procurement Integrity Act violation and/or the Gratuities violation.

Subpart 1203.3—Reports of Suspected Antitrust Violations

1203.301 General.

(b) The same procedures contained in 1203.203 shall be followed for suspected antitrust violations, except reports of suspected antitrust violations shall be coordinated with legal counsel for referral to the Department of Justice, if deemed appropriate.

1203.303 Reporting suspected antitrust violations.

(b) The same procedures contained in 1203.203 shall be followed for suspected antitrust violations, except reports of suspected antitrust violations shall be coordinated with legal counsel for referral to the Department of Justice, if deemed appropriate.

Subpart 1203.4—Contingent Fees

1203.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

(a) The same procedures contained in 1203.203 shall be followed for reporting the attempted or actual exercise of improper influence, misrepresentation of a contingent fee arrangement, or other violation of the Covenant Against Contingent Fees (*see* FAR 52.203–5), except reports of misrepresentation or violations of the Covenant Against Contingent Fees shall be coordinated with legal counsel for referral to the Department of Justice, if deemed appropriate.

Subpart 1203.5—Other Improper Business Practices

1203.502–2 Subcontractor kickbacks.

(g) The same procedures contained in 1203.203 shall be followed for reporting a violation of 41 U.S.C. chapter 87, Kickbacks.

Subpart 1203.7—Voiding and Rescinding Contracts

1203.703 Authority.

(a) The head of the contracting activity (HCA) is authorized by the Secretary of Transportation to declare void and rescind contracts and other transactions listed in Public Law 87–849 (18 U.S.C. 218), in which there has been a final conviction for bribery, conflict of interest, or any other violation of 18 U.S.C. 201–224).

(b) The Head of the Operating Administration (HOA) is authorized to make determinations, in accordance with FAR 3.703(b)(2).

Subpart 1203.9—Whistleblower Protections for Contractor Employees

1203.906 Remedies.

(a) The HCA is authorized to make determinations and take actions under FAR 3.906(a).

(b) The HCA is authorized to take actions under FAR 3.906(b).

PART 1204—ADMINISTRATIVE AND INFORMATION MATTERS

Sec.

Subpart 1204.1—Contract Execution

1204.103 Contract clause.

Subpart 1204.5—Electronic Commerce in Contracting

1204.502 Policy.

Subpart 1204.8—Government Contract Files

1204.801 General.
1204.804 Closeout of contract files.
1204.804–5 Procedures for closing out contract files.
1204.804–570 Supporting closeout documents.

Subpart 1204.9—Taxpayer Identification Number Information

1204.903 Reporting contract information to the IRS.

Subpart 1204.13—Personal Identity Verification

1204.1301 Policy.
1204.1303 Contract clause.

Subpart 1204.17—Service Contracts Inventory

1204.1703 Reporting requirements.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1204.1—Contract Execution

1204.103 Contract clause.

The contracting officer shall insert the clause at FAR 52.204–1, Approval of Contract, filled in as appropriate, in solicitations and contracts when approval to award the resulting contract must be obtained from an official at a level above the contracting officer.

Subpart 1204.5—Electronic Commerce in Contracting

1204.502 Policy.

(c) DOT's preferred policy is to use electronic signatures, records and communication methods in lieu of paper transactions whenever practicable. Before using electronic commerce, the HOA and OA shall ensure that the OA systems are capable of ensuring authentication and confidentiality commensurate with the risk of unauthorized access to or modification of the information.

Subpart 1204.8—Government Contract Files

1204.801 General.

(a) The COCO is designated as the head of each office performing contracting and contract administration functions. The Chief Financial Officer (CFO) of the OA is designated as the head of the office performing paying functions.

1204.804 Closeout of contract files.

1204.804–5 Procedures for closing out contract files.

1204.804–570 Supporting closeout documents.

(a) When applicable (*see* paragraphs (a)(1) through (4) of this section) and prior to contract closeout, the contracting officer shall obtain the listed DOT and Department of Defense (DOD) forms from the contractor to facilitate contract closeout. See 1253 for links to forms.

(1) Form DOT F 4220.4, Contractor's Release, *see* FAR 52.216–7;

(2) Form DOT F 4220.45, Contractor's Assignment of Refunds, Rebates, Credits and Other Amounts, FAR 52.216–7;

(3) Form DOT F 4220.46, Cumulative Claim and Reconciliation Statement, *see* FAR 4.804–5(a)(13); and

(4) Department of Defense (DD) Form 882, Report of Inventions and Subcontracts, *see* FAR 52.227–14.

(b) The forms listed in paragraph (a) of this section are used primarily for the closeout of cost-reimbursement, time-and-materials, and labor-hour contracts. However, the forms may also be used for closeout of other contract types or when necessary to protect the Government's interest.

Subpart 1204.9—Taxpayer Identification Number Information

1204.903 Reporting contract information to the IRS.

(a) The SPE is authorized to report certain information, including TIN data, to the IRS.

Subpart 1204.13—Personal Identity Verification

1204.1301 Policy.

(a) DOT follows National Institute of Standards and Technology (NIST) Federal Information Processing Standards (FIPS) Publication (PUB) Number 201–2, Personal Identity Verification (PIV) of Federal Employees and Contractors, or NIST-issued successor publications, and OMB implementation guidance for personal identity verification, for all affected contractor and subcontractor personnel when contract performance requires contractors to have routine physical access to a federally-controlled facility and/or routine physical and logical access to a federally-controlled information system.

(c) OAs must designate an official responsible for verifying contractor employees' personal identity.

1204.1303 Contract clause.

The contracting officer shall insert the clause at 1252.204–70, Contractor Personnel Security and Agency Access, in solicitations and contracts (including task orders, if appropriate), exceeding the micro-purchase threshold, when contract performance requires contractors to have routine physical access to a federally-controlled facility and/or routine physical and logical access to a Departmental/federally-controlled information system.

Subpart 1204.17—Service Contracts Inventory

1204.1703 Reporting requirements.

(b) *Agency reporting responsibilities.*

(2) The OSPE is responsible for compiling and submitting the DOT annual inventory to OMB and for posting and publishing the inventory consistent with FAR 4.1703(b)(2).

PART 1205—PUBLICIZING CONTRACT ACTIONS

Sec.

Subpart 1205.1—Dissemination of Information

1205.101 Methods of disseminating information.

Subpart 1205.4—Release of Information

1205.402 General public.
1205.403 Requests from Members of Congress.

Subpart 1205.6—Publicizing Multi-Agency Use Contracts

1205.601 Governmentwide database of contracts.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1205.1—Dissemination of Information

1205.101 Methods of disseminating information.

(a) The DOT Office of Small and Disadvantaged Business Utilization, 1200 New Jersey Avenue SE, Washington, DC 20590 publishes a Procurement Forecast of planned procurements each fiscal year on their website at: *https://www.transportation.gov/osdbu/procurement-forecast/summary/.*

Subpart 1205.4—Release of Information

1205.402 General public.

(a) Upon request, and consistent with DOT Freedom of Information Act rules and regulations and 1224.203, DOT will furnish the general public with the following information on proposed contracts and contract awards—

(1) After the opening of sealed bids, names of firms that submitted bids; and

(2) After contract award, the names of firms that submitted proposals.

(b) DOT will process requests for other specific information in accordance with the DOT Freedom of Information Act rules and regulations and 1224.203.

1205.403 Requests from Members of Congress.

The HCA is authorized to approve the release of certain contract information to Members of Congress under FAR 5.403.

Subpart 1205.6—Publicizing Multi-Agency Use Contracts

1205.601 Governmentwide database of contracts.

(b) The OA HCA is responsible for complying with the requirements of FAR 5.601(b).

PART 1206—COMPETITION REQUIREMENTS

Sec.

Subpart 1206.2—Full and Open Competition After Exclusion of Sources.

1206.202 Establishing or maintaining alternative sources.

Subpart 1206.3—Other Than Full and Open Competition

1206.302 Circumstances permitting other than full and open competition.
1206.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.
1206.302–7 Public interest.

Subpart 1206.5—Advocates for Competition

1206.501 Requirement.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1206.2—Full and Open Competition After Exclusion of Sources

1206.202 Establishing or maintaining alternative sources.

(a) The head of the contracting activity (HCA) is delegated authority to exclude a particular source from a contract action in order to establish or maintain an alternative source under the conditions listed in FAR 6.202(a).

(b) The HCA is also delegated authority to approve a Determination and Findings (D&F) in support of a contract action awarded under the authority of FAR 6.202(a).

Subpart 1206.3—Other Than Full and Open Competition

1206.302 Circumstances permitting other than full and open competition.

1206.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.

(b)(4) The HCA is authorized to determine that only specified makes and models of technical equipment and parts will satisfy the agency's needs under FAR 6.302–1(b)(4).

1206.302–7 Public interest.

(a)(2) The authority under FAR 6.302–7 whereby full and open competition need not be provided for when determined that it is not in the public interest in a particular acquisition is reserved by the Secretary and may not be delegated. A written determination made and signed by the Secretary shall be included in the contract file.

(c)(3) The contracting officer shall prepare a justification to support the determination under FAR 6.302–7(c)(3).

Subpart 1206.5—Advocates for Competition

1206.501 Requirement.

The DOT Agency Advocate for Competition is the Deputy Assistant Secretary for Administration.

PART 1207—ACQUISITION PLANNING

Subpart 1207.3—Contractor Versus Government Performance

Sec.
1207.305 Solicitation provisions and contract clause.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1207.3—Contractor Versus Government Performance

1207.305 Solicitation provisions and contract clause.

The contracting officer may insert clause 1252.237–73, Key Personnel, in solicitations and contracts when the acquisition is conducted pursuant to OMB Circular A–76 and meets the clause prescription requirements at 1237.110–70(b).

PART 1209—CONTRACTOR QUALIFICATIONS

Subpart 1209.4—Debarment, Suspension, and Ineligibility

Sec.
1209.400 Scope of subpart.
1209.403 Definitions.
1209.405 Effect of listing.
1209.405–1 Continuation of current contracts.
1209.405–2 Restrictions on subcontracting.
1209.406 Debarment.
1209.406–1 General.
1209.406–3 Procedures.
1209.407 Suspension.
1209.407–1 General.
1209.407–3 Procedures.
1209.470 Fact-finding procedures.
1209.471 Appeals.

Subpart 1209.5—Organizational and Consultant Conflicts of Interest

1209.507 Solicitation provisions and contract clause.
1209.507–270 Contract clauses.

Subpart 1209.6—Contractor Team Arrangements

1209.602 General.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1209.4—Debarment, Suspension, and Ineligibility

1209.400 Scope of subpart.

This subpart provides DOT's policy and procedures for the debarment and suspension of contractors.

1209.403 Definitions.

As used in this subpart—

DOT Order 4200.5G means the DOT order or its successor establishing DOT's internal procedures for Suspension and Debarment, and Ineligibility Policies.

Senior Accountable Official (SAO) for Suspension and Debarment means the Senior Procurement Executive (SPE), as delegated by the Secretary of DOT, for all suspensions and debarments within DOT. The SAO sets forth departmental standards for suspension and debarment policies and procedures, excluding the Office of Inspector General (OIG).

Suspension and Debarment Coordinator (SDC) means the program manager for the Suspension and Debarment Program at each OA and Office of the Secretary of Transportation. The SDC advises the SDO. The SDC coordinates all materials for presentation to the Suspending and Debarring Official for proposed suspension or debarment activities, enters information regarding any administrative agreement into the Federal Awardee Performance and Integrity Information System (FAPIIS), and enters information regarding suspensions and debarments into *SAM.gov*.

Suspending and Debarring Official (SDO) means the individual designated responsibility as authorized by the Secretary of DOT to impose procurement suspensions and debarments, exclusions, and other related matters pursuant to FAR part 9. Each OA and the Office of the Secretary of Transportation (OST) has separately appointed SDOs. The SPE serves as the SDO for OST. A list of the OA appointed SDOs is maintained on the OSPE website.

1209.405 Effect of listing.

(a) The SDO is authorized to make a written determination of compelling reasons to solicit offers from, award contracts to, or consent to subcontract with contractors debarred, suspended, or proposed for debarment and that has an active exclusion record in the System for Award Management (SAM) in accordance with FAR 9.405.

(e)(2) The SDO is authorized to make a written determination that a compelling reason exists to consider a bid or offer from a contractor whose name or company is included on the listing.

(3) The SDO is authorized to make a written determination that a compelling reason exists for a contracting officer to consider proposals, quotations, or offers received from any listed contractor that have an active exclusion record in SAM, and that such proposals, quotations, or offers may be evaluated for award or included in the competitive range, and, if applicable, discussions conducted with a listed offeror as set forth in FAR 9.405(e)(3).

1209.405–1 Continuation of current contracts.

(a) Notwithstanding the suspension, proposed debarment, or debarment of a contractor, contracting officers may continue contracts or subcontracts in existence at the time the contractor was suspended, proposed for debarment, or debarred, if authorized by the SDO and the SDO makes a written determination, consistent with the procedures described in FAR 9.405–1(a) setting forth the compelling reasons for continuing such contract(s) and placing order(s).

(b) The SDO is delegated the authority on behalf of the Secretary of DOT to make the written determination required under FAR 9.405–1(b).

1209.405–2 Restrictions on subcontracting.

(a) The SDO is delegated the authority on behalf of the Secretary of DOT to authorize contracting officers to consent to subcontracts with contractors debarred, suspended, or proposed for debarment as required by FAR 9.405–2(a).

1209.406 Debarment.

1209.406–1 General.

(c) The OST Suspending and Debarring Official (SDO) and OA-appointed SDO (*see* 1209.403) is authorized to continue business dealings between the agency and a contractor that is debarred or proposed for debarment under FAR 9.406–1(c), except under FAR 23.506(e) if the SDO has made a written determination of compelling reasons justifying the continued business dealings.

(d)(1) The SDO's authority includes debarments from contracts for the purchase of Federal personal property pursuant to the Federal Management Regulation at 41 CFR 102–117.295 (*see* FAR 9.406–1(d)(1) through (2)).

1209.406–3 Procedures.

Contracting officers and contracting activities shall comply with DOT Order 4200.5G, Suspension and Debarment, and Ineligibility Policies, and this subpart to include the following procedures—

(a) *Investigation and referral.* Any individual may submit a referral to debar an individual or contractor to the cognizant SDO (the debarring official) (*see* 1209.403). The referral for debarment shall be supported with

evidence of a cause for debarment listed in FAR 9.406–2 and this subpart. The contracting officer shall promptly report a proposed debarment action directly to the SDO. Upon review by the SDO, if the matter involves possible criminal or fraudulent activities, the SDO shall also refer the matter to the DOT Office of Inspector General to ensure coordination of appropriate activity. The report shall contain the following information:

(1) The DOT official OA code to identify the OA taking action is as follows: DOT (general) (DOT–OST); Federal Aviation Administration (DOT–FAA); Federal Highway Administration (DOT–FHWA); Federal Motor Carrier Safety Administration (DOT–FMCSA); Federal Railroad Administration (DOT–FRA); Federal Transit Administration (DOT–FTA); Maritime Administration (DOT–MARAD); National Highway Traffic Safety Administration (DOT–NHTSA); Pipeline and Hazardous Materials Safety Administration (DOT–PHMSA); Office of the Assistant Secretary for Research and Technology (OST–R); and Great Lakes St. Lawrence Development Corporation (GLS).

(2) Name, address and telephone number for the point of contact for the activity making the report;

(3) Name and address of the contractor;

(4) Names and addresses of the members of the board, principal officers, partners, owners, and managers;

(5) Names and addresses of all known affiliates, subsidiaries, or parent firms, and the nature of the business relationship;

(6) For each contract affected by the conduct being reported—

(i) The contract number;

(ii) Description of supplies or services;

(iii) The amount;

(iv) The percentage of completion;

(v) The amount paid to the contractor;

(vi) Whether the contract is assigned under the Assignment of Claims Act and, if so, to whom; and

(vii) The amount due to the contractor.

(7) For any other contracts outstanding with the contractor or any of its affiliates—

(i) The contract number(s);

(ii) The amount(s);

(iii) The amounts paid to the contractor;

(iv) Whether the contract(s) is assigned under the Assignment of Claims Act and, if so, to whom; and

(v) The amount(s) due the contractor;

(8) A complete summary of all pertinent evidence and the status of any legal proceedings involving the contractor;

(9) An estimate of any damages sustained by the Government as a result of the contractor's action (explain how the estimate was calculated);

(10) The comments and recommendations of the contracting officer and each higher-level contracting review authority regarding—

(i) Whether to suspend or debar the contractor;

(ii) Whether to apply limitations to the suspension or debarment;

(iii) The period of any recommended debarment; and

(iv) Whether to continue any current contracts with the contractor (explain why a recommendation regarding current contract is not included);

(11) When appropriate, as an enclosure to the report—

(i) A copy or extracts of each pertinent contract;

(ii) Witness statements or affidavits;

(iii) Copies of investigative reports;

(iv) Certified copies of indictments, judgments, and sentencing actions; and

(v) Any other appropriate exhibits or documents.

(b) *Decisionmaking process.* When the SDO finds preponderance of the evidence for a cause for debarment, as listed in FAR 9.406–2 or this subpart, the contracting officer in conjunction with the SDC shall prepare a recommendation and draft notice of proposed debarment for the SDO's consideration. The contractor (and any specifically named affiliates) are provided an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment as set forth in paragraph (d).

(c) *Notice of proposal to debar.* DOT shall send the notice of proposed debarment to the last known address of the individual or contractor, the individual or contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other means that allows for confirmation of delivery to include by mail, to the last known street address, to the last known facsimile numbers, or to the last known email address. In the case of a contractor, DOT may send the notice of proposed debarment to the contractor, any partner, principal, officer, director, owner or co-owner, or joint venture; to the contractor's identified counsel for purposes of administrative proceedings; or to the contractor's agent for the service of process. If sent by email, it shall be sent to the last known email addresses for all three, if known. Additionally, for each specifically named affiliate, the notice shall be sent to the affiliate itself, the affiliate's identified counsel for purposes of the administrative proceedings, or the affiliate's agency for service of process. If sent by email, it shall be sent to the last known email addresses for all three, if known. The SDO shall also ensure that the appropriate parties are listed as excluded in the System for Award Management (SAM) in accordance with FAR 9.404.

(d) *Debarring official's decision.* If DOT does not receive a reply from the contractor within 30 calendar days after sending the notice of proposed debarment, the SDC shall prepare a recommendation in conjunction with the cognizant contracting officer, and refer the case to the SDO for a decision on whether to debar based on the information available. If DOT receives a reply from the contractor within 30 calendar days after sending the notice of proposed debarment, the SDC in conjunction with the cognizant contracting officer shall consider the information in the reply before the SDC makes their recommendation to the SDO.

(2) The SDO reviews submittals, case documents and acts in accordance with DOT Order 4200.5G and the General DOT Guidelines for Suspension and Debarment, paragraph 12c.

(i) The SDO, upon the request of the contractor proposed for debarment, shall, as soon as practicable, allow the contractor an opportunity to appear before the SDO to present information or argument, in person or through a representative. The contractor may supplement the oral presentation with written information and argument. This information submitted by a contractor proposed for debarment is known as a Presentation of Matters in Opposition as set forth in DOT Order 4200.5G. DOT shall conduct the proceeding in an informal manner and without requirement for a transcript. The SDO may use flexible procedures to allow a contractor to present matters in opposition via telephone of internet. If so, the debarring official should change the notice in paragraph (c) to include those flexible procedures.

(ii) If the SDO finds the contractor's or individual's submission in opposition to the proposed debarment raises a genuine dispute over facts material to the proposed debarment and the debarment action is not based on a conviction or civil judgment, the SDC shall submit to the SDO the information establishing the dispute of material facts. If the SDO agrees there is a genuine dispute of material facts, the SDO shall conduct a fact-finding proceeding or shall refer the dispute to a designee for resolution pursuant to

1209.470, Fact-finding procedures. The SDC shall provide the contractor or individual the disputed material fact(s).

(iii) If the proposed debarment action is based on a conviction or civil judgment, or if there are no disputes over material facts, or if any disputes over material facts have been resolved pursuant to 1209.470, Fact-finding procedures, the SDO shall make a decision on the basis of all information available including any written findings of fact submitted by the designated fact finder, and oral or written arguments presented or submitted to the SDC by the contractor.

(e) *Notice of debarring official's decision.* In actions processed under FAR 9.406 where no suspension is in place and where a fact-finding proceeding is not required, DOT shall make the final decision on the proposed debarment within 30 business days after receipt of any information and argument submitted by the contractor by the means of delivery set forth in paragraph (c) of this section, unless the SDO extends this period for good cause.

1209.406–4 Period of debarment.

(b) The SDC, in conjunction with the contracting officer, may submit a recommendation to the SDO to extend or reduce the period of debarment, or amend the scope of the debarment, imposed under FAR 9.406.

1209.407 Suspension.

1209.407–1 General.

(b) For the purposes of FAR 9.407–1, the SDO is the suspending official under the Federal Management Regulation at 41 CFR 102–117.295.

(d) The SDO is authorized to make a written determination of compelling reasons justifying continuing business dealings between the agency and a contractor that is suspended. However, in accordance with FAR 23.506(e), only the Secretary of Transportation may waive the suspension of contract payments, termination of a contract for default, or suspension of a contractor for actions under FAR subpart 23.5—Drug-Free Workplace and FAR 23.506.

1209.407–3 Procedures.

Contracting officers and contracting activities shall comply with DOT Order 4200.5G, Suspension and Debarment, and Ineligibility Policies, and this subpart to include the following procedures—

(a) *Investigation and referral.* Any individual may submit a referral to suspend an individual or contractor to the SDC or SDO (the debarring official) (*see* 1209.403). The SDC shall promptly report, in writing, a proposed suspension action directly to the SDO. Upon review by the SDO, if the matter involves possible criminal or fraudulent activities, the SDO shall also refer the matter to the DOT OIG to ensure coordination of appropriate activity.

(b) *Decisionmaking process.* When the SDC finds adequate evidence of a cause for suspension, as listed in FAR 9.407–2, the SDC shall prepare a recommendation and draft notice of suspension for the SDO's consideration. After receipt of the report from the SDC, the SDO may request from interested parties, including the contractor if deemed appropriate, a meeting or additional supporting information to assist in the suspension decision. The SDC creates a case in the DOT Suspension and Debarment Tracking System as set forth in DOT Order 4200.5G. The contractor (and any specifically named affiliates) are provided an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment as set forth in paragraph (d) of this section.

(c) *Notice of suspension.* DOT shall send the notice of suspension to the last known address of the individual or contractor, the individual or contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other means that allows for confirmation of delivery to include by mail, to the last known street address, to the last known facsimile numbers, or to the last known email address. In the case of a contractor, DOT may send the notice of suspension to the contractor, any partner, principal, officer, director, owner or co-owner, or joint venture; to the contractor's identified counsel for purposes of administrative proceedings; or to the contractor's agent for the service of process. If sent by email, it shall be sent to the last known email addresses for all three, if known. Additionally, for each specifically named affiliate, the notice shall be sent to the affiliate itself, the affiliate's identified counsel for purposes of the administrative proceedings, or the affiliate's agency for service of process. If sent by email, it shall be sent to the last known email addresses for all three, if known. The SDO shall also ensure that the appropriate parties are listed as excluded in SAM in accordance with FAR 9.404. After reviewing the SDC's report, and any additional information received in accordance with paragraph (b) of this section, the SDO shall prepare and coordinate with legal counsel a written notice of suspension.

(5) The SDO, upon the request of the contractor suspended, shall, as soon as practicable, allow the contractor an opportunity to appear before the SDO to present information or argument, in person or through a representative. The contractor may supplement the oral presentation with written information and argument. DOT shall conduct the proceeding in an informal manner and without requirement for a transcript.

(6)(i) If the SDC finds the contractor's or individual's submission in opposition to the suspension raises a genuine dispute over facts material to the suspension, or for the purposes of FAR 9.407–3(b)(2), Decision making process, in actions not based on an indictment, the SDC shall submit to the SDO the information establishing the dispute of material facts. If the SDO agrees there is a genuine dispute of material facts, the SDO shall conduct a fact-finding proceeding or refer the dispute to a designee for resolution pursuant to 1209.470, Fact-finding procedures. The SDC shall provide the contractor or individual the information that established the dispute of material fact(s) in advance of the fact-finding proceeding, in the event the contractor would like to add to the facts prior to the decision of the SDO.

(ii) If the suspension is based on a conviction or civil judgment, or if there are no disputes over material facts, or if any disputes over material facts have been resolved pursuant to 1209.470, Fact-finding procedures, the SDO shall make a decision on the basis of all information available including any written findings of fact submitted by the designated fact finder, and oral or written arguments presented or submitted by the contractor. The contractor may supplement the oral presentation with written information and argument. The proceeding will be conducted in an informal manner and without requirement for a transcript.

(d) *Suspending official's decision.* The SDO shall notify the contractor of the decision whether to impose a suspension. The SDO shall then forward the original signed decision to the contracting officer for inclusion in the contract file. The SDO reviews submittals, case documents and acts in accordance with DOT Order 4200.5G and the General DOT Guidelines for Suspension and Debarment, paragraph 12c. The SDO may use flexible procedures to allow a contractor to present matters in opposition via telephone or internet. If so, the debarring official should change the notice in paragraph (c) to include those flexible procedures.

1209.470 Fact-finding procedures.

The provisions of this section constitute the procedures to be used to resolve genuine disputes of material fact pursuant to 1209.406–3 and 1209.407–3 of this part. The SDC shall establish the date for the fact-finding hearing, normally to be held within 30 business days after notifying the contractor or individual that the SDO has determined a genuine dispute of material fact(s) exists.

(a) The Government's representative and the contractor shall each have an opportunity to present evidence relevant to the genuine dispute(s) of material fact identified by the SDO. The contractor or individual may appear in person or through counsel at the fact-finding hearing and should address all defenses, contested facts, admissions, remedial actions taken, and, if a proposal to debar is involved, mitigating and aggravating factors. The contractor or individual may submit documentary evidence, present witnesses, and confront any person the agency presents.

(b) Witnesses may testify in person. Witnesses will be reminded of the official nature of the proceedings and that any false testimony given is subject to criminal prosecution. Witnesses are subject to cross-examination. The fact-finding proceeding is an informal evidentiary hearing, during which the Rules of Evidence and Civil Procedure do not apply. Hearsay evidence may be presented and will be given appropriate weight by the fact-finder.

(c) The proceedings shall be transcribed and a copy of the transcript shall be made available at cost to the contractor upon request, unless the contractor and the factfinder, by mutual agreement, waive the requirement for a transcript.

(d) The fact-finder shall prepare a written finding(s) of fact for the record by a preponderance of the evidence for proposed debarments, and by adequate evidence for suspensions. A copy of the findings of fact shall be provided to the SDO, the Government's representative, and the contractor or individual. The SDO will consider the written findings of fact in the decision regarding the suspension or proposed debarment.

1209.471 Appeals.

Based on the decision by the SDO, the respondent may elect to request reconsideration as provided for in paragraph (a) of this section. If the request for reconsideration is denied, the respondent may seek judicial review as provided for in paragraph (b) of this section.

(a) Request for reconsideration. Upon receiving a final decision to debar from the SDO, a debarred individual or entity may ask the SDO to reconsider the debarment decision or to modify the debarment by reducing the time period or narrowing the scope of the debarment. This request must be in writing and supported with documentation.

(b) Judicial review. A suspended or debarred individual or entity may seek judicial review upon denial of a request for reconsideration.

Subpart 1209.5—Organizational and Consultant Conflicts of Interest

1209.507 Solicitation provisions and contract clause.

1209.507–270 Contract clauses.

(a) In accordance with FAR 9.507–2, the contracting officer shall insert a clause substantially the same as the clause at 1252.209–70, Organizational and Consultant Conflicts of Interest, as applicable, in solicitations and contracts.

(b) In accordance with FAR 9.507–2, the contracting officer shall insert a clause substantially the same as the clause at 1252.209–71, Limitation of Future Contracting, as applicable, in solicitations and contracts.

Subpart 1209.6—Contractor Team Arrangements

1209.602 General.

(c) Contracting officers shall require offerors to disclose teaming arrangements as a part of any offer. The teaming arrangement shall be evaluated as a part of overall prime contractor responsibility, as well as under the technical and/or management approach evaluation factor where applicable.

PART 1211—DESCRIBING AGENCY NEEDS

Subpart 1211.2—Using and Maintaining Requirements Documents

Sec.

1211.204 Solicitation provisions and contract clauses.
1211.204–70 Contract clauses.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1211.2—Using and Maintaining Requirements Documents

1211.204 Solicitation provisions and contract clauses.

1211.204–70 Contract clauses.

The contracting officer shall insert the clause at 1252.211–70, Index for Specifications, when an index or table of contents may be furnished with the specification.

PART 1212—ACQUISITION OF COMMERCIAL ITEMS

Subpart 1212.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

Sec.

1212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1212.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

1212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f) The following DOT provisions and clauses are authorized for use in acquisitions of commercial items when required by the individual provision or clause prescription:

(1) 1252.201–70, Contracting Officer's Representative.

(2) 1252.204–70, Contractor Personnel Security and Agency Access.

(3) 1252.209–70, Organizational and Consultant Conflicts of Interest.

(4) 1252.209–71, Limitation of Future Contracting.

(5) 1252.211–70, Index for Specifications.

(6) 1252.216–70, Evaluation of Offers Subject to an Economic Price Adjustment Clause.

(7) 1252.216–71, Determination of Award Fee.

(8) 1252.216–72, Award Fee Plan.

(9) 1252.216–73, Distribution of Award Fee.

(10) 1252.216–74, Settlement of Letter Contract.

(11) 1252.222–70, Strikes or Picketing Affecting Timely Completion of the Contract Work.

(12) 1252.222–71, Strikes or Picketing Affecting Access to a DOT Facility.

(13) 1252.223–70, Removal or Disposal of Hazardous Substances—Applicable Licenses and Permits.

(14) 1252.223–71, Accident and Fire Reporting.

(15) 1252.223–73, Seat Belt Use Policies and Programs.

(16) 1252.232–70, Electronic Submission of Payment Requests.

(17) 1252.237–70, Qualifications of Contractor Employees.

(18) 1252.237–71, Certification of Data.

(19) 1252.237–72, Prohibition on Advertising.

(20) 1252.237–73, Key Personnel.

(21) 1252.239–70, Security Requirements for Unclassified Information Technology Resources.

(22) 1252.239–71, Information Technology Security Plan and Accreditation.

(23) 1252.239–72, Compliance with Safeguarding DOT Sensitive Data Controls.

(24) 1252.239–73, Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information.

(25) 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting.

(26) 1252.239–75, DOT Protection of Information About Individuals, PII, and Privacy Risk Management Requirements.

(27) 1252.239–76, Cloud Computing Services.

(28) 1252.239–77, Data Jurisdiction.

(29) 1252.239–78, Validated Cryptography for Secure Communications.

(30) 1252.239–79, Authentication, Data Integrity, and Non-Repudiation.

(31) 1252.239–80, Audit Record Retention for Cloud Service Providers.

(32) 1252.239–81, Cloud Identification and Authentication (Organizational Users) Multi-Factor Authentication.

(33) 1252.239–82, Identification and Authentication (Non-Organizational Users).

(34) 1252.239–83, Incident Reporting Timeframes.

(35) 1252.239–84, Media Transport.

(36) 1252.239–85, Personnel Screening—Background Investigations.

(37) 1252.239–86, Boundary Protection—Trusted internet Connections.

(38) 1252.239–87, Protection of Information at Rest.

(39) 1252.239–88, Security Alerts, Advisories, and Directives.

(40) 1252.239–89, Technology Modernization.

(41) 1252.239–90, Technology Upgrades/Refreshment.

(42) 1252.239–91, Records Management.

(43) 1252.239–92, Information and Communication Technology Accessibility Notice.

(44) 1252.239–93, Information and Communication Technology Accessibility.

(45) 1252.242–70, Dissemination of Information—Educational Institutions.

(46) 1252.242–71, Contractor Testimony.

(47) 1252.242–72, Dissemination of Contract Information.

PART 1213—SIMPLIFIED ACQUISITION PROCEDURES

Subpart 1213.70—Department of Transportation Procedures for Acquiring Training Services

Sec.
1213.7000 Applicability.
1213.7001 Solicitation provision and contract clause.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1213.70—Department of Transportation Procedures for Acquiring Training Services

1213.7000 Applicability.

(a) DOT policy at 1237.7000 also applies to Standard Form (SF) 182, Request, Authorization, Agreement and Certification of Training, which may be used to acquire training services; however, the policy does not apply to training services acquired by Governmentwide commercial purchase card. The Governmentwide commercial purchase card may only be used to acquire training services valued at the micro-purchase threshold level or less.

(b) As reflected in 1237.7002, this policy does not apply to training attended by DOT employees that is scheduled and conducted by Government sources of supply, educational institutions, or private entities where DOT does not control or sponsor the training. Examples of when the policy does and does not apply include:

(1) When SF 182s are issued for three DOT employees to attend a one-week course at a university or other private entity, the policy does not apply. DOT does not control the course because the university or private entity has a contract in place with the training provider and DOT is placing an order under an existing contract; and

(2) When DOT awards a contract to a university or other private entity to provide training for DOT and/or other Government personnel, the policy applies. DOT controls this course; therefore, no soliciting or advertising of private non-Government training while conducting the contracted-for training is permitted.

1213.7001 Solicitation provision and contract clause.

(a) Contracting officers shall insert the provision as prescribed at 1252.237–71, Certification of Data, in all solicitations and requests for quotations, and the clause as prescribed at 1252.237–72, Prohibition on Advertising, in solicitations, requests for quotations, and all contracts (*e.g.,* purchase orders, SF 182s) for training services when the content and/or presentation of the training is controlled by DOT.

(b) Contracting officers shall incorporate the successful offeror's certified data into any resultant contract(s). Certified data may be adopted by reference, if the contracting officer determines it contains information sufficient to reliably describe the certified data submitted. For example, this type of information includes dated material such as resumes and company or personnel qualifications.

PART 1214 [RESERVED]

PART 1215—CONTRACTING BY NEGOTIATION

Subpart 1215.4—Contract Pricing

Sec.
1215.404 Proposal analysis.
1215.404–470 Payment of profit or fee.

Subpart 1215.6—Unsolicited Proposals

1215.603 General.
1215.604 Agency points of contact.
1215.606 Agency procedures.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1215.4—Contract Pricing

1215.404 Proposal analysis.

1215.404–470 Payment of profit or fee.

The contracting officer shall not pay profit or fee on undefinitized contracts or undefinitized contract modifications. Any profit or fee earned shall be paid after the contract or modification is definitized.

Subpart 1215.6—Unsolicited Proposals

1215.603 General.

DOT will not pay any costs associated with the preparation of unsolicited proposals. Proposals that do not meet the definition and applicable content and marking requirements of *FAR subpart 15.6* will not be considered under any circumstances and will be returned to the submitter.

1215.604 Agency points of contact.

(a) Unsolicited proposals should be submitted to the responsible OA contracting office for appropriate handling. Specific information concerning the mission of each DOT OA is available online at *https://www.transportation.gov/.* Offerors are urged to contact these contracting/procurement offices prior to submitting a proposal to ensure that the unsolicited proposal reaches the correct contracting office for action. This action will reduce

unnecessary paperwork and wasted time for both the Government and offerors.

1215.606 Agency procedures.

The OA contracting office is the designated point of contact for receipt and handling of unsolicited proposals (*see* 1215.604). The assigned DOT contracting office will review and evaluate the proposal within 30 calendar days, if practicable, in accordance with FAR 15.606–1, Receipt and initial review, to inform the offeror of the reasons for rejection and the proposed disposition of the unsolicited proposal.

PART 1216—TYPES OF CONTRACTS

Sec.

Subpart 1216.2—Fixed-Price Contracts

1216.203 Fixed-price contracts with economic price adjustment.
1216.203–4 Contract clauses.
1216.203–470 Solicitation provision.

Subpart 1216.4—Incentive Contracts

1216.406–70 DOT contract clauses.

Subpart 1216.5—Indefinite-Delivery Contracts

1216.505 Ordering.

Subpart 1216.6—Time-and-Materials, Labor-Hour, and Letter Contracts

1216.603 Letter contracts.
1216.603–4 Contract clauses.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1216.2—Fixed-Price Contracts

1216.203 Fixed-price contracts with economic price adjustment.

1216.203–4 Contract clauses.

1216.203–470 Solicitation provision.

The contracting officer shall insert the provision at 1252.216–70, Evaluation of Offers Subject to an Economic Price Adjustment Clause, in solicitations containing an economic price adjustment clause.

Subpart 1216.4—Incentive Contracts

1216.406–70 DOT contract clauses.

(a) As authorized by FAR 16.406(e), the contracting officer shall insert the clause at 1252.216–71, Determination of Award Fee, in all cost-plus-award-fee solicitations and contracts.

(b) The contracting officer shall insert the clause at 1252.216–72, Award Fee Plan, in all cost-plus-award-fee solicitations and contracts.

(c) The contracting officer shall insert the clause at 1252.216–73, Distribution of Award Fee, in all cost-plus-award-fee solicitations and contracts.

Subpart 1216.5—Indefinite-Delivery Contracts

1216.505 Ordering.

(b)(8) Unless otherwise designated by the Head of the Operating Administration, the Advocate for Competition for the Operating Administration (OA) is designated as the OA Task and Delivery Order Ombudsman. If any corrective action is needed after reviewing complaints from contractors on task and delivery order contracts, the OA Ombudsman shall provide a written determination of such action to the contracting officer. Issues that cannot be resolved within the OA, shall be forwarded to the DOT Task and Delivery Order Ombudsman for review and resolution. The DOT Task and Delivery Order Ombudsman is located in the Office of the Senior Procurement Executive.

Subpart 1216.6—Time-and-Materials, Labor-Hour, and Letter Contracts

1216.603 Letter contracts.

1216.603–4 Contract clauses.

The contracting officer shall insert the clause at 1252.216–74, Settlement of Letter Contract, in all definitized letter contracts.

PART 1217—SPECIAL CONTRACTING METHODS

Sec.

Subpart 1217.70—Fixed-Price Contracts for Vessel Repair, Alteration or Conversion

1217.7000 Definition.
1217.7001 Clauses.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1217.70—Fixed-Price Contracts for Vessel Repair, Alteration or Conversion

1217.7000 Definition.

Lay Days means time allowed to the master of a vessel for loading and unloading the same.

1217.7001 Clauses.

(a) The clause at 1252.217–70, Guarantee, shall be used where general guarantee provisions are deemed desirable by the contracting officer.

(1) When inspection and acceptance tests will afford full protection to the Government in ascertaining conformance to specifications and the absence of defects and deficiencies, no guarantee clause for that purpose shall be included in the contract.

(2) The customary guarantee period, to be inserted in the first sentence of the clause at 1252.217–70, Guarantee, is 60 days. In certain instances, it may be advisable for the contracting officer to include a contract clause for a guarantee period longer than 60 days. These instances are as follows—

(i) If, as a result of a full inquiry, the contracting officer determines that there will be no increased costs as a result of a longer guarantee period, the contracting officer may substitute guarantee longer than the usual 60 days; or

(ii) When the contracting officer's inquiry discloses that increased costs will result or are expected to result from a longer guarantee period, the contracting officer shall submit a letter to the Chief of the Contracting Office, requesting approval for use of guarantee period in excess of 60 days. The letter must contain sufficient facts to justify the use of a longer guarantee period. Upon approval, the contracting officer may insert a longer period in the first sentence of the clause at 1252.217–70, Guarantee.

(b) The contracting officer shall insert the following clauses in solicitations and contracts for vessel repair, alteration or conversion:

(1) 1252.217–71, Delivery and Shifting of Vessel.

(2) 1252.217–72, Performance.

(3) 1252.217–73, Inspection and Manner of Doing Work.

(4) 1252.217–74, Subcontracts.

(5) 1252.217–76, Liability and Insurance.

(6) 1252.217–77, Title.

(7) 1252.217–78, Discharge of Liens.

(8) 1252.217–79, Delays.

(9) 1252.217–80, Department of Labor Safety and Health Regulations for Ship Repair.

(c) The contracting officer may insert the clause at 1252.217–75, Lay Days, in sealed bid fixed-price solicitations and contracts for vessel repair, alteration, or conversion which are to be performed within the United States, the District of Columbia, and all territories and possessions of the United States. The contracting officer may also insert the clause at 1252.217–75, Lay Days, in negotiated solicitations and contracts to be performed outside the United States.

PART 1219—SMALL BUSINESS PROGRAMS

Sec.

Subpart 1219.2—Policies

1219.201 General policy.
1219.201–70 Procurement goals for small business.
1219.202 Specific policies.

1219.202–70 Procurement Forecast.

Subpart 1219.4—Cooperation With the Small Business Administration

1219.401 General.

Subpart 1219.5—Set-Asides for Small Business

1219.501 General.
1219.502–8 Rejecting Small Business Administration recommendations.
1219.502–9 Withdrawing or modifying small business set-asides.

Subpart 1219.7—The Small Business Subcontracting Program

1219.705 Responsibilities of the contracting officer under the subcontracting assistance program.
1219.705–6 Postaward responsibilities of the contracting officer.

Subpart 1219.8—Contracting With The Small Business Administration (the 8(a) Program)

1219.800 General.
1219.815 Release for non-8(a) procurement.

Subpart 1219.70 DOT Mentor-Protégé Program

1219.7000 General.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1219.2—Policies

1219.201 General policy.

(c) The Director, Office of Small and Disadvantaged Business Utilization (OSDBU) shall be a member of the Senior Executive Service and appointed by the Secretary of Transportation. (15 U.S.C. 637, 644, and 657.)

(d) The responsible HCA for each OA shall appoint a Small Business Specialist (SBS). The SBS will assist the OSDBU Director in carrying out the functions and duties prescribed in FAR 19.201(d). A list of DOT SBS is provided at OSDBU's website at: *https://www.transportation.gov/osdbu/procurement-assistance/talk-dot-small-business-specialist.*

1219.201–70 Procurement goals for small business.

As required by the Small Business Act, the Secretary shall establish annual goals for small business participation in DOT contracts and subcontracts. Each contracting activity in consultation with the OSDBU on behalf of the Secretary shall establish annual goals that present, for that activity, the maximum practicable opportunity for small business concerns to participate in the performance of the activity's contracts and subcontracts.

1219.202 Specific policies.

OSDBU is responsible for reviewing procurement strategies and subcontracting efforts, establishing review thresholds and making recommendations to further the implementation of this part. The OSDBU Director may waive review of certain classes of acquisitions that the Director identifies as providing limited or no opportunity for small business participation or may delegate review of such acquisitions to the OA Small Business Specialists.

1219.202–70 Procurement Forecast.

The OSDBU shall prepare and maintain DOT's Procurement Forecast in coordination with DOT Operating Administrations. The forecast will be published every year on or before October 1st and can be found at *https://www.transportation.gov/osdbu/procurement-forecast/summary.* Contracting officers and small business specialists will work with the OSDBU to maintain accurate procurement forecast information.

Subpart 1219.4—Cooperation with the Small Business Administration

1219.401 General.

(a) The OSDBU Director will be the primary point of contact with the U.S. Small Business Administration and facilitate the formulation of policies to ensure maximum practicable opportunities are available to small business concerns in prime and subcontracting opportunities.

Subpart 1219.5—Set-Asides for Small Business

1219.501 General.

(a) Contracting officers shall set aside to small business concerns acquisitions of supplies or services that have an anticipated dollar value above the micro-purchase threshold but not exceeding the simplified acquisition threshold, as prescribed at FAR 13.003(b)(1). Contracting officers shall set aside proposed acquisitions exceeding the simplified acquisition threshold for small business concerns unless it is determined there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery (*see* FAR 19.502–2). Contracting officers will document their determination utilizing the DOT Form 4250.1 which will include the results of the market research performed, including justifications.

1219.502–8 Rejecting Small Business Administration recommendations.

(a) If the contracting officer rejects a recommendation of the SBA procurement center representative, the contracting officer will coordinate with the OSDBU to submit a written notice to the SBA within 5 working days of the contracting officer's receipt of the recommendation.

1219.502–9 Withdrawing or modifying small business set-asides.

(a) If the contracting officer makes a determination before contract award that a set-aside is disadvantageous to the public interest, withdrawal of an individual small business set-aside shall be initiated by giving written notice to the small business specialist, the SBA procurement center representative and the OSDBU stating the reasons for withdrawal.

(b) If the agency small business specialist does not agree to a withdrawal or modification, the case shall be referred to the COCO for review prior to consulting with the assigned SBA representative. The contracting officer shall follow the documentation requirements of FAR 19.506(c).

Subpart 1219.7—The Small Business Subcontracting Program

1219.705 Responsibilities of the contracting officer under the subcontracting assistance program.

1219.705–6 Postaward responsibilities of the contracting officer.

(f) The Office of Small and Disadvantaged Business Utilization (S–40) is responsible for acknowledging receipt of, or rejecting, the Summary Subcontract Report (SSR) in the Electronic Subcontracting Reporting System (eSRS).

Subpart 1219.8—Contracting with the Small Business Administration (the 8(a) Program)

1219.800 General.

(f) *Delegated program authority.* The Small Business Administration (SBA) and Department of Transportation (DOT), have entered into a Partnership Agreement (PA) delegating SBA's contract execution and administrative functions to DOT. Contracting officers shall follow the alternate procedures in this subpart, as applicable, to award 8(a) contracts under the PA. (*See https://www.transportation.gov/sites/dot.dev/files/docs/Department%20of%20Transportation_Partnership%20Agreement.pdf.*)

(1) The SBA delegates only the authority to sign contracts on its behalf. Consistent with the provisions of the PA, the SBA remains the prime contractor on all 8(a) contracts, continues to determine eligibility of

concerns for contract award, and retains appeal rights under FAR 19.810.

(2) The PA sets forth the delegation of authority and establishes the basic procedures for expediting the award of 8(a) contract requirements as reflected in this subpart.

(3) Contracts awarded under the PA may be awarded directly to the 8(a) participant on either a sole source or competitive basis. An SBA signature on the contract is not required. *See* FAR 19.811–3 for contract clauses to use.

1219.815 Release for non-8(a) procurement.

(b) Contracting officers requesting the release of a requirement for a non-8(a) procurement will follow procedures prescribed at FAR 19.815 and submit requests through the DOT OSDBU Director. The OSDBU Director will submit the request to SBA's Associate Administrator for Business Development for consideration.

Subpart 1219.70 DOT Mentor-Protégé Program

1219.7000 General.

(a) The Small Business Administration provides general oversight to federal mentor-protégé programs. However, DOT has its own program tailored to assist small business concerns in the transportation industry to enhance their capability to compete for federal procurement opportunities. The program is administered by the DOT Office of Small and Disadvantaged Business Utilization (OSDBU) at *https://www.transportation.gov/osdbu.*

(b) Small business concerns and large DOT prime contractors are encouraged to participate in the Department's Mentor-Protégé Program. Mentor firms provide eligible small business Protégé firms with developmental assistance to enhance their business capabilities and ability to obtain Federal contracts.

(c) Mentor firms are eligible small businesses and large DOT prime contractors or other socioeconomic firms capable of providing developmental assistance. Protégé firms are small businesses as defined in 13 CFR part 121.

(d) Developmental assistance is technical, managerial, financial, and other mutually beneficial assistance that assists Protégé firms. The costs for developmental assistance will not be reimbursed to the Mentor firm.

(e) Mentor and Protégé firms shall submit an evaluation of the overall experience in the program to OSDBU at the conclusion of the agreement or the voluntary withdrawal by either party from the program, whichever occurs first. At the end of each year, the Mentor and Protégé firms will submit a report regarding program accomplishments under their agreement.

(f) Mentor or Protégé firms shall notify OSDBU in writing, at least 30 calendar days in advance of the effective date of the firm's withdrawal from the program.

PART 1222—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Subpart 1222.1—Basic Labor Policies

Sec.
1222.101 Labor relations.
1222.101–70 Admittance of union representatives to DOT installations.
1222.101–71 Contract clauses.

Subpart 1222.8—Equal Employment Opportunity

1222.808 Complaints.
1222.810–70 Contract clause.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1222.1—Basic Labor Policies

1222.101 Labor relations.

1222.101–70 Admittance of union representatives to DOT installations.

(a) It is DOT policy to admit labor union representatives of contractor employees to DOT installations to visit work sites and transact labor union business with contractors, their employees, or union stewards pursuant to existing union collective bargaining agreements. Their presence shall not interfere with the contractor's work progress under a DOT contract, nor violate the safety or security regulations that may be applicable to persons visiting the installation. The union representatives will not be permitted to conduct meetings, collect union dues, or make speeches concerning union matters while visiting a work site.

(b) Whenever a union representative is denied entry to a work site, the person denying entry shall make a written report to the labor advisor for the applicable Operating Administration or to the DOT labor coordinator, the Office of the General Counsel, Office of General Law, within the Office of the Secretary of Transportation, within two working days after the request for entry is denied. The report shall include the reason(s) for the denial, the name of the representative denied entry, the union affiliation and number, and the name and title of the person that denied the entry.

1222.101–71 Contract clauses.

(a) When applicable, the contracting officer may insert the clause at 1252.222–70, Strikes or Picketing Affecting Timely Completion of the Contract Work, in solicitations and contracts.

(b) When applicable, the contracting officer may insert the clause at 1252.222–71, Strikes or Picketing Affecting Access to a DOT Facility, in solicitations and contracts.

Subpart 1222.8—Equal Employment Opportunity

1222.808 Complaints.

Contractors shall, in good faith, cooperate with the Department of Transportation in investigations of Equal Employment Opportunity (EEO) complaints processed pursuant to 29 CFR part 1614 and in accordance with clause 1252.222–72 as prescribed in this subpart.

1222.810–70 Contract clause.

The contracting officer shall insert the clause at 1252.222–72, Contractor Cooperation in Equal Employment Opportunity and Anti-Harassment Investigations, in solicitations, contracts, and orders that include the clause at FAR 52.222–26, Equal Opportunity.

PART 1223—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

Subpart 1223.3—Hazardous Material Identification and Material Safety Data

Sec.
1223.303 Contract clause.

Subpart 1223.70—Safety Requirements for Selected Dot Contracts

1223.7000 Contract clauses.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

PART 1223—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

Subpart 1223.3—Hazardous Material Identification and Material Safety Data

1223.303 Contract clause.

The contracting officer shall insert the clause at 1252.223–70, Removal or Disposal of Hazardous Substances—Applicable Licenses and Permits, in solicitations and contracts involving the

removal or disposal of hazardous waste material.

Subpart 1223.70—Safety Requirements for Selected DOT Contracts

1223.7000 Contract clauses.

(a) Where all or part of a contract will be performed on Government-owned or leased property, the contracting officer shall insert the clause at 1252.223–71, Accident and Fire Reporting.

(b) For all solicitations and contracts under which human test subjects will be utilized, the contracting officer shall insert the clause at 1252.223–72, Protection of Human Subjects. Contractors can request copies of applicable Operating Administration (OA)-specific policies regarding the protection of human subjects directly from contracting officers.

(c) The contracting officer shall insert the clause at 1252.223–73, Seat Belt Use Policies and Programs, in all solicitations and contracts, exceeding the simplified acquisition threshold.

PART 1224—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

Subpart 1224.1—Protection of Individual Privacy

Sec.
1224.102–70 General.
1224.103 Procedures.

Subpart 1224.2—Freedom of Information Act

1224.203 Policy.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1224.1—Protection of Individual Privacy

1224.102–70 General.

(a) Records maintained in a Privacy Act system of records shall not be released except by the Government or at the Government's direction regardless of whether the Government or a contractor acting on behalf of the Government is maintaining the records. Examples of systems of records are:

(1) Personnel, payroll and background records about any officer or employee of DOT, or other person, including his or her residential address;

(2) Medical histories and medical records concerning individuals, including applications for licenses; and

(3) Any other record containing information about an individual which includes that individual's name or other personal identifier.

(b) Examples of records to which the Privacy Act does not apply are:

(1) Records that are maintained by a contractor on individuals employed by the contractor in the process of providing goods and services to the Federal government; and

(2) Student records generated in connection with the student's attendance (*e.g.,* admission forms, grade reports) at an educational institution contracted by the agency to provide training to students. These records must be similar to those maintained on other students and must not be commingled with records of other students.

1224.103 Procedures.

DOT rules and regulations implementing the Privacy Act of 1974 are located at 49 CFR part 10.

Subpart 1224.2—Freedom of Information Act

1224.203 Policy.

DOT rules and regulations implementing the Freedom of Information Act (FOIA) and the names and addresses of the OA FOIA offices are located in 49 CFR part 7. The DOT FOIA website can be found at *https://www.transportation.gov/foia.* Specific contract award information shall be requested from the FOIA office of the OA making the contract award.

PART 1227—PATENTS, DATA, AND COPYRIGHTS

Sec.

Subpart 1227.3—Patent Rights under Government Contracts

1227.304 Procedures.
1227.304–4 Appeals.
1227.305 Administration of patent rights clauses.
1227.305–4 Protection of invention disclosures.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1227.3—Patent Rights under Government Contracts

1227.304 Procedures.

1227.304–4 Appeals.

(b) Contractors may appeal agency actions listed at FAR 27.304–4(a)(1) and (a)(3) through (a)(4) to the cognizant Head of the Contracting Activity (HCA). Contracting officers shall coordinate actions under this section with the legal counsel of the responsible office. The following procedures apply:

(1) Actions must be appealed within 30 days of receipt of the written statement issued by DOT required by FAR 27.304–4(a). The contractor must present all pertinent arguments in the appeal along with documentary evidence, if any.

(2) The HCA shall issue a determination within 45 days from the date the contractor's appeal is received.

(c) Contractor appeal of decisions rendered under FAR 27.304–4(a)(2) are subject to the following requirements:

(1) Actions must be appealed within 30 days of receipt of the written statement required by FAR 27.304–4(a). The contractor must present all pertinent arguments in the appeal along with documentary evidence, if any.

(2) The HCA may hold an informal hearing if deemed appropriate or at the request of the contractor. The informal hearing shall be held after all fact-finding is completed.

(i) If a hearing is held, DOT shall provide for a transcribed record of the hearing unless transcription is waived as provided for in paragraph (ii). A copy of the transcript shall be available to the contractor at cost.

(ii) Transcription of the hearing may be waived by agreement of the parties.

(3) The HCA shall designate an impartial fact-finding official. The official conducting the fact-finding shall prepare findings of fact and transmit them to the HCA promptly after the conclusion of the fact-finding proceeding along with a recommended determination.

(i) A copy of the findings of fact shall be sent to the contractor (assignee or exclusive licensee) by mail, to the last known street address, the last known facsimile number, or the last known email address and to the contractor's identified counsel. The contractor (assignee or exclusive licensee) and agency representatives will be given 30 days to submit written arguments to the HCA; and, upon request by the contractor oral arguments will be held before the HCA as part of an informal hearing. The HCA will make the final determination as to whether the initial agency action was appropriate under the relevant laws and procedures (*see* 1227.304–4(c)).

(ii) Any portion of the informal hearing that involves testimony or evidence shall be closed to the public. Agencies shall not disclose any such information obtained during the appeal to persons outside the government except when such release is authorized by the contractor (assignee or licensee).

(4) The HCA's final determination shall be based on the findings of facts, together with any other information and written or oral arguments submitted by the contractor (assignee or exclusive licensee) and agency representatives, and any other information in the administrative record. The HCA may

reject only those facts that have been found clearly erroneous and must explicitly state the rejection and the basis for the contrary finding. The HCA shall provide the contractor (assignee or exclusive licensee) a written determination by certified or registered mail no later than 90 days after fact-finding is completed or no later than 90 days after oral arguments, whichever is later.

1227.305 Administration of patent rights clauses.

1227.305–4 Protection of invention disclosures.

Solicitations and contracts that include a patent rights clause must provide the contractor the means to report inventions made during contract performance and at contract completion. This requirement may be fulfilled by requiring the contractor to submit a Department of Defense *DD Form 882,* Report of Inventions and Subcontracts.

PART 1228—BONDS AND INSURANCE

Sec.

Subpart 1228.1—Bonds and Other Financial Protections

1228.106 Administration.
1228.106–470 Contract clause-notification of payment bond protection.
1228.106–6 Furnishing information.
1228.106–70 Execution and administration of bonds.
1228.106–71 Performance and payment bonds for certain contracts.
1228.106–7100 Waiver.
1228.106–7101 Exception.

Subpart 1228.3—Insurance

1228.306 Insurance under fixed-price contracts.
1228.306–70 Contracts for lease of aircraft.
1228.307–1 Group insurance plans.
1228.311–1 Contract clause.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1228.1—Bonds and Other Financial Protections

1228.106 Administration.

1228.106–470 Contract clause-notification of payment bond protection.

The contracting officer must insert the clause at 1252.228–74, Notification of Payment Bond Protection, in solicitations and contracts when payment bonds are required.

1228.106–6 Furnishing information.

(c) When furnishing a copy of a payment bond and contract in accordance with FAR 28.106–6(b), the requirement for a copy of the contract may be satisfied by furnishing a pdf of the contract's first pages which show the contract number and date, the contractor's name and signature, the contracting officer's signature, and the description of the contract work. The contracting officer furnishing the copies shall place the statement ''Certified to be a true and correct copy'' followed by his/her signature, title and name of the Operating Administration using an authenticated electronic signature. The fee for furnishing the requested certified copies shall be determined in accordance with the DOT Freedom of Information Act regulation, 49 CFR part 7, and 1224.203.

1228.106–70 Execution and administration of bonds.

(a) The contracting officer shall notify the surety within 30 days of the contractor's failure to perform in accordance with the terms of the contract.

(b) When a partnership is a principal on a bond, the names of all the members of the firm shall be listed in the bond following the name of the firm, and the phrase ''a partnership composed of.'' If a principal is a corporation, the state of incorporation must also appear on the bond.

(c) Performance or payment bond(s), other than an annual bond, shall not predate the contract to which it pertains.

(d) Bonds may be filed with the original contract to which they apply, or all bonds can be separately maintained and reviewed quarterly for validity. If separately maintained, each contract file shall cross-reference the applicable bonds.

1228.106–71 Performance and payment bonds for certain contracts.

1228.106–7100 Waiver.

(a) Pursuant to the authority vested in the Secretary of Transportation by the Bond statute at 40 U.S.C. chapter 31, subchapter III, Bonds (historically known as the Miller Act), the requirements of 40 U.S.C. 3131 *et seq.* are waived, to the extent authorized in accordance with 40 U.S.C. 3134(b).

1228.106–7101 Exception.

A performance and payment bond for the contracts described under 1228.106–7100(a) may be advantageous in view of unusual circumstances arising in connection with such contracts. Requests for the authority to include the requirement for either a performance or payment bond, or both in the contracts described under 1228.106–7100(a) shall be submitted by the contracting officer to the HCA, before a solicitation is issued.

Subpart 1228.3—Insurance

1228.306 Insurance under fixed-price contracts.

1228.306–70 Contracts for lease of aircraft.

(a) The contracting officer shall insert the clauses at 1252.228–70, Loss of or Damage to Leased Aircraft; 1252.228–71, Fair Market Value of Aircraft; and 1252.228–72, Risk and Indemnities, unless otherwise indicated by the specific instructions for their use, in any contract for the lease of aircraft (including aircraft used in out-service flight training), except in the following circumstances—

(1) When the hourly rental rate does not exceed $250 and the total rental cost for any single transaction is not in excess of $2,500;

(2) When the cost of hull insurance does not exceed 10 percent of the contract rate; or

(3) When the lessor's insurer does not grant a credit for uninsured hours, thereby preventing the lessor from granting the same to the Government.

(b) As codified, 49 U.S.C. 44112, as amended, provides that an aircraft lessor under a lease of 30 days or more is not liable for injury or death of persons, or damage or loss of property, unless the aircraft is in the actual possession or control of the lessor and the damage occurs because of—

(1) The aircraft, engine, or propeller; or

(2) The flight of, or an object falling from, the aircraft, engine, or propeller.

(c) On short-term or intermittent-use leases, however, the owner may be liable for damage caused by operation of the aircraft. It is usual for the aircraft owner to retain insurance covering this liability during the term of such lease. Such insurance can, often for little or no increase in premium, be made to cover the Government's exposure to liability as well. To take advantage of this coverage, the Risks and Indemnities clause at 1252.228–72, prescribed in paragraph (d) of this section, shall be used.

(d) The contracting officer shall insert the clause at 1252.228–72, Risk and Indemnities, in any contract for out-service flight training or for the lease of aircraft when the Government will have exclusive use of the aircraft for a period of less than thirty days.

(e) During the performance of a contract for out-service flight training for DOT, whether the instruction to DOT personnel is in leased, contractor-provided, or Government-provided aircraft, contractor personnel shall always, during the entirety of the course

of training and operation of the aircraft, remain in command of the aircraft. At no time shall Government personnel or other personnel be permitted to take command of the aircraft. The contracting officer shall insert the clause at 1252.228–73, Command of Aircraft, in any solicitation and contract for out-service flight training, whether performed utilizing DOT-leased aircraft, contractor-provided aircraft, or Government-provided aircraft.

1228.307–1 Group insurance plans.

(a) *Prior approval requirements.* Contractors shall provide plans required by FAR 28.307–1(a) to the contracting officer for approval.

1228.311–1 Contract clause.

The contracting officer shall insert the clause at FAR 52.228–7, Insurance Liability to Third Persons, as prescribed in FAR 28.311–1 unless it is waived by an official one level above the contracting officer.

PART 1231—CONTRACT COST PRINCIPLES AND PROCEDURES

Sec.

Subpart 1231.2—Contracts with Commercial Organizations

1231.205 Selected costs.
1231.205–3270 Precontract costs—incurrence of costs.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1231.2—Contracts With Commercial Organizations

1231.205 Selected costs.

1231.205–3270 Precontract costs—incurrence of costs.

(a) The decision to incur precontract costs is the responsibility of the contractor. DOT officials shall not authorize, demand, or require a contractor to incur precontract costs. The contracting officer may advise the prospective contractor that any costs incurred before contract award are at the contractor's sole risk and that if negotiations fail to result in a binding contract, payment of these costs may not be made by the Government.

(b) When the contracting officer determines that incurring precontract costs was necessary to meet the proposed contract delivery schedule of a cost-reimbursement contract, the clause at 1252.231–70, Date of Incurrence of Costs, may be inserted in the resultant contract.

PART 1232—CONTRACT FINANCING

Subpart 1232.7—Contract Funding

Sec.
1232.770 Incremental funding during a Continuing Resolution.
1232.770–1 Scope of section.
1232.770–2 Definition.
1232.770–3 General.
1232.770–4 Policy.
1232.770–5 Limitations.
1232.770–6 Procedures.
1232.770–7 Clause.

Subpart 1232.9—Prompt Payment

1232.905–70 Payment documentation and process—form of invoice.

Subpart 1232.70—Electronic Invoicing Requirements

1232.7000 Scope of subpart.
1232.7001 Definition.
1232.7002 Electronic payment requests—invoices.
1232.7003 Payment system registration.
1232.7003–1 Electronic authentication.
1232.7004 Waivers.
1232.7005 Contract clause.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1232.7—Contract Funding

1232.770 Incremental funding during a Continuing Resolution.

1232.770–1 Scope of section.

This section provides policy and procedures for using incremental funding for fixed-price, time-and-material and labor-hour contracts during a period in which funds are provided to the DOT and its operating administrations, under a continuing resolution. Heads of the contracting activities may develop necessary supplemental internal procedures and guidance to advise offerors and contractors of these policies and procedures.

1232.770–2 Definition.

Continuing Resolution (CR) means an appropriation, in the form of a joint resolution, that provides budget authority for federal agencies, specific activities, or both to continue operation until the regular appropriations are enacted. Typically, a continuing resolution is used when legislative action on appropriations is not completed by the beginning of a fiscal year.

1232.770–3 General.

The Anti-Deficiency Act, 31 U.S.C. 1341, and FAR 32.702, state that no officer or employee of the Government may create or authorize an obligation in excess of the funds available, or in advance of appropriations unless otherwise authorized by law. A CR provides funding for continuing projects or activities that were conducted in the prior fiscal year for which appropriations, funds, or other authority was previously made available. Each CR is governed by the specific terms in that specific CR (*e.g.,* duration of the CR) and under certain CRs, the funding amounts available for award of some contract actions are inadequate to fund the entire amounts needed.

1232.770–4 Policy.

(a) A fixed-price, time-and-materials or labor-hour contract or order for commercial or non-commercial severable services may be incrementally funded when—

(1) Funds are provided to DOT or operating administration under a CR. This includes funds appropriated to DOT, an operating administration, funds appropriated to another entity that will be directly obligated on a DOT contract, and funds in a revolving fund or similar account that will be reimbursed by a customer agency funded by a CR;

(2) The responsible fiscal authority has not allocated sufficient funds to fully fund the contract action that is otherwise authorized to be issued;

(3) There is no statutory restriction that would preclude the proposed use of funds;

(4) Funds are available and unexpired, as of the date the funds are obligated;

(5) Assurance is provided by the responsible financial authority that full funding is anticipated once an Appropriations Act is enacted; and

(6) The clause prescribed by 1232.770–7 is incorporated into the contract or order.

(b) Incremental funding may be limited to individual line item(s) or a particular order(s).

1232.770–5 Limitations.

This policy does not apply to contract actions using funds that are not covered by the CR.

1232.770–6 Procedures.

(a) An incrementally funded fixed-price, time-and-materials or labor-hour contract shall be fully funded once funds are available.

(b) The contracting officer shall ensure that sufficient funds are allotted to the contract to cover the total amount payable to the contractor in the event of termination for convenience by the Government.

(c) Upon receipt of the contractor's notice under paragraph (c) of the clause at 1252.232–71, Limitation of Government's Obligation, the contracting officer shall promptly

provide written notice to the contractor that the Government is—

(i) Obligating additional funds for continued performance and increasing the Government's limitation of obligation in a specified amount;

(ii) Obligating the full amount of funds needed;

(iii) Terminating for convenience, as applicable, the affected line items or contract; or

(iv) Considering whether to allot additional funds; and

(A) The contractor is entitled by the contract terms to stop work when the Government's limitation of obligation is reached; and

(B) Any costs expended beyond the Government's limitation of obligation are at the contractor's risk.

(d) Upon learning that the contract will receive no further funds by the date provided in the notice under paragraph (c) of the clause at 1252.232–71, Limitation of Government's Obligation, the contracting officer shall promptly give the contractor written notice of the Government's decision and terminate the affected line items or contract, as applicable, for the convenience of the Government.

1232.770–7 Clause.

(a) The contracting officer shall insert the clause at 1252.232–71, Limitation of Government's Obligation, in—

(1) Solicitations and contracts for severable services when incremental funding of a fixed-price, time-and-material or labor-hour contract due to a CR is anticipated; or

(2) Contracts or orders for severable services when incremental funding of a fixed-price, time-and-material or labor-hour contract is authorized and DOT or its operating administrations are operating under a CR (*see* 1232.770–4).

(b) The contracting officer shall insert the information required in paragraphs (a) and (c) of clause 1252.232–71. Contracting officers are authorized, in appropriate cases, to revise paragraph (a) of clause 1252.232–71 to specify the work required under the contract, in lieu of using contract line item numbers, as well as revise paragraph (c) of the clause to specify a different notification period and percentage. The 30-day period may be varied up to 90 days, and the 75 percent can be varied from 75 up to 85 percent.

Subpart 1232.9—Prompt Payment

1232.905–70 Payment documentation and process—form of invoice.

(a) Under fixed-price contracts, the contracting officer shall require the contractor to submit an invoice or voucher on any form or format meeting FAR 32.905(b) requirements.

(b) Under other than fixed-price contracts, the contracting officer shall require the contractor to submit the Standard Form (SF) 1034, Public Voucher for Purchases and Services Other Than Personal, and the SF 1035, Public Voucher for Purchases and Services Other Than Personal (Continuation Sheet), to request payments. The forms must be completed as required by Table 1232–1 to this part, Instructions for Completing the SF 1034, and Table 1232–2 to this part, Instructions for Completing the SF 1035.

Table 1232–1

Instructions for Completing the SF 1034

The SF 1034, Public Voucher for Purchases and Services Other Than Personal, shall be completed in accordance with the below instructions. The numbered items correspond to the entries on the form.

Caption on the SF 1034	Data to be inserted in the block
1. U.S. DEPARTMENT, BUREAU, OR ESTABLISHMENT AND LOCATION	Name and address of the contracting office which issued the contract.
2. DATE VOUCHER PREPARED	Date voucher submitted to the designated billing office cited under the contract or order.
3. CONTRACT NO. AND DATE	Contract No. and, when applicable, the Order No. and date as shown on the award document.
4. REQUISITION NO. AND DATE	Leave blank or fill-in in accordance with the instructions in the contract.
5. VOUCHER NO	Start with "1" and number consecutively. A separate series of consecutive numbers must be used beginning with "1" for each contract number or order number (when applicable). **Note:** Insert the word "FINAL" if this is the last voucher.
6. SCHEDULE NO.; PAID BY; DATE INVOICE RECEIVED; DISCOUNT TERMS; PAYEE'S ACCOUNT NO.; SHIPPED FROM/TO; WEIGHT; GOVERNMENT B/L.	Leave all these blocks blank.
7. PAYEE'S NAME AND ADDRESS	Name and address of contractor as it appears on the contract. If the contract is assigned to a bank, also show "CONTRACT ASSIGNED" below the name and address of the contractor.
8. NUMBER AND DATE OF ORDER	Leave blank. (*See* #3 above.)
9. DATE OF DELIVERY OR SERVICE	The period for which the incurred costs are being claimed (*e.g.,* month and year; beginning and ending date of services, etc.).
10. ARTICLES OR SERVICES	Insert the following: "For detail, *see* the total amount of the claim transferred from the attached SF 1035, page X of X." One space below this line, insert the following: "COST REIMBURSABLE-PROVISIONAL PAYMENT."
11. QUANTITY; UNIT PRICE; (COST; PER)	Leave blank.
12. AMOUNT	Insert the total amount claimed from the last page of the SF 1035.
Payee must NOT use the space below.	Do NOT write or type below this line.

Table 1232–2

Instructions for Completing the SF 1035

The SF 1035, Public Voucher for Purchases and Services Other Than Personal (Continuation Sheet), shall be completed in accordance with the below instructions.

1. Use the same basic instructions for the SF 1035 as used for the SF 1034. Ensure that the contract and, if applicable, order number, are shown on each continuation sheet. Use as many sheets as necessary to show the information required by the contract, contracting officer, or responsible audit agency; however, if more than one sheet of SF 1035 is used, each sheet shall be in numerical sequence.

2. The following items are generally entered below the line with Number and Date of Order; Date of Delivery or Service; Articles or Services; Quantity; Unit Price; and Amount (but do not necessarily tie to these captions).

3. Description of data to be inserted as it applies to the contract or order number including the CLIN or SLIN.

a. Show, as applicable, the target or estimated costs, target or fixed-fee, and total contract value, as adjusted by any modifications to the contract or order. The FAR permits the contracting officer to withhold a percentage of fixed fee until a reserve is set aside in an amount that is considered necessary to protect the Government's interest.

b. Show the following costs and supporting data (as applicable) to the contract or order:

(1) *Direct Labor.* List each labor category, rate per labor hour, hours worked, and extended total labor dollars per labor category.

(2) *Premium Pay/Overtime.* List each labor category, rate per labor hour, hours worked, and the extended total labor dollars per labor category. Note: Advance written authorization must be received from the contracting officer to work overtime or to pay premium rates; therefore, identify the contracting officer's written authorization to the contractor.

(3) *Fringe Benefits.* If fringe benefits are included in the overhead pool, no entry is required. If the contract allows for a separate fringe benefit pool, cite the formula (rate and base) in effect during the time the costs were incurred. If the contract allows for billing fringe benefits as a direct expense, show the actual fringe benefit costs.

(4) *Materials, Supplies, Equipment.* Show those items normally treated as direct costs. Expendable items need not be itemized and may be grouped into major classifications such as office supplies. However, items valued at $5,000 or more must be itemized. *See* FAR part 45, Government Property, for reporting of property.

(5) *Travel.* List the name and title of traveler, place of travel, and travel dates. If the travel claim is based on the actual costs expended, show the amount for the mode of travel (*i.e.,* airline, private auto, taxi, etc.), lodging, meals, and other incidental expenses separately, on a daily basis. These actual costs must be supported with receipts to substantiate the costs paid. Travel costs for consultants must be shown separately and also supported.

(6) *Other Direct Costs.* Itemize those costs that cannot be placed in categories (1) through (5) above. Categorize these costs to the extent possible.

(7) *Total Direct Costs.* Cite the sum of categories (1) through (6) above.

(8) *Overhead.* Cite the rate, base, and extended amount.

(9) *G&A Expense.* Cite the rate, base, and extended amount.

(10) *Total Costs.* Cite the sum of categories (7) through (9) above.

(11) *Fee.* Cite the rate, base, and extended amount.

(12) *Total Cost and Fee Claimed.* Enter this amount on the SF 1034.

Completion Voucher

The completion (final) voucher is the last voucher to be submitted for incurred, allocable, and allowable costs expended to perform the contract or order. This voucher should include all contract reserves, allowable cost withholdings, balance of fixed fee, etc. However, the amount of the completion voucher when added to the total amount previously paid cannot exceed the total amount of the contract.

1232.7000 Scope of subpart.

This subpart prescribes policy and procedures for submitting and processing payment requests in electronic form.

1232.7001 Definition.

Payment request, as used in this subpart, means a bill, voucher, invoice, or request for contract financing payment with associated supporting documentation.

1232.7002 Electronic payment requests—invoices.

(a) *Requirements.* Contracts shall require the electronic submission of payment requests, except for—

(1) Purchases paid for with a Government-wide commercial purchase card;

(2) Classified contracts or purchases when electronic submission and processing of payment requests could compromise classified information or national security; or

(3) As directed by the contracting officer to submit payment requests by mail.

(b) *Alternate procedures.* Where a contract requires the electronic submission of invoices, the contracting officer may authorize alternate procedures only if the contracting officer makes a written determination that the Department of the Transportation (DOT) is unable to receive electronic payment requests or provide acceptance electronically and it is approved one level above the contracting officer.

(c) *DOT electronic invoicing system.* The Department of Transportation utilizes the DELPHI eInvoicing System. The DELPHI module for submitting invoices is called *iSupplier.* Except as provided in paragraphs (a) and (b) of this section, contracting officers and DOT finance officials shall process electronic payment submissions through the DELPHI System and the DELPHI module for submitting invoices, *iSupplier. iSupplier* is also the official system of record for DOT payment requests. If the requirement for electronic submission of payment requests is waived under paragraph (a) or (b) of this section, the contract or alternate payment authorization, as applicable, shall specify the form and method of payment request submission.

1232.7003 Payment system registration.

The contractor shall submit payment requests in electronic form unless directed by the contracting officer to submit payment requests by mail. Purchases paid with a Governmentwide commercial purchase card are considered to be an electronic transaction for purposes of this requirement, and therefore no additional electronic invoice submission is required.

1232.7003–1 Electronic authentication.

Access to DELPHI is granted with electronic authentication of credentials (name & valid email address) utilizing the GSA credentialing platform login.gov. Vendors submitting invoices will be required to submit invoices via *iSupplier* (DELPHI) and authenticated via *www.login.gov*

1232.7004 Waivers.

If a vendor is unable to utilize DOT's DELPHI electronic invoicing system, DOT may consider waivers on a case-by-case basis. Vendors should contact their COR for procedures, or access the DELPHI website at *http://www.dot.gov/cfo/delphi-einvoicing-system.html.*

1232.7005 Contract clause.

The contracting officer shall insert the clause at 1252.232–70, Electronic Submission of Payment Requests, in solicitations and contracts exceeding the micro-purchase threshold, except those for which the contracting officer has directed or approved otherwise under 1232.7002, and those paid with a Governmentwide commercial purchase card.

PART 1233—PROTESTS, DISPUTES, AND APPEALS

Subpart 1233.1—Protests

Sec.
1233.103 Protests to the agency.
1233.104 Protests to GAO.

Subpart 1233.2—Disputes and Appeals

1233.211 Contracting officer's decision.
1233.214 Alternative dispute resolution (ADR).

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1233.1—Protests

1233.103 Protests to the agency.

(c) DOT Operating Administrations (OAs) shall consider the use of Alternate Dispute Resolution (ADR) in all agency protest actions.

1233.104 Protests to GAO.

The protest process at the Government Accountability Office

(GAO) may include ADR assistance by GAO. The contracting officer shall, with advice of counsel, explore the possibility of using ADR for all GAO protests.

Subpart 1233.2—Disputes and Appeals

1233.211 Contracting officer's decision.

(a)(4)(v) *Contracting officer's actions on claims.* In accordance with FAR 33.211(a)(4)(i) through (vi), contracting officers shall include in a statement of the contracting officer's decision referenced at FAR 33.211(a)(iv), paragraphs substantially as follows:

This is the final decision of the Contracting Officer. You may appeal this decision to the Civilian Board of Contract Appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the Civilian Board of Contract Appeals as set forth below and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number.

Where to File: All filings must be submitted to the Clerk of the Board. Filings shall be to Civilian Board of Contract Appeals, 1800 F Street NW, Washington, DC 20405 in any of the ways as set forth at their website at *https://cbca.gov/howto/index.html.*

With regard to appeals to the Civilian Board of Contract Appeals, you may, solely at your election, proceed under the board's—

(1) Small claim procedure for claims of $50,000 or less or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), $150,000 or less; or

(2) Accelerated procedure for claims of $100,000 or less.

Instead of appealing to the Civilian Board of Contract Appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in 41 U.S.C. 7102(d), regarding Maritime Contracts) within 12 months of the date you receive this decision.''

1233.214 Alternative dispute resolution (ADR).

(c) The Administrative Dispute Resolution Act (ADRA) of 1990, Public Law 101–552, as reauthorized by the Administrative Dispute Resolution Act (ADRA) of 1996, Public Law 104–320, authorizes and encourages agencies to use mediation, conciliation, arbitration, and other techniques for the prompt and informal resolution of disputes, either before or after appeal, and for other purposes. ADR procedures may be used when—

(1) There is mutual consent by the parties to participate in the ADR process (with consent being obtained either before or after an issue in controversy has arisen); and either

(2) Prior to the submission of a claim; or

(3) In resolution of a formal claim.

(d)(1) Use of ADR shall be coordinated with counsel. For all matters filed with the Civilian Board of Contract Appeals (CBCA), the CBCA Alternate Dispute Resolution (ADR) procedures contained in 48 CFR 6101.54 shall be followed.

(2) For other matters, pursuant to the Administrative Dispute Resolution Act (ADRA), DOT has appointed a Dispute Resolution Specialist, who is responsible for the operations of the Center for Alternative Dispute Resolution. The Center may provide an internal DOT neutral agreeable to the parties to conduct any of the alternative means of dispute resolution set forth in the ADRA, 5 U.S.C. 571(3), on a non-reimbursable basis for DOT operating administrations and their contracting partners. Alternative means of dispute resolution include settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration, or any combination of these methods. The Center may also arrange for an external public or private neutral at the parties' expense.

PART 1234 [RESERVED]

PART 1235—RESEARCH AND DEVELOPMENT CONTRACTING

Sec.

1235.003 Policy.
1235.010–70 Scientific and technical reports—acquisition, publication and dissemination.
1235.011–70 Contract clause.
1235.012 Patent rights.
1235.070 Research misconduct.
1235.070–1 Contract clause.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

1235.003 Policy.

(b) *Cost sharing.* DOT cost sharing policies that are not otherwise required by law, shall be in accordance with FAR 16.303, FAR 42.707(a) and Operating Administration (OA) procedures.

(c) *Recoupment.* DOT recoupment not otherwise required by law shall be in accordance with OA procedures.

1235.010–70 Scientific and technical reports—acquisition, publication and dissemination.

DOT policy for the acquisition, publishing format, and dissemination of scientific and technical reports is established in DOT Order 1700.18B, Acquisition, Publication and Dissemination of DOT Scientific and Technical Reports. The contracting officer is responsible for ensuring the requirements specified in this order, as well as any OA implementing policies, are adequately addressed in the Research and Development (R&D) solicitation and resulting contract award, when applicable.

1235.011–70 Contract clause.

The contracting officer shall insert the clause at 1252.235–71, Technology Transfer, in all solicitations and contracts for experimental, developmental, or research work.

1235.012 Patent rights.

Patent rights shall be in accordance with FAR part 27 and any OA implementing procedures.

1235.070 Research misconduct.

(a) *Applicability.* DOT policy on scientific integrity is implemented in the Deputy Secretary's memorandum dated April 10, 2012, Implementation of Departmental Scientific Integrity Policy. The Department is dedicated to preserving the integrity of the research it conducts and funds and will not tolerate misconduct in the performance of these activities. DOT's research misconduct policy is set forth in the *DOT Implementation Guidance for Executive Office of the President, Office of Science and Technology Policy, Federal Policy on Research Misconduct, dated February 2002.* This policy applies to all DOT-funded or DOT-conducted research, including intramural research, research conducted by contractors, and research performed at research institutions, including universities and industry.

(b) *Definition.* Research misconduct means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results. Research misconduct does not include honest error or differences of opinion. A finding of research misconduct means a determination based on a preponderance of the evidence that research misconduct has occurred, including a conclusion that there has been a significant departure from accepted practices of the relevant research community and that it was knowingly, intentionally, or recklessly committed.

1235.070–1 Contract clause.

The contracting officer shall insert the clause at 1252.235–70, Research Misconduct, in all solicitations and contracts for research and development.

PART 1236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Subpart 1236.5—Contract Clauses

Sec.
1236.570 Special precautions for work at operating airports.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1236.5—Contract Clauses

1236.570 Special precautions for work at operating airports.

Where any acquisition will require work at an operating airport, insert the clause at 1252.236–70, Special Precautions for Work at Operating Airports, in solicitations and contracts.

PART 1237—SERVICE CONTRACTING

Subpart 1237.1—Service Contracts—General

Sec.
1237.110–70 Contract clauses.

Subpart 1237.70—Procedures for Acquiring Training Services

1237.7000 Policy.
1237.7001 Certification of data.
1237.7002 Applicability.
1237.7003 Solicitation provision and contract clause.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1237.1—Service Contracts—General

1237.110–70 Contract clauses.

(a) The contracting officer shall insert the clause at 1252.237–70, Qualifications of Contractor Employees, in all solicitations and contracts for services where contractor employees will have access to Government facilities, sensitive information, including proprietary data and/or resources.

(b) The contracting officer shall insert the clause at 1252.237–73, Key Personnel, in solicitations and contracts for services when the selection for award is substantially based on the offeror's possession of special capabilities regarding personnel.

Subpart 1237.70—Procedures for Acquiring Training Services

1237.7000 Policy.

When training services are provided under contract, DOT policy requires that all prospective contractors:

(a) Certify that the data provided concerning company qualifications, background statements, and resumes, for example, is current, accurate, and complete; and

(b) Agree to not solicit or advertise private, non-Government training while conducting a training course.

1237.7001 Certification of data.

Towards fulfilling DOT's policy at 1237.7000(a), contracting officers shall request information from prospective contractors for certification purposes. The type of information requested is dependent upon the criticality of the service and/or any unique or essential qualification requirements.

1237.7002 Applicability.

The policy at 1237.7000 applies to all contracts (as defined in FAR 2.101) awarded by DOT for training services when DOT controls the content and/or presentation of the course. This policy does not apply to courses attended by DOT employees that are offered and sponsored by Government sources of supply, educational institutions, or private entities where DOT does not control the course content or presentation. (*See* 1213.7100 for examples.)

1237.7003 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 1252.237–71, Certification of Data, in solicitations and the clause at 1252.237–72, Prohibition on Advertising, in solicitations and contracts for training services when the content and/or presentation of the course is controlled by DOT.

(b) The contracting officer shall incorporate the successful offeror's certified data into any resultant contract(s). Certified data may be adopted by reference, if the contracting officer determines it contains sufficient descriptive information (*i.e.,* dated material such as resumes, company and/or personnel qualifications) to reliably describe the certified data submitted.

PART 1239—ACQUISITION OF INFORMATION TECHNOLOGY

Sec.
1239.000 Scope of part.
1239.002 Definitions.

Subpart 1239.1—General

1239.101 Policy.
1239.101–70 Policy—software management and development.
1239.101–70–1 Scope.
1239.101–70–2 Definitions.
1239.101–70–3 Policy.
1239.106–70 Contract clauses.

Subpart 1239.2—Electronic and Information Technology

1239.201 Scope of subpart.
1239.203 Applicability.
1239.203–70 Information and communication technology accessibility standards—contract clause and provision.

Subpart 1239.70—Information Security and Incident Response Reporting

1239.7000 Scope of subpart.
1239.7001 Definitions.
1239.7002 Policy.
1239.7003 Contract clauses.

Subpart 1239.71—Protection of Data About Individuals

1239.7100 Scope of subpart.
1239.7101 Definitions.
1239.7102 Policy.
1239.7103 Responsibilities.
1239.7104 Contract clause.

Subpart 1239.72—Cloud Computing

1239.7200 Scope of subpart.
1239.7201 Definitions.
1239.7202 Policy.
1239.7203 DOT FedRAMP specific requirements.
1239.7204 Contract clauses.

Subpart 1239.73—Technology Modernization and Upgrades/Refreshment

1239.7300 Scope of subpart.
1239.7301 Definitions.
1239.7302 Policy.
1239.7303 Contract clauses.

Subpart 1239.74—Records Management

1239.7400 Scope of subpart.
1239.7401 Definition.
1239.7402 Policy.
1239.7403 Contract clause.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

1239.000 Scope of part.

In addition to FAR 39.000, this part prescribes acquisition policies and procedures for use in acquiring information technology and information technology-related supplies, services and systems, including information technology-related services and information security, to include—

(a) Software management and development;

(b) Section 508 standards and compliance for contracts;

(c) Information security and incident response reporting;

(d) Protection of data about individuals;

(e) Cloud computing;

(f) Technology modernization and upgrade/refreshment; and

(g) Record management.

1239.002 Definitions.

As used in this part—

Information means any communication or representation of knowledge such as facts, data, or opinions in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual (Committee on National Security Systems Instruction (CNSSI) 4009).

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information (44 U.S.C. 3502).

Media means physical devices or writing surfaces including, but not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which information is recorded, stored, or printed within an information system.

Subpart 1239.1—General

1239.101 Policy.

1239.101–70 Policy—software management and development.

1239.101–70–1 Scope.

This subpart applies to all acquisitions of products or services supporting the development or maintenance of software.

1239.101–70–2 Definitions.

As used in this subpart—

Application means software that resides above system software and includes applications such as database programs, word processors and spreadsheets. Application software may be bundled with system software or published alone.

Programming software means tools to aid developers in writing programs including compilers, linkers, debuggers, interpreters and text editors.

Software means a set of instructions or programs instructing a computer to do specific tasks including scripts, applications, programs and a set of instructions. Includes System, Programming, and Application software.

System software means a platform comprised of Operating System (OS) programs and services, including settings and preferences, file libraries and functions used for system applications. System software also includes device drivers that run basic computer hardware and peripherals.

1239.101–70–3 Policy.

The contracting officer will ensure all documents involving the acquisition of development or maintenance of DOT applications, systems, infrastructure, and services contain the appropriate clauses as may be required by Federal Acquisition Regulation (FAR) and other Federal authorities, in order to ensure that information system modernization is prioritized accordance with Federal law, OMB Guidance, and DOT policy.

1239.106–70 Contract clauses.

The contracting officer shall insert the clause at 1252.239–70, Security Requirements for Unclassified Information Technology Resources, and the clause at 1252.239–71, Information Technology Security Plan and Accreditation, in all solicitations and contracts exceeding the micro-purchase threshold that include information technology services.

Subpart 1239.2—Electronic and Information Technology

1239.201 Scope of subpart.

This subpart applies to the acquisition of Electronic and Information Technology (EIT) supplies and services). The term ''EIT'' as used in this subpart is intended to refer to Information and Communication Technology (ICT) and any successor terms used to describe such technology. It concerns the access to and use of information and data, by both Federal employees with disabilities, and members of the public with disabilities in accordance with FAR 39.201. This implements DOT policy on Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d) as it applies to contracts and acquisitions.

1239.203 Applicability.

(a) Solicitations for information technology (information and communication technology) or IT-related supplies and services may require submission of a Section 508 Checklist available at *https://www.section508.gov/sell/vpat.*

1239.203–70 Information and communication technology accessibility standards—contract clause and provision.

(a) The contracting officer shall insert the provision at 1252.239–92, Information and Communication Technology Accessibility Notice, in all solicitations.

(b) The contracting officer shall insert the clause at 1252.239–93, Information and Communication Technology Accessibility, in all contracts and orders.

Subpart 1239.70—Information Security and Incident Response Reporting

1239.7000 Scope of subpart.

(a) This subpart applies to contracts and subcontracts requiring contractors and subcontractors to safeguard DOT sensitive data that resides in or transits through covered contractor information systems by applying specified network security requirements. It also requires reporting of cyber incidents.

(b) This subpart does not abrogate any other requirements regarding contractor physical, personnel, information, technical, or general administrative security operations governing the protection of unclassified information, nor does it affect requirements of the National Industrial Security Program.

1239.7001 Definitions.

As used in this subpart—

Adequate security means protective measures that are commensurate with the consequences and probability of loss, misuse, or unauthorized access to, or modification of information.

Contractor attributional/proprietary information means information that identifies the contractor(s), whether directly or indirectly, by the grouping of information that can be traced back to the contractor(s) (*e.g.,* program description, facility locations), personally identifiable information, as well as trade secrets, commercial or financial information, or other commercially sensitive information that is not customarily shared outside of the company.

Contractor information system means an unclassified information system that is owned, or operated by or for, a contractor and that processes, stores, or transmits DOT sensitive information.

DOT sensitive data means unclassified information as that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Governmentwide policies, and is—

(1) Marked or otherwise identified in the contract, task order, or delivery order and provided to the contractor by or on behalf of DOT in support of the performance of the contract; or

(2) Collected, developed, received, transmitted, used, or stored by or on behalf of the contractor in support of the performance of the contract.

Cyber incident means actions taken through the use of computer networks that result in a compromise or an actual or potentially adverse effect on an information system and/or the information residing therein.

Rapidly report means reporting within two (2) hours of discovery of any cyber incident.

Technical information means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information. Examples of technical information include research and engineering data, engineering

drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog-item identifications, data sets, studies and analyses and related information, and computer software executable code and source code.

1239.7002 Policy.

(a) Contractors and subcontractors are required to provide adequate security on all contractor information systems that will collect, use, process, store, or disseminate DOT sensitive data.

(b) Contractors and subcontractors shall report cyber incidents directly to DOT via the DOT Security Operations Center (SOC) 24 hours-a-day, 7 days-a-week, 365 days a year (24x7x365) at phone number: 571–209–3080 (Toll Free: 866–580–1852) within two (2) hours of discovery. Subcontractors will provide to the prime contractor the incident report number automatically assigned by DOT. Lower-tier subcontractors likewise report the incident report number automatically assigned by DOT to their higher-tier subcontractor, until the prime contractor is reached.

(c) If a cyber incident occurs, contractors and subcontractors shall submit to DOT, in accordance with the instructions contained in the clause at 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting—

(1) A cyber incident report;

(2) The malicious software, if detected and isolated; and

(3) The medium or media (or access to covered contractor information systems and equipment) upon request.

(d) Notwithstanding to the requirement for the reporting of cyber incidents, if existing safeguards have ceased to function or the Government or Contractor discovers new or unanticipated threats or hazards, the discoverer shall immediately bring the situation to the attention of the other party.

(1) Information shared by the contractor may include contractor attributional/proprietary information. The Government will protect against the unauthorized use or release of information that includes contractor attributional/proprietary information.

(2) A cyber incident that is reported by a contractor or subcontractor shall not, by itself, be interpreted as evidence that the contractor or subcontractor has failed to provide adequate security on their covered contractor information systems, or has otherwise failed to meet the requirements of the clause at 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting. When a cyber incident is reported, the contracting officer shall consult with the DOT component Chief Information Officer/cyber security office prior to assessing contractor compliance (*see* 1239.7003.) The contracting officer shall consider such cyber incidents in the context of an overall assessment of a contractor's compliance with the requirements of the clause at 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting.

(3) Support services contractors directly supporting Government activities related to safeguarding DOT sensitive data and cyber incident reporting (*e.g.,* forensic analysis, damage assessment, or other services that require access to data from another contractor) are subject to restrictions on use and disclosure of reported information.

1239.7003 Contract clauses.

(a) The contracting officer shall insert the clause at 1252.239–72, Compliance with Safeguarding DOT Sensitive Data Controls, in all solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, except for solicitations solely for the acquisition of commercially available off-the-shelf (COTS) items.

(b) The contracting officer shall insert clause at 1252.239–73, Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information, in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, for services that include support for the Government's activities related to safeguarding DOT sensitive data and cyber incident reporting.

(c) The contracting officer shall insert clause at 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting, in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, except for solicitations and contracts solely for the acquisition of COTS items.

Subpart 1239.71—Protection of Data About Individuals

1239.7100 Scope of subpart.

This subpart includes Privacy Act and data protection considerations for DOT contracts. Data protection requirements are in addition to provisions concerning the general protection of individual privacy (*see* FAR subpart 24.1) and privacy in the acquisition of information technology (*see* FAR 39.105). DOT rules and regulations implementing the Privacy Act of 1974 are located at 49 CFR part 10.

1239.7101 Definitions.

As used in this subpart—

Data protection means the practice of protecting data and managing risks associated with the collection, display, use, processing, storage, transmission, and disposal of information or data as well as the systems and processes used for those purposes. Data protection uses physical, technical and administrative controls to protect the integrity, availability, authenticity, non-repudiation, and confidentiality of data by incorporating protection, detection, and reaction capabilities. Data protection encompasses not only digital data, but also data in analog or physical form, and applies to data in transit as well as data at rest.

Breach means the disclosure of information to unauthorized persons, or a violation of the security policy of a system, in which unauthorized access, compromise, use, disclosure, modification, destruction, access or loss use of data, or the copying of information to unauthorized media may have occurred.

Information security means the protection of information and information systems from unauthorized access, use, disclosure, disruption, modification, or destruction in order to provide—

(i) Integrity, which means guarding against improper information modification or destruction, and includes ensuring information non-repudiation and authenticity;

(ii) Confidentiality, which means preserving authorized restrictions on access and disclosure, including means for protecting personal privacy and proprietary information; and

(iii) Availability, which means ensuring timely and reliable access to and use of information.

Personally Identifiable Information (PII) means the definition as set forth in FAR 24.101.

Privacy incident means the loss of control, compromise, unauthorized disclosure, unauthorized acquisition, or unauthorized access to PII regardless of format.

1239.7102 Policy.

DOT must ensure that data protection is provided for information and information systems in accordance with current policies, procedures, and statutes, including:

(1) The Clinger-Cohen Act.

(2) The E-Government Act.

(3) Federal Information Systems Modernization Act.

(4) Federal Information Processing Standards.

(5) OMB Circular A–130, Managing Information as a Strategic Resource.

(6) 49 CFR part 10, Maintenance of and Access to Records Pertaining to Individuals.

(7) DOT Order 1351.18, Privacy Risk Management Policy.

(8) DOT Order 1351.19, PII Breach Notification Controls.

(9) DOT Order 1351.28, Records Management.

(10) DOT Order 1351.37, Departmental Cyber Security Policy.

1239.7103 Responsibilities.

(a) The contracting officer will include appropriate data protection requirements in all contracts and other acquisition-related documents for DOT information created, collected, displayed, used, processed, stored, transmitted, and disposed of by contractors.

(b) The contracting officer will ensure all contracts with contractors maintaining information systems containing PII contain the appropriate clauses as may be required by the Federal Acquisition Regulation (FAR) and other OMB and agency memorandums and directives, to ensure that PII under the control of the contractor is maintained in accordance with Federal law and DOT policy.

(c) The contracting officer and assigned contracting officer's representatives and program and project managers will obtain contractual assurances from third parties working on official DOT business that third parties will protect PII in a manner consistent with the privacy practices of the Department during all phases of the system development lifecycle.

(d) Program and project managers and requiring activities will address the need to protect information about individuals and/or PII in the statement of work (SOW), performance work statement (PWS) or statement of objectives (SOO). Contracting officers will notify the appropriate organization or office when it intends to issue a solicitation for items or services requiring access to personal information or PII. Contracting officers will identify the Component Privacy Officer as the point of contact for oversight of privacy protection and identify the Component Information Systems Security Manager for the component for oversight of information security to the contractor after award.

(e) *See* 1252.239–75, DOT Protection of Information about Individuals, PII and Privacy Risk Management Requirements, for additional information regarding the requirements of DOT Order 1351.18, Privacy Risk Management Policy and DOT Order 1351.37, Departmental Cyber Security Policy.

1239.7104 Contract clause.

The contracting officer shall insert the clause at 1252.239–75, DOT Protection of Information About Individuals, PII and Privacy Risk Management Requirements, in solicitations and contracts involving contractor performance of data protection functions and for contracts involving the design, development, or operation of an information system with access to personally identifiable information as described in DOT Order 1351.18, Privacy Risk Management, and DOT Order 1351.37, Departmental Cyber Security Policy.

Subpart 1239.72—Cloud Computing

1239.7200 Scope of subpart.

This subpart prescribes policies and procedures for the acquisition of cloud computing services.

1239.7201 Definitions.

As used in this subpart—

Authorizing official means the senior Federal official or executive with the authority to formally assume responsibility for operating an information system at an acceptable level of risk to organizational operations (including mission, functions, image, or reputation), organizational assets, individuals, other organizations, and the Nation.

Cloud computing means a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (*e.g.,* networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. This includes other commercial terms, such as on-demand self-service, broad network access, resource pooling, rapid elasticity, and measured service. It also includes commercial offerings for software-as-a-service, infrastructure-as-a-service, and platform-as-a-service.

Government data means any information, document, media, or machine-readable material regardless of physical form or characteristics, that is created or obtained by the Government in the course of official Government business.

Government-related data means any information, document, media, or machine-readable material regardless of physical form or characteristics that is created or obtained by a contractor through the storage, processing, or communication of Government data. This does not include a contractor's business records (*e.g.,* financial records, legal records, and other similar records) or data such as operating procedures, software coding, or algorithms that are not uniquely applied to the Government data.

1239.7202 Policy.

(a) *General.* Generally, DOT entities shall acquire cloud computing services using commercial terms and conditions that are consistent with Federal law and the agency's needs, including those requirements specified in this subpart. Some examples of commercial terms and conditions are license agreements, End User License Agreements (EULAs), Terms of Service (TOS), or other similar legal instruments or agreements. Contracting officers shall carefully review commercial terms and conditions and consult counsel to ensure these are consistent with Federal law, regulations, and the agency's needs. Contracting officers shall incorporate any applicable service provider terms and conditions into the contract by attachment or other appropriate mechanism.

(b) *FedRAMP provisional authorization.* Except as provided in paragraph (b)(1) of this section, the contracting officer shall only award a contract to acquire cloud computing services from a cloud service provider (*e.g.,* contractor or subcontractor, regardless of tier) that has been granted provisional authorization by the General Services Administration (GSA) Federal Risk and Authorization Management Program (FedRAMP), and meets the security requirements set out by the DOT Chief Information Officer (CIO), at the level appropriate to the requirement to provide the relevant cloud computing services.

(1) The contracting officer may award a contract to acquire cloud computing services from a cloud service provider that has not been granted provisional authorization when—

(i) The requirement for a provisional authorization is waived by the DOT CIO; or

(ii) The cloud computing service requirement is for a private, on-premises version that will be provided from Government facilities. Under this circumstance, the cloud service provider must obtain a provisional authorization prior to operational use.

(2) When contracting for cloud computing services, the contracting officer shall ensure the following

information is provided by the requiring activity:

(i) Government data and Government-related data descriptions.

(ii) Data ownership, licensing, delivery and disposition instructions specific to the relevant types of Government data and Government-related data (*e.g.,* Contract Data Requirements List; work statement task; line items). Disposition instructions shall provide for the transition of data in commercially available, or open and non-proprietary format (and for permanent records, in accordance with disposition guidance issued by National Archives and Record Administration).

(iii) Appropriate requirements to support applicable inspection, audit, investigation, or other similar authorized activities specific to the relevant types of Government data and Government-related data, or specific to the type of cloud computing services being acquired.

(iv) Appropriate requirements to support and cooperate with applicable system-wide search and access capabilities for inspections, audits, investigations.

(c) *Required storage of data within the United States or outlying areas.* (1) Cloud computing service providers are required to maintain within the 50 states, the District of Columbia, or outlying areas of the United States, all Government data that is not physically located on DOT premises, unless otherwise authorized by the DOT CIO.

(2) The contracting officer shall provide written approval to the contractor when the contractor is permitted to maintain Government data at a location outside the 50 States, the District of Columbia, and outlying areas of the United States.

1239.7203 DOT FedRAMP specific requirements.

DOT entities shall set forth DOT FedRAMP specific cloud service requirements. DOT cloud service providers shall adhere to specific requirements when providing services to DOT and its operating administrations whenever DOT or other Federal agency information, sensitive information as defined by DOT policy, personally identifiable information, or third-party provided information and data will transit through or reside on the cloud services system and infrastructure and that requires protection according to required National Institute of Standards and Technology (NIST) Federal Information Processing Standards (FIPS). In addition to the requirements found elsewhere in the FAR, the following are required—

(a) *Validated cryptography for secure communications.* The FedRAMP security control baseline requires cryptographic mechanisms to prevent unauthorized disclosure of information during transmission unless otherwise protected by alternative physical measures (see NIST FIPS 140–2). DOT entities must require FIPS 140–2 validated cryptography be used between DOT and the cloud service provider. The program/project manager or requiring activity shall specify which level (1–4) of FIPS 140–2 validation is required. See the clause prescribed at 1239.7204(c).

(b) *Digital signature cryptography—(authentication, data integrity, and non-repudiation).* Cloud service providers are required to implement FIPS 140–2 validated cryptography for digital signatures. If DOT entities require integration with specific digital signature technologies, contracting officers shall specify what level of FIPS 140–2 encryption, is required. See the clause prescribed at 1239.7204(d).

(c) *Audit record retention for cloud service providers.* DOT entities should consider the length of time Cloud Service Providers (CSP) must retain audit records. DOT implements the FedRAMP requirement for a service provider to retain system audit records on-line for at least ninety calendar days and to further preserve audit records off-line for a period that is in accordance with DOT and NARA requirements. See the clause prescribed at 1239.7204(e).

(d) *Cloud identification and authentication (organizational users) multi-factor authentication.* Cloud Service Providers pursuing a FedRAMP authorization must provide a mechanism for DOT activities and operating administrations (*i.e.,* Government consuming end-users) to use multi-factor authentication. DOT follows National Institute of Standards and Technology (NIST) Federal Information Processing Standards (FIPS) Publication (PUB) Number 201–2, Personal Identity Verification (PIV) of Federal Employees and Contractors or successor publications. See the clause prescribed at 1239.7204(f).

(e) *Identification and authentication (non-organizational users).* Contracting officers shall require that Cloud Service Providers pursuing a FedRAMP authorization are required to provide multi-factor authentication for the provider's administrators. See the clause prescribed at 1239.7204(g).

(f) *Incident reporting timeframes.* Contracting officers shall specify in solicitations and contracts the required FedRAMP parameters for Incident Reporting at the levels stipulated in NIST SP 800–61, as well as the requirement for an Incident Reporting Plan that complies with those requirements. The program office shall include specific incident reporting requirements including who and how to notify the agency. See 1239.7002(b) and the clause prescribed at 1239.7204(h).

(g) *Media transport.* DOT or other Federal agency information and data require protection. Contracting officers shall set forth specific DOT media transport requirements. See the clause prescribed at 1239.7204(i).

(h) *Personnel screening—background investigations.* When DOT leverages FedRAMP Provisional Authorizations, DOT conducts the required background investigations, but may accept reciprocity from other agencies that have implemented the Cloud Service Provider's systems. DOT's screening procedures, process, and additional screening requirements are set forth at 1252.204–70 and the clause prescribed at 1239.7204(j).

(i) *Minimum personnel security requirements—U.S. citizenship and clearance.* Contractors shall provide support personnel who are U.S. persons maintaining a NACI clearance or greater in accordance with OMB memoranda and contract clauses, and shall undergo required DOT background investigations prior to providing services and performing on the contract. See clause 1252.204–70(b) and the clause prescribed at 1239.7204(j). Reinvestigations are required for cloud services provider personnel as follows—

(1) Moderate risk law enforcement and high impact public trust level—a reinvestigation is required during the 5th year; and

(2) There is no reinvestigation for other moderate risk positions or any low risk positions.

1239.7204 Contract clauses.

(a) The contracting officer shall insert the clause at 1252.239–76, Cloud Computing Services, in solicitations and contracts, including those using FAR part 12 procedures, for the acquisition of commercial items, for information technology services involving cloud computing services.

(b) The contracting officer shall insert a clause substantially as follows at 1252.239–77, Data Jurisdiction, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial items, for information technology services involving cloud computing services.

(c) The contracting officer shall insert a clause substantially as follows at 1252.239–78, Validated Cryptography for Secure Communications, in

solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial items, for information technology services involving cloud computing services.

(d) The contracting officer shall insert a clause substantially as follows at 1252.239–79, Authentication, Data Integrity, and Non-Repudiation, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial items, for information technology services involving cloud computing services.

(e) The contracting officer shall insert a clause substantially as follows at 1252.239–80, Audit Record Retention for Cloud Service Providers, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial items, for information technology services involving cloud computing services.

(f) The contracting officer shall insert a clause substantially as follows at 1252.239–81, Cloud Identification and Authentication (Organizational Users) Multi-Factor Authentication, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial items, for information technology services involving cloud computing services.

(g) The contracting officer shall insert a clause substantially as follows at 1252.239–82, Identification and Authentication (Non-Organizational Users), in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial items, for information technology services involving cloud computing services.

(h) The contracting officer shall insert a clause substantially as follows at 1252.239–83, Incident Reporting Timeframes, in all services solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial items, and for information technology services involving cloud computing services.

(i) The contracting officer shall insert a clause substantially as follows at 1252.239–84, Media Transport, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial items, for information technology services involving cloud computing services.

(j) The contracting officer shall insert a clause substantially as follows at 1252.239–85, Personnel Screening—Background Investigations, in all services solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial items, for information technology services involving cloud computing services.

(k) The contracting officer shall insert a clause substantially as follows at 1252.239–86, Boundary Protection—Trusted internet Connections, in all solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial items, for information technology services involving cloud computing services.

(l) The contracting officer shall insert a clause substantially as follows at 1252.239–87, Protection of Information at Rest, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial item, for information technology services involving cloud computing services.

(m) The contracting officer shall insert a clause substantially as follows at 1252.239–88, Security Alerts, Advisories, and Directives, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial item, for information technology services involving cloud computing services.

Subpart 1239.73—Technology Modernization and Upgrades/Refreshment

1239.7300 Scope of subpart.

This subpart prescribes policies and procedures for incorporating technology modernization, upgrades and refreshment into acquisitions involving information technology products or services supporting the development of applications, information systems, or system software.

1239.7301 Definitions.

As used in this subpart—

Application means the software that resides above system software and includes applications such as database programs, word processors and spreadsheets. Application software may be bundled with system software or published alone.

Modernization means the conversion, rewriting or porting of a legacy system to a modern computer programming language, software libraries, protocols, or hardware platform.

System software means a platform composed of operating system programs and services, including settings and preferences, file libraries and functions used for system applications. System software also includes device drivers that run basic computer hardware and peripherals.

Refresh means the periodic replacement of equipment to ensure continuing reliability of equipment and/or improved speed and capacity.

Upgrade means an updated version of existing hardware, software or firmware. The purpose of an upgrade is improved and updated product features, including performance, product life, usefulness and convenience.

1239.7302 Policy.

Contracting officers will ensure all documents involving the acquisition of development or maintenance of DOT applications, systems, infrastructure, and services will contain the appropriate clauses as may be required by the Federal Acquisition Regulation (FAR) and other Federal authorities, in order to ensure that information system modernization is prioritized accordance with Federal law, OMB Guidance, and DOT policy.

1239.7303 Contract clauses.

(a) The contracting officer shall insert the clause at 1252.239–89, Technology Modernization, in solicitations and contracts when the contractor or a subcontractor, at any tier, proposes a modernization approach to develop or maintain information systems, applications, infrastructure, or services.

(b) The contracting officer shall insert the clause at 1252.239–90, Technology Upgrades/Refreshment, in solicitations and contracts when the contractor or a subcontractor at any tier, proposes technology improvements (upgrades/refreshments) to develop or maintain information systems, applications, infrastructure, or services.

Subpart 1239.74—Records Management

1239.7400 Scope of subpart.

This subpart prescribes policies for records management requirements for contractors who create, work with, or otherwise handle Federal records, regardless of the medium in which the records exists.

1239.7401 Definitions.

As used in this subpart—

Federal record, as defined in 44 U.S.C. 3301, means all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them. The term Federal record:

(i) Includes all DOT records.

(ii) Does not include personal materials.

(iii) Applies to records created, received, or maintained by contractors pursuant to a DOT contract.

(iv) May include deliverables and documentation associated with deliverables.

1393.7140 Policy.

(a) *Requirements.*—(1) *Compliance.* Contractors shall comply with all applicable records management laws and regulations, as well as National Archives and Records Administration (NARA) records policies, including but not limited to the Federal Records Act (44 U.S.C. chapters 21, 29, 31, 33), NARA regulations at 36 CFR Chapter XII Subchapter B, and those policies associated with the safeguarding of records covered by Privacy Act of 1974 (5 U.S.C. 552a). These policies include the preservation of all records, regardless of form or characteristics, mode of transmission, or state of completion.

(2) *Applicability.* In accordance with 36 CFR 1222.32, all data created for Government use and delivered to, or falling under the legal control of, the Government are Federal records subject to the provisions of 44 U.S.C. chapters 21, 29, 31, and 33, the Freedom of Information Act (FOIA) (5 U.S.C. 552), as amended, and the Privacy Act of 1974 (5 U.S.C. 552a), as amended, and must be managed and scheduled for disposition only as permitted by the Federal Records Act, relevant statute or regulation, and DOT Order 1351.28, Departmental Records Management Policy.

(3) *Records maintenance.* While DOT records are in a contractor's custody, the contractor is responsible for preventing the alienation or unauthorized destruction of the DOT records, including all forms of mutilation. Records may not be removed from the legal custody of DOT or destroyed except in accordance with the provisions of the agency records schedules and with the written concurrence of the DOT or Component Records Officer, as appropriate. Willful and unlawful destruction, damage or alienation of Federal records is subject to the fines and penalties imposed by 18 U.S.C. 2701. In the event of any unlawful or accidental removal, defacing, alteration, or destruction of records, the contractor must report the event to the contracting officer, in accordance with 36 CFR 1230, Unlawful or Accidental Removal, Defacing, Alteration, or Destruction of Records, for reporting to NARA.

(4) *Unauthorized disclosure.* Contractors shall notify the contracting officer within two hours of discovery of any inadvertent or unauthorized disclosures of information, data, documentary materials, records or equipment. Contractors shall ensure that the appropriate personnel, administrative, technical, and physical safeguards are established to ensure the security and confidentiality of the information, data, documentary material, records and/or equipment accessed, maintained, or created, is properly protected. Contractors shall not remove material from Government facilities or systems, or facilities or systems operated or maintained on the Government's behalf, without the express written permission of the contracting officer or contracting officer's representative. When information, data, documentary material, records and/or equipment is no longer required, it shall be returned to DOT control or the contractor must hold it until otherwise directed. Items returned to the Government shall be hand carried, mailed, emailed, or securely electronically transmitted to the contracting officer or address prescribed in the contract. Destruction of records is expressly prohibited unless authorized.

(b) *Non-public information.* Contractors shall not create or maintain any records containing any non-public DOT information that are not specifically tied to or authorized by the contract.

1239.7403 Contract clause.

The contracting officer shall insert the clause at 1239.239–91, Records Management, in all solicitations and contracts involving services where contractors or subcontractors and their employees or associates collect, access, maintain, use or disseminate or otherwise handle Federal records.

PART 1242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

Subpart 1242.1—Contract Audit Services

Sec.

1242.101 Contract audit responsibilities.
1242.102 Assignment of contract audit services.
1242.170 Contract clause.

Subpart 1242.2—Contract Administration Services

1242.270 Contract clauses.

Subpart 1242.3—Contract Administration Office Functions

1242.302 Contract administration functions.

Subpart 1242.15—Contractor Performance Information

1242.1503 Procedures.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1242.1—Contract Audit Services

1242.101 Contract audit responsibilities.

(b) It is DOT policy that private certified public accounting (CPA) firms may be used to provide audit services as described in FAR 42.101 to DOT contracting officers when procurement schedule demands cannot be met by the Defense Contract Audit Agency (DCAA) or the agency with audit cognizance.

1242.102 Assignment of contract audit services.

(b) In accordance with 1242.101, when the responsible audit agency declines a request for services, DOT contracting officers may utilize audit services from commercial CPA firms as authorized in 1242.101.

1242.170 Contract clause.

The contracting officer shall insert the clause at 1252.242–74, Contract Audit Support, in solicitation and contracts when other than firm-fixed-price contracts are contemplated.

Subpart 1242.2—Contract Administration Services

1242.270 Contract clauses.

(a) The contracting officer may use the clause at 1252.242–70, Dissemination of Information—Educational Institutions, in lieu of the clause at 1252.242–72, Dissemination of Contract Information, in DOT research contracts with educational institutions, except contracts that require the release or coordination of information.

(b) The contracting officer shall insert the clause at 1252.242–71, Contractor Testimony, in all solicitations and contracts issued by NHTSA. Other OAs may use the clause as deemed appropriate.

(c) The contracting officer may insert the clause at 1252.242–72, Dissemination of Contract Information, in all DOT contracts except contracts that require the release or coordination of information.

Subpart 1242.3—Contract Administration Office Functions

1242.302 Contract administration functions.

(a) If a cognizant Federal agency has not performed the functions identified in FAR 42.302(a)(5), (9), (11), and (12),

then DOT contracting officers are authorized to perform these functions with the assistance of either the cognizant government auditing agency, if assigned and available to provide support in a timely manner. If the cognizant government auditing agency is not assigned and/or available in the necessary timeframe, DOT contracting officers may use the audit services of a CPA firm.

(13) The assignment of contract administration to a Defense Contract Management Agency (DCMA) office by the contracting officer does not affect the designation of the paying office unless a transfer of DOT funds to the agency of the Contract Administration Office (CAO) is effected, and the funds are converted to the CAO agency's account for payment purposes. When the contracting officer proposes to delegate the contract payment function to another agency (*e.g.,* DCMA), the contracting officer shall discuss the transfer of funds procedures with the OA cognizant payment office. The CAO, the contracting officer, or the designated contract specialist in the contracting office shall review and approve the invoices and vouchers under the assigned contracts. The review and approval of invoices under cost-reimbursement and time-and-materials type contracts cannot be delegated to the Contracting Officer's Representative.

Subpart 1242.15—Contractor Performance Information

1242.1503 Procedures.

(a)(1) Each OA is responsible for assigning responsibility and management accountability for the completeness of past performance submissions as required in FAR 42.1503(a).

PART 1245 [RESERVED]

PART 1246—QUALITY ASSURANCE

Subpart 1246.1—General

Sec.
1246.101 Definitions.
1246.101–70 Additional definitions.

Subpart 1246.7—Warranties

1246.705–70 Limitations—restrictions.
1246.706–70 Warranty terms and conditions—requirements.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1246.1—General

1246.101 Definitions.

1246.101–70 Additional definitions.

As used in this subpart—

At no additional cost to the Government means at no increase in price for firm-fixed-price contracts, at no increase in target or ceiling price for fixed price incentive contracts (*see* FAR 46.707), or at no increase in estimated cost or fee for cost-reimbursement contracts.

Defect means any condition or characteristic in any supplies or services furnished by the contractor under the contract that is not in compliance with the requirements of the contract.

Major acquisition means an acquisition or for supplies or services that requires submission of an OMB Exhibit 300 (Capital Asset Plan/Business Case) in accordance with OMB Circular A–11, Preparation, Submission and Execution of the Budget, and also for information technology or information technology related acquisitions, compliance with the Department Chief Information Officer (CIO) Policy (CIOP). A major acquisition typically has one or more of the following characteristics—

(a) Life-cycle costs of $150 million or more;

(b) Is a financial system, e-gov system, or e-business system with a life-cycle cost of $500,000 or more; or

(c) An acquisition that does not meet the dollar thresholds of paragraphs (a) or (b) of this section but—

(1) Is mission-critical;

(2) Requires special management attention because of its importance to an OA mission;

(3) Plays a significant role in the administration of OA programs, processes or other resources; or

(4) Directly supports the President's Management Agenda.

Performance requirements means the operating capabilities, maintenance, and reliability characteristics of a system that are determined to be necessary for it to fulfill the requirement for which the system is designed.

Subpart 1246.7—Warranties

1246.705–70 Limitations—restrictions.

(a) The following restrictions are applicable to DOT contracts:

(1) The contractor shall not be required to honor the warranty on any property furnished by the Government except for—

(i) Defects in installation; and

(ii) Installation or modification in such a manner that invalidates a warranty provided by the manufacturer of the property.

(2) Any warranty obtained shall specifically exclude coverage of damage in time of war (combat damage) or national emergency.

(3) Contracting officers shall not include in a warranty clause any terms that require the contractor to incur liability for loss, damage, or injury to third parties.

1246.706–70 Warranty terms and conditions—requirements.

(a) When appropriate and cost effective, the contracting officer shall comply with the following requirements when developing the warranty terms and conditions—

(1) Identify the affected line item(s) and the applicable specification(s);

(2) Require that the line item's design and manufacture will conform to—

(i) An identified revision of a top-level drawing; and/or

(ii) An identified specification or revision thereof.

(3) Require that the line item conform to the specified Government performance requirements;

(4) Require that all line items and components delivered under the contract will be free from defects in materials and workmanship;

(5) State that if the contractor fails to comply with specification or there are defects in material and workmanship, the contractor will bear the cost of all work necessary to achieve the specified performance requirements, including repair and/or replacement of all parts;

(6) Require the timely replacement/repair of warranted items and specify lead times for replacement/repair where possible;

(7) Identify the specific paragraphs containing Government performance requirements that the contractor must meet;

(8) Ensure that any performance requirements identified as goals or objectives beyond specification requirements are excluded from the warranty provision;

(9) Specify what constitutes the start of the warranty period (*e.g.,* delivery, acceptance, in-service date), the ending of the warranty (*e.g.,* passing a test or demonstration, or operation without failure for a specified period), and circumstances requiring an extension of warranty duration (*e.g.,* extending the warranty period as a result of mass defect correction during warranty period);

(10) Identify what transportation costs will be paid by the contractor in relation to the warranty coverage;

(11) In addition to combat damage, identify any conditions which will not be covered by the warranty, and

(12) Identify any limitation on the total dollar amount of the contractor's warranty exposure, or agreement to share costs after a certain dollar

threshold to avoid unnecessary warranty returns.

(b) In addition to the terms and conditions listed in paragraph (a) of this section, the contracting officer shall consider the following when a warranty clause is being used for a major system, as defined in FAR 2.101:

(1) For line items or components which are commercially available, obtaining a warranty as is normally provided by the manufacturer or supplier, in accordance with FAR 46.703(d) and FAR 46.710(b)(2).

(2) Obtaining a warranty of compliance with the stated requirements for line items or components provided in accordance with either design and manufacturing or performance requirements as specified in the contract or any modification to that contract.

(3) The warranty provided under paragraph (b)(2) of this section shall provide that in the event the line items or any components thereof fails to meet the terms of the warranty provided, the contracting officer may—

(i) Require the contractor to promptly take such corrective action as the contracting officer determines to be necessary at no additional cost to the Government, including repairing or replacing all parts necessary to achieve the requirements set forth in the contract;

(ii) Require the contractor to pay costs reasonably incurred by the United States in taking necessary corrective action; or

(iii) Equitably reduce the contract price.

(4) Inserting remedies, exclusions, limitations and durations, provided these are consistent with the specific requirements of this subpart and FAR 46.706.

(5) Excluding from the terms of the warranty certain defects for specified supplies (exclusions) and limiting the contractor's liability under the terms of the warranty (limitations), as appropriate, if necessary to derive a cost-effective warranty considering the technical risk, contractor financial risk, or other program uncertainties.

(6) Structuring of a broader and more comprehensive warranty where such is advantageous. Likewise, the contracting officer may narrow the scope of a warranty when appropriate (*e.g.,* where it would be inequitable to require a warranty of all performance requirements because a contractor had not designed the system).

(c) Any contract that contains a warranty clause must contain warranty implementation procedures, including warranty notification content and procedures, and identify the individuals responsible for implementation of warranty provisions. The contract may also permit the contractor's participation in investigation of system failures, if the contractor is reimbursed at established rates for fault isolation work, and that the Government receive credit for any payments where equipment failure is covered by warranty provisions.

PART 1247—TRANSPORTATION

Subpart 1247.5—Ocean Transportation By U.S.-Flag Vessels

Sec.
1247. 506 Procedures.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1247.5—Ocean Transportation by U.S.-Flag Vessels

1247.506 Procedures.

(a) The Maritime Administration (MARAD) is the enforcing agency of the cargo preference statutes. MARAD can assist contractors in locating *U.S.-flag carriers* and determine when such services are not available and they can assist contracting officers in evaluating costs, services, and other matters regarding ocean transportation.

(d) If no transportation officer is available, the contracting officer shall submit a copy of the rated ''on board'' bill of lading, for each shipment, no later than 20 days after the vessels loading date for exports and 30 days for imports as stated in 46 CFR 381.3. All non-vessel ocean common carrier bills of lading should be accompanied by the underlying carrier's ocean bill of lading. The documents shall be sent to the Maritime Administration, Office of Cargo and Commercial Sealift, MAR–620, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. The bill of lading shall contain the following information—

(1) Name of sponsoring Government agency or department;

(2) Name of vessel;

(3) Vessel flag of registry;

(4) Date of loading;

(5) Port of loading;

(6) Port of final discharge;

(7) Commodity description;

(8) Gross weight in kilos; and

(9) Total ocean freight revenue in U.S. dollars.

PART 1252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Sec.

Subpart 1252.1—Instructions for Using Provisions and Clauses

1252.101–70 Using this part.

Subpart 1252.2—Text of Provisions and Clauses

1252.201–70 Contracting Officer's Representative.
1252.204–70 Contractor Personnel Security and Agency Access.
1252.209–70 Organizational and Consultant Conflicts of Interest.
1252.209–71 Limitation of Future Contracting.
1252.211–70 Index for Specifications.
1252.216–70 Evaluation of Offers Subject to an Economic Price Adjustment Clause.
1252.216–71 Determination of Award Fee.
1252.216–72 Award Fee Plan.
1252.216–73 Distribution of Award Fee.
1252.216–74 Settlement of Letter Contract.
1252.217–70 Guarantee.
1252.217–71 Delivery and Shifting of Vessel.
1252.217–72 Performance.
1252.217–73 Inspection and Manner of Doing Work.
1252.217–74 Subcontracts.
1252.217–75 Lay Days.
1252.217–76 Liability and Insurance.
1252.217–77 Title.
1252.217–78 Discharge of Liens.
1252.217–79 Delays.
1252.217–80 Department of Labor Safety and Health Regulations for Ship Repair.
1252.222–70 Strikes or Picketing Affecting Timely Completion of the Contract Work.
1252.222–71 Strikes or Picketing Affecting Access to a DOT Facility.
1252.222–72 Contractor Cooperation in Equal Employment Opportunity Investigations.
1252.223–70 Removal or Disposal of Hazardous Substances—Applicable Licenses and Permits.
1252.223–71 Accident and Fire Reporting.
1252.223–72 Protection of Human Subjects.
1252.223–73 Seat Belt Use Policies and Programs.
1252.228–70 Loss of or Damage to Leased Aircraft.
1252.228–71 Fair Market Value of Aircraft.
1252.228–72 Risk and Indemnities.
1252.228–73 Command of Aircraft.
1252.228–74 Notification of Payment Bond Protection.
1252.231–70 Date of Incurrence of Costs.
1252.232–70 Electronic Submission of Payment Requests.
1252.232–71 Limitation of Government's Obligation.
1252.235–70 Research Misconduct.
1235.235–71 Technology Transfer.
1252.236–70 Special Precautions for Work at Operating Airports.
1252.237–70 Qualifications of Contractor Employees.
1252.237–71 Certification of Data.
1252.237–72 Prohibition on Advertising.
1252.237–73 Key Personnel.
1252.239–70 Security Requirements for Unclassified Information Technology Resources.
1252.239–71 Information Technology Security Plan and Accreditation.

1252.239–72 Compliance with Safeguarding DOT Sensitive Data Controls.
1252.239–73 Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information.
1252.239–74 Safeguarding DOT Sensitive Data and Cyber Incident Reporting.
1252.239–75 DOT Protection of Information About Individuals, PII, and Privacy Risk Management Requirements.
1252.239–76 Cloud Computing Services.
1252.239–77 Data Jurisdiction.
1252.239–78 Validated Cryptography for Secure Communications.
1252.239–79 Authentication, Data Integrity, and Non-Repudiation.
1252.239–80 Audit Record Retention for Cloud Service Providers.
1252.239–81 Cloud Identification and Authentication (Organizational Users) Multi-Factor Authentication.
1252.239–82 Identification and Authentication (Non-Organizational Users).
1252.239–83 Incident Reporting Timeframes.
1252.239–84 Media Transport.
1252.239–85 Personnel Screening—Background Investigations.
1252.239–86 Boundary Protection—Trusted internet Connections.
1252.239–87 Protection of Information at Rest.
1252.239–88 Security Alerts, Advisories, and Directives.
1252.239–89 Technology Modernization.
1252.239–90 Technology Upgrades/Refreshment.
1252.239–91 Records Management.
1252.239–92 Information and Communication Technology Accessibility Notice.
1252.239–93 Information and Communication Technology Accessibility.
1252.242–70 Dissemination of Information—Educational Institutions.
1252.242–71 Contractor Testimony.
1252.242–72 Dissemination of Contract Information.
1252.242–74 Contract Audit Support.

Subpart 1252.3—Provisions and Clauses Matrix

1252.301 Solicitation provisions and contract clauses (Matrix).

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1252.1—Instructions for Using Provisions and Clauses

1252.101–70 Using this part.

TAR provisions or clauses that supplement the FAR shall follow the following numbering conventions in accordance with FAR 52.101(b)(2)(i):

(a) Agency-prescribed provisions and clauses permitted by TAR and used on a standard basis (*i.e.,* normally used in two or more solicitations or contracts regardless of contract type) shall be prescribed and contained in the TAR. Operating Administrations (OAs) desiring to use a provision or a clause on a standard basis shall submit a request containing a copy of the clause(s), justification for its use, and evidence of legal counsel review to the Office of the Senior Procurement Executive in accordance with 1201.304 for possible inclusion in the TAR. (*See* FAR 52.101(b)(2)(i)(A)).

(b) Provisions and clauses used on a one-time basis (*i.e.,* non-standard provisions and clauses) may be approved by the contracting officer, unless a higher level is designated by the OA. (*See* FAR 52.101(b)(2)(i)(C)). This authority is permitted subject to—

(1) Evidence of legal counsel review in the contract file;

(2) Inserting these clauses in the appropriate sections of the uniform contract format; and

(3) Ensuring the provisions and clauses do not deviate from the requirements of the FAR and TAR.

Subpart 1252.2—Text of Provisions and Clauses

1252.201–70 Contracting Officer's Representative.

As prescribed in 1201.604–70, insert the following clause:

Contracting Officer's Representative (DATE)

(a) The Contracting Officer may designate Government personnel to act as the Contracting Officer's Representative (COR) to perform functions under the contract such as review and/or inspection and acceptance of supplies, services, including construction, and other functions of a technical nature. The Contracting Officer will provide a written notice of such designation to the Contractor within five working days after contract award or for construction, not less than five working days prior to giving the contractor the notice to proceed. The designation letter will set forth the authorities and limitations of the COR under the contract.

(b) The Contracting Officer cannot authorize the COR or any other representative to sign documents (*i.e.,* contracts, contract modifications, etc.) that require the signature of the Contracting Officer.

(End of clause)

1252.204–70 Contractor Personnel Security and Agency Access.

As prescribed in 1204.1303, insert the following clause:

Contractor Personnel Security and Agency Access (DATE)

(a) *Definitions.* As used in this clause—

Agency access means access to DOT facilities, sensitive information, information systems or other DOT resources.

Applicant means a contractor employee for whom the Contractor applies for a DOT identification card.

Contractor employee means prime contractor and subcontractor employees who require agency access to perform work under a DOT contract.

Identification card (or ''ID card'') means a government issued or accepted identification card such as a Personal Identity Verification (PIV) card, a PIV-lnteroperable (PIV–1) card from an authorized PIV–1 issuer, or a non-PIV card issued by DOT, or a nonPIV card issued by another Federal agency and approved by DOT. PIV and PIV–1 cards have physical and electronic attributes that other (non-PIV) ID cards do not have.

Issuing office means the DOT entity that issues identification cards to contractor employees.

Local security servicing organization means the DOT entity that provides security services to the DOT organization sponsoring the contract.

(b) *Risk and sensitivity level designations.* For contracts requiring access to DOT facilities, sensitive information, information systems or other DOT resources, contractor employees will be required to complete background investigations, identity proofing, and government identification card application procedures to determine suitability for access. DOT will assign a risk and sensitivity level designation to the overall contract and/or to contractor employee positions by category, group or individual. The risk and sensitivity level designations will be the basis for determining the level of personnel security processing required for contractor employees. The following risk and sensitivity level designations and associated level of processing are required and include the prior levels—

(1) *Low risk level:* National Agency Check with Written Inquiries (NACI);

(2) *Moderate risk level:* Minimum Background Investigation (MBI); and

(3) *High risk level:* Background Investigation.

(c) *Security clearances.* Contractor employees may also be required to obtain security clearances (*i.e.,* Confidential, Secret, or Top Secret). National Security work designated ''special sensitive,'' ''critical sensitive,'' or ''non-critical sensitive,'' will determine the level of clearance required for contractor employees. Personnel security clearances for national security contracts in DOT will be processed according to the

Department of Defense National Industrial Security Program Operating Manual (NISPOM).

(d) *Pre-screening of contractor employees.* The Contractor must pre-screen individuals designated for employment under any DOT contract by verifying minimal suitability requirements to ensure that only candidates that appear to meet such requirements are considered for contract employment, and to mitigate the burden on the Government of conducting background investigations on objectionable applicants. The Contractor must exercise due diligence in pre-screening all employees prior to submission to DOT for agency access. DOT may decline to grant agency access to a contractor employee for reasons including, but not limited to—

(1) Conviction of a felony, a crime of violence, or a misdemeanor involving moral turpitude;

(2) Falsification of information entered on forms or of other documents submitted;

(3) Improper conduct including criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct or other conduct adverse to the Government regardless of whether the conduct is directly related to the contract; and

(4) Any behavior judged to pose a potential threat to DOT facilities, sensitive information, information systems or other resources.

(e) *Citizenship status.* The Contractor must monitor a non-citizen's continued authorization for employment in the United States. The Contractor must provide documentation to the Contracting Officer or the Contracting Officer's Representative (COR) during the background investigation process that validates that the E-Verify requirement has been met for each contractor employee.

(f) *Background investigation and adjudication.* A contractor employee must have a favorable adjudication of background investigation before DOT will issue an ID card to the contractor employee granting access to DOT facilities, sensitive information, information systems or other DOT resources. DOT may accept favorable adjudications of background investigations from other Federal agencies when applicants have held PIV cards issued by those agencies with no break in service. DOT may also accept PIV–1 (interoperable) cards issued by an authorized PIV–1 issuer as evidence of identity. A favorable adjudication does not preclude DOT from initiating a new investigation when deemed necessary. At a minimum, the FBI National Criminal History Check (fingerprint check) must be favorably completed before a DOT identification card can be issued. Each Contractor must use the Office of Personnel Management's (OPM) e-QIP system to complete any required investigative forms. Instructions for obtaining fingerprints will be provided by the COR or Contracting Officer. The DOT Office of Security, M–40, or a DOT organization delegated authority by M–40, is responsible for adjudicating the suitability of contractor employees.

(g) *Agency access denied.* Upon contract award, DOT will initiate the agency access procedure for all contractor employees requiring access to DOT facilities, sensitive information, information systems and other DOT resources for contract performance. DOT may deny agency access to any individual about whom an adverse suitability determination is made. Failure to submit the required security information or to truthfully answer all questions shall constitute grounds for denial of access. The Contractor must not provide agency access to contractor employees until the COR or Contracting Officer provides notice of approval, which is authorized only by the DOT Office of Security (M–40) or a DOT organization delegated authority by M–40. Where a proposed contractor employee is denied agency access by the Government or, if for any reason a proposed application is withdrawn by the Contractor during the agency access process, the additional costs and administrative burden for conducting additional background investigations caused by a lack of effective prescreening or planning on the part of the Contractor may be considered as part of the Contractor's overall performance evaluation.

(h) *Identification card application process.* The COR will be the DOT ID card Sponsor and point of contact for the Contractor's application for a DOT ID card. The COR shall review and approve the DOT ID card application before an ID card is issued to the applicant. An applicant may be issued either a Personal Identity Verification (PIV) card that meets the standards of Homeland Presidential Security Directive (HSPD–12), or an applicant may be issued a non-PIV card. Generally, a non-PIV card will be issued for contracts that expire in six months or less, including option periods. The COR may request the issuing office to waive the six-month eligibility requirement when it is in DOT's interest for contract performance. The following applies—

(1) PIV card. The applicant must complete a DOT on-line application for a PIV card;

(2) Non-PIV card. The applicant must complete and submit a hard copy of Form 1681 to the COR/Sponsor; and

(3) Regardless of the type of card to be issued (PIV or non-PIV), the applicant must appear in person to provide two forms of identity source documents in original form to DOT. The identity source documents must come from the list of acceptable documents included in Form F–9, OMB No. 1115–0136, Employment Eligibility Verification. At least one document must be a valid State or Federal government-issued picture identification. For a PIV card, the applicant may be required to appear in-person a second time for enrollment and activation.

(i) *Identification card custody and control.* The Contractor is responsible for the custody and control of all forms of government identification issued by DOT to contractor employees for access to DOT facilities, sensitive information, information systems and other DOT resources. The Contractor shall:

(1) Provide a listing of personnel for whom an identification (ID) card is requested to the COR or PM who will provide a copy of the listing to the card issuing office. This may include Contractor and subcontractor personnel. Follow issuing office directions for submittal of an application package(s).

(2) While visiting or performing work on a DOT facility, as specified by the issuing office, PM or COR, ensure that contractor employees prominently display their ID card.

(3) Immediately notify the COR or, if the COR is unavailable, the Contracting Officer when a contractor employee's status changes and no longer requires agency access (*e.g.,* employee's transfer, completion of a project, retirement, removal from work on the contract, or termination of employment) that may affect the employee's eligibility for access to the facility, sensitive information, or resources.

(4) Promptly deliver to the issuing office: (a) All ID cards assigned to an employee who no longer requires access to the facility; and (b) all expired ID cards within five (5) days of their expiration or all cards at time of contract termination, whichever occurs first.

(5) Immediately report any lost or stolen ID cards to the issuing office and follow its instructions.

(i) The Contractor is responsible for maintaining and safeguarding the DOT ID card upon issuance to the contractor employee. The Contractor must ensure

that contractor employees comply with DOT requirements concerning the renewal, loss, theft, or damage of an ID card. The Contractor must immediately notify the COR or, if the COR is unavailable, the Contracting Officer when an ID card is lost, stolen or damaged.

(ii) Failure to comply with the requirements for custody and control of DOT ID cards may result in withholding final payment or contract termination based on the potential for serious harm caused by inappropriate access to DOT facilities, sensitive information, information systems or other DOT resources.

(iii) Specific actions and activities are required in certain events—

(A) *Renewal.* A contractor employee's DOT issued ID card is valid for a maximum of three years or until the contract expiration date (including option periods), whichever occurs first. The renewal process should begin six weeks before the PIV card expiration date. If a PIV card is not renewed before it expires, the contractor employee will be required to sign-in daily for facility access and may have limited access to information systems and other resources.

(B) *Lost/stolen.* Immediately upon detection, the Contractor or contractor employee must report a lost or stolen DOT ID card to the COR, or if the COR is unavailable, the Contracting Officer, the issuing office, or the local servicing security organization. The Contractor must submit an incident report within 48 hours, through the COR or, if the COR is unavailable, the Contracting Officer, the issuing office, or the local security servicing organization describing the circumstances of the loss or theft. The Contractor must also report a lost or stolen PIV card through the DOT on-line registration system. If the loss or theft is reported by the Contractor to the local police, a copy of the police report must be provided to the COR or Contracting Officer. From the date of notification to DOT, the Contractor must wait three days before getting a replacement ID card. During the 3-day wait period, the contractor employee must sign in daily for facility access.

(C) *Replacement.* An ID card will be replaced if it is damaged, contains incorrect data, or is lost or stolen for more than 3 days, provided there is a continuing need for agency access to perform work under the contract.

(D) *Surrender of ID cards.* Upon notification that routine access to DOT facilities, sensitive information, information systems or other DOT resources is no longer required, the Contractor must surrender the DOT issued ID card to the COR, or if the COR is unavailable, the Contracting Officer, the issuing office, or the local security servicing organization in accordance with agency procedures.

(j) *Flow down of clause.* The Contractor is required to include this clause in any subcontracts at any tier that require the subcontractor or subcontractor's employees to have access to DOT facilities, sensitive information, information systems or other resources.

(End of clause)

1252.209–70 Organizational and Consultant Conflicts of Interest.

As prescribed in 1209.507–270(a), the contracting officer shall insert a clause substantially as follows in solicitations and contracts:

Organizational and Consultant Conflicts of Interest (OCCI) (DATE)

(a) An offeror shall identify in its proposal, quote, bid or any resulting contract, any potential or actual Organizational and Consultant Conflicts of Interest (OCCI) as described in FAR subpart 9.5. This includes actual or potential conflicts of interests of proposed subcontractors. If an offeror identifies in its proposal, quote, bid or any resulting contract, a potential or actual conflict of interests the offeror shall submit an Organizational and Consultant Conflicts of Interest Plan (OCCIP) to the contracting officer. The OCCIP shall describe how the offeror addresses potential or actual conflicts of interest and identify how they will avoid, neutralize, or mitigate present or future conflicts of interest.

(b) Offerors must consider whether their involvement and participation raises any OCCI issues, especially in the following areas when:

(1) Providing systems engineering and technical direction.

(2) Preparing specifications or work statements and/or objectives.

(3) Providing evaluation services.

(4) Obtaining access to proprietary information.

(c) If a prime contractor or subcontractor breaches any of the OCCI restrictions, or does not disclose or misrepresents any relevant facts concerning its conflict of interest, the government may take appropriate action, including terminating the contract, in additional to any remedies that may be otherwise permitted by the contract or operation of law.

(End of clause)

1252.209–71 Limitation of Future Contracting.

As prescribed in 1209.507–270(b), the contracting officer shall insert a clause substantially as follows in solicitations and contracts:

Limitation of Future Contracting (DATE)

(a) The Contracting Officer has determined that this acquisition may give rise to a potential organizational conflict of interest. Accordingly, prospective offerors are encouraged to review FAR subpart 9.5—Organizational Conflicts of Interest.

(b) The nature of this conflict is [*describe the conflict*].

(c) The restrictions upon future contracting are as follows:

(1) If the Contractor, under the terms of this contract, or through the performance of tasks pursuant to this contract, is required to develop specifications or statements of work that are to be incorporated into a solicitation, the Contractor shall be ineligible to perform the work described in that solicitation as a prime or first-tier subcontractor under an ensuing government contract. This restriction shall remain in effect for a reasonable time, as agreed to by the Contracting Officer and the Contractor, sufficient to avoid unfair competitive advantage or potential bias (this time shall in no case be less than the duration of the initial ensuing contract).

(2) To the extent that the work under this contract requires access to proprietary, business confidential, or financial data of other companies, and if these data remains proprietary or confidential, the Contractor shall protect such data from unauthorized use and disclosure and agrees not to use the data to compete with those other companies.

(End of clause)

1252.211–70 Index for Specifications.

As prescribed in 1211.204–70, insert the following clause:

Index for Specifications (DATE)

If an index or table of contents is furnished in connection with specifications, such index or table of contents is for convenience only. Its accuracy and completeness is not guaranteed, and it is not a part of the specification. In case of discrepancy between the index or table of contents and the specifications, the specifications shall govern.

(End of clause)

1252.216–70 Evaluation of Offers Subject to an Economic Price Adjustment Clause.

As prescribed in 1216.203–470, insert the following provision:

Evaluation of Offers Subject to an Economic Price Adjustment Clause (DATE)

Offers shall be evaluated without an amount for an economic price adjustment being added. Offers will be rejected that—(1) increase the ceiling stipulated; (2) limit the downward adjustment; or (3) delete the economic price adjustment clause. If the offer stipulates a ceiling lower than that included in the solicitation, the lower ceiling will be incorporated into any resulting contract.

(End of provision)

1252.216–71 Determination of Award Fee.

As prescribed in 1216.406–70(a), insert the following clause:

Determination of Award Fee (DATE)

(a) The Government shall evaluate Contractor performance at the end of each specified evaluation period to determine the amount of award. The contractor agrees that the amount of award and the award fee determination methodology are unilateral decisions to be made at the sole discretion of the Government.

(b) Contractor performance shall be evaluated according to the Award Fee Plan. The Contractor shall be periodically informed of the quality of its performance and areas in which improvements are expected.

(c) The contractor shall be promptly advised, in writing, of the determination and reasons why the award fee was or was not earned. The Contractor may submit a performance self-evaluation for each evaluation period. The amount of award is at the sole discretion of the Government but any self-evaluation received within _____ (*insert number*) days after the end of the current evaluation period will be given such consideration, as may be deemed appropriate by the Government.

(d) The amount of award fee that can be awarded in each evaluation period is limited to the amounts set forth at _____ (*identify location of award fee amounts*). Award fee that is not earned in an evaluation period cannot be reallocated to future evaluation periods.

(End of clause)

1252.216–72 Award Fee Plan.

As prescribed in 1216.406–70(b), insert the following clause:

Award Fee Plan (DATE)

(a) An Award Fee Plan shall be unilaterally established by the Government based on the criteria stated in the contract and used for the determination of award fee. This plan shall include the criteria used to evaluate each area and the percentage of award fee, if any, available for each area. A copy of the plan shall be provided to the Contractor _____ (*insert number*) calendar days prior to the start of the first evaluation period.

(b) The criteria contained within the Award Fee Plan may relate to: (1) Technical (including schedule) requirements, if appropriate; (2) Management; and (3) Cost.

(c) The Award Fee Plan may, consistent with the contract, be revised unilaterally by the Government at any time during the period of performance. Notification of such changes shall be provided to the Contractor _____ (*insert number*) calendar days prior to the start of the evaluation period to which the change will apply.

(End of clause)

1252.216–73 Distribution of Award Fee.

As prescribed in 1216.406–70(c), insert the following clause:

Distribution of Award Fee (DATE)

(a) The total amount of award fee available under this contract is assigned according to the following evaluation periods and amounts—

Evaluation Period:

Available Award Fee:

[*Contracting Officer insert appropriate information*]

(b) After the Contractor has been paid 85 percent of the base fee and potential award fee, the Government may withhold further payment of the base fee and award fee until a reserve is set aside in an amount that the Government considers necessary to protect its interest. This reserve shall not exceed 15 percent of the total base fee and potential award fee or $150,000, whichever is less. Thereafter, base fee and award fee payments may continue.

(c) In the event of contract termination, either in whole or in part, the amount of award fee available shall represent a prorata distribution associated with evaluation period activities or events as determined by the Government.

(d) The Government will promptly make payment of any award fee upon the submission by the Contractor to the Contracting Officer's Representative, of a public voucher or invoice in the amount of the total fee earned for the period evaluated. Payment may be made without using a contract modification.

(End of clause)

1252.216–74 Settlement of Letter Contract.

As prescribed in 1216.603–4, insert the following clause:

Settlement of Letter Contract (DATE)

(a) This contract constitutes the definitive contract contemplated by issuance of letter contract _____ [*insert number*] dated _____ [*insert effective date*]. It supersedes the letter contract and its modification number(s) _____ [*insert number(s)*] and, to the extent of any inconsistencies, governs.

(b) The cost(s) and fee(s), or price(s), established in this definitive contract represents full and complete settlement of letter contract _____ [*insert number*] and modification number(s) _____ [*insert number(s)*]. Payment of the agreed upon fee or profit withheld pending definitization of the letter contract, may commence immediately at the rate and times stated within this contract.

(End of clause)

1252.217–70 Guarantee.

As prescribed at 1217.7001(a), insert the following clause:

Guarantee (DATE)

(a) In the event any work performed or materials furnished by the Contractor prove defective or deficient within 60 days from the date of redelivery of the vessel(s), the Contractor, as directed by the Contracting Officer and at its own expense, shall correct and repair the deficiency in accordance with the contract terms and conditions.

(b) If the Contractor or any subcontractor has a guarantee for work performed or materials furnished that exceeds the 60-day period, the Government shall be entitled to rely upon the longer guarantee until its expiration.

(c) With respect to any individual work item identified as incomplete at the time of redelivery of the vessel(s), the guarantee period shall run from the date the item is completed.

(d) If practicable, the Government shall give the Contractor an opportunity to correct the deficiency.

(1) If the Contracting Officer determines it is not practicable or is otherwise not advisable to return the vessel(s) to the Contractor, or the Contractor fails to proceed with the repairs promptly, the Contracting Officer may direct that the repairs be performed elsewhere, at the Contractor's expense.

(2) If correction and repairs are performed by other than the Contractor, the Contracting Officer may discharge the Contractor's liability by making an equitable deduction in the price of the contract.

(e) The Contractor's liability shall extend for an additional 90-day guarantee period on those defects or deficiencies that the Contractor corrected.

(f) At the option of the Contracting Officer, defects and deficiencies may be left uncorrected. In that event, the Contractor and Contracting Officer shall negotiate an equitable reduction in the contract price. Failure to agree upon an equitable reduction shall constitute a dispute under the Disputes clause of this contract.

(End of clause)

1252.217–71 Delivery and Shifting of Vessel.

As prescribed at 1217.7001(b), insert the following clause:

Delivery and Shifting of Vessel (DATE)

The Government shall deliver the vessel to the Contractor at his place of business. Upon completion of the work, the Government shall accept delivery of the vessel at the Contractor's place of business. The Contractor shall provide, at no additional charge, upon 24 hours' advance notice, a tug or tugs and docking pilot, acceptable to the Contracting Officer, to assist in handling the vessel between (to and from) the Contractor's plant and the nearest point in a waterway regularly navigated by vessels of equal or greater draft and length. While the vessel is in the hands of the Contractor, any necessary towage, cartage, or other transportation between ship and shop or elsewhere, which may be incident to the work herein specified, shall be furnished by the Contractor without additional charge to the Government.

(End of clause)

1252.217–72 Performance.

As prescribed at 1217.7001(b), insert the following clause:

Performance (DATE)

(a) Upon the award of the contract, the Contractor shall promptly start the work specified and shall diligently prosecute the work to completion. The Contractor shall not start work until the contract has been awarded except in the case of emergency work ordered by the Contracting Officer in writing.

(b) The Government shall deliver the vessel described in the contract at the time and location specified in the contract. Upon completion of the work, the Government shall accept delivery of the vessel at the time and location specified in the contract.

(c) The Contractor shall without charge—

(1) Make available to personnel of the vessel while in dry dock or on a marine railway, sanitary lavatory and similar facilities at the plant acceptable to the Contracting Officer;

(2) Supply and maintain suitable brows and gangways from the pier, dry dock, or marine railway to the vessel;

(3) Treat salvage, scrap or other ship's material of the Government resulting from performance of the work as items of Government-furnished property, in accordance with clause 52.245–1, Government Property;

(4) Perform, or pay the cost of, any repair, reconditioning or replacement made necessary as the result of the use by the Contractor of any of the vessel's machinery, equipment or fittings, including, but not limited to, winches, pumps, rigging, or pipe lines; and

(5) Furnish suitable offices, office equipment and telephones at or near the site of the work for the Government's use.

(d) The contract will state whether dock and sea trials are required to determine whether or not the Contractor has satisfactorily performed the work.

(1) If dock and sea trials are required, the vessel shall be under the control of the vessel's commander and crew.

(2) The Contractor shall not conduct dock and sea trials not specified in the contract without advance approval of the Contracting Officer. Dock and sea trials not specified in the contract shall be at the Contractor's expense and risk.

(3) The Contractor shall provide and install all fittings and appliances necessary for dock and sea trials. The Contractor shall be responsible for care, installation, and removal of instruments and apparatus furnished by the Government for use in the trials.

(End of clause)

1252.217–73 Inspection and Manner of Doing Work.

As prescribed at 1217.7001(b), insert the following clause:

Inspection and Manner of Doing Work (DATE)

(a) The Contractor shall perform work in accordance with the contract, any drawings and specifications made a part of the job order, and any change or modification issued under the Changes clause.

(b)(1) Except as provided in paragraph (b)(2) of this clause, and unless otherwise specifically provided in the contract, all operational practices of the Contractor and all workmanship, material, equipment, and articles used in the performance of work under this contract shall be in accordance with the best commercial marine practices and the rules and requirements of all appropriate regulatory bodies including, but not limited to the American Bureau of Shipping, the U.S. Coast Guard, and the Institute of Electrical and Electronic Engineers, in effect at the time of Contractor's submission of offer, and shall be intended and approved for marine use.

(2) When Navy specifications are specified in the contract, the Contractor shall follow Navy standards of material and workmanship. The solicitation shall prescribe the Navy standard whenever applicable.

(c) The Government may inspect and test all material and workmanship at any time during the Contractor's performance of the work.

(1) If, prior to delivery, the Government finds any material or workmanship is defective or not in accordance with the contract, in addition to its rights under the Guarantee clause, the Government may reject the defective or nonconforming material or workmanship and require the Contractor to correct or replace it at the Contractor's expense.

(2) If the Contractor fails to proceed promptly with the replacement or correction of the material or workmanship, the Government may replace or correct the defective or nonconforming material or workmanship and charge the Contractor the excess costs incurred.

(3) As specified in the contract, the Contractor shall provide and maintain an inspection system acceptable to the Government.

(4) The Contractor shall maintain complete records of all inspection work and shall make them available to the Government during performance of the contract and for 90 days after the completion of all work required.

(d) The Contractor shall not permit any welder to work on a vessel unless the welder is, at the time of the work, qualified to the standards established by the U.S. Coast Guard, American Bureau of Shipping, or Department of the Navy for the type of welding being performed. Qualifications of a welder shall be as specified in the contract.

(e) The Contractor shall—

(1) Exercise reasonable care to protect the vessel from fire;

(2) Maintain a reasonable system of inspection over activities taking place in the vicinity of the vessel's magazines, fuel oil tanks, or storerooms containing flammable materials.

(3) Maintain a reasonable number of hose lines ready for immediate use on the vessel at all times while the vessel is berthed alongside the Contractor's pier or in dry dock or on a marine railway;

(4) Unless otherwise provided in the contract, provide sufficient security patrols to reasonably maintain a fire watch for protection of the vessel when it is in the Contractor's custody;

(5) To the extent necessary, clean, wash, and steam out or otherwise make safe, all tanks under alteration or repair.

(6) Furnish the Contracting Officer a ''gas-free'' or ''safe-for-hotwork'' certificate before any hot work is done on a tank;

(7) Treat the contents of any tank as Government property in accordance with ~~the~~ clause 52.245–1, Government Property; and

(8) Dispose of the contents of any tank only at the direction, or with the concurrence, of the Contracting Officer.

(9) Be responsible for the proper closing of all openings to the vessel's underwater structure upon which work has been performed. The Contractor additionally must advise the COR of the status of all valves closures and openings for which the Contractor's workers were responsible.

(f) Except as otherwise provided in the contract, when the vessel is in the custody of the Contractor or in dry dock or on a marine railway and the temperature is expected to go as low as 35 Fahrenheit, the Contractor shall take all necessary steps to—

(1) Keep all hose pipe lines, fixtures, traps, tanks, and other receptacles on the vessel from freezing; and

(2) Protect the stern tube and propeller hubs from frost damage.

(g) The Contractor shall, whenever practicable—

(1) Perform the required work in a manner that will not interfere with the berthing and messing of Government personnel attached to the vessel; and

(2) Provide Government personnel attached to the vessel access to the vessel at all times.

(h) Government personnel attached to the vessel shall not interfere with the Contractor's work or workers.

(i)(1) The Government does not guarantee the correctness of the dimensions, sizes, and shapes set forth in any contract, sketches, drawings, plans, or specifications prepared or furnished by the Government, unless the contract requires that the Contractor perform the work prior to any opportunity to inspect.

(2) Except as stated in paragraph (i)(1) of this clause, and other than those parts furnished by the Government, and the Contractor shall be responsible for the correctness of the dimensions, sizes, and shapes of parts furnished under this contract.

(j) The Contractor shall at all times keep the site of the work on the vessel free from accumulation of waste material or rubbish caused by its employees or the work. At the completion of the work, unless the contract specifies otherwise, the Contractor shall remove all rubbish from the site of the work and leave the immediate vicinity of the work area ''broom clean.''

(End of clause)

1252.217–74 Subcontracts.

As prescribed at 1217.7001(b), insert the following clause:

Subcontracts (DATE)

(a) Nothing contained in the contract shall be construed as creating any contractual relationship between any subcontractor and the Government. The divisions or sections of the specifications are not intended to control the Contractor in dividing the work among subcontractors or to limit the work performed by any trade.

(b) The Contractor shall be responsible to the Government for acts and omissions of its own employees, and of subcontractors and their employees. The Contractor shall also be responsible for the coordination of the work of the trades, subcontractors, and material men.

(c) The Contractor shall, without additional expense to the Government, employ specialty subcontractors where required by the specifications.

(d) The Government or its representatives will not undertake to settle any differences between the Contractor and its subcontractors, or any differences between subcontractors.

(End of clause)

1252.217–75 Lay Days.

As prescribed at 1217.7001(c), insert the following clause:

Lay Days (DATE)

(a) Lay day time will be paid by the Government at the Contractor's stipulated bid price for this item of the contract when the vessel remains on the dry dock or marine railway as a result of any change that involves work in addition to that required under the basic contract.

(b) No lay day time shall be paid until all items of the basic contract for which a price was established by the Contractor and for which docking of the vessel was required have been satisfactorily completed and accepted.

(c) Days of hauling out and floating, whatever the hour, shall not be paid as lay day time, and days when no work is performed by the Contractor shall not be paid as lay day time.

(d) Payment of lay day time shall constitute complete compensation for all costs, direct and indirect, to reimburse the Contractor for use of dry dock or marine railway.

(End of clause)

1252.217–76 Liability and Insurance.

As prescribed at 1217.7001(b), insert the following clause:

Liability and Insurance (DATE)

(a) The Contractor shall exercise its best efforts to prevent accidents, injury, or damage to all employees, persons, and property, in and about the work, and to the vessel or part of the vessel upon which work is done.

(b) *Loss or damage to the vessel, materials, or equipment.* (1) Unless otherwise directed or approved in writing by the Contracting Officer, the Contractor shall not carry insurance against any form of loss or damage to the vessel(s) or to the materials or equipment to which the Government has title or which have been furnished by the Government for installation by the Contractor. The Government assumes the risks of loss of and damage to that property.

(2) The Government does not assume any risk with respect to loss or damage compensated for by insurance or otherwise or resulting from risks with respect to which the Contractor has failed to maintain insurance, if available, as required or approved by the Contracting Officer.

(3) The Government does not assume risk of and will not pay for any costs of the following:

(i) Inspection, repair, replacement, or renewal of any defects in the vessel(s) or material and equipment due to—

(A) Defective workmanship performed by the Contractor or its subcontractors;

(B) Defective materials or equipment furnished by the Contractor or its subcontractors; or

(C) Workmanship, materials, or equipment which do not conform to the requirements of the contract, whether or not the defect is latent or whether or not the nonconformance is the result of negligence.

(ii) Loss, damage, liability, or expense caused by, resulting from, or incurred as a consequence of any delay or disruption, willful misconduct or lack of good faith by the Contractor or any of its representatives that have supervision or direction of—

(A) All or substantially all of the Contractor's business; or

(B) All or substantially all of the Contractor's operation at any one plant.

(4) As to any risk that is assumed by the Government, the Government shall be subrogated to any claim, demand or cause of action against third parties that exists in favor of the Contractor. If required by the Contracting Officer, the Contractor shall execute a formal assignment or transfer of the claim, demand, or cause of action.

(5) No party other than the Contractor shall have any right to proceed directly against the Government or join the Government as a codefendant in any action.

(6) Notwithstanding the foregoing, the Contractor shall bear the first $5,000 of loss or damage from each occurrence or incident, the risk of which the Government would have assumed under the provision of this paragraph (b).

(c) *Indemnification.* The Contractor indemnifies the Government and the vessel and its owners against all claims, demands, or causes of action to which the Government, the vessel or its owner(s) might be subject as a result of damage or injury (including death) to the property or person of anyone other than the Government or its employees, or the vessel or its owner, arising in whole or in part from the negligence or other wrongful act of the Contractor, or its agents or employees, or any subcontractor, or its agents or employees.

(1) The Contractor's obligation to indemnify under this paragraph shall not exceed the sum of $300,000 as a consequence of any single occurrence with respect to any one vessel.

(2) The indemnity includes, without limitation, suits, actions, claims, costs, or demands of any kind, resulting from death, personal injury, or property damage occurring during the period of performance of work on the vessel or within 90 days after redelivery of the vessel. For any claim, etc., made after 90 days, the rights of the parties shall be as determined by other provisions of this contract and by law. The indemnity does apply to death occurring after 90 days where the injury was received during the period covered by the indemnity.

(d) *Insurance.* (1) The Contractor shall, at its own expense, obtain and maintain the following insurance—

(i) Casualty, accident, and liability insurance, as approved by the Contracting Officer, insuring the performance of its obligations under paragraph (c) of this clause.

(ii) Workers Compensation Insurance (or its equivalent) covering the employees engaged on the work.

(2) The Contractor shall ensure that all subcontractors engaged on the work obtain and maintain the insurance required in paragraph (d)(1) of this clause.

(3) Upon request of the Contracting Officer, the Contractor shall provide evidence of the insurance required by paragraph (d) of this clause.

(e) The Contractor shall not make any allowance in the contract price for the inclusion of any premium expense or charge for any reserve made on account of self-insurance for coverage against any risk assumed by the Government under this clause.

(f) The Contractor shall give the Contracting Officer written notice as soon as practicable after the occurrence of a loss or damage for which the Government has assumed the risk.

(1) The notice shall contain full details of the loss or damage.

(2) If a claim or suit is later filed against the Contractor as a result of the event, the Contractor shall immediately deliver to the Government every demand, notice, summons, or other process received by the Contractor or its employees or representatives.

(3) The Contractor shall cooperate with the Government and, upon request, shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses, and in the conduct of suits. The Government shall reimburse the Contractor for expenses incurred in this effort, other than the cost of maintaining the Contractor's usual organization.

(4) The Contractor shall not, except at its own expense, voluntarily make any payments, assume any obligation, or incur any expense other than what would be imperative for the protection of the vessel(s) at the time of the event.

(g) In the event of loss of or damage to any vessel(s), material, or equipment which may result in a claim against the Government under the insurance provisions of this contract, the Contractor shall promptly notify the Contracting Officer of the loss or damage. The Contracting Officer may, without prejudice to any right of the Government, either—

(1) Order the Contractor to proceed with replacement or repair, in which event the Contractor shall effect the replacement or repair;

(i) The Contractor shall submit to the Contracting Officer a request for reimbursement of the cost of the replacement or repair together with whatever supporting documentation the Contracting Officer may reasonably require, and shall identify the request as being submitted under the Insurance clause of this contract.

(ii) If the Government determines that the risk of the loss or damage is within the scope of the risks assumed by the Government under this clause, the Government will reimburse the Contractor for the reasonable allowable cost of the replacement or repair, plus a reasonable profit (if the work or replacement or repair was performed by the Contractor) less the deductible amount specified in paragraph (b) of this clause.

(iii) Payments by the Government to the Contractor under this clause are outside the scope of and shall not affect the pricing structure of the contract, and are additional to the compensation otherwise payable to the Contractor under this contract; or

(2) Decide that the loss or damage shall not be replaced or repaired and in that event, the Contracting Officer shall—

(i) Modify the contract appropriately, consistent with the reduced requirements reflected by the unreplaced or unrepaired loss or damage; or

(ii) Terminate the repair of any part or all of the vessel(s) under the Termination for Convenience of the Government clause of this contract.

(End of clause)

1252.217–77 Title.

As prescribed at 1217.7001(b), insert the following clause:

Title (DATE)

(a) Unless otherwise provided, title to all materials and equipment to be incorporated in a vessel in the performance of this contract shall vest in the Government upon delivery at the location specified for the performance of the work.

(b) Upon completion of the contract, or with the approval of the Contracting Officer during performance of the contract, all Contractor-furnished materials and equipment not incorporated in, or placed on, any vessel, shall become the property of the Contractor, unless the Government has reimbursed the Contractor for the cost of the materials and equipment.

(c) The vessel, its equipment, movable stores, cargo, or other ship's materials shall not be considered Government-furnished property.

(End of clause)

1252.217–78 Discharge of Liens.

As prescribed at 1217.7001(b), insert the following clause:

Discharge of Liens (DATE)

(a) The Contractor shall immediately discharge or cause to be discharged, any lien or right in rem of any kind, other than in favor of the Government, that exists or arises in connection with work done or materials furnished under this contract.

(b) If any such lien or right *in rem* is not immediately discharged, the Government, at the expense of the Contractor, may discharge, or cause to be discharged, the lien or right.

(End of clause)

1252.217–79 Delays.

As prescribed at 1217.7001(b), insert the following clause:

Delays (DATE)

When during the performance of this contract the Contractor is required to delay work on a vessel temporarily, due to orders or actions of the Government respecting stoppage of work to permit shifting the vessel, stoppage of hot work to permit bunkering, stoppage of work due to embarking or debarking passengers and loading or discharging cargo, and the Contractor is not given sufficient advance notice or is otherwise unable to avoid incurring additional costs on account thereof, an equitable adjustment shall be made in the price of the contract pursuant to the ''Changes'' clause.

(End of clause)

1252.217–80 Department of Labor Safety and Health Regulations for Ship Repair.

As prescribed at 1217.7001(b), insert the following clause:

Department of Labor Safety and Health Regulations for Ship Repair (DATE)

Nothing contained in this contract shall relieve the Contractor of any obligations it may have to comply with—

(a) The Occupational Safety and Health Act of 1970 (29 U.S.C. 651, *et seq.*);

(b) The Occupational Safety and Health Standards for Shipyard Employment (29 CFR part 1915); or

(c) Any other applicable Federal, State, and local laws, codes, ordinances, and regulations.

(End of clause)

1252.222–70 Strikes or Picketing Affecting Timely Completion of the Contract Work.

As prescribed in 1222.101–71(a), insert the following clause:

Strikes or Picketing Affecting Timely Completion of the Contract Work (DATE)

Notwithstanding any other provision hereof, the Contractor is responsible for delays arising out of labor disputes, including but not limited to strikes, if such strikes are reasonably avoidable. A delay caused by a strike or by picketing which constitutes an unfair labor practice is not excusable unless the Contractor takes all reasonable and appropriate action to end such a strike or picketing, such as the filing of a charge with the National Labor Relations Board, the use of other available Government procedures, and the use of private boards or organizations for the settlement of disputes.

(End of clause)

1252.222–71 Strikes or Picketing Affecting Access to a DOT Facility.

As prescribed in 1222.101–71(b), insert the following clause:

Strikes or Picketing Affecting Access to a DOT Facility (DATE)

If the Contracting Officer notifies the Contractor in writing that a strike or picketing—(a) Is directed at the Contractor or subcontractor or any employee of either; and (b) Impedes or threatens to impede access by any person to a DOT facility where the site of the work is located, the Contractor shall take all appropriate action to end such strike or picketing, including, if necessary, the filing of a charge of unfair labor practice with the National Labor Relations Board or the use of other available judicial or administrative remedies.

(End of clause)

1252.222–72 Contractor Cooperation in Equal Employment Opportunity and Anti-Harassment Investigations.

As prescribed in 1222.810–70, insert the following clause:

Contractor Cooperation in Equal Employment Opportunity and Anti-Harassment Investigations (DATE)

(a) *Definitions.* As used in this clause—

Complaint means a formal or informal complaint that has been filed with DOT management, DOT agency Equal Employment Opportunity (EEO) officials, the Equal Employment Opportunity Commission (EEOC), the Office of Federal Contract Compliance Programs (OFCCP) or a court of competent jurisdiction.

Contractor employee means all current Contractor employees who work or worked under this contract. The term also includes current employees of subcontractors who work or worked under this contract. In the case of Contractor and subcontractor employees who worked under this contract, but who are no longer employed by the Contractor or subcontractor, or who have been assigned to another entity within the Contractor's or subcontractor's organization, the Contractor shall provide DOT with that employee's last known mailing address, email address, and telephone number, if that employee has been identified as a witness in an EEO or Anti-Harassment complaint or investigation.

Good faith cooperation means, but is not limited to, making Contractor employees available, with the presence or assistance of counsel as deemed appropriate by the Contractor, for:

(1) Formal and informal interviews by EEO counselors, the OFCCP, or other Agency officials processing EEO or Anti-Harassment complaints;

(2) Formal or informal interviews by EEO investigators charged with investigating complaints of unlawful discrimination filed by Federal employees;

(3) Reviewing and signing appropriate affidavits or declarations summarizing statements provided by such Contractor employees during the course of EEO or Anti-Harassment investigations;

(4) Producing documents requested by EEO counselors, EEO investigators, OFCCP investigators, Agency employees, or the EEOC in connection with a pending EEO or Anti-Harassment complaint; and

(5) Preparing for and providing testimony in depositions or in hearings before the MSPB, EEOC, OFCCP, and U.S. District Court.

(b) *Cooperation with investigations.* In addition to complying with the clause at FAR 52.222–26, Equal Opportunity, the Contractor shall, in good faith, cooperate with the Department of Transportation in investigations of Equal Employment Opportunity (EEO) complaints processed pursuant to 29 CFR part 1614 and internal Anti-Harassment investigations.

(c) *Compliance.* Failure on the part of the Contractor or its subcontractors to comply with the terms of this clause may be grounds for the Contracting Officer to terminate this contract for default or for cause in accordance with the termination clauses in the contract.

(d) *Subcontract flowdown.* The Contractor shall include the provisions of this clause in all subcontract solicitations and subcontracts awarded, at any tier, under this contract.

(End of clause)

1252.223–70 Removal or Disposal of Hazardous Substances—Applicable Licenses and Permits.

As prescribed in 1223.303, insert the following clause:

Removal or Disposal of Hazardous Substances—Applicable Licenses and Permits (Date)

The Contractor has ____ or does not have ____ [*Contractor check applicable response*] all licenses and permits required by Federal, state, and local laws to perform hazardous substance(s) removal or disposal services. If the Contractor does not currently possess these documents, it must obtain all requisite licenses and permits within ____ [*Contracting Officer insert number*] calendar days after date of award. The Contractor shall provide evidence of said documents to the Contracting Officer or designated Government representative prior to commencement of work under the contract.

(End of clause)

1252.223–71 Accident and Fire Reporting.

As prescribed in 1223.7000(a), insert the following clause:

Accident and Fire Reporting (DATE)

(a) The Contractor shall report to the Contracting Officer any accident or fire occurring at the site of the work which causes—

(1) A fatality or as much as one lost workday on the part of any employee of the Contractor or subcontractor at any tier;

(2) Damage of $1,000 or more to Government-owned or leased property, either real or personal;

(3) Damage of $1,000 or more to Contractor or subcontractor owned or leased motor vehicles or mobile equipment; or

(4) Damage for which a contract time extension may be requested.

(b) Accident and fire reports required by paragraph (a) of this section shall be accomplished by the following means:

(1) Accidents or fires resulting in a death, hospitalization of five or more persons, or destruction of Government-owned or leased property (either real or personal), the total value of which is estimated at $100,000 or more, shall be reported immediately by telephone to the Contracting Officer or his/her authorized representative and shall be confirmed in writing within 24 hours to the Contracting Officer. Such report shall state all known facts as to extent of injury and damage and as to cause of the accident or fire.

(2) Other accident and fire reports required by paragraph (a) of this section may be reported by the Contractor using a state, private insurance carrier, or Contractor accident report form which provides for the statement of—

(i) The extent of injury; and

(ii) The damage and cause of the accident or fire.

Such report shall be mailed or otherwise delivered to the Contracting Officer within 48 hours of the occurrence of the accident or fire.

(c) The Contractor shall assure compliance by subcontractors at all tiers with the requirements of this clause.

(End of clause)

1252.223–72 Protection of Human Subjects.

As prescribed in 1223.7000(b), insert the following clause:

Protection of Human Subjects (DATE)

(a) The Contractor shall comply with 49 CFR part 11, DOT's regulations for the protection of human subjects participating in activities supported directly or indirectly by contracts from DOT. In addition, the Contractor shall comply with any DOT Operating Administration (OA)-specific policies and procedures on the protection of human subjects.

(b) To demonstrate compliance with the subject DOT regulations and to protect human subjects, the Contractor shall ensure the following:

(1) The Contractor shall establish and maintain a committee competent to review projects and activities that involve human subjects.

(2) The committee shall be assigned responsibility to determine, for each activity planned and conducted, that—

(i) The rights and welfare of subjects are adequately protected;

(ii) The risks to subjects are outweighed by potential benefits; and

(iii) The informed consent of subjects shall be obtained by methods that are adequate and appropriate.

(3) Committee reviews shall be conducted with objectivity and in a manner to ensure the exercise of independent judgment of the members. Members shall be excluded from review of projects or activities in which they have an active role or a conflict of interests.

(4) Continuing constructive communication between the committee and the project directors must be maintained as a means of safeguarding the rights and welfare of subjects.

(5) Facilities and professional attention required for subjects who may suffer physical, psychological, or other injury as a result of participating in an activity shall be provided.

(6) The committee shall maintain records of committee review of applications and active projects, of documentation of informed consent, and of other documentation that may pertain to the selection, participation, and protection of subjects. Detailed records shall be maintained of circumstances of any review that adversely affects the rights or welfare of the individual subjects. Such materials shall be made available to DOT upon request.

(7) The retention period of such records and materials shall be as specified at FAR 4.703.

(c) Periodic reviews shall be conducted by the Contractor to assure, through appropriate administrative overview, that the practices and procedures designed for the protection of the rights and welfare of subjects are being effectively applied.

(d) If the Contractor has or maintains a relationship with a Department of Health and Human Services approved Institutional Review Board (IRB) which can appropriately review this contract in accordance with the technical requirements and any applicable OA policies and procedures that apply, that IRB will be considered acceptable for the purposes of this contract.

(End of clause)

1252.223–73 Seat Belt Use Policies and Programs.

As prescribed in 1223.7000(c), insert the following clause:

Seat Belt Use Policies and Programs (DATE)

In accordance with Executive Order 13043, Increasing Seat Belt Use in the United States, dated April 16, 1997, the Contractor is encouraged to adopt and enforce on-the-job seat belt use policies and programs for its employees when operating company-owned, rented, or personally-owned vehicles. The National Highway Traffic Safety Administration (NHTSA) is responsible for providing leadership and guidance in support of this Presidential initiative. For information on how to implement such a program or for statistics on the potential benefits and cost-savings to your company or organization, please visit the Click it or Ticket seat belt safety section of NHTSA's website at *https://www.nhtsa.gov/campaign/click-it-or-ticket* and *https://www.nhtsa.gov/risky-driving/seat-belts.* Additional resources are available from the Network of Employers for Traffic Safety (NETS), a public-private partnership headquartered in the Washington, DC metropolitan area which partners with NHTSA, and is dedicated to improving the traffic safety practices of employers and employees (*see https://*

trafficsafety.org/). NETS provides access to a simple, user friendly program tool kit at [*https://trafficsafety.org/road-safety-resources/public-resources/2seconds2click-seat-belt-campaign/.*

(End of clause)

1252.228–70 Loss of or Damage to Leased Aircraft.

As prescribed in 1228.306–70(a), insert the following clause:

Loss of or Damage to Leased Aircraft (DATE)

(a) Except normal wear and tear, the Government assumes all risk of loss of, or damage to, the leased aircraft during the term of this lease while the aircraft is in the possession of the Government.

(b) In the event of damage to the aircraft, the Government, at its option, shall make the necessary repairs with its own facilities or by contract, or pay the Contractor the reasonable cost of repair of the aircraft.

(c) In the event the aircraft is lost or damaged beyond repair, the Government shall pay the Contractor a sum equal to the fair market value of the aircraft at the time of such loss or damage, which value may be specifically agreed to in clause 1252.228–71, Fair Market Value of Aircraft, less the salvage value of the aircraft. However, the Government may retain the damaged aircraft or dispose of it as it wishes. In that event, the Contractor will be paid the fair market value of the aircraft as stated in the clause.

(d) The Contractor agrees that the contract price does not include any cost attributable to hull insurance or to any reserve fund it has established to protect its interest in the aircraft. If, in the event of loss or damage to the leased aircraft, the Contractor receives compensation for such loss or damage in any form from any source, the amount of such compensation shall be—

(1) Credited to the Government in determining the amount of the Government's liability; or

(2) For an increment of value of the aircraft beyond the value for which the Government is responsible.

(e) In the event of loss of or damage to the aircraft, the Government shall be subrogated to all rights of recovery by the Contractor against third parties for such loss or damage and the Contractor shall promptly assign such rights in writing to the Government.

(End of clause)

1252.228–71 Fair Market Value of Aircraft.

As prescribed in 1228.306–70(a), insert the following clause:

Fair Market Value of Aircraft (DATE)

For purposes of clause 1252.228–70, Loss of or Damage to Leased Aircraft, the fair market value of the aircraft to be used in the performance of this contract shall be the lesser of the two values set out in paragraphs (a) and (b) below—

(a) $_____; [*Contracting Officer insert value*] or

(b) If the Contractor has insured the same aircraft against loss or destruction in connection with other operations, the amount of such insurance coverage on the date of the loss or damage for which the Government may be responsible under this contract.

(End of clause)

1252.228–72 Risk and Indemnities.

As prescribed in 1228.306–70(a) and (d), insert the following clause:

Risk and Indemnities (DATE)

The Contractor hereby agrees to indemnify and hold harmless the Government, its officers and employees from and against all claims, demands, damages, liabilities, losses, suits and judgments (including all costs and expenses incident thereto) which may be suffered by, accrue against, be charged to or recoverable from the Government, its officers and employees by reason of injury to or death of any person other than officers, agents, or employees of the Government or by reason of damage to property of others of whatsoever kind (other than the property of the Government, its officers, agents or employees) arising out of the operation of the aircraft. In the event the Contractor holds or obtains insurance in support of this covenant, evidence of insurance shall be delivered to the Contracting Officer.

(End of clause)

1252.228–73 Command of Aircraft.

As prescribed in 1228.306–70(d), insert the following clause:

Command of Aircraft (DATE)

During the performance of a contract for out-service flight training for DOT, whether the instruction to DOT personnel is in leased, contractor-provided, or Government-provided aircraft, contractor personnel shall always, during the entirety of the course of training and during operation of the aircraft, remain in command of the aircraft. At no time shall other personnel be permitted to take command of the aircraft.

(End of clause)

1252.228–74 Notification of Payment Bond Protection.

As prescribed in guidance at 1228.106–470, insert the following clause:

Notification of Payment Bond Protection (DATE)

(a) The prime contract is subject to the Bonds statute (historically referred to as the Miller Act) (40 U.S.C. chapter 31, subchapter III), under which the prime contractor has obtained a payment bond. This payment bond may provide certain unpaid employees, suppliers, and subcontractors a right to sue the bonding surety under the Bonds statute for amounts owned for work performed and materials delivery under the prime contract.

(b) Persons believing that they have legal remedies under the Bonds statute should consult their legal advisor regarding the proper steps to take to obtain these remedies. This notice clause does not provide any party any rights against the Federal Government, or create any relationship, contractual or otherwise, between the Federal Government and any private party.

(c) The surety which has provided the payment bond under the prime contract is:

[*Contracting Officer fill-in prime contractor's surety information*]

_____

(Name)

_____

(Street Address)

_____

(City, State, Zip Code)

_____

(Contact & Tel. No.)

(d) Subcontract flowdown requirements. This clause shall be flowed down to all subcontractors. Prime contractors shall insert this notice clause in all first-tier subcontracts and shall require the clause to be subsequently flowed down by all first-tier subcontractors to all their subcontractors, at any tier. This notice contains information pertaining to the surety that provided the payment bond under the prime contract and is required to be inserted in its entirety to include the information set forth in paragraph (c).

(End of clause)

1252.231–70 Date of Incurrence of Costs.

As prescribed in 1231.205–3270(b), insert the following clause:

Date of Incurrence of Costs (DATE)

The Contractor shall be entitled to reimbursement for costs incurred on or after _____

[*Contracting Officer insert date*] in an amount not to exceed $_____ [*Contracting Officer insert amount*] that, if incurred after this contract had been entered into, would have been reimbursable under this contract.

(End of clause)

1252.232–70 Electronic Submission of Payment Requests.

As prescribed in 1232.7005, insert the following clause:

Electronic Submission of Payment Requests (DATE)

(a) *Definitions.* As used in this clause—

(1) *Contract financing payment* has the meaning given in FAR 32.001.

(2) *Payment request* means a bill, voucher, invoice, or request for contract financing payment or invoice payment with associated supporting documentation. The payment request must comply with the requirements identified in FAR 32.905(b), ''Content of Invoices,'' this clause, and the applicable Payment clause included in this contract.

(3) *Electronic form* means an automated system transmitting information electronically according to the accepted electronic data transmission methods and formats identified in paragraph (c) of this clause. Facsimile, email, and scanned documents are not acceptable electronic forms for submission of payment requests.

(4) *Invoice payment* has the meaning given in FAR 32.001.

(b) *Electronic payment requests.* Except as provided in paragraph (e) of this clause, the contractor shall submit payment requests in electronic form. Purchases paid with a Governmentwide commercial purchase card are considered to be an electronic transaction for purposes of this rule, and therefore no additional electronic invoice submission is required.

(c) *Processing system.* The Department of Transportation utilizes the DELPHI system for processing invoices. The DELPHI module for submitting invoices is called *iSupplier.* Access to DELPHI is granted with electronic authentication of credentials (name & valid email address) utilizing the GSA credentialing platform *login.gov.* For vendors submitting invoices, they will be required to submit invoices via *iSupplier* (DELPHI) and authenticated via *www.login.gov.*

(d) *Invoice requirements.* In order to receive payment and in accordance with the Prompt Payment Act, all invoices submitted as attachments in *iSupplier* (DELPHI) shall contain the following:

(1) Invoice number and invoice date.

(2) Period of performance covered by invoice.

(3) Contract number and title.

(4) Task/Delivery Order number and title (if applicable).

(5) Amount billed (by CLIN), current and cumulative.

(6) Total ($) of billing.

(7) Cumulative total billed for all contract work to date.

(8) Name, title, phone number, and mailing address of person to be contacted in the event of a defective invoice.

(9) Travel. If the contract includes allowances for travel, all invoices which include charges pertaining to travel expenses will catalog a breakdown of reimbursable expenses with the appropriate receipts to substantiate the travel expenses.

(e) *Payment system registration.* All persons accessing the iSupplier (DELPHI) will be required to have their own unique user ID and password and be credentialed through *login.gov.*

(1) *Electronic authentication. See www.login.gov* for instructions.

(2) To create a *login.gov* account, the user will need a valid email address and a working phone number. The user will create a password and then *login.gov* will reply with an email confirming the email address.

(3) *iSupplier* (DELPHI) registration instructions: New users should navigate to: *http://einvoice.esc.gov* to establish an account. Users are required to log in to *iSupplier* (DELPHI) every 45 days to keep it active.

(4) *Training on DELPHI.* To facilitate use of DELPHI, comprehensive user information is available at *http://einvoice.esc.gov.*

(5) *Account Management.* Vendors are responsible to contact their assigned COR when their firm's points of contacts will no longer be submitting invoices, so they can be removed from the system.

(f) *Waivers.* For contractors/vendors who are unable to utilize DOT's DELPHI system, waivers may be considered by DOT on a case-by-case basis. Vendors should contact their Contracting Officer's Representative (COR) for procedures.

(g) *Exceptions and alternate payment procedures.* If, based on one of the circumstances set forth in 1232.7002(a) or (b), and the contracting officer directs that payment requests be made by mail, the contractor shall submit payment requests by mail through the United States Postal Service to the designated agency office. If alternate payment procedures are authorized, the Contractor shall include a copy of the Contracting Officer's written authorization with each payment request. If DELPHI has been succeeded by later technology, the Contracting Officer will supply the Contractor with the latest applicable electronic invoicing instructions.

(End of clause)

1252.232–71 Limitation of Government's Obligation.

As prescribed in 1232.770–7, insert the following clause:

Limitation of Government's Obligation (DATE)

(a) Funding is not currently available to fully fund this contract due to the Government operating under a continuing resolution (CR). The item(s) listed in the table below are being incrementally funded as described below. The funding allotted to these item(s) is presently available for payment and allotted to this contract. This table will be updated by a modification to the contract when additional funds, if any, are made available to this contract.

Contract line item No. (CLIN)	CLIN total price	Funds allotted to the CLIN	Funds required for complete funding of the CLIN
	$ $ $ $	$ $ $ $	$ $ $ $
Totals	$	$	$

(b) For the incrementally funded CLIN(s) identified in paragraph (a) of this clause, the Contractor agrees to perform up to the point at which the total amount payable by the Government, including any invoice payments to which the Contractor is entitled and reimbursement of authorized termination costs in the event of termination of those CLIN(s) for the Government's convenience, does not exceed the total amount currently obligated to those CLIN(s). The Contractor is not authorized to continue work on these item(s) beyond that point. The Government will not be obligated—in any event—to reimburse the Contractor in excess of the amount allotted to the CLIN(s) of the contract regardless of anything to the contrary in any other clause, including but not limited to the clause entitled ''Termination for Convenience of the Government'' or paragraph (l) entitled ''Termination for the Government's Convenience'' of the clause at FAR 52.212–4, ''Commercial Terms and Conditions Commercial Items.''

(c) Notwithstanding paragraph (h) of this clause, the Contractor shall notify the Contracting Officer in writing at least 30 days prior to the date when, in the Contractor's best judgment, the work will reach the point at which the total amount payable by the Government, including any cost for termination for convenience, will approximate 85 percent of the total amount then allotted to the contract for performance of the item(s) identified in paragraph (a) of this clause. The notification shall state the estimated date when that point will be reached and an estimate of additional funding, if any, needed to continue performance. The notification shall also advise the Contracting Officer of the estimated amount of additional funds required for the timely performance of the item(s) funded pursuant to this contract. If after such notification additional funds are not allotted by the date identified in the Contractor's notification, or by an agreed upon substitute date, the Contracting Officer will terminate any item(s) for which additional funds have not been allotted, pursuant to the terms of this contract authorizing termination for the convenience of the Government. Failure to make the notification required by this paragraph, whether for reasons within or beyond the Contractor's control, will not increase the maximum amount payable to the Contractor under paragraphs (a) and (b) of this clause.

(d) The Government may, at any time prior to termination, allot additional funds for the performance of the item(s) identified in paragraph (a) of this clause.

(e) The termination provisions of paragraphs (a) through (h) of this clause do not limit the rights of the Government under the clause entitled ''Default'' or paragraph (m) entitled ''Termination for Cause,'' of the clause at FAR 52.212–4, ''Commercial Terms and Conditions Commercial Items.'' The provisions of this clause are limited to the work and allotment of funds for the item(s) set forth in paragraph (a) of this clause. This clause no longer applies once the contract is fully funded.

(f) Nothing in this clause affects the right of the Government to terminate this contract pursuant to the Government's termination for convenience terms set forth in this contract.

(g) Nothing in this clause shall be construed as authorization of voluntary services whose acceptance is otherwise prohibited under 31 U.S.C. 1342.

(h) The parties contemplate that the Government will allot funds to this contract from time to time as the need arises and as funds become available. There is no fixed schedule for providing additional funds.

(End of clause)

1252.235–70 Research Misconduct.

As prescribed in 1235.070–1, insert the following clause:

Research Misconduct (DATE)

(a) *Definitions.* As used in this clause—

Adjudication means the process of reviewing recommendations from the investigation phase and determining appropriate corrective actions.

Complainant means the person who makes an allegation of research misconduct or the person who cooperates with an inquiry or investigation.

DOT Oversight Organization is the Department of Transportation (DOT) operating administration or secretarial office sponsoring or managing Federally-funded research.

Evidence includes, but is not limited to, research records, transcripts, or recordings of interviews, committee correspondence, administrative records, grant applications and awards, manuscripts, publications, expert analyses, and electronic data.

Fabrication means making up data or results and recording or reporting them.

Falsification means manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

Inquiry means preliminary information gathering and fact-finding to determine if an allegation, or apparent instance of research misconduct, warrants an investigation.

Investigation means formal collection and evaluation of information and facts to determine if research misconduct can be established, to assess its extent and consequences, and to recommend appropriate action.

Plagiarism means the appropriation of another person's ideas, processes, results, or words without giving appropriate credit. Research misconduct does not include honest error or differences of opinion.

Research and Technology Coordinating Council (RTCC) is the lead DOT entity for coordination of all actions related to allegations of research misconduct. The respondent in a research misconduct finding may appeal through the RTCC to the Deputy Secretary of Transportation.

Research institution includes any Contractor conducting research under DOT-funded contractual instruments, contracts, and similar instruments.

Research misconduct means fabrication, falsification, or plagiarism, in proposing, performing, or reviewing research, or in reporting research results. Research misconduct does not include honest error or difference of opinion.''

Research record means the record of data or results that embody the facts resulting from scientific inquiry, and includes, but is not limited to, research proposals, laboratory records, both physical and electronic, progress reports, abstracts, theses, oral presentations, internal reports, and journal articles.

Respondent means the person against whom an allegation of research misconduct has been made, or the person whose actions are the focus of the inquiry or investigation.

(b) *General guidelines.* (1) *Confidentiality.* DOT organizations, including research organizations, are required to safeguard the confidentiality of the inquiry, investigation and decision-making processes, including maintaining complete confidentiality of all records and identities of respondents and complainants.

(2) *Retaliation prohibited.* If a complainant who has reported possible research misconduct alleges retaliation on the part of DOT organization management, the report will be addressed by management officials who will conduct an inquiry into the allegations followed by an appropriate management action.

(3) *Separation of phases.* DOT organizations and research organizations must ensure the

separation of the Inquiry, Investigation and Determination Phases of this process.

(4) In general, DOT organizations must strive to protect the interests of the Federal Government and the public in carrying out this process.

(c) *Elements to support a finding of research misconduct.* Research institutions (including Contractors) that receive DOT funds shall respond to allegations of research misconduct. The following elements describe the type of behavior, level of intent and burden of proof required to support a finding of research misconduct:

(1) There must be a significant departure from the accepted practices of the relevant research community;

(2) The misconduct must have been committed intentionally, or knowingly, or recklessly and;

(3) The allegation must be proven by a preponderance of the evidence.

(d) *DOT Oversight Organization Investigation.* The DOT oversight organization may proceed with its own investigation at any time if:

(1) DOT determines the research institution is not prepared to handle the allegation in a manner consistent with this policy.

(2) DOT involvement is needed to protect the public interest, including public health and safety.

(3) The allegation involves an entity of sufficiently small size (or an individual) that it cannot sufficiently conduct the investigation itself.

(4) The DOT oversight organization may take, or cause to be taken, interim administrative actions (including special certifications, assurances, or other administrative actions) when deemed appropriate to protect the welfare of human and animal subjects of research, prevent inappropriate use of Federal funds, or otherwise protect the public interest and safety.

(e) *Investigating research misconduct.* Research institutions, or in limited circumstances discussed in paragraph (d) the DOT Oversight Organization shall use the following procedures to investigate allegations of research misconduct:

(1) Inquire promptly into the research misconduct allegation and complete an initial inquiry within 60 calendar days after receipt of the allegation.

(2) Notify the Contracting Officer immediately, in writing, when an inquiry results in a determination that an investigation is warranted, and promptly begin an investigation.

(3) Ensure the objectivity and expertise of the individuals selected to review allegations and conduct investigations.

(4) Conduct the investigation according to established internal procedures and complete it within 120 calendar days of completing the initial inquiry.

(5) Document the investigation. Include documentation that—

(i) Describes the allegation(s);

(ii) Lists the investigators;

(iii) Describes the methods and procedures used to gather information and evaluate the allegation(s);

(iv) Summarizes the records and data compiled, states the findings, and explains the supporting reasons and evidence;

(v) States the potential impact of any research misconduct; and

(vi) Describes and explains any institutional sanctions or corrective actions recommended or imposed as appropriate within its jurisdiction and as consistent with other relevant laws.

(6) Provide the respondent (the person against whom an allegation of research misconduct has been made) with a reasonable opportunity (*e.g.,* 30 calendar days) to review and respond to the investigation report. The respondent's written comments or rebuttal will be made part of the investigative record.

(7) Within 30 calendar days after completion of an investigation, forward investigative reports, documentation, and respondent's response to the Contracting Officer who will coordinate with the DOT oversight organization(s) sponsoring and/or monitoring the federally-funded research.

(8) Time extensions. Contractors should request time extensions as needed, from the Contracting Officer of the appropriate DOT oversight organization. The Contracting Officer has discretion to waive time requirements for good cause.

(f) *Activity sanctions or corrective actions.* Upon receipt of the investigative reports from the contractor, the DOT oversight organization, in conjunction with the Contracting Officer, will review the report, and determine the appropriate administrative action to be taken. In deciding what actions to take, the oversight organizations should consider: The severity of the misconduct; the degree to which the misconduct was knowing, intentional or reckless; and whether it was an isolated event or part of a pattern. Sanctions or corrective actions may range as follows—

(1) *Minimal restrictions*—such as a letter of reprimand, additional conditions on awards, requiring third-party certification of accuracy or compliance with particular policies, regulations, guidelines, or special terms and conditions;

(2) *Moderate restrictions*—such as limitations on certain activities or expenditures under an active award, or special reviews of requests for funding; or

(3) *More severe restrictions*—such as termination of an active award, or government-wide suspension or debarment.

(i) When the DOT oversight organization concludes an investigation with a determination of research misconduct, the DOT Office of the Senior Procurement Executive will be so advised and may notify any other sources of research that provide support to the respondent that a finding of research misconduct has been made.

(ii) If there are reasonable indications that criminal violations may have occurred, the DOT oversight organization, in conjunction with the Contracting Officer, shall consult with the Office of Inspector General to determine an appropriate course of action, including debarment or suspension. The DOT oversight organization, in conjunction with the Contracting Officer will notify the respondent in writing of its action, sanctions to be imposed if applicable, and the DOT appeal procedures.

(g) *Appeals and final administrative action.* (1) The Federal Acquisition Regulation governs in all matters pertaining to termination of the contract, and suspension/debarment.

(2) In all other cases, the Contractor may appeal the sanction or corrective action through the DOT Research and Technology Coordinating Council (RTCC) to the Deputy Secretary of Transportation, in writing within 30 calendar days after receiving written notification of the research misconduct finding and associated administrative action(s). The Contractor shall mail a copy of the appeal to the Contracting Officer.

(3) If there is no request for appeal within 30 calendar days, the administrative actions of the oversight organization shall be final.

(4) If a request for appeal is received by the RTCC within the 30 calendar day limit, the Deputy Secretary may have the RTCC review the appeal and make recommendations.

(5) The RTCC on behalf of the Deputy Secretary will normally inform the appellant of the final decision on an appeal within 60 calendar days of receipt. This decision will then be the final DOT administrative action.

(h) *Criminal or civil fraud violations.* When the DOT oversight organization concludes an investigation with a

determination of research misconduct, the DOT Office of the Senior Procurement Executive may notify any other sources of research that provide support to the respondent. If criminal or civil fraud violations may have occurred, the oversight organization should promptly refer the matter to the DOT Inspector General, the Department of Justice or other appropriate investigative body.

(i) *Subcontract flowdown.* The Contractor shall include the substance of this clause in all subcontracts that involve research.

(End of clause)

1252.235–71 Technology Transfer.

As prescribed in 1235.011–70, insert the following clause:

Technology Transfer (DATE)

(a) The Contractor, in accordance with the provisions in the attached Statement of Work, will develop a Technology Transfer Plan to be approved by _____ [*Fill-in: Contracting Officer to fill-in the cognizant DOT/OA*] prior to the initiation of any work under this contract and shall execute the approved plan throughout the conduct of this Agreement. Such plan shall include, at a minimum—

(1) A description of the problem and technical solutions being researched, including any potential or identified technology developments that are the intended output of or which may be derived from the research;

(2) A list identifying and categorizing by interest potential stakeholders in the outputs of the research to be performed;

(3) A plan for engaging the identified potential stakeholders to determine interest in and obtain suggested refinements to the research, before and during the conduct of this contract, to enhance the likelihood of adoption/implementation of the research outputs. Such engagement activities shall comprise communicating research status to identified stakeholders, soliciting their feedback; disseminating research outputs, and identifying whether the outputs were adopted/implemented;

(4) A proposed delivery or demonstration activity (*e.g.,* conference presentation of a final report, demonstration of software, or demonstration of tangible output);

(5) A draft plan for the commercialization of any research outputs, including the specific identification of stakeholders most likely to be of interest in the commercialization of the research outputs;

(6) The identification of the specific methods and channels for dissemination of the research outputs (*e.g.,* publication, licensing to a third party, or manufacture and sale); and

(7) A plan for tracking and reporting to [*Fill-in: Contracting Officer to fill in the cognizant DOT/OA*] the research outputs, outcomes, and impacts.

(b) The Contractor shall provide to _____ [*Fill-in: Contracting Officer to fill-in the cognizant DOT/OA*] at least once every six months, or as an attachment to any more frequent research progress reports, a Technology Transfer Report addressing and updating each element of their approved Technology Transfer Plan. Such report shall include—

(1) An updated description of the problem and technical solution(s) being researched, particularly where any revisions to the research are based on feedback from a stakeholder engagement;

(2) A summary of overall technology transfer progress;

(3) An updated listing of interested stakeholders and an identification of their potential role (*e.g.,* research sponsor, potential end-user, or regulator);

(4) A listing of the stakeholders engaged since the most recently submitted Technology Transfer Report;

(5) The identification of any additional stakeholder engagement activity (including the mechanism used to engage the stakeholder) and the results of such activity;

(6) The conduct and results of any delivery/demonstration activity occurring since the most recently submitted Report update, including the identification of any stakeholder participants;

(7) An acknowledgement of the submission of any technical or progress report that would satisfy the Public Access requirement and whether such submissions are properly represented in the USDOT Research Hub and the National Transportation Library; and

(8) Any information on instances of any use of an output of research conducted under this contract.

(End of clause)

1252.236–70 Special Precautions for Work at Operating Airports.

As prescribed in 1236.570, insert the following clause:

Special Precautions for Work at Operating Airports (DATE)

(a) When work is to be performed at an operating airport, the Contractor must arrange its work schedule so as not to interfere with flight operations. Such operations will take precedence over construction convenience. Any operations of the Contractor that would otherwise interfere with or endanger the operations of aircraft shall be performed only at times and in the manner directed by the Contracting Officer. The Government will make every effort to reduce the disruption of the Contractor's operation.

(b) Unless otherwise specified by local regulations, all areas in which construction operations are underway shall be marked by yellow flags during daylight hours and by red lights at other times. The red lights along the edge of the construction areas within the existing aprons shall be the electric type of not less than 100 watts intensity placed and supported as required. All other construction markings on roads and adjacent parking lots may be either electric or battery type lights. These lights and flags shall be placed to outline the construction areas and the distance between any two flags or lights shall not be greater than 25 feet. The Contractor shall provide adequate watch to maintain the lights in working condition at all times other than daylight hours. The hour of beginning and the hour of ending of daylight will be determined by the Contracting Officer.

(c) All equipment and material in the construction areas or when moved outside the construction area shall be marked with airport safety flags during the day and when directed by the Contracting Officer, with red obstruction lights at nights. All equipment operating on the apron, taxiway, runway, and intermediate areas after darkness hours shall have clearance lights in conformance with instructions from the Contracting Officer. No construction equipment shall operate within 50 feet of aircraft undergoing fuel operations. Open flames are not allowed on the ramp except at times authorized by the Contracting Officer.

(d) Trucks and other motorized equipment entering the airport or construction area shall do so only over routes determined by the Contracting Officer. Use of runways, aprons, taxiways, or parking areas as truck or equipment routes will not be permitted unless specifically authorized for such use. Flag personnel shall be furnished by the Contractor at points on apron and taxiway for safe guidance of its equipment over these areas to assure right of way to aircraft. Areas and routes used during the contract must be returned to their original condition by the Contractor. The maximum speed allowed at the airport shall be

established by airport management. Vehicles shall be operated to be under safe control at all times, weather and traffic conditions considered. Vehicles must be equipped with head and tail lights during the hours of darkness.

(End of clause)

1252.237–70 Qualifications of Contractor Employees.

As prescribed in 1237.110–70(a), insert the following clause:

Qualifications of Contractor Employees (DATE)

(a) *Definition. Sensitive information,* as used in this clause, means any information that, if subject to unauthorized access, modification, loss, or misuse, or is proprietary data, could adversely affect the national interest, the conduct of Federal programs, or the privacy of individuals specified in The Privacy Act, 5 U.S.C. 552a, but has not been specifically authorized under criteria established by an Executive Order or an Act of Congress to be kept secret in the interest of national defense or foreign policy.

(b) Work under this contract may involve access to DOT facilities, sensitive information or resources (*e.g.,* information technology including computer systems). To protect sensitive information, which shall not be disclosed by the contractor unless authorized in writing by the Contracting Officer, the Contractor shall provide training to any contractor employees authorized to access sensitive information, and upon request of the Government, provide information to assist the Government in determining an individual's suitability to have authorization.

(c) The Contracting Officer may require dismissal from work under this contract those employees deemed incompetent, careless, insubordinate, unsuitable, or otherwise objectionable, or whose continued employment is deemed contrary to the public interest or inconsistent with the best interest of national security.

(d) Contractor employees working on this contract must complete such forms as may be necessary for security or other reasons, including the conduct of background investigations to determine suitability. Completed forms shall be submitted as directed by the Contracting Officer. Upon the Contracting Officer's Representative (COR) or Program Manager's (PM) request, the Contractor's employees shall be fingerprinted, or subject to other investigations as required.

(e) The Contractor shall ensure that contractor employees working on this contract are citizens of the United States of America or non-citizens who have been lawfully admitted for permanent residence or employment (indicated by immigration status) as evidenced by U.S. Citizenship and Immigration Services (USCIS) documentation.

(f) Subcontract flow-down requirement. The Contractor shall include this clause, including this paragraph (f), in subcontracts whenever this clause is included in the prime contractor's contract.

(End of clause)

1252.237–71 Certification of Data.

As prescribed in 1237.7003, insert the following provision:

Certification of Data (DATE)

(a) The offeror represents and certifies that to the best of its knowledge and belief, the information and/or data (*e.g.,* company profile; qualifications; background statements; brochures) submitted with its offer is current, accurate, and complete as of the date of its offer.

(b) The offeror understands that any inaccurate data provided to the Department of Transportation may subject the offeror, its subcontractors, its employees, or its representatives to: (1) Prosecution for false statements pursuant to 18 U.S.C. 1001 and/or; (2) enforcement action for false claims or statements pursuant to the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801–3812 and 49 CFR part 31 and/or; (3) termination for default or for cause under any contract resulting from its offer and/or; (4) debarment or suspension.

(c) The offeror agrees to obtain a similar certification from its subcontractors and submit such certification(s) with its offer.

Signature: _____

Date: _____

Typed Name and Title: _____

Company Name: _____

_____

This certification concerns a matter within the jurisdiction of an agency of the United States and the making of a false, fictitious, or fraudulent certification may render the maker subject to prosecution under 18 U.S.C. 1001.

(End of provision)

1252.237–72 Prohibition on Advertising.

As prescribed in 1213.7101 and 1237.7003, insert the following clause:

Prohibition on Advertising (DATE)

The contractor or its representatives (including training instructors) shall not advertise or solicit business from attendees for private, non-Government training during contracted-for training sessions. This prohibition extends to unsolicited oral comments, distribution or sales of written materials, and/or sales of promotional videos or audio tapes. The contractor agrees to insert this clause in its subcontracts.

(End of clause)

1252.237–73 Key Personnel.

As prescribed in 1237.110–70(b), insert the following clause:

Key Personnel (DATE)

(a) The personnel as specified below are considered essential to the work being performed under this contract and may, with the consent of the contracting parties, be changed during the course of the contract by adding or deleting personnel, as appropriate.

(b) Before removing, replacing, or diverting any of the specified individuals, the Contractor shall notify the contracting officer, in writing, before the change becomes effective. The Contractor shall submit information to support the proposed action to enable the contracting officer to evaluate the potential impact of the change on the contract. The Contractor shall not remove or replace personnel under this contract until the Contracting Officer approves the change in writing. The key personnel under this contract are:

[*Contracting Officer insert specified key personnel*]

(End of clause)

1252.239–70 Security Requirements for Unclassified Information Technology Resources.

As prescribed in 1239.106–70, insert the following clause:

Security Requirements for Unclassified Information Technology Resources (DATE)

(a) The Contractor shall be responsible for information technology security for all systems connected to a Department of Transportation (DOT) network or operated by the Contractor for DOT, regardless of location. This clause is applicable to all or any part of the contract that includes information technology resources or services in which the Contractor has physical or electronic access to DOT information that directly supports the mission of DOT. The term ''information technology,'' as used in this clause, means any equipment or interconnected system or subsystem of equipment, including telecommunications equipment, that is used in the automatic

acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. This includes both major applications and general support systems as defined by OMB Circular A–130. Examples of tasks that require security provisions include—

(1) Hosting of DOT e-Government sites or other IT operations;

(2) Acquisition, transmission, or analysis of data owned by DOT with significant replacement cost should the contractor's copy be corrupted; and

(3) Access to DOT general support systems/major applications at a level beyond that granted the general public, *e.g.,* bypassing a firewall.

(b) The Contractor shall develop, provide, implement, and maintain an IT Security Plan. This plan shall describe the processes and procedures that the Contractor will follow to ensure appropriate security of IT resources developed, processed, or used under this contract. The plan shall describe those parts of the contract to which this clause applies. The Contractor's IT Security Plan shall comply with applicable Federal Laws that include, but are not limited to, 40 U.S.C. 11331, the Federal Information Security Management Act (FISMA) of 2002 and the E-Government Act of 2002. The plan shall meet IT security requirements in accordance with Federal and DOT policies and procedures, and as amended during the term of this contract and include, but are not limited to the following.

(1) OMB Circular A–130, Managing Information as a Strategic Resource;

(2) National Institute of Standards and Technology (NIST) Guidelines;

(3) DOT CIO IT Policy (CIOP) compendium and associated guidelines;

(4) DOT Order 1630.2C, Personnel Security Management; and

(5) DOT Order 1351.37, Departmental Cyber Security Policy.

(c) Within 30 days after contract award, the contractor shall submit the IT Security Plan to the DOT Contracting Officer for review. This plan shall detail the approach contained in the offeror's proposal or sealed bid. Upon acceptance by the Contracting Officer, the Plan shall be incorporated into the contract by contract modification

(d) Within six (6) months after contract award, the Contractor shall submit written proof of IT Security accreditation to the Contracting Officer. Such written proof may be furnished either by the Contractor or by a third party. Accreditation shall be in accordance with DOT policy available from the Contracting Officer upon request. The Contractor shall submit along with this accreditation a final security plan, risk assessment, security test and evaluation, and disaster recovery plan/continuity of operations plan. The accreditation and accompanying documents, to include a final security plan, risk assessment, security test and evaluation, and disaster recovery/continuity of operations plan, upon acceptance by the Contracting Officer, will be incorporated into the contract by contract modification.

(e) On an annual basis, the Contractor shall verify in writing to the Contracting Officer that the IT Security Plan remains valid.

(f) The Contractor shall ensure that the official DOT banners are displayed on all DOT systems (both public and private) operated by the Contractor that contain Privacy Act information before allowing anyone access to the system. The DOT CIO will make official DOT banners available to the Contractor.

(g) The Contractor shall screen all personnel requiring privileged access or limited privileged access to systems operated by the Contractor for DOT or interconnected to a DOT network in accordance with DOT Order 1630.2C Personnel Security Management, as amended.

(h) The Contractor shall ensure that its employees performing services under this contract receive annual IT security training in accordance with OMB Circular A–130, FISMA, and NIST requirements, as amended, with a specific emphasis on rules of behavior.

(i) The Contractor shall provide the Government access to the Contractor's and subcontractors' facilities, installations, operations, documentation, databases and personnel used in performance of the contract. The Contractor shall provide access to enable a program of IT inspection (to include vulnerability testing), investigation and audit (to safeguard against threats and hazards to the integrity, availability and confidentiality of DOT data or to the function of information technology systems operated on behalf of DOT), and to preserve evidence of computer crime.

(j) The Contractor shall incorporate and flow down the substance of this clause to all subcontracts that meet the conditions in paragraph (a) of this clause.

(k) The Contractor shall immediately notify the Contracting Officer when an employee who has access to DOT information systems or data terminates employment.

(End of clause)

1252.239–71 Information Technology Security Plan and Accreditation.

As prescribed in 1239.106–70, insert the following provision:

Information Technology Security Plan and Accreditation (DATE)

All offers submitted in response to this solicitation shall address the approach for completing the security plan and accreditation requirements in clause 1252.239–70, Security Requirements for Unclassified and Sensitive Information Technology Resources.

(End of provision)

1252.239–72 Compliance with Safeguarding DOT Sensitive Data Controls.

As prescribed in TAR 1239.7003(a), insert the following clause:

Compliance With Safeguarding DOT Sensitive Data Controls (DATE)

(a) The Contractor shall implement security requirements contained in clause 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting, for all DOT sensitive data on all Contractor information systems that support the performance of this contract.

(b) Contractor information systems not part of an information technology service or system operated on behalf of the Government as part of this contract are not subject to the provisions of this clause.

(c) By submission of this offer, the Offeror represents that it will implement the security requirements specified by National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171 ''Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations'' (*see http://dx.doi.org/10.6028/NIST.SP.800-171*) that are in effect at the time the solicitation is issued or as authorized by the contracting officer.

(d) If the Offeror proposes to vary from any security requirements specified by NIST SP 800–171 in effect at the time the solicitation is issued or as authorized by the Contracting Officer, the Offeror shall submit to the Contracting Officer, for consideration by the DOT Chief Information Officer (CIO), a written explanation of—

(1) Why a particular security requirement is not applicable; or

(2) How the Contractor will use an alternative, but equally effective, security measure to satisfy the requirements of NIST SP 800–171.

(e) The Office of the DOT CIO will evaluate offeror requests to vary from NIST SP 800–171 requirements and

inform the Offeror in writing of its decision before contract award. The Contracting Officer will incorporate accepted variance(s) from NIST SP 800–171 into any resulting contract.

(End of clause)

1252.239–73 Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information.

As prescribed in 1239.7003(b), insert the following clause:

Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information (DATE)

(a) *Definitions.* As used in this clause—

Compromise means disclosure of information to unauthorized persons, or a violation of the security policy of a system, whereby without authorization information is disclosed, modified, destroyed, lost, or copied to unauthorized media—whether intentionally or unintentionally.

DOT sensitive data means unclassified information that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Governmentwide policies, and is—

(1) Marked or otherwise identified in the contract, task order, or delivery order and provided to the Contractor by or on behalf of DOT in support of the performance of the contract; or

(2) Collected, developed, received, transmitted, used, or stored by or on behalf of the Contractor in support of the performance of the contract.

Cyber incident means actions taken through the use of computer networks that result in a compromise or an actual or potentially adverse effect on an information system and/or the information residing therein.

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.

Media means physical devices or writing surfaces including, but not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which DOT sensitive data is recorded, stored, or printed within a covered contractor information system.

DOT technical information means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information. Examples of technical information include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog-item identifications, data sets, studies and analyses and related information, and computer software executable code and source code.

(b) *Restrictions.* (1) The Contractor agrees that the following conditions apply to any information it receives or creates in the performance of this contract derived from a third-party's reporting of a cyber incident, pursuant to TAR clause, 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting (or derived from such information obtained under that clause):

(2) The Contractor shall access and use the information only for the purpose of furnishing advice or technical assistance directly to the Government in support of the Government's activities related to clause 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting, and shall not be used for any other purpose.

(3) The Contractor shall protect the information against unauthorized release or disclosure.

(4) The Contractor shall ensure that its employees are subject to use and non-disclosure obligations consistent with this clause prior to the employees being provided access to or use of the information.

(5) The third-party contractor that reported the cyber incident is a third-party beneficiary of the non-disclosure agreement between the Government and Contractor, as required by paragraph (b)(3) of this clause.

(6) A breach of these obligations or restrictions may subject the Contractor to—

(i) Criminal, civil, administrative, and contractual penalties and other appropriate remedies; and

(ii) Civil actions for damages and other appropriate remedies by the third party that reported the cyber incident, as a third-party beneficiary of this clause.

(c) *Subcontract flowdown requirement.* The Contractor shall include this clause, including this paragraph (c), in subcontracts, or similar contractual instruments, for services that include support for the Government's activities related to safeguarding covered DOT sensitive data and cyber incident reporting, including subcontracts for commercial items, without alteration, except to identify the parties.

(End of clause)

1252.239–74 Safeguarding DOT Sensitive Data and Cyber Incident Reporting.

As prescribed in 1239.7003(c), insert the following clause:

Safeguarding DOT Sensitive Data and Cyber Incident Reporting (DATE)

(a) *Definitions.* As used in this clause—

Adequate security means protective measures that balance and are commensurate with the impact and consequences of the loss, misuse, or unauthorized access to, or modification of information against the probability of occurrence.

Compromise means disclosure of information to unauthorized persons, or a violation of the security policy of a system, whereby without authorization information is disclosed, modified, destroyed, lost, or copied to unauthorized media—whether intentionally or unintentionally.

Contractor attributional/proprietary information means information that identifies the Contractor(s), whether directly or indirectly, by the grouping of information that can be traced back to the Contractor(s) (*e.g.,* program description, facility locations), personally identifiable information, trade secrets, commercial or financial information, or other commercially sensitive information not customarily shared outside of a company.

Covered contractor information system means an unclassified information system owned or operated by or for a Contractor and that processes, stores, or transmits DOT sensitive data.

DOT sensitive data means unclassified information that requires safeguarding or dissemination controls pursuant to and consistent with law, regulation, and Government-wide policies, and is—

(1) Marked or otherwise identified in the contract, task order, or delivery order and provided to the Contractor by or on behalf of DOT in support of the performance of the contract; or

(2) Collected, developed, received, transmitted, used, or stored by or on behalf of the Contractor in support of the performance of the contract.

Cyber incident means actions taken through the use of computer networks that result in a compromise or an actual or potentially adverse effect on an information system and/or the information residing therein.

Federal record as defined in 44 U.S.C. 3301, includes all recorded information, regardless of form or characteristics, made or received by a Federal agency

under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them. The term Federal record—

(1) Includes all DOT records;

(2) Does not include personal materials;

(3) Applies to records created, received, or maintained by Contractors pursuant to a DOT contract; and

(4) May include deliverables and documentation associated with deliverables.

Forensic analysis means the practice of gathering, retaining, and analyzing computer-related data for investigative purposes in a manner that maintains the integrity of the data.

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.

Malicious software means computer software or firmware intended to perform an unauthorized process that will have adverse impact on the confidentiality, integrity, or availability of an information system. This definition includes a virus, worm, Trojan horse, or other code-based entity that infects a host, as well as spyware and some forms of adware.

Media means physical devices or writing surfaces including, but not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which DOT sensitive data is recorded, stored, or printed within a covered contractor information system.

Operationally critical support means supplies or services designated by the Government as critical for airlift, sealift, intermodal transportation services, or logistical support that is essential to the mobilization, deployment, or sustainment of the Armed Forces in a contingency operation.

Spillage security incident means an incident that results in the transfer of classified or unclassified information onto an information system not accredited (*i.e.,* authorized) for the appropriate security level.

Technical information means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information, regardless of whether or not the clause is incorporated in this solicitation or contract. Examples of technical information include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog-item identifications, data sets, studies and analyses and related information, and computer software executable code and source code.

(b) *Adequate security.* The Contractor shall provide adequate security on all covered contractor information systems. To provide adequate security, the Contractor shall implement, at a minimum, the following information security protections:

(1) For covered Contractor information systems that are part of an information technology (IT) service or system operated on behalf of the Government, the following security requirements apply:

(i) Cloud computing services shall be subject to the security requirements specified in the clause 1252.239–76, Cloud Computing Services, of this contract.

(ii) Any other such IT service or system (*i.e.,* other than cloud computing) shall be subject to the security requirements specified elsewhere in this contract.

(2) For covered Contractor information systems that are not part of an IT service or system operated on behalf of the Government and therefore are not subject to the security requirement specified at paragraph (b)(1) of this clause, the following security requirements apply:

(i) Except as provided in paragraph (2)(b)(iv) of this clause, the contractor information system shall be subject to the security requirements in National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171, ''Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations'' (available via the internet at *http://dx.doi.org/10.6028/NIST.SP.800-171*) in effect at the time the solicitation is issued or as authorized by the Contracting Officer.

(ii) The Contractor shall implement NIST SP 800–171 no later than 30 days after the award of this contract. The Contractor shall notify Contract Officer of any security requirements specified by NIST SP 800–171 not implemented within 30 days of time of contract award.

(iii) If the Offeror proposes to vary from any security requirements specified by NIST SP 800–171 in effect at the time the solicitation is issued or as authorized by the Contracting Officer, the Offeror shall submit to the Contracting Officer, for consideration by the DOT Chief Information Officer (CIO), a written explanation of—

(A) Why a particular security requirement is not applicable; or

(B) How the Contractor will use an alternative, but equally effective, security measure to satisfy the requirements of NIST SP 800–171.

(iv) The Office of the DOT CIO will evaluate offeror requests to vary from NIST SP 800–171 requirements and inform the Offeror in writing of its decision before contract award. The Government will incorporate accepted variance(s) from NIST SP 800–171 into any resulting contract.

(v) The Contractor need not implement any security requirement adjudicated by an authorized representative of the DOT CIO to be nonapplicable or to have an alternative, but equally effective, security measure that may be implemented in its place.

(vi) If the DOT CIO has previously adjudicated the contractor's requests indicating that a requirement is not applicable or that an alternative security measure is equally effective, a copy of that approval shall be provided to the Contracting Officer when requesting its recognition under this contract

(3) If the Contractor intends to use an external cloud service provider to store, process, or transmit any DOT sensitive data in performance of this contract, the Contractor shall require and ensure that the cloud service provider meets security requirements equivalent to those established by the Government for the Federal Risk and Authorization Management Program (FedRAMP) Moderate baseline (*https://www.fedramp.gov/resources/documents/*) and that the cloud service provider complies with requirements in paragraphs (c) through (h) of this clause for cyber incident reporting, malicious software, media preservation and protection, access to additional information and equipment necessary for forensic analysis, and cyber incident damage assessment.

(4) The Contractor will apply other information systems security measures when the Contractor reasonably determines that information systems security measures, in addition to those identified in paragraphs (b)(1) and (b)(2) of this clause, may be required to provide adequate security in a dynamic environment or to accommodate special circumstances (*e.g.,* medical devices) and any individual, isolated, or temporary deficiencies based on an

assessed risk or vulnerability. These measures may be addressed in a system security plan, as required by, clause 1252.239–70, Security Requirements for Unclassified Information Technology Resources.

(c) *Cyber incident reporting requirement.* (1) When the Contractor discovers a cyber incident that affects a covered contractor information system or the DOT sensitive data residing therein, or that affects the contractor's ability to perform the requirements of the contract that are designated as operationally critical support and identified in the contract, the Contractor shall—

(i) Conduct a review for evidence of compromise of DOT sensitive data, including, but not limited to, identifying compromised computers, servers, specific data, and user accounts. This review shall also include analyzing covered contractor information system(s) that were part of the cyber incident, as well as other information systems on the Contractor's network(s), that may have been accessed as a result of the incident in order to identify compromised DOT sensitive data or that affect the Contractor's ability to provide operationally critical support; and

(ii) Rapidly report cyber incidents to DOT Security Operations Center (SOC) 24x7x365 at phone number: 571–209–3080 (Toll Free: 1–866–580–1852).

(d) *Cyber incident report.* The cyber incident report shall be treated as information created by or for DOT and shall include, at a minimum, the required elements in paragraph (c)(1)(i).

(e) *Spillage.* Upon notification by the Government of a spillage, or upon the Contractor's discovery of a spillage, the Contractor shall cooperate with the Contracting Officer to address the spillage in compliance with DOT policy.

(f) *Malicious software.* When the Contractor or subcontractors discover and isolate malicious software in connection with a reported cyber incident, the Contractor shall submit the malicious software to DOT in accordance with instructions provided by the Contracting Officer. Do not send the malicious software to the Contracting Officer.

(g) *Media preservation and protection.* When a Contractor discovers a cyber incident has occurred, the Contractor shall preserve and protect images of all known affected information systems identified in paragraph (c)(1)(i) of this clause and all relevant monitoring/packet capture data for at least 90 days from the submission of the cyber incident report to allow DOT to request the media or decline interest.

(h) *Access to additional information or equipment necessary for forensic analysis.* Upon request by DOT, the Contractor shall provide DOT with access to additional information or equipment that is necessary to conduct a forensic analysis.

(i) *Cyber incident damage assessment activities.* If DOT elects to conduct a damage assessment, the Contracting Officer will request that the Contractor provide all of the damage assessment information gathered in accordance with paragraph (c) of this clause.

(j) *DOT safeguarding and use of Contractor attributional/proprietary information.* The Government shall protect against the unauthorized use or release of information obtained from the Contractor (or derived from information obtained from the Contractor) under this clause that includes Contractor attributional/proprietary information, including such information submitted in accordance with paragraph (c). To the maximum extent practicable, the Contractor shall identify and mark attributional/proprietary information. In making an authorized release of such information, the Government will implement appropriate procedures to minimize the Contractor attributional/proprietary information that is included in such authorized release consistent with applicable law.

(k) *Use and release of Contractor attributional/proprietary information not created by or for DOT.* Information that is obtained from the Contractor (or derived from information obtained from the Contractor) under this clause that is not created by or for DOT is authorized to be released outside of DOT—

(1) To entities with missions that may be affected by such information;

(2) To entities that may be called upon to assist in the diagnosis, detection, or mitigation of cyber incidents;

(3) To Government entities that conduct counterintelligence or law enforcement investigations;

(4) To a support services contractor (''recipient'') that is directly supporting Government activities under a contract that includes the clause at 1252.239–73, Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information; or

(5) With Contractor's consent; or

(6) As otherwise required by law.

(l) *Use and release of Contractor attributional/proprietary information created by or for DOT.* Information that is obtained from the Contractor (or derived from information obtained from the Contractor) under this clause that is created by or for DOT (including the information submitted pursuant to paragraph (c) of this clause) is authorized to be used and released outside of DOT for purposes and activities authorized by paragraph (j) of this clause, and for any other lawful Government purpose or activity, subject to all applicable statutory, regulatory, and policy based restrictions on the Government's use and release of such information.

(m) The Contractor shall conduct activities under this clause in accordance with applicable laws and regulations on the interception, monitoring, access, use, and disclosure of electronic communications and data.

(n) *Other safeguarding or reporting requirements.* The safeguarding and cyber incident reporting required by this clause in no way abrogates the Contractor's responsibility for other safeguarding or cyber incident reporting pertaining to its unclassified information systems as required by other applicable clauses of this contract, or as a result of other applicable Government statutory or regulatory requirements.

(o) *Subcontract flowdown requirements.* The Contractor shall—

(1) Include this clause, including this paragraph (o), in subcontracts, or similar contractual instruments, for operationally critical support, or for which subcontract performance will involve DOT sensitive data, including subcontracts for commercial items, without alteration, except to identify the parties. The Contractor shall determine if the information required for subcontractor performance retains its identity as DOT sensitive data and will require protection under this clause, and, if necessary, consult with the Contracting Officer; and

(2) Require subcontractors to—

(i) Notify the prime Contractor (or next higher-tier subcontractor) when submitting a request to vary from a NIST SP 800–171 security requirement to the Contracting Officer, in accordance with paragraph(b) (2)(iii) of this clause; and

(ii) Provide the incident report number, automatically assigned by DOT, to the prime Contractor (or next higher-tier subcontractor) as soon as practicable, when reporting a cyber incident to DOT as required in paragraph (c) of this clause.

(End of clause)

1252.239–75 DOT Protection of Information About Individuals, PII, and Privacy Risk Management Requirements.

As prescribed in 1239.7104, insert the following clause:

DOT Protection of Information About Individuals, PII, and Privacy Risk Management Requirements (DATE)

(a) *Compliance with standards.* To the extent Contractor creates, maintains, acquires, discloses, uses, or has access to PII in furtherance of the contract, Contractor shall comply with all applicable Federal law, guidance, and standards and DOT policies pertaining to its protection. Contractor shall notify DOT in writing immediately upon the discovery that Contractor is no longer in compliance with DOT data protection standards with respect to any PII.

(b) *Unanticipated threats.* If new or unanticipated threats or hazards are discovered by either the Government or the Contractor, or if existing safeguards have ceased to function, the discoverer shall immediately bring the situation to the attention of the other party.

(c) *Privacy Act.* The Contractor will—

(1) Comply with the Privacy Act of 1974, 5 U.S.C. 552a, DOT implementing regulations (49 CFR part 10), and DOT policies issued under the Act in the design, development, and/or operation of any system of records on individuals to accomplish a DOT function when the contract specifically identifies the work that the Contractor is to perform.

(2) Include the Privacy Act notification contained in this contract in every solicitation and resulting subcontract and in every subcontract awarded without a solicitation, when the work statement in the proposed subcontract requires the redesign, development, and/or operation of a system of records on individuals that is subject to the Act; and

(3) Include this clause, including this paragraph (c), in all subcontracts awarded under this contract which requires the design, development, and/or operation of such a system of records.

(d) *Privacy Act records.* The Contractor shall not release records subject to the Privacy Act except by the direction of the DOT, regardless of whether DOT or the Contractor maintains the records.

(e) *Confidentiality agreement.* Contractor agrees to execute a confidentiality agreement protecting PII, when necessary, and further agrees not to appropriate such PII for its own use or to disclose such information to third parties unless specifically authorized by DOT in writing.

(f) *Surrender of records.* If at any time during the term of the Contract any part of PII, in any form, that Contractor obtains from or on behalf of DOT ceases to be required by Contractor for the performance of its obligations under the Contract, or upon termination of the Contract, whichever occurs first, Contractor shall, within ten (10) business days, notify DOT and securely return such PII to DOT, or, at DOT's written request destroy, un-install and/or remove all copies of such PII in Contractor's possession or control, or such part of the PII which relates to the part of the Contract which is terminated, or the part no longer required, as appropriate, and certify to DOT that the requested action has been completed.

(g) *NIST FIPS 140–2.* At a minimum, the Contractor shall protect all PII created, collected, used, maintained, or disseminated on behalf of the Department using controls consistent with Federal Information Processing Standard Publication 199 (FIPS 199) moderate confidentiality standards, unless otherwise authorized by the DOT Chief Privacy Officer.

(h) *Protection of sensitive information.* The Contractor shall comply with Government and DOT guidance for protecting PII.

(i) *Breach.* The Contractor shall bear all costs, losses, and damages resulting from the Contractor's breach of these clauses. Contractor agrees to release, defend, indemnify, and hold harmless DOT for claims, losses, penalties, and damages and costs to the extent arising out of Contractor's, or its subcontractor's, negligence, unauthorized use or disclosure of PII and/or Contractor's, or its subcontractor's, breach of its obligations under these clauses.

(j) *Breach reporting.* Contractors shall report breaches involving PII directly to DOT at (202) 385–4357 or 1–(866)–466–5221 within two (2) hours of discovery. Contractor shall provide the incident number automatically assigned by DOT for all breaches reported by the Contractor or any subcontractors to the Contracting Officer.

(k) *Applicability.* Contractor shall inform all principals, officers, employees, agents and subcontractors engaged in the performance of this contract of the obligations contained in these clauses.

(l) *Training.* To the extent necessary and/or required by law, the Contractor shall provide training to employees, agents, and subcontractors to promote compliance with these clauses. The Contractor is liable for any breach of these clauses by any of its principals, officers, employees, agents and subcontractors.

(m) *Subcontractor engagement.* When the Contractor engages a subcontractor in connection with its performance under the contract, and the Contractor provides such subcontractor access to PII, the Contractor shall provide the Contracting Officer with prompt notice of the identity of the subcontractor and the extent of the role that the subcontractor will play in connection with the performance of the contract. This obligation is in addition to any limitations of subcontracting and consent to subcontract requirements identified elsewhere in the clauses and provisions of this contract.

(n) *Subcontract flowdown requirements.* Contractors shall flow down this clause to all subcontracts and purchase orders or other agreements and require that subcontractors incorporate this clause in their subcontracts, appropriately modified for identification of the parties. The Contractor shall enforce the terms of the clause, including action against its subcontractors, their employees and associates or third-parties, for noncompliance. All subcontractors given access to any PII must agree to—

(1) Abide by the clauses set forth herein, including, without limitation, its provisions relating to compliance with data privacy standards for the Protection of Data about Individuals and Breach Notification Controls and Notice of Security and/or Privacy Incident;

(2) Restrict use of PII only for subcontractor's internal business purposes and only as necessary to render services to Contractor in connection with Contractor's performance of its obligations under the contract;

(3) Certify in writing, upon completion of services provided by a subcontractor, that the subcontractor has returned to the Contractor all records containing PII within 30 days of subcontractor's completion of services to Contractor. Failure of subcontractor to return all records containing PII within this period will be reported to DOT as a privacy incident; and

(4) Report breaches involving PII directly to DOT at (202) 385–4357 or 1–(866)–466–5221 within two (2) hours of discovery. Subcontractors shall provide the incident report number automatically assigned by DOT to the prime contractor. Lower-tier subcontractors, likewise, shall report the incident report number automatically assigned by DOT to their higher-tier subcontractor until the prime contractor is reached. Contractor shall provide the DOT incident number to the Contracting Officer.

(End of clause)

1252.239–76 Cloud Computing Services.

As prescribed in 1239.7204(a), insert the following clause:

Cloud Computing Services (DATE)

(a) *Definitions.* As used in this clause—

Authorizing official, as described in Appendix B of DOT Order 1350.37, Departmental Cybersecurity Policy, means the senior Federal official or executive with the responsibility for operating an information system at an acceptable level of risk to organizational operations (including mission, functions, image, or reputation), organizational assets, individuals, other organizations, and the Nation.

Cloud computing means a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (*e.g.,* networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. This includes other commercial terms, such as on-demand self-service, broad network access, resource pooling, rapid elasticity, and measured service. It also includes commercial offerings for software-as-a-service, infrastructure-as-a-service, and platform-as-a-service.

Compromise means disclosure of information to unauthorized persons, or a violation of the security policy of a system, whereby without authorization information is disclosed, modified, destroyed, lost, or copied to unauthorized media—whether intentionally or unintentionally.

Cyber incident means actions taken through the use of computer networks that result in a compromise or an actual or potentially adverse effect on an information system and/or the information residing therein.

*Government dat*a means any information, document, media, or material regardless of physical form or characteristics, that is created or obtained by the Government in the course of official Government business.

Government-related data means any information, document, media, or material regardless of physical form or characteristics that is created or obtained by a Contractor through the storage, processing, or communication of Government data. This does not include contractor's business records *e.g.,* financial records, legal records etc. or data such as operating procedures, software coding or algorithms that are not uniquely applied to the Government data.

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.

Media means physical devices or writing surfaces including, but not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which information is recorded, stored, or printed within an information system.

Spillage security incident means an incident that results in the transfer of classified information onto an information system not accredited (*i.e.,* authorized) for the appropriate security level.

(b) *Cloud computing security requirements.* The requirements of this clause are applicable when using cloud computing to provide information technology services in the performance of the contract.

(1) If the Contractor indicated in its offer that it does not anticipate the use of cloud computing services in the performance of a resultant contract, and after the award of this contract, the Contractor proposes to use cloud computing services in the performance of the contract, the Contractor shall obtain approval from the Contracting Officer prior to utilizing cloud computing services in performance of the contract.

(2) The Contractor shall implement and maintain administrative, technical, and physical safeguards and controls with the security level and services required in accordance with the DOT Order 1351.37, Departmental Cybersecurity Policy, and the requirements of DOT Order 1351.18, Departmental Privacy Risk Management Policy (the versions of each that in effect at the time the solicitation is issued or as authorized by the Contracting Officer), unless notified by the Contracting Officer that this requirement has been waived by the DOT Chief Information Officer.

(3) The Contractor shall maintain all Government data not physically located on DOT premises within the United States, the District of Columbia, and all territories and possessions of the United States, unless the Contractor receives written notification from the Contracting Officer to use another location, in accordance with DOT Policy.

(4) DOT will determine the security classification level for the cloud system in accordance with Federal Information Processing Standard 199; the Contractor will then apply the appropriate set of impact baseline controls as required in the FedRAMP Cloud Computing Security Requirements Baseline document to ensure compliance with security standards. The FedRAMP baseline controls are based on NIST Special Publication 800–53, Security and Privacy Controls for Information Systems and Organizations (version in effect at the time the solicitation is issued or as authorized by the Contracting Officer), Security Control Baselines and also includes a set of additional controls for use within systems providing cloud services to the federal government.

(5) The Contractor shall maintain a security management continuous monitoring environment that meets or exceeds the requirements in the Reporting and Continuous Monitoring section of this contract/task order _____ [*Fill-in: Contracting Officer enter the requirements document paragraph reference number*] based upon the latest edition of FedRAMP Cloud Computing Security Requirements Baseline and FedRAMP Continuous Monitoring Requirements.

(6) The Contractor shall be responsible for the following privacy and security safeguards:

(i) To the extent required to carry out the FedRAMP assessment and authorization process and FedRAMP continuous monitoring, to safeguard against threats and hazards to the security, integrity, and confidentiality of any non-public Government data collected and stored by the Contractor, the Contractor shall provide the Government access to the Contractor's facilities, installations, technical capabilities, operations, documentation, records, and databases.

(ii) The Contractor shall also comply with any additional FedRAMP and DOT Order, cybersecurity and privacy policies.

(7) The Government may perform manual or automated audits, scans, reviews, or other inspections of the vendor's IT environment being used to provide or facilitate services for the Government. In accordance with the Federal Acquisition Regulation (FAR) clause 52.239–1, Privacy or Security Safeguards, the Contractor shall provide the Government access to Contractor's facilities, installations, technical capabilities, operations, documentation, records and databases to carry out a program of inspection. Contractors shall provide access within two hours of notification by the Government. The program of inspection shall include, but is not limited to—

(i) Authenticated and unauthenticated operating system/network vulnerability; scans;

(ii) Authenticated and unauthenticated web application vulnerability scans;

(iii) Authenticated and unauthenticated database application vulnerability scans; and

(8) Automated scans can be performed by Government personnel, or agents acting on behalf of the Government, using Government operated equipment, and Government specified tools.

(9) If new or unanticipated threats or hazards are discovered by either the Government or the Contractor, or if existing safeguards have ceased to function, the discoverer shall immediately bring the situation to the attention of the other party.

(10) If the vendor chooses to run its own automated scans or audits, results from these scans may, at the Government's discretion, be accepted in lieu of Government performed vulnerability scans. In these cases, the Government will approve scanning tools and their configuration. In addition, the Contractor shall provide complete results of vendor-conducted scans to the Government.

(c) *Limitations on access to and use and disclosure of Government data and Government-related data.*

(1) The Contractor shall not access, use, or disclose Government data unless specifically authorized by the terms of this contract or a task order or delivery order issued hereunder.

(i) If authorized by the terms of this contract or a task order or delivery order issued hereunder, any access to, or use or disclosure of, Government data shall only be for purposes specified in this contract or task order or delivery order.

(ii) The Contractor shall ensure that its employees are subject to all such access, use, and disclosure prohibitions and obligations.

(iii) These access, use, and disclosure prohibitions and obligations shall survive the expiration or termination of this contract.

(2) The Contractor shall use Government-related data only to manage the operational environment that supports the Government data and for no other purpose unless otherwise permitted with the prior written approval of the Contracting Officer.

(d) *Cloud computing services cyber incident reporting.* The Contractor shall report all cyber incidents related to the cloud computing service provided under this contract. To DOT via the DOT Security Operations Center (SOC) 24 hours-a-day, 7 days-a-week, 365 days a year (24x7x365) at phone number: 571–209–3080 (Toll Free: 866–580–1852) within 2 hours of discovery.

(e) *Spillage.* Upon notification by the Government of a spillage, or upon the Contractor's discovery of a spillage, the Contractor shall cooperate with the Contracting Officer to address the spillage in compliance with agency procedures.

(f) *Malicious software.* The Contractor or subcontractors that discover and isolate malicious software in connection with a reported cyber incident shall submit the malicious software in accordance with instructions provided by the Contracting Officer.

(g) *Media preservation and protection.* When a Contractor discovers a cyber incident has occurred, the Contractor shall preserve and protect images of all known affected information systems identified in the cyber incident report (*see* paragraph 5 of this clause) and all relevant monitoring/packet capture data for at least 90 days from the submission of the cyber incident report to allow DOT to request the media or decline interest.

(h) *Access to additional information or equipment necessary for forensic analysis.* Upon request by DOT, the Contractor shall provide DOT with access to additional information or equipment that is necessary to conduct a forensic analysis.

(i) *Cyber incident damage assessment activities.* If DOT elects to conduct a damage assessment, the Contracting Officer will request that the Contractor provide all of the damage assessment information gathered in accordance with paragraph 7 of this clause.

(j) *Subcontract flowdown requirement.* The Contractor shall include this clause, including this paragraph (j), in all subcontracts that involve or may involve cloud services, including subcontracts for commercial items.

(End of clause)

1252.239–77 Data Jurisdiction.

As prescribed in 1239.7204(b), insert a clause substantially as follows:

Data Jurisdiction (DATE)

The Contractor shall identify all data centers that the data at rest or data backup will reside, including primary and replicated storage. The Contractor shall ensure that all data centers not physically located on DOT premises reside within the United States, the District of Columbia, and all territories and possessions of the United States, unless otherwise authorized by the DOT CIO. The Contractor shall provide a Wide Area Network (WAN), with a minimum of _____ [*Contracting Officer fill-in: Insert specific number*] data center facilities at _____ [*Contracting Officer fill-in number*] different geographic locations with at least _____ [*Contracting Officer fill-in number*] Internet Exchange Point (IXP) for each price offering. The Contractor shall provide internet bandwidth at the minimum of _____ [*Contracting Officer fill-in applicable gigabytes*] GB.

(End of clause)

1252.239–78 Validated Cryptography for Secure Communications.

As prescribed in 1239.7204(c), insert a clause substantially as follows:

Validated Cryptography for Secure Communications (DATE)

(a) The Contractor shall use only cryptographic mechanisms that comply with _____ [*Contracting Officer insert FIPS 140–2 level #*]. All deliverables shall be labeled _____ [*Contracting Officer insert appropriate label such as ''For Official Use Only'' (FOUO) or other DOT-agency selected designation per document sensitivity*].

(b) External transmission/dissemination of _____ [*Contracting Officer fill-in: e.g., labeled deliverables*] to or from a Government computer must be encrypted. Certified encryption modules must be used in accordance with _____ [*Contracting Officer shall insert the standard, such as FIPS PUB 140–2, ''Security requirements for Cryptographic Modules.''*

(End of clause)

1252.239–79 Authentication, Data Integrity, and Non-Repudiation.

As prescribed in 1239.7204(d), insert a clause substantially as follows:

Authentication, Data Integrity, and Non-Repudiation (DATE)

The Contractor shall provide a [*Fill-in: Contracting Officer fill-in the ''cloud service'' name*] system that implements _____ [*Contracting Officer insert the required level (1–4) of FIPS 140–2 encryption standard*] that provides for origin authentication, data integrity, and signer non-repudiation.

(End of clause)

1252.239–80 Audit Record Retention for Cloud Service Providers.

As prescribed in 1239.7204(e), insert the following clause:

Audit Record Retention for Cloud Service Providers (DATE)

(a) The Contractor shall support a system in accordance with the requirement for Federal agencies to manage their electronic records in accordance with 36 CFR 1236.20 and 1236.22, including but not limited to capabilities such as those identified in DoD STD–5015.2 V3, Electronic Records Management Software Applications

Design Criteria Standard, NARA Bulletin 2008–05, July 31, 2008, Guidance concerning the use of email archiving applications to store email, and NARA Bulletin 2010–05 September 08, 2010, Guidance on Managing Records in Cloud Computing Environments.

(b) The Contractor shall maintain records to retain functionality and integrity throughout the records' full lifecycle including—

(1) Maintenance of links between records and metadata; and

(2) Categorization of records to manage retention and disposal, either through transfer of permanent records to NARA or deletion of temporary records in accordance with NARA approved retention schedules.

(End of clause)

1252.239–81 Cloud Identification and Authentication (Organizational Users) Multi-Factor Authentication.

As prescribed in 1239.7204(f), insert the following clause:

Cloud Identification and Authentication (Organizational Users) Multi-Factor Authentication (DATE)

The Contractor shall support a secure, multi-factor method of remote authentication and authorization to identified Government Administrators that will allow Government-designated personnel the ability to perform management duties on the system. The Contractor shall support multi-factor authentication in accordance with National Institute of Standards and Technology (NIST) Federal Information Processing Standards (FIPS) Publication (PUB) Number 201–2, Personal Identity Verification (PIV) of Federal Employees and Contractors, or NIST issued successor publications, and OMB implementation guidance for personal identity verification.

(End of clause)

1252.239–82 Identification and Authentication (Non-Organizational Users).

As prescribed in 1239.7204(g), insert the following clause:

Identification and Authentication (Non-Organizational Users) (DATE)

The Contractor shall support a secure, multi-factor method of remote authentication and authorization to identified Contractor Administrators that will allow Contractor designated personnel the ability to perform management duties on the system as required by the contract.

(End of clause)

1252.239–83 Incident Reporting Timeframes.

As prescribed in 1239.7204(h), insert the following clause:

Incident Reporting Timeframes (DATE)

(a) The Contractor shall report all computer security incidents to the DOT Security Operations Center (SOC) in accordance with Subpart 1239.70—Information Security and Incident Response Reporting.

(b) Contractors and subcontractors are required to report cyber incidents directly to DOT via the DOT SOC 24 hours-a-day, 7 days-a-week, 365 days a year (24x7x365) at phone number: 571–209–3080 (Toll Free: 866–580–1852) within 2 hours of discovery, regardless of the incident category. See 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting.

(End of clause)

1252.239–84 Media Transport.

As prescribed in 1239.7204(i), insert a clause substantially as follows:

Media Transport (DATE)

(a) The Contractor shall document activities associated with the transport of DOT information stored on digital and non-digital media and employ cryptographic mechanisms to protect the confidentiality and integrity of this information during transport outside of controlled areas. This applies to—

(1) Digital media, containing DOT or other Federal agency or other sensitive or third-party provided information that requires protection, that is transported outside of controlled areas must be encrypted using FIPS 140–2 [*Contracting Officer insert required encryption mode, based on FIPS 199 risk category*]; and

(2) Nondigital media must be secured using the same policies and procedures as paper.

(b) Contractors shall ensure accountability for media, containing DOT or other Federal agency or other sensitive or third-party provided information that is transported outside of controlled areas must ensure accountability. This can be accomplished through appropriate actions such as logging and a documented chain of custody form.

(c) DOT or other Federal agency sensitive or third-party provided information that resides on mobile/portable devices (*e.g.,* USB flash drives, external hard drives, and SD cards) must be encrypted using FIPS 140–2 [*Contracting Officer insert the required encryption mode based on FIPS 199 risk category*]. All Federal agency data residing on laptop computing devices must be protected with NIST-approved encryption software.

(End of clause)

1252.239–85 Personnel Screening—Background Investigations.

As prescribed in 1239.7204(j), insert the clause as follows:

Personnel Screening—Background Investigations (DATE)

(a) Contractors shall provide support personnel who are U.S. persons maintaining a NACI clearance or greater in accordance with OMB memorandum M–05–24, Section C. (*see http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-24.pdf*).

(b) The Contractor shall furnish documentation reflecting favorable adjudication of background investigations for all personnel supporting the system. The Contractor shall also comply with Executive Order 12968, Access to Classified Information. DOT separates the risk levels for personnel working on Federal computer systems into three categories: Low risk, moderate risk, and high risk. The Contractor is responsible for the cost of meeting all security requirements and maintaining assessment and authorization.

(c) The Contractor's employees with access to DOT systems containing sensitive information may be required to obtain security clearances (*i.e.,* Confidential, Secret, or Top Secret). National Security work designated ''special sensitive,'' ''critical sensitive,'' or ''non-critical sensitive,'' will determine the level of clearance required for contractor employees. Personnel security clearances for national security contracts in DOT will be processed according to the Department of Defense National Industrial Security Program Operating Manual (NISPOM).

(d) The Contracting Officer, through the Contracting Officer's Representative (COR) or Program Manager will ensure that all required information is forwarded to the Federal Protective Service (FPS) in accordance with the DOT Policy. FPS will then contact each Applicant with instructions for completing required forms and releases for the type of personnel investigation requested.

(e) Applicants will not be reinvestigated if a prior favorable adjudication is on file with FPS, OPM or DoD, there has been no break in service, and the position is identified at the same or lower risk level. Once a favorable FBI Criminal History Check

(Fingerprint Check) has been returned, Applicants may receive a DOT identity credential (if required) and initial access to information systems holding DOT information.

(End of clause)

1252.239–86 Boundary Protection—Trusted internet Connections.

As prescribed in 1239.7204(k), insert the clause as follows:

Boundary Protection—Trusted Internet Connections (DATE)

The Contractor shall ensure that Federal information, other than non-sensitive information, being transmitted from Federal government entities to external entities using cloud services is inspected by Trusted internet Connections (TIC) processes or the Contractor shall route all external connections through a Trusted internet Connection (TIC).

(End of clause)

1252.239–87 Protection of Information at Rest.

As prescribed in 1239.7204(l), insert the clause as follows:

Protection of Information at Rest and in Transit (DATE)

The Contractor shall provide security mechanisms for handling data at rest and in transit in accordance with FIPS 140–2 _____ [*Contracting officer insert encryption standard, based on NIST FIPS 199 categorization*].

(End of clause)

1252.239–88 Security Alerts, Advisories, and Directives.

As prescribed in 1239.7204(m), insert the clause as follows:

Security Alerts, Advisories, and Directives (DATE)

The Contractor shall provide a list of its personnel, identified by name and role, assigned system administration, monitoring, and/or security responsibilities and are designated to receive security alerts, advisories, and directives and individuals responsible for the implementation of remedial actions associated with them.

(End of clause)

1252.239–89 Technology Modernization.

As prescribed in 1239.7303(a), insert the following clause:

Technology Modernization (DATE)

(a) *Modernization approach.* After issuance of the contract, the Government may solicit, and the Contractor is encouraged to propose independently, a modernization approach to the hardware, software, specifications, or other requirements of the contract. This modernization approach may be proposed to increase efficiencies (both system and process level), reduce costs, strengthen the cyber security posture, or for any other purpose which presents an advantage to the Government. Furthermore, the modernization approach should, to the maximum extent practicable, align with how the commercial sector would solve the problem.

(b) *Proposal requirements.* As part of the proposed changes, the Contractor shall submit a price or cost proposal to the Contracting Officer for evaluation. Those proposed modernized improvements that are acceptable to the Government will be processed as modifications to the contract. At a minimum, the Contractor shall submit the following information with each proposal:

(1) A summary of how the modernized proposal aligns with the commercial sector approach and how the current approach is out of alignment/differs;

(2) A description of the difference between the existing contract requirement and the proposed change, and the comparative advantages and disadvantages of each;

(3) Itemized requirements of the contract that must be changed if the proposal is adopted and the proposed revision to the contract for each such change;

(4) An estimate of the changes in performance and price or cost, if any, that will result from adoption of the proposal;

(5) An evaluation of the effects the proposed changes would have on collateral costs to the Government, such as Government-furnished property costs, costs of related items, and costs of maintenance, operation and conversion (including Government application software);

(6) A statement of the schedule for contract modification adopting the proposal that maximizes benefits of the changes during the remainder of the contract including supporting rationale; and

(7) Identification of impacts on contract cost and schedule. The Government is not liable for proposal preparation costs or for any delay in acting upon any proposal submitted pursuant to this clause.

(c) *Withdrawal.* The Contractor has a right to withdraw, in whole or in part, any proposal not adopted by contract modification within the period specified in the proposal. The decision of the Contracting Officer whether to accept any such proposal under this contract is final and not subject to the ''Disputes'' clause of this contract.

(d) *Product testing.* If the Government wishes to test and evaluate any item(s) proposed, the Contracting Officer will issue written directions to the Contractor specifying what item(s) will be tested, where and when the item(s) will be tested, to whom the item(s) is to be delivered, and the number of days (not to exceed 90 calendar days) that the item will be tested.

(e) *Contract modification.* The Contracting Officer may accept any proposal submitted pursuant to this clause by giving the Contractor written notice thereof. This written notice will be given by issuance of a modification to the contract. Until the Government issues a modification incorporating a proposal under this contract, the Contractor shall remain obligated to perform in accordance with the requirements, terms, and conditions of the existing contract.

(f) *Change orders.* If a proposal submitted pursuant to this clause is accepted and applied to this contract, the equitable adjustment increasing or decreasing the price or cost-plus-fixed-fee (CPFF) shall be in accordance with the procedures of the applicable ''Changes'' clause incorporated by reference in the contract. The resulting contract modification will state that it is made pursuant to this clause.

(End of clause)

1252.239–90 Technology Upgrades/Refreshment.

As prescribed in 1239.7303(b), insert the following clause:

Technology Upgrades/Refreshment (DATE)

(a) *Upgrade/refreshment approach.* After issuance of the contract, the Government may solicit, and the Contractor is encouraged to propose independently, technology improvements to the hardware, software, specifications, or other requirements of the contract. These improvements may be proposed to save money, to improve performance, to save energy, to satisfy increased data processing requirements, or for any other purpose that presents a technological advantage to the Government. As part of the proposed changes, the Contractor shall submit a price or cost proposal to the Contracting Officer for evaluation. Those proposed technology improvements that are acceptable to the Government will be processed as modifications to the contract. As a minimum, the following

information shall be submitted by the Contractor with each proposal:

(1) A description of the difference between the existing contract requirement and the proposed change, and the comparative advantages and disadvantages of each;

(2) Itemized requirements of the contract that must be changed if the proposal is adopted, and the proposed revision to the contract for each such change;

(3) An estimate of the changes in performance and price or cost, if any, that will result from adoption of the proposal;

(4) An evaluation of the effects the proposed changes would have on collateral costs to the Government, such as Government-furnished property costs, costs of related items, and costs of maintenance, operation and conversion (including Government application software);

(5) A statement of the time by which the contract modification adopting the proposal must be issued so as to obtain the maximum benefits of the changes during the remainder of the contract including supporting rationale; and

(6) Identification of any impacts to contract completion time or delivery schedule. The Government is not liable for proposal preparation costs or for any delay in acting upon any proposal submitted pursuant to this clause. The Contractor has a right to withdraw, in whole or in part, any proposal not adopted by contract modification within the period specified in the proposal. The decision of the Contracting Officer whether to accept any such proposal under this contract is final and not subject to the ''Disputes'' clause of this contract.

(b) *Test and evaluation.* If the Government wishes to test and evaluate any item(s) proposed, the Contracting Officer will issue written directions to the Contractor specifying what item(s) will be tested, where and when the item(s) will be tested, to whom the item(s) is to be delivered, and the number of days (not to exceed 90 calendar days) that the item will be tested. The Contracting Officer may accept any proposal submitted pursuant to this clause by giving the Contractor written notice thereof. This written notice will be given by issuance of a modification to the contract. Unless and until a modification is executed to incorporate a proposal under this contract, the Contractor shall remain obligated to perform in accordance with the requirements, terms and conditions of the existing contract. If a proposal submitted pursuant to this clause is accepted and applied to this contract, the equitable adjustment increasing or decreasing the price or CPFF shall be in accordance with the procedures of the applicable ''Changes'' clause incorporated by reference in Section I of the contract. The resulting contract modification will state that it is made pursuant to this clause.

(End of clause)

1252.239–91 Records Management.

As prescribed in 1239.7403, insert the following clause:

Records Management (DATE)

(a) *Definition.*

Federal record, as defined in 44 U.S.C. 3301, means all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them. The term Federal record:

(1) Includes all DOT records.

(2) Does not include personal materials.

(3) Applies to records created, received, or maintained by Contractors pursuant to a DOT contract.

(4) May include deliverables and documentation associated with deliverables.

(b) *Requirements.* (1) *Compliance.* Contractor shall comply with all applicable records management laws and regulations, as well as National Archives and Records Administration (NARA) records policies, including but not limited to the Federal Records Act (44 U.S.C. chapters 21, 29, 31, 33), NARA regulations at 36 CFR Chapter XII Subchapter B, and those policies associated with the safeguarding of records covered by Privacy Act of 1974 (5 U.S.C. 552a). These policies include the preservation of all records, regardless of form or characteristics, mode of transmission, or state of completion.

(2) *Applicability.* In accordance with 36 CFR 1222.32, all data created for Government use and delivered to, or falling under, the legal control of the Government, are Federal records subject to the provisions of 44 U.S.C. chapters 21, 29, 31, and 33, the Freedom of Information Act (FOIA) (5 U.S.C. 552), as amended, and the Privacy Act of 1974 (5 U.S.C. 552a), as amended. Such Federal records shall be managed and scheduled for disposition only as permitted by the Federal Records Act, relevant statute or regulation, and DOT Order 1351.28, Departmental Records Management Policy.

(3) *Records maintenance.* While DOT records are in the Contractor's custody, the Contractor is responsible for preventing the alienation or unauthorized destruction of DOT records, including all forms of mutilation. Records may not be removed from the legal custody of DOT or destroyed except in accordance with the provisions of the agency records schedules and with the written concurrence of the DOT or Component Records Officer, as appropriate. Willful and unlawful destruction, damage or alienation of Federal records is subject to the fines and penalties imposed by 18 U.S.C. 2701. In the event of any unlawful or accidental removal, defacing, alteration, or destruction of records, the Contractor must report the event to the Contracting Officer in accordance with 36 CFR 1230, Unlawful or Accidental Removal, Defacing, Alteration, or Destruction of Records, for reporting to NARA.

(4) *Unauthorized disclosure.* The Contractor shall notify the Contracting Officer within two hours of discovery of any inadvertent or unauthorized disclosures of information, data, documentary materials, records or equipment. Disclosure of non-public information is limited to authorized personnel with a need-to-know as described in the contract. The Contractor shall ensure that the appropriate personnel, administrative, technical, and physical safeguards are established to ensure the security and confidentiality of this information, data, documentary material, records and/or equipment. The Contractor shall not remove material from Government facilities or systems, or facilities or systems operated or maintained on the Government's behalf, without the express written permission of the Contracting Officer. When information, data, documentary material, records and/or equipment is no longer required, it shall be returned to DOT control or the Contractor must hold it until otherwise directed. Items returned to the Government shall be hand carried, mailed, emailed, or securely electronically transmitted to the Contracting Officer or address prescribed in the contract. Destruction of records is expressly prohibited unless in accordance with the contract.

(c) *Non-public information.* The Contractor shall not create or maintain any records containing any non-public

DOT information that are not specifically authorized by the contract.

(d) *Rights in data.* Rights in data under this contract are set forth in clauses prescribed by FAR part 27 and included in this contract, (*e.g.,* 52.227–14 Rights in Data—General). Contractor must make any assertion of copyright in the data or other deliverables under this contract and substantiate such assertions. Contractor must add or correct all limited rights, restricted rights, or copyright notices and take all other appropriate actions in accordance with the terms of this contract and the clauses included herein.

(e) *Notification of third-party access requests.* The Contractor shall notify the Contracting Officer promptly of any requests from a third party for access to Federal records, including any warrants, seizures, or subpoenas it receives, including those from another Federal, State, or local agency. The Contractor shall cooperate with the Contracting Officer to take all measures to protect Federal records, from any unauthorized disclosure.

(f) *Training.* All Contractor employees assigned to this contract who create, work with, or otherwise handle records are required to take DOT-provided records management training. The Contractor is responsible for confirming to the Contracting Officer that training, including initial training and any annual or refresher training, has been completed in accordance with agency policies.

(g) *Subcontract flowdown requirements.* (1) The Contractor shall incorporate the substance of this clause, its terms and requirements including this paragraph (g), in all subcontracts under this contract, and require written subcontractor acknowledgment of same.

(2) Violation by a subcontractor of any provision set forth in this clause will be attributed to the Contractor.

(End of clause)

1252.239–92 Information and Communication Technology Accessibility Notice.

As prescribed in 1239.203–70(a), insert the following provision:

Information and Communication Technology Accessibility Notice (DATE)

(a) Any offeror responding to this solicitation must comply with established DOT Information and Communication Technology (ICT) (formerly known as Electronic and Information (EIT)) accessibility standards. Information about Section 508 is available at *https://www.section508.gov/* or *https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-section-508-standards.*

(b) The Section 508 accessibility standards applicable to this solicitation are stated in the clause at 1252.239–81, Information and Communication Technology Accessibility. In order to facilitate the Government's determination whether proposed ICT supplies and services meet applicable Section 508 accessibility standards, offerors must submit appropriate Section 508 Checklists, in accordance with the checklist completion instructions. The purpose of the checklists is to assist DOT acquisition and program officials in determining whether proposed ICT supplies or information, documentation and services support conform to applicable Section 508 accessibility standards. The checklists allow offerors or developers to self-evaluate their supplies and document—in detail—whether they conform to a specific Section 508 accessibility standard, and any underway remediation efforts addressing conformance issues.

(c) Respondents to this solicitation must identify any exception to Section 508 requirements. If an offeror claims its supplies or services meet applicable Section 508 accessibility standards, and it is later determined by the Government, *i.e.,* after award of a contract or order, that supplies or services delivered do not conform to the described accessibility standards, remediation of the supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its expense.

(End of provision)

1252.239–93 Information and Communication Technology Accessibility.

As prescribed in 1239.203–70(b), insert the following clause:

Information and Communication Technology Accessibility (DATE)

(a) *Definition.* The term *Electronic and Information Technology (EIT)* supplies and services, as used in this subpart, is intended to refer to *Information and Communication Technology (ICT)* and any successor terms used to describe such technology.

(b) All EIT supplies, information, documentation and services support developed, acquired, maintained or delivered under this contract or order must comply with the Information and Communication Technology (ICT) Standards and Guidelines (*see* 36 CFR parts 1193 and 1194). Information about Section 508 is available at *https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ictrefresh/corrections-to-the-ict-final-rule.*

(c) The Section 508 accessibility standards applicable to this contract or order are identified in the Specification, Statement of Work, or Performance Work Statement. If it is determined by the Government that ICT supplies and services provided by the Contractor do not conform to the described accessibility standards in the contract, remediation of the supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its own expense.

(d) The Section 508 accessibility standards applicable to this contract are: _____ [*Contracting Officer inserts the applicable Section 508 accessibility standards*].

(e) In the event of a modification(s) to this contract or order, which adds new ICT supplies or services or revises the type of, or specifications for, supplies or services, the Contracting Officer may require that the Contractor submit a completed Section 508 Checklist and any other additional information necessary to assist the Government in determining that the ICT supplies or services conform to Section 508 accessibility standards. If the Government determines that ICT supplies and services provided by the Contractor do not conform to the described accessibility standards in the contract, remediation of the supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its own expense.

(f) If this is an indefinite-delivery type contract, a Blanket Purchase Agreement or a Basic Ordering Agreement, the task/delivery order requests that include ICT supplies or services will define the specifications and accessibility standards for the order. In those cases, the Contractor may be required to provide a completed Section 508 Checklist and any other additional information necessary to assist the Government in determining that the ICT supplies or services conform to Section 508 accessibility standards. If it is determined by the Government that ICT supplies and services provided by the Contractor do not conform to the described accessibility standards in the provided documentation, remediation of the supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its own expense.

(End of clause)

1252.242–70 Dissemination of Information—Educational Institutions.

As prescribed in 1242.270(a), insert the following clause:

Dissemination Of Information—Educational Institutions (DATE)

(a) The Department of Transportation (DOT) desires widespread dissemination of the results of funded transportation research. The Contractor, therefore, may publish (subject to the provisions of the ''Data Rights'' and ''Patent Rights'' clauses of the contract) research results in professional journals, books, trade publications, or other appropriate media (a thesis or collection of theses should not be used to distribute results because dissemination will not be sufficiently widespread). All costs of publication pursuant to this clause shall be borne by the Contractor and shall not be charged to the Government under this or any other Federal contract.

(b) Any copy of material published under this clause must contain acknowledgment of DOT's sponsorship of the research effort and a disclaimer stating that the published material represents the position of the author(s) and not necessarily that of DOT. Articles for publication or papers to be presented to professional societies do not require the authorization of the Contracting Officer prior to release. However, two copies of each article shall be transmitted to the Contracting Officer at least two weeks prior to release or publication.

(c) Press releases concerning the results or conclusions from the research under this contract shall not be made or otherwise distributed to the public without prior written approval of the Contracting Officer.

(d) Publication under the terms of this clause does not release the Contractor from the obligation of preparing and submitting to the Contracting Officer a final report containing the findings and results of research, as set forth in the schedule of the contract.

(End of clause)

1252.242–71 Contractor Testimony.

As prescribed in 1242.270(b), insert the following clause:

Contractor Testimony (DATE)

All requests for the testimony of the Contractor or its employees, and any intention to testify as an expert witness relating to: (a) Any work required by, and/or performed under, this contract; or (b) any information provided by any party to assist the Contractor in the performance of this contract, shall be immediately reported to the Contracting Officer. Neither the Contractor nor its employees shall testify on a matter related to work performed or information provided under this contract, either voluntarily or pursuant to a request, in any judicial or administrative proceeding unless approved, in advance, by the Contracting Officer or required by a judge in a final court order.

(End of clause)

1252.242–72 Dissemination of Contract Information.

As prescribed in 1242.270(c), insert the following clause:

Dissemination of Contract Information (DATE)

The Contractor shall not publish, permit to be published, or distribute for public consumption, any information, oral or written, concerning the results or conclusions made pursuant to the performance of this contract, without the prior written consent of the Contracting Officer. Two copies of any material proposed to be published or distributed shall be submitted to the Contracting Officer.

(End of clause)

1252.242–74 Contract Audit Support.

As prescribed in 1242.170, insert the following clause:

Contract Audit Support (DATE)

The Government may at its sole discretion utilize certified public accountant(s) to provide contract audit services in lieu of the cognizant government audit agency to accomplish the contract administration requirements of FAR parts 32 and 42 under the terms and conditions of this contract. The audit services contractor reviewing the Contractor's accounting systems and data will perform this function in accordance with contract provisions which prohibit disclosure of proprietary financial data or use of such data for any purpose other than to perform the required audit services. The Contractor shall provide access to accounting systems, records and data to the audit services contractor like that provided to the cognizant government auditor.

(End of clause)

Subpart 1252.3—Provision and Clause Matrix

1252.301 Solicitation provisions and contract clauses (Matrix).

The TAR matrix is not published in the CFR. It is available on the Acquisition.gov website at *https://www.acquisition.gov/TAR.*

PART 1253—FORMS

Subpart 1253.2—Prescription of Forms

Sec.
1253.204–70 Administrative matters—agency specified forms.
1253.227 Patents, data, and copyrights.
1253.227–3 Patent rights under Government contracts.

Subpart 1253.3—Forms Used in Acquisitions

1253.300–70 DOT agency forms.

Authority: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 1253.2—Prescription of Forms

1253.204–70 Administrative matters—agency specified forms.

The following forms are prescribed for use in the closeout of applicable contracts, as specified in 1204.804–570:

(a) Department of Transportation (DOT) *Form DOT F 4220.4, Contractor's Release.* (*See* 1204.804–570.) *Form DOT F 4220.4* is authorized for local reproduction and a copy is furnished for this purpose in the appendix to 1253.3.

(b) *Form DOT F 4220.45, Contractor's Assignment of Refunds, Rebates, Credits, and Other Amounts.* (*See* 1204.804–570.) *Form DOT F 4220.45* is authorized for local reproduction and a copy is furnished for this purpose in the appendix to 1253.3.

(c) *Form DOT F 4220.46, Cumulative Claim and Reconciliation Statement.* (*See* 1204.804–570.) *Form DOT F 4220.46* is authorized for local reproduction and a copy is furnished for this purpose in the appendix to 1253.3.

(d) Department of Defense *DD Form 882, Report of Inventions and Subcontracts.* (*See* 1204.804–570.) DD Form 882 can be found at *http://www.esd.whs.mil/Directives/forms/.*

1253.227 Patents, data, and copyrights.

1253.227–3 Patent rights under Government contracts.

The following form is prescribed as a means for contractors to report inventions made during contract performance, as specified in 1227.305–4:

Department of Defense *DD Form 882, Report of Inventions and Subcontracts.*

DD Form 882 can be found at *http://www.esd.whs.mil/Directives/forms/.*

Subpart 1253.3—Forms Used in Acquisitions

1253.300–70 DOT agency forms.

This subpart identifies, in numerical sequence, agency forms that are specified by the TAR for use in acquisitions. See Table 1253.1—Forms Used in DOT Acquisitions. Forms are also accessible in Adobe .PDF and Microsoft Word files on the DOT Office of Senior Procurement Executive website at *https://www.transportation.gov/assistant-secretary-administration/procurement/tar-part-1253-forms.*

TABLE 1253–1—FORMS USED IN DOT ACQUISITIONS

Form name	Form number
Contractor's Release Form	4220.4
Contractor's Assignment of Refunds, Rebates, Credits, and other Amounts	4220.45
Cumulative Claim and Reconciliation Statement	4220.46

[FR Doc. 2021–24421 Filed 12–6–21; 8:45 am]

BILLING CODE 4910–9X–P

FEDERAL REGISTER

Vol. 86 Tuesday,

No. 232 December 7, 2021

Part IV

Department of Energy

10 CFR Parts 429 and 430

Energy Conservation Program: Test Procedure for Ceiling Fans; Proposed Rule

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 430

[EERE–2013–BT–TP–0050]

RIN 1904–AD88

Energy Conservation Program: Test Procedure for Ceiling Fans

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Supplemental notice of proposed rulemaking and request for comment.

SUMMARY: The U.S. Department of Energy (''DOE'') proposes to amend the test procedures for ceiling fans. DOE initially presented proposed amendments in a notice of proposed rulemaking (''NOPR'') published on September 30, 2019. DOE is publishing this supplemental notice of proposed rulemaking (''SNOPR'') to present modifications to certain proposals presented in the NOPR, and to propose additional amendments. In this SNOPR, DOE proposes to include a definition for ''circulating air'' for the purpose of the ceiling fan definition, include ceiling fans greater than 24 feet in the scope, include certain belt-driven ceiling fans within scope, include a standby metric for large-diameter ceiling fans, amend the low speed definition, permit an alternate set-up to collect air velocity test data, amend certain set-up and operation specifications, amend the blade thickness measurement requirement, and update product-specific rounding and enforcement provisions. DOE is seeking comment from interested parties on the proposal.

DATES: DOE will accept comments, data, and information regarding this proposal no later than February 7, 2022. See section V, ''Public Participation,'' for details. DOE will hold a webinar on Tuesday, January 11, 2022, from 12:30 p.m. to 3:30 p.m. E.S.T. See section V, ''Public Participation,'' for webinar registration information, participant instructions, and information about the capabilities available to webinar participants. If no participants register for the webinar, it will be cancelled.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *www.regulations.gov.* Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2013–BT–TP–0050, by any of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
2. *Email: CF2013TP0050@ee.doe.gov.* Include the docket number EERE–2013–BT–TP–0050 or regulatory information number (''RIN'') 1904–AD88 in the subject line of the message.

No telefacsimilies (''faxes'') will be accepted. For detailed instructions on submitting comments and additional information on this process, see section V of this document.

Although DOE has routinely accepted public comment submissions through a variety of mechanisms, including the Federal eRulemaking Portal, email, postal mail, or 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 suspending receipt of public comments via postal mail and hand delivery/courier. If a commenter finds that this change poses an undue hardship, please contact Appliance Standards Program staff at (202) 586–1445 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, webinar attendee lists and transcripts (if a webinar is held), comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *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.

The docket web page can be found at *regulations.gov/docket/EERE-2013-BT-TP-0050.* The docket web page contains instructions on how to access all documents, including public comments, in the docket. See section V for information on how to submit comments through *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT:

Mr. Jeremy Dommu, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–2J, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–9870. Email *ApplianceStandardsQuestions@ee.doe.gov.*

Ms. Amelia Whiting, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–9870. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

For further information on how to submit a comment, review other public comments and the docket, or participate in a public meeting (if one is held), contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

DOE has submitted the collection of information contained in the proposed rule to OMB for review under the Paperwork Reduction Act, as amended. (44 U.S.C. 3507d)) Comments on the information collection proposal shall be directed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Sofie Miller, OIRA Desk Officer by email: *sofie.e.miller@omb.eop.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Authority and Background
A. Authority
B. Background
II. Synopsis of the Notice of Proposed Rulemaking
III. Discussion
A. Scope of Ceiling Fan Definition
B. Scope of Test Procedure for Large-Diameter Ceiling Fans
C. Belt-Driven Ceiling Fans
D. Standby Power Metric for Large-Diameter Ceiling Fans
E. Low-Speed Definition
F. Sensor Arm Setups
G. Air Velocity Sensor Mounting Angle
H. Instructions To Measure Blade Thickness
I. Specifications for Ceiling Fans With Accessories
J. Product Specific Rounding and Enforcement Provisions
1. Airflow (CFM) at High Speed Rounding
2. Blade Edge Thickness Rounding and Tolerance
3. Blade RPM Tolerance
4. Represented Values Within Product Class Definitions
K. Test Procedure Costs, Harmonization, and Other Topics
1. Test Procedure Costs and Impact
2. Harmonization With Industry Standards
L. Compliance Date and Waivers
IV. Procedural Issues and Regulatory Review
A. Review Under Executive Order 12866
B. Review Under the Regulatory Flexibility Act
1. Description of Reasons Why Action Is Being Considered
2. Objective of, and Legal Basis for, Rule
3. Description and Estimate of Small Entities Regulated
4. Description and Estimate of Compliance Requirements
5. Duplication, Overlap, and Conflict With Other Rules and Regulations

6. Significant Alternatives to the Rule
C. Review Under the Paperwork Reduction Act of 1995
D. Review Under the National Environmental Policy Act of 1969
E. Review Under Executive Order 13132
F. Review Under Executive Order 12988
G. Review Under the Unfunded Mandates Reform Act of 1995
H. Review Under the Treasury and General Government Appropriations Act, 1999
I. Review Under Treasury and General Government Appropriations Act, 2001
J. Review Under Executive Order 12630
K. Review Under Executive Order 13211
L. Review Under Section 32 of the Federal Energy Administration Act of 1974
M. Description of Materials Incorporated by Reference
V. Public Participation
A. Participation in the Webinar
B. Submission of Comments
C. Issues on Which DOE Seeks Comment
VI. Approval of the Office of the Secretary

I. Authority and Background

DOE is authorized to establish and amend energy conservation standards and test procedures for ceiling fans. (42 U.S.C. 6293(b)(16)(A)(i) and (B), and 42 U.S.C. 6295(ff)) DOE's energy conservation standards and test procedures for ceiling fans are currently prescribed at title 10 of the Code of Federal Regulations (''CFR''), part 430 section 32(s)(1) and (2), 10 CFR part 430 section 23(w), and 10 CFR part 430 subpart B appendix U (''Appendix U''). The following sections discuss DOE's authority to establish test procedures for ceiling fans and relevant background information regarding DOE's consideration of test procedures for this product.

A. Authority

The Energy Policy and Conservation Act, as amended (''EPCA''),[1] authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part B [2] of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles, which sets forth a variety of provisions designed to improve energy efficiency. These products include ceiling fans, the subject of this document. (42 U.S.C. 6291(49), 42 U.S.C. 6293(b)(16)(A)(i) and (B), and 42 U.S.C. 6295(ff))

The energy conservation program under EPCA consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of EPCA specifically include definitions (42 U.S.C. 6291), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), energy conservation standards (42 U.S.C. 6295), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

The Federal testing requirements consist of test procedures that manufacturers of covered products must use as the basis for: (1) Certifying to DOE that their products comply with the applicable energy conservation standards adopted pursuant to EPCA (42 U.S.C. 6295(s)), and (2) making representations about the efficiency of those consumer products (42 U.S.C. 6293(c)). Similarly, DOE must use these test procedures to determine whether the products comply with relevant standards promulgated under EPCA. (42 U.S.C. 6295(s))

Federal energy efficiency requirements for covered products established under EPCA generally supersede State laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297) DOE may, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions of EPCA. (42 U.S.C. 6297(d))

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered products. EPCA requires that any test procedures prescribed or amended under this section be reasonably designed to produce test results which measure energy efficiency, energy use or estimated annual operating cost of a covered product during a representative average use cycle or period of use and not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

In addition, EPCA requires that DOE amend its test procedures for all covered products to integrate measures of standby mode and off mode energy consumption. (42 U.S.C. 6295(gg)(2)(A)) Standby mode and off mode energy consumption must be incorporated into the overall energy efficiency, energy consumption, or other energy descriptor for each covered product unless the current test procedures already account for and incorporate standby and off mode energy consumption or such integration is technically infeasible. If an integrated test procedure is technically infeasible, DOE must prescribe a separate standby mode and off mode energy use test procedure for the covered product, if technically feasible. (42 U.S.C. 6295(gg)(2)(A)) Any such amendment must consider the most current versions of the International Electrotechnical Commission (''IEC'') Standard 62301 [3] and IEC Standard 62087 [4] as applicable. (42 U.S.C. 6295(gg)(2)(A))

With respect to ceiling fans, EPCA requires that test procedures be based on the ''Energy Star Testing Facility Guidance Manual: Building a Testing Facility and Performing the Solid State Test Method for ENERGY STAR Qualified Ceiling Fans, Version 1.1'' published by the Environmental Protection Agency, and that the Secretary may review and revise the test procedures established. (42 U.S.C. 6293(b)(16)(A)(i) and (B))

EPCA also requires that, at least once every 7 years, DOE evaluate test procedures for each type of covered product, including ceiling fans, to determine whether amended test procedures would more accurately or fully comply with the requirements for the test procedures to not be unduly burdensome to conduct and be reasonably designed to produce test results that reflect energy efficiency, energy use, and estimated operating costs during a representative average use cycle or period of use. (42 U.S.C. 6293(b)(1)(A))

If the Secretary determines, on her own behalf or in response to a petition by any interested person, that a test procedure should be prescribed or amended, the Secretary shall promptly publish in the **Federal Register** proposed test procedures and afford interested persons an opportunity to present oral and written data, views, and arguments with respect to such procedures. The comment period on a proposed rule to amend a test procedure shall be at least 60 days and may not exceed 270 days. In prescribing or amending a test procedure, the Secretary shall take into account such information as the Secretary determines relevant to such procedure, including technological developments relating to energy use or energy efficiency of the type (or class) of covered products involved. (42 U.S.C. 6293(b)(2)). If DOE determines that test procedure revisions are not appropriate, DOE must publish its determination not to amend the test procedures. (42 U.S.C. 6293(b)(1)(A)(ii)) DOE is publishing this SNOPR pursuant to the 7-year review requirement specified in EPCA.

[1] All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020).

[2] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

[3] IEC 62301, *Household electrical appliances—Measurement of standby power* (Edition 2.0, 2011–01).

[4] IEC 62087, *Methods of measurement for the power consumption of audio, video, and related equipment* (Edition 3.0, 2011–04).

B. Background

As stated, DOE's existing test procedures for ceiling fans appear at Appendix U. DOE published a final rule in the **Federal Register** on July 25, 2016 (''July 2016 Final Rule''), which amended the test procedures for ceiling fans at Appendix U. 81 FR 48620, 48622. On September 30, 2019, DOE published a NOPR (''September 2019 NOPR'') proposing amendments to the test procedure addressing questions received from interested parties. 84 FR 51440. In the September 2019 NOPR, DOE proposed to interpret the term ''suspended from a ceiling'' in the EPCA definition of ceiling fan to mean offered for mounting only on a ceiling; specify that very small-diameter (''VSD'') ceiling fans that do not also meet the definition of low-speed small-diameter (''LSSD'') ceiling fan are not required to be tested pursuant to the DOE test method; for LSSD and VSD ceiling fans, increase the tolerance for the stability criteria for the average air velocity measurements during low speed tests; specify that large-diameter ceiling fans with blade spans greater than 24 feet do not need to be tested pursuant to the DOE test method; codify current guidance on calculating several values reported on the U.S. Federal Trade Commission's (''FTC'') EnergyGuide label for LSSD and VSD ceiling fans; and amend certification requirements and product-specific enforcement provisions to reflect the current test procedures and recently amended energy conservation standards for ceiling fans. 84 FR 51440, 51442. Additionally, on October 17, 2019, DOE hosted a public meeting to present the September 2019 NOPR proposals.

Table I.1 lists a subset of comments received by DOE in response to the September 2019 NOPR that are relevant to this SNOPR.

TABLE I.1—SUBSET OF COMMENTS RECEIVED IN RESPONSE TO SEPTEMBER 2019 NOPR THAT ARE RELEVANT TO THIS SNOPR

Commenter(s)	Reference in this SNOPR	Commenter type
Air Movement and Control Association International *	AMCA	Trade Association.
American Lighting Association	ALA	Trade Association.
Anonymous	Anonymous	Individual Commenter.
Big Ass Fans	BAF	Manufacturer.
Chris Ransom	Ransom	Individual Commenter.
Hunter Fan Company	Hunter	Manufacturer.
Pacific Gas and Electric Company, San Diego Gas and Electric, and Southern California Edison.	CA IOUs	Utilities.

DOE received two separate comment submissions from AMCA; however, the second comment replaced the first. See comment number 33 in the docket (replacing comment number 30).

A parenthetical reference at the end of a comment quotation or paraphrase provides the location of the item in the public record.[5] This SNOPR only discusses a subset of topics under consideration as part of this test procedure rulemaking and not all comments received in response to the September 2019 NOPR are addressed in this SNOPR. Comments not addressed in this SNOPR will be addressed in the next stages of the rulemaking.

DOE, with the support of the ALA, conducted a round robin test program for ceiling fans to observe laboratory setups and test practices, evaluate within-laboratory variation (*i.e.,* repeatability) and assess between-laboratory consistency (*i.e.,* reproducibility). Round robin testing was conducted from January 2019 to April 2020. Six test laboratories participated in the round robin, representing both manufacturer laboratories and third-party laboratories. Four laboratories are located in North America, and two are located in China. ALA and ceiling fan manufacturers supplied two samples each of five ceiling fan models (for a total of 10 test samples). The laboratories were instructed to test according to appendix U. DOE representatives were present during all testing to observe test setups and practices used in a variety of labs. In this SNOPR, DOE includes several proposals based on test results and observations made during round robin testing. The round robin test report has been separately published in the docket.[6]

On May 27, 2021, DOE published a final rule to amend the current regulations for large-diameter ceiling fans. 86 FR 28469 (''May 2021 Technical Amendment'') The contents of these technical amendments correspond with provisions enacted by Congress through the Energy Act of 2020. *Id.* Specifically, section 1008 of the Energy Act of 2020 amended section 325(ff)(6) of EPCA to specify that large-diameter ceiling fans manufactured on or after January 21, 2020, are not required to meet minimum ceiling fan efficiency requirements in terms of the ratio of the total airflow to the total power consumption as established in a final rule published January 19, 2017 (82 FR 6826; ''January 2017 Final Rule''), and instead are required to meet specified minimum efficiency requirements based on the Ceiling Fan Energy Index (''CFEI'') metric. 86 FR 28469, 28469–28470. The May 2021 Technical Amendment also implemented conforming amendments to the ceiling fan test procedure to ensure consistency with the Energy Act of 2020. 86 FR 28469, 28470.

On May 7, 2021, DOE published an early assessment request for information (RFI) undertaking an early assessment review for amended energy conservation standards for ceiling fans to determine whether to amend applicable energy conservation standards for this product. 86 FR 24538 (''May 2021 RFI'').

II. Synopsis of the Notice of Proposed Rulemaking

In this SNOPR, DOE proposes to update appendix U as follows:

(1) Specify that for the purpose of the ceiling fan definition, ''circulating air'' means the discharge of air in an upward or downward direction with the air returning to the intake side of the fan. A ceiling fan that has a ratio of fan blade span (in inches) to maximum rotation rate (in revolutions per minute) greater than 0.06 provides circulating air;

(2) Extend the scope of the test procedure to include large diameter fans with a diameter greater than 24 feet;

[5] The parenthetical reference provides a reference for information located in the docket of DOE's rulemaking to develop test procedures for ceiling fans. (Docket No. EERE–2013–BT–TP–0050, which is maintained at *www.regulations.gov/docket/EERE-2013-BT-TP-0050*). The references are arranged as follows: (Commenter name, comment docket ID number, page of that document).

[6] The docketed round robin report can be found in the rulemaking docket EERE–2013–BT–TP–0050. *www.regulations.gov/docket/EERE-2013-BT-TP-0050.*

(3) Include high-speed belt-driven and large-diameter belt-driven ceiling fans within scope;

(4) Add a standby power metric for large-diameter ceiling fans;

(5) Modify the low-speed definition to ensure that LSSD ceiling fans (including VSD ceiling fans that also meet the definition of an LSSD fan) are tested at a more representative low speed rather than the currently required ''lowest available ceiling fan speed'';

(6) Allow use of an alternative procedure for air velocity data collection that relies on a two-arm sensor arm setup, and require setups with arm rotation to stabilize the arm prior to data collection;

(7) Clarify the alignment of air velocity sensor placement on the sensor arm(s);

(8) Specify the instructions to measure blade thickness for LSSD and HSSD ceiling fan definitions;

(9) Specify test procedures for ceiling fans with accessories and/or features; and

(10) Amend product-specific rounding and enforcement provisions for ceiling fans.

Table II.1 summarizes DOE's proposed actions compared to the current test procedure, as well as the reason for the proposed change.

TABLE II.1—SUMMARY OF CHANGES IN PROPOSED TEST PROCEDURE RELATIVE TO CURRENT TEST PROCEDURE

Current DOE test procedure	NOPR proposal	SNOPR proposal	Attribution
Defines ''ceiling fan'' based on EPCA as ''a nonportable device that is suspended from a ceiling for circulating air via the rotation of fan blades''.	Interpreted the EPCA definition of ceiling fan to mean those fans offered for mounting only on a ceiling and seeks comment on a proposed alternative interpretation.	Defines the term ''circulating air'' for the purpose of the ceiling fan definition to mean ''the discharge of air in an upward or downward direction with the air returning to the intake side of the fan. A ceiling fan that has a ratio of fan blade span (in inches) to maximum rotation rate (in revolutions per minute) greater than 0.06 provides circulating air''.	Response to industry comments.
Excludes large diameter fans with a diameter of greater than 24 feet from the test procedure.	Specified that large-diameter ceiling with blade spans greater than 24 feet do not need to be tested pursuant to the DOE test method.	Includes large diameter fans with a diameter of greater than 24 feet in the scope of the test procedure.	Response to industry comments.
Excludes all belt-driven ceiling fans from the test procedure.	N/A	Includes definitions and test procedures for high-speed belt-driven ceiling fans and large-diameter belt-driven ceiling fans.	Response to industry comments.
Includes a standby power test procedure, but no standby power metric for large-diameter ceiling fan CFEI metric. Prior to the Energy Act of 2020, the CFM/W metric was applicable for large-diameter ceiling fans, which included standby power.	N/A	Amends Appendix U to include a standby power metric for large-diameter ceiling fans.	42 U.S.C. 6295(gg)(2)(A) requires test procedures for all products to include standby mode and off mode energy consumption.
Defines ''low speed'' as ''the lowest available ceiling fan speed, *i.e.,* the fan speed corresponding to the minimum, non-zero, blade RPM''.	No proposed updates, but requested comment on updating the definition of low speed to ''as the lowest available ceiling fan speed for which fewer than half or three, whichever is fewer, sensors on any individual axis are measuring less than 30 feet per minute''.	Defines ''low speed'' as the ''lowest available ceiling fan speed for which fewer than half or three, whichever is fewer, sensors per individual axis are measuring less than 40 feet per minute.'' Alternatively, DOE is considering representing the proposed definition as a table instead, indicating the number of sensors that must measure >40 FPM.	Improve the repeatability and reproducibility of the test procedure as determined during round robin testing.
Prescribes two setups, a four-arm and one-arm sensor setup for certain fan types.	N/A	Adds an alternative two-arm setup to measure air velocity. Further, adds requirement for setups that require arm rotation to stabilize the arm to dissipate any residual turbulence prior to data collection.	Improve the repeatability and reproducibility of the test procedure as determined during round robin testing.
Does not explicitly specify air velocity sensor alignment or acceptance angle.	N/A	Provides explicit instructions to align the air velocity sensors perpendicular to the airflow.	Improve the repeatability and reproducibility of the test procedure as determined during round robin testing.
Does not specify how fan blade thickness should be measured.	Added specification to measure fan blade thickness without consideration of ''rolled-edge'' blade design.	Adds specification to measure fan blade thickness in a consistent manner for all fan blade types (including ''rolled-edge'' blade designs).	Improve the repeatability and reproducibility of the test procedure.

TABLE II.1—SUMMARY OF CHANGES IN PROPOSED TEST PROCEDURE RELATIVE TO CURRENT TEST PROCEDURE—Continued

Current DOE test procedure	NOPR proposal	SNOPR proposal	Attribution
Does not include specific instructions on how ceiling fan accessories and/or features should be incorporated into the test procedure.	N/A	Specifies that accessories/additional features should be turned off, when possible, before testing ceiling fans for active mode and standby mode.	Improve representativeness and reproducibility of the test procedure.
Does not include any measurement tolerances for blade RPM and blade edge thickness and any rounding requirement for represented values.	Included measurement tolerance of at least ±0.1 inch for blade edge thickness; within the greater of 1% of the average RPM at high speed (rounded to the nearest RPM) or 1 RPM. Includes proposal that blade edge thickness be rounded to ±0.1 inch.	Updates measurement tolerances for blade RPM to 2% and blade edge thickness to ±0.01 inch. Also updates rounding requirements for blade edge thickness to ±0.01 inch. Includes new rounding proposal for airflow at high speed.	Include rounding and enforcement requirements for current standards.

Additionally, to provide interested parties with a complete set of proposed amendments, this SNOPR includes all proposed regulatory text for the proposals from the September 2019 NOPR and this SNOPR. DOE maintains the following proposals from the September 2019 NOPR: (1) Specifying that VSD ceiling fans that do not also meet the definition of LSSD fan are not required to be tested pursuant to the DOE test method for purposes of demonstrating compliance with DOE's energy conservation standards for ceiling fans or representations of efficiency; (2) increasing the tolerance for the stability criteria for the average air velocity measurements for LSSD and VSD ceiling fans that also meet the definition of LSSD fan; (3) codifying in regulation existing guidance on the method for calculating several values reported on the Federal Trade Commission (FTC) EnergyGuide label using results from the ceiling fan test procedures in Appendix U to subpart B of 10 CFR part 430 and represented values in 10 CFR part 429; and (4) amending product-specific represented values, rounding and enforcement provisions. 84 FR 51440, 51442. DOE continues to review and consider comments received on these proposals and will address such comments in a future stage of the rulemaking. DOE will be addressing certification and reporting requirements in a separate rulemaking.

DOE has tentatively determined that the proposed amendments described in section III of this SNOPR would not require re-testing for a majority of ceiling fans. The proposal to redefine low speed would require retesting for a limited number of LSSD ceiling fans, if made final. Discussion of DOE's proposed actions are addressed in detail in section III of this SNOPR, including test procedure costs and cost savings.

III. Discussion

A. Scope of Ceiling Fan Definition

The Energy Policy and Conservation Act defines ''ceiling fan'' as ''a nonportable device that is suspended from a ceiling for circulating air via the rotation of fan blades.'' (42 U.S.C. 6291(49)) DOE codified the statutory definition in 10 CFR 430.2. In the July 2016 Final Rule, DOE stated that the test procedure applies to any product meeting this definition, including hugger fans, fans designed for applications where large airflow volume may be needed, and highly decorative fans. 81 FR 48620, 48622. DOE stated, however, that manufacturers were not required to test the following fans according to the test procedure: Belt-driven ceiling fans, centrifugal ceiling fans, oscillating ceiling fans, and ceiling fans whose blades' plane of rotation cannot be within 45 degrees of horizontal. *Id.*

In the September 2019 NOPR, DOE proposed to clarify its interpretation of the statutory definition in response to an inquiry from the AMCA regarding the application of the term ''ceiling fan'' to products known as ''air circulating fan heads (''ACFHs'').''[7] 84 FR 51440, 51443–51445. In letters submitted to DOE in May and July of 2019, AMCA asserted that air circulating fan heads have distinct characteristics and functions compared to traditional ceiling fans, including that air circulating fan heads provide concentrated directional airflow as opposed to circulating air.[8] (AMCA, No. 23 in *both May and July 2019 letters,* at p. 1) AMCA recommended that DOE use the physical characteristics of fan diameter and rotational tip speed or outlet air speed as a means to distinguish fans that circulate air (as necessary to meet the statutory definition of ''ceiling fan'') from ACFHs that provide directional air flow (*i.e.,* fans excluded from the statutory definition of ''ceiling fan'').[9] (AMCA, No. 23 *in the July 2019 letter* at p. 2)

Accordingly, in the September 2019 NOPR, DOE proposed to clarify the definition of ''ceiling fan'' and proposed two alternate definitions of the term. The first proposed definition would provide additional direction to distinguish a ''ceiling fan'' from other fans based on the ''non-portable'' element and ''suspended from a ceiling'' (*i.e.,* ''mounting'') element of the statutory definition. 84 FR 51440, 51444. Specifically, DOE proposed to include within the definition that for purposes of the definition, the term ''suspended from a ceiling'' means offered for mounting on a ceiling, and the term ''nonportable'' means not offered for mounting on a surface other than a ceiling.'' *Id.*

The second proposed definition would specifically reference ACFHs and provide additional clarification on the mounting element. 84 FR 51440, 51444. Specifically, DOE proposed to include within the definition that any fan, including those meeting the definition of an ''air circulating fan head'' in

[7] Section 5.1.1 of ANSI/AMCA Standard 230–15 (''AMCA 230–15''), ''Laboratory Methods of Testing Air Circulating Fans for Rating and Certification,'' defines *air circulating fan head* as ''an assembly consisting of a motor, impeller and guard for mounting on a pedestal having a base and column, wall mount bracket, ceiling mount bracket, I-beam bracket or other commonly accepted mounting means.''

[8] The May and July 2019 letters are available at *www.regulations.gov/document?D=EERE-2013-BT-TP-0050-0023.*

[9] AMCA specifically recommended the use of tip speed, which is calculated as blade diameter × 3.14159 × rotational speed in RPM, and suggested that the maximum tip speed of a ceiling fan would be 4000 feet per minute. See May 2019 letter, page 2.

AMCA 230–15, that does not have a ceiling mount option, or that has more than one mounting option (even if one of the mounting options is a ceiling mount), is not a ceiling fan. Such fans do not meet the statutory criteria of being ''nonportable'', ''suspended from the ceiling'', and ''for the purpose of circulating air.'' 84 FR 51440, 51444–51445.

In addition to the alternate proposed definitions, DOE acknowledged AMCA's suggestion of using tip speed or outlet air speed to distinguish between ACFHs and ceiling fans, and requested comment and data on whether and how the test procedure could be amended to accommodate such a distinction. 84 FR 51440, 51445.

In response to the September 2019 NOPR, ALA explained that while the first option is better than the alternative definition, they opposed both options. ALA stated that the first alternate definition (distinguishing ceiling fans based on ''non-portable'' and ''mounting'') is too broad, could create a loophole for ceiling fans to be exempt from the standards, and that unregulated ceiling fans as a result of this proposed definition would eventually overtake the market. ALA also stated that the second alternative definition (referencing ACFHs and ''mounting'') it is too narrow, and products that would be innovative or meet a specific need in the market could not be made or sold. (ALA, No. 34 at p. 2)

AMCA stated the proposal will provide excessive opportunity for currently regulated fans to escape regulation. Further, AMCA identified three large-diameter ceiling fan (''LDCF'') manufacturers that offer or have offered ground-mounted LDCFs and suggested that with the proposed reinterpretation, LDCF manufacturers could chose to offer a floor-mount option for their products and be exempt from standards. AMCA also commented that the proposed definition of ''portable'' would open a significant loophole and explained that many LDCFs are not hardwired in place. (AMCA, No. 33 at pp. 2–3)

CA IOUs stated that DOE's proposed interpretation to only address fans offered for mounting on a ceiling in the September 2019 NOPR deviates from the scope of products established under the existing legislation and raises concerns of potential gaming to avoid product testing, as well as potential backsliding for products that would be newly exempted after being included in the previous test procedure iteration. (CA IOUs No. 31 at p. 2)

Hunter commented that further clarification and additional stipulations beyond those proposed by DOE would be required to prevent unwelcomed loopholes and alleviate the possibility of ''gaming the system'' to claim an exemption from testing. (Hunter No. 29 at p. 2) Anonymous commented that the interpretations put forth in the NOPR limit the applicability to nonportable ceiling fans that are used to create air circulation, and recommended that the test procedures should apply to all fans, even portable ones that may plug into the wall, and are not necessarily for ''air circulation''. (Anonymous, No. 32 at p. 1)

As an alternative to DOE's proposal, multiple interested parties recommended that the definition of ceiling fan be based on, in part, a ratio of diameter to maximum operating speed. Specifically, these commenters suggested that a diameter-to-maximum operating speed ratio less than 0.06 inches/RPM could be used to distinguish products that are not ceiling fans, *i.e.,* air circulating fan heads. (Hunter Fans, BAFs, Public Meeting Transcript at pp. 33–35, AMCA, No. 33 at pp. 3–6; ALA, No. 34 at p. 2; and Hunter No. 29 at p. 2). AMCA further recommended that air-circulating fan heads be named as a separate category by DOE. (AMCA, No. 33 at p. 5) BAF suggested that the ratio of diameter (inches) to the maximum speed (RPM) provides a reasonable means for separating air circulating fan heads from LSSD, HSSD and large-diameter ceiling fans. (BAF, No. 36 at pp. 1–2) As a justification of this ratio, AMCA provided analysis of 528 fan models, which included a total of 397 LDCF, HSSD, and LSSD ceiling fan types, as well as 131 ACFHs. Among the sample of ACFH models, the highest diameter-to-maximum operating speed ratio was 0.058, in comparison to the lowest diameter-to-maximum operating speed ratios for the three ceiling fan types (0.353, 0.091, and 0.087 for LDCF, HSSD, and LSSD, respectively). Therefore, even the maximum ratio for the sample of ACFH models is significantly lower than the minimum ratio for the other ceiling fan types, thus showing a clear distinction between ACFH and other ceiling fan types. Based on this analysis, AMCA recommended that ACFHs be designated as a separate category by DOE in its ceiling fan regulations, and that fans meeting the definition of ACFH per AMCA 230 [10] and having a diameter-to-maximum operating speed ratio less than or equal to 0.06 inches/RPM are not ''ceiling fans''. (AMCA, No. 33 at pp. 4–6)

Similarly, Hunter provided data summarizing the ranges of diameter-to-maximum operating speed ratios for a total of 414 fan models representing LDCF, LSSD, and HSSD ceiling fan categories and ACFHs. The data indicated minimum values of the diameter-to-maximum operating speed ratio for the three ceiling fan types of around 0.10, 0.09, and 0.09 (for LDCF, HSSD, and LSSD, respectively) and a maximum value for ACFHs of around 0.03. Based on this data, Hunter suggested that a ratio of 0.06 would provide a clear separation between ACFHs and all other fan classifications. (Hunter No. 29 at pp. 2–3)

ALA explained, in support of this proposal, that high-velocity fan heads are not used for the purpose of circulating air within the meaning of EPCA's ''ceiling fan'' definition as these fans do not create air circulation by discharging air in the downward direction for it to be returned to the intake side of the fan with significant momentum. Instead, ALA commented that high-velocity fan heads provide directional, concreated high speed airflow targeted to a specific location. (ALA, No. 34 at pp. 2–3)

AMCA also provided comments on the extent to which the ceiling fan design criteria (in 10 CFR 430.32(s)(1) [11]) would be applicable for ACFHs. Specifically, AMCA stated that (1) the lighting requirements in 10 CFR 430.32(s)(1)(i) would only apply to a very small portion of the ACFH market [12] and that AMCA is unaware of any ACFH with an integrated light kit; (2) the adjustable speed requirement in 10 CFR 430.32(s)(1)(ii) could be applicable, as some ACFHs offer multiple operating speeds, but requiring adjustable speeds would add cost to single-speed products; and (3) the capability of reverse fan action requirement in 10 CFR 430.32(s)(1)(iii) would not be applicable because reverse fan action is typically used for air

[10] Section 5.1.1 of AMCA 230–15 defines air circulating fan head as an ''assembly consisting of a motor, impeller and guard for mounting on a pedestal having a base and column, wall mount bracket, ceiling mount bracket, I-beam bracket or other commonly accepted mounting means.''

[11] The ceiling fan design criteria outlined in 10 CFR 430.32(s)(1) are: (i) Fan speed controls separate from any lighting controls: (ii) Adjustable speed controls (either more than 1 speed or variable speed); (ii) the capability of reversible fan action, except for (A) fans sold for industrial applications, (B) fans sold for outdoor applications, and (c) cases in which safety standards would be violated by the use of the reversible mode.

[12] AMCA explained that dock fans are the only air circulation fans that are typically sold with a light, but the light is typically attached to the mounting arm, not integrated into the fan. (AMCA, No. 33 at p. 7)

mixing in the heating season, and the blade shapes of ACFHs do not lend themselves to great utility in the reverse direction. AMCA was also not aware of any ACFHs that were reversible and stated that consumers also do not purchase ACFHs for winter-mode (*i.e.,* reverse direction) use. (AMCA, No. 3 pp. 7–8)

DOE performed an independent analysis using available test data from past DOE rulemakings and manufacturer-provided data in support of this test procedure rulemaking to calculate the diameter-to-maximum operating speed to determine whether the currently regulated fans in the test sample had a diameter-to-maximum operating speed ratio of greater than 0.06, as AMCA's provided data suggests. The analysis confirmed that HSSD, standard, and hugger ceiling fans have a diameter-to-maximum operating speed ratio of greater than 0.06 in/RPM, while those fans identified as ACFHs have a diameter-to-maximum operating speed ratio of less than or equal to 0.06 in/RPM.

TABLE III.1—SUMMARY OF DOE INDEPENDENT CF DEFINITION ANALYSIS

	Number of ceiling fans	Minimum diameter-to-maximum-operating-speed ratio
Hugger	42	0.098
Standard	49	0.105
HSSD	11	0.078
VSD	8	0.008
		Maximum diameter-to-maximum-operating-speed ratio
ACFH	35	0.029

In regards to VSD ceiling fans, all VSD ceiling fans, for which DOE had available test data, had a diameter-to-maximum operating speed ratio of less than 0.06 in/RPM, indicating that a threshold value of 0.06 in/RPM would not distinguish all VSD ceiling fans from ACFHs. VSDs are discussed further in the discussion that follows.

In this SNOPR, DOE proposes to define the term ''circulating air'', as it is used in the ceiling fan definition and include a specification that ceiling fans with a maximum operating speed ratio of greater than 0.06 in/RPM is considered to provide circulating air. EPCA does not define ''circulating air,'' but DOE understands that the term can generally be understood as the discharge of air in an upward or downward direction with the air returning to the intake side of the fan, *i.e.,* the air is circulated within a space. In contrast, directional airflow targets the discharged air at a specific location and the discharged air does not return to the intake side of the fan, *i.e.,* directional airflow moves air but does not circulate it within the space. A fan that provides directional airflow, as opposed to ''circulating air'', would not be a ''ceiling fan'' as that term is defined in EPCA.

DOE tentatively concludes that the diameter-to-maximum operating speed ratio of 0.06 in/RPM is appropriate to distinguish fans with directional airflow from circulating airflow. Data submitted by commenters as well as DOE's analysis indicate that a ratio of 0.06 in/RPM would distinguish fans that circulate air from fans that provide directional airflow and therefore are not ''ceiling fans.'' With the exception of certain VSD ceiling fans, as described further in the following paragraph, application of this ratio will continue to include within scope LDCF, HSSD, and LSSD ceiling fans, as these fans provide circulating airflow.

As described, certain VSD ceiling fans have a diameter-to-maximum operating speed ratio less than 0.06 and thus would be excluded from the scope of ceiling fans because of the proposed definition for ''circulating air''. DOE identifies these VSD ceiling fans as ''high-speed'' VSD ceiling fans because the tip speeds of the VSD ceiling fans discussed in Table III.1 all exceed the LSSD definition tip speed threshold (defined in section 1.16 of Appendix U), regardless of the thickness of the blades. Therefore, these VSD ceiling fans would not meet the LSSD ceiling fan definition. Further, as DOE discussed in the September 2019 NOPR, the current DOE test procedure provides a method of testing only those VSD ceiling fans that meet the LSSD ceiling fan definition. 84 FR 51440, 51445. DOE proposed in the September 2019 NOPR to specify explicitly that VSD ceiling fans that do not also meet the LSSD definition are not required to be tested pursuant to the DOE test method for the purposes of demonstrating compliance with DOE's energy conservation standards for ceiling fans or representations of efficiency. *Id.*

With regard to consideration of ''circulating air'', DOE understands based on the physical characteristics of the fans that these high-speed VSD ceiling fans provide consumers with directional high-speed airflow and do not circulate air within the space. Specifically, because of the small size (*i.e.,* smaller blade span compared to other small-diameter ceiling fans) and the higher speeds (*i.e.,* tip speeds above the LSSD ceiling fan definition thresholds), the function of these ''high-speed'' VSD ceiling fans is more akin to air circulating fan heads in that airflow is targeted in a specific direction without the air returning to the intake side of the fan. For this SNOPR, DOE initially determines that these high-speed VSD fans were inappropriately covered and that because they provide directional airflow and are not ''circulating air'', they would not be considered ceiling fans. Further, DOE notes that VSD ceiling fans (as a whole) represent less than one percent of the total ceiling fan market.

As discussed, the available data indicates that a diameter-to-maximum operating speed ratio of 0.06 in/RPM would distinguish between fans that provide air circulation and fans that provide directional airflow. The proposed definition for ''circulating air'', which would incorporate this ratio into the definition, would explicitly exclude from the ceiling fan scope ACFHs and ''high-speed'' VSDs having a diameter-to-operating speed ratio of less than 0.06 in/RPM. Therefore, including a definition for air circulating fan heads in DOE's test procedure would be unnecessary. DOE is therefore

not proposing a definition for air circulating fan head in this SNOPR.

In summary, in this SNOPR, DOE proposes the following definition for ''circulating air'' for the purpose of the ceiling fan definition:

Ceiling fan means a nonportable device that is suspended from a ceiling for circulating air via the rotation of fan blades. For the purpose of this definition:

(1) *Circulating Air* means the discharge of air in an upward or downward direction with the air returning to the intake side of the fan. A ceiling fan that has a ratio of fan blade span (in inches) to maximum rotation rate (in revolutions per minute) greater than 0.06 provides circulating air.

(2) For all other ceiling fan related definitions, see appendix U to this subpart.

In proposing this amendment, DOE notes that the design standards of EPCA would not be applicable to ceiling fans that do not meet the criteria of the proposed definition. Specifically, EPCA requires all ceiling fans manufactured after January 1, 2007, to have: (i) Fan speed controls separate from any lighting controls; (ii) adjustable speed controls (either more than 1 speed or variable speed); and (iii) the capability of reversible fan action, except for fans sold for industrial applications, fans sold for outdoor applications, and cases in which safety standards would be violated by the use of the reversible mode. (42 U.S.C. 6295(ff)(1)(A)) The energy conservation standards established by DOE would also not be applicable to such products.

Alternatively, DOE is considering including the definition of ''circulating air'' discussed previously within appendix U, instead of within the ceiling fan definition of 10 CFR 430.2.

DOE seeks comment on the proposed definition of ''circulating air'' for the purpose of the ceiling fan definition. Specifically, DOE requests comment on the use of a ''diameter-to-maximum operating speed'' ratio to distinguish fans with circulating airflow from directional airflow, and the appropriateness of using 0.06 in/RPM as the threshold ratio. If another ratio should be considered, DOE requests additional data to corroborate that ratio.

DOE seeks comment on the characterization of fans that would fall below the 0.06 in/RPM threshold ratio, such as certain high-speed VSD ceiling fans that do not also meet the definition of an LSSD fan. Specifically, DOE request comment on the appropriateness of excluding high-speed VSD ceiling fans from scope of ''ceiling fans.''

DOE seeks comment regarding whether ''circulating air'' should be defined within the definition of ceiling fan at 10 CFR 430.2, as DOE has proposed, or if ''circulating air'' should be defined separately within appendix U.

B. Scope of Test Procedure for Large-Diameter Ceiling Fans

Currently, section 3.4.1 of appendix U specifies that the test procedure for LDCFs is applicable for ceiling fans up to 24 feet in diameter. While the test procedure is only applicable for ceiling fans up to 24 feet in diameter, there is no language in the energy conservation standards for large diameter ceiling fans (in 10 CFR 430.32(s)(2)(ii)) that explicitly limits the scope of the large-diameter ceiling fan standards to large-diameter ceiling fans with blade spans 24 feet or smaller.[13]

In the September 2019 NOPR, DOE proposed that LDCFs with blade spans greater than 24 feet do not need to be tested pursuant to the DOE test procedure for purposes of determining compliance with DOE energy conservation standards or making other representations of efficiency due to the lack of LDCFs on the market availability of test facilities capable of testing LDCFs, especially those with blade spans greater than 24 feet. 84 FR 51440, 51449 (citing 81 FR 48620, 48632 (July 25, 2016)). In response, BAF provided written comments and statements in the public meeting that BAF does not foresee a need for establishing a limit of 24 feet, which it described as artificial. (Public Meeting Transcript at pp. 98–99; *see also* BAF, No. 36 at p.2) AMCA commented that ceiling fans larger than 24 feet in diameter are uncommon in the United States due to requirements in the United States Standard for the Installation of Sprinkler Systems (NFPA 13). AMCA stated that in some situations ceiling fans larger than 24 feet in diameter could be used (*e.g.,* where sprinklers are not present), and that the AMCA 230–15 test method should be used for those ceiling fans. (AMCA, No. 33 at p. 8)

In this SNOPR, DOE is proposing to remove the 24-foot blade span limit in section 3.4.1 of appendix U. This proposal is based on two primary factors. First, because DOE's test procedure for LDCFs is based on AMCA 230–15, nothing inherent to the test procedure would prevent testing of a ceiling fan greater than 24 feet. AMCA 230–15 provides minimum clearances as a function of blade span, and does not specify an upper limit on blade span. Second, DOE received confirmation that AMCA has a test facility capable of testing ceiling fans with blade spans substantially larger than 24 feet, according to the minimum clearances specified in AMCA 230–15.

DOE seeks comment on its proposal to remove the 24-foot blade span limit in section 3.4.1 of appendix U, which would expand the scope of the test procedure for LDCFs to ceiling fans with blade span larger than 24 feet.

DOE was made aware that AMCA 230–15 was inconsistent in its conversion of measurements to standard air density. Whereas calculated thrust is converted to standard air density (section 9.3 of AMCA 230–15), electric input power is not. Thrust (which is used to determine airflow in cubic feet per minute (CFM)) and electric input power are inputs to the CFEI metric described in AMCA 208–18. Therefore, without the correction, the same fan can have different values for CFEI depending on the density of the air where the fan is being tested. On May 5, 2021, AMCA made a correction to address the inconsistency in the industry standard in the form of a technical errata sheet for AMCA 230–15. The technical errata sheet details that the corrections listed in the errata sheet apply to all copies of AMCA 230–15. Accordingly, in this SNOPR, DOE clarifies that the technical errata sheet applies to AMCA 230–15, which is currently incorporated by reference in 10 CFR 430.3(b)(4).

C. Belt-Driven Ceiling Fans

Section 1.3 of appendix U defines a belt-driven ceiling fan as ''a ceiling fan with a series of one or more fan heads, each driven by a belt connected to one or more motors that are located outside of the fan head.'' Moreover, in section 2 of appendix U, DOE excludes belt-driven ceiling fans from the scope of the test procedure.

In response to the May 2021 RFI, DOE received a number of comments recommending including certain belt-driven ceiling fans within the scope of the test procedure. Specifically, BAF commented that a new type of belt-driven ceiling fan has come onto the market since the last final rule that uses larger motors and has higher tip speeds (above 5000 feet per minute, or fpm). (BAF, EERE–2021–BT–STD–0011, No. 14 at p. 2). AMCA also commented that a new type of belt-driven fan has come onto the market with a larger motor (1

[13] While, the Energy Act of 2020 updated 10 CFR 432(s)(2)(ii) to specify that large diameter ceiling fans are subject to the CFEI metric, the previous energy conservation standards or the amended energy conservation standards imposed any upper limit on the blade span for large-diameter ceiling fans.

to 3 hp) and higher tip speeds (5000 to 6000 fpm). (AMCA, EERE–2021–BT–STD–0011, No. 9 at p. 2) BAF recommends that this new variety of belt-driven fans be tested according to AMCA 230–15/AMCA 208. (BAF, EERE–2021–BT–STD–0011, No. 14 at p. 2). AMCA recommended separating belt-driven fans into two classes—high-speed and low-speed—and to test high-speed belt-driven fans according to ANSI/AMCA Standard 230–15, including the technical erratum sheet published by AMCA on May 5, 2021. (AMCA, EERE–2021–BT–STD–0011, No. 9 at p. 4; *see also* BAF, EERE–2021–BT–STD–0011, No. 14 at p. 2)

In the July 2016 Final Rule, DOE discussed that DOE would not propose standards for belt-driven ceiling fans due to the limited number of basic models and lack of available data. 81 FR 48619, 48622. During the last rulemaking, DOE's review of the belt-driven ceiling fan market at the time suggested that these fans are used in bars and restaurants that have decorative ceilings with limited electrical boxes on the ceiling to mount multiple conventional ceiling fans. In addition, DOE noted that the observed belt-driven ceiling fans were highly customizable, in that consumers can decide on the number of fan heads and the kind of fan belts to use. At the time, because these individual fan heads could not be isolated in testing, they could not be testing according to appendix U as written and were thus exempted. (See Chapter 3 of the November 2016 Energy Conservation Standards Final Rule Technical Support Document [14]). While DOE did not establish a test procedure for these fans, DOE noted that it would be investigating appropriate test procedures for belt-driven ceiling fans. 81 FR 48619, 48622.

Since the last rulemaking and based on comments received, DOE has identified higher speed, belt-driven ceiling fans on the market, intended for industrial and commercial applications. DOE conducted market research and found that these fans were typically single-head fans housed in a cage, frequently mounted to the ceiling by straps or brackets as opposed to the traditional downrod. They were marketed for a variety of industrial applications such as agriculture, warehouses, and factories. Like other belt-driven fans, the motors typically exist outside of the housing for the fan, but still located within the cage. However, unlike other belt-driven ceiling fans, they are not customizable, and the fan head can be isolated for testing. DOE notes that, in contrast to the low-speed multiple head belt-driven ceiling fans, these designs allow single-head belt-driven ceiling fans to be tested using current test procedures in appendix U. Therefore, DOE proposes to include these higher speed single-head belt-driven ceiling fans within the scope of the test procedure, as long as these fans meet the proposed amended ceiling fan definition.

To distinguish these high-speed belt-driven ceiling fans with one fan head from other low-speed, multiple head belt-driven ceiling fans, DOE proposes the following definition:

High-speed belt-driven (HSBD) ceiling fan means a small-diameter ceiling fan that is a belt-driven ceiling fan with one fan head, and has tip speeds greater than or equal to 5000 feet per minute.

DOE preliminarily concludes that 5000 fpm may be an appropriate threshold based on recommendations from the commenters. However, DOE is considering other thresholds that may be appropriate for the proposed definition.

DOE seeks comment on including within the test procedure scope HSBD ceiling fans, the proposed term and definition, and the appropriate tip speed threshold. Furthermore, DOE requests data on blade thickness and tip speeds for these HSBD ceiling fans.

Further, DOE observed at least one belt-driven ceiling fan that has a marketed blade span greater than 7 feet. DOE proposes to include such ceiling fans in the test procedure scope. To separate these ceiling fans from the proposed HSBD ceiling fan scope, DOE proposes the following definition:

Large-diameter belt-driven (LDBD) ceiling fan means a belt-driven ceiling fan with one fan head that has a represented value of blade span, as determined in 10 CFR 429.32(a)(3)(i), greater than seven feet.

Within this definition, DOE proposes to incorporate the specification for the represented value of blade span as proposed in the September 2019 NOPR. 84 FR 51440, 51450.

DOE seeks comment on including within the test procedure scope LDBD ceiling fans, and the proposed definition.

Alternatively, DOE may consider a combined term and definition for all belt-driven ceiling fans that meet the above scope of HSBD and LDBD ceiling fans. Specifically, DOE could remove the ''small-diameter'' part of the aforementioned HSBD definition. By removing ''small-diameter'' in the definition, the alternate HSBD definition should accommodate belt-driven ceiling fans with blade spans greater than seven feet. DOE alternatively proposes that the term high-speed belt-driven ceiling fan reads as follows:

High-speed belt-driven ceiling fan (HSBD) means a ceiling fan that is a belt-driven ceiling fan with one fan head, and has tip speeds greater than or equal to 5000 feet per minute.

DOE seeks comment on the alternate definition for HSBD ceiling fans, and whether it would incorporate all the LDBD ceiling fans from DOE's primary proposal. Further, DOE requests comment on whether the HSBD and LDBD ceiling fan scope should be combined, *i.e.,* what is the utility and application of the two fan categories.

In conversations with manufacturers, DOE learned that the HSBD ceiling fans and LDBD ceiling fans move significantly more air than HSSD ceiling fans and as such, these fans could be difficult to test under the small-diameter ceiling fan test procedure (*i.e.,* using sensor arm setup) due to the possibility of inducing vortexes in the smaller testing room.[15] Typically, HSSD fans use a fractional horsepower (*i.e.,* less than 1 horsepower) direct-drive motor. By contrast, these HSBD ceiling fans and LDBD ceiling fans use a much larger motor, often in excess of 1 horsepower (''HP''), to spin with much higher tip speeds.

DOE received comments from two stakeholders on testing these fans to AMCA 230–15. Both BAF and AMCA also recommended testing all high-speed belt-driven fans according to appendix U corrected, *i.e.,* ANSI/AMCA Standard 230–15. (AMCA, EERE–2021–BT–STD–0011, No. 9 at p. 4; *see also* BAF, EERE–2021–BT–STD–0011, No. 14 at p. 2) Therefore, DOE proposes to test both HSBD ceiling fans and LDBD ceiling fans according to AMCA 230–15. DOE proposes to specify that HSBD ceiling fans and LDBD ceiling fans be tested using the test apparatus in appendix U, section 3.4, which references AMCA 230–15.[16]

DOE requests comment on requiring AMCA 230–15 as the test procedure for

[14] Found at: *www.regulations.gov/document/EERE-2012-BT-STD-0045-0149.*

[15] Vortexes in the testing room creates highly turbulent air flow that revolves around an axis and can move at differing speeds depending on the air distance from the vortex center of rotation. These swirling and turbulent air flows would make it difficult for the air velocity sensors used in the small-diameter ceiling fan test procedure to meet the stability criteria.

[16] AMCA 208–18 includes the calculation method for the fan energy index (FEI). AMCA–208 references several other test methods for calculation of fan air performance, depending on the fan type, including AMCA 230–15. Both AMCA 208–18 and AMCA 230–15 are referenced in appendix U.

HSBD and LDBD ceiling fans, or whether DOE should consider any other test procedure.

While some of the HSBD ceiling fans and LDBD ceiling fans are advertised as being capable of variable speed operation, and sold with a variable speed drive, others are advertised as only capable of single speed operation. For HSBD and LDBD ceiling fans capable of only single speed operation, DOE proposes that both HSBD and LDBD ceiling fans be tested only at high speed operation. For HSBD and LDBD ceiling fans capable of variable speed operation, DOE proposes that HSBD and LDBD ceiling fans also be tested at high speed operation and 40 percent speed.

DOE requests comment on its proposal to test single speed HSBD and LDBD ceiling fans only at high speed and variable speed HSBD and LDBD ceiling fans at high speed and 40 percent speed. Alternatively, DOE requests comment on the typical number of operating speeds and hours for HSBD ceiling fans and LDBD ceiling fans.

As stated previously, the quantity of air moved by HSBD ceiling fans and LDBD ceiling fans is significantly greater than HSSD ceiling fans on the market and more similar to the max airflow (or CFM) of large-diameter ceiling fans. Therefore, DOE proposes that the efficiency metric for both HSBD ceiling fans and LDBD ceiling fans be CFEI, consistent with large-diameter ceiling fans. Therefore, DOE is proposing to modify the language in appendix U, section 3.5 to specify that for HSBD ceiling fans and/or LDBD ceiling fans capable of only single speed operation, the CFEI should be calculated only at high speed. Similarly, DOE is proposing that for large-diameter, HDBD, and LDBD ceiling fans the CFEI be calculated at high speed and 40 percent speed.

Alternatively, DOE is also considering the small-diameter ceiling fan metric, CFM/W, for HSBD ceiling fans and/or LDBD ceiling-fans. If DOE were to consider a CFM/W metric, DOE would need to account for the number of operating hours in active mode and the number of hours at each operating speed. DOE would also need data on the number of hours in standby mode.

DOE requests comment on whether the efficiency of HDBD ceiling fans and LDBD ceiling fans is more appropriately evaluated using the CFEI or CFM/W metric.

D. Standby Power Metric for Large-Diameter Ceiling Fans

As discussed previously, the Energy Act of 2020 specifies that LDCFs are no longer required to meet minimum ceiling fan efficiency requirements in terms of the ratio of total airflow to total power consumption, CFM/W, as established in the January 2017 Final Rule. (See also 42 U.S.C. 6295(ff)(6)(C)(i)(I)) Instead, Congress established separate minimum efficiency standards for two distinct modes of LDCF operation. (42 U.S.C. 6295(ff)(6)(C)(i)(II)) Specifically, Congress defined standards based on a CFEI at high speed, and at 40 percent speed or the nearest speed that is not less than 40 percent speed. *Id.* The Energy Act of 2020 amendments to EPCA explain that ''CFEI'' means the Fan Energy Index for large-diameter ceiling fans, and that it is calculated in accordance with ANSI/AMCA Standard 208–18 titled ''Calculation of the Fan Energy Index'', with the following modifications: Using an Airflow Constant (Q_0) of 26,500 cubic feet per minute; using a Pressure Constant (P_0) of 0.0027 inches water gauge; and using a Fan Efficiency Constant (η_0) of 42 percent. (42 U.S.C. 6295(ff)(6)(C)(ii)) Whereas the CFM/W metric incorporated active mode and standby mode into a single metric, the new CFEI metric, adopted in the Energy Act of 2020, incorporates only active mode, without accounting for standby mode.

EPCA requires amended test procedures and energy conservation standards to incorporate standby mode and off mode energy use.[17] (42 U.S.C. 6295(gg)(2) and (3)) Amended test procedures must integrate standby mode and off mode energy consumption into the overall energy efficiency, energy consumption, or other energy descriptor, unless the current test procedures for a covered product already incorporate standby mode and off mode energy consumption, or such an integrated test procedure is technically infeasible, in which case the Secretary shall prescribe a separate standby mode and off mode energy use test procedure for the covered product, if technically feasible. (42 U.S.C. 6295(gg)(2)(A))

DOE has initially determined that it would be technically infeasible to integrate standby power with each of the statutory CFEI requirements (*i.e.,* high-speed requirement and 40-percent requirement), such that the integrated metric would be representative of an average period of use as required by EPCA. (*See* 42 U.S.C. 6293(b)(3)) The two standards for LDCFs established by Congress require measurement of energy efficiency at two separate modes of operation, both of which occur during active mode (*i.e.,* operation of the fan at high speed, and operation of the fan at 40 percent speed or the nearest speed that is not less than 40 percent speed). Each energy efficiency measurement, by itself, does not fully represent active mode energy efficiency (and even a combination of the two may not fully represent active mode).

Standby mode is a distinct mode from either of the segments of active mode for which energy efficiency is measured. If an LDCF is consuming energy, but not operating in active mode, it is operating in either standby mode or off mode.[18]

Given that, as previously discussed, each metric required by the Energy Act of 2020 does not fully account for active mode energy use/efficiency, neither metric would be appropriately representative if integrated with standby mode operation because the resulting metric would capture a portion of active mode energy and the total standby energy use. Such an integrated metric would not be representative of an average period of use. Further, were standby power integrated into the measurements required for both LDCF standards, the same standby energy use would be represented twice—once with the integrated high-speed metric and once with the integrated 40-percent metric. The standby mode energy use could be scaled to the active mode energy use for the corresponding LDCF standard, but under such a metric, standby mode energy use would not be fully captured. Even if both LDCF standards were integrated with a scaled standby energy use, the total standby mode energy use may not be captured because the measurements for the two LCDF standards may not represent the complete active mode operation.

For the reasons discussed in the preceding paragraphs, DOE is proposing a separate metric for standby mode energy use.

Specifically, DOE proposes for the test method for power consumption in

[17] EPCA defines ''standby mode'' as the condition in which an energy-using product: Is connected to a main power source, and offers one or more of the following user-oriented or protective functions: (1) The ability to facilitate the activation or deactivation of other functions (including active mode) by remote switch (including remote control), internal sensor, or timer; and (2) continuous functions, including information or status displays (including clocks), or sensor-based functions. (42 U.S.C. 6295(gg)(1)(A)(iii)) ''Off mode'' is the condition in which the ceiling fan is connected to a main power source and is not providing any standby or active mode function. (42 U.S.C. 6295(gg)(1)(A)(ii))

[18] Consistent with the discussion in the October 2014 test procedure NOPR for ceiling fans, DOE's research continues to suggest that there is no off mode power consumption for ceiling fans, so DOE is not proposing an off-mode power efficiency metric or off mode testing. *See* 79 FR 62522, 62524 (Oct. 17, 2014).

standby mode already established in section 3.6 of appendix U to remain applicable to LCDFs. The standby mode test method measures standby power in watts and is based on IEC standard 62301:2011, with modifications to reduce test burden by reducing the interval of time over which testing occurs as well as the period of time required prior to standby testing.

DOE notes that no standby standard is currently applicable to LDCFs and that were DOE to adopt the proposed standby test procedure and metric for LDCFs, manufacturers would not be required to test to that provision until such time as compliance is required with an energy conservation standard for standby mode, should such a standard be established.

DOE seeks comment on its preliminary determination that establishing an integrated metric that incorporates the energy efficiency measured as required under each LCDF standard and the energy use measured during standby mode would be technically infeasible.

DOE seeks comment on its proposal to specify for LDCFs a separate standby mode energy use metric, which would be based on the standby power procedure defined in section 3.6 of appendix U.

DOE also notes that if a CFEI standard is established for HSBD ceiling fans and LDBD ceiling fans, as is being proposed in this SNOPR, a separate standby mode energy use metric would need to be established. Similar to the LDCFs, DOE proposes for the test method for power consumption in standby mode already established in section 3.6 of appendix U to be applicable to HSBD ceiling fans and/or LDBD ceiling fans. The standby mode test method measures standby power in watts and is based on IEC standard 62301:2011, with modifications to reduce test burden by reducing the interval of time over which testing occurs as well as the period of time required prior to standby testing.

Alternatively, were DOE to decide that a CFM/W metric is more appropriate for HSBD and LDBD ceiling fans, DOE proposes that the standby power would be incorporated into the CFM/W metric, similar to other small-diameter ceiling fans, and would be calculated according to section 3.6 of appendix U.

DOE seeks comment on its proposal to specify for HSBD ceiling fans and LDBD ceiling fans a separate standby mode energy use metric, which would be based on the standby power procedure defined in section 3.6 of appendix U.

E. Low-Speed Definition

Section 1.12 of appendix U defines low speed to mean ''the lowest available ceiling fan speed, *i.e.,* the fan speed corresponding to the minimum, non-zero, blade RPM.''

In the September 2019 NOPR, DOE described that through round robin testing and industry inquiry, DOE is aware that the lowest available fan speed on some ceiling fans provides an extremely low rotation rate, leading to atypically low airflow. 84 FR 51440, 51446. Because of the extremely low rotation rate and atypically low airflow consumers are unlikely to use such a setting to circulate air. It is expected that such a low fan speed is provided for aesthetic purposes; for example, one such product advertises the lowest speed as helping to maintain a ''calm atmosphere.'' [19] For such products, the lowest speed available on the ceiling fan is not representative of the lowest speed for that product that can provide ''circulation of air''.

In addition to not being representative of a speed that can circulate air, DOE has observed through round robin testing that requiring testing at the ''lowest available speed'' on such products creates added test burden because laboratories have difficulty meeting the stability criteria [20] despite routinely achieving stability for other fans (without such extremely low speed settings). 84 FR 51440, 51446–51447. Accordingly, in the September 2019 NOPR, DOE stated that it is considering modifying the definition of low speed. Specifically, DOE suggested defining the low speed for the purpose of testing as the lowest available ceiling fan speed for which fewer than half or three, whichever is fewer, sensors on any individual axis are measuring less than 30 feet per minute (''FPM''). In conjunction, DOE considered providing explicit instructions in the test procedure to start at the lowest speed and move to the next highest speed until the modified low speed criteria are met. DOE requested comment on this modification. 84 FR 51440, 51447

In response to the September 2019 NOPR, ALA, AMCA, BAF, Hunter and Ransom supported DOE's proposal to redefine low speed. (ALA, No. 34 at p. 3; AMCA, No. 33 at p. 8; BAF No. 36 at p. 2; Hunter No. 29 at p. 4; Ransom, No. 35 at p. 1) During the public meeting, AMCA discussed how low speed in a residential setting sometimes serves as a different function for the consumer than the movement and recirculation of air (*i.e.,* ''serenity mode'') and measuring this speed under the current test procedure is erratic and can end up being a non-qualifying test. (AMCA, Public Meeting Transcript at p. 52–53) Westinghouse also was generally supportive of the proposal. (Westinghouse, Public Meeting Transcript at p. 57) Ransom suggested that adding an exception for fans with ''serenity modes'' [21] would benefit manufacturers in applications where this aesthetic is desired. (Ransom, No. 35 at p. 1) ALA and Hunter commented that the ''serenity'' features satisfy a consumer aesthetic desire or provide decorative utility. (ALA, No. 34 at p. 4; Hunter No. 29 at p. 4) In response to DOE's suggested definition in the September 2019 NOPR, ALA commented that ''low speed'' should be defined as ''the lowest available ceiling fan speed for which fewer than half or three, whichever is fewer, sensors on any individual axis are measuring less than 40 FPM, rather than 30 FPM.'' (ALA, No. 34 at p. 3) BAF also suggested 40 FPM as the lowest speed at which draft begins to be felt at the occupant level. (BAF, Public Meeting Transcript at p. 61)

The current definition of low speed could require testing LSSD ceiling fans and VSD ceiling fans that also meet the definition of an LSSD fan at a speed with an extremely low rotation rate, which consumers are unlikely to use to circulate air. Rather, as suggested by Hunter and ALA, this speed is used more for a consumer aesthetic desire, as indicated by this speed being advertised as helping to maintain a ''calm atmosphere.'' For such products, the low speed as defined for the purpose of the current DOE test procedure is not representative of the low speed required for ''circulation of air''.[22] Further, as observed through round robin testing and as discussed previously, requiring testing at the ''lowest available speed''

[19] See example product brochure at *https://www.lowes.com/pd/Hunter-52-in-Indoor-Multi-position-Ceiling-Fan-with-Light-Kit-5-Blade/1270423* which discusses the fan's ''serenity speed''.

[20] Section 3.3.2(1) of Appendix U defines the stability criteria for airflow. Airflow is considered stable if the average air velocity for all axes for each sensor varies by less than 5% compared to the average air velocity measured for that same sensor in a successive set of air velocity measurements.

[21] DOE interprets ''serenity mode'' as the speed with an extremely low rotation rate, leading to a typically low airflow.

[22] DOE has proposed to define circulating air as ''the discharge of air in an upward or downward direction with the air returning to the intake side of the fan. A ceiling fan that has a ratio of fan blade span (in inches) to maximum rotation rate (in revolutions per minute) greater than 0.06 provides circulating air.'' The extremely low rotation rates described in this section provide insufficient air movement for the discharge of air to return to the intake side of the fan.

would be overly burdensome to test because laboratories have trouble meeting the stability criteria.

For the September 2019 NOPR, DOE initially developed the 30 FPM threshold by identifying the threshold below which several common varieties of air velocity sensors could no longer meet the test procedure accuracy and stability requirements. 84 FR 51440, 51447. However, DOE had also stated in the September 2019 NOPR that ceiling fans with low speeds that produce air velocities lower than 40 FPM may have trouble meeting the stability criteria. 84 FR 51440, 51446. As noted, section 3.2 of appendix U specifies that air velocity sensors must have an accuracy within ±5% of reading or 2 FPM, whichever is greater. In further reviewing these accuracy requirements, DOE notes that the 2 FPM accuracy tolerance can be determined by multiplying the 5 percent accuracy requirement with 40 FPM, indicating that an air velocity threshold of 40 FPM, rather than 30 FPM, would better align with these established stability criteria. Furthermore, for the September 2019 NOPR proposal of a 30 FPM threshold, DOE had not evaluated every sensor used by laboratories and considered the commenters' proposals to use a 40 FPM threshold to be more representative based on industry experience.

For the reasons discussed, DOE proposes to amend the low-speed definition as follows:

Low speed means the lowest available ceiling fan speed for which fewer than half or three, whichever is fewer, sensors per individual axis are measuring less than 40 feet per minute.

Alternatively, DOE is considering representing the proposed definition as a table indicating the number of sensors that must measure >40 FPM, as follows:

Low speed means the lowest available speed that meets the following criteria:

Number of sensors per individual axis as determined in section 3.2.2(6) of Appendix U	Number of sensors per individual axis measuring 40 feet per minute or greater
3	2
4	3
5	3
6	4
7	4
8	5
9	6
10	7
11	8
12	9

Furthermore, DOE proposes to include explicit instructions in the test procedure to start at the lowest speed and move to the next highest speed until the modified low speed criteria are met. This would ensure the identification of the lowest speed of the fan that meets the proposed low speed definition. DOE understands that most LSSD ceiling fans have distinct speed settings and would be able to accommodate this proposal.

DOE expects that this proposed amendment would reduce the total test time per unit for low speed tests for a subset of LSSD ceiling fans. Under the current test procedure, the low speeds in question would likely require laboratories to run tests for a long period (potentially the full duration of the laboratories' local operating procedures limit) before achieving the necessary stability criteria requirements. The proposed alternate test method could mitigate the occurrence of these long test runs. DOE estimates that manufacturers of LSSD ceiling fans that conduct testing in-house could save approximately 60 minutes in per unit testing time due to the new low speed criteria.

DOE does not expect this amendment to require retesting or to change measured efficiency for the majority of LSSD ceiling fans. However, for the small subset of LSSD ceiling fans for which the lowest speed is at an extremely low rotation rate and provides a low airflow, retesting may be required if the lowest speed does not meet the proposed definition of low speed. In the instances under the proposal for which testing at the next highest speed were to be required, testing at the next highest speed would likely result in increased power consumption, but it would also result in increased airflow. The resulting ceiling fan efficiency is calculated by weighting the airflow and power consumption results from the high speed test (which is not proposed to be amended) with the low speed test, resulting in a weighted average CFM/W (Equation 1, Appendix U). Because the measured efficiency is a ratio of airflow and power consumption and testing at the next highest speed would result in an increase in airflow as well as power consumption, DOE expects the low speed proposal to have insignificant effect on ceiling fan efficiency for the applicable subset of LSSD ceiling fans.

The potential cost and cost saving impacts of this proposal are discussed in section III.K.1.a. of this document.

DOE seeks comment on the proposal to update the low speed definition as follows: *Low speed* means the lowest available ceiling fan speed for which fewer than half or three, whichever is fewer, sensors per individual axis are measuring less than 40 feet per minute.

DOE also seeks comment on the alternate proposal to represent low speed as a table specifying the number of sensors per individual axis required to measure greater than 40 feet per minute.

DOE seeks comment on the proposal to require testing to start at the lowest speed and move to the next highest speed until the modified low speed criteria are met. Specifically, DOE seeks comment on whether any applicable variable speed LSSD ceiling fans (without distinct speed settings) would require further specificity on this proposal and if so, how it should be specified.

Hunter, ALA, BAF and AMCA further commented that if either tested fan sample (per DOE sampling requirements) has a lowest-speed setting that does not meet the definition of low speed under this proposal, both samples should be tested at the next highest speed. (Hunter, No. 29 at p. 4; ALA, No. 34 at p. 3; BAF, No. 36 at p. 2; AMCA, No. 33 at p. 8) DOE requires that ceiling fan representation must be based on sampling requirements prescribed at 10 CFR 429.11, which specifies that the minimum number of units tested shall be no less than two. 10 CFR 429.32. Testing of ceiling fans must be conducted according to Appendix U, which as proposed, would require determining the setting that meets the definition of low speed individually for each of the units in the sample, if applicable. As discussed previously, 40 FPM is representative of the low speed required for ''circulation of air''. To the extent that there is any variation within the sample of fans for a basic model, determining the setting that meets the definition of low speed individually for each unit in the sample would correspond to how each unit in the sample would be operating during a representative average use cycle.

DOE requests comment on the extent to which, for DOE certification purposes, an individual unit within a sample of fans (per basic model) could have a different setting that meets the proposed definition of low speed than other units within the same sample. If so, DOE requests data on how the issue could affect representativeness (in terms of ceiling fan efficiency) of the basic model.

F. Sensor Arm Setups

To record air velocity readings, Section 3.3.2 of appendix U prescribes two setups for taking airflow measurements along four perpendicular axes (designated A, B, C, and D): A single rotating sensor arm or four fixed sensor arms. If using a single rotating sensor arm, airflow readings are first measured on Axis A, followed by

successive measurements on Axes B, C, and D. If using four fixed sensor arms, the readings for all four axes are measured simultaneously. See Steps 4 and 5 of section 3.3.2(2) of appendix U. The team has observed that valid results are generally attained more quickly using the four-arm setup because measurements are taken simultaneously in all four axes and stability can be achieved in fewer runs (*i.e.,* a complete set of air velocity measurements for all axes). However, a four-arm setup is more expensive because it requires at least 4 times as many sensors. This setup is typically used by laboratories that primarily test LSSD fans (which require low airflow to be measured) or laboratories that test large quantities of fans, for which a faster throughput is important. A single-arm setup is less expensive and is typically used by laboratories that test mostly high-speed ceiling fans or test very few ceiling fans.

The single-arm setup requires the rotation of the arm every 100 seconds, which disrupts the air, often increasing the time to achieve stability. Assuming it takes 3 cycles to reach stability for the low-speed test (*i.e.,* average air velocity across all sensors for cycles 2 and 3 meet the stability criteria), the test length would be around 16 minutes for the four fixed arm unit and around 41 minutes for the single rotating arm unit.[23] During round robin testing, DOE personnel noted that laboratories using the single rotating sensor arm waited approximately 30 seconds for arm vibration to dissipate before starting data collection at the new position, adding a minimum of 1 minute 30 seconds to each test cycle.

During round-robin testing, laboratories with single-arm setups were able to achieve stability for 75 percent of fans tested, as compared to 96 percent for laboratories using four-arm setups.

To address stability issues in a single-arm setup, DOE proposes, based on observations from the round robin testing, to provide explicit instruction for setups that require arm rotation to stabilize the arm and allow 30 seconds between test runs for any residual turbulence to dissipate prior to data collection after each rotation. While this additional instruction would increase testing time of each axis, based on observation through round robin testing, DOE has initially determined that this requirement could further contribute to more accurate and stable airflow measurements during testing. In some cases, this could reduce overall testing time by avoiding the need to retest to meet the required air velocity stability criteria (section 3.3.2(1) of appendix U).

As an alternative to the single- and four-arm setup options, DOE also proposes to allow laboratories to rely on test setups with two arms, so that the system would need to be rotated only once to collect data for all four axes. A two-arm setup would require less time to collect the necessary data than a 1-arm setup and would therefore reduce testing burden for laboratories currently using a 1-arm setup. It would also require fewer sensors than a four-arm setup, and could therefore provide a cost-effective approach to achieve stability conditions more easily at low speed. DOE proposes to amend sections 3.2.2(4) and 3.3.2 of appendix U to accommodate the use of a two-arm setup.

DOE seeks comment on the proposed requirement to add 30 seconds between test runs for a rotating arm setup (either single-arm or two-arm).

DOE seeks comment on its proposal to permit the use of a two-arm setup, as well as any data to confirm that a 2-arm option produces comparable results to the existing 1-arm and 4-arm options.

G. Air Velocity Sensor Mounting Angle

Section 3.2.2 of appendix U does not specify the applicable mounting angle of the sensors on the sensor arm.

Air velocity is most accurately measured by aligning the velocity sensor perpendicular to the airflow path, as this is the orientation for which the airflow through the openings of the sensor is smooth and free of turbulence. However, during recent round robin testing, the team noted that some air velocity sensors were not aligned perpendicular to the path of airflow. A misaligned velocity sensor could produce inaccurate air velocity measurements. Therefore, to ensure consistent air velocity alignment, DOE proposes to include explicit instructions in section 3.2.2(6) of appendix U to align the air velocity sensors perpendicular to the direction of airflow. DOE could also consider updating Figure 2 of appendix U (which would be renumbered as Figure 3 in this proposal), or adding a new figure, to depict more clearly the alignment of the velocity sensors perpendicular to the direction of airflow.

DOE requests comment on its proposal to specify aligning the air velocity sensors perpendicular to the airflow. DOE also requests comment on whether it should revise Figure 2 of appendix U, and/or provide an additional figure, to depict more clearly the alignment of the velocity sensors perpendicular to the direction of airflow.

H. Instructions To Measure Blade Thickness

Sections 1.8 and 1.13 in appendix U incorporate a fan blade thickness threshold of 3.2 mm within the definitions of HSSD ceiling fan and LSSD ceiling fan, respectively. Blade edge thickness is used to distinguish product classes because it relates to safety considerations that, in turn, relate to where a ceiling fan is likely to be installed. Commercial and industrial ceiling fans are typically installed in locations with higher ceilings, and therefore thin leading edges on the blades do not present the safety hazard that thin leading edges would present on ceiling fans that are installed at lower heights, *i.e.,* residential ceiling fans.

Appendix U currently does not provide instruction for how to measure fan blade thickness. In the September 2019 NOPR, DOE proposed that blade edge thickness for small diameter fans be measured at the leading edge of the fan blade (*i.e.,* the edge in the forward direction) with an instrument having a measurement resolution of at least a tenth of an inch. DOE also proposed the following instructions for measuring blade edge thickness to ensure test procedure reproducibility, given potential variations in blade characteristics: (1) Measure at the point at which the blade is thinnest along the radial length of the fan blade and is greater than or equal to one inch from the tip of the fan blade, and (2) Measure one inch from the leading edge of the fan blade. 84 FR 51440, 51450.

DOE has subsequently become aware of a ''rolled-edge'' blade design on a residential ceiling fan for which the thickness of the body of the blade is less than 3.2 mm, but that has a curled shape along the leading edge, with the curl having an outer thickness greater than 3.2 mm. For such a rolled-edge blade, the blade thickness measurement procedure proposed in the September 2019 NOPR would indicate a ''thin blade'' despite the thicker leading edge, resulting in the fan being classified as an HSSD, which as discussed are generally non-residential fans. Conversely, measuring the thickness at the rolled edge (less than one inch from the leading edge) would result in the fan being classified as an LSSD, which are generally residential fans. In order to measure blade thickness for ''rolled-edge,'' flat, tapered, and other ceiling fan blade types in a manner that will consistently classify ceiling fans with

[23] These time frames were determined in the round robin report, found in the rulemaking docket EERE–2013–BT–TP–0050. *www.regulations.gov/docket/EERE-2013-BT-TP-0050.*

these blade types into the right product class, DOE is proposing to update the proposal for measuring blade thickness as follows: (1) Locate the cross section perpendicular to the fan blade's radial length, that is at least one inch from the tip of the fan blade and for which the blade is thinnest, and (2) measure the thickest point of that cross section within one inch from the leading edge of the fan blade.

DOE expects that this proposal would result in ceiling fans with ''rolled-edge'' blade designs being assigned to the appropriate product class, while having minimal effect on the blade thickness measurement of other blade types relative to the proposal in the September 2019 NOPR.

DOE seeks comment on its proposal to measure ceiling fan blade thickness at the thickest point within 1″ of the blade's leading edge, along the plane perpendicular to the blade's radial length at which the blade is thinnest. Specifically, DOE seeks feedback on if this update will prevent ceiling fans from being incorrectly classified into the wrong product class. DOE also welcomes feedback on if the blade thickness should be measured within 1″ of the leading edge, or if the allowable thickness measurement zone should be restricted to closer to the leading edge (*e.g.,* within ½″ or ¼″ of the leading edge).

I. Specifications for Ceiling Fans With Accessories

Sections 3.3.1 (''Test conditions to be followed when testing'') and 3.5.1 of appendix U, require that a ceiling fan's heater and light kit be installed, but not energized during the power consumption measurement. These provisions are in place to include any impact these accessories might have on airflow, but prevent any reduction of the measured airflow efficiency that would result from including power consumption that does not relate to the ceiling fan's ability to circulate air. Beyond heaters and light kits, an increasing number of ceiling fan models on the market contain other features, such as air ionization and ultraviolet technology, that do not relate to the ceiling fan's ability to circulate air, but that consume power and therefore could reduce the measured airflow efficiency.

DOE proposes to amend the language in sections 3.3.1 and 3.5.1 in appendix U to apply more broadly to any additional accessories or features that do not relate to the ceiling fan's ability to create airflow by rotation of the fan blades. Specifically, DOE proposes that such accessories or features must not be energized during testing. If the accessory or feature cannot be turned off, it shall be set to the lowest energy-consuming mode during testing. This proposal would clarify the application of the test procedure to ceiling fans with accessories or features other than light kits and heaters, while not incurring additional test costs or burdens. DOE does not expect this clarification to result in manufacturers having to re-test their ceiling fans, because DOE expects that manufacturers would have set such accessory features to their lowest energy-consuming state during testing.

DOE seeks comment on its proposal to require that testing be performed without any additional accessories or features energized, if possible; and if not, with the additional accessories or features set at the lowest energy-consuming mode for testing.

J. Product Specific Rounding and Enforcement Provisions

1. Airflow (CFM) at High Speed Rounding

In the September 2019 NOPR, DOE proposed amendments to 10 CFR 429.32 to specify that represented values are to be determined consistent with the test procedures in appendix U and to specify rounding requirements for represented values. 84 FR 51440, 51450. DOE proposed represented value and rounding requirements for product-specific information that was necessary to determine the minimum allowable ceiling fan efficiency and the proper category of certain ceiling fans, including blade span, blade RPM, blade edge thickness and distance between the ceiling and the lowest point on the fan blades. *Id* In this SNOPR, DOE is proposing alternate rounding requirements for blade edge thickness, as discussed in section III.J.2.

DOE notes that airflow (CFM) at high speed is also product-specific information required to determine product category. Specifically, airflow (CFM) at high speed is required to determine whether a ceiling fan is a highly-decorative ceiling fan. While 10 CFR 429.32(a)(2)(i) already provides the represented value calculation for airflow, neither that section nor appendix U provides any rounding requirements for airflow at high speed as it relates to determining whether a ceiling fan is a highly-decorative ceiling fan. Accordingly, in this SNOPR, DOE proposes to specify that any represented value of airflow (CFM) at high speed, including the value used to determine whether a ceiling fan is a highly-decorative ceiling fan, is determined pursuant to 10 CFR 429.32(a)(2)(i) and rounded to the nearest CFM. Manufacturers are already required to determine this value if making representations under the current test procedure for ceiling fans and will be required to use this value to ensure the products they distribute in commerce comply with the amended energy conservation standards. Further, the rounding of airflow to the nearest CFM is consistent with the current DOE guidance for the Federal Trade Commission (''FTC'') EnergyGuide label.

DOE seeks comment on its proposal to specify that any represented value of airflow (CFM) at high speed, including the value used to determine whether a ceiling fan is a highly-decorative ceiling fan, is determined pursuant to 10 CFR 429.32(a)(2)(i) and rounded to the nearest CFM.

2. Blade Edge Thickness Rounding and Tolerance

Appendix U of 10 CFR part 430 currently does not prescribe measurement tolerances for blade edge thickness. The September 2019 NOPR proposed that blade edge thickness for small-diameter ceiling fans be measured with an instrument with a measurement resolution of at least one tenth of an inch. Further, DOE proposed that blade edge thickness be rounded to the nearest tenth of an inch, effectively providing a tolerance range of ±0.1 in. See 84 FR 51440, 51450–1. This tolerance would enable both tape measures and calipers to be used for this measurement, which typically have resolutions of 1/32 in (0.03 in) and 0.001 in, respectively. In response to the September 2019 NOPR, ALA and Hunter suggested that blade edge thickness should be measured with dial calipers only. (Hunter No. 29 at p.5; ALA, No. 34 at p. 4) Hunter stated that the proposed blade thickness resolution of 0.1 inches is too large and that a tape measure cannot be used, and instead recommended that the required instrument resolution should be 0.001 in, with a measurement tolerance of ±1/32 in. (Hunter No. 29 at p. 5)

Upon further consideration, DOE recognizes that a rounding and tolerance requirement of ±0.1 in would not provide sufficient resolution (*i.e.* number of digits) to represent fan blade edge thickness in relation to the 3.2 mm (0.126 in) threshold defined in Sections 1.8 and 1.13 in appendix U. Based on observation from round robin testing, DOE understands that most, if not all, laboratories use calipers to measure blade edge thickness. Accordingly, in this SNOPR, DOE proposes to require the use of an instrument with a measurement resolution of at least 0.001 in, and for the blade edge thickness

measurement to be rounded to the nearest 0.01 in. This effectively would provide a tolerance range of approximately 0.01 in.

DOE requests comment on the proposed instrument measurement resolution, rounding and tolerance requirements for blade edge thickness measurements.

3. Blade RPM Tolerance

For LDCFs, section 3.5(2) of appendix U specifies that when testing at 40 percent speed for ceiling fans that can operate over an infinite number of speeds, ensure the average measured RPM is within the greater of 1% of the average RPM at high speed or 1 RPM. Appendix U does not prescribe a tolerance for measuring RPM of the high speed itself. In the September 2019 NOPR, DOE proposed to extend these tolerances to high speed for all ceiling fans, and to consider the represented blade RPM at high speed to be valid if the measurement(s) (either the measured value for a single unit, or the mean of the measured values for a multiple unit sample, rounded to the nearest RPM) are within the greater of 1% or 1 RPM of the represented blade RPM at high speed. 84 FR 51440, 51451.

In response, ALA asked DOE to clarify whether the 1 percent verification measurement would apply only to LDCFs. (ALA, No. 34, at p. 4) Hunter commented that the tolerance of 1 percent is too tight because too many variables, such as variation in voltage and measuring equipment, exist between laboratories for manufacturers to be able to meet this tight tolerance. Hunter suggested that instead, the tolerance should be increased from ±1% to ±3%. (Hunter No. 29 at p. 4)

In this SNOPR, DOE further considered the appropriate tolerances for voltage and measuring equipment variations, recognizing that such variation directly impacts the blade RPM measurements. For voltage, section 3.3.1(5)(iii) of appendix U allows the test voltage to vary by ±1% throughout the test. For measuring equipment variation, Appendix U does not specify a required accuracy for tachometers used in testing. However, the tachometer used by several of the participating round-robin laboratories has an accuracy of ±0.01% of the reading.[24] Combining the voltage variation tolerance and equipment accuracy variation with the September 2019 NOPR proposal of 1% tolerance of represented blade RPM at high speed would result in an overall tolerance of ±2.01%. Therefore, DOE proposes to increase the tolerance for blade RPM measurements at high speed from ±1% to ±2% to account for voltage variation and equipment resolution.

DOE seeks comment on its proposal to define a tolerance of 2% for blade RPM measurements at high speed. If other tolerances are recommended, DOE seeks specific equipment and/or voltage variation data to justify the recommended tolerance.

4. Represented Values Within Product Class Definitions

In the September 2019 NOPR, DOE proposed updates to the product class definitions in appendix U to reference the proposed represented value provisions to specify that the product class for each basic model is determined using the represented values of blade span, blade RPM, blade edge thickness, and the distance between the ceiling and the lowest point on the fan blades. 84 FR 51440, 51450. In reviewing the September 2019 NOPR proposed updates to the definitions, DOE noted that the definitions referenced the incorrect regulatory text sections for the represented values proposed in 10 CFR 429.32. As such, in this SNOPR, DOE proposes updates to the references within the product class definitions to reference the appropriate represented value regulatory text sections.

K. Test Procedure Costs, Harmonization, and Other Topics

1. Test Procedure Costs and Impact

In this SNOPR, DOE proposes to amend the existing test procedure for ceiling fans by (1) including a definition for ''circulating air'' for the purpose of the ceiling fan definition; (2) expanding test procedure scope to include large-diameter ceiling fans with a diameter greater than 24 feet; (3) expanding the test procedure to high-speed belt-driven ceiling fans and large-diameter belt-driven ceiling fans; (4) including a provisions for measuring standby energy consumption for large-diameter ceiling fans; (5) amending the definition for low-speed; (6) allowing two-arm sensor setup; (7) requiring sensor arm to stabilize for 30 seconds prior to rotating sensor axes; (8) further specifying air velocity sensor mounting position; (9) providing instructions to measure blade thickness; (10) clarifying test procedures for ceiling fans with accessories; and (11) amending product-specific rounding and enforcement provisions for ceiling fans to reflect the most recent amendments to the test procedures and energy conservation standards for ceiling fans. Additionally, this SNOPR includes proposed regulatory text from the September 2019 NOPR: (1) Specifying that VSD ceiling fans that do not also meet the definition of LSSD fan are not required to be tested pursuant to the DOE test method; (2) increasing the tolerance for the stability criteria for the average air velocity measurements for LSSD and VSD ceiling fans; (3) codifying in regulation existing guidance on the method for calculating several values reported on the Federal Trade Commission (FTC) EnergyGuide label using results from the ceiling fan test procedures in Appendix U to subpart B of 10 CFR part 430 and represented values in 10 CFR part 429; and (4) amending product-specific represented value, rounding and enforcement provisions. 84 FR 51440, 51442. DOE has tentatively determined that the test procedure as proposed in this September 2019 NOPR and as modified by this SNOPR will not be unduly burdensome for manufacturers to conduct.

Further discussion of the cost impacts of the test procedure amendments are presented in the following paragraphs.

a. Cost Impacts for Scope

As discussed in section III.A and III.B of this SNOPR, DOE is proposing to define ''circulating air'' to differentiate fans for ''circulating air'' (*i.e.,* ceiling fans) from other products that are not considered to be a ceiling fan for the purposes of the EPCA definition for ceiling fans, and include large-diameter ceiling fans greater than 24 feet in diameter.

Regarding DOE's proposal to include a definition for ''circulating air,'' DOE identified that certain high-speed VSD ceiling fans with a diameter-to-maximum operating speed ratio less than 0.06 would be excluded from the ceiling fan scope. As discussed, VSD ceiling fans represent less than one percent of the total ceiling fan market. Furthermore, the segment of VSD ceiling fans that would be excluded from the ceiling fan scope would represent a portion of the less than one percent of the market. While the definition as proposed would likely result in a small cost savings for VSD ceiling fan manufacturers, DOE conservatively did not include these de minimis cost savings as part of the cost impact calculations.

Regarding including within the scope of the test procedure large-diameter ceiling fans greater than 24 feet in diameter, DOE is not aware of any large diameter ceiling fans greater than 24 feet commercially available on the market.

[24] The data sheet for the referenced tachometer can be found here: *https://monarchserver.com/Files/pdf/ACT3x_Datasheet_May_19.pdf.*

DOE requests comment on the number of ceiling fan models on the market that are larger than 24 feet, and the associated burden of testing any ceiling fans larger than 24 feet to the proposed DOE test procedure in this SNOPR.

b. Cost Impacts for New Belt-Driven Ceiling Fans

Based on DOE's review of literature of manufacturers who make HSBD and LDBD ceiling fans, DOE identified five manufacturers selling 17 ceiling fan models that are currently not covered by DOE's ceiling fan test procedure that would be covered by the proposed test procedure amendments, if finalized. Sixteen of these models fit the criteria for HSBD ceiling fans and one model fits the definition of LDBD ceiling fan. Four of these models are capable of variable speed operation while the remaining 13 are only capable of single speed operation. Based on third-party lab test cost quotes to test these belt-driven ceiling fans in accordance with AMCA 230–15, DOE estimates that it would cost manufacturers approximately $2,670 for a third-party to test one unit at high speed only and $3,165 to test one unit at both high speed and 40 percent speed. DOE requires at least two units be tested. Therefore, DOE estimates it would cost manufacturers approximately $5,340 per basic model capable of only single speed operation and $6,330 per basic model for multi-speed units. Therefore, DOE estimates that ceiling fan manufacturers would incur a one-time cost of approximately $94,740 to conduct testing for the proposed expanded scope of belt-driven ceiling fans.

DOE requests comment on the per model test cost estimate to test these expanded scope belt-driven ceiling fans, and the current estimate of the number of manufacturers and number of models of expanded scope belt-driven ceiling fans currently made by ceiling fan manufacturers.

c. Cost Impacts for Stability Criteria

This SNOPR includes regulatory text from the September 2019 NOPR proposing to increase the tolerance for the stability criteria for the average air velocity measurements of LSSD and VSD ceiling fans that meet the definition of LSSD ceiling fans at low speed. 84 FR 51440, 51446. DOE had identified cost savings that manufacturers would likely experience from avoiding the need to purchase additional and more-costly air velocity sensors to meet the stability criteria required by the current test procedure. 84 FR 51440, 51453–51454.

To test ceiling fans up to 84 inches in diameter with an air velocity sensor every 4 inches and in all four axes could require a manufacturer to purchase, calibrate, and install as many as 45 upgraded sensors. In this SNOPR, DOE estimates that this investment would be approximately $50,000 per manufacturer for these upgraded sensors. DOE estimated that at least two ceiling fan manufacturers have in-house testing facilities that would have had to invest in upgraded sensors to meet the stability criteria to comply with the current test procedure. Therefore, DOE estimates that the industry-wide one-time avoided cost due to this proposal would be approximately $100,000.

d. Cost Impacts for Low Speed Definition

As discussed in section III.D of this document, DOE is proposing to amend the low speed definition, which is required to test LSSD ceiling fans. DOE estimates that this proposal would require retesting a subset of LSSD ceiling fans. Based on DOE review of DOE's Compliance Certification Database (''CCD''), DOE identified 3,427 unique basic models of LSSD ceiling fans. Additionally, DOE estimated that there are 1,003 unique basic models of LSSD ceiling fans with more than three speed settings. DOE conservatively estimates that approximately 10 percent of LSSD ceiling fans with more than three speed settings, 100 unique basic models, would be affected by the proposed low speed definition and would have to be retested in active mode using the proposed low speed definition, if finalized. Further, DOE estimates that the test procedure for LSSD ceiling fans will cost $1,500 on average per basic model active mode test. Therefore, DOE estimates that ceiling fan manufacturers would incur a one-time cost of approximately $150,000 to conduct retesting for the proposed low speed definition.

e. Cost Impacts for Other Test Procedure Amendments

DOE does not anticipate that the remainder of the amendments proposed in this SNOPR and the September 2019 NOPR would impact test costs.

The proposal to allow a two-arm sensor setup is in addition to the single-arm and four-arm setup already allowed in Appendix U. The proposal to require that the sensor arm to stabilize for an extra 30 seconds before moving axes should allow for more accurate air velocity measurements, resulting in less number of repetitions to meet the stability requirement in section 3.3.2 (1) of Appendix U. The proposals to specify air velocity sensor mounting position, measure blade thickness and testing for ceiling fans with accessories are clarifications.

DOE requests comment on the specific costs and cost savings identified regarding the proposed amendments to the scope, stability criteria, and low speed definition. Additionally, DOE requests comment on any other potential costs or costs savings not identified that ceiling fan manufacturers may incur as a result of the proposed test procedure amendments.

2. Harmonization With Industry Standards

DOE's established practice is to adopt relevant industry standards as DOE test procedures unless such methodology would be unduly burdensome to conduct or would not produce test results that reflect the energy efficiency, energy use, water use (as specified in EPCA) or estimated operating costs of that product during a representative average use cycle or period of use. Section 8(c) of appendix A of 10 CFR part 430 subpart C. In cases where the industry standard does not meet EPCA statutory criteria for test procedures, DOE will make modifications through the rulemaking process to these standards as the DOE test procedure.

The test procedures for ceiling fans at Appendix U incorporates by reference ANSI/AMCA 208–18, AMCA 230–15 and IEC 62301. ANSI/AMCA 208–18 provides the calculations to determine the CFEI for large-diameter ceiling fans. AMCA 230–15 provides the test methods to determine airflow (in CFM) and power consumption (in Watts), which are inputs to the CFEI metric described in AMCA 208–18. IEC 62301 provides the test method for measuring standby power for all ceiling fans. DOE is not proposing incorporating by reference any additional industry standards in this SNOPR. DOE requests comments on the benefits and burdens of the proposed updates and additions to industry standards referenced in the test procedure for ceiling fans.

DOE recognizes that adopting industry standards with modifications imposes a burden on industry *(i.e.,* manufacturers face increased costs if the DOE modifications require different testing equipment or facilities). DOE seeks comment on the degree to which the DOE test procedure should consider and be harmonized further with the most recent relevant industry standards for ceiling fans and whether there are any changes to the Federal test method that would provide additional benefits

to the public. DOE also requests comment on the benefits and burdens of, or any other comments regarding adopting any industry/voluntary consensus-based or other appropriate test procedure, without modification.

L. Compliance Date and Waivers

EPCA prescribes that, if DOE amends a test procedure, all representations of energy efficiency and energy use, including those made on marketing materials and product labels, must be made in accordance with that amended test procedure, beginning 180 days after publication of such a test procedure final rule in the **Federal Register**. (42 U.S.C. 6293(c)(2)) To the extent the modified test procedure proposed in this document is required only for the evaluation and issuance of updated efficiency standards, use of the modified test procedure, if finalized, would not be required until the implementation date of updated standards. Section 8(e) of appendix A 10 CFR part 430 subpart C.

If DOE were to publish an amended test procedure EPCA provides an allowance for individual manufacturers to petition DOE for an extension of the 180-day period if the manufacturer may experience undue hardship in meeting the deadline. (42 U.S.C. 6293(c)(3)) To receive such an extension, petitions must be filed with DOE no later than 60 days before the end of the 180-day period and must detail how the manufacturer will experience undue hardship. (*Id.*)

Upon the compliance date of test procedure provisions of an amended test procedure, should DOE issue a such an amendment, any waivers that had been previously issued and are in effect that pertain to issues addressed by such provisions are terminated. 10 CFR 430.27(h)(3). Recipients of any such waivers would be required to test the products subject to the waiver according to the amended test procedure as of the compliance date of the amended test procedure. The amendments proposed in the September 2019 NOPR document pertain to issues addressed by a waiver granted to BAS, Case No. 2017–011. *See* 84 FR 51440, 51446.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

The Office of Management and Budget (''OMB'') has determined that this test procedure proposed rulemaking does not constitute ''significant regulatory actions'' under section 3(f) of Executive Order (''E.O.'') 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive order by the Office of Information and Regulatory Affairs (''OIRA'') in OMB.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (''IRFA'') for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website: *https://energy.gov/gc/office-general-counsel.* DOE reviewed this proposed rule under the provisions of the Regulatory Flexibility Act and the policies and procedures published on February 19, 2003.

The following sections detail DOE's IRFA for this test procedure SNOPR.

1. Description of Reasons Why Action Is Being Considered

DOE is proposing to amend the existing DOE test procedures for ceiling fans. DOE shall amend test procedures with respect to any covered product, if the Secretary determines that amended test procedures would more accurately produce test results which measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use. (42 U.S.C. 6293(b)(1)(A))

2. Objective of, and Legal Basis for, Rule

DOE is required to review existing DOE test procedures for all covered products every 7 years. (42 U.S.C. 6293(b)(1)(A))

3. Description and Estimate of Small Entities Regulated

For manufacturers of ceiling fans, the Small Business Administration (''SBA'') has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. *See* 13 CFR part 121. The size standards are listed by North American Industry Classification System (''NAICS'') code and industry description available at: *https://www.sba.gov/document/support--table-size-standards.* Ceiling fan manufacturing is classified under NAICS code 335210, ''Small Electrical Appliance Manufacturing.'' The SBA sets a threshold of 1,500 employees or less for an entity to be considered as a small business for this category.

To estimate the number of companies that manufacture ceiling fans covered by this rulemaking, DOE used data from DOE's publicly available Compliance Certification Database (''CCD''). DOE's small business search focused on companies that sell at least one LSSD ceiling fan model with more than three speed settings as well small businesses that sell HSBD or LDBD ceiling fans, since those are the only manufacturers, large or small, that are estimated to incur any costs due to the proposed test procedure amendments.

DOE identified 10 potential domestic small businesses that manufacture at least one LSSD ceiling fan with more than three speed settings. These 10 potential domestic small businesses sell approximately 325 unique LSSD ceiling fans with more than three speed settings. Additionally, DOE identified four potential domestic small businesses that manufacture HSBD or LDBD ceiling fans. These four potential domestic small businesses sell 15 known HSBD ceiling fan models and one known LDBD ceiling fan models.

4. Description and Estimate of Compliance Requirements

In this SNOPR, DOE proposes to amend the existing test procedure for ceiling fans by (1) including a definition for ''circulating air'' for the purpose of the ceiling fan definition; (2) expanding test procedure scope to include large-diameter ceiling fans with a diameter greater than 24 feet; (3) expanding the test procedure to HSBD ceiling fans and LDBD ceiling fans; (4) including a standby metric for large-diameter ceiling fans; (5) amending the definition for low-speed; (6) allowing two-arm sensor setup; (7) requiring sensor arm to stabilize for 30 seconds prior to rotating sensor axes; (8) detailing air velocity sensor mounting position; (9) providing instructions to measure blade thickness; (10) clarifying test procedures for ceiling fans with accessories; and (11) amending certain product-specific rounding and enforcement provisions. Additionally, DOE continues to propose the following proposals from the September 2019 NOPR: (1) Specifying that VSD ceiling fans that do not also

meet the definition of LSSD fan are not required to be tested pursuant to the DOE test method; (2) increasing the tolerance for the stability criteria for the average air velocity measurements for LSSD ceiling fans; (3) codifying guidance for calculating several values reported on the FTC EnergyGuide label; and (4) amending other product-specific represented value, rounding and enforcement provisions.

DOE estimates that some ceiling fan manufacturers would experience a cost from the proposed test procedure amendment, if finalized, due to retesting specific LSSD ceiling fans at low speed. Additionally, DOE estimates that some ceiling fan manufacturers would experience a cost savings from the proposed test procedure amendment, if finalized, regarding the stability criteria for average air velocity measurements by not having to purchase sensors.

As stated in the previous section, DOE identified 10 potential domestic small businesses selling approximately 325 unique LSSD ceiling fans with more than three speed settings. DOE previously estimated that approximately 10 percent of LSSD ceiling fan models with more than three speed settings would be required to re-test their models using the proposed definition for low-speed. Therefore, DOE estimates that approximately 33 ceiling fan models sold by domestic small businesses would need to be re-tested due to this proposed test procedure amendment. DOE previously estimated that it costs manufacturers approximately $1,500 for a third-party lab to conduct this test. Therefore, DOE estimates that all domestic small businesses would incur approximately $49,500 to re-test certain LSSD ceiling fans to the proposed low-speed definition. DOE estimates that the annual revenue of these 10 potential domestic small businesses that sell at least one LSSD ceiling fan with more than three speed settings range from approximately $1.7 million to over $250 million, with a median value of approximately $36 million.

Additionally, as stated in the previous section, DOE identified four potential domestic small businesses selling 15 HSBD ceiling fan models, four of which are capable of variable speed operation, and one LDBD ceiling fan models. DOE estimates that the test procedure for belt-driven ceiling fans would cost manufacturers approximately $5,340 per basic model capable of only single speed operation and $6,330 per basic model for multi-speed units to test in accordance to this proposed test procedure, if finalized. Therefore, DOE estimates that domestic small businesses would incur a one-time cost of approximately $89,400 to conduct testing for the proposed expanded scope of belt-driven ceiling fan. DOE estimates that the annual revenue of these four potential domestic small businesses that sell at least one HSBD or LDBD ceiling fan range from approximately $79,000 to $16 million.

DOE presents the estimated testing costs and annual revenue for each potential small business in Table IV.1.

TABLE IV.1—ESTIMATED TESTING COSTS AND ANNUAL REVENUE FOR EACH SMALL BUSINESS

Company	Number of belt-driven ceiling fan models	Estimated testing cost	Estimated annual revenue	Testing costs as a percent of annual revenue
Small Business 1	9	$48,060	$16,000,000	0.3
Small Business 2	5	28,680	79,000	36.3
Small Business 3	1	6,330	1,500,000	0.4
Small Business 4	1	6,330	97,000	6.5

DOE requests comment on the number of potential small businesses DOE identified; the number of ceiling fan models estimated to be manufactured by these potential small businesses; and the per-model testing costs DOE estimated small businesses may incur to test these identified ceiling fans. Additionally, DOE also requests comment on any other potential costs small businesses may incur due to the proposed amended test procedures, if finalized.

5. Duplication, Overlap, and Conflict With Other Rules and Regulations

DOE is not aware of any rules or regulations that duplicate, overlap, or conflict with the proposed rule being considered today.

6. Significant Alternatives to the Rule

As previously stated in this section, DOE is required to review existing DOE test procedures for all covered products every 7 years. Additionally, DOE shall amend test procedures with respect to any covered product, if the Secretary determines that amended test procedures would more accurately produce test results which measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use. (42 U.S.C. 6293(b)(1)(A)) DOE has initially determined that the proposed test procedure amendments for ceiling fans would more accurately produce test results to measure the energy efficiency of ceiling fans.

While DOE recognizes that requiring that ceiling fan manufacturers to retest specific LSSD ceiling fans at low speed and expanding the scope of ceiling fans would cause manufacturers to re-test or test some ceiling fan models, the costs to re-test and test these models are inexpensive for most ceiling fan manufacturers. DOE has tentatively determined that there are no better alternatives than the proposed amended test procedures, in terms of both meeting the agency's objectives to accurately measure energy efficiency and reduce burden on manufacturers. Therefore, DOE is proposing to amend the existing DOE test procedure for ceiling fans, as proposed in this SNOPR.

Additional compliance flexibilities may be available through other means. EPCA provides that a manufacturer whose annual gross revenue from all of its operations does not exceed $8 million for the 12-month period preceding the date of the application may apply for an exemption from all or part of an energy conservation standard for a period not longer than 24 months after the effective date of a final rule establishing the standard. (42 U.S.C. 6295(t)) Additionally, manufacturers subject to DOE's energy efficiency standards may apply to DOE's Office of Hearings and Appeals for exception relief under certain circumstances. Manufacturers should refer to 10 CFR part 430, subpart E, and 10 CFR part 1003 for additional details on these additional compliance flexibilities.

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of ceiling fans must certify to DOE that their products

comply with any applicable energy conservation standards. To certify compliance, manufacturers must first obtain test data for their products according to the DOE test procedures, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including ceiling fans. (*See* generally 10 CFR part 429.) The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (''PRA''). DOE's current reporting requirements have been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 35 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, certifying compliance, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

1. Description of the Requirements

In this SNOPR, DOE is proposing to expand the scope of the test procedure to include LDCFs with a diameter greater than 24 feet. If DOE amends the test procedures scope as proposed in this SNOPR, manufacturers of ceilings fans with a diameter greater than 24 feet will be required to certify compliance with energy conservation standards (in 10 CFR 430.32(s)(2)(ii)) beginning 180 days after publication of a test procedure final rule in the **Federal Register**. (42 U.S.C. 6293(c)(2)) DOE is proposing to revise the collection of information approval under OMB Control Number 1910–1400 to account for the paperwork burden associated with the expanded scope of LDCFs with a diameter greater than 24 feet, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, certifying compliance, and completing and reviewing the collection of information.

2. Method of Collection

DOE is proposing that respondents must submit electronic forms using DOE's online Compliance Certification Management System (''CCMS''). DOE's CCMS is publicly accessible at *www.regulations.doe.gov/ccms/,* and includes instructions for users, registration forms, and the product-specific reporting templates required for use when submitting information to CCMS.

3. Data

The following are DOE estimates of the total annual reporting and recordkeeping burden imposed on manufacturers of LDCFs with a diameter greater than 24 feet subject to the amended certification reporting requirements in this proposed rule. DOE has reviewed the market for ceiling fans with a diameter greater than 24 feet and has identified 4 models currently being offered for sale by 2 manufacturers, both of which already certify compliance with the current energy conservation standards for ceiling fans. As a result of this market assessment, DOE did not find any new or additional respondents that would be required submit information as a result of the proposed expansion of scope for LDCFs.

The addition of four basic models to certification reports will simply expand their current CCMS excel templates by a row per basic model, which is trivial compared to the total number of ceiling fans they are already submitting.

OMB Control Number: 1910–1400.

Form Number: DOE F 220.7.

Type of Review: Regular submission.

Affected Public: Domestic manufacturers and importers of LDCFs with a diameter greater than 24 feet.

Estimated Number of Respondents: 0 (already submitting under current approval).

Estimated Time per Response: 0 (already submitting under current approval).

Estimated Total Annual Burden Hours: 0.

Estimated Total Annual Cost to the Manufacturers: $0 in recordkeeping/reporting costs.

4. Conclusion

DOE has tentatively determined that these proposed amendments would not impose additional costs for manufacturers of ceiling fans because manufacturers of these products or equipment are already submitting certification reports to DOE and should have readily available the information that DOE would collect if the proposed expansion of scope is finalized as part of this rulemaking. Public comment is sought on the number of respondents and burden requirements for collecting information for LDCFs with a diameter greater than 24 feet. Send comments on these or any other aspects of the collection of information to the email address listed in the **ADDRESSES** section and to the OMB Desk Officer by email to *Sofie.E.Miller@omp.eop.gov.*

D. Review Under the National Environmental Policy Act of 1969

DOE is analyzing this proposed regulation in accordance with the National Environmental Policy Act of 1969 (''NEPA'') and DOE's NEPA implementing regulations (10 CFR part 1021). DOE's regulations include a categorical exclusion for rulemakings interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended. 10 CFR part 1021, subpart D, appendix A5. DOE anticipates that this rulemaking qualifies for categorical exclusion A5 because it is an interpretive rulemaking that does not change the environmental effect of the rule and otherwise meets the requirements for application of a categorical exclusion. *See* 10 CFR 1021.410. DOE will complete its NEPA review before issuing the final rule.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (Aug. 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that executive agencies make every reasonable effort to ensure that the regulation (1) clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (''UMRA'') requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *https://energy.gov/gc/office-general-counsel.* DOE examined this proposed rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859 (March 18, 1988), that this proposed regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

The proposed regulatory action to amend the test procedure for measuring the energy efficiency of ceiling fans is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; ''FEAA'') Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (''FTC'') concerning the impact of the commercial or industry standards on competition.

DOE is not proposing any new incorporations by reference of commercial standards in this SNOPR.

The proposed modifications to the test procedure for ceiling fans would not incorporate any new testing methods.

M. Description of Materials Incorporated by Reference

The Director of the Federal Register previously approved the following standards from the Air Movement and Control Association International, Inc. (AMCA), for incorporation by reference into appendix U to subpart B: ANSI/AMCA Standard 208–18, (''AMCA 208–18''), Calculation of the Fan Energy Index, and ANSI/AMCA Standard 230–15 (''AMCA 230–15''), ''Laboratory Methods of Testing Air Circulating Fans for Rating and Certification.''

V. Public Participation

A. Participation in the Webinar

The time and date of the webinar are listed in the **DATES** section at the beginning of this document. If no participants register for the webinar, it will be cancelled. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's website: *www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=5.* Participants are responsible for ensuring their systems are compatible with the webinar software.

B. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this document.

Submitting comments via www.regulations.gov. The *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 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 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. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *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 *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.

DOE processes submissions made through *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 *www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email. Comments and documents submitted via email will be posted to *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 on a cover letter. Include 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 telefacsimiles (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, written in English and 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 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, postal mail, or hand delivery/courier 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 or on a CD, if feasible. 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).

C. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

(1) DOE seeks comment on the proposed definition of ''circulating air'' for the purpose of the ceiling fan definition. Specifically, DOE requests comment on the use of a ''diameter-to-maximum operating speed'' ratio to distinguish fans with circulating airflow from directional airflow, and the appropriateness of using 0.06 in/RPM as the threshold ratio. If another ratio should be considered, DOE requests additional data to corroborate that ratio.

(2) DOE seeks comment on the characterization of fans that would fall below the 0.06 in/RPM threshold ratio, such as certain high-speed VSD ceiling fans that do not also meet the definition of an LSSD fan. Specifically, DOE request comment on the appropriateness of excluding high-speed VSD ceiling fans from scope of ''ceiling fans.''

(3) DOE seeks comment regarding whether ''circulating air'' should be defined within the definition of ceiling fan at 10 CFR 430.2, as DOE has proposed, or if ''circulating air'' should be defined separately within appendix U.

(4) DOE seeks comment on its proposal to remove the 24-foot blade span limit in section 3.4.1 of appendix U, which would expand the scope of the test procedure for LDCFs to ceiling fans with blade span larger than 24 feet.

(5) DOE seeks comment on including within the test procedure scope HSBD ceiling fans, the proposed term and definition, and the appropriate tip speed threshold. Furthermore, DOE requests data on blade thickness and tip speeds for these HSBD ceiling fans.

(6) DOE seeks comment on the alternate definition for HSBD ceiling fans, and whether it would incorporate all the LDBD ceiling fans from DOE's primary proposal. Further, DOE requests comment on whether the HSBD and LDBD ceiling fan scope should be combined, *i.e.,* what is the utility and application of the two fan categories.

(7) DOE requests comment on requiring AMCA 230–15 as the test procedure for HSBD and LDBD ceiling fans, or whether DOE should consider any other test procedure.

(8) DOE requests comment on its proposal to test single speed HSBD and LDBD only at high speed and variable speed HSBD and LDBD at high speed and 40 percent speed. Alternatively, DOE requests comment the typical number of operating speeds and hours for HSBD ceiling fans and LDBD ceiling fans.

(9) DOE requests comment on whether the efficiency of HDBD fans and LDBD ceiling fans is more appropriately evaluated using the CFEI or CFM/W metric.

(10) DOE seeks comment on its preliminary determination that establishing an integrated metric that incorporates the energy efficiency measured as required under each LCDF standard and the energy use measured during standby mode would be technically infeasible.

(11) DOE seeks comment on its proposal to specify for LDCFs a separate standby mode energy use metric, which would be based on the standby power procedure defined in section 3.6 of appendix U.

(12) DOE seeks comment on its proposal to specify for HSBD ceiling fans and LDBD ceiling fans a separate standby mode energy use metric, which would be based on the standby power procedure defined in section 3.6 of appendix U.

(13) DOE seeks comment on the proposal to update the low speed definition as follows: Low speed means the lowest available ceiling fan speed for which fewer than half or three, whichever is fewer, sensors per individual axis are measuring less than 40 feet per minute.

(14) DOE also seeks comment on the alternate proposal to represent low speed as a table specifying the number of sensors per individual axis required to measure greater than 40 feet per minute.

(15) DOE seeks comment on the proposal to require testing to start at the lowest speed and move to the next highest speed until the modified low speed criteria are met. Specifically, DOE seeks comment on whether any applicable variable speed LSSD ceiling fans (without distinct speed settings) would require further specificity on this proposal and if so, how it should be specified.

(16) DOE requests comment on the extent to which, for DOE certification purposes, an individual unit within a sample of fans (per basic model) could have a different setting that meets the proposed definition of low speed than other units within the same sample. If so, DOE requests data on how the issue could affect representativeness (in terms of ceiling fan efficiency) of the basic model.

(17) DOE seeks comment on the proposed requirement to add 30 seconds between test runs for a rotating arm setup (either single-arm or two-arm).

(18) DOE seeks comment on its proposal to permit the use of a two-arm setup, as well as any data to confirm that a 2-arm option produces comparable results to the existing 1-arm and 4-arm options.

(19) DOE requests comment on its proposal to specify aligning the air velocity sensors perpendicular to the airflow. DOE also requests comment on whether it should revise Figure 2 of appendix U, and/or provide an additional figure, to depict more clearly the alignment of the velocity sensors perpendicular to the direction of airflow.

(20) DOE seeks comment on its proposal to measure ceiling fan blade thickness at the thickest point within 1″ of the blade's leading edge, along the plane perpendicular to the blade's radial length at which the blade is thinnest. Specifically, DOE seeks feedback on if this update will prevent ceiling fans from being incorrectly classified into the wrong product class. DOE also welcomes feedback on if the blade thickness should be measured within 1″ of the leading edge, or if the allowable thickness measurement zone should be restricted to closer to the leading edge (*e.g.,* within ½″ or ¼″ of the leading edge).

(21) DOE seeks comment on its proposal to require that testing be performed without any additional accessories or features energized, if possible; and if not, with the additional accessories or features set at the lowest energy-consuming mode for testing.

(22) DOE seeks comment on its proposal to specify that any represented value of airflow (CFM) at high speed, including the value used to determine whether a ceiling fan is a highly-decorative ceiling fan, is determined pursuant to 10 CFR 429.32(a)(2)(i) and rounded to the nearest CFM.

(23) DOE requests comment on the proposed instrument measurement resolution, rounding and tolerance requirements for blade edge thickness measurements.

(24) DOE seeks comment on its proposal to define a tolerance of 2% for blade RPM measurements at high speed. If other tolerances are recommended, DOE seeks specific equipment and/or voltage variation data to justify the recommended tolerance.

(25) DOE requests comment on the number of ceiling fan models on the market that are larger than 24 feet, and the associated burden of testing any ceiling fans larger than 24 feet to the proposed DOE test procedure in this SNOPR.

(26) DOE requests comment on the per model test cost estimate to test these expanded scope belt-driven ceiling fans, and the current estimate of the number of manufacturers and number of models of expanded scope belt-driven ceiling fans currently made by ceiling fan manufacturers.

(27) DOE requests comment on the specific costs and cost savings identified regarding the proposed amendments to the scope, stability criteria, and low speed definition. Additionally, DOE requests comment on any other potential costs or costs savings not identified that ceiling fan manufacturers may incur as a result of the proposed test procedure amendments.

(28) DOE requests comment on the number of potential small businesses DOE identified; the number of ceiling fan models estimated to be manufactured by these potential small businesses; and the per-model testing costs DOE estimated small businesses may incur to test these identified ceiling fans. Additionally, DOE also requests comment on any other potential costs small businesses may incur due to the proposed amended test procedures, if finalized.

(29) DOE requests comment on the number of respondents and burden requirements for collecting information for LDCFs with a diameter greater than 24 feet.

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this supplemental notice of proposed rulemaking.

List of Subjects

10 CFR Part 429

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Reporting and recordkeeping requirements.

10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Signing Authority

This document of the Department of Energy was signed on November 16, 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 November 17, 2021.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

For the reasons stated in the preamble, DOE proposes to amend parts 429 and 430 of chapter II of title 10, Code of Federal Regulations as set forth below:

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 2. Section 429.32 is amended by:

■ a. Revising the introductory text in paragraph (a)(2);

■ b. Revising paragraph (a)(2)(ii)(B); and

■ c. Adding paragraphs (a)(3) and (4);

The revisions and additions read as follows:

§ 429.32 Ceiling fans.

(a) * * *

(2) For each basic model of ceiling fan, a sample of sufficient size must be randomly selected and tested to ensure that—

* * * * *

(ii) * * *

(B) The upper 95 percent confidence limit (UCL) of the true mean divided by 1.1, where:

$$UCL = \overline{x} + t_{0.95}\left(\frac{s}{\sqrt{n}}\right)$$

And $\overline{x}$ is the sample mean; s is the sample standard deviation; n is the number of samples; and $t_{0.95}$ is the t statistic for a 95% one-tailed confidence interval with n-1 degrees of freedom (from appendix A to this subpart); and

(3) For each basic model of ceiling fan,

(i) Any represented value of blade span, as defined in section 1.4 of appendix U to subpart B of part 430, is the mean of the blade spans measured for the sample selected as described in paragraph (a)(1) of this section, rounded to the nearest inch; and

(ii) Any represented value of blade revolutions per minute (RPM) is the mean of the blade RPM measurements measured for the sample selected as described in paragraph (a)(1) of this section, rounded to the nearest RPM; and

(iii) Any represented value of blade edge thickness is the mean of the blade edge thicknesses measured for the sample selected as described in paragraph (a)(1) of this section, rounded to the nearest 0.01 inch; and

(iv) Any represented value of the distance between the ceiling and the lowest point on the fan blades is the mean of the distances measured for the sample selected as described in paragraph (a)(1) of this section, rounded to the nearest quarter of an inch; and

(v) Any represented value of tip speed is pi multiplied by represented value of blade span divided by twelve multiplied by the represented value of RPM, rounded to the nearest foot per minute;

(vi) Any represented value of airflow (CFM) at high speed, including the value used to determine whether a ceiling fan is a highly-decorative ceiling fan as defined in section 1.9 of appendix U to subpart B of part 430, is determined pursuant to paragraph (a)(2)(i) and rounded to the nearest CFM; and

(4) To determine values required by the Federal Trade Commission (FTC), use the following provisions. Note that, for multi-mount ceiling fans these values must be reported on the EnergyGuide label for the ceiling fan configuration with the lowest efficiency.

(i) FTC Airflow. Determine the represented value for FTC airflow by calculating the weighted-average airflow of an LSSD or VSD ceiling fan basic model at low and high fan speed as follows:

$$Airflow_{FTC} = \frac{CFM_{Low} \times 3.0 + CFM_{High} \times 3.4}{6.4}$$

Where:

$Airflow_{FTC}$ = represented value for FTC airflow, rounded to the nearest CFM,

CFM_{Low} = represented value of measured airflow, in cubic feet per minute, at low fan speed, pursuant to paragraph (a)(2)(i) of this section, and

CFM_{High} = represented value of measured airflow, in cubic feet per minute, at high fan speed, pursuant to paragraph (a)(2)(i) of this section.

(ii) FTC Energy Use. Determine represented value for FTC energy use by calculating the weighted-average power consumption of an LSSD or VSD ceiling fan basic model at low and high fan speed as follows:

$$Energy\ Use_{FTC} = \frac{W_{Low} \times 3.0 + W_{High} \times 3.4 + W_{Sb} \times 17.6}{6.4}$$

Where:

$Energy\ Use_{FTC}$= represented value for FTC Energy Use, rounded to the nearest watt,

W_{Low} = represented value of measured power consumption, in watts, at low fan speed, pursuant to paragraph (a)(2)(ii) of this section,

W_{High} = represented value of measured power consumption, in watts, at high fan speed, pursuant to paragraph (a)(2)(ii) of this section, and

W_{sb} = represented value of measured power consumption, in watts, in standby mode, pursuant to paragraph (a)(2)(ii) of this section.

(iii) FTC Estimated Yearly Energy Cost. Determine the represented value for FTC estimated yearly energy cost of an LSSD or VSD ceiling fan basic model at low and high fan speed as follows:

$$EYEC_{FTC} = \frac{W_{Low} \times 3.0 + W_{High} \times 3.4 + W_{Sb} \times 17.6}{1000} \times 365 \times 0.12$$

Where:

$EYEC_{FTC}$ = represented value for FTC estimated yearly energy cost, rounded to the nearest dollar, and

W_{Low} = represented value of measured power consumption, in watts, at low fan speed, pursuant to paragraph (a)(2)(ii) of this section,

W_{High} = represented value of measured power consumption, in watts, at high fan speed, pursuant to paragraph (a)(2)(ii) of this section, and

W_{sb} = represented value of measured power consumption, in watts, in standby mode, pursuant to paragraph (a)(2)(ii) of this section.

* * * * *

■ 3. Section 429.134 is amended by adding paragraph (s) to read as follows:

§ 429.134 Product-specific enforcement provisions.

* * * * *

(s) *Ceiling Fans*—(1) *Verification of blade span.* DOE will measure the blade span and round the measurement pursuant to the test requirements of 10 CFR part 430 of this chapter for each unit tested. DOE will consider the represented blade span valid only if the rounded measurement(s) (either the rounded measured value for a single unit, or the mean of the rounded measured values for a multiple unit sample, rounded to the nearest inch) is the same as the represented blade span.

(i) If DOE determines that the represented blade span is valid, that blade span will be used as the basis for determining the product class and calculating the minimum allowable ceiling fan efficiency.

(ii) If DOE determines that the represented blade span is invalid, DOE will use the rounded measured blade span(s) as the basis for determining the product class, and calculating the minimum allowable ceiling fan efficiency.

(2) *Verification of the distance between the ceiling and lowest point of fan blades.* DOE will measure the distance between the ceiling and lowest point of the fan blades and round the measurement pursuant to the test requirements of 10 CFR part 430 of this chapter for each unit tested. DOE will consider the represented distance valid only if the rounded measurement(s) (either the measured value for a single unit, or the mean of the measured values for a multiple unit sample, rounded to the nearest quarter inch) are the same as the represented distance.

(i) If DOE determines that the represented distance is valid, that distance will be used as the basis for determining the product class.

(ii) If DOE determines that the represented distance is invalid, DOE will use the rounded measured distance(s) as the basis for determining the product class.

(3) *Verification of blade revolutions per minute (RPM) measured at high speed.* DOE will measure the blade RPM at high speed pursuant to the test requirements of 10 CFR part 430 of this chapter for each unit tested. DOE will consider the represented blade RPM measured at high speed valid only if the measurement(s) (either the measured value for a single unit, or the mean of the measured values for a multiple unit sample, rounded to the nearest RPM) are within the greater of 2% of the represented blade RPM at high speed.

(i) If DOE determines that the represented RPM is valid, that RPM will be used as the basis for determining the product class.

(ii) If DOE determines that the represented RPM is invalid, DOE will use the rounded measured RPM(s) as the basis for determining the product class.

(4) *Verification of blade edge thickness.* DOE will measure the blade edge thickness and round the measurement pursuant to the test requirements of 10 CFR part 430 for each unit tested. DOE will consider the represented blade edge thickness valid only if the measurement(s) (either the measured value for a single unit, or the mean of the measured values for a multiple unit sample, rounded to the nearest 0.01 inch) are the same as the represented blade edge thickness.

(i) If DOE determines that the represented blade edge thickness is valid, that blade edge thickness will be used for determining product class.

(ii) If DOE determines that the represented blade edge thickness is invalid, DOE will use the rounded measured blade edge thickness(es) as the basis for determining the product class.

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 4. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 5. Section 430.2 is amended by revising the definition of ''Ceiling fan'' to read as follows:

§ 430.2 Definitions.

* * * * *

Ceiling fan means a nonportable device that is suspended from a ceiling for circulating air via the rotation of fan blades. For the purpose of this definition:

(1) Circulating Air means the discharge of air in an upward or downward direction with the air returning to the intake side of the fan. A ceiling fan that has a ratio of fan blade span (in inches) to maximum rotation rate (in revolutions per minute) greater than 0.06 provides circulating air.

(2) For all other ceiling fan related definitions, see appendix U to this subpart.

* * * * *

■ 6. Section 430.23 is amended by revising paragraph (w) to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(w) *Ceiling fans.* Measure the following attributes of a single ceiling fan in accordance with appendix U to this subpart: Airflow; power consumption; ceiling fan efficiency; ceiling fan energy index (CFEI); standby power; distance between the ceiling and lowest point of fan blades; blade span; blade edge thickness; and blade revolutions per minute (RPM).

* * * * *

■ 7. Appendix U to subpart B of part 430 is amended by:

■ a. Revising the introductory text;

■ b. Revising sections 1.4, and 1.8 through 1.20;

■ c. Adding sections 1.21 and 1.22;

■ d. Revising sections 2, 3, 3.2.2(1), 3.2.2(4), 3.2.2(6), 3.2.3, 3.3.1(3), 3.3.1(4), 3.3.1(8), and 3.3.2;

■ e. Adding section 3.3.3;

■ f. Revising section 3.4;

■ g. Removing section 3.4.1, and redesignating sections 3.4.2 through 3.4.4, as sections 3.4.1 through 3.4.3;

■ h. Revising sections 3.5, 3.5.1, 3.6.(1), 4, and 5;

The revisions and additions read as follows:

Appendix U to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Ceiling Fans

Prior to [*effective date of test procedure final rule*], manufacturers must make any representations with respect to the energy use or efficiency of ceiling fans as specified in Section 2 of this appendix as it appeared on January 23, 2017. On or after [*effective date of test procedure final rule*], manufacturers of ceiling fans, as specified in section 2 of this appendix, must make any representations with respect to energy use or efficiency in accordance with the results of testing pursuant to this appendix. Certification of standby power consumption for large-diameter ceiling fans is required from the time that an energy conservation standard on standby power consumption requires compliance.

1. * * *

1.4. *Blade span* means the diameter of the largest circle swept by any part of the fan blade assembly, including attachments. The represented value of blade span (D) is as determined in 10 CFR 429.32.

* * * * *

1.8. *High-speed small-diameter (HSSD) ceiling fan* means a small-diameter ceiling fan that is not a very-small-diameter ceiling fan, highly-decorative ceiling fan or belt-driven ceiling fan and that has a represented value of blade edge thickness, as determined in 10 CFR 429.32(a)(3)(iii), of less than 3.2 mm or a maximum represented value of tip speed, as determined in 10 CFR 429.32(a)(3)(v), greater than the applicable limit specified in the table in this definition.

HIGH-SPEED SMALL-DIAMETER CEILING FAN BLADE AND TIP SPEED CRITERIA

Airflow direction	Thickness (t) of edges of blades		Tip speed threshold	
	Mm	Inch	m/s	feet per minute
Downward-only	4.8 > t ≥ 3.2	3/16 > t ≥ 1/8	16.3	3,200
Downward-only	t ≥ 4.8	t ≥ 3/16	20.3	4,000
Reversible	4.8 > t ≥ 3.2	3/16 > t ≥ 1/8	12.2	2,400
Reversible	t ≥ 4.8	t ≥ 3/16	16.3	3,200

1.9. *High-speed belt-driven (HSBD) ceiling fan* means a small-diameter ceiling fan that is a belt-driven ceiling fan with one fan head, and has tip speeds greater than or equal to 5000 feet per minute.

1.10. *Highly-decorative ceiling fan* means a ceiling fan with a maximum represented value of blade revolutions per minute (RPM), as determined in 10 CFR 429.32(a)(3)(ii), of 90 RPM, and a represented value of airflow at high speed, as determined in 10 CFR 429.32(a)(3)(vi), of less than 1,840 CFM.

1.11. *Hugger ceiling fan* means a low-speed small-diameter ceiling fan that is not a very-small-diameter ceiling fan, highly-decorative ceiling fan, or belt-driven ceiling fan, and for which the represented value of the distance between the ceiling and the lowest point on the fan blades, as determined in 10 CFR 429.32(a)(3)(iv), is less than or equal to 10 inches.

1.12. *Large-diameter ceiling fan* means a ceiling fan that is not a highly-decorative ceiling fan or belt-driven ceiling fan and has a represented value of blade span, as determined in 10 CFR 429.32(a)(3)(i), greater than seven feet.

1.13. *Large-diameter belt-driven (LDBD) ceiling fan* means a belt-driven ceiling fan with one fan head that has a represented value of blade span, as determined in 10 CFR 429.32(a)(3)(i), greater than seven feet.

1.14. *Low speed* means the lowest available ceiling fan speed for which fewer than half or three, whichever is fewer, sensors per individual axis are measuring less than 40 feet per minute.

1.15. *Low-speed small-diameter (LSSD) ceiling fan* means a small-diameter ceiling fan that has a represented value of blade edge thickness, as determined in 10 CFR 429.32(a)(3)(iii), greater than or equal to 3.2 mm and a maximum represented value of tip speed, as determined in 10 CFR 429.32(a)(3)(v), less than or equal to the applicable limit specified in the table in this definition.

LOW-SPEED SMALL-DIAMETER CEILING FAN BLADE AND TIP SPEED CRITERIA

Airflow direction	Thickness (t) of edges of blades		Tip speed threshold	
	Mm	Inch	m/s	feet per minute
Reversible	4.8 > t ≥ 3.2	3/16 > t ≥ 1/8	12.2	2,400
Reversible	t ≥ 4.8	t ≥ 3/16	16.3	3,200

1.16. *Multi-head ceiling fan* means a ceiling fan with more than one fan head, *i.e.,* more than one set of rotating fan blades.

1.17. *Multi-mount ceiling fan* means a low-speed small-diameter ceiling fan that can be mounted in the configurations associated with both the standard and hugger ceiling fans.

1.18. *Oscillating ceiling fan* means a ceiling fan containing one or more fan heads for which the axis of rotation of the fan blades cannot remain in a fixed position relative to the ceiling. Such fans have no inherent means by which to disable the oscillating function separate from the fan blade rotation.

1.19. *Small-diameter ceiling fan* means a ceiling fan that has a represented value of blade span, as determined in 10 CFR 429.32(a)(3)(i), less than or equal to seven feet.

1.20. *Standard ceiling fan* means a low-speed small-diameter ceiling fan that is not a very-small-diameter ceiling fan, highly-decorative ceiling fan or belt-driven ceiling fan, and for which the represented value of the distance between the ceiling and the lowest point on the fan blades, as determined in 10 CFR 429.32(a)(3)(iv), is greater than 10 inches.

1.21. *Total airflow* means the sum of the product of airflow and hours of operation at all tested speeds. For multi-head fans, this includes the airflow from all fan heads.

1.22. *Very-small-diameter (VSD) ceiling fan* means a small-diameter ceiling fan that is not a highly-decorative ceiling fan or belt-driven ceiling fan; and has one or more fan heads, each of which has a represented value of blade span, as determined in 10 CFR 429.32(a)(3)(i), of 18 inches or less. Only VSD fans that also meet the definition of an LSSD fan are required to be tested for purposes of determining compliance with energy efficiency standards established by DOE and for other representations of energy efficiency.

2. Scope:

The provisions in this appendix apply to ceiling fans except:

(1) Ceiling fans where the plane of rotation of a ceiling fan's blades is not less than or equal to 45 degrees from horizontal, or cannot be adjusted based on the manufacturer's specifications to be less than or equal to 45 degrees from horizontal;

(2) Centrifugal ceiling fans;

(3) Belt-driven ceiling fans that are not either a high-speed belt-driven ceiling fan or a large-diameter belt-driven ceiling fan; and

(4) Oscillating ceiling fans.

3. *General Instructions, Test Apparatus, and Test Measurement:*

The test apparatus and test measurement used to determine energy performance depend on the ceiling fan's blade span, and in some cases the ceiling fan's blade edge thickness. For each tested ceiling fan, measure the lateral distance from the center of the axis of rotation of the fan blades to the furthest fan blade edge from the center of the axis of rotation. Measure this lateral distance at the resolution of the measurement instrument, using an instrument with a measurement resolution of least 0.25 inches. Multiply the lateral distance by two and then round to the nearest whole inch to determine the blade span. For ceiling fans having a blade span greater than 18 inches and less than or equal to 84 inches, measure the

ceiling fan's blade edge thickness. To measure the fan blade edge thickness, use an instrument with a measurement resolution of at least 0.001 inch and measure the thickness of one fan blade's leading edge (in the forward direction) according to the following:

(1) Locate the cross section perpendicular to the fan blade's radial length that is at least one inch from the tip of the fan blade and for which the blade is thinnest, and

(2) Measure at the thickest point of that cross section within one inch from the leading edge of the fan blade.

See Figure 1 of this appendix for an instructional schematic on the fan blade edge thickness measurement. Figure 1 depicts a ceiling fan from above. Round the measured blade edge thickness to the nearest 0.01 inch.

BILLING CODE 6450–01–P

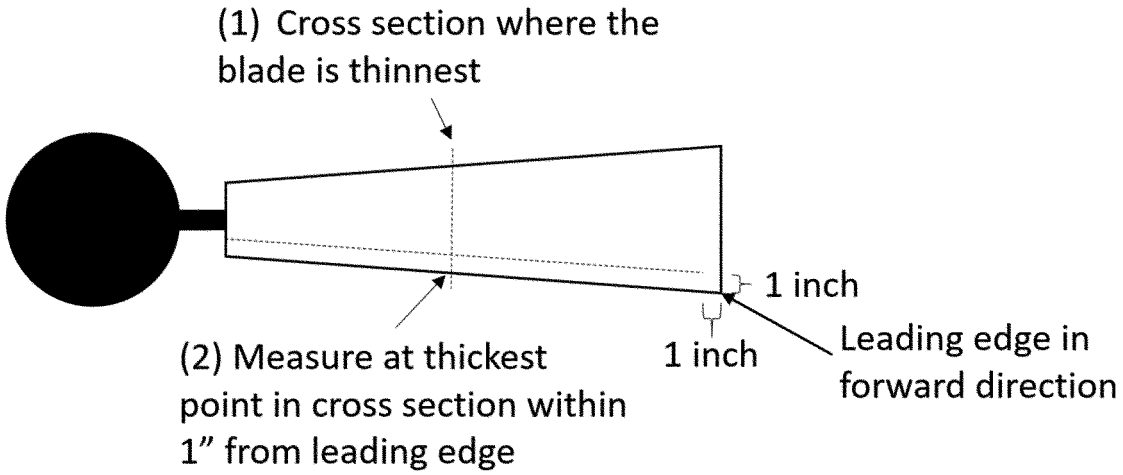


Figure 1 to Appendix U to Subpart B of Part 430: Measurement Criteria for Fan Blade Edge Thickness

* * * * *

3.2.2. *Equipment Set-up.*

(1) Make sure the transformer power is off. Hang the ceiling fan to be tested directly from the ceiling, according to the manufacturer's installation instructions. Hang all non-multi-mount ceiling fans in the fan configuration that minimizes the distance between the ceiling and the lowest point of the fan blades. Hang and test multi-mount fans in two configurations: The configuration associated the definition of a standard fan that minimizes the distance between the ceiling and the lowest point of the fan blades and the configuration associated with the definition of a hugger fan that minimizes the distance between the ceiling and the lowest point of the fan blades. For all tested configurations, measure the distance between the ceiling and the lowest point of the fan blade using an instrument with a measurement resolution of at least 0.25 inches. Round the measured distance from the ceiling to the lowest point of the fan blade to the nearest quarter inch.

* * * * *

(4) A single rotating sensor arm, two rotating sensor arms, or four fixed sensor arms can be used to take air velocity measurements along four axes, labeled A–D. Axes A, B, C, and D are at 0, 90, 180, and 270 degree positions. Axes A–D must be perpendicular to the four walls of the room. See Figure 2 of this appendix.

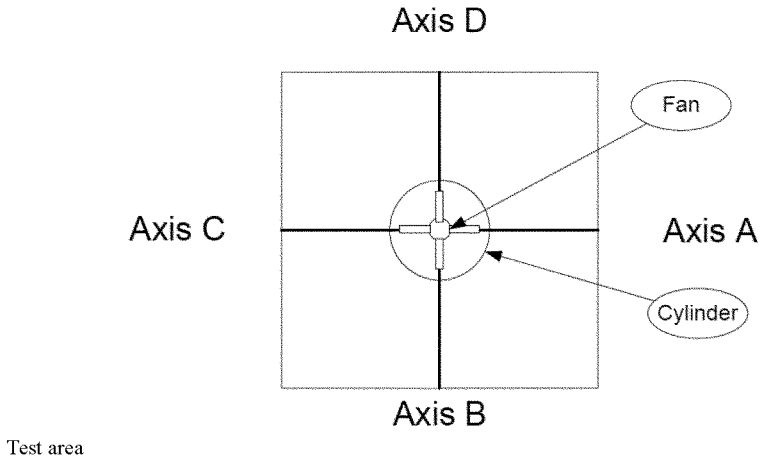


Figure 2 to Appendix U to Subpart B of Part 430: Testing Room and Sensor Arm Axes

* * * * *

(6) Place the sensors at intervals of 4 ± 0.0625 inches along a sensor arm, starting with the first sensor at the point where the four axes intersect, aligning the sensors perpendicular to the direction of airflow. Do not touch the actual sensor prior to testing. Use enough sensors to record air delivery within a circle 8 inches larger in diameter than the blade span of the ceiling fan being tested. The experimental set-up is shown in Figure 3 of this appendix.

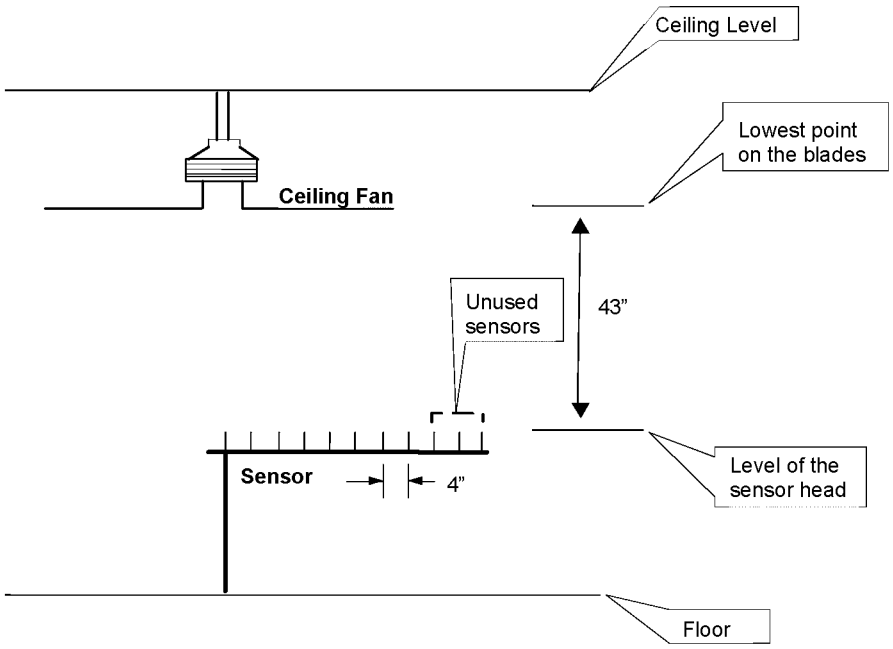


Figure 3 to Appendix U to Subpart B of Part 430: Air Delivery Room Set-Up for Small-Diameter Ceiling Fans other than High-Speed Belt-Driven Ceiling Fans

BILLING CODE 6450–01–C

* * * * *

3.2.3. *Multi-Head Ceiling Fan Test Set-Up.* Hang a multi-headed ceiling fan from the ceiling such that one of the ceiling fan heads is centered directly over sensor 1 (*i.e.,* at the intersection of axes A, B, C, and D). The distance between the lowest point any of the fan blades of the centered fan head can reach and the air velocity sensors is to be such that it is the same as for all other small-diameter ceiling fans (see Figure 3 of this appendix). If the multi-head ceiling fan has an oscillating function (*i.e.,* the fan heads change their axis of rotation relative to the ceiling) that can be switched off, switch it off prior to taking air velocity measurements. If any multi-head fan does not come with the

blades preinstalled, install fan blades only on the fan head that will be directly centered over the intersection of the sensor axes. (Even if the fan heads in a multi-head ceiling fan would typically oscillate when the blades are installed on all fan heads, the ceiling fan is subject to this test procedure if the centered fan head does not oscillate when it is the only fan head with the blades installed.) If the fan blades are preinstalled on all fan heads, measure air velocity in accordance with section 3.3 of this appendix except turn on only the centered fan head. Take the power consumption measurements separately, with the fan blades installed on all fan heads and with any oscillating function, if present, switched on.

* * * * *

3.3.1 *Test conditions to be followed when testing:*

* * * * *

(3) If present, any additional accessories or features sold with the ceiling fan that do not relate to the ceiling fan's ability to create airflow by rotation of the fan blades (for example light kit, heater, air ionization, ultraviolet technology) is to be installed but turned off during testing. If the accessory/feature cannot be turned off, it shall be set to the lowest energy-consuming mode during testing.

(4) If present, turn off any oscillating function causing the axis of rotation of the fan head(s) to change relative to the ceiling during operation prior to taking air velocity measurements. Turn on any oscillating function prior to taking power measurements.

* * * * *

(8) Measure power input at a point that includes all power-consuming components of the ceiling fan (but without any attached light kit energized; or without any additional accessory or feature energized, if possible; and if not, with the additional accessory or feature set at the lowest energy-consuming mode).

* * * * *

3.3.2 *Air Velocity and Power Consumption Testing Procedure:*

Measure the air velocity (FPM) and power consumption (W) for HSSD ceiling fans until stable measurements are achieved, measuring at high speed only. Measure the air velocity and power consumption for LSSD and VSD ceiling fans that also meet the definition of an LSSD fan until stable measurements are achieved, measuring first at low speed and then at high speed. To determine low speed, start measurements at the lowest available speed and move to the next highest speed until the low speed definition in section 1.12 of this appendix is met. Air velocity and power consumption measurements are considered stable for high speed if:

(1) The average air velocity for each sensor varies by less than 5% or 2 FPM, whichever is greater, compared to the average air velocity measured for that same sensor in a successive set of air velocity measurements, and

(2) Average power consumption varies by less than 1% in a successive set of power consumption measurements.

(a) Air velocity and power consumption measurements are considered stable for low speed if:

(1) The average air velocity for each sensor varies by less than 10% or 2 FPM, whichever is greater, compared to the average air velocity measured for that same sensor in a successive set of air velocity measurements, and

(2) Average power consumption varies by less than 1% in a successive set of power consumption measurements.

(b) These stability criteria are applied differently to ceiling fans with airflow not directly downward. See section 3.3.3 of this appendix.

Step 1: Set the first sensor arm (if using four fixed arms), two sensor arm (if using a two-arm rotating setup), or single sensor arm (if using a single-arm rotating setup) to the 0 degree Position (Axis A). If necessary, use a marking as reference. If using a single-arm rotating setup or two-arm rotating setup, adjust the sensor arm alignment until it is at the 0 degree position by remotely controlling the antenna rotator.

Step 2: Set software up to read and record air velocity, expressed in feet per minute (FPM) in 1 second intervals. (Temperature does not need to be recorded in 1 second intervals.) Record current barometric pressure.

Step 3: Allow test fan to run 15 minutes at rated voltage and at high speed if the ceiling fan is an HSSD ceiling fan. If the ceiling fan is an LSSD or VSD ceiling fan that also meets the definition of an LSSD fan, allow the test fan to run 15 minutes at the rated voltage and at the lowest available ceiling fan speed. Turn off all forced-air environmental conditioning equipment entering the chamber (*e.g.,* air conditioning), close all doors and vents, and wait an additional 3 minutes prior to starting test session.

Step 4a: For a rotating sensor arm: Begin recording readings. Starting with Axis A, take 100 air velocity readings (100 seconds run-time) and record these data. For all fans except multi-head fans and fans capable of oscillating, also measure power during the interval that air velocity measurements are taken. Record the average value of the air velocity readings for each sensor in feet per minute (FPM). Determine if the readings meet the low speed definition as defined in section 1.12 of this appendix. If not, restart Step 4a at the next highest speed until the low-speed definition is met. Once the low speed definition is met, rotate the arm, stabilize the arm, and allow 30 seconds to allow the arm to stop oscillating. Repeat data recording and rotation process for Axes B, C, and D. Step 4a is complete when the readings for all axes meet the low speed definition at the same speed. Save the data for all axes only for those measurements that meet the low speed definition. Using the measurements applicable to low speed, record the average value of the power measurement in watts (W) (400 readings). Record the average value of the air velocity readings for each sensor in feet per minute (FPM) (400 readings).

Step 4b: For a two-arm rotating setup: Begin recording readings. Starting with Axes A and C, take 100 air velocity readings (100 seconds run-time) for both axes and record these data. For all fans except multi-head fans and fans capable of oscillating, also measure power during the interval that air velocity measurements are taken. Record the average value of the air velocity readings for each sensor in feet per minute (FPM). Determine if the readings meet the low speed definition as defined in section 1.12 of this appendix. If not, restart Step 4b at the next highest speed until the low speed definition is met. Once the low speed definition is met, rotate the two-arm, stabilize the arm, and allow 30 seconds to allow the arm to stop oscillating. Repeat data recording for Axes B and D. Step 4b is complete when the readings for all axes meet the low speed definition at the same speed. Save the data for all axes only for those measurements that meet the low speed definition. Using the measurements applicable to low speed, record the average value of the power measurement in watts (W) (200 readings). Record the average value of the air velocity readings for each sensor in feet per minute (FPM) (200 readings).

Step 4c: For four fixed sensor arms: Begin recording readings. Take 100 air velocity readings (100 seconds run-time) and record this data. Take the readings for all sensor arms (Axes A, B, C, and D) simultaneously. For all fans except multi-head fans and fans capable of oscillating, also measure power during the interval that air velocity measurements are taken. Record the average value of the air velocity readings for each sensor in feet per minute (FPM). Determine if the readings meet the low speed definition as defined in section 1.12 of this appendix. If not, restart Step 4c at the next highest speed until the low speed definition is met. Step 4c is complete when the readings for all axes meet the low speed definition at the same speed. Save the data for all axes only for those measurements that meet the low speed definition. Using the measurements applicable to low speed, record the average value of the power measurement in watts (W) (100 readings). Record the average value of the air velocity readings for each sensor in feet per minute (FPM) (100 readings).

Step 5: Repeat step 4a, 4b or 4c until stable measurements are achieved.

Step 6: Repeat steps 1 through 5 above on high speed for LSSD and VSD ceiling fans that also meet the definition of an LSSD fan. Note: Ensure that temperature and humidity readings are maintained within the required tolerances for the duration of the test (all tested speeds). Forced-air environmental conditioning equipment may be used and doors and vents may be opened between test sessions to maintain environmental conditions.

Step 7: If testing a multi-mount ceiling fan, repeat steps 1 through 6 with the ceiling fan in the ceiling fan configuration (associated with either hugger or standard ceiling fans) not already tested.

If a multi-head ceiling fan includes more than one category of ceiling fan head, then test at least one of each unique category. A fan head with different construction that could affect air movement or power consumption, such as housing, blade pitch,

or motor, would constitute a different category of fan head.

Step 8: For multi-head ceiling fans, measure active (real) power consumption in all phases simultaneously at each speed continuously for 100 seconds with all fan heads turned on, and record the average value at each speed in watts (W).

For ceiling fans with an oscillating function, measure active (real) power consumption in all phases simultaneously at each speed continuously for 100 seconds with the oscillating function turned on. Record the average value of the power measurement in watts (W).

For both multi-head ceiling fans and fans with an oscillating function, repeat power consumption measurement until stable power measurements are achieved.

3.3.3 *Air Velocity Measurements for Ceiling Fans With Airflow Not Directly Downward:*

Using the number of sensors that cover the same diameter as if the airflow were directly downward, record air velocity at each speed from the same number of continuous sensors with the largest air velocity measurements. This continuous set of sensors must be along the axis that the ceiling fan tilt is directed in (and along the axis that is 180 degrees from the first axis). For example, a 42-inch fan tilted toward axis A may create the pattern of air velocity shown in Figure 4 of this appendix. As shown in Table 1 of this appendix, a 42-inch fan would normally require 7 active sensors per axis. However, because the fan is not directed downward, all sensors must record data. In this case, because the set of sensors corresponding to maximum air velocity are centered 3 sensor positions away from the sensor 1 along the A axis, substitute the air velocity at A axis sensor 4 for the average air velocity at sensor 1. Take the average of the air velocity at A axis sensors 3 and 5 as a substitute for the average air velocity at sensor 2, take the average of the air velocity at A axis sensors 2 and 6 as a substitute for the average air velocity at sensor 3, etc. Lastly, take the average of the air velocities at A axis sensor 10 and C axis sensor 4 as a substitute for the average air velocity at sensor 7. Stability criteria apply after these substitutions. For example, air velocity stability at sensor 7 are determined based on the average of average air velocity at A axis sensor 10 and C axis sensor 4 in successive measurements. Any air velocity measurements made along the B–D axis are not included in the calculation of average air velocity.

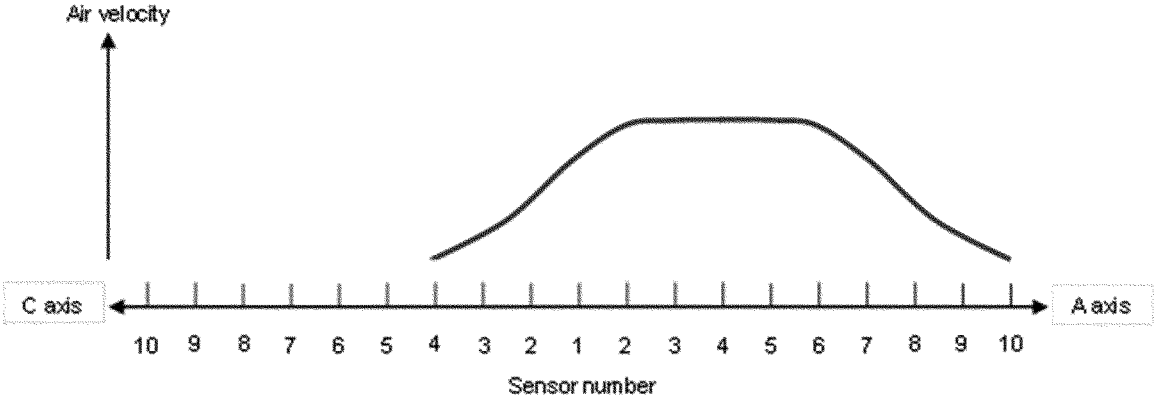


Figure 4 to Appendix U to Subpart B of Part 430: Example Air Velocity Pattern for Airflow Not Directly Downward

3.4 Test apparatus for large-diameter ceiling fans, high-speed belt-driven ceiling fans and large-diameter belt-driven ceiling fans:

The test apparatus and instructions for testing large-diameter ceiling fans, HSBD and LDBD ceiling fans must conform to the requirements specified in sections 3 through 7 of AMCA 230–15 (incorporated by reference, see § 430.3), with the following modifications:

* * * * *

3.5 Active mode test measurement for large-diameter ceiling fans, high-speed belt-driven ceiling fans and large-diameter belt-driven ceiling fans:

(1) Test large-diameter ceiling fans in accordance with AMCA 208–18 (incorporated by reference, see § 430.3), in all phases simultaneously at:

(a) High speed, and

(b) 40 percent or the nearest speed that is not less than 40 percent speed.

(2) Test high-speed belt-driven ceiling fans and large-diameter belt-driven ceiling fans in accordance with AMCA 208–18, in all phases simultaneously at:

(a) High speed, and

(b) 40 percent or the nearest speed that is not less than 40 percent speed, if the fan is capable of multi-speed operation.

(3) When testing at 40 percent speed for large-diameter ceiling fans that can operate over an infinite number of speeds (*e.g.,* ceiling fans with VFDs), ensure the average measured RPM is within the greater of 1% of the average RPM at high speed or 1 RPM. For example, if the average measured RPM at high speed is 50 RPM, for testing at 40% speed, the average measured RPM should be between 19 RPM and 21 RPM. If the average measured RPM falls outside of this tolerance, adjust the ceiling fan speed and repeat the test. Calculate the airflow and measure the active (real) power consumption in all phases simultaneously in accordance with the test requirements specified in sections 8 and 9, AMCA 230–15, with the following modifications:

3.5.1 Measure active (real) power consumption in all phases simultaneously at a point that includes all power-consuming components of the ceiling fan. If present, any additional accessories or features sold with the ceiling fan that do not relate to the ceiling fan's ability to create airflow by rotation of the fan blades (for example light kit, heater, air ionization, ultraviolet technology) are to be installed but turned off during testing. If the accessory/feature cannot be turned off, it shall be set to the lowest energy-consuming mode during testing.

* * * * *

3.6 Test measurement for standby power consumption.

(1) * * *

(a) The ability to facilitate the activation or deactivation of other functions (including active mode) by remote switch (including remote control), internal sensor, or timer.

(b) Continuous functions, including information or status displays (including clocks), or sensor-based functions.

* * * * *

4. *Calculation of Ceiling Fan Efficiency From the Test Results:*

4.1 Calculation of effective area for small-diameter ceiling fans other than high-speed belt-driven ceiling fans:

Calculate the effective area corresponding to each sensor used in the test method for small-diameter ceiling fans other than high-speed belt-driven ceiling fans (section 3.3 of this appendix) with the following equations:

(1) For sensor 1, the sensor located directly underneath the center of the ceiling fan, the effective width of the circle is 2 inches, and the effective area is:

$$Effective\ Area\ (sq.ft.) = \pi\left(\frac{2}{12}\right)^2 = 0.0873 \qquad \textbf{Eq. 1}$$

(2) For the sensors between sensor 1 and the last sensor used in the measurement, the effective area has a width of 4 inches. If a sensor is a distance *d,* in inches, from sensor 1, then the effective area is:

$$Effective\ Area\ (sq.ft.) = \pi\left(\frac{d+2}{12}\right)^2 - \pi\left(\frac{d-2}{12}\right)^2 \qquad \textbf{Eq. 2}$$

(3) For the last sensor, the width of the effective area depends on the horizontal displacement between the last sensor and the point on the ceiling fan blades furthest radially from the center of the fan. The total area included in an airflow calculation is the area of a circle 8 inches larger in diameter than the ceiling fan blade span (as specified in section 3 of this appendix).

Therefore, for example, for a 42-inch ceiling fan, the last sensor is 3 inches beyond the end of the ceiling fan blades. Because only the area within 4 inches of the end of the ceiling fan blades is included in the airflow calculation, the effective width of the circle corresponding to the last sensor would be 3 inches. The calculation for the effective area corresponding to the last sensor would then be:

$$Effective\ Area\ (sq.ft.) = \pi\left(\frac{d+1}{12}\right)^2 - \pi\left(\frac{d-2}{12}\right)^2 = \pi\left(\frac{24+1}{12}\right)^2 - \pi\left(\frac{24-2}{12}\right)^2 = 3.076 \qquad \textbf{Eq. 3}$$

For a 46-inch ceiling fan, the effective area of the last sensor would have a width of 5 inches, and the effective area would be:

$$Effective\ Area\ (sq.ft.) = \pi\left(\frac{d+3}{12}\right)^2 - \pi\left(\frac{d-2}{12}\right)^2 = \pi\left(\frac{24+3}{12}\right)^2 - \pi\left(\frac{24-2}{12}\right)^2 = 5.345 \qquad \textbf{Eq. 4}$$

4.2 Calculation of airflow and efficiency for small-diameter ceiling fans other than high-speed belt-driven ceiling fans:

Calculate fan airflow using the overall average of both sets of air velocity measurements at each sensor position from the successive sets of measurements that meet the stability criteria from section 3.3 of this appendix. To calculate airflow for HSSD, LSSD, and VSD ceiling fans, multiply the overall average air velocity at each sensor position from section 3.3 (for high speed for HSSD, LSSD, and VSD ceiling fans that also meet the definition of an LSSD ceiling fan; and repeated for low speed only for LSSD and VSD ceiling fans that also meet the definition of an LSSD ceiling fan) by that sensor's effective area (see section 4.1 of this appendix), and then sum the products to obtain the overall calculated airflow at the tested speed.

For each speed, using the overall calculated airflow and the overall average power consumption measurements from the successive sets of measurements as follows:

$$Ceiling\ Fan\ Efficiency\ (CFM/W) = \frac{\sum_i (CFM_i \times OH_i)}{W_{Sb} \times OH_{Sb} + \sum_i (W_i \times OH_i)} \qquad \textbf{Eq. 5}$$

Where:

CFM_i = airflow at speed *i,*

OH_i = operating hours at speed *i,* as specified in Table 2 of this appendix,

W_i = power consumption at speed *i,*

OH_{Sb} = operating hours in standby mode, as specified in Table 2 of this appendix, and

W_{Sb} = power consumption in standby mode.

Calculate two ceiling fan efficiencies for multi-mount ceiling fans: One efficiency corresponds to the ceiling fan mounted in the configuration associated with the definition of a hugger ceiling fan, and the other efficiency corresponds to the ceiling fan mounted in the configuration associated with the definition of a standard ceiling fan.

TABLE 2 TO APPENDIX U TO SUBPART B OF PART 430: DAILY OPERATING HOURS FOR CALCULATING CEILING FAN EFFICIENCY

	No Standby	With standby
Daily Operating Hours for LSSD and VSD* Ceiling Fans		
High Speed	3.4	3.4
Low Speed	3.0	3.0
Standby Mode	0.0	17.6
Off Mode	17.6	0.0
Daily Operating Hours for HSSD Ceiling Fans		
High Speed	12.0	12.0
Standby Mode	0.0	12.0
Off Mode	12.0	0.0

These values apply only to VSD fans that also meet the definition of an LSSD fan.

4.3 Calculation of airflow and efficiency for multi-head ceiling fans:

Calculate airflow for each fan head using the method described in section 4.2 of this appendix. To calculate overall airflow at a given speed for a multi-head ceiling fan, sum the airflow for each fan head included in the ceiling fan (a single airflow can be applied to each of the identical fan heads, but at least one of each unique fan head must be tested). The power consumption is the measured power consumption with all fan heads on. Using the airflow as described in this section, and power consumption measurements from section 3.3 of this appendix, calculate ceiling fan efficiency for a multi-head ceiling fan as follows:

$$\boldsymbol{Ceiling\ Fan\ Efficiency\ (CFM/W)} = \frac{\sum_i (CFM_i \times OH_i)}{W_{Sb} \times OH_{Sb} + \sum_i (W_i \times OH_i)} \qquad \textbf{Eq. 6}$$

Where:

CFM_i = sum of airflows for each head at speed i,

OH_i = operating hours at speed i as specified in Table 2 of this appendix,

W_i = power consumption at speed i,

OH_{Sb} = operating hours in standby mode as specified in Table 2 of this appendix, and

W_{Sb} = power consumption in standby mode.

5. *Calculation of Ceiling Fan Energy Index (CFEI) From the Test Results for Large Diameter Ceiling Fans, High-Speed Belt-Driven Ceiling Fans, and Large-Diameter Belt-Driven Ceiling Fans:*

Calculate CFEI, which is the FEI for large-diameter ceiling fans, high-speed belt-driven ceiling fans, and large-diameter belt-driven ceiling fans, at the speeds specified in section 3.5 of this appendix according to ANSI/AMCA 208–18, with the following modifications:

(1) Using an Airflow Constant (Q0) of 26,500 cubic feet per minute;

(2) Using a Pressure Constant (P0) of 0.0027 inches water gauge; and

(3) Using a Fan Efficiency Constant (η0) of 42 percent.

[FR Doc. 2021–25416 Filed 12–6–21; 8:45 am]

BILLING CODE 6450–01–P

Reader Aids

Federal Register

Vol. 86, No. 232

Tuesday, December 7, 2021

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6050**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.govinfo.gov.**

Federal Register information and research tools, including Public Inspection List and electronic text are located at: **www.federalregister.gov.**

E-mail

FEDREGTOC (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new**, enter your email address, then follow the instructions to join, leave, or manage your subscription.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html and select** *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

FEDERAL REGISTER PAGES AND DATE, DECEMBER

68103–68388 1
68389–68532 2
68533–68874 3
68875–69156 6
69157–69574 7

CFR PARTS AFFECTED DURING DECEMBER

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.

2 CFR

200 68533

3 CFR

Proclamations:
10314 68103
10315 68385
10316 68867
10317 68869
10318 69157
Executive Orders:
13803 (Superseded and revoked by EO 14056) 68871
13906 (Superseded and revoked by EO 14056) 68871
14056 68871

7 CFR

915 69159
1471 68875
1484 68880
1485 68882
Proposed Rules:
983 68932
986 68934

9 CFR

2 68533
92 68834
93 68834
94 68834
95 68834
96 68834
98 68834

10 CFR

429 68389
430 68389
Proposed Rules:
429 69544
430 69544

12 CFR

614 68395
615 68395
620 68395
628 68395

14 CFR

39 ..... 68105, 68107, 68109, 68884, 68887, 68889, 68892, 68894, 68897, 68899, 68902, 68905. 68907, 68910, 69161, 69163, 69165
71 ..... 68395, 68538, 68912
91 69167
97 ..... 68539, 68541
Proposed Rules:
39 ..... 68166, 68168, 68171, 68937
71 ..... 68173, 68571, 69181

17 CFR

211 68111
240 68330
Proposed Rules:
240 68300

19 CFR

12 ..... 68544, 68546

20 CFR

Proposed Rules:
655 68174

21 CFR

1 68728
11 68728
16 68728
129 68728
868 68396
876 68398
882 ..... 68399, 68401
888 68403
Proposed Rules:
112 69120
1308 ..... 69182, 69187

23 CFR

645 68553

25 CFR

Proposed Rules:
514 68445
537 68446
559 68200

26 CFR

Proposed Rules:
1 68939
301 68939

27 CFR

Proposed Rules:
1 68573
17 68573
19 68573
20 68573
22 68573
26 68573
27 68573
28 68573
31 68573

29 CFR

1910 68560
1915 68560
1917 68560
1918 68560
1926 68560
1928 68560

4044 68560
Proposed Rules:
1910 68594
1915 68594
1917 68594
1918 68594
1926 68594
1928 68594

33 CFR

100 68405
135 68123
138 68123
153 68123
165 ....68406, 68407, 68562, 68564, 68566, 68913
Proposed Rules:
165 68948
328 69372

36 CFR

219 68149

37 CFR

380 68150
Proposed Rules:
1 69195

38 CFR

3 68409

39 CFR

Proposed Rules:
3065 68202

40 CFR

52 ....68411, 68413, 68421, 68568, 69173
180 ....68150, 68915, 68918, 68921
272 68159
Proposed Rules:
52 ....68447, 68449, 68954, 68957, 68960, 69198, 69200, 69207, 69210
82 68962
120 69372

42 CFR

100 68423
Proposed Rules:
Ch. IV 68594

45 CFR

Proposed Rules:
1336 69215

47 CFR

1 68428
63 68428
Proposed Rules:
1 68230
73 68203

48 CFR

502 68441
509 68441
511 68441
512 68441
514 68441
532 68441
536 68441
538 68441
552 68441
Proposed Rules:
Ch. 1 69218
Ch. 12 69452

49 CFR

1180 68926

50 CFR

223 69178
648 68569
Proposed Rules:
223 68452
224 68452
648 68456
679 ....68608, 68982

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 December 6, 2015

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.