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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

### 14 CFR Part 399

**[Docket No. DOT–OST–2021–0142]**

**RIN 2105–AF03**

## Procedures in Regulating Unfair or Deceptive Practices

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

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Transportation (Department or DOT) is amending its regulations regarding the hearing procedures that are available when the Department proposes a discretionary aviation consumer protection rulemaking declaring a practice to be unfair or deceptive. This final rule simplifies the hearing procedures and allows the Department greater flexibility to conduct a hearing in a manner that would not unduly delay the aviation consumer protection rulemaking.

**DATES:** Effective March 4, 2022.

**FOR FURTHER INFORMATION CONTACT:** Robert Gorman, Kimberly Graber, or Blane Workie, Office of Aviation Consumer Protection, U.S. Department of Transportation, 1200 New Jersey Ave. SE, Washington, DC 20590, 202–366–9342, 202–366–7152 (fax); *robert.gorman@dot.gov; kimberly.graber@dot.gov; blane.workie@dot.gov* (email).

**SUPPLEMENTARY INFORMATION:**

## I. Background

### *A. The Unfair and Deceptive Practices Statute and the Department's Recent Rulemaking*

The Department's authority to regulate unfair and deceptive practices in air transportation or the sale of air transportation is found at 49 U.S.C. 41712 (section 41712) in conjunction with its rulemaking authority under 49 U.S.C. 40113, which states that the Department may take action that it considers necessary to carry out this part, including prescribing regulations. Section 41712 gives the Department the authority to investigate and decide whether an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice in air transportation or the sale of air transportation. Under section 41712, after notice and an opportunity for a hearing, the Department has the authority to issue orders to stop an unfair or deceptive practice. A different statute, 49 U.S.C. 46301, gives the Department the authority to issue civil penalties for violations of section 41712 or for any regulation issued under the authority of section 41712.

On December 20, 2020, the Department published in the **Federal Register** a final rule titled ''Defining Unfair or Deceptive Practices'' (UDP Final Rule).[1] The UDP Final Rule was intended to provide regulated entities and other stakeholders with greater clarity about the Department's enforcement and regulatory processes with respect to aviation consumer protection actions under section 41712.[2] It sets forth procedures that the Department would use when conducting future enforcement actions under the authority of section 41712.[3] The UDP Final Rule also sets forth procedures, including evidentiary hearing procedures, that the Department would use when conducting future discretionary rulemaking actions under the authority of section 41712.[4] Those procedures for evidentiary hearings are being amended through this rulemaking.

In addition, the UDP Final Rule defined the terms ''unfair'' and ''deceptive'' for purposes of section 41712. The definitions were modeled after Federal Trade Commission (FTC) precedent; they also reflect the Department's longstanding interpretation of those terms.[5] However, the UDP Final Rule did not fully resolve the meaning of unfair or deceptive. Executive Order (E.O.) 14036, ''Promoting Competition in the American Economy,'' issued by President Biden on July 9, 2021, directs the Department to ''start development of proposed amendments'' to its definitions of the terms 'unfair' and 'deceptive' in 49 U.S.C. 41712.[6] In keeping with this Executive Order, the Department intends to issue in the near future an interpretive rule that would more clearly apprise the public of the Department's interpretation of the definitions of ''unfair'' and ''deceptive'' found in section 41712, and as defined by the Department at 14 CFR 399.79.

### *B. Amendments to Evidentiary Hearing Provisions for Discretionary Aviation Consumer Protection Rulemakings*

The UDP Final Rule established the Department's procedures for hearings for discretionary aviation consumer protection rulemaking actions promulgated under the authority of section 41712. The Department is revising those procedures after a careful review of recent changes in the Department's and FTC's internal policies and procedures relating to the issuance of rulemaking documents and concern that the existing hearing procedures for discretionary aviation consumer protections actions do not provide the Department with enough flexibility to adapt internal procedures to facilitate efficient rulemaking. The Department is concerned that the overly particularized rigidity of the existing procedures in the UDP Final Rule may have the unintended consequence of causing unnecessary delay. The Department has determined that although it remains useful to have specific procedures for evidentiary hearings, the procedures should be streamlined to provide greater flexibility and ensure that important consumer protection rulemakings are not unduly delayed.

#### 1. Evidentiary Hearing Provisions as Established in the UDP Final Rule

Under the hearing provisions of the UDP Final Rule, if the Department proposes a new discretionary rulemaking declaring a practice to be unfair or deceptive, then any interested party may file a petition for an

[1] 85 FR 78707 (December 7, 2020); RIN 2105–AE72; Docket DOT–OST–2019–0182.

[2] 85 FR 78707.

[3] 14 CFR 399.79.

[4] 14 CFR 399.75.

[5] 14 CFR 399.79(b); 85 FR 78708.

[6] *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.*

evidentiary hearing.[7] The petition must be directed to the attention of the General Counsel, and must be filed before the close of the comment period on the proposed rule.[8] To obtain an evidentiary hearing, the party must demonstrate that: (1) The proposed rule depends on conclusions concerning one or more specific scientific, technical, economic, or other factual issues that are genuinely in dispute or that may not satisfy the requirements of the Information Quality Act; (2) the ordinary public comment process is unlikely to provide an adequate examination of the issues to permit a fully informed judgment; and (3) the resolution of the disputed factual issues would likely have a material effect on the costs and benefits of the proposed rule.[9] Even if the petitioner establishes these elements, the General Counsel may still deny the petition if: (1) The hearing would not advance the consideration of the proposed rule; or (2) the hearing would unreasonably delay completion of the rulemaking.[10]

The existing procedures provide that if the General Counsel grants the petition, then a notice of the hearing must be placed in the **Federal Register**, identifying the specific issues that will be considered.[11] The General Counsel must develop procedures for conducting evidentiary hearings.[12] Interested parties must have a reasonable opportunity to participate in the hearing through the presentation of testimony and written submissions.[13] The General Counsel must appoint a ''neutral officer'' to preside over the hearing, and must allow ''a reasonable opportunity to question the presenters.'' [14] After the hearing is closed, the neutral officer must place minutes of the meeting on the docket, along with proposed findings of fact on the disputed issues.[15] Interested parties who participated in the hearing must be given the opportunity to file ''statements of agreement or objection'' to the proposed findings.[16]

After the hearing, the General Counsel must consider the record of the hearing, along with the neutral officer's findings, and determine whether to: (1) Terminate the proposed rulemaking; (2) modify it by filing a new or supplemental notice of proposed rulemaking; or (3) finalize the rule without material changes.[17] Any of these choices must be accompanied by a notice in the **Federal Register** explaining the basis for the decision.[18]

2. Evidentiary Hearing Provisions—Rationale

The Department indicated in the UDP Final Rule that these evidentiary hearing procedures were consistent with section 41712, which requires the Department to provide notice and an opportunity for a hearing before finding that a regulated entity is engaged in an unfair or deceptive practice.[19] The Department noted that hearing procedures would be helpful in cases where the Department's proposed rulemaking may be premised on complex or disputed issues of fact.[20] The Department also noted that the traditional notice-and-comment procedures of the Administrative Procedure Act ''remain the default process,'' and that a hearing may be granted only if an interested party shows that traditional notice-and-comment is inadequate.[21] The Department further noted that the General Counsel may deny a hearing upon a finding that the hearing would unreasonably delay the rulemaking.[22] The Department also explained that the Department had held evidentiary hearings on proposed aviation consumer protection rulemakings in the past, but had not codified nor fully publicized those procedures.[23] In summary, the Department recognized that hearing procedures may add time to the overall rulemaking process, but concluded that the hearing procedures, as written, would ''promote fairness, due process, and well-informed rulemaking, without unduly delaying the proceeding itself.'' [24]

*C. Subsequent Developments on Evidentiary Hearing Procedures*

Recently, both the Department and the FTC have reexamined or revised their evidentiary hearing procedures for rulemakings. On April 2, 2021, the Department repealed most of 49 CFR part 5, which included hearing procedures for high-impact and economically significant rules issued by the Department.[25] The Department further indicated that it would review the substance of the Department's rulemaking procedures in light of Executive Order 13992 (January 25, 2021). This Executive Order not only repealed a number of executive orders relating to the rulemaking process, but also directed agencies to ''promptly take steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing'' those repealed executive orders.

Meanwhile, on July 22, 2021, the FTC announced that it streamlined its rules of practice regarding evidentiary hearings for rulemakings that would declare a specific act or practice to be unfair or deceptive.[26] For example, the FTC eliminated the requirement that the evidentiary hearing be conducted by an Administrative Law Judge (ALJ); instead, hearings may be conducted by a neutral presiding officer appointed by the FTC Chair.[27] The FTC also eliminated other rules, including: (1) A requirement that the hearings include ''direct examination'' of individuals who present their views at such hearing; (2) rules relating to compelling documents and testimony; and (3) a requirement that Commission staff produce a report analyzing the rulemaking record, along with an additional period for interested parties to comment on the report.[28] The FTC reasoned that its amendments would allow for transparent public participation in the rulemaking process while avoiding unnecessary procedural delays to effective rulemaking.[29]

[7] A discretionary rulemaking is one that is not mandated by statute. *See* 14 CFR 399.75(c).

[8] 85 FR 78716–78717; 14 CFR 399.75(b)(1).

[9] *Id.* at 78716–78717; 14 CFR 399.75(b)(2).

[10] *Id.* at 78717; 14 CFR 399.75(b)(3).

[11] 14 CFR 399.75(b)(5).

[12] 14 CFR 399.75(b)(6)(i).

[13] *Id.*

[14] 14 CFR 399.75(b)(6)(ii).

[15] 14 CFR 399.75(b)(6)(iii).

[16] 14 CFR 399.75(b)(6)(iv).

[17] 14 CFR 399.75(b)(7).

[18] *Id.*

[19] 85 FR 78711.

[20] *Id.* at 78712.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] DOT Final Rule, ''Administrative Rulemaking, Guidance, and Enforcement Procedures,'' 86 FR 17292 (April 2, 2021) (effective May 3, 2021), repealing most of 49 CFR part 5, which had been found at 84 FR 71714 (December 27, 2019, effective January 27, 2020). Despite this repeal, the hearing procedures for aviation consumer protection rulemakings found in 14 CFR 399.75 remained intact.

[26] ''Revisions to Rules of Practice,'' 86 FR 38542 (July 22, 2021). Pursuant to the FTC Act, the FTC is required to ''provide an opportunity for an informal hearing'' before issuing a rule declaring a specific act or practice to be unfair or deceptive. 15 U.S.C. 57a(b)(1)(C); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, Public Law 93–637. The FTC Act also sets forth the basic requirements for such a hearing. 5 U.S.C. 57a(c). The FTC's rules of practice implementing the FTC Act originally contained provisions that went beyond what the FTC Act itself called for.

[27] *Id.* at 38546, 38551. Under the FTC's new rules, the Chief Presiding Officer appoints the presiding officer for the hearing. *Id.* at 38549; 16 CFR 1.13(a). The FTC Chair is the Chief Presiding Officer, unless the Chair appoints another Commissioner or an individual ''who is not responsible to any other official or employee of the Commission.'' 16 CFR 0.8.

[28] *Id.*

[29] *Id.* at 38552.

## II. Discussion of Revisions To Rule on Evidentiary Hearings

The Department maintains the view that it remains useful to have specified procedures for evidentiary hearings because it may be beneficial to hold evidentiary hearings before completing certain discretionary aviation consumer protection rulemakings. When structured properly and used judiciously, evidentiary hearings should help to ensure that the Department's assumptions relating to economic, technical, and other matters are based on a solid foundation. The Department also sees value in publicizing and standardizing the procedures for evidentiary hearings, given that the Department's use of such hearings is not new. With publicly available standards, evidentiary hearings should serve to promote robust public participation in the rulemaking process by all stakeholders. At the same time, the Department finds that it is important to balance the need for robust public participation with the need for procedures that provide the Department with enough flexibility to ensure important rulemakings are not bogged down by overly prescriptive procedural constraints. Accordingly, the Department has modified its evidentiary hearing procedures to promote flexibility and efficiency.

First, the Department has simplified the standard for granting a hearing to a ''public interest'' standard. The question of whether a hearing is in the public interest will turn on a number of factors, including but not limited to the novelty and complexity of the issues, the degree to which a public hearing would illuminate those issues beyond what could be accomplished in the notice-and-comment process, and the degree to which a public hearing would delay the underlying proceedings. The public interest standard is designed to encourage the General Counsel to consider not only the elements outlined in the UDP Final Rule, but also any other unique factors that may be relevant to the specific rulemaking at issue.

The Department has also amended the level of proof necessary for the grant of a public hearing from a ''plausible'' standard to a ''credible and convincing'' standard; the petitioner would be required to make a ''credible and convincing prima facie showing that granting the petition is in the public interest.'' The Department is of the view that the ''credible and convincing evidence'' standard best serves to ensure that the usual notice-and-comment procedure of the APA remains the default procedure. The new standard also ensures that the petitioner presents a strong basis from which the General Counsel may conclude that expending the resources required for a public hearing is justified.

The Department has also modified its procedures for granting or denying an evidentiary hearing. Under the UDP Final Rule, the General Counsel was required to issue a detailed statement of reasons for *denying* a petition, but there was no similar requirement if the General Counsel *granted* the petition. The Department is of the view that the General Counsel should issue an explanatory statement of the basis for the decision in either granting or denying the petition. However, the statement need not be overly detailed; it should set forth with sufficient clarity the basis for the decision that it is or is not in the public interest to hold an evidentiary hearing. Such a requirement will promote fairness and transparency in the Department's rulemaking processes.

The Department has also afforded the General Counsel greater discretion to appoint an appropriate hearing officer for the evidentiary hearing. The UDP Rule currently requires the General Counsel to appoint a ''neutral officer'' to preside over the hearing, implying that Department staff working on the rulemaking may not preside over the hearing. Under this new rule, the General Counsel has broader discretion to appoint an appropriate hearing officer from within or outside the Department to conduct the hearing.

Next, the Department now allows the hearing officer greater flexibility with respect to when and how testimony is presented at the hearing. The UDP Final Rule required ''a reasonable opportunity to participate in the hearing through the presentation of testimony and written submissions'' and ''a reasonable opportunity to question the presenters.'' The new rule eliminates these requirements and allows the hearing officer greater discretion to determine whether testimony, written submissions, and/or cross-examination are appropriate given the unique circumstances of each hearing.

The Department has simplified the requirements for the hearing officer's report after the hearing is closed. The UDP Final Rule provided that, after the record of the hearing is closed, ''the hearing officer shall place on the docket minutes of the hearing with sufficient detail as to fully reflect the evidence and arguments presented on the issues, along with proposed findings addressing the disputed issues of fact identified in the hearing notice.'' [30] In this new rule, the hearing officer is simply required to place on the record the minutes with sufficient detail as to fully reflect the evidence and arguments presented on the issues and not the proposed findings addressing the disputed issues of fact identified in the hearing. The findings would be provided by the Department in subsequent documents that modify, terminate, or maintain the proposed rule.

Finally, the Department has amended the procedures that take place after the hearing is closed. The new rule clarifies that in keeping with current practice, *all* interested parties (not just those who participated in the hearing) may file statements or comments in the docket after the hearing is closed.

## III. Administrative Procedure Act

Under the Administrative Procedure Act, the normal notice and comment procedures do not apply to an action that is a rule of agency organization, procedure, or practice. *See* 5 U.S.C. 553(b)(A). Since this final rule revises only internal processes applicable to the Department's administrative procedures, this is a rule of agency procedure for which notice and comment are not required.

## Rulemaking Analyses and Notices

### *A. E.O. 12866 and DOT Regulatory Policies and Procedures*

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. The Department does not anticipate that this rulemaking, which amends the Department's internal procedures, will have an economic impact on regulated entities.

### *B. Regulatory Flexibility Act*

Since notice and comment rulemaking is not necessary for this rule, the analytical provisions of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612) do not apply.

### *C. Executive Order 13132 (Federalism)*

Executive Order 13132 requires agencies to ensure meaningful and timely input by State and local officials in the development of regulatory policies that may 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

[30] 14 CFR 399.75(b)(6)(iii).

levels of government. This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (August 4, 1999), and DOT has determined that this action will not have a substantial direct effect or federalism implications on the States and would not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions. Therefore, consultation with the States is not necessary.

*D. Executive Order 13175 (Tribal Consultation)*

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Because this rulemaking does not significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13175 do not apply.

*E. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that DOT consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations. The DOT has determined there are no new information collection requirements associated with this final rule.

*F. National Environmental Policy Act*

The agency has analyzed the environmental impacts of this action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, ''Procedures for Considering Environmental Impacts'' (44 FR 56420, October 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). Paragraph 4.c.6.i of DOT Order 5610.1C categorically excludes ''[a]ctions relating to consumer protection, including regulations.'' Since this rulemaking relates to the definition of unfair and deceptive practices under section 41712, the Department's central consumer protection statute, this is a consumer protection rulemaking. The agency does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

**List of Subjects in 14 CFR Part 399**

Consumer protection, Policies, Rulemaking proceedings, Enforcement, Unfair or deceptive practices.

For the reasons set forth in the preamble, the Department of Transportation amends 14 CFR part 399 as follows:

## PART 399—STATEMENTS OF GENERAL POLICY

■ 1. The authority citation for part 399 continues to read as follows:

**Authority:** 49 U.S.C. 41712, 40113(a).

■ 2. Section 399.75 is amended by revising paragraphs (b)(2) through (7) and removing paragraph (b)(8).

The revisions read as follows:

**§ 399.75 Rulemakings related to unfair and deceptive practices.**

* * * * *

(b) * * *

(2) *Decision on petition for hearing.* The petition shall be granted if the petitioner makes a clear and convincing showing that granting the petition is in the public interest. Factors in determining whether a petition is in the public interest include, but are not limited to:

(i) Whether the proposed rule depends on conclusions concerning one or more specific scientific, technical, economic, or other factual issues that are genuinely in dispute or that may not satisfy the requirements of the Information Quality Act;

(ii) Whether the ordinary public comment process is unlikely to provide an adequate examination of the issues to permit a fully informed judgment;

(iii) Whether the resolution of the disputed factual issues would likely have a material effect on the costs and benefits of the proposed rule;

(iv) Whether the requested hearing would advance the consideration of the proposed rule and the General Counsel's ability to make the rulemaking determinations required by this section; and

(v) Whether the hearing would unreasonably delay completion of the rulemaking.

(3) *Explanation of decision.* If a petition is granted or denied in whole or in part, the General Counsel shall provide an explanation of the basis for the decision,

(4) *Hearing notice.* If the General Counsel grants the petition, the General Counsel shall publish notification of the hearing in the **Federal Register**. The document shall specify the proposed rule at issue and the specific factual issues to be considered at the hearing. The scope of the hearing shall be limited to the factual issues specified in the notice.

(5) *Hearing process.* (i) A hearing under this section shall be conducted using procedures approved by the General Counsel, and interested parties shall have a reasonable opportunity to participate in the hearing.

(ii) The General Counsel shall arrange for a hearing officer to preside over the hearing.

(iii) After the hearing and after the record of the hearing is closed, the hearing officer shall place on the docket minutes of the hearing with sufficient detail as to fully reflect the evidence and arguments presented on the issues. The complete record of the hearing shall be made part of the rulemaking record.

(iv) Interested parties shall be given an opportunity to file statements or comments after the hearing.

(6) *Actions following hearing.* (i) Following the completion of the hearing process, the General Counsel shall consider the record of the hearing, and shall make a reasoned determination whether to terminate the rulemaking; to proceed with the rulemaking as proposed; or to modify the proposed rule.

(ii) If the General Counsel decides to terminate the rulemaking, the General Counsel shall publish a document in the **Federal Register** announcing the decision and explaining the reasons for the decision.

(iii) If the General Counsel decides to finalize the proposed rule without material modifications, the General Counsel shall explain the reasons for the decision and its responses to the hearing record in the preamble to the final rule.

(iv) If the General Counsel decides to modify the proposed rule in material respects, the General Counsel shall publish a new or supplemental notice of proposed rulemaking in the **Federal Register** explaining the General Counsel's responses to and analysis of the hearing record, setting forth the modifications to the proposed rule, and providing additional reasonable opportunity for public comment on the proposed modified rule.

(7) *Interagency review process.* The hearing procedures under this paragraph (b) shall not impede or interfere with the interagency review process of the Office of Information and

Regulatory Affairs for the proposed rulemaking.

* * * * *

Issued this 21st day of January, 2022, in Washington, DC, under authority delegated in 49 CFR 1.27(n).

**John E. Putnam,**

*Deputy General Counsel.*

[FR Doc. 2022–01589 Filed 2–1–22; 8:45 am]

**BILLING CODE 4910–9X–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### 18 CFR Part 381

**[Docket No. RM22–4–000]**

### Annual Update of Filing Fees

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Final rule; annual update of Commission filing fees.

**SUMMARY:** In accordance with the Commission's regulations, the Commission issues this update of its filing fees. This document provides the yearly update using data in the Commission's Financial System to calculate the new fees. The purpose of updating is to adjust the fees on the basis of the Commission's costs for Fiscal Year 2021.

**DATES:** Effective March 4, 2022.

**FOR FURTHER INFORMATION CONTACT:** Maryam Khan, Office of the Executive Director, Federal Energy Regulatory Commission, 999 North Capitol St. NE, Room 22–02, Washington, DC 20426, 202–502–6683.

**SUPPLEMENTARY INFORMATION:**

*Document Availability:* 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 FERC's Home Page (*http://www.ferc.gov*). 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.

From FERC's website on the internet, this information is available in the eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field and follow other directions on the search page.

User assistance is available for eLibrary and other aspects of FERC's website during normal business hours. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

### Annual Update of Filing Fees

### (January 24, 2022)

The Federal Energy Regulatory Commission (Commission) is issuing this document to update filing fees that the Commission assesses for specific services and benefits provided to identifiable beneficiaries. Pursuant to 18 CFR 381.104, the Commission is establishing updated fees on the basis of the Commission's Fiscal Year 2021 costs. The adjusted fees announced in this document are effective March 4, 2022. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, that this final rule is not a major rule within the meaning of section 251 of Subtitle E of Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. 804(2). The Commission is submitting this final rule to both houses of the United States Congress and to the Comptroller General of the United States.

The new fee schedule is as follows:

| | |
|---|---|
| **Fees Applicable to the Natural Gas Policy Act** | |
| 1. Petitions for rate approval pursuant to 18 CFR 284.123(b)(2). (18 CFR 381.403) | $16,770 |
| **Fees Applicable to General Activities** | |
| 1. Petition for issuance of a declaratory order (except under Part I of the Federal Power Act). (18 CFR 381.302(a)) | 33,690 |
| 2. Review of a Department of Energy remedial order: | |
| *Amount in controversy* | |
| $0–9,999. (18 CFR 381.303(b)) | 100 |
| $10,000–29,999. (18 CFR 381.303(b)) | 600 |
| $ 30,000 or more. (18 CFR 381.303(a)) | 49,170 |
| 3. Review of a Department of Energy denial of adjustment: | |
| *Amount in controversy* | |
| $0–9,999. (18 CFR 381.304(b)) | 100 |
| $10,000–29,999. (18 CFR 381.304(b)) | 600 |
| $30,000 or more. (18 CFR 381.304(a)) | 25,780 |
| 4. Written legal interpretations by the Office of General Counsel. (18 CFR 381.305(a)) | 9,660 |
| **Fees Applicable to Natural Gas Pipelines** | |
| 1. Pipeline certificate applications pursuant to 18 CFR 284.224. (18 CFR 381.207(b)) | *1,000 |
| **Fees Applicable to Cogenerators and Small Power Producers** | |
| 1. Certification of qualifying status as a small power production facility. (18 CFR 381.505(a)) | 28,970 |
| 2. Certification of qualifying status as a cogeneration facility. (18 CFR 381.505(a)) | 32,790 |

*This fee has not been changed.

**List of Subjects in 18 CFR Part 381**

Electric power plants, Electric utilities, Natural gas, Reporting and recordkeeping requirements.

Issued: January 24, 2022.

**Anton C. Porter,**

*Executive Director, Office of the Executive Director.*

In consideration of the foregoing, the Commission amends part 381, chapter I, title 18, Code of Federal Regulations, as set forth below.

## PART 381—FEES

■ 1. The authority citation for part 381 continues to read as follows:

**Authority:** 15 U.S.C. 717–717w; 16 U.S.C. 791–828c, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352; 49 U.S.C. 60502; 49 App. U.S.C. 1–85.

**§ 381.302 [Amended]**

■ 2. In § 381.302, paragraph (a) is amended by removing ''$ 31,160'' and adding ''$ 33,690'' in its place.

**§ 381.303 [Amended]**

■ 3. In § 381.303, paragraph (a) is amended by removing ''$ 45,480'' and adding ''$ 49,170'' in its place.

**§ 381.304 [Amended]**

■ 4. In § 381.304, paragraph (a) is amended by removing ''$ 23,850'' and adding ''$ 25,780'' in its place.

**§ 381.305 [Amended]**

■ 5. In § 381.305, paragraph (a) is amended by removing ''$ 8,940'' and adding ''$ 9,660'' in its place.

**§ 381.403 [Amended]**

■ 6. Section § 381.403 is amended by removing ''$ 15,510'' and adding ''$ 16,770'' in its place.

**§ 381.505 [Amended]**

■ 7. In § 381.505, paragraph (a) is amended by removing ''$ 26,790'' and adding ''$ 28,970'' in its place and by removing ''$ 30,330'' and adding ''$ 32,790'' in its place.

[FR Doc. 2022–02022 Filed 2–1–22; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 1

**[Docket No. FDA–2019–N–3325]**

**RIN 0910–AH31**

### Laboratory Accreditation for Analyses of Foods; Correction

**AGENCY:** Food and Drug Administration, Department of Health and Human Services (HHS).

**ACTION:** Final rule; correction.

**SUMMARY:** The Food and Drug Administration (FDA or we) is correcting a final rule that appeared in the **Federal Register** on December 3, 2021. The document amended our regulations to establish a program for the testing of food in certain circumstances by accredited laboratories, as required under the Federal Food, Drug, and Cosmetic Act. The final rule published with some editorial and inadvertent errors. This document corrects those errors.

**DATES:** Effective February 1, 2022.

**FOR FURTHER INFORMATION CONTACT:** Stacie Hammack, Food and Feed Laboratory Operations, Office of Regulatory Affairs, Food and Drug Administration, 60 8th Street NE, Atlanta, GA 30309, 301–796–5817, *Stacie.Hammack@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of Friday, December 3, 2021, in FR Doc. 2021–25716, appearing on page 68728, the following corrections are made:

## PART 1—GENERAL ENFORCEMENT REGULATIONS

### Subpart R [Corrected]

■ 1. On page 68817, in the second column, in part 1, subpart R, the table of contents entry for § 1.1124 is corrected to read ''What are the records requirements for a recognized accreditation body?''.

■ 2. On page 68823, in the first column, in part 1, subpart R, the undesignated heading between §§ 1.1125 and 1.1130 is corrected to read ''FDA Oversight of Recognized Accreditation Bodies''.

**§ 1.1131 [Corrected]**

■ 3. On page 68823, in the second column, § 1.1131(a)(2) is corrected by removing ''ISO/IEC 17011:2017 section 9.5'' and adding ''ISO/IEC 17011:2017(E) section 9.5'' in its place.

Dated: January 25, 2022.

**Lauren K. Roth,**

*Associate Commissioner for Policy.*

[FR Doc. 2022–02046 Filed 2–1–22; 8:45 am]

BILLING CODE 4164–01–P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 127

**[Docket No. USCG–2019–0444]**

**RIN 1625–AC52**

### Operational Risk Assessments for Waterfront Facilities Handling Liquefied Natural Gas as Fuel, and Updates to Industry Standards

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard issues this final rule amending its regulations concerning waterfront facilities handling liquefied natural gas (LNG) and liquefied hazardous gas (LHG). The final rule makes the following three changes. First, the final rule revises the Coast Guard's existing regulations to allow waterfront facilities handling LNG as fuel to conduct an operational risk assessment instead of a waterway suitability assessment (WSA) without first obtaining Captain of the Port (COTP) approval. Second, the final rule revises existing regulations to update incorporated technical standards to reflect the most recent published editions. These updated industry standards only apply to waterfront facilities handling LNG and LHG that are constructed, expanded, or modified under a contract awarded after the implementation date of the final rule. Third, for waterfront facilities handling LNG that must comply with the WSA requirements, the final rule requires these facilities to provide information to the Coast Guard regarding the nation of registry for vessels transporting natural gas that are reasonably anticipated to be servicing the facilities, and the nationality or citizenship of officers and crew serving on board those vessels.

**DATES:** This final rule is effective March 4, 2022. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register on March 4, 2022.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2019–0444 in the search box and click

''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

**FOR FURTHER INFORMATION CONTACT:** For information about this document call or email Mr. Ken Smith, Project Manager, Coast Guard, Vessel and Facility Operating Standards Division, Commandant (CG–OES–2); telephone 202–372–1413, email *Ken.A.Smith@uscg.mil.*

**SUPPLEMENTARY INFORMATION:**

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## I. Abbreviations

API American Petroleum Institute
ASME The American Society of Mechanical Engineers
ASTM ASTM International
BLS U.S. Bureau of Labor Statistics
CFR Code of Federal Regulations
CG–OES Coast Guard Office of Operating and Environmental Standards
COI Collection of information
COTP Captain of the Port
DHS Department of Homeland Security
DNV Det Norske Veritas
FERC Federal Energy Regulatory Commission
FR Federal Register
GSA General Services Administration
HAZID Hazard Identification
IA Interagency Agreement
IBR Incorporated by reference
IEC International Electrotechnical Commission
ISO International Organization for Standardization
LHG Liquefied hazardous gas
LNG Liquefied natural gas
LOI Letter of Intent
MISLE Marine Information for Safety and Law Enforcement
NFPA National Fire Protection Association
NPRM Notice of proposed rulemaking
OFR Office of the Federal Register
OMB Office of Management and Budget
ORA Operational risk assessment
PHMSA Pipeline and Hazardous Materials Safety Administration
SBA Small Business Administration
SME Subject Matter Expert
SNPRM Supplementary notice of proposed rulemaking
§ Section
U.S.C. United States Code
WSA Waterway suitability assessment

## II. Executive Summary

The purpose of this final rule is to amend the regulations in Title 33 of the Code of Federal Regulations (CFR) part 127 concerning waterfront facilities handling liquefied natural gas (LNG) [1] and liquefied hazardous gas (LHG). The final rule makes three changes: (1) Changes the risk assessment requirements for facilities that only handle LNG as fuel and do not transfer LNG as cargo to or from a vessel; (2) updates the technical standards already incorporated by reference in part 127; and (3) adds a requirement that LNG import/export facilities provide certain information to satisfy a statutory requirement. We discuss each change below.

First, the final rule adds new § 127.008 to allow waterfront facilities handling LNG as fuel (LNG fuel facilities [2] [3]) to conduct an operational risk assessment (ORA) instead of a waterway suitability assessment (WSA), without first obtaining Captain of the Port (COTP) approval. An ORA focuses on the safety and security associated with shore-based operations within the marine transfer area, whereas a WSA focuses on the risks and vulnerabilities of the waterway associated with an LNG import/export facility. LNG fuel facilities, as defined, do not transfer LNG as cargo to or from a vessel and so an assessment of the waterway is unnecessary. The final rule reduces the regulatory burden on LNG fuel facilities by reducing the scope of the analysis and the amount of information facility owners would have to submit to the Coast Guard. Reducing the regulatory burden could increase the maritime industry's level of interest in converting or constructing vessels to use LNG as a marine fuel to comply with stricter emissions standards and realize economic advantages.[4]

Second, the final rule updates the technical standards already incorporated by reference in part 127 to reflect the most recent published editions of these standards. We have determined that modified, expanded, and new LNG fuel facilities, LNG import/export facilities, and waterfront facilities handling LHG are built to the most recent industry standards available at the time of modification, expansion, or construction, and not the outdated standards currently codified in 33 CFR part 127.[5]

Third, for LNG import/export facilities that must comply with the WSA requirements in § 127.007, the final rule requires these facilities to provide information to the Coast Guard at the time the WSA is submitted. The required information is the nation of registry for vessels transporting natural gas that are reasonably anticipated to be servicing the facilities, and the nationality or citizenship of officers and crew serving on board those vessels. We are making this change to assist us in meeting our obligation under § 304(c)(2) of the Coast Guard and Maritime Transportation Act of 2006.[6] This statute requires the Coast Guard, when operating as a contributing agency in the Federal Energy Regulatory Commission (FERC) shoreside licensing process for an onshore or near-shore LNG terminal, to provide this information to FERC.

## III. Basis and Purpose, and Regulatory History

On October 5, 2020, the Coast Guard published a notice of proposed rulemaking (NPRM) in the **Federal Register** (FR) titled, ''Operational Risk Assessments for Waterfront Facilities Handling Liquefied Natural Gas as Fuel, and Updates to Industry Standards.'' [7] The NPRM included a 60-day comment period. No public meetings were requested, and none were held. During the comment period for the NPRM, the

[1] For the purpose of simplification, in this final rule we refer to a waterfront facility handling LNG as an ''*LNG import/export facility*'' to distinguish it from an LNG fuel facility. This term is used for convenience and does not appear in the regulatory text.

[2] This rule defines *LNG fuel facility* in § 127.005 to mean a waterfront facility that handles LNG for the sole purpose of providing LNG from shore-based structures to vessels for use as a marine fuel, and that does not transfer LNG to or receive LNG from vessels capable of carrying LNG in bulk as cargo.

[3] *LNG fuel facility* does not include the transfer of LNG to a vessel for delivery to other vessels for use as fuel. This type of transfer operation is a transfer of LNG in bulk to a vessel capable of carrying LNG in bulk as cargo.

[4] See the report by the Congressional Research Service, titled ''LNG as a Maritime Fuel: Prospects and Policy'' (dated February 5, 2019) at *https://fas.org/sgp/crs/misc/R45488.pdf.*

[5] This determination was made by direct communication with members of the LNG community through the Coast Guard's participation on the technical committee for the National Fire Protection Association 59A titled, ''Standard for the Production, Storage, and Handling of LNG,'' which has approximately 50 members representing various owners, operators, and designers of waterfront facilities handling LNG and related LNG equipment suppliers, and through direct contact with owners and operators intending to build or modify waterfront facilities handling LNG.

[6] Public Law 109–241, codified at 33 U.S.C. 1504(j)(2).

[7] 85 FR 62651.

Coast Guard received five comment submissions.

Chapter 700 of title 46 United States Code (U.S.C.), Ports and Waterways Safety, authorizes the Secretary of the department in which the Coast Guard is operating to take certain actions to advance port, harbor, and coastal facility safety and security. Specifically, Sections 70011 and 70034 authorize the Secretary to promulgate regulations for the handling, loading, unloading, storage, stowage, and movement of hazardous materials on a structure on or along U.S. navigable waters as necessary to protect the vessel, structure, water, or shore area. The Secretary has delegated this authority to the Commandant of the Coast Guard in DHS Delegation 00170.1, Revision No. 01.2, paragraph (II)(70).

The purpose of this final rule is to reduce unnecessary requirements for LNG fuel facilities; update technical standards that apply to all facilities covered by part 127; and implement a statutory requirement that LNG import/export facilities provide certain information.

## IV. Discussion of Comments and Changes

The Coast Guard received five comment submissions during the 60-day comment period that ended on December 5, 2020. Four comment submissions were received from members of the public and one joint submission was submitted on behalf of two industry organizations. One commenter pointed out that by the time the proposed rule became final, the National Fire Protection Association (NFPA) would have adopted the 2020 edition of the NFPA 70 standard. In the NPRM, which was published on October 5, 2020, we proposed to incorporate by reference the 2017 edition of NFPA 70. After reviewing this comment, we discovered that the 2020 edition of NFPA 70 became effective on August 25, 2019. The 2020 edition features changes related to emergency disconnects, ground-fault circuit interrupter protection, surge protection, and other topics related to electrical safety. However, the provisions of the 2020 edition that would apply to regulated facilities through §§ 127.107(a) and (c), 127.201(c)(1), and 127.1107, remain unchanged from the 2017 edition. In this final rule, we incorporate by reference the 2020 edition of NFPA 70. Incorporating the most current available edition of NFPA 70 will make it easier for regulated entities to obtain the incorporated standard. Because this change does not alter the regulatory requirements we proposed for public comment, no additional notice or opportunity for public comment is necessary.

The same commenter informed us that the ASTM International (ASTM) standard ASTM E119–20, Standard Test Methods for Fire Tests of Building Construction and Materials, approved May 1, 2020 has superseded NFPA 251. This standard provides the fire-test-response criteria and procedures for structural materials used in building construction. The application of the test procedures contained in this standard are used to evaluate the duration for which building construction materials and assemblies can either contain a fire, retain structural integrity, or both. In response to this comment, we will revise the regulatory text in this final rule in § 127.005 for the definition of the term ''fire endurance rating'' by deleting the reference to NFPA 251 and replacing it with the reference to ASTM E119–20. This section refers to a standard time temperature curve, which is the same in both NFPA 251 and ASTM E119–20. The NFPA provides notice on their website that it withdrew NFPA 251 in the fall of 2010 [8] and the material contained in NFPA 251 is now found in ASTM E119–20 and UL 263. Because making this change does not alter the regulatory requirements we proposed for public comment, no additional notice or opportunity for public comment is necessary.

Another commenter recommended that the best course of action for the Coast Guard would be for owners and operators continue to meet with the COTP before submitting an ORA to the Coast Guard. The commenter said this would allow safety precautions to be taken into consideration when establishing new LNG fuel facilities, while also reducing the amount of work LNG facility owners and operators would have to do to get the LNG fuel facility approved. The Coast Guard expects owners and operators to continue meeting with the COTP, but has determined that the preliminary requirement for LNG fuel facilities to obtain the COTP's approval prior to beginning the ORA should be eliminated. Interactions will take place throughout the development of the ORA, because the Coast Guard is a key port stakeholder that must be consulted during the risk assessment process. New § 127.008(d)(1) identifies the standards to be followed for conducting an ORA and each of the standards contain provisions for either engaging with local stakeholders or the authorities having jurisdiction over the proposed LNG fuel facilities. Accordingly, the COTP will continue to work closely with owners and operators to assess the risks associated with their operation and determine whether the mitigation measures proposed are suitable. This regulatory change only eliminates the preliminary step, for certain facilities, of obtaining the COTP's approval to begin the ORA.

One commenter made reference to the 2004 Interagency Agreement (IA) titled, ''For the Safety and Security Review of Waterfront Import/Export Liquefied Natural Gas Facilities'' (issued on February 10, 2004), established between the Coast Guard, FERC, and the Pipeline and Hazardous Materials Safety Administration (PHMSA).[9] The commenter stated that by allowing owners or operators to conduct an ORA, instead of a WSA, without first obtaining COTP approval appears to render the terms of the IA moot. The IA remains in effect and applies only to LNG import or export facilities, which must conduct a WSA, under § 127.007. The LNG fuel facilities this regulatory action addresses in § 127.008 will not be importing or exporting LNG, but providing LNG as fuel from shore-based structures to vessels. Accordingly, the IA does not apply to the LNG fuel facilities affected by this aspect of the final rule. Supplies of LNG will be delivered to an LNG fuel facility from shore-based sources (for example, tank trucks, rail cars, or pipelines), making waterway assessment unnecessary, because no waterborne sources are used to supply LNG to the facility. LNG fuel facilities, through the ORA process, will have to assess the overall safety and security of the facilities just like LNG import or export facilities do when conducting a WSA.

The Coast Guard received one joint comment submission on behalf of two well-known oil and gas industry organizations, the Center for Liquefied Natural Gas and the American Petroleum Institute. These organizations voiced strong support for the proposed rule, noting that the LNG industry has a strong safety record and long history of working closely with regulators and first responders to maximize safety and security of both large and small LNG facilities. The commenters said that the use of an ORA instead of a WSA will benefit LNG fuel facilities and integrate the benefits of risk-based principles over

[8] ''Standard Methods of Tests of Fire Resistance of Building Construction and Materials,'' *https://www.nfpa.org/codes-and-standards/all-codes-and-standards/list-of-codes-and-standards/detail?code=251.* (Last visited Oct. 26, 2021).

[9] The IA agreement referenced by the commenter can be found at *https://www.ferc.gov/sites/default/files/2020-07/2004-interagency.pdf.* This website was accessed on October 26, 2021.

the more prescriptive regulations and policies associated with conducting a WSA. The commenters said, and the Coast Guard agrees, ''. . . that allowing an ORA to be conducted instead of a WSA would benefit waterfront facilities handling LNG as fuel. Allowing an ORA would integrate the benefits of risk-based principles over the more prescriptive regulations of a WSA. Utilizing a risk-based approach (like the ORA) effectively manages safety by allowing examination and devotion of resources on the areas of the system that pose the greatest risk to process safety, mechanical integrity, and product quality without compromising equipment care and personnel well-being.'' The Coast Guard also believes the ORA focuses attention on critical areas and establishes safety standards that all future LNG fuel facility owners can follow, which helps ensure a consistent approach for evaluating the safety and security concerns associated with each individual project. In this manner, maritime safety and security may be more effectively managed without unnecessary costs being imposed on the industry.

One concern raised by these commenters involved the proposed updates to the existing standards currently incorporated by reference in 33 CFR part 127, noting that updating to newer editions could cause conflict with standards that are incorporated by reference by other government and state agencies that may share overlapping jurisdiction. In this regard, the commenters indicated that it is vital that all stakeholders, including the operators of LNG fuel facilities and personnel of agencies having jurisdiction over the facilities, have a clear understanding of which version of a standard is to be used and how that standard will be interpreted and enforced. They agree that updating existing regulations to incorporate technical standards to reflect the most recent published editions is good practice and asked that the Coast Guard attempt to ensure that standards are not in conflict with other regulatory bodies having overlapping jurisdiction. In this instance, the commenters noted that the 2001 and 2006 editions of NFPA 59A that are incorporated by reference in PHMSA's regulations (see 49 CFR 193.2013) reference different editions of ASME B31.3 and NFPA 70 than the editions we intend to incorporate. However, the Coast Guard does not believe this causes a conflict, because the regulations of both the Coast Guard and PHMSA clearly define each agency's jurisdictional boundaries. The Coast Guard has jurisdictional authority over the marine transfer areas for LNG and LHG, which are defined in § 127.005. PHMSA's jurisdictional authority, as defined in 49 CFR 193.2001, does not include marine cargo transfer areas, with the exception of siting requirements for the facility. Through its regulations, the Coast Guard makes it clear to the regulated industry that ASME B31.3–2020, referenced in § 127.1101, must be used for the construction of piping systems located in the marine transfer areas for waterfront facilities handling LHG. Also, through its regulations, the Coast Guard makes it clear to the regulated industry that NFPA 70 2020, referenced in §§ 127.107, 127.201, and 127.1107, must be used for the construction of electrical systems and warning alarms located in the marine transfer areas for LNG and LHG.

The Coast Guard agrees with many of the points raised by these commenters and understands that there may be certain circumstances when the editions of standards we incorporate by reference are different than the editions of the standards incorporated by other state or Federal agencies. The Coast Guard has chosen to incorporate the latest editions of the standards referenced in § 127.003 in order to meet the intent of the Office of Management and Budget (OMB) Circular A–119 (Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities),[10] which requires that agencies incorporate the most recent standards to enhance safety with minimum cost.

The Coast Guard coordinated with FERC and PHMSA on this rulemaking. Nonetheless, the Coast Guard intends to work with FERC and PHMSA to update the existing IA shared between the agencies, which may provide an opportunity to address differences in the editions of the standards each agency has incorporated by reference in its regulations.

The Coast Guard also received a question submitted directly to the project manager, which the Coast Guard has posted in the docket folder for transparency. The question was related to information presented in the NPRM, and asked which three facility owners the Coast Guard met with and whether there are notes or summaries from those meetings. In response, we notified the requestor that the three facilities were Tote Maritime, Harvey Gulf Marine International, and Eagle LNG. The substance of the meetings is summarized in the NPRM,[11] and no additional notes are available.

## V. Discussion of the Rule

This final rule amends 33 CFR part 127. With this final rule, we are finalizing the following three changes:

First, the Coast Guard is revising its existing regulations to allow certain LNG fuel facilities to conduct an ORA instead of a WSA without first obtaining COTP approval to do so. By allowing LNG fuel facilities that only handle LNG as fuel and do not transfer LNG as cargo to or from a vessel to use an ORA in lieu of a WSA, without submitting an alternative request and meeting with the COTP, this final rule reduces the regulatory burden on LNG fuel facilities. This is accomplished by reducing the scope of the analysis and the amount of information facility owners will have to submit to the Coast Guard, eliminating an unnecessary administrative burden on these entities.

Second, the Coast Guard is updating the technical standards already incorporated by reference in part 127 to reflect the most recent published editions of these standards. These technical standards apply to LNG fuel facilities, LNG import/export facilities, and waterfront facilities handling LHG.

Third, for LNG import/export facilities that must comply with the WSA requirements in § 127.007, the Coast Guard is requiring these facilities to provide information at the time the WSA is submitted regarding the nation of registry for vessels transporting LNG that are reasonably anticipated to be servicing the facilities, and the nationality or citizenship of officers and crew serving on board those vessels. The Coast Guard is making this change to assist in meeting obligations under section 304(c)(2) of the Coast Guard and Maritime Transportation Act of 2006.[12] This statute requires the Coast Guard, when operating as a contributing agency in the FERC shoreside licensing process for an onshore or near-shore LNG terminal, to provide this information to FERC.

The following paragraphs explain additional, minor ways the final rule differs from the proposal on which we received public comments. None of these differences alter how the rule affects regulated entities, and so no additional notice or opportunity to comment on them is necessary.

The Coast Guard will amend the proposed authority citation for 33 CFR part 127 from ''Pub. L. 109–241, sec.

[10] *https://www.nist.gov/system/files/revised_circular_a-119_as_of_01-22-2016.pdf.*

[11] See 85 FR 62651, at 62654.

[12] Public Law 109–241, codified at 33 U.S.C. 1504(j)(2).

304(c)(2)'' to ''33 U.S.C. 1504(j)(2),'' because, on January 1, 2021, that section of the statute was codified at 33 U.S.C. 1504(j)(2). The authority citation also reflects a recent revision to the delegation of authorities from the Secretary to the Coast Guard.

In the NPRM, the Coast Guard proposed to update the existing ASTM F1121–87, Standard Specification for International Shore Connections for Marine Fire Applications, by replacing the Reapproved 2010 edition with the Reapproved 2015 edition. Since publication of the NPRM, the Coast Guard learned that ASTM published ASTM F1121–87 (Reapproved in 2019) in January 2020 without change. The substantive content in the ASTM F1121–87 (Reapproved 2019) remains the same as the Reapproved 2010 and Reapproved 2015 editions. ASTM F1121–87 (Reapproved 2019) is the publication most readily available to the public. Accordingly, this final rule references the ASTM F1121–87 (Reapproved 2019) in §§ 127.003(c)(2), 127.611, and 127.1511.

Additionally, in the NPRM, the Coast Guard proposed to update the American Society of Mechanical Engineers (ASME) ASME B31.3–1993 standard by replacing it with the ASME B31.3–2018. Since publication of the NPRM, the Coast Guard learned that ASME issued ASME B31.3–2020 on June 18, 2021. As a result, the Coast Guard is incorporating the latest edition of this standard in the final rule to ensure that piping systems used on waterfront facilities handling LHG are designed and constructed in accordance with ASME B31.3–2020. This standard is a technical engineering standard used by design engineers to ensure that piping systems are safe for use with hazardous liquids under pressure. Changes between the 2018 and 2020 editions include both minor editorial corrections as well as technical changes associated with stress calculations and material selections. The changes between editions have no cost impact on owners and operators of waterfront facilities handling LHG, but rather affect the methods and considerations used by design engineers to evaluate materials and calculate stress levels in piping systems. This final rule references ASME B31.3–2020 in §§ 127.003(b)(2) and 127.1101(a).

In the NPRM, the Coast Guard proposed to update the existing ASME B16.5 standard by replacing the 1992 edition with the 2017 edition. Since publication of the NPRM, the Coast Guard learned that ASME issued ASME B16.5–2020 on January 29, 2021. The regulations in § 127.1102(a)(4)(ii) require that each hose within the marine transfer area for LHG used for the transfer of LHG or its vapors to or from a vessel must meet the flange requirements contained in ASME B16.5. This standard is a technical standard used by designers and manufacturers and has no impact on facility owners and operators. Each new edition of this standard has a table in the front of the document that identifies the changes made to the edition. After evaluating the extent of the changes to ASME B16.5–2020, the Coast Guard determined the changes deal with such things as stress calculations, new materials, and other technical items, which have no direct cost to owners and operators of LNG fuel facilities. Incorporating the latest edition available will ensure that facilities constructed after the final rule is published will be using the most recent industry standards when they are designing and constructing their transfer hose systems. Accordingly, in this final rule, reference to ASME B16.5–2020 is made in §§ 127.003(b)(1) and 127.1102(a)(4)(ii).

In the NPRM, the Coast Guard proposed new paragraph (g) of § 127.007 to require an owner or operator intending to build a new LNG facility to submit the LOI no later than the date that the owner or operator files a pre-filing request with FERC under 18 CFR 153 or 157, and include the nation of registry for, and the nationality or citizenship of officers and crew serving on board, vessels transporting natural gas that are reasonably anticipated to be servicing the LNG facility. During review of the regulatory text, we realized that it is best to include this text in existing paragraph (a), which contains the requirements for submitting an LOI to the COTP no later than the date that the owner or operator files a pre-filing request with FERC under 18 CFR parts 153 and 157. Therefore, we are moving the text from proposed new paragraph (g) to existing paragraph (a)(1).

Because we are not finalizing the change we proposed in new paragraph (g), existing paragraphs (g) and (h) do not need to be redesignated as paragraphs (h) and (i). Therefore, new paragraph (j) is being redesignated as new paragraph (i).

## VI. Incorporation by Reference

Section 127.003 of the final rule incorporates by reference 14 standards. Under 5 U.S.C. 552(a) and 1 CFR part 51, a publication is eligible for incorporation by reference if it meets Office of the Federal Register policies and is reasonably available to and usable by the class of persons affected. Regulations in part 51 require that agencies discuss, in the final rule, ways that the materials the agency incorporates by reference are reasonably available, to interested parties and how interested parties can obtain the materials. In addition, the preamble to the final rule must summarize the material.

In accordance with the OFR's requirements, section VII.L. of this final rule summarizes the major provisions of the standards that the Coast Guard incorporates by reference into § 127.003. Interested parties can purchase copies of these standards directly from the sources listed in § 127.003, or make arrangements to inspect them at a Coast Guard facility.

## VII. Regulatory Analyses

The Coast Guard performed the regulatory analysis of this final rule after considering relevant existing statutes and Executive orders.

### *A. Regulatory Planning and Review*

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (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.

OMB has not designated this final rule a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. A regulatory analysis follows.

The following paragraphs explain the impact of the final rule and the alternatives we considered. The Coast Guard received five comment submissions during the 60-day comment period that ended on December 5, 2020. We received one comment on the third alternative that we will address in the alternative section. We received no public comments on the estimated benefits and costs; hence, the methodology employed in the regulatory analysis remains unchanged. However, we have updated the wage rates and other prices to capture changes in these values since the publication of the NPRM. In particular, while the NPRM used 2018 values, this final rule uses 2020 wage rates and prices.

The Coast Guard's authority to address safety and security issues raised by the increased use of LNG by maritime vessels is the basis for this final rule. In this final rule, the Coast Guard is making it easier to conduct an ORA instead of a WSA for certain LNG facilities due to the size and scope of these facilities' operations. An ORA focuses on the safety and security associated with shore-based operations within the marine transfer area, whereas a WSA focuses on the risks and vulnerabilities of the waterway associated with an LNG import/export facility. ORAs and WSAs follow similar procedures for assessing risk, and the Coast Guard determined that it could narrow the scope of the assessment for an LNG fuel facility to focus on operations solely taking place at the facility if LNG tank vessels do not deliver to the facility using the associated waterway.

We estimated the benefits and costs of this final rule against the no-action baseline. We determined that removing the requirements that LNG fuel facilities submit an alternative request and meet with the COTP to conduct an ORA in lieu of a WSA has quantifiable benefits in the form of cost savings. We also determined that updating standards incorporated by reference in this final rule has unquantified benefits. Table 1 of this analysis provides a summary of the affected population, cost savings, unquantified benefits, and no-cost changes of this final rule. We estimate an annualized cost savings to industry of $16,586 (with a 7-percent discount rate), and an annualized cost savings to the government of $700 (with a 7-percent discount rate), for a total net annualized cost savings of $17,287 in 2020 dollars, using a 7-percent discount rate. This is compared to the proposed rule's estimated total net annualized cost savings of $16,843 in 2018 dollars, using a 7-percent discount rate.

TABLE 1—SUMMARY OF THE IMPACTS OF THE FINAL RULE

| Category | Summary |
|---|---|
| Applicability [13] | New LNG import/export facilities. New LNG fuel facilities. New LHG Facilities. |
| Affected Population | 20 new LNG import/export facilities over the 10-year analysis period. 10 new LNG fuel facilities over the 10-year analysis period. 30 new LHG facilities over the 10-year analysis period. |
| Cost Savings to Industry (7-percent discount rate). | 10-year: ($116,496) * |
| | Annualized: ($16,586) * |
| Cost Savings to Government (7-percent discount rate). | 10-year: ($4,918) * |
| | Annualized: ($700) * |
| No cost requirements | Update incorporated technical standards to reflect the most recent published editions. Require the Letter of Intent (LOI) of a new LNG import/export facility to include information on the nation of registry for, and the nationality or citizenship of officers and crew serving on board, vessels transporting natural gas that are reasonably anticipated to be servicing that facility. |
| Unquantified Benefit | Updating standards incorporate by reference improves clarity, and alleviates discrepancies and unnecessary duplications between regulatory standards and industry best practices. |

* Costs are in 2020 dollars.

## Affected Population

As of 2020, there are 12 existing LNG import/export facilities, 3 existing LNG fuel facilities, and 106 existing LHG facilities that are regulated under 33 CFR part 127. No new facilities have been constructed since the publication of the proposed rule. Based on the Coast Guard's Marine Information for Safety and Law Enforcement (MISLE) database regarding activation dates of the 3 existing LNG fuel facilities and the projected activation dates of 1 LNG fuel facility under construction, we estimate that 10 new LNG fuel facilities will be built during the 10-year analysis period, or 1 annually.[14] Using MISLE data on existing LNG import/export facilities, we estimate that 20 new LNG import/export facilities will be built during the 10-year analysis period, or 2 annually. Using MISLE data, we estimate that 30 new LHG facilities will be built during the 10-year analysis period, or 3 annually. However, for the purposes of this analysis, we assume that, on average, each year 3 new LHG facilities will replace 3 retiring LHG facilities for a static total population of 106 facilities. Table 2 presents the projected number of LNG import/export facilities, LNG fuel facilities, and LHG facilities over the 10-year analysis period.

This rule finalizes the three substantive changes proposed in the NPRM to existing regulations that impact different segments of the affected population. First, the final rule modifies current regulations to allow LNG fuel facilities that do not receive LNG from vessels to conduct an ORA instead of the WSA without first obtaining COTP approval per existing § 127.007, which impacts one new LNG fuel facility annually. Second, the final rule updates the technical standards already incorporated by reference in part 127 to

[13] In this regulatory analyses, ''*LNG fuel facility*'' refers to a waterfront facility that handles LNG for the sole purpose of providing LNG from shore-based structures to vessels for use as a marine fuel, and that does not transfer LNG to or receive LNG from vessels capable of carrying LNG in bulk as cargo. ''*LNG import/export facility*'' refers to any structure on, in, or under the navigable waters of the United States, or any structure on land or any area on shore immediately adjacent to such waters, used or capable of being used to transfer liquefied natural gas, in bulk, to or from a vessel. ''*LHG facility*'' refers to any structure on, in, or under the navigable waters of the United States, or any structure on land or any area on shore immediately adjacent to such waters, used or capable of being used to transfer liquefied hazardous gas, in bulk, to or from a vessel. These terms are used for convenience in this preamble and do not appear in the regulatory text.

[14] The first LNG fuel facility in the United States became operational in 2016. The second and third became operational in 2018 and 2019, respectively.

reflect the most recent published editions of these standards, which impacts one new LNG fuel facility, two new LNG import/export facilities, and three replacement LHG facilities annually. Third, the final rule requires that LNG import/export facilities must comply with the WSA requirements in § 127.007 to provide information at the time the WSA is submitted regarding the nation of registry for vessels transporting LNG that are reasonably anticipated to be servicing the facilities and the nationality or citizenship of officers and crew serving on board those vessels, which impacts two new LNG import/export facilities annually.

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**Table 2: Total Facilities by Year**

| Year | LNG Import/Export Facilities | | | LNG Fuel Facilities | | | LHG Facilities | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Existing Facilities | New Facilities | Total | Existing Facilities | New Facilities | Total | Existing Facilities | New Facilities | Retiring Facilities | Total |
| 1 | 12 | 2 | 14 | 3 | 1 | 4 | 106 | 3 | 3 | 106 |
| 2 | 14 | 2 | 16 | 4 | 1 | 5 | 106 | 3 | 3 | 106 |
| 3 | 16 | 2 | 18 | 5 | 1 | 6 | 106 | 3 | 3 | 106 |
| 4 | 18 | 2 | 20 | 6 | 1 | 7 | 106 | 3 | 3 | 106 |
| 5 | 20 | 2 | 22 | 7 | 1 | 8 | 106 | 3 | 3 | 106 |
| 6 | 22 | 2 | 24 | 8 | 1 | 9 | 106 | 3 | 3 | 106 |
| 7 | 24 | 2 | 26 | 9 | 1 | 10 | 106 | 3 | 3 | 106 |
| 8 | 26 | 2 | 28 | 10 | 1 | 11 | 106 | 3 | 3 | 106 |
| 9 | 28 | 2 | 30 | 11 | 1 | 12 | 106 | 3 | 3 | 106 |
| 10 | 30 | 2 | 32 | 12 | 1 | 13 | 106 | 3 | 3 | 106 |

Benefits

Cost Savings to Industry

The quantified benefits of this final rule are due to the cost savings associated with the new requirement allowing businesses that intend to build an LNG fuel facility, modify an existing LNG fuel facility, or reactivate an inactive LNG fuel facility to complete an LOI and ORA instead of an LOI and a WSA without submitting an alternative request and meeting with the COTP.

Currently, an owner intending to build a new LNG fuel facility has the option of either (1) meeting with the COTP and submitting an alternative request to complete an ORA; or (2) completing a traditional WSA that focuses on the traffic, security, and navigational hazards of the affected waterway in addition to operational risk. With the final rule, an owner intending to build a new LNG fuel facility can conduct an ORA in lieu of a WSA without submitting an alternative request and having a preliminary meeting with the COTP, resulting in cost savings. The remainder of this regulatory analysis presents the cost savings associated with this change.

As noted in the ''Affected Population'' section of this analysis, there are currently three active LNG fuel facilities and one LNG fuel facility under construction. Of these four facilities, three submitted alternative requests and received permission to conduct an ORA under existing alternative methods because the Coast Guard determined that an ORA was more appropriate for their intended LNG operations. The other LNG fuel facility chose to complete a WSA and thus did not submit an alternative request. Based on this background information and discussions with subject matter experts (SMEs) in the Coast Guard Office of Operating and Environmental Standards (CG–OES), we estimate that, going forward, 75 percent of the LNG fuel facilities will submit an alternative request and complete an ORA and the other 25 percent will complete a WSA (see table 3 below).

According to the OMB-approved collection of information (COI) (Control Number 1625–0049), completing an alternative request requires 2 clerical hours and 8 managerial hours. The mean hourly wage rates in 2020 for clerks and managers from the U.S. Bureau of Labor Statistics (BLS) were $29.50 and $77.48, respectively.[15] To account for the cost of employee benefits, such as vacation time and health insurance, we multiplied the mean hourly wage rates by a load factor of 1.62, resulting in a loaded mean hourly wage rate of about $47.79 for a clerk ($29.50 × 1.62) and $125.52 for a manager ($77.48 × 1.62).[16]

Therefore, we estimate the labor cost of completing an alternative request to be about $1,100, which includes $95.58 in clerical labor cost (2 clerical hours × $47.79 per hour) and $1,004.16 in managerial labor cost (8 managerial hours × $125.52 per hour). With this final rule, LNG fuel facilities will no longer submit an alternative request to complete an ORA; therefore, each new facility that requests an ORA will have a one-time benefit of $1,100. As shown in table 3, given that 75 percent of new facilities will submit an alternative request, we estimate the annualized cost savings to industry to be about $825, using a 7-percent discount rate.

[15] We used 2020 wage data from the U.S. Bureau of Labor Statistics' Occupational Employment Statistics for the natural gas distribution sector using the North American Industry Classification System with an industry code of 221200. Readers can view the wage rates at *https://www.bls.gov/oes/2020/may/naics4_221200.htm*. Note that we used the occupational code of Information and Record Clerks, OC 43–4000, as a proxy for the labor category ''clerk'', and the occupational code of Architectural and Engineering Managers, OC 11–9041, as a proxy for the labor category ''manager'' as a manager with some engineering knowledge is expected to be involved in completing the alternative request.

[16] To obtain the load factor, we divided the total cost for employers by the wages and salaries of private workers for the utility sector in December 2020, or $67.62 divided by $41.64 equals 1.62. Readers can find this information in Table 4 of the Employer Costs for Employee Compensation December 2020 News Release available at *https://www.bls.gov/news.release/archives/ecec_03182021.htm*.

| Table 3: Discounted Cost Savings to Industry of No Longer Completing an Alternative Submission ($2020) | | | | | |
|---|---|---|---|---|---|
| **Year** | **Total Decrease in Cost** | **Percent (%) of Facilities Completing Alternative** | **Undiscounted Cost Savings** | **Cost Savings Discounted at 3%** | **Cost Savings Discounted at 7%** |
| **(a)** | **(b)** | **(c)** | **(d)=(b)×(c)** | **(e)=(d)÷(1.03)[a]** | **(f)=(d)÷(1.07)[a]** |
| 1 | $1,100 | 0.75 | $825 | $801 | $771 |
| 2 | $1,100 | 0.75 | $825 | $777 | $720 |
| 3 | $1,100 | 0.75 | $825 | $755 | $673 |
| 4 | $1,100 | 0.75 | $825 | $733 | $629 |
| 5 | $1,100 | 0.75 | $825 | $711 | $588 |
| 6 | $1,100 | 0.75 | $825 | $691 | $550 |
| 7 | $1,100 | 0.75 | $825 | $671 | $514 |
| 8 | $1,100 | 0.75 | $825 | $651 | $480 |
| 9 | $1,100 | 0.75 | $825 | $632 | $449 |
| 10 | $1,100 | 0.75 | $825 | $614 | $419 |
| **Total** | | | **$8,248** | **$7,036** | **$5,793** |
| **Annualized** | | | | **$825** | **$825** |
| Totals may not sum due to independent rounding. | | | | | |

As part of requesting an alternative approval to conduct an ORA, the requesting party meets with the COTP to discuss the alternative. These meetings require representatives of the requesting firm to travel to meet with the COTP. The travel costs associated with these meetings mainly depend on the distance between the firm's headquarters and the site selected for the new LNG fuel facility. Review of the headquarters locations and the site locations of existing and under construction LNG fuel facilities in our MISLE database suggests that 75 percent of the facilities

are approximately an 80-mile round trip drive from the COTP; therefore, we assume the representatives of these facilities will drive to the meeting. Flight travel will be required for visits to the other 25 percent of facilities.[17] Moreover, discussions with Coast Guard SMEs in CG–OES revealed that a meeting lasts for an average of 2 hours and involves two managerial employees, one technical employee (engineer) and one outside consultant hired by the firm.

We estimate that it takes approximately 2 hours to complete the 80-mile round trip drive. Accordingly, including driving time, we estimate the duration of the meeting to be about 4 work hours. The BLS reported a mean hourly wage rate for an engineer to be $54.18 in 2020; using a load factor of 1.62, we obtained a loaded mean hourly wage rate of about $87.77 ($54.18 × 1.62).[18] Discussions with industry consultants revealed that the mean hourly wage rate for a consultant completing WSAs and ORAs for LNG fuel facilities was about $229 in 2017.[19] Using the inflation factor of 1.0549, we estimate the consultant mean hourly wage rate to be about $242 in 2020 dollars.[20]

We estimate the total labor cost per meeting when industry representatives drive to meet with the COTP to be about $2,323 annually, which is the sum of $351.08 in engineer's labor cost (4 hours × $87.77), $1,004.16 in manager's labor cost (2 managers × 4 hours × $125.52), and $968 for the consultant's labor cost (4 hours × $242).

To calculate the cost of driving to the COTP's facility, we use the 2020 General Services Administration (GSA) reimbursable rate for personal vehicles, $0.575 per mile, which considers the cost of fuel, depreciation, maintenance, and insurance.[21] Accordingly, the Coast Guard estimates that an 80-mile round trip drive to the COTP costs about $46 (80 miles × $0.575 per mile) per new facility.

With this final rule, industry representatives will no longer need to drive to meet with the COTP to submit and discuss the alternative, resulting in an annual benefit of $2,369 per meeting ($46 driving cost + $2,323 in labor cost). As shown in table 4, given that about 56.25 percent of the new LNG fuel facility representatives will drive to the COTP, we estimate the annualized cost savings to industry of not having to drive to the COTP to discuss an alternative request to be about $1,327 using a 7-percent discount rate.[22] We estimate the discounted cost savings to industry of not driving to meet with a COTP to be about $9,319 over a 10-year period of analysis, using a 7-percent discount rate.

[17] Of the four LNG fuel facilities (three existing and one projected to be operational in the future), three of the facilities are, on average, within an 80-mile round trip from their respective headquarters. One facility located in Jacksonville, FL is an approximately 1,700-mile round trip from its headquarters' location in Houston, TX. Based on this information, we assume that 75 percent of participants will drive while the other 25 percent will fly.

[18] We calculated an engineer's mean hourly wage using 2020 wage data from BLS' Occupational Employment Statistics for the natural gas distribution sector using the North American Industry Classification System with an industry code of 221200. Readers can use the link *https://www.bls.gov/oes/2020/may/naics4_221200.htm*. Note that the occupational code for engineers is OC 17–2000.

[19] Discussion with consultants reveal that, on average, in 2017, completing a WSA costs $114,585 and takes about 500 hours. Based on this information, we estimate the mean consultant wage rate to be about $229.17 ($114,585 divided by 500 hours equals $229.17 per hour) in 2017.

[20] To obtain the inflation factor, we divided the GDP deflator for 2020 (113.625) by the GDP deflator for 2017 (107.710), which equals 1.054915.

[21] Readers can view the 2020 reimbursable rates for personal vehicles at *https://www.gsa.gov/travel/plan-book/transportation-airfare-pov-etc/privately-owned-vehicle-mileage-rates/pov-mileage-rates-archived.*

[22] We obtained 56.25 percent by multiplying the proportion of facilities submitting alternative (75 percent) by the proportion driving to the COTP (75 percent) (*i.e.,* 0.75 multiplied by 0.75 equals 0.5625).

**Table 4: Discounted Industry Cost Savings for No Longer Meeting with COTP (Driving) ($2020)**

| Year | Travel Cost | Labor Cost | Total Change in Cost | Percent (%) of Facilities* | Undiscounted Cost Savings | Cost Savings Discounted at 3% | Cost Savings Discounted at 7% |
|---|---|---|---|---|---|---|---|
| **(a)** | **(b)** | **(c)** | **(d)=(b)+(c)** | **(e)** | **(f)=(d)×(e)** | **(g)=(f)÷(1.03)[a]** | **(h)=(f)÷(1.07)[a]** |
| 1 | $46.00 | $2,323 | $2,369 | 0.56 | $1,327 | $1,288 | $1,240 |
| 2 | $46.00 | $2,323 | $2,369 | 0.56 | $1,327 | $1,251 | $1,159 |
| 3 | $46.00 | $2,323 | $2,369 | 0.56 | $1,327 | $1,214 | $1,083 |
| 4 | $46.00 | $2,323 | $2,369 | 0.56 | $1,327 | $1,179 | $1,012 |
| 5 | $46.00 | $2,323 | $2,369 | 0.56 | $1,327 | $1,144 | $946 |
| 6 | $46.00 | $2,323 | $2,369 | 0.56 | $1,327 | $1,111 | $884 |
| 7 | $46.00 | $2,323 | $2,369 | 0.56 | $1,327 | $1,079 | $826 |
| 8 | $46.00 | $2,323 | $2,369 | 0.56 | $1,327 | $1,047 | $772 |
| 9 | $46.00 | $2,323 | $2,369 | 0.56 | $1,327 | $1,017 | $722 |
| 10 | $46.00 | $2,323 | $2,369 | 0.56 | $1,327 | $987 | $674 |
| **Total** | | | | | **$13,268** | **$11,318** | **$9,319** |
| **Annualized** | | | | | | **$1,327** | **$1,327** |

Totals may not sum due to independent rounding.
* The fraction of facilities submitting an alternative for an ORA (0.75) multiplied by the fraction of industry representatives driving to the COTP (0.75).

As stated above, we assume that 25 percent of the facilities submitting alternative requests will fly representatives to meet with the COTP. We estimate that, including travel time, the trip will take approximately 12 work hours.[23] Accordingly, the labor cost per meeting will be about $6,970, which is the sum of $1,053 for an engineer's labor cost (12 hours × $87.77 per hour), $3,012 for a manager's labor cost (2 managers × 12 hours × $125.52 per hour), and $2,904 for a consultant's labor cost (12 hours × $242 per hour).

To calculate the cost of flying to the COTP's facility, we first computed the cost of a plane ticket, hotel, rental car, and per diem.[24] We estimate the cost of each round trip flight (non-stop) to be about $275, for a total flight cost of $1,100 (4 flight tickets × $275 per round trip flight ticket).[25] The Coast Guard assumes that each individual spends a

[23] This estimate is based on the travel time between one LNG fuel facility's headquarters—which is in Houston—and its facility location—which is in Jacksonville, FL.

[24] As the future location of new facilities and the corresponding headquarters of these facilities are unknown, we use national averages for flight costs, lodging expenses, and per diems.

[25] U.S. Bureau of Transportation Statistics (*https://www.bts.gov/content/national-level-domestic-average-fare-series*) reports the average cost of a domestic U.S. flight on a quarterly basis. We estimate the mean cost of domestic flight to be $275 in 2020.

night in a hotel at a cost of $110 per night,[26] for a total cost of $440 (4 rooms × $110 per night). We assume that the four representatives will share a rental car estimated to cost $63 for transit to and from the airport and the meeting.[27] We also assume that each individual needs about 2 days of meals and incidental allowance (first and last day of travel), which is about $41.25 per day per person for a total of $330 ($41.25 per day × 2 days × 4 persons).[28]

Accordingly, we estimate the total cost of flight travel to be about $1,933, which includes the cost of plane tickets ($1,100), cost of overnight accommodations ($440), cost of a rental car ($63), and per diem expenses ($330). Hence, we estimate that this final rule will result in an annual cost savings of about $8,903 per meeting ($1,933 in transportation cost and $6,970 in labor cost), as industry representatives will no longer need to fly to meet with the COTP. Given that 18.75 percent of the new LNG fuel facilities (one facility a year) will choose to fly representatives to meet with the COTP, we estimate the annualized cost savings to industry of not flying will be about $1,669 ($8,903 × 1 facility × 0.75 × 0.25) using a 7-percent discount rate, where 0.75 is the fraction of facilities submitting an alternative and 0.25 is the fraction flying to meet the COTP.[29] Moreover, we estimate the discounted or the present value cost savings to industry of not flying to meet with the COTP to be $11,724 over a 10-year period of analysis, using a 7-percent discount rate. See table 5 for details.

[24] As the future location of new facilities and the corresponding headquarters of these facilities are unknown, we use national averages for flight costs, lodging expenses, and per diems.

[25] U.S. Bureau of Transportation Statistics (*https://www.bts.gov/content/national-level-domestic-average-fare-series*) reports the average cost of a domestic U.S. flight on a quarterly basis. We estimate the mean cost of domestic flight to be $275 in 2020.

[26] We multiplied the 2020 standard GSA rate for lodging ($96)—which can be found at FY 2020 Per Diem Rates for Federal Travelers Released, GSA—by the national mean lodging tax rate of 14.10 percent—which can be found at HVS, 2020 HVS Lodging Tax Report—USA—for a total cost of $110 per night ($96 per night multiplied by 14.10 percent tax equals $110 per night) in 2020 dollars.

[27] We used the $50 cost estimate of a round trip airport transfer from the ''Validation of Merchant Mariners' Vital Information and Issuance of Coast Guard Merchant Mariner's Licenses and Certificates of Registry'' interim rule (71 FR 2154, January 13, 2006) as a proxy for the cost of a round trip airport transfer, and traveling to and from the meeting. We adjusted the $50 amount to 2020 dollars using an inflation factor of 1.2616, which is obtained by dividing 2020 GDP deflator (113.625) by 2006 GDP deflator (90.066) (*i.e.,* 113.625 divided by 90.066 equals 1.2616). So, we estimate the airport transfer cost to be about $63 ($50 multiplied by 1.616 equals $63) in 2020 dollars.

**Table 5: Discounted Industry Cost Savings of No Longer Meeting with COTP (Flight) ($2020)**

| Year | Travel Cost Decrease per Facility | Labor Cost Decrease per Facility | Decrease in Cost per Facility | Percent (%) of Facilities* | Cost Savings | Cost Savings Discounted at 3% | Cost Savings Discounted at 7% |
|---|---|---|---|---|---|---|---|
| (a) | (b) | (c) | (d)=(b)+(c) | (e) | (f)=(d)×(e) | (g)=(f)÷(1.03)[a] | (h)=(f)×(1.07)[a] |
| 1 | $1,933 | $6,970 | $8,903 | 0.1875 | $1,669 | $1,621 | $1,560 |
| 2 | $1,933 | $6,970 | $8,903 | 0.1875 | $1,669 | $1,573 | $1,458 |
| 3 | $1,933 | $6,970 | $8,903 | 0.1875 | $1,669 | $1,528 | $1,363 |
| 4 | $1,933 | $6,970 | $8,903 | 0.1875 | $1,669 | $1,483 | $1,273 |
| 5 | $1,933 | $6,970 | $8,903 | 0.1875 | $1,669 | $1,440 | $1,190 |
| 6 | $1,933 | $6,970 | $8,903 | 0.1875 | $1,669 | $1,398 | $1,112 |
| 7 | $1,933 | $6,970 | $8,903 | 0.1875 | $1,669 | $1,357 | $1,040 |
| 8 | $1,933 | $6,970 | $8,903 | 0.1875 | $1,669 | $1,318 | $972 |
| 9 | $1,933 | $6,970 | $8,903 | 0.1875 | $1,669 | $1,279 | $908 |
| 10 | $1,933 | $6,970 | $8,903 | 0.1875 | $1,669 | $1,242 | $849 |
| **Total** | | | | | **$16,693** | **$14,239** | **$11,724** |
| **Annualized** | | | | | | **$1,669** | **$1,669** |

Totals may not sum due to independent rounding.
* The fraction of facilities submitting alternative (0.75) multiplied by the fraction flying to the COTP (0.25).

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Based on reviews of data in MISLE and discussions with Coast Guard SMEs, we determined that, of the four LNG fuel facilities (three existing and one under construction), three submitted an alternative request and completed an ORA and one completed a WSA. Accordingly, we estimate that under the existing regulatory requirements, 25 percent of LNG fuel facilities complete a full WSA instead of submitting an alternative request. With this final rule, new LNG fuel facilities no longer need to complete a WSA when an ORA is a more appropriate and cheaper alternative. Discussions with industry representatives revealed that consulting firms take approximately 289 hours to complete an ORA and 500 hours to complete a WSA. Accordingly, we estimate the average cost to complete a WSA to be $121,000 (500 consultant hours × $242 per hour) and the average cost to complete an ORA to be $69,938 (289 consultant hours × $239 per hour); hence, completing an ORA instead of a WSA results in a cost savings of about $51,062.

Table 6 presents the annualized cost savings to industry for completing an ORA in lieu of a WSA. Given that only 25 percent of new facilities complete a

WSA, we estimate the total annualized cost savings to industry of completing an ORA in lieu of a WSA to be approximately $12,766 ($51,062 in cost savings × 1 facility × 0.25 of facilities that submit WSAs), using a 7-percent discount rate. We estimate the total discounted or present value cost savings of completing an ORA in place of a WSA to be about $89,660 over a 10-year period of analysis, using a 7-percent discount rate.

TABLE 6—DISCOUNTED COST SAVINGS TO INDUSTRY OF COMPLETING ORAS AS OPPOSED TO WSAS

[$2020]

| Year | Total change in cost | Total number of new LNG fuel facilities | Total cost savings | Cost savings discounted at 3% | Cost savings discounted at 7% |
|---|---|---|---|---|---|
| (a) | (b) | (c) | (d) = (b) × (c) | (j) = (i) ÷ (1.03) [(a)] | (k) = (i) ÷ (1.07) [(a)] |
| 1 | $51,062 | 0.25 | $12,766 | $12,394 | $11,930 |
| 2 | 51,062 | 0.25 | 12,766 | 12,033 | 11,150 |
| 3 | 51,062 | 0.25 | 12,766 | 11,682 | 10,420 |
| 4 | 51,062 | 0.25 | 12,766 | 11,342 | 9,739 |
| 5 | 51,062 | 0.25 | 12,766 | 11,012 | 9,102 |
| 6 | 51,062 | 0.25 | 12,766 | 10,691 | 8,506 |
| 7 | 51,062 | 0.25 | 12,766 | 10,380 | 7,950 |
| 8 | 51,062 | 0.25 | 12,766 | 10,077 | 7,430 |
| 9 | 51,062 | 0.25 | 12,766 | 9,784 | 6,944 |
| 10 | 51,062 | 0.25 | 12,766 | 9,499 | 6,489 |
| Total | | | 127,655 | 108,892 | 89,660 |
| Annualized | | | | 12,766 | 12,766 |

Totals may not sum due to independent rounding.

Table 7 contains the total cost savings to industry of removing the requirements that LNG fuel facilities submit an alternative request and meet with the COTP to conduct an ORA in lieu of a WSA. We estimate the total present value or discounted cost savings to industry of this final rule over a 10-year period of analysis to be about $116,496 in 2020 dollars, using a 7-percent discount rate. We estimate the annualized cost savings to industry to be about $16,586 in 2020 dollars, using a 7-percent discount rate.

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| Table 7: Total Industry Cost Savings ($2020) | | | | | | | |
|---|---|---|---|---|---|---|---|
| Year | Cost Savings Item | | | | Total Cost Savings (undiscounted) | Cost Savings Discounted at 3% | Cost Savings Discounted at 7% |
| | Alternative Submission | Industry Cost for Driving to Meeting with COTP | Industry Cost for Flying to Meeting with COTP | ORA Instead of WSA | | | |
| (a) | (b) | (c) | (d) | (e) | (f)=(b)+(c)+(d)+(e) | (g)=(f)÷(1.03)[a] | (h)=(f)÷(1.07)[a] |
| 1 | $825 | $1,327 | $1,669 | $12,766 | $16,586 | $16,103 | $15,501 |
| 2 | $825 | $1,327 | $1,669 | $12,766 | $16,586 | $15,634 | $14,487 |
| 3 | $825 | $1,327 | $1,669 | $12,766 | $16,586 | $15,179 | $13,539 |
| 4 | $825 | $1,327 | $1,669 | $12,766 | $16,586 | $14,737 | $12,654 |
| 5 | $825 | $1,327 | $1,669 | $12,766 | $16,586 | $14,308 | $11,826 |
| 6 | $825 | $1,327 | $1,669 | $12,766 | $16,586 | $13,891 | $11,052 |
| 7 | $825 | $1,327 | $1,669 | $12,766 | $16,586 | $13,486 | $10,329 |
| 8 | $825 | $1,327 | $1,669 | $12,766 | $16,586 | $13,093 | $9,653 |
| 9 | $825 | $1,327 | $1,669 | $12,766 | $16,586 | $12,712 | $9,022 |
| 10 | $825 | $1,327 | $1,669 | $12,766 | $16,586 | $12,342 | $8,432 |
| **Total** | | | | | **$165,863** | **$141,485** | **$116,496** |
| **Annualized** | | | | | | **$16,586** | **$16,586** |
| Totals may not sum due to independent rounding. | | | | | | | |

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Cost Savings to Government

Under the current regulation in § 127.017, the Coast Guard must review alternative requests submitted by facilities seeking to conduct an ORA in lieu of WSA and meet with facility representatives at the COTP to discuss

the alternative. With this final rule, the Coast Guard no longer needs to review alternative requests, meet with facility representatives, and review a WSA, resulting in benefits, in the form of cost savings, to the Federal Government.

According to the OMB-approved COI (Control Number 1625–0049), reviewing an alternative request requires 4 hours of enlisted staff time (2 hours of E–5 time and 2 hours of E–6 time) and 1 hour of two officers' time combined (0.5 hours of O–2 time and 0.5 hours of O–3 time).

To estimate the labor cost of reviewing alternative requests, we used loaded hourly wage rates of officers and enlisted staff members in Commandant Instruction 7310.1U, Coast Guard Reimbursable Standard Rates. For the 2020 fiscal year, the loaded hourly wage rates for O–2, O–3, E–5, and E–6 employees were $70, $84, $54, and $62, respectively.[30] Accordingly, we estimate the total labor cost of reviewing an alternative request to be about $311 (see table 8 for details).

TABLE 8—GOVERNMENT COST SAVINGS FOR NO LONGER REVIEWING ALTERNATIVE REQUESTS

[$2020]

| Employee code | Loaded wage | Hours | | Cost | | Cost savings |
|---|---|---|---|---|---|---|
| | | Baseline | Post-rule | Baseline | Post-rule | |
| | (a) | (b) | (c) | (d) = (a) × (b) | (e) = (a) × (c) | (f) = (e) − (d) |
| E–5 | $54 | 2 | 0 | $108 | $0 | $108 |
| E–6 | 62 | 2 | 0 | 124 | 0 | 124 |
| O–2 | 70 | 0.5 | 0 | 35 | 0 | 35 |
| O–3 | 84 | 0.5 | 0 | 42 | 0 | 42 |
| Total | ..... | 5 | 0 | 309 | 0 | 309 |

Given that 75 percent of LNG fuel facilities have currently submitted an alternative request, and given that we estimate one submission annually, we estimate the annualized cost savings to the Federal Government of no longer reviewing these requests to be about $232 ($309 in cost saving × 1 facility × 0.75), using a 7-percent discount rate.

In addition to reviewing the alternative request, Coast Guard staff must also meet with representatives of the firm submitting the alternative request. Discussions with Coast Guard SMEs in CG–OES revealed that the meetings involve O–3 and O–4 level Coast Guard staff and last 2 hours. According to the Commandant Instruction 7310.1U, Coast Guard Reimbursable Standard Rates, for the 2020 fiscal year, the loaded mean hourly wage rate for O–4 was $98. Accordingly, we estimate the total labor cost of reviewing an alternative request to be $364 ((2 hours of O–3 time × $84) + (2 hours of O–4 time × $98)). Therefore, given the assumption that 75 percent of LNG fuel facilities will submit alternative requests, and given that there will be one submission annually, the average annual cost savings to the Federal Government of no longer meeting with facility representatives will be $273 ($364 in cost saving × 1 facility × 0.75), undiscounted.

Finally, we anticipate the Federal Government will save money by reviewing an ORA when compared to a WSA. The COI (Control Number 1625–0049) reports that reviewing a WSA and the corresponding hazard identification (HAZID)[31] study requires 20 hours of enlisted staff time (10 hours of E–5 time and 10 hours of E–6 time) and 40 hours of officer time (20 hours of O–2 time and 20 hours of O–3 time), costing approximately $4,240. Based on discussions with Coast Guard SMEs in Sector Jacksonville, reviewing an ORA and the corresponding HAZID study requires 38 hours of officer time (19 hours of O–3 time and 19 hours of O–4 time), costing about $3,458. Accordingly, we estimate the cost savings from reviewing an ORA instead of a WSA to be about $782 ($4,240 − $3,458), undiscounted (See table 9 for detail).

TABLE 9—GOVERNMENT COST SAVINGS TO REVIEW AN ORA AS OPPOSED TO A WSA

| Employee code | Loaded wage | Hours | | Cost | | Cost savings |
|---|---|---|---|---|---|---|
| | | Baseline | Post-rule | Baseline | Post-rule | |
| | (a) | (b) | (c) | (d) = (a) × (b) | (e) = (a) × (c) | (f) = (e) − (d) |
| E–5 | $54 | 10 | 0 | $540 | $0 | $540 |
| E–6 | 62 | 10 | 0 | 620 | 0 | 620 |
| O–2 | 70 | 20 | 0 | 1,400 | 0 | 1,400 |
| O–3 | 84 | 20 | 19 | 1,680 | 1,596 | 84 |
| O–4 | 98 | 0 | 19 | 0 | 1,862 | -1,862 |
| Total | ..... | 60 | 38 | 4,240 | 3,458 | 782 |

Therefore, given that only 25 percent of the LNG facilities currently conduct a WSA, instead of submitting an alternative request, we estimate the annualized cost savings to the government of reviewing an ORA instead of a WSA to be about $196 ($782 in cost savings × 1 facility × 0.25) using a 7-percent discount rate.

Table 10 presents the total cost savings to the Federal Government associated with eliminating the requirement to submit an alternative request and meet with the COTP to

[28] The 2020 GSA rate for meals and incidental expenses for first and last day of travel is $41.25 (See FY 2020 Per Diem Rates for Federal Travelers Released, GSA).

[29] We obtained 18.75 percent by multiplying the proportion of facilities submitting alternative (75 percent) by the proportion flying to the COTP (25 percent) (*i.e.,* 0.25 multiplied by 0.75 equals 0.1875).

conduct an ORA in lieu of a WSA. We estimate the total discounted or present value cost savings to the Federal Government over a 10-year period of analysis to be about $4,918, using a 7-percent discount rate. We estimate the annualized cost savings to the Federal Government to be about $700, using a 7-percent discount rate.

TABLE 10—TOTAL GOVERNMENT COST SAVINGS

[$2020]

| Year | Cost savings item | | | Total undiscounted cost savings | Cost savings discounted at 3% | Cost savings discounted at 7% |
|---|---|---|---|---|---|---|
| | Alternative submission review | Meeting with industry representatives | Reviewing WSAs | | | |
| (a) | (b) | (c) | (d) | (e) = (b) + (c) + (d) | (f) = (e) ÷ (1.03) [(a)] | (g) = (e) ÷ (1.07) [(a)] |
| 1 | $232 | $273 | $196 | $700 | $680 | $654 |
| 2 | 232 | 273 | 196 | 700 | 660 | 612 |
| 3 | 232 | 273 | 196 | 700 | 641 | 572 |
| 4 | 232 | 273 | 196 | 700 | 622 | 534 |
| 5 | 232 | 273 | 196 | 700 | 604 | 499 |
| 6 | 232 | 273 | 196 | 700 | 586 | 467 |
| 7 | 232 | 273 | 196 | 700 | 569 | 436 |
| 8 | 232 | 273 | 196 | 700 | 553 | 408 |
| 9 | 232 | 273 | 196 | 700 | 537 | 381 |
| 10 | 232 | 273 | 196 | 700 | 521 | 356 |
| Total | | | | 7,003 | 5,973 | 4,918 |
| Annualized | | | | | 700 | 700 |

Totals may not sum due to independent rounding.

Total Cost Savings

Table 11 summarizes the total cost savings of this final rule to industry and the Federal Government for the 10-year period of analysis. We estimate the total discounted or present value cost savings to industry and the Federal Government over a 10-year period of analysis to be about $121,414 in 2020 dollars, using a 7-percent discount rate. We estimate the annualized cost savings to be about $17,287 in 2020 dollars, using a 7-percent discount rate.

TABLE 11—TOTAL COST SAVINGS TO INDUSTRY AND THE FEDERAL GOVERNMENT

[$2020]

| Year | Total cost savings to industry | Total cost savings to government | Total undiscounted cost savings | Discounted cost savings | |
|---|---|---|---|---|---|
| | | | | 3% | 7% |
| 1 | $16,586 | $700 | $17,287 | $16,783 | $16,156 |
| 2 | 16,586 | 700 | 17,287 | 16,294 | 15,099 |
| 3 | 16,586 | 700 | 17,287 | 15,820 | 14,111 |
| 4 | 16,586 | 700 | 17,287 | 15,359 | 13,188 |
| 5 | 16,586 | 700 | 17,287 | 14,912 | 12,325 |
| 6 | 16,586 | 700 | 17,287 | 14,477 | 11,519 |
| 7 | 16,586 | 700 | 17,287 | 14,056 | 10,765 |
| 8 | 16,586 | 700 | 17,287 | 13,646 | 10,061 |
| 9 | 16,586 | 700 | 17,287 | 13,249 | 9,403 |
| 10 | 16,586 | 700 | 17,287 | 12,863 | 8,788 |
| Total | 165,863 | 7,003 | 172,866 | 147,458 | 121,414 |
| Annualized | | | | 17,287 | 17,287 |

Totals may not sum due to independent rounding.

Unquantified Benefits

This final rule has unquantified benefits to the regulated industry. This final rule updates the standards incorporated by reference to reflect the latest standards available to industry and requires all new LNG import/export facilities and waterfront facilities handling LHG to meet these standards. This requirement benefits the regulated industry as it eliminates the confusion that may arise from different standards existing in Coast Guard regulations that do not match current industry standards.

Cost

The requirements of this final rule do not add to industry costs compared to the no-action baseline. In particular, we determined that updating industry standards incorporated by reference in the regulation is a no-cost change. Based on discussions with an industry consultant and SMEs in CG–OES, we determined that industry builds new, expanded, and modified LNG import/export facilities, LNG fuel facilities, and LHG facilities to the most current standards available at the time, and not to the outdated standards currently codified in part 127. In addition, the new industry standards do not apply to facilities constructed, expanded, or modified under a contract-awarded after the implementation date of the final rule. Hence, we do not anticipate owners and operators of new, expanded and modified facilities to incur any cost

to meet the updated or new industry standards.

In addition, as part of the LOI, the Coast Guard is adding a new paragraph, § 127.007(a)(1). This paragraph requires LNG import/export facilities that complete a WSA to provide information to the Coast Guard on the nation of registry and the nationality or citizenship of officers and crew serving on board vessels transporting LNG that are reasonably anticipated to be servicing that facility. This requirement will only be applicable when a facility has to submit the LOI and WSA to the Coast Guard, and is not required every time a vessel comes to port. Because both the LOI and WSA are submitted years before the facility becomes operational, Coast Guard SMEs have determined that it is highly unlikely any specific details regarding vessels and their crew will be known at the time the facility submits the LOI and WSA. Table 12 summarizes the changes with no cost impacts.

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**Table 12: Summary of Changes to 33 CFR 127 with no Economic Impacts**

| Topic | CFR Section | Facility Type(s) | Changes in Requirements | Cost Impact |
|---|---|---|---|---|
| **General Requirements** | | | | |
| Authority | | All | •Revised the authority citation to read as 33 U.S.C. 1504(j)(2), 46 U.S.C. 70011 and 70034; 46 U.S.C. Chapter 701; Department of Homeland Security Delegation No. 0170.1. Pub. L. 109-241, sec. 304(c)(2). | •No cost. This change is administrative in nature. |
| Applicability | § 127.001 | All | •Amended paragraph (a) and (c) by removing the word "existing" because the term as it is currently defined in § 127.005 does not cover waterfront facilities handling LNG and LHG constructed after 1988 and 1996, respectively. | •No cost. The word "existing" is removed to avoid confusion as this final rule also applies to facilities handling LNG and LHG constructed after 1988 and 1996, respectively. This change is administrative in nature. |
| | | Inactive LNG fuel and import/export facilities | •Amended paragraph (c) by removing a reference to § 127.701, which contains security requirements for inactive LNG facilities. | •No cost. The Coast Guard has determined that the security requirements are now covered under 33 CFR part 105 and, thus, reference to § 127.701 in paragraph (c) is duplicative. Accordingly, removing the requirement does not have cost implications. |
| | | All | •Revised the applicability to read as "Waterfront facilities handling LNG and LHG constructed, expanded, or modified under a contract awarded after March 4, 2022, are required to comply with the standards referenced in § 127.003. All other facilities, unless expanded or modified in accordance with this part, are required to meet previously applicable standards , but may request to apply a later edition of the standards in accordance with § 127.017." | •No cost. This change is administrative in nature. |
| Incorporation by reference | § 127.003 | All | •Updated standards that are currently listed to reflect the latest edition of the standards available and adding three new standards for incorporation by reference (see section VII.L of this preamble for a list of these standards). | •No cost. The Coast Guard has determined that all new LNG import/export facilities, LNG fuel facilities, and LHG facilities will meet the most recent industry standards in the absence of regulation. |
| Definitions | § 127.005 | All | •Added new definitions for "LNG fuel facility" and modified the existing definitions for "Facility" and "Fire endurance rating." | •No cost. This change is administrative in nature. |
| LOI and WSA | § 127.007 | New LNG import/export facilities and LHG Facilities | •Amended paragraph (a), (b), and (e) by removing the word "existing" because the term as it is currently defined in § 127.005 does not cover waterfront facilities handling LNG and LHG constructed after 1988 and 1996, respectively. | •No cost. The word "existing" is removed to avoid confusion as this final rule also applies to facilities handling LNG and LHG constructed after 1988 and 1996, respectively. This change is administrative in nature |

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| | | New LNG Fuel Facilities | •Excluded LNG fuel facilities from this section because they will be addressed in a new § 127.008. | •No cost. This change is administrative in nature. |
| | | New LNG import/export facilities | •Added new paragraph (a)(1) requiring an LNG import/export facility to provide information to the Coast Guard on the nation of registry of the vessels for, and the nationality or citizenship of officers and crew serving on board vessels transporting natural gas that are reasonably anticipated to be servicing that facility. | •No cost. This requirement will only be applicable when a facility has to submit the LOI and WSA to the Coast Guard, and is not required every time a vessel comes to port. Because both the LOI and WSA are submitted years before the facility becomes operational, Coast Guard SMEs have determined that it is highly unlikely any specific details regarding vessels and their crew will be known at the time the LOI and WSA are submitted. |
| | | | Added new paragraph (i) to clarify that an owner or operator intending to construct a new LNG fuel facility or modify any LNG fuel facility, or reactivate an inactive LNG fuel facility, may comply with § 127.008 in lieu of meeting the requirements in this section. | •No cost. This change is administrative in nature. |
| LOI and ORA | § 127.008 | New LNG Fuel Facilities | •Identified industry standards related to conducting risk assessments on LNG fuel facilities. | •No cost. The Coast Guard has determined that all new LNG fuel facilities and LHG facilities will meet the most recent industry standards in the absence of regulation. |
| Letter of Recommendation | § 127.009 | All New Facilities | •Updated text to refer to § 127.008. | •No cost. This change is administrative in nature, and it only clarifies that the letter for recommendation may be sent after the receipt of a WSA or ORA. |
| Inspection of Waterfront Facilities | § 127.011 | All New Facilities | •Replaced the word "shall" with "must." | •No cost. This change is administrative in nature. |
| Appeals | § 127.015 | All New Facilities | •Updated the address of Coast Guard Headquarters.<br>•Updated the name of the Coast Guard office reviewing appeals. | •No cost. This change is administrative in nature.<br>• |
| Alternatives | § 127.017 | All New Facilities | •Added reference to § 127.003. | •No cost. This change is administrative in nature |
| Operations Manual and Emergency Manual Procedures for Examination | § 127.019 | All New Facilities | •Replaced the word "shall" with "must." | •No cost. This change is administrative in nature. |
| | | | •Amended paragraph (b) by removing the word "existing" to clarify that all waterfront facilities handling LNG and LHG, regardless of when they were constructed, must submit the information required in § 127.019. | •No cost. This change is administrative in its nature. |
| **LNG - Design and Construction** | | | | |
| Design and | § 127.101 | New LNG | •Updated references to NFPA 59A chapters and sections to | •No cost. This change is administrative in |

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| Construction General | | Facilities | reflect the numbering in the most recent edition. | nature. |
| Electrical Power System | § 127.107 | New LNG Facilities | •Added references to § 127.003, "Incorporation by reference." | •No cost. The Coast Guard has determined that all new LNG and LHG facilities will meet the most recent industry standards in the absence of regulation. |
| | | | •Removed the words, "National Electrical Code." | •No cost. This change is administrative in nature. |
| **LNG – Equipment** | | | | |
| Sensing and Alarm Systems | § 127.201 | New LNG Facilities | •Added references to § 127.003, "Incorporation by reference." | •No cost. The Coast Guard has determined that all new LNG and LHG facilities will meet the most recent industry standards in the absence of regulation. |
| | | | •Updated references to NFPA 59A sections to reflect the numbering in the most recent edition. | •No cost. This change is administrative in nature. |
| **LNG – Operations** | | | | |
| Persons in Charge of Shoreside Transfer Operations: Qualifications and Certification. | § 127.301 | New LNG Facilities | •Replaced the word "shall" with "must." | •No cost. This change is administrative in nature. |
| Operations Manual and Emergency Manual Use | § 127.309 | New LNG Facilities | •Replaced the word "shall" with "must." | •No cost. This change is administrative in nature. |
| Motor Vehicles | § 127.311 | New LNG Facilities | •Replaced the word "shall" with "must." | •No cost. This change is administrative in nature. |
| Bulk Storage | § 127.313 | New LNG Facilities | •Replaced the word "shall" with "must." | •No cost. This change is administrative in nature. |
| | | | •Added references to § 127.003, "Incorporation by reference. | •No cost. The Coast Guard has determined that all new LNG and LHG facilities will meet the most recent industry standards in the absence of regulation. |
| Primary Transfer Inspection | § 127.315 | New LNG Facilities | •Replaced the word "shall" with "must." | •No cost. This change is administrative in nature. |
| Declaration of Inspection | § 127.317 | New LNG Facilities | •Replaced the word "shall" with "must." | •No cost. This change is administrative in nature. |

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| LNG Transfer | § 127.319 | New LNG Facilities | •Replaced the word "shall" with "must." | •No cost. This change is administrative in nature. |
| Release of LNG | § 127.321 | New LNG Facilities | •Replaced the word "shall" with "must." | •No cost. This change is administrative in nature. |
| **LNG – Maintenance** | | | | |
| Maintenance: General | § 127.401 | New LNG Facilities | • Replaced the word "shall" with "must." | • No cost. This change is administrative in nature. |
| Inspections | § 127.403 | New LNG Facilities | • Replaced the word "shall" with "must." | • No cost. This change is administrative in nature. |
| Repairs | § 127.405 | New LNG Facilities | • Replaced the word "shall" with "must." | • No cost. This change is administrative in nature. |
| | | | • Updated references to NFPA 59A sections to reflect the numbering in the most recent edition.<br>• Added references to § 127.003, "Incorporation by reference." | • No cost. The Coast Guard has determined that all new LNG and LHG facilities will meet the most recent industry standards in the absence of regulation. |
| Testing | § 127.407 | New LNG Facilities | • Replaced the word "shall" with "must." | • No cost. This change is administrative in nature. |
| Records | § 127.409 | New LNG Facilities | • Replaced the word "shall" with "must." | • No cost. This change is administrative in nature. |
| **LNG - Fire Equipment** | | | | |
| Portable Fire Extinguishers | § 127.603 | New LNG Facilities | • Added references to § 127.003, "Incorporation by reference." | • No cost. The Coast Guard has determined that all new LNG and LHG facilities will meet the most recent industry standards in the absence of regulation. |
| | | | • Updated references to NFPA 59A sections to reflect the numbering in the most recent edition. | • No cost. This change is administrative in nature. |
| International Shore Connection | § 127.611 | New LNG Facilities | • Added references to § 127.003, "Incorporation by reference."<br>• Updated the referenced version of ASTM F 1121-87. | • No cost. The Coast Guard has determined that all new LNG and LHG facilities will meet the most recent industry standards in the absence of regulation. |
| Smoking | § 127.613 | New LNG Facilities | • Replaced the word "shall" with "must." | • No cost. This change is administrative in nature. |
| Fires | § 127.615 | New LNG Facilities | • Replaced the word "shall" with "must." | • No cost. These changes are administrative in nature. |
| Hotwork | § 127.617 | New LNG Facilities | • Replaced the word "shall" with "must." | • No cost. These changes are administrative in nature. |
| **LNG — Security** | | | | |
| Security on Existing | § 127.701 | New LNG Facilities | • Removed the section, as the requirements in this section are no longer needed because facilities regulated under | • No cost. These changes are administrative in nature |

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| Facilities | | | part 127 are required to comply with the maritime security facilities regulations contained in 33 CFR part 105. | |
| Access to the Marine Transfer Area for LNG | § 127.703 | New LNG Facilities | • Removed the section, as the requirements in this section are no longer needed because facilities regulated under part 127 are required to comply with the maritime security facilities regulations contained in 33 CFR part 105. | • No cost. These changes are administrative in nature. |
| Security Systems | § 127.705 | New LNG Facilities | • Removed the section, as the requirements in this section are no longer needed because facilities regulated under Part 127 are required to comply with the maritime security facilities regulations contained in 33 CFR part 105. | • No cost. These changes are administrative in nature. |
| Security Personnel | § 127.707 | New LNG Facilities | • Removed the section, as the requirements in this section are no longer needed because facilities regulated under Part 127 are required to comply with the maritime security facilities regulations contained in 33 CFR part 105. | • No cost. These changes are administrative in nature. |
| Protective Enclosures | § 127.709 | New LNG Facilities | • Removed the section, as the requirements in this section are no longer needed because facilities regulated under part 127 are required to comply with the maritime security facilities regulations contained in 33 CFR part 105. | • No cost. These changes are administrative in nature. |
| Communications | § 127.711 | New LNG Facilities | • Removed the section, as the requirements in this section are no longer needed because facilities regulated under part 127 are required to comply with the maritime security facilities regulations contained in 33 CFR part 105. | • No cost. These changes are administrative in nature. |
| **LHG - Design and Construction** | | | | |
| Piping Systems | § 127.1101 | New LHG Facilities | • Updated the referenced version of ASME B31.3.<br>• Added references to § 127.003, "Incorporation by reference." | • No cost. The Coast Guard has determined that all new LNG and LHG facilities will meet the most recent industry standards in the absence of regulation. |
| Transfer Hoses and Loading Arms | § 127.1102 | New LHG Facilities | • Updated the referenced version of ASME B16.5<br>• Added references to § 127.003, "Incorporation by reference." | • No cost. The Coast Guard has determined that all new LNG and LHG facilities will meet the most recent industry standards in the absence of regulation. |
| Piers and wharves | § 127.1103 | New LHG Facilities | • Removed the word "existing" from this section to clarify that the requirements in this section apply to new constructions in the marine transfer area of all LHG facilities, and not just to "existing" facilities. | • No cost. These changes are administrative in nature. |
| Layout and spacing of marine transfer area for LHG | § 127.1105 | New LHG Facilities | • Removed the word "existing" from this section to clarify that the requirements in this section apply to new constructions in the marine transfer area of all LHG facilities, and not just to "existing" facilities. | • No cost. These changes are administrative in nature. |
| Electrical Systems | § 127.1107 | New LHG Facilities | • Added references to § 127.003, "Incorporation by reference." | • No cost. The Coast Guard has determined that all new LNG and LHG facilities will meet the most recent |

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| | | | | industry standards in the absence of regulation. |
| **LHG — Equipment** | | | | |
| Gas Detection | § 127.1203 | New LHG Facilities | • Updated the referenced version of IEC 60079-29-1.<br>• Added references to § 127.003, "Incorporation by reference." | • No cost. The Coast Guard has determined that all new LNG and LHG facilities will meet the most recent industry standards in the absence of regulation. |
| Warning Alarms | § 127.1207 | New LHG Facilities | • Replaced the word "shall" with "must." | • No cost. These changes are administrative in nature. |
| **LHG — Operations** | | | | |
| Persons in Charge of Transfers for the Facility: Qualifications and Certification. | § 127.1301 | New LHG Facilities | • Replaced the word "shall" with "must." | • No cost. This change is administrative in nature. |
| Training | § 127.1302 | New LHG Facilities | • Replaced the word "shall" with "must." | • No cost. This change is administrative in nature. |
| Operations Manual and Emergency Manual Use | § 127.1309 | New LHG Facilities | • Replaced the word "shall" with "must." | • No cost. This change is administrative in nature. |
| Motor Vehicles | § 127.1311 | New LHG Facilities | • Replaced the word "shall" with "must." | • No cost. This change is administrative in nature. |
| Storage of Hazardous Materials | § 127.1313 | New LHG Facilities | • Replaced the word "shall" with "must."<br>• Added references to § 127.003, "Incorporation by reference." | • No cost. This change is administrative in nature. |
| Preliminary Transfer Inspection | § 127.1315 | New LHG Facilities | • Replaced the word "shall" with "must." | • No cost. This change is administrative in nature. |
| Declaration of Inspection | § 127.1317 | New LHG Facilities | • Replaced the word "shall" with "must." | • No cost. This change is administrative in nature. |
| Transfer of LHG | § 127.1319 | New LHG Facilities | • Replaced the word "shall" with "must." | • No cost. This change is administrative in nature. |
| Release of LHG | § 127.1321 | New LHG Facilities | • Replaced the word "shall" with "must." | • No cost. This change is administrative in nature. |
| Access to Marine Transfer Area for LHG | § 127.1325 | New LHG Facilities | • Replaced the word "shall" with "must." | • No cost. This change is administrative in nature. |
| **LHG — Maintenance** | | | | |
| General | § 127.1401 | New LHG Facilities | • Replaced the word "shall" with "must." | • No cost. This change is administrative in nature. |
| Inspections | § 127.1403 | New LHG | • Replaced the word "shall" with "must." | • No cost. This change is administrative |

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| | | Facilities | | in nature. |
| Repairs | § 127.1405 | New LHG Facilities | • Replaced the word "shall" with "must."<br>• Added references to § 127.003, "Incorporation by reference." | • No cost. This change is administrative in nature.<br>• No cost. The Coast Guard has determined that all new LNG and LHG facilities will meet the most recent industry standards in the absence of regulation. |
| Tests | § 127.1407 | New LHG Facilities | • Replaced the word "shall" with "must." | • No cost. This change is administrative in nature. |
| Records | § 127.1409 | New LHG Facilities | • Replaced the word "shall" with "must." | • No cost. This change is administrative in nature. |
| **LHG - Fire Equipment** | | | | |
| General | § 127.1501 | New LHG facilities | • Amended this section by removing the word "existing" to clarify that § 127.1501 applies to new LHG facilities, not just "existing" LHG facilities. | • No cost. This change is administrative in nature. |
| Portable Fire Extinguishers | § 127.1503 | New LHG Facilities | • Added references to § 127.003, "Incorporation by reference." | • No cost. This change is administrative in nature. |
| International Shore Connection | § 127.1511 | New LHG Facilities | • Added references to § 127.003, "Incorporation by reference." | • No cost. This change is administrative in nature. |
| | | | • Updated the referenced version of ASTM F 1121-87. | • No cost. The Coast Guard has determined that all new LNG and LHG facilities will meet the most recent industry standards in the absence of regulation. |
| **LHG - Fire Protection** | | | | |
| Smoking | § 127.1601 | New LHG Facilities | • Replaces the word "shall" with "must." | • No cost. This change is administrative in nature. |
| Hotwork | § 127.1603 | New LHG Facilities | • Replaces the word "shall" with "must." | • No cost. This change is administrative in nature. |
| Other Sources of Ignition | § 127.1605 | New LHG Facilities | • Replaces the word "shall" with "must." | • No cost. This change is administrative in nature. |

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Alternatives

While developing this final rule, the Coast Guard considered three alternatives to the rule. We present a summary of the alternatives below and show their corresponding impact and cost savings in table 13.

Alternative 1: No Action Alternative

Under this alternative, the Coast Guard would accept the status quo and review each proposal for an LNG fuel facility on a case-by-case, equivalency basis. We rejected this alternative because the Coast Guard believes this approach is inefficient in an environment of growing interest in LNG fuel because it does not respond to the needs of the U.S. maritime industry. This alternative would not impose any additional costs on industry, nor will this option result in cost savings for the affected facilities or the Coast Guard.

Alternative 2: Submit an ORA, But Do Not Update the IBR Standards Alternative

Under this alternative, the Coast Guard would allow new LNG fuel facilities to submit an ORA instead of a WSA without submitting an alternative request and meeting with the COTP. However, under this alternative, the Coast Guard would not update the existing IBR standards. This alternative would not impose any additional costs to industry and would result in cost savings. We rejected this alternative because the regulations would continue to reference outdated standards instead of reflecting industry best practices and the best technologies available to industry.

Alternative 3: Continue To Meet With the COTP When Submitting the ORA

Under this alternative, the Coast Guard would allow new LNG fuel facilities to submit an ORA instead of a WSA, as long as the facility representatives continue to meet with the COTP and get the ORA approved. Although this alternative would be less burdensome compared to the baseline, the Coast Guard rejected this alternative because it would require industry representatives to continue meeting with the COTP in person to discuss the ORA.

One commenter expressed support for this alternative, noting that it would be beneficial if owners and operators continue to meet with the COTP before submitting an ORA, as this would reduce the amount of work facility owners would have to do to get the LNG fuel facility approved. Another commenter added that the meeting provides the COTP with an opportunity to notice any potential safety and security risks to the facility. As stated before, the Coast Guard expects owners and operators to continue meeting with the COTP, but has determined that the preliminary requirement for certain facilities to obtain the COTP's approval prior to beginning the ORA should be eliminated.

TABLE 13—COMPARISON OF REGULATORY ALTERNATIVES

| Alternative | Annualized cost savings | Impact of the alternative |
|---|---|---|
| Final Rule | $17,287 | Codifies industry standards, establishes national baseline safety standards and alleviates discrepancies and unnecessary duplication between regulatory standards and industry best practices. In addition, it reduces the burden to industry by allowing new LNG fuel facilities to submit an ORA instead of a WSA without first having to submit an alternative request and meet with the COTP to obtain approval. |
| Alternative 1: *No Action* | 0 | This alternative would not codify minimum safety standards, respond to industry needs, or reduce industry burden. It would not impose any additional costs. |
| Alternative 2: *Submit an ORA, but do not update the IBR Standards Alternative.* | 17,287 | This alternative would reduce the burden to industry by allowing new LNG fuel facilities to submit an ORA instead of a WSA without first having to submit an alternative request and meet with the COTP to obtain approval. However, it would not update IBR standards. This alternative would not impose any additional costs to industry. |
| Alternative 3: *Continue to Meet with the COTP when submitting an ORA.* | [32] 14,018 | This alternative would codify industry standards establishing national baseline safety standards. In addition, it would reduce the burden to industry by allowing new LNG fuel facilities to submit an ORA instead of a WSA without first having to submit an alternative request. However, this alternative would still require meeting with the COTP, making it more burdensome compared to the final rule. This alternative would not impose any additional costs to industry, but has less cost savings compared to Alternative 2. |

*B. Small Entities*

Under the Regulatory Flexibility Act, 5 U.S.C. 601–612, we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. There were no public comments pertaining to the analysis on small entities.

This rule applies to new LNG fuel facilities, LNG import and export facilities, and new LHG facilities. A threshold analysis of the small entity impacts follows.

LNG Fuel Facilities

The Coast Guard has determined this rule will not generate costs on existing LNG fuel facilities but will generate cost savings to one new facility per year. In particular, we estimate that this rule will generate a net cost savings of about $16,586, using 7-percent discount rate, to one new LNG fuel facility per year, compared to the $16,153 net cost savings calculated in the proposed rule. To estimate the potential impact on small entities, we compare the $16,586 in net cost savings with the annual revenue data of the new LNG fuel facility impacted by this rule. The Coast Guard determined that an entity would have to have an annual revenue of $1,658,600 or less for this rule to have an impact greater than 1 percent of revenue.

Using the Small Business Administration's (SBA) size standards

[32] This is cost savings under the preferred option ($17,287) minus the cost of meeting to industry, which equals $1,327 when driving and $1,669 when flying, for a total of $2,996; and the cost of meeting to Government, which is $273. $17,287 − ($2,996 + 273) = $14,018.

table,[33] we determined that two of the four LNG fuel facilities are small entities. These two small entities have a North American Industry Classification System (NAICS) code of 213112 and 541990. Based on SBA's size standards table, the size standard for these codes is $38.5 million and $15 million, respectively. Publicly available data suggests that the annual revenue of the two facilities is about $2.4 million and about $3.8 million, respectively. Thus, conservatively assuming the new LNG fuel facility will have annual revenues equivalent to the smallest entity in the industry, we estimate that the economic impact, in the form of cost savings, of this rule will be approximately 0.69 percent of revenue (($16,586 ÷ $2,400,000) × 100 = 0.6910)), compared to the 0.673 percent of revenue calculated in the proposed rule.

No not-for-profit organizations are involved with LNG fuel facilities. In addition, this rule will not have an adverse or beneficial impact on small government entities.

LNG Import/Export Facilities

The Coast Guard has determined that this rule will have no cost or cost savings impact on existing and new LNG import/export facilities. Moreover, no not-for-profit organizations are involved with LNG import/export facilities. This rule will not have an adverse or beneficial impact on small government entities.

LHG Facilities

The Coast Guard has determined that this rule will have no cost or cost savings impact on existing and new LHG facilities. Moreover, no not-for-profit organizations are involved with LHG facilities. This rule will not have an adverse or beneficial impact on small government entities. Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

*C. Assistance for Small Entities*

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, we offer to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

*D. Collection of Information*

This rule calls for a revised collection of information under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. As defined in 5 CFR 1320.3(c), ''collection of information'' comprises reporting, recordkeeping, monitoring, posting, labeling, and other similar actions. The title and description of the information collection, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection.

*Title:* Waterfront Facilities Handling Liquefied Natural Gas and Liquefied Hazardous Gas.

*OMB Control Number:* 1625–0049.

*Summary of the Collection of Information:* The Coast Guard currently collects information from waterfront facilities handling LNG and LHG under 33 CFR part 127. The current information collection request contains requirements in the following sections: LOIs, WSAs, the submission of appeals to the Coast Guard, the submission of alternatives to the Coast Guard, Operations Manuals, Emergency Manuals, Certification of the Person in Charge, Declaration of Inspection, and Records of Maintenance. In addition, this rule will add a new collection of information for ORA submissions for new LNG fuel facilities.

*Need for Information:* The Coast Guard has regulations that provide safety standards for the design and construction, equipment, operations, maintenance, personnel training, and fire protection at waterfront facilities handling LNG. These regulations help reduce the probability that an accident could occur and help reduce the damage and injury to persons and property should an accident occur.

*Use of Information:* The Coast Guard currently uses the information collected for the following purposes: (1) To determine the suitability of a waterfront facility handling LNG to safely conduct LNG fuel transfer operations; (2) to properly evaluate alternative procedures to ensure they provide at least the same degree of safety as the regulations; (3) to ensure that safe operating procedures and an effective training program are set up by the waterfront facility operator; (4) to ensure that effective procedures have been set up by the waterfront facility operator to respond to emergencies; ensure the person in charge of an LNG or LHG transfer is properly qualified; and (5) to verify that persons in charge are following proper transfer procedures.

*Description of the Respondents:* The respondents are LNG import/export facilities, LNG fuel facilities, and LHG facilities.

*Number of Respondents:* This rule does not change the number of respondents. However, we anticipate the number of waterfront facilities handling LNG will increase by three annually (two new LNG import/export facilities and one LNG fuel facility). We also anticipate three new LHG facilities will replace three retiring facilities annually.

*Frequency of Response:* The number of responses will vary by requirement. This rule does not change the frequency of responses for existing requirements. However, this rule introduces a new ORA requirement, which is a one-time requirement for a LNG fuel facility.

*Burden of Response:* The burden per response for each regulatory requirement varies. For the new ORA requirement, we estimate it will take 289 hours to complete. Submitting an ORA in place of a WSA (500 hours per response) is a savings of 211 hours per response.

*Estimate of Total Annual Burden:* To account for the change in the facility population and the new ORA option, we estimate that the burden will increase by 1,956 hours.

For a new LNG import/export facility, this rule will require providing information to the Coast Guard at the time the WSA is submitted on the nation of registry for, and the nationality or citizenship of officers and crew serving on board vessels transporting natural gas that are reasonably anticipated to be servicing that facility. The Coast Guard does not expect the facility to have specific details regarding vessels and their crew when it submits the LOI and WSA to the Coast Guard, as these submissions happen several years before the facility begins operations. The Paperwork Reduction Act will not apply to this requirement as the Coast Guard anticipates only two new LNG

[33] Readers can view industry size standards at *https://www.sba.gov/document/support--table-size-standards* (accessed July 11, 2019).

import/export facilities per year will be subject to this requirement.[34]

As required by 44 U.S.C. 3507(d), we will submit a copy of this rule to OMB for its review of the collection of information.

You are not required to respond to a collection of information unless it displays a currently valid OMB control number. OMB has not yet completed its review of this collection. Therefore, we are not making § 127.008 effective until OMB completes action on our information collection request, at which time we will publish a **Federal Register** notice describing OMB's action and, if OMB grants approval, notifying you when § 127.008 takes effect.

*E. Federalism*

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

This rule, with respect to the LOI, WSA, and ORA submission requirements and COTP approval (33 CFR 127.007, 127.008, 127.009, 127.015, and 127.017), does not conflict with State interests. They are procedural requirements for the Coast Guard's own safety and security risk analysis, approval, and appeal process of a new, modified, or reactivated facility and its attendant LNG transfer operations. As it relates to other requirements imposed by individual States, or their political subdivisions, the submission and approval process for the construction of a new structure will be unaffected by this rule.

Moreover, with respect to LNG transfer operations that may be included in the LOI, WSA, and ORA submissions, pursuant to 46 U.S.C. 70011(b)(1), Congress has expressly authorized the establishment of ''procedures, measures and standards for the handling, loading, unloading, storage, stowage and movement on a structure of explosives or other dangerous articles and substances, including oil or hazardous material.'' The Coast Guard affirmatively preempts any State rules related to these procedures, measures, and standards. *See* the Supreme Court's decision in *United States* v. *Locke,* 529 U.S. 89, 109–110 (2000).

Regarding the updates of technical standards referenced in 33 CFR part 127, it is Congress's express intent that, with respect to waterfront structures, States retain the power to regulate to higher standards than those promulgated by the Coast Guard. As stated in 46 U.S.C. 70011(c), ''State Law.—Nothing in this section, with respect to structures, prohibits a State or political subdivision thereof from prescribing higher safety equipment or safety standards than those that may be prescribed by regulations under this section.'' Thus, Congress has made clear that the Federal standards promulgated under this section establish the uniform minimum standards of the United States, but individual States are entitled to impose higher safety equipment requirements or higher safety standards for structures within their jurisdiction.

Therefore, other than with respect to structures as noted above, because the States may not regulate within these categories where such regulation conflicts with Federal requirements, this rule is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

*F. Unfunded Mandates*

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

*G. Taking of Private Property*

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights).

*H. Civil Justice Reform*

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, (Civil Justice Reform), to minimize litigation, eliminate ambiguity, and reduce burden.

*I. Protection of Children*

We have analyzed this rule under Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks). This rule is not an economically significant rule and will not create an environmental risk to health or risk to safety that might disproportionately affect children.

*J. Indian Tribal Governments*

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

*K. Energy Effects*

We have analyzed this rule under Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use). We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

*L. Technical Standards and Incorporation by Reference*

The National Technology Transfer and Advancement Act, codified as a note to 15 U.S.C. 272, directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule incorporates by reference the following new voluntary consensus standards:

- Det Norske Veritas (DNV), DNVGL–RP–G105, Recommended Practice, Development and operation of liquefied natural gas bunkering facilities, October 2015 Edition. This standard provides guidance to the industry on the developmental, organizational, technical, functional, and operational issues of LNG bunkering (fueling) facilities in order to ensure global

[34] The Paperwork Reduction Act applies to collections of information using identical questions posed to, or reporting or recordkeeping requirements imposed on, 10 or more persons per year. See 5 CFR 1320.3(c), and Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies and Independent Regulatory Agencies,* dated April 7, 2010, at p. 2.

compatibility and secure a high level of safety, integrity, and reliability. The DNVGL–RP–G105 standard was selected because it aligns with the International Organization for Standardization (ISO), (''ISO/TS 18683''), discussed below. Both of these standards provide guidance to industry on conducting risk assessments that are focused on providing LNG as a marine fuel (bunkering operations).

• International Organization for Standardization (ISO), (''ISO/TS 18683''), Guidelines for systems and installations for supply of LNG as fuel to ships, First Edition, January 15, 2015. This standard gives guidance on the minimum requirements for the design and operation of the LNG bunkering (fueling) facility, including the interface between the LNG supply facilities and receiving ships.

• ISO 28460:2010(E), (''ISO 28460''), Petroleum and natural gas industries—Installation and equipment for liquefied natural gas—Ship-to-shore interface and port operations, First edition, December 15, 2010. This standard specifies the requirements for ship, terminal, and port service providers to ensure the safe transit of an LNG carrier through the port area and the safe and efficient transfer of its cargo.

This rule incorporates by reference the following updated voluntary consensus standards:

• American Petroleum Institute (API), API Recommended Practice 2003, (''API RP 2003'') Protection Against Ignitions Arising Out of Static, Lightning and Stray Currents, Eighth Edition, September 2015. This standard presents the current state of knowledge and technology in the fields of static electricity and stray currents applicable to the prevention of hydrocarbon ignition in the petroleum industry, based on both scientific research and practical experience.

• The American Society of Mechanical Engineers (ASME), ASME B16.5–2020, Pipe Flanges and Flanged Fittings, NPS ½ through NPS 24 Metric/Inch Standard, Issued January 29, 2021. This standard covers pressure-temperature ratings, materials, dimensions, tolerances, marking, testing, and methods of designating openings for pipe flanges and flanged fittings.

• ASME B31.3–2020, Process Piping, ASME Code for Pressure Piping, B31, Issued June 18, 2021. This standard contains requirements for piping typically found in petroleum refineries; chemical, pharmaceutical, textile, paper, semiconductor, and cryogenic plants; and related processing plants and terminals. It covers materials and components, design, fabrication, assembly, erection, examination, inspection, and testing of piping.

• ASTM International, ASTM E119–20, Standard Test Methods for Fire Tests of Building Construction and Materials, approved May 1, 2020. This standard provides methods of fire tests applicable to assemblies of masonry units and to composite assemblies of structural materials for buildings, including bearing and other walls, partitions, columns, girders, beams, slabs, and composite slab and beam assemblies for floors and roofs. This standard also applies to other assemblies and structural units that constitute permanent integral parts of a finished building.

• ASTM F 1121–87 (Reapproved 2019), Standard Specification for International Shore Connections for Marine Fire Applications, approved December 1, 2019, published January 2020. This standard covers the specifications for the design and manufacture of international shore connections used with marine firefighting systems during an emergency when a stricken ship has a system failure.

• International Electrotechnical Commission (IEC), IEC 60079–29–1, Explosive atmospheres—Part 29–1: Gas detectors—Performance requirements of detectors for flammable gases, Edition 2.0, July 2016. This standard specifies general requirements for construction, testing, and performance, and describes the test methods that apply to portable, transportable, and fixed apparatus for the detection and measurement of flammable gas or vapor concentrations with air.

• National Fire Protection Association (NFPA), NFPA 10, Standard for Portable Fire Extinguishers, 2018 Edition, effective August 21, 2017. This standard applies to the selection, installation, inspection, maintenance, recharging, and testing of portable extinguishing equipment and Class D extinguishing agents.

• NFPA 30, Flammable and Combustible Liquids Code, 2018 Edition, effective September 6, 2017. This standard applies to the storage, handling, and use of flammable and combustible liquids, including waste liquids.

• NFPA 51B, Standard for Fire Prevention During Welding, Cutting, and Other Hot Work, 2019 Edition, effective July 15, 2018. This standard covers provisions to prevent injury, loss of life, and loss of property from fire or explosion as a result of hot work.

• NFPA 59A, Standard for the Production, Storage, and Handling of Liquefied Natural Gas (LNG), 2019 Edition, effective November 25, 2018. This standard provides minimum fire protection, safety, and related requirements for the location, design, construction, security, operation, and maintenance of LNG plants.

• NFPA 70, National Electrical Code, 2020 Edition, effective August 25, 2019. The provisions of this standard apply to the design, modification, construction, inspection, maintenance, and testing of electrical systems, installations, and equipment.

The list of these standards and the locations where these standards are available is found in § 127.003.

*M. Environment*

We have analyzed this rule under Department of Homeland Security Management Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that does not individually or cumulatively have a significant effect on the human environment. A final Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. This rule is categorically excluded under paragraphs A3 and L54 in Appendix A, Table 1 of DHS Directive Instruction Manual 023–01–001–01, Rev. 1.[35] Paragraph A3 pertains to promulgation of rules and other guidance documents that interpret or amend existing regulations without changing its environmental effect. Paragraph L54 pertains to regulations that are editorial or procedural. This rule promotes the Coast Guard's maritime safety and Ports and waterway security missions.

**List of Subjects in 33 CFR Part 127**

Fire prevention, Harbors, Hazardous substances, Incorporation by reference, Natural gas, Reporting and recordkeeping requirements, Security measures.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 127 as follows:

[35] *https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001_508%20Admin%20Rev.pdf.*

## PART 127—WATERFRONT FACILITIES HANDLING LIQUEFIED NATURAL GAS AND LIQUEFIED HAZARDOUS GAS

■ 1. The authority citation for part 127 is revised to read as follows:

**Authority:** 33 U.S.C. 1504(j)(2); 46 U.S.C. 70011 and 70034; 46 U.S.C. Chapter 701; DHS Delegation No. 00170.1, Revision No. 01.2, paragraph (II)(92)(a).

■ 2. Amend § 127.001 by:
■ a. In paragraph (a), removing the word ''existing'';
■ b. Revising paragraph (c); and
■ c. Adding paragraph (f).

The revision and addition read as follows:

### § 127.001 Applicability.

* * * * *

(c) Sections 127.007(b), (c), and (d), and 127.019(b) of subpart A of this part apply to the marine transfer area for LNG of each inactive facility.

* * * * *

(f) Waterfront facilities handling LNG and LHG constructed, expanded, or modified under a contract awarded after March 4, 2022, are required to comply with the applicable standards referenced in § 127.003. All other facilities, unless expanded or modified in accordance with this part, are required to meet previously applicable standards but may request to apply a later edition of the standards in accordance with § 127.017.

■ 3. Revise § 127.003 to read as follows:

### § 127.003 Incorporation by reference.

Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, the Coast Guard must publish a document in the **Federal Register** and the material must be available to the public. All approved material is available for inspection at the U.S. Coast Guard, Office of Operating and Environmental Standards (CG–OES), 2703 Martin Luther King Jr. Avenue SE, STOP 7509, Washington, DC 20593–7509, 202–372–1410, and is available from the sources listed in the following paragraphs. It is also available for inspection 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.* (See § 127.017 for alternative compliance methods.)

(a) American Petroleum Institute (API), 200 Massachusetts Avenue NW, Suite 1100, Washington, DC 20001–5571, 202–682–8000, *http://www.api.org.*

(1) API Recommended Practice 2003 (''API RP 2003''), Protection Against Ignitions Arising Out of Static, Lightning and Stray Currents, Eighth Edition, September 2015, for § 127.1101(h).

(2) [Reserved]

(b) The American Society of Mechanical Engineers (ASME), Two Park Avenue, New York, NY 10016–5990, 800–843–2763, *https://www.asme.org.*

(1) ASME B16.5–2020, Pipe Flanges and Flanged Fittings, NPS ½ Through NPS 24 Metric/Inch Standard, Issued January 29, 2021, for § 127.1102(a).

(2) ASME B31.3–2020, Process Piping, ASME Code for Pressure Piping, B31, Issued June 18, 2021, for § 127.1101(a).

(c) ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA, 19428–2959, 610–832–9500, *https://www.astm.org.*

(1) ASTM E119–20, Standard Test Methods for Fire Tests of Building Construction and Materials, approved May 1, 2020, for § 127.005.

(2) ASTM F1121–87 (Reapproved 2019), Standard Specification for International Shore Connections for Marine Fire Applications, approved December 1, 2019, for §§ 127.611 and 127.1511.

(d) Det Norske Veritas (DNV), Veritasveien 1, 1363 Høvik Norway, +47 6757 9900, *https://www.dnv.com.*

(1) DNVGL–RP–G105, Recommended Practice, Development and operation of liquefied natural gas bunkering facilities, October 2015 Edition, for § 127.008(d).

(2) [Reserved]

(e) International Electrotechnical Commission (IEC), IEC Central Office, 3 rue de Varembé, P.O. Box 131, CH 1211, Geneva 20, Switzerland, +41 22 919 02 11, *https://www.iec.ch.*

(1) IEC 60079–29–1, Explosive atmospheres—Part 29–1: Gas detectors—Performance requirements of detectors for flammable gases, Edition 2.0, July 2016, for § 127.1203(a).

(2) [Reserved]

(f) International Organization for Standardization (ISO), Chemin de Blandonnet 8, CP 401, 1214 Vernier, Geneva, Switzerland, +41 22 749 01 11, *https://www.iso.org.*

(1) ISO/TS 18683:2015(E), (''ISO/TS 18683''), Guidelines for systems and installations for supply of LNG as fuel to ships, First Edition, January 15, 2015, for § 127.008(d)(1).

(2) ISO 28460:2010(E), (''ISO 28460''), Petroleum and natural gas industries—Installation and equipment for liquefied natural gas—Ship-to-shore interface and port operations, First edition, December 15, 2010, for § 127.008(d)(2).

(g) National Fire Protection Association (NFPA), 1 Batterymarch Park, Quincy, MA 02169–7471, 800–344–3555, *https://www.nfpa.org.*

(1) NFPA 10, Standard for Portable Fire Extinguishers, 2018 Edition, effective August 21, 2017, for §§ 127.603(a) and 127.1503.

(2) NFPA 30, Flammable and Combustible Liquids Code, 2018 Edition, effective September 6, 2017, for §§ 127.313(b) and 127.1313(b).

(3) NFPA 51B, Standard for Fire Prevention During Welding, Cutting, and Other Hot Work, 2019 Edition, effective July 15, 2018, for §§ 127.405(b) and 127.1405(b).

(4) NFPA 59A, Standard for the Production, Storage, and Handling of Liquefied Natural Gas (LNG), 2019 Edition, effective November 25, 2018, for §§ 127.008(d), 127. 101, 127.201(b) and (c), 127.405(a) and (b), and 127.603(a).

(5) NFPA 70, National Electrical Code, 2020 Edition, effective August 25, 2019, for §§ 127.107(a) and (c), 127.201(c), and 127.1107.

■ 4. In § 127.005, revise the definitions of ''Facility'' and ''Fire endurance rating'' and add a definition for ''LNG fuel facility'' in alphabetical order to read as follows:

### § 127.005 Definitions.

* * * * *

*Facility* means either a waterfront facility handling LHG or a waterfront facility handling LNG, and includes LNG fuel facilities.

*Fire endurance rating* means the duration for which an assembly or structural unit will contain a fire or retain structural integrity when exposed to the temperatures specified in the standard time-temperature curve in ASTM E119–20 (incorporated by reference, see § 127.003).

* * * * *

*LNG fuel facility* means a waterfront facility that handles LNG for the sole purpose of providing LNG from shore-based structures to vessels for use as a marine fuel, and that does not transfer LNG to or receive LNG from vessels capable of carrying LNG in bulk as cargo.

* * * * *

■ 5. Amend § 127.007 by:
■ a. Revising the section heading, and paragraphs (a), (b), and (e); and
■ b. Adding paragraph (i).

The revisions and addition read as follows:

**§ 127.007 Letter of intent and waterway suitability assessment for waterfront facilities handling LNG or LHG.**

(a) An owner or operator intending to build a new facility handling LNG or LHG, or an owner or operator planning new construction to expand marine terminal operations in any facility handling LNG or LHG, where the construction or expansion will result in an increase in the size or frequency of LNG or LHG marine traffic on the waterway associated with a facility, must submit a Letter of Intent (LOI) to the Captain of the Port (COTP) of the zone in which the facility is or will be located. The LOI must meet the requirements in paragraph (c) of this section.

(1) The owner or operator of an LNG facility must submit the LOI to the COTP no later than the date that the owner or operator files a pre-filing request with the Federal Energy Regulatory Commission (FERC) under 18 CFR parts 153 and 157, but, in all cases, at least 1 year prior to the start of construction. The LOI must include the nation of registry for, and the nationality or citizenship of the officers and crew serving on board, vessels transporting LNG that are reasonably anticipated to be servicing the LNG facility.

(2) The owner or operator of an LHG facility must submit the LOI to the COTP no later than the date that the owner or operator files with the Federal or State agency having jurisdiction, but, in all cases, at least 1 year prior to the start of construction.

(b) An owner or operator intending to reactivate an inactive facility must submit an LOI that meets paragraph (c) of this section to the COTP of the zone in which the facility is located.

(1) The owner or operator of an LNG facility must submit the LOI to the COTP no later than the date the owner or operator files a pre-filing request with FERC under 18 CFR parts 153 and 157, but, in all cases, at least 1 year prior to the start of LNG transfer operations.

(2) The owner or operator of an LHG facility must submit the LOI to the COTP no later than the date the owner or operator files with the Federal or State agency having jurisdiction, but, in all cases, at least 1 year prior to the start of LHG transfer operations.

* * * * *

(e) An owner or operator intending to build a new LNG or LHG facility, or an owner or operator planning new construction to expand marine terminal operations in any facility handling LNG or LHG, where the construction or expansion will result in an increase in the size or frequency of LNG or LHG marine traffic on the waterway associated with a facility, must file or update as appropriate a waterway suitability assessment (WSA) with the COTP of the zone in which the facility is or will be located. The WSA must consist of a Preliminary WSA and a Follow-on WSA. A COTP may request additional information during review of the Preliminary WSA or Follow-on WSA.

* * * * *

(i) An owner or operator intending to construct a new LNG fuel facility or modify any LNG fuel facility, or reactivate an inactive LNG fuel facility, may comply with § 127.008 in lieu of meeting the requirements in this section.

■ 6. Add § 127.008 to read as follows:

**§ 127.008 Letter of intent and operational risk assessment for LNG fuel facilities.**

(a) An owner or operator intending to build a new LNG fuel facility, modify construction of any LNG fuel facility, or reactivate an inactive LNG fuel facility electing to complete an operational risk assessment (ORA) in lieu of a WSA as outlined in § 127.007, must submit an LOI and ORA to the COTP of the zone in which the LNG fuel facility is or will be located at least 1 year prior to the start of LNG transfer operations.

(b) Each LOI must contain the information in § 127.007(c)(1) through (c)(5).

(c) The owner or operator who submits an LOI under paragraph (a) of this section must notify the COTP in writing within 15 days of any of the following:

(1) There is any change in the information submitted under paragraph (b) of this section; or

(2) No LNG fuel transfer operations are scheduled within the next 12 months.

(d) The ORA required by paragraph (a) must:

(1) Be carried out in accordance with Chapter 7 of ISO/TS 18683 and Appendix D of DNVGL–RP–G105; or Chapter 19 of NFPA 59A (all incorporated by reference, see § 127.003); or other industry developed risk assessment method acceptable to the Office of Operating and Environmental Standards, Commandant (CG–OES); and

(2) Consider possible factors affecting the ship/shore interface and port operations described in Section 6 of ISO 28460 (incorporated by reference, see § 127.003).

■ 7. In § 127.009, revise paragraph (a) introductory text and paragraph (a)(1) to read as follows:

**§ 127.009 Letter of recommendation.**

(a) After the COTP receives the information and analyses required by § 127.007 or § 127.008, the COTP issues a Letter of Recommendation (LOR) as to the suitability of the waterway for LNG or LHG marine traffic or the operational safety and security of the LNG fuel facility to the Federal, State, or local government agencies having jurisdiction for siting, construction, and operation, and, at the same time, sends a copy to the owner or operator, based on the—

(1) Information submitted under § 127.007 or § 127.008;

* * * * *

**§ 127.011 [Amended]**

■ 8. Amend § 127.011 by removing the word ''shall'' and adding, in its place, the word ''must''.

■ 9. In § 127.015, revise paragraphs (c)(1) and (d) to read as follows:

**§ 127.015 Appeals.**

* * * * *

(c) * * *

(1) Appeal that ruling in writing to the Assistant Commandant for Prevention Policy, U.S. Coast Guard, (CG–5P), 2703 Martin Luther King Jr. Ave. SE, Stop 7509, Washington, DC 20593–7509; and

* * * * *

(d) The Assistant Commandant for Prevention Policy issues a ruling after reviewing the appeal submitted under paragraph (c) of this section, which is final agency action.

* * * * *

■ 10. In § 127.017, revise the paragraph (a) introductory text to read as follows:

**§ 127.017 Alternatives.**

(a) The COTP may allow alternative procedures, methods, or equipment standards, including alternatives to standards listed in § 127.003, to be used by an operator instead of any requirements in this part if—

* * * * *

■ 11. Revise § 127.101 to read as follows:

**§ 127.101 Design and construction: General.**

The marine transfer area for LNG must meet the following criteria in NFPA 59A (incorporated by reference, see § 127.003):

(a) Chapter 5, Section 5.3.1.7;

(b) Chapter 6, Section 6.7;

(c) Chapter 10;

(d) Chapter 11, except Sections 11.9, and 11.10;

(e) Chapter 12;

(f) Chapter 15, except Sections 15.4 and 15.6; and

(g) Annex B.

■ 12. In § 127.107, revise paragraphs (a) and (c) to read as follows:

**§ 127.107 Electrical power systems.**

(a) The electrical power system must have a power source and a separate emergency power source, so that failure of one source does not affect the capability of the other source. The system must meet NFPA 70 (incorporated by reference, see § 127.003).

* * * * *

(c) If an auxiliary generator is used as an emergency power source, it must meet Section 700.12 of NFPA 70 (incorporated by reference, see § 127.003).

■ 13. In § 127.201, revise paragraphs (b)(2) and (c)(1) and (2) to read as follows:

**§ 127.201 Sensing and alarm systems.**

* * * * *

(b) * * *

(2) Meet Section 16.4 of NFPA 59A (incorporated by reference, see § 127.003).

(c) * * *

(1) Be in each enclosed or covered Class I, Division 1, hazardous location defined in Section 500.5(B)(1) of NFPA 70 (incorporated by reference, see § 127.003) and each area in which flammable or combustible material is stored; and

(2) Meet Section 16.4 of NFPA 59A (incorporated by reference, see § 127.003).

**§ 127.301 [Amended]**

■ 14. In § 127.301(b), remove the word ''shall'' wherever it appears, and add, in its place, the word ''must''.

**§ 127.311 [Amended]**

■ 15. In § 127.311(a), remove the word ''shall'' and add, in its place, the word ''must''.

**§ 127.313 [Amended]**

■ 16. Amend § 127.313 by:

■ a. In paragraph (a), removing the word ''shall'' and adding, in its place, the word ''must''; and

■ b. In paragraph (b), removing the text ''Chapter 4 of NFPA 30'' and adding, in its place, the text ''NFPA 30 (incorporated by reference, see § 127.003)''.

**§ 127.315 [Amended]**

■ 17. In § 127.315 introductory text, remove the word ''shall'' and add, in its place, the word ''must''.

**§ 127.317 [Amended]**

■ 18. In § 127.317(a) and (b), remove the word ''shall'' wherever it appears, and add, in its place, the word ''must''.

**§ 127.319 [Amended]**

■ 19. In § 127.319(a) and (b), remove the word ''shall'' wherever it appears and add, in its place, the word ''must''.

**§ 127.321 [Amended]**

■ 20. In § 127.321, remove the word ''shall'' wherever it appears and add, in its place, the word ''must''.

**§ 127.401 [Amended]**

■ 21. In § 127.401, remove the word ''shall'' and add, in its place, the word ''must''.

**§ 127.403 [Amended]**

■ 22. In § 127.403, remove the word ''shall'' and add, in its place, the word ''must''.

■ 23. In § 127.405, revise the introductory text and paragraphs (a)(1) and (b) to read as follows:

**§ 127.405 Repairs.**

The operator must ensure that—

(a) * * *

(1) The equipment continues to meet the applicable requirements in this subpart and in NFPA 59A (incorporated by reference, see § 127.003); and

* * * * *

(b) Welding is done in accordance with NFPA 51B and Section 10.4.3 of NFPA 59A (both incorporated by reference, see § 127.003).

**§ 127.407 [Amended]**

■ 24. In § 127.407(a), remove the word ''shall'' and add, in its place, the word ''must''.

**§ 127.409 [Amended]**

■ 25. In § 127.409(a), remove the word ''shall'' and add, in its place, the word ''must''.

■ 26. In § 127.603, revise paragraph (a) to read as follows:

**§ 127.603 Portable fire extinguishers.**

* * * * *

(a) Portable fire extinguishers that meet Section 16.6.1 of NFPA 59A and Chapter 6 of NFPA 10 (both incorporated by reference, see § 127.003); and

* * * * *

**§ 127.611 [Amended]**

■ 27. In § 127.611, remove the text ''ASTM F 1121'' and add, in its place, the text ''ASTM F1121–87 (Reapproved 2019)''.

**§ 127.613 [Amended]**

■ 28. In § 127.613, remove the word ''shall'' and add, in its place, the word ''must''.

**§ 127.615 [Amended]**

■ 29. In § 127.615, remove the word ''shall'' and add, in its place, the word ''must''.

**§ 127.617 [Amended]**

■ 30. In § 127.617, remove the word ''shall'' and add, in its place, the word ''must''.

**§§ 127.701 through 127.711 [Removed]**

■ 31. Remove §§ 127.701 through 127.711, including the undesignated center heading ''Security'' that precedes § 127.701.

**§ 127.1101 [Amended]**

■ 32. Amend § 127.1101 by:

■ a. In paragraph (a), removing the text ''ASME B31.3'' and adding, in its place, the text ''ASME B31.3–2020 (incorporated by reference, see § 127.003)''; and

■ b. In paragraph (h), after the text ''API RP 2003'' adding the text ''(incorporated by reference, see § 127.003)''.

**§ 127.1102 [Amended]**

■ 33. In § 127.1102(a)(4)(ii), remove the text ''ANSI B16.5'' and add, in its place, the text ''ASME B16.5–2020 (incorporated by reference, see § 127.003)''.

**§ 127.1103 [Amended]**

■ 34. In § 127.1103, remove the word ''existing'' wherever it appears.

**§ 127.1105 [Amended]**

■ 35. In § 127.1105 introductory text, remove the word ''existing''.

**§ 127.1107 [Amended]**

■ 36. In § 127.1107, after the text ''NFPA 70'' add the text ''(incorporated by reference, see § 127.003)''.

**§ 127.1203 [Amended]**

■ 37. In § 127.1203(a), remove the text ''ANSI S12.13, Part I'' and add, in its place, the text ''IEC 60079–29–1 (incorporated by reference, see § 127.003)''.

**§ 127.1207 [Amended]**

■ 38. In § 127.1207(c), remove the word ''shall'' and add, in its place, the word ''must''.

**§ 127.1301 [Amended]**

■ 39. In § 127.1301(b), remove the word ''shall'' and add, in its place, the word ''must''.

**§ 127.1302 [Amended]**

■ 40. In § 127.1302(a) introductory text and (c), remove the word ''shall'' wherever it appears, and add, in its place, the word ''must''.

**§ 127.1311 [Amended]**

■ 41. In § 127.1311, remove the word ''shall'' wherever it appears, and add, in its place, the word ''must''.

**§ 127.1313 [Amended]**

■ 42. Amend § 127.1313 as follows:
■ a. In paragraph (a), remove the word ''shall'' and add, in its place, the word ''must''; and
■ b. In paragraph (b),
■ i. Remove the word ''shall'' and add, in its place, the word ''must''; and
■ ii. Remove the text, ''Chapter 4 of NFPA 30''; and add, in its place the text ''NFPA 30 (incorporated by reference, see § 127.003)''.

**§ 127.1315 [Amended]**

■ 43. In § 127.1315 introductory text, remove the word ''shall'' and add, in its place, the word ''must''.

**§ 127.1317 [Amended]**

■ 44. In § 127.1317(a), (d), and (e), remove the word ''shall'' wherever it appears, and add, in its place, the word ''must''.

**§ 127.1319 [Amended]**

■ 45. In § 127.1319, remove the word ''shall'' wherever it appears, and add, in its place, the word ''must''.

**§ 127.1321 [Amended]**

■ 46. In § 127.1321, remove the word ''shall'' wherever it appears, and add, in its place, the word ''must''.

**§ 127.1325 [Amended]**

■ 47. In § 127.1325 introductory text, remove the word ''shall'' and add, in its place, the word ''must''.

**§ 127.1401 [Amended]**

■ 48. In § 127.1401, remove the word ''shall'' and add, in its place, the word ''must''.

**§ 127.1403 [Amended]**

■ 49. In § 127.1403, remove the word ''shall'' wherever it appears, and add, in its place, the word ''must''.

**§ 127.1405 [Amended]**

■ 50. Amend § 127.1405 as follows:
■ a. In the introductory text, remove the word ''shall'' and add, in its place, the word ''must'';
■ b. In paragraph (a)(1), remove the word ''and''; and
■ c. In paragraph (b), after the text ''NFPA 51B'', add the text ''(incorporated by reference, see § 127.003)''.

**§ 127.1407 [Amended]**

■ 51. In § 127.1407(a) introductory text and paragraphs (c), (d), (e), and (f), remove the word ''shall'' wherever it appears, and add, in its place, the word ''must''.

**§ 127.1409 [Amended]**

■ 52. In § 127.1409, remove the word ''shall'' wherever it appears, and add, in its place, the word ''must''.

**§ 127.1501 [Amended]**

■ 53. In § 127.1501(a), delete the word ''existing.''

**§ 127.1503 [Amended]**

■ 54. In § 127.1503, after the text ''NFPA 10'', add the text ''(incorporated by reference, see § 127.003)''.

**§ 127.1511 [Amended]**

■ 55. In § 127.1511, remove the text ''ASTM F 1121'' and add, in its place, the text ''ASTM F1121–87 (Reapproved 2019)''.

**§ 127.1601 [Amended]**

■ 56. In § 127.1601 introductory text, remove the word ''shall'' and add, in its place, the word ''must''.

**§ 127.1603 [Amended]**

■ 57. In § 127.1603 introductory text, remove the word ''shall'' and add, in its place, the word ''must''.

**§ 127.1605 [Amended]**

■ 58. In § 127.1605 introductory text, remove the word ''shall'' and add, in its place, the word ''must''.

Dated: January 24, 2022.

**J.W. Mauger,**

*Rear Admiral, U.S. Coast Guard, Assistant Commandant for Prevention Policy.*

[FR Doc. 2022–01888 Filed 2–1–22; 8:45 am]

BILLING CODE 9110–04–P

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## ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

## 36 CFR Part 1155

**[Docket No. ATBCB–2020–0003]**

**RIN 3014–AA46**

## Procedures for Issuing Guidance Documents; Recission

**AGENCY:** Architectural and Transportation Barriers Compliance Board.

**ACTION:** Final rule.

**SUMMARY:** Pursuant to the Executive Order entitled ''Revocation of Certain Executive Orders concerning Federal Regulation'', the Architectural and Transportation Barriers Compliance Board (hereafter, ''Access Board,'' or ''Board''), is removing its regulation that details internal procedures for issuance, public availability, modification, and withdrawal of agency guidance documents, as defined by the Executive Order entitled ''Promoting the Rule of Law Through Agency Guidance Documents''.

**DATES:** This final rule is effective February 2, 2022.

**FOR FURTHER INFORMATION CONTACT:** General Counsel Christopher Kuczynski, (202) 272–0042, *generalcounsel@access-board.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Background

Executive Order (E.O.) 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents,'' issued on October 9, 2019, required each agency to promulgate regulations that ''set forth processes and procedures for issuing guidance documents.'' 84 FR 55235. On September 21, 2020, the Board issued a final rule, entitled ''Guidance Documents,'' to implement E.O. 13891. 85 FR 59187. The final rule established 36 CFR part 1155, which created internal procedural requirements governing the issuance, public availability, and modification or withdrawal of Access Board guidance documents.

On January 20, 2021, President Biden issued E.O. 13992, ''Revocation of Certain Executive Orders Concerning Federal Regulation,'' which, among other things, revokes E.O. 13891. 86 FR 7049. To comply with the new executive order, the Access Board is rescinding its newly-issued guidance procedures codified at 36 CFR part 1155. Nonetheless, the Board intends to retain all Access Board guidance documents in a single location on the agency's website at *www.access-board.gov/guidance,* as we believe this improves the usability of, and access to, our guidance documents for the public.

### II. Regulatory Process Matters

*Administrative Procedure Act*

The rescinded guidance procedures and this final rule solely address internal matters related to agency management and practices. As such, this rule is exempt from the notice-and-comment process pursuant to the Administrative Procedure Act. See 5 U.S.C. 553(a)(2), 553(b)(3)(A). The

original final rule was issued without notice and comment. This rule is also exempt from the requirement in 5 U.S.C. 553(d) that the effective date of a regulation must be at least 30 days after publication in the **Federal Register**.

*Executive Order 12866*

This final rule rescinds internal rules of agency procedure only. OMB has determined that the rule is not a significant regulatory action within the meaning of Executive Order 12866.

*Congressional Review Act*

This final rule is not a major rule within the meaning of the Congressional Review Act. *See* 5 U.S.C. 801, *et seq.*

*Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) requires Federal agencies to analyze regulatory options that may assist in minimizing any significant impact of a rule on small businesses and small governmental jurisdictions. See 5 U.S.C. 604, 605(b). Because this final rule relates solely to the recission of agency internal procedures and, moreover, is not subject to notice-and-comment rulemaking, the RFA is inapplicable.

*Federalism (Executive Order 13132)*

The Access Board has analyzed this direct final rule in accordance with the principles and criteria set forth in Executive Order 13132. The Board has determined that 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, and, therefore, does not have Federalism implications.

*Paperwork Reduction Act*

This final rule does not specify any new collections of information or recordkeeping requirements that require OMB approval under the Paperwork Reduction Act. See 44 U.S.C. 3501 *et seq.*

*Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act of 1995 (codified at 2 U.S.C. 1531 *et seq.*) (''UMRA'') generally requires that Federal agencies assess the effects of their discretionary regulatory actions that may result in the expenditure of $100 million (adjusted for inflation) or more in any one year by the private sector, or by State, local, and tribal governments in the aggregate. Because this direct final rule is being issued under the good cause exception in the Administrative Procedure Act section 553(b)(B), UMRA's analytical requirements are inapplicable. See 2 U.S.C. 1532(a).

**List of Subjects in 36 CFR Part 1155**

Administrative practice and procedure.

For the reasons discussed in the preamble, and under the authority of 29 U.S.C. 792, the Access Board amends 36 CFR chapter XI as follows:

## PART 1155—[REMOVE AND RESERVE]

■ 1. Remove and reserve part 1155.

**Sachin Pavithran,**

*Executive Director.*

[FR Doc. 2022–02132 Filed 2–1–22; 8:45 am]

BILLING CODE 8150–01–P

## DEPARTMENT OF VETERANS AFFAIRS

## 38 CFR Part 1

**RIN 2900–AR20**

## Threshold for Reporting VA Debts to Consumer Reporting Agencies

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) amends its regulations around the conditions by which VA benefits debts or medical debts are reported to consumer reporting agencies (CRA). The Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020 provides the Secretary authority to prescribe regulations that establish the minimum amount of a benefits or medical debt that the Secretary will report to the CRA. This change will establish the methodology for determining a minimum threshold for debts reported to CRA.

**DATES:** This rule is effective March 4, 2022.

**FOR FURTHER INFORMATION CONTACT:** Jason Hoge, Director of Operations, Debt Management Center, Office of Management, 189, 1 Federal Drive, Suite 4500, Fort Snelling, MN 55111, (612) 725–4337. (This is not a toll-free telephone number.)

**SUPPLEMENTARY INFORMATION:** On July 23, 2021 (86 FR 38958), VA published a proposed rule in the **Federal Register** that would significantly reduce the amount of VA debts referred to the CRA. VA provided a 60-day comment period, which ended on September 21, 2021. VA received nine comments on the proposed rule.

**Summary of Regulatory Changes**

This final rule amends VA's regulation that governs reporting of delinquent debts to CRA. This rulemaking would update the regulation to comply with section 2007 of Public Law 116–315, the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020. Section 2007 amends chapter 53 of title 38, United States Code by adding section 5320 as follows: ''The Secretary shall prescribe regulations that establish the minimum amount of a claim or debt, arising from a benefit administered by the Under Secretary for Benefits or Under Secretary for Health, that the Secretary will report to a consumer reporting agency under section 3711 of title 31.''

This amendment will establish the methodology for determining the minimum threshold for reporting certain VA debts to CRA. It will also exclude from the minimum threshold those debts in which there is an indication of fraud, misrepresentation, or bad faith on the part of the debtor.

**Background on Governing Statutes**

The Debt Collection Improvement Act of 1996 (DCIA), in part, mandated agencies to report delinquent debts to CRA. 31 U.S.C. 3711(e); Sec. 31001(k), Public Law 104–134, 110 Stat. 1321. The purpose of the DCIA includes maximizing collection of delinquent debts by ensuring quick action to recover debts, use of appropriate collection tools, and minimizing the costs of debt collection. Sec. 31001(b), Public Law 104–134.

Section 5320 of title 38, United States Code, authorizes VA to ''establish the minimum amount of a claim or debt, arising from a benefit administered by the Under Secretary for Benefits or Under Secretary for Health, that the Secretary will report to a consumer reporting agency under section 3711 of title 31.'' The intent of section 5320 is to lessen negative impact of CRA reports on Veterans.

**Introduction to Regulatory Changes**

As explained in more detail below, we amend 38 CFR 1.916 to comply with 38 U.S.C. 5320, to establish a minimum threshold for reporting debts to CRA.

In accordance with 31 U.S.C. 3711(e), the VA Debt Management Center (DMC) is responsible for reporting delinquent debts to CRA. Prior to January 5, 2021, DMC reported an average of 5,000 delinquent Veteran accounts monthly. DMC regularly receives complaints from Veterans whose accounts have been reported to CRA. Common complaints

from Veterans include loss of security clearance, inability to obtain approval for home loans or home refinancing, and difficulty securing rental housing. This amendment recognizes that the debts described in 38 U.S.C. 5320 are fundamentally different from consumer debt. Debts arising from a benefit administered by the Under Secretary for Benefits or the Under Secretary for Health may result from a variety of scenarios, including overpayments that are not the fault of the Veteran.

Section 5320 authorizes the Secretary to establish a minimum threshold that will ultimately reduce the number of debts that will be reported to CRA. This will, in turn, decrease the number of Veterans negatively impacted by these reports. The VA's mission is to ''fulfill President Lincoln's promise 'To care for him who shall have borne the battle, and for his widow, and his orphan' by serving and honoring the men and women who are America's Veterans.'' Negative credit reports may cause housing insecurity or job loss, and this result is inconsistent with VA's mission.

**38 CFR 1.916 Disclosure of Debt Information to Consumer Reporting Agencies (CRA)**

We amend 38 CFR 1.916, which sets forth the requirements for reporting delinquent debts to CRA, by inserting paragraphs (c)(1) through (3) to provide the methodology used by the Secretary to establish the minimum threshold. This section would also clarify that the minimum threshold applies only to a debt of an individual that arises from a benefit administered by the Under Secretary for Benefits or Under Secretary for Health.

We add paragraphs (c)(1) through (3) to provide that:

- The Secretary has established a minimum threshold for a debt, arising from a benefit administered by the Under Secretary for Benefits or Under Secretary for Health, that the Secretary will report to a consumer reporting agency under section 3711 of title 31.
- VA will only report those debts that meet the following standards:
  - The debt is classified as currently not collectible. For purposes of this paragraph, the debt is currently not collectible if VA has exhausted available collection efforts, including, as appropriate, referrals for administrative offset and enforced collection;
  - The debt is not owed by an individual who is determined by VA to be catastrophically disabled or has reported to VA a gross household income below the applicable geographically adjusted income limits that would entitle a VA beneficiary to cost-free health care, medications and/or beneficiary travel; and
  - The outstanding debt amount is over $25, or such higher amount VA may from time to time prescribe, in accordance with § 1.921 of the part.
- The minimum threshold set forth in the paragraph will not apply if there is an indication of fraud, misrepresentation, or bad faith on the part of the individual in connection with the debt.

*Positive Comments*

Most commenters were in support of the proposed rule. One commenter stated that the rule will make life easier for Veterans, particularly those who have experienced conditions that require them to receive financial assistance from VA. Another commenter stated the rule demonstrates that VA recognizes these debts are not like consumer debts and result from many sources, including some that are of no fault of the Veteran. The commenter added the proposed rule makes it clear that VA understands that fraudulent and misrepresented claims should not be tolerated, and these are exempt from the proposed rule, as they should be. An additional commenter similarly mentioned that these debts should be recognized differently from consumer debts as many times it is not the fault of the Veteran, and we should be protecting those who serve us.

VA thanks the commenters for their support of the rule. We are not making any changes based on these comments.

*Comments on Referral of Medical Debts*

One commenter stated there should never be a time Veteran medical debts should be reported to a credit reporting agency. The commenter added that reporting Veterans for non-payment or delinquent status of a medical debt can further add to the mental and emotional turmoil most are already dealing with.

Another commenter suggested expanding reporting restrictions to Veterans in priority groups one through seven. The commenter states the proposed criteria would effectively exclude Veterans in VA health care priority groups four and five but leave several categories of Veterans unprotected. The commenter added Veterans should be as insulated as possible from the negative consequences of having medical debt included in their credit reports and urged the VA to exclude all delinquent debts held by Veterans in priority groups one through seven.

VA acknowledges and understands the concern with reporting medical debts to CRA. However, the proposed rule states VA will only report debts that are considered currently not collectible, the debt is not owed by an individual who is determined catastrophically disabled or has a gross household income below the applicable geographically adjusted income limit, and the outstanding debt amount is over $25. When considering VA medical debts that fall under these conditions, VA is obligated by the Debt Collection Improvement Act (DCIA) to report delinquent debts to the CRA. Through VA's analysis and determination of the referral conditions, the current rule is projected to result in a significant reduction in referred debts while continuing to comply with DCIA. Therefore, VA is not making changes based on these comments.

*Comment on Minimum Threshold Amount*

Several commenters voiced concern over the $25 minimum threshold amount. One commenter suggested the $25 threshold be increased to $1,000 since this would more likely represent a common loan borrowed on the regular marketplace. The commenter also stated a significant amount of Veterans face housing and job insecurity, even with benefits extended to them, so the proposed threshold requirement should be higher.

Another commenter stated by setting a low monetary threshold of $25, it is hard to imagine there will be a significant reduction in debt reporting. The same commenter suggested the VA set the minimum threshold at the 10 percent rating monthly rate.

One commenter suggested to substantially increase the proposed dollar amount from $25 to a higher threshold that would follow various characteristics about Veterans' delinquent debt, such as the median medical collections tradeline provided by Consumer Financial Protection Bureau (CFPB). The commenter further explains the CFPB reports that the addition of any paid or unpaid collections tradeline can significantly reduce a credit score and may even preclude individuals from accessing the credit market altogether.

VA considered several different threshold amounts and after thorough analysis came to the threshold as proposed in the rule which includes four criteria: (1) The debt is classified as currently not collectible; (2) The debt is not owed by an individual who is determined by VA to be catastrophically disabled or has reported to VA a gross household income below the applicable geographically adjusted income limits; (3) The outstanding debt amount is over

$25.00; and (4) There is no indication of fraud, misrepresentation, or bad faith on the part of the individual in connection with the debt. Based on the comprehensive impact of the criteria in addition to the dollar amount, VA is not making changes based on these comments.

*Comments on Definition of Catastrophically Disabled Veteran*

One commenter suggested expanding its exemptions to all totally and permanently disabled Veterans as an additional way to lessen the impact of CRA reporting. Another commenter stated VA should align the ''catastrophically disabled'' rule to meet the Department of Education's Total and Permanent Disability Discharge program. The commenter states VA's use of ''catastrophically disabled'' in the proposed rule places a significantly higher standard even though a rating of 100% or a finding of total disability makes it just as unreasonable to expect the Veteran to be able to repay the debt. One commenter made a similar suggestion that VA should consider expanding its exemptions to all totally and permanently disabled Veterans as an additional way to lessen the impact of CRA reporting.

As stated in the proposed rule, VA will only report debts to CRA if the debt is not owed by an individual who is determined to be catastrophically disabled or has reported to VA a gross household income below the applicable geographically adjusted income limits. Due to the requirements of the DCIA and the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020, VA is not making changes based on these comments.

*Comments on Veteran Benefits*

One commenter stated benefits or entitlements for Veterans should not end once they are no longer in the service due to medical issues or disabilities caused by their time in the military. It was also suggested that all Veterans should have a counselor of some sort to inform them of their financial responsibilities in connection with receiving services. Another commenter stated Veterans need more support and access to benefits than what is currently available, and the benefits that are available should not be allowed to negatively impact Veterans on the housing and job market.

VA acknowledges the concerns addressed in these comments; however, the comments do not directly correlate with the proposed rulemaking so VA will not be making any changes based on these comments.

*Comment on Referral of Education Debts*

One commenter stated the proposed rule should be revised to exempt, or at a minimum, specifically restrict the reporting of educational overpayment debts to a CRA since most of these debts are caused by error or delay by VA or an institution.

Effective January 5, 2021, Public Law 116–315 section 1019 was enacted, making the school, instead of the student, financially liable for payments such as tuition, fees, and Yellow Ribbon paid directly to a school. Therefore, any educational overpayment debt owed to the VA would be a books and supplies or housing debt. Students currently enrolled in school would have their debts offset by their VA benefits so there should be very few debts classified as currently not collectible in this category. Due to the fact that reporting educational overpayment debts to CRA is a rare occurrence, VA is not making changes based on this comment.

*Comment on Referral of Debts Under Dispute by a Veteran*

One commenter suggested the VA should prohibit reporting of any debt to a CRA that is being disputed until an individual's dispute or appeal is resolved. The commenter states if the dispute is found in favor of the Veteran, the inaccurate negative credit report may have caused irreversible financial harm, such as the loss of a security clearance, inability to obtain credit for the purchase of a home or vehicle, and inability to secure rental housing.

When an individual timely disputes or appeals his or her VA debt, VA pauses collection on the debt, and the debt would not be referred to CRA until the dispute or appeal has been resolved. The determination of currently not collectible would come well after any resolution of a dispute. VA is not making changes based on this comment.

Based on the rationale set forth in the **SUPPLEMENTARY INFORMATION** to the proposed rule and in this final rule, VA is adopting the proposed rule with no changes.

**Executive Orders 12866 and 13563**

Executive Orders 12866 and 13563 direct agencies to assess the 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 determined that this rule is not a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at *www.regulations.gov.*

**Regulatory Flexibility Act**

The Secretary hereby certifies that this 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). The regulations established by this rulemaking do not impose burdens or otherwise regulate the activities of any small entities outside of VA. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

**Paperwork Reduction Act**

This rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

**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. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

**Congressional Review Act**

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act) (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

**List of Subjects in 38 CFR Part 1**

Administrative practice and procedure, Archives and records, Cemeteries, Claims, Courts, Crime, Flags, Freedom of information, Government contracts, Government employees, Government property,

Infants and children, Inventions and patents, Parking, Penalties, Postal Service, Privacy, Reporting and recordkeeping requirements, Seals and insignia, Security measures, Wages.

**Signing Authority**

Denis McDonough, Secretary of Veterans Affairs, approved this document on December 2, 2021, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

**Jeffrey M. Martin,**

*Assistant Director, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.*

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 1 as set forth below:

## PART 1—GENERAL PROVISIONS

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

**Authority:** 31 U.S.C. 3711(e); 38 U.S.C. 501, 5701(g) and (i); 38 U.S.C. 5320.

■ 2. Amend § 1.916 by revising paragraph (c) to read as follows:

**§ 1.916 Disclosure of debt information to consumer reporting agencies (CRA).**

* * * * *

(c) Subject to the conditions set forth in this paragraph (c) and paragraph (d) of this section, information concerning individuals may be disclosed to consumer reporting agencies for inclusion in consumer reports pertaining to the individual, or for the purpose of locating the individual. Disclosure of the fact of indebtedness will be made if the individual fails to respond in accordance with written demands for repayment, or refuses to repay a debt to the United States. In making any disclosure under this section, VA will provide consumer reporting agencies with sufficient information to identify the individual, including the individual's name, address, if known, date of birth, VA file number, and Social Security number.

(1) The Secretary has established a minimum threshold for a debt, arising from a benefit administered by the Under Secretary for Benefits or Under Secretary for Health, that the Secretary will report to a consumer reporting agency under 31 U.S.C. 3711.

(2) VA will only report those debts that meet the following standards:

(i) The debt is classified as currently not collectible. For purposes of this paragraph (c)(2)(i), the debt is currently not collectible if VA has exhausted available collection efforts, including, as appropriate, referrals for administrative offset and enforced collection;

(ii) The debt is not owed by an individual who is determined by VA to be catastrophically disabled or has reported to VA a gross household income below the applicable geographically adjusted income limits that would entitle a VA beneficiary to cost-free health care, medications and/or beneficiary travel; and

(iii) The outstanding debt amount is over $25, or such higher amount VA may from time to time prescribe, in accordance with § 1.921.

(3) The minimum threshold set forth in this paragraph (c) will not apply if there is an indication of fraud, misrepresentation, or bad faith on the part of the individual in connection with the debt.

* * * * *

[FR Doc. 2022–01496 Filed 2–1–22; 8:45 am]

BILLING CODE 8320–01–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 80

**[EPA–HQ–OAR–2021–0793; FRL–8521.1–01–OAR]**

**RIN 2060–AV57**

## Renewable Fuel Standard (RFS) Program: Extension of Compliance and Attest Engagement Reporting Deadlines

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is finalizing modifications of certain compliance dates under the Renewable Fuel Standard (RFS) program. First, EPA is extending the RFS compliance reporting deadline and the associated attest engagement reporting deadline for the 2019 compliance year for small refineries only. Second, EPA is extending the RFS compliance reporting deadline and the associated attest engagement reporting deadline for the 2020, 2021, and 2022 compliance years for all obligated parties. Finally, EPA is changing the way in which future RFS compliance and attest engagement reporting deadlines are determined.

**DATES:**

*Effective date:* The amendatory instructions in this final rule are effective on January 31, 2022.

*Operational dates:* For operational purposes under the Clean Air Act (CAA), this final rule is effective as of January 27, 2022.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2021–0793. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material is not available on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *https://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** For questions regarding this action, contact Karen Nelson, Office of Transportation and Air Quality, Compliance Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: (734) 214–4657; email address: *nelson.karen@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Dates**

Section 553(d) of the Administrative Procedure Act (APA), 5 U.S.C. chapter 5, generally provides that rules may not take effect until 30 days after they are published in the **Federal Register**. EPA is issuing this final rule under CAA section 307(d), which states, ''The provisions of section 553 through 557 . . . of Title 5 shall not, except as expressly provided in this section, apply to actions to which this subsection applies.'' Thus, section 553(d) of the APA does not apply to this rule. EPA is nevertheless acting consistently with the policies underlying APA section 553(d) in making this final rule effective upon signature. The purpose of this APA 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 an 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. Thus, APA section 553(d) allows an effective date less than 30 days after publication for any rule that ''grants or recognizes an exemption or relieves a restriction'' (see 5 U.S.C. 553(d)(1)). An accelerated effective date

may also be appropriate for good cause pursuant to APA section 553(d)(3) where an agency can ''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 the regulatory amendments to 40 CFR part 80, subpart M, are effective upon signature because they relieve a restriction by extending the 2019–2022 compliance reporting deadlines (and associated attest engagement report deadlines) ahead of the otherwise imminent 2020 and 2021 compliance reporting deadlines (January 31, 2022, and March 31, 2023, respectively), thereby providing obligated parties with additional time to demonstrate compliance.[1] There is additionally good cause for immediate implementation of these provisions such that they are effective in advance of the finalization of two different but related RFS actions, as this will ensure regulated parties have clarity on their present and future RFS obligations before they are required to demonstrate compliance for the years at issue. First, EPA has proposed to deny all pending small refinery exemption (SRE) petitions, including 29 petitions for 2019.[2] There is therefore good cause for this action to be effective upon signature to extend the regulatory deadline for small refineries to comply with their 2019 obligations (previously November 30, 2021) because EPA believes that the most equitable approach for the small refineries that have pending SRE petitions is to take final action on those petitions before small refineries are required to comply with their 2019 obligations. Second, EPA has proposed to revise the 2020 standards as well as to establish the 2021 and 2022 standards.[3] There is good cause for this action to be effective upon signature to relieve regulated entities of the requirement to comply with their 2020 obligations that may be modified by the final 2020–2022 rule; any delay in the effectiveness of this action past January 31, 2022, would result in confusion among regulated entities regarding the timing of their compliance obligations.

[1] This action postdates the previous 2019 compliance reporting deadline of November 30, 2021 (86 FR 17073, 17074; April 1, 2021).

[2] 86 FR 70999 (December 14, 2021) (hereinafter ''the Proposed SRE Denial'').

[3] 86 FR 72436 (December 21, 2021) (hereinafter ''the 2020–2022 rule'').

**Does this action apply to me?**

Entities potentially affected by this final rule are those involved with the production, distribution, and sale of transportation fuels, including gasoline, diesel, and renewable fuels such as ethanol, biodiesel, renewable diesel, and biogas. Potentially affected categories include:

| Category | NAICS [1] code | Examples of potentially affected entities |
|---|---|---|
| Industry .... | 324110 | Petroleum refineries. |
| Industry .... | 325193 | Ethyl alcohol manufacturing. |
| Industry .... | 325199 | Other basic organic chemical manufacturing. |
| Industry .... | 424690 | Chemical and allied products merchant wholesalers. |
| Industry .... | 424710 | Petroleum bulk stations and terminals. |
| Industry .... | 424720 | Petroleum and petroleum products merchant wholesalers. |
| Industry .... | 221210 | Manufactured gas production and distribution. |
| Industry .... | 454319 | Other fuel dealers. |

[1] North American Industry Classification System (NAICS).

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your entity would be affected by this action, you should carefully examine the applicability criteria in 40 CFR part 80. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

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## I. Background and Extension of Deadlines

The RFS regulations establish deadlines for obligated parties with renewable volume obligations (RVOs) to submit annual compliance reports to EPA, and later deadlines for the same parties to submit associated attest engagement reports. Under the previous RFS regulations, obligated parties needed to submit compliance reports for each calendar year by March 31 of the following year and the associated attest engagements by June 1 of the following year.[4] On April 1, 2021, EPA extended the deadlines for small refineries to demonstrate compliance with their 2019 RFS obligations and for all obligated parties to demonstrate compliance with their 2020 RFS obligations.[5] In that same action, we also extended the deadlines for the corresponding attest engagements reports.[6]

On November 26, 2021, we again proposed to extend certain reporting deadlines applicable to the 2019 and 2020 compliance years, and additionally to extend certain reporting deadlines for the 2021 compliance year, due to continued delay in the promulgation of the 2021 and 2022 standards and uncertainty around EPA's SRE policy.[7] Following this proposal, on December 14, 2021, we issued the Proposed SRE Denial, proposing to deny all pending SRE petitions. And on December 21, 2021, we proposed the 2020–2022 rule to establish the 2021 and 2022 standards and to modify the 2020 standards.

Table I–1 summarizes the new annual compliance and attest engagement reporting deadlines for the 2019–2022 compliance years that EPA is finalizing.

[4] See 40 CFR 80.1451(a) and 80.1464(d).

[5] 86 FR 17073 (April 1, 2021).

[6] *Id.*

[7] 86 FR 67419 (November 26, 2021).

Obligated party commenters generally supported our proposal to extend the compliance deadlines, although some suggested that longer compliance deadline extensions would be helpful. In contrast, biofuels industry groups opposed our proposal and suggested that extensions were not necessary or disruptive to the program. We have considered these comments, and in some cases (*i.e.,* 2022 deadlines), slightly adjusted our regulations in response to the comments.[8]

TABLE I–1—SUMMARY OF RFS ANNUAL COMPLIANCE AND ATTEST ENGAGEMENT REPORTING DEADLINES FOR OBLIGATED PARTIES FOR 2019–2022

| Compliance year | Obligated party | Annual compliance reporting deadline | Attest engagement reporting deadline |
|---|---|---|---|
| 2019 | All obligated parties (except small refineries). | March 31, 2020 | June 1, 2020. |
| 2019 | Small refineries | Next quarterly reporting deadline [a] after the effective date of the 2021 standards. | Next June 1 annual attest engagement reporting deadline after the 2019 compliance reporting deadline for small refineries. |
| 2020 | All obligated parties | Next quarterly reporting deadline after the 2019 compliance reporting deadline for small refineries. | Next June 1 annual attest engagement reporting deadline after the 2020 compliance reporting deadline. |
| 2021 | All obligated parties | Next quarterly reporting deadline after the 2020 compliance reporting deadline. | Next June 1 annual attest engagement reporting deadline after the 2021 compliance reporting deadline. |
| 2022 | All obligated parties | Next quarterly reporting deadline after either the effective date of the 2023 standards or the 2021 compliance reporting deadline, whichever is later. | Next June 1 annual attest engagement reporting deadline after the 2022 compliance reporting deadline. |

[a] The RFS quarterly reporting deadlines are March 31, June 1, September 1, and December 1, as specified in 40 CFR 80.1451(f)(2).

We are also finalizing a new approach to setting reporting deadlines for obligated parties that will automatically establish the annual compliance and attest engagement reporting deadlines for a given compliance year based on the effective date of the subsequent compliance year's standards, if such a date is after the March 31 regulatory deadline. We discuss this new approach in more detail in section I.D. Comments from both obligated parties and biofuels industry groups generally opposed the automatic extensions of the reporting deadlines. One obligated party commenter stated that an approach for automatic extensions should instead be considered as part of EPA's upcoming ''Set Rule'' for years 2023 and beyond. Biofuels industry groups stated that creating a system for automatic extensions of the reporting deadlines would disincentivize EPA from promulgating future-year standards on time. We have considered these comments, but we have concluded that having regulations in place that remove one source of uncertainty in the RFS program, were EPA to ever again be late in promulgating standards, is in the best interest of our implementation of the program, as it will render future rulemakings like this one to extend compliance deadlines unnecessary and prevent placing an unnecessary burden on obligated parties to prepare, submit, and then possibly retract and revise compliance reports for deadlines that were later extended. Therefore, we are finalizing our approach as proposed.[9]

*A. Extension of the 2019 RFS Compliance Reporting Deadline for Small Refineries*

For small refineries, we are extending the 2019 compliance reporting deadline to the next quarterly reporting deadline after the effective date of the 2021 standards, as proposed.[10] In December 2021, EPA proposed two RFS actions that, if finalized, are likely to affect 2019 compliance for small refineries. First, in the 2020–2022 rule, we proposed to lower the existing 2020 standards. As explained in that proposal, this revision is justified by decreased transportation fuel demand due to the COVID–19 pandemic and due to a potential change in approach to how EPA evaluates SRE petitions compared to the policy that was in place at the time the 2020 standards were finalized. Second, in the Proposed SRE Denial, we proposed to deny all pending SRE petitions currently before EPA.[11] The comment periods for these actions close after both the previous 2019 compliance deadline for small refineries and the previous 2020 compliance deadline for all obligated parties. Because we have not yet made a final decision on the SRE petitions nor finalized changes to the 2020 standards, and given the continued uncertainty surrounding SREs under the RFS program, we are finalizing our proposed extension of the 2019 compliance deadline until the next quarterly reporting deadline after the 2021 standards become effective.[12] We note also that, if we adjust the 2020 standards downward as proposed in the 2020–2022 rule, additional Renewable Identification Numbers (RINs) will likely become available in the marketplace for small refineries to demonstrate compliance with their 2019 obligations.

As an example of the potential timing of this deadline, if the final rule establishing the 2021 standards is published in the **Federal Register** on May 15, 2022, then the effective date of the 2021 standards would be 60 days later on July 14, 2022, and the 2019 compliance reporting deadline for small refineries would be September 1, 2022, because that would be the next quarterly reporting deadline after the effective date of the 2021 standards.[13] We are

[8] Further discussion of the comments received, and our responses to them, can be found in the Response to Comments document, available in the docket for this action.

[9] Further discussion of the comments received on the automatic reporting deadline extensions, and our responses to them, can be found in section 3 of the Response to Comments document, available in the docket for this action.

[10] The effective date of 2021 standards is generally expected to be 60 days after publication of the action establishing the standards in the **Federal Register**.

[11] EPA currently has before it over 60 SRE petitions for 2019–2021.

[12] A small refinery may petition EPA for an exemption from its RFS obligations under 40 CFR 80.1441(e)(2).

[13] Table I.C–1 illustrates this example deadline for 2019 based on an effective date of July 14, 2022.

tying the 2019 compliance reporting deadline to the effective date of the 2021 standards to allow for the proper sequencing of deadlines such that 2019 compliance will be complete prior to 2020 compliance, and 2020 compliance will be complete prior to 2021 compliance, given the continued delay in promulgating the 2021 standards. As noted earlier, we proposed to revise the 2020 standards in the 2020–2022 rule; thus, the 2020 standards may be revised along with the promulgation of the 2021 standards. The compliance schedule finalized in this action sequences the 2019 and 2020 compliance reporting deadlines to eliminate the need for small refineries to demonstrate compliance with their 2020 obligations before EPA takes a final action on revising the 2020 standards.

On January 24, 2020, the U.S. Court of Appeals for the Tenth Circuit issued a decision in *Renewable Fuels Association* v. *EPA* (*RFA*) invalidating on multiple grounds three SREs granted by EPA.[14] The small refineries whose SREs were invalidated by the court in the *RFA* case sought rehearing from the Tenth Circuit, which was denied on April 7, 2020.[15] Thus, the Tenth Circuit's decision was not final until after the 2019 compliance reporting deadline of March 31, 2020, had already passed. On September 4, 2020, the small refinery intervenors in that suit filed a petition for a writ of certiorari from the U.S. Supreme Court, which was granted on January 8, 2021, in *HollyFrontier* v. *RFA.*[16] On June 25, 2021, the Supreme Court issued its opinion in *HollyFrontier.*[17] In line with this case law, EPA has proposed to deny all of the pending SRE petitions in the Proposed SRE Denial, but as the comment period for that action is still ongoing, EPA has not yet made a final decision and there remains uncertainty about the resolution of the 2019 and other pending SRE petitions at this time.

Therefore, we believe it appropriate to extend the 2019 compliance reporting deadline for small refineries as proposed. Additionally, because we proposed to modify the 2020 standards in the 2020–2022 rule, RIN availability in the market is likely to change due to the two-year ''lifespan'' of RINs. Obligated parties may satisfy up to 20 percent of their individual 2020 obligations through the use of 2019 RINs. If finalized, our proposed reductions to the 2020 volumes would likely result in additional 2019 RINs being available in the market as parties make adjustments to their RIN holdings. These 2019 RINs could thus become available to small refineries for compliance with their 2019 RFS obligations. We believe that it is appropriate to extend the 2019 compliance reporting deadline only for small refineries because it is only their compliance requirements that have been affected by the recent *HollyFrontier* and *RFA* decisions. We are extending this flexibility to all small refineries regardless of whether they have an SRE petition for 2019 pending before EPA. All other obligated parties' compliance obligation deadlines for 2019 have already passed and remain unchanged.[18]

We recognize that some small refineries have already submitted their 2019 compliance reports. However, we will allow all small refineries to revisit their 2019 compliance reports before their new 2019 compliance reporting deadline. This means that if a small refinery carried forward a deficit to demonstrate compliance for 2019 by November 30, 2021, but later receives an SRE for 2019 or retires RINs in accordance with its RVOs, that initial decision to carry forward a deficit will not constitute a carry-forward deficit (*i.e.,* failing to meet the requirement to retire sufficient RINs as described in 40 CFR 80.1427(a)(1)) that would make the small refinery ineligible to do the same for 2020 under 40 CFR 80.1427(b). Small refineries that did not submit a compliance report by November 30, 2021, will need to submit a compliance report to comply with the new 2019 compliance reporting deadline, unless they receive an exemption for 2019.

This deadline extension will apply only to those parties who meet the definition of small refinery in Clean Air Act (CAA) section 211(o)(1)(k) and 40 CFR 80.1441(e)(2)(iii) for the 2019 compliance year. Limiting the extension in this way is appropriate because only small refineries' compliance obligations are affected by the *HollyFrontier* and *RFA* opinions and it is consistent with our eligibility requirements regarding SREs. We recognize that, in recent years, we have determined that some parties who have petitioned for SREs have been deemed ineligible by EPA, often due to the refinery's throughput (*i.e.,* more than 75,000 barrels of crude oil per day) or the nature of their business (*i.e.,* not a petroleum refinery). The parties that EPA has found ineligible because they do not meet the definition of small refinery in recent years will similarly not be eligible for the 2019 compliance date extension for small refineries.

We note that all of the existing regulatory flexibilities for small refineries—including the ability to satisfy up to 20 percent of their 2019 RVOs using 2018 carryover RINs under 40 CFR 80.1427(a)(5) and the ability to carry forward a deficit from 2019 to 2020 if they did not carry forward a deficit from 2018 under 40 CFR 80.1427(b)—continue to be available to them to demonstrate compliance for 2019 by the new 2019 compliance reporting deadline. This means that small refineries that carried forward a deficit for 2019 in their initial 2019 compliance reports (filed in 2020 or 2021) can reverse that decision in new compliance reports and retain their ability to carry forward a deficit for 2020. It also means that small refineries that did not submit a 2019 compliance report by November 30, 2021, can also carry forward a deficit for 2020. Finally, small refineries can either carry forward a deficit for 2019 (if they did not do so for 2018) or for 2020 (if they do not do so for 2019).

### *B. Extension of the 2020, 2021, and 2022 RFS Compliance Reporting Deadline for All Obligated Parties*

As proposed, we are finalizing the extension of the 2020 compliance reporting deadline for all obligated parties from January 31, 2022, to the next quarterly reporting deadline after the 2019 compliance reporting deadline for small refineries, and the extension of the 2021 compliance reporting deadline for all obligated parties from March 31, 2022, to the next quarterly reporting deadline after the 2020 compliance reporting deadline. Also, in response to comments and in order to ensure proper sequencing of the compliance reporting deadlines, we are extending the 2022 compliance reporting deadline for all obligated parties from March 31, 2023, to the next quarterly reporting deadline after either the effective date of the 2023 standards or the 2021 compliance reporting deadline, whichever is later. We are doing so because EPA has not yet established the 2021 or 2022 standards, including applicable volumes, and we recognize the importance to obligated parties of planning their compliance for a given calendar year by understanding their obligations for the years before and

[14] *Renewable Fuels Ass'n* v. *EPA,* 948 F.3d 1206 (10th Cir. 2020) (*RFA).*

[15] Order, *RFA,* No. 18–9533 (10th Cir. Apr. 7, 2020).

[16] *HollyFrontier Cheyenne Refining, LLC* v. *Renewable Fuels Ass'n,* 114 S.Ct. 2172 (2021).

[17] *Id.* at 2181.

[18] The 2019 compliance and attest engagement reporting deadlines were March 31, 2020, and June 1, 2020, respectively.

after.[19] This is particularly true given the two-year ''lifespan'' for RINs, such that 2020 RINs can be used for compliance with either 2020 or 2021 obligations. Compliance obligations for 2021 and 2022 will remain unknown until EPA finalizes the 2021 and 2022 standards. Additionally, EPA has proposed to modify the 2020 standards in the 2020–2022 rule. Delaying the 2020 compliance deadline until after EPA completes its revision of the 2020 standards would avoid unnecessary RIN retirements and corresponding unretirements due to potential modification of the standards. Finally, several commenters noted that it is likely that the 2022 compliance reporting deadline will be affected by the new sequencing of the 2019, 2020, and 2021 compliance reporting deadlines, and recommended that EPA take the same approach to extending the 2022 deadline as for 2020 and 2021. We agree with the commenters and are extending the 2022 compliance reporting deadline as well. However, unlike 2019, 2020, and 2021, for 2022 we have not yet proposed the subsequent year's standards (*i.e.,* the 2023 standards). Therefore, we are establishing the 2022 compliance reporting deadline as the next quarterly reporting deadline after either the effective date of the 2023 standards or the 2021 compliance reporting deadline, whichever is later. This will ensure that obligated parties know their 2023 obligations before complying with their 2022 obligations, consistent with our approach for 2019–2021.

These deadline extensions will allow proper sequencing of the compliance dates. It will allow small refineries to complete compliance with their 2019 obligations before having to comply with their 2020 RFS obligations. It will also allow for obligated parties to make additional RIN acquisitions, transfers, transactions, and retirements prior to the compliance reporting deadlines by providing at least 60 days between each of the 2019–2022 compliance reporting deadlines.

Using the prior example, if the final rule establishing the 2021 standards has an effective date of July 14, 2022, the 2019 compliance reporting deadline for small refineries would be September 1, 2022. Furthermore, by operation of law, under this scenario, the 2020 compliance reporting deadline for all obligated parties would be December 1, 2022, the 2021 compliance reporting deadline would be March 31, 2023, and the 2022 compliance reporting deadline would be June 1, 2023.[20]

*C. Corresponding Attest Engagement Reporting Deadlines*

We are finalizing the deadline extension for attest engagement reports required under 40 CFR 80.1464(g) for small refineries for 2019 compliance demonstrations and for all obligated parties for 2020 and 2021 compliance demonstrations to the next June 1 annual attest engagement reporting deadline after the applicable 2019–2021 compliance reporting deadline. Also, in response to comments and in order to ensure proper sequencing of the attest engagement reporting deadlines, we are extending the 2022 attest engagement reporting deadline for all obligated parties from June 1, 2023, to the next June 1 annual attest engagement reporting deadline after the 2022 compliance reporting deadline. Using the prior example where the final rule establishing the 2021 standards has an effective date of July 14, 2022, under this approach, the 2019 attest engagement reporting deadline for small refineries and the 2020 and 2021 attest engagement reporting deadline for all obligated parties would be due on June 1, 2023, and the 2022 attest engagement reporting deadline for all obligated parties would be due on June 1, 2024.

We are extending these attest engagement reporting deadlines to ensure enough time for attest auditors to reasonably conduct the 2019, 2020, 2021, and 2022 attest engagement reports. Because the annual attest engagement reporting deadline occurs only once each year (June 1), it is likely that with the new compliance deadline extensions, several of the affected 2019, 2020, 2021, and 2022 attest engagement reports will be due on the same June 1 deadline (either in 2023 or 2024). This change will therefore minimize confusion and maximize efficiency for the attest auditors to conduct and prepare reports.

Table I.C–1 illustrates the example deadlines for the 2019–2022 annual compliance and attest engagement reporting deadlines. Note that these dates do not represent the actual reporting deadlines, which will be based on the effective date of the 2021 standards. We will post the actual reporting deadlines on our reporting deadlines website.[21]

TABLE I.C–1—EXAMPLE RFS ANNUAL COMPLIANCE AND ATTEST ENGAGEMENT REPORTING DEADLINES FOR OBLIGATED PARTIES [a]

| Compliance year | Obligated party | Annual compliance reporting deadline | Attest engagement reporting deadline |
|---|---|---|---|
| 2019 | All obligated parties (except small refineries) | March 31, 2020 | June 1, 2020. |
| 2019 | Small refineries | September 1, 2022 | June 1, 2023. |
| 2020 | All obligated parties | December 1, 2022 | June 1, 2023. |
| 2021 | All obligated parties | March 31, 2023 | June 1, 2023. |
| 2022 | All obligated parties | June 1, 2023 | June 1, 2024. |

[a] Example based on an effective date of July 14, 2022, for the final rule establishing the 2021 standards.

*D. Annual Compliance and Attest Engagement Reporting Deadlines Based on Effective Date*

For annual compliance and annual attest engagement reporting deadlines for 2023 and beyond, we are finalizing the same approach as that outlined above for 2019–2022. Under this approach, for 2023 and beyond, the annual compliance reporting deadline will be the latest date of the following:

- March 31st of the subsequent calendar year;

[19] For discussion of obligated parties' interest in such extensions in past actions, see 80 FR 33100, 33149–50 (June 10, 2015) and 78 FR 49794, 49823 (August 15, 2013).

[20] Table I.C–1 illustrates these example deadlines for 2020, 2021, and 2022 based on an effective date of July 14, 2022.

[21] The reporting deadlines website is available at: *https://www.epa.gov/fuels-registration-reporting-and-compliance-help/reporting-deadlines-fuel-programs.*

• The next quarterly reporting deadline after the effective date of the subsequent compliance year's standards (typically 60 days after publication of the final rule in the **Federal Register**); or

• The next quarterly reporting deadline under 40 CFR 80.1451(f)(2) after the annual compliance reporting deadline for the prior compliance year.

Under this approach, which is consistent with the proposal, the annual compliance reporting deadline will also be at least 60 days after publication of the subsequent year's standards in the **Federal Register** and 60 days after the prior year's compliance reporting deadline. This approach will also avoid EPA having to repeatedly extend compliance reporting deadlines for obligated parties should promulgation of the subsequent year's standards be delayed, and will provide regulatory certainty for obligated parties. We will continue to strive to promulgate the standards for a given compliance year prior to the beginning of that year, and the provisions finalized in this action will apply only in the unusual circumstance where promulgation of the following year's standards are significantly delayed.

Similarly, for 2023 and beyond, we are tying the annual attest engagement reporting deadline to the effective date of the standards in the same manner as finalized for the 2019–2022 annual attest engagement reporting deadlines, which will make it the latest date of the following:

• June 1 of the subsequent calendar year; or

• The next June 1 annual attest engagement reporting deadline after the annual compliance reporting deadline.

Under this approach, annual attest engagement reports will be due at least 60 days after the annual compliance reporting deadline like under the current regulations.

To help communicate the annual compliance and annual attest engagement reporting deadlines, we will also post the annual compliance and annual attest engagement reporting deadlines on our website.[22]

*E. Severability*

We intend for our action in this final rule modifying the compliance reporting deadlines for 2019 for small refineries and 2020, 2021 and 2022 for all obligated parties, as well as the associated annual attest engagement reporting deadlines, to be severable from our modifications of the regulations relating to future compliance deadlines (*i.e.,* for compliance years 2023 and beyond).

## II. Statutory and Executive Order Reviews

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

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

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

*B. Paperwork Reduction Act (PRA)*

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2060–0725 and 2060–0723. This action only makes a one-time change in the compliance dates for certain regulated parties and adjusts the due date of their compliance reports and attest engagements to reflect this change. It does not change the information to be collected or increase the frequency of collection.

*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. In making this determination, EPA concludes that the impact of concern for this rule is any significant adverse economic impact on small entities and that the agency is certifying that this rulemaking will not have a significant economic impact on a substantial number of small entities if the rule has no net burden on the small entities subject to the rule. This action extends the RFS compliance and attest engagement reporting deadlines. We do not anticipate that there will be any costs associated with these changes. We have therefore concluded that this action will have no net regulatory burden for all directly regulated small entities.

*D. Unfunded Mandates Reform Act (UMRA)*

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

*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. This rule only affects RFS obligated parties. Thus, Executive Order 13175 does not apply to this action.

*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 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) and 1 CFR Part 51*

This action 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 is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does establish an environmental health or safety standard. This action addresses the RFS compliance and attest

[22] Information related to annual compliance and attest engagement reporting is available at: *https://www.epa.gov/fuels-registration-reporting-and-compliance-help/reporting-fuel-programs.* The annual compliance and attest engagement reporting deadlines will be posted at: *https://www.epa.gov/fuels-registration-reporting-and-compliance-help/reporting-deadlines-fuel-programs.*

engagement reporting deadlines and does not impact the standards themselves.

*K. Congressional Review Act (CRA)*

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

**III. Statutory Authority**

Statutory authority for this action comes from section 211(o) of the Clean Air Act, 42 U.S.C. 7545(*o*).

**List of Subjects in 40 CFR Part 80**

Environmental protection, Administrative practice and procedure, Air pollution control, Diesel fuel, Fuel additives, Gasoline, Imports, Oil imports, Penalties, Petroleum, Renewable fuel, Reporting and recordkeeping requirements.

Dated: January 27, 2022.

**Michael S. Regan,**

*Administrator.*

For the reasons set forth in the preamble, EPA amends 40 CFR part 80 as follows:

## PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

■ 1. The authority citation for part 80 continues to read as follows:

**Authority:** 42 U.S.C. 7414, 7521, 7542, 7545, and 7601(a).

## Subpart M—Renewable Fuel Standard

■ 2. Amend § 80.1451 by:
■ a. Revising paragraph (a)(1) introductory text;
■ b. Removing and reserving paragraph (a)(1)(xiv);
■ c. Revising paragraph (f) introductory text; and
■ d. Adding paragraph (f)(1) and headings for paragraphs (f)(2) and (3).

The revisions and additions read as follows:

### § 80.1451 What are the reporting requirements under the RFS program?

(a) * * *

(1) Annual compliance reports must include all the following information:

* * * * *

(f) *Report submission deadlines.* The submission deadlines for annual and quarterly reports are as follows:

(1) *Annual compliance reports*—(i) *Obligated parties.* (A) Except as specified in paragraph (f)(1)(i)(B) of this section, for obligated parties, annual compliance reports must be submitted by whichever of the following dates is latest:

(*1*) March 31 of the subsequent calendar year.

(*2*) The next quarterly reporting deadline under paragraph (f)(2) of this section after the date the subsequent compliance year's renewable fuel standards become effective in § 80.1405(a).

(*3*) The next quarterly reporting deadline under paragraph (f)(2) of this section after the annual compliance reporting deadline for the prior compliance year.

(B)(*1*) For obligated parties that meet the requirements for a small refinery under § 80.1441(e)(2)(iii), for the 2019 compliance year, annual compliance reports must be submitted no later than the next quarterly reporting deadline under paragraph (f)(2) of this section after the date the 2021 renewable fuel standards become effective in § 80.1405(a).

(*2*) For the 2020 compliance year, annual compliance reports must be submitted no later than the next quarterly reporting deadline in paragraph (f)(2) of this section after the deadline in paragraph (f)(1)(i)(B)(*1*) of this section.

(*3*) For the 2021 compliance year, annual compliance reports must be submitted no later than the next quarterly reporting deadline in paragraph (f)(2) of this section after the deadline in paragraph (f)(1)(i)(B)(*2*) of this section.

(*4*) For the 2022 compliance year, annual compliance reports must be submitted by whichever of the following dates is latest:

(*i*) The next quarterly reporting deadline under paragraph (f)(2) of this section after the date the 2023 renewable fuel standards become effective in § 80.1405(a).

(*ii*) The next quarterly reporting deadline in paragraph (f)(2) of this section after the deadline in paragraph (f)(1)(i)(B)(*3*) of this section.

(ii) *All other parties.* For all parties other than obligated parties, annual compliance reports must be submitted by March 31 of the subsequent year.

(iii) *Deadline publication.* The annual compliance reporting deadline will be calculated in accordance with paragraph (f)(1)(i) of this section and published on EPA's website.

(2) *Quarterly compliance reports.* * * *

(3) *Report certification.* * * *

* * * * *

■ 3. Amend § 80.1464 by:
■ a. Revising paragraph (d); and
■ b. Removing and reserving paragraph (g); and
■ c. Removing paragraph (i)(3).

The revision reads as follows:

### § 80.1464 What are the attest engagement requirements under the RFS program?

* * * * *

(d) *Report submission deadlines*—(1) *Obligated parties.* (i) Except as specified in paragraph (d)(1)(ii) of this section, for obligated parties, annual attest engagement reports must be submitted to EPA by whichever of the following dates is latest:

(A) June 1 of the subsequent calendar year.

(B) The next June 1 annual attest engagement reporting deadline after the annual compliance reporting deadline under § 80.1451(f)(1)(i)(A).

(ii)(A) For obligated parties that meet the requirements for a small refinery under § 80.1441(e)(2)(iii), for the 2019 compliance year, annual attest engagement reports must be submitted to EPA no later than the next June 1 annual attest engagement reporting deadline after the annual compliance reporting deadline under § 80.1451(f)(1)(i)(B)(*1*).

(B) For obligated parties, for the 2020 compliance year, annual attest engagement reports must be submitted to EPA no later than the next June 1 annual attest engagement reporting deadline after the annual compliance reporting deadline under § 80.1451(f)(1)(i)(B)(*2*).

(C) For obligated parties, for the 2021 compliance year, annual attest engagement reports must be submitted to EPA no later than the next June 1 annual attest engagement reporting deadline after the annual compliance reporting deadline under § 80.1451(f)(1)(i)(B)(*3*).

(D) For obligated parties, for the 2022 compliance year, annual attest engagement reports must be submitted to EPA no later than the next June 1 annual attest engagement reporting deadline after the annual compliance reporting deadline under § 80.1451(f)(1)(i)(B)(*4*).

(2) *All other parties.* All parties other than obligated parties must submit annual attest engagement reports to EPA by June 1 of the subsequent calendar year.

(3) *Deadline publication.* The annual attest engagement reporting deadline will be calculated in accordance with paragraph (d)(1) of this section and published on EPA's website.

* * * * *

[FR Doc. 2022–02149 Filed 1–31–22; 8:45 am]

BILLING CODE 6560–50–P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 180**

**[EPA–HQ–OPP–2021–0656; FRL–9326–01–OCSPP]**

# Alcohols, C10–16, Ethoxylated, Sulfates, Mono(hydroxyethyl)ammonium Salts (CAS No. 157627–92–4); Tolerance Exemption

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes an exemption from the requirement of a tolerance for residues of alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts (CAS No. 157627–92–4); when used as an inert ingredient in pesticide formulations used pre- and post-harvest as well as in formulations applied to livestock. Spring Regulatory Sciences, on behalf of BASF Corporation, submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance for specific uses. This regulation eliminates the need to establish a maximum permissible level for residues of alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts (CAS No. 157627–92–4) on food or feed commodities or when applied to livestock.

**DATES:** This regulation is effective February 2, 2022. Objections and requests for hearings must be received on or before April 4, 2022, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2021–0656, is available at *https://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805.

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:** Marietta Echeverria, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this action apply to me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

### *B. How can I get electronic access to other related information?*

You may access a frequently updated electronic version of 40 CFR part 180 through the Office of the Federal Register's e-CFR site at *https://www.ecfr.gov/current/title40.*

### *C. Can I file an objection or hearing request?*

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2021–0656 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before April 4, 2022. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2021–0656, by one of the following methods.

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *https://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

## II. Petition for Exemption

In the **Federal Register** of October 21, 2021 (86 FR 58239) (FRL–8792–04), EPA issued a document pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the receipt of a pesticide petition (PP IN–11530) filed by Spring Regulatory Sciences (6620 Cypresswood Dr. Suite 250, Spring, TX 77379), on behalf of BASF Corporation (100 Park Avenue, Florham Park, New Jersey 07932). The petition requested that 40 CFR 180.910 and 180.930 be amended by establishing an exemption from the requirement of a tolerance for residues of alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts (CAS No. 157627–92–4) for use as an inert ingredient at no more than 30% by weight of the final pesticide formulation. That document included a summary of the petition prepared by the petitioner and solicited comments on the petitioner's request. The Agency did not receive any public comments.

## III. Inert Ingredient Definition

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of ingredients (except when they have a

pesticidal efficacy of their own): Solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term ''inert'' is not intended to imply nontoxicity; the ingredient may or may not be chemically active. Generally, EPA has exempted inert ingredients from the requirement of a tolerance based on the low toxicity of the individual inert ingredients.

## IV. Risk Assessment and Determination of Safety

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue.''

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be shown that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(c)(2)(B), EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure to alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts including exposure resulting from the exemption established by this action. EPA's assessment of exposures and risks associated with alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts follows.

In an effort to streamline its publications in the **Federal Register**, EPA is not reprinting sections that repeat what has been previously published for tolerance rulemakings of the same pesticide chemical. Where scientific information concerning a particular chemical remains unchanged, the content of those sections would not vary between tolerance rulemakings, and republishing the same sections is unnecessary. EPA considers referral back to those sections as sufficient to provide an explanation of the information EPA considered in making its safety determination for the new rulemaking.

EPA has previously published tolerance rulemakings for alkyl alcohol alkoxylate phosphate derivatives (AAAPDs) and alkyl alcohol alkoxylate sulfate derivatives (AAASDs), in which EPA concluded, based on the available information, that there is a reasonable certainty that no harm would result from aggregate exposure to AAAPDs and AAASDs, and established tolerances for residues of those chemicals. EPA is incorporating previously published sections from that rulemaking as described further in this rulemaking, as they remain unchanged. The past rule EPA cites here covers AAAPDs and AAASDs, which are collectively referred to as alkyl alcohol alkoxylate phosphate and sulfate derivatives (AAAPSDs). Alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts (CAS No. 157627–92–4) is an AAASD that is synthesized as a mixture. Based on the structural and physicochemical similarities between Alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts (CAS No. 157627–92–4) and other AAAPSDs previously assessed by EPA, the data used in the 2009 risk assessment for AAAPSDs is considered appropriate to assess alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts.

### *A. Toxicological Profile*

The Toxicological Profile of alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts remain unchanged from the Toxicological Profile in Unit IV.A. of the July 29, 2009 rulemaking (74 FR 37571) (FRL–8424–6). Refer to that section for a discussion of the Toxicological Profile of AAAPSDs.

### *B. Toxicological Points of Departure/Levels of Concern*

The Toxicological Points of Departure/Levels of Concern of alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts remain unchanged from the Toxicological Profile in Unit IV.B. of the July 29, 2009 rulemaking (74 FR 37571) (FRL–8424–6). Refer to that section for a discussion of the Toxicological Points of Departure/Levels of Concern of AAAPSDs.

### *C. Exposure Assessment*

The exposure assessment for alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts remain unchanged from the July 29, 2009 rulemaking and supporting human health risk assessment (D365210, June 8, 2009). Provided that the AAAPSDs are limited to no more than 30% by weight in the final formulation, there were no dietary, residential or aggregate risks of concern for the U.S. population and all subpopulations. No occupational risks of concern were identified when assuming that mixer/loader/applicators will wear chemical-resistant gloves. Based on this human health risk assessment, an exemption from the requirement of a tolerance was established under 40 CFR 180.920 for pre-harvest use of AAAPDs to no more than 30% by weight in pesticide end-use products. This risk assessment also supported the use of the AAASD inert ingredients in pesticide formulations intended for use pre- and post-harvest (40 CFR 180.910) as well as for use on livestock (40 CFR 180.930). Therefore, provided alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts are limited to no more than 30% by weight in the final formulation, there

are no dietary, residential or aggregate risks of concern for the U.S. population and all subpopulations. As a result, the Agency has determined that a tolerance is not necessary to protect public health.

*D. Cumulative Effects From Substances With a Common Mechanism of Toxicity*

Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not determined that alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts share a common mechanism of toxicity with any other substances, and alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts do not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts do not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *https://www.epa.gov/pesticides/cumulative.*

*E. Additional Safety Factor for the Protection of Infants and Children*

Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base unless EPA concludes that a different margin of safety will be safe for infants and children. EPA continues to conclude that there is reliable data showing that the safety of infants and children would be adequately protected if the Food Quality Protection Act (FQPA) safety factor were reduced from 10x to 1x. The reasons for that decision are articulated in Unit IV.D. of the July 29, 2009 rulemaking.

*F. Determination of Safety*

Therefore, based on the risk assessments and information described above, EPA concludes there is a reasonable certainty that no harm will result to the general population, or to infants and children, from aggregate exposure to alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts. More detailed information about the Agency's analysis can be found at *https://www.regulations.gov* in the documents titled ''Alkyl Alcohol Alkoxylate Phosphate and Sulfate Derivatives (AAAPDs and AAASDs—JITF CST 2 Inert Ingredients). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide Formulations'' and ''IN–11530; Petition to Add Alcohols, C10–16, Ethoxylated, Sulfates, Mono(hydroxyethyl)ammonium Salts (CAS No. 157627–92–4) to the Current Tolerance Exemption for Alkyl Alcohol Alkoxylate Phosphate and Sulfate Derivatives (AAAPSDs)'' These documents can be found in docket ID numbers EPA–HQ–OPP–2009–0131 and EPA–HQ–OPP–2021–0656.

## V. Other Considerations

*A. Analytical Enforcement Methodology*

An analytical method is not required for enforcement purposes since the Agency is not establishing a numerical tolerance for residues of alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts in or on any food commodities. EPA is establishing a limitation on the amount of alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts that may be used in pesticide formulations. This limitations will be enforced through the pesticide registration process under the Federal Insecticide, Fungicide, and Rodenticide Act (''FIFRA''), 7 U.S.C. 136 *et seq.* EPA will not register any pesticide formulation for food use that exceeds 30% by weight of alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts in the final pesticide formulation.

*B. International Residue Limits*

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established a MRL for alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts.

## VI. Conclusion

EPA finds that exempting residues of alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts from the requirement of a tolerance will be safe. Therefore, an exemption from the requirement of a tolerance is established under 40 CFR 180.910 and 180.930 for alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts when used as an inert ingredient at no more than 30% by weight in pesticide formulations.

## VII. Statutory and Executive Order Reviews

This action establishes a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food

retailers, not States or Tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or Tribal Governments, on the relationship between the National Government and the States or Tribal Governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

### VIII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule 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**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

### List of Subjects in 40 CFR Part 180

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

Dated: January 20, 2022.

**Marietta Echeverria,**

*Acting Director, Registration Division, Office of Pesticide Programs.*

Therefore, for the reasons stated in the preamble, the EPA amends 40 CFR chapter I as follows:

## PART 180—TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES IN FOOD

■ 1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.910, revise the inert ingredient(s) in the table to read as follows:

**§ 180.910 Inert ingredients used pre- and post-harvest; exemptions from the requirement of a tolerance.**

* * * * *

TABLE 1 TO 180.910

| Inert ingredients | Limits | Uses |
|---|---|---|
| * * * * * | * | * |
| α-alkyl($C_6$-$C_{15}$)-ω-hydroxypoly(oxyethylene)sulfate, and its ammonium, calcium, magnesium, potassium, sodium, and zinc salts, poly(oxyethylene) content averages 2–4 moles (CAS Reg. Nos.: 3088–31–1, 3694–74–4, 9004–82–4, 9004–84–6, 9021–91–4, 9086–52–6, 13150–00–0, 15826–16–1, 25446–78–0, 26183–44–8, 27140–00–7, 27731–62–0, 32612–48–9, 34431–25–9, 35015–74–8, 50602–06–7, 52286–18–7, 52286–19–8, 54116–08–4, 55901–67–2, 61702–79–2, 61894–66–4, 62755–21–9, 63428–85–3, 63428–86–4, 63428–87–5, 65086–57–9, 65086–79–5, 65104–74–7, 65122–38–5, 67674–66–2, 67762–19–0, 67762–21–4, 67845–82–3, 67845–83–4, 67923–90–4, 68037–05–8, 68037–06–9, 68171–41–5, 68424–50–0, 68511–39–7, 68585–34–2, 68610–66–2, 68611–29–0, 68611–55–2, 68649–53–6, 68890–88–0, 68891–29–2, 68891–30–5, 68891–38–3, 69011–37–6, 73665–22–2, 75422–21–8, 78330–16–2, 78330–17–3, 78330–25–3, 78330–26–4, 78330–27–5, 78330–28–6, 78330–29–7, 78330–30–0, 96130–61–9, 106597–03–9, 110392–50–2, 119432–41–6, 125301–88–4, 125301–89–5, 125301–92–0, 125736–54–1, 157627–92–4, 157707–85–2, 160104–51–8, 160901–27–9, 160901–28–0, 160901–29–1, 160901–30–4, 161025–28–1, 161074–79–9, 162063–19–6, 219756–63–5). | Not to exceed 30% of formulation. | Surfactants, related adjuvants of surfactants. |
| α-alkyl (minimum $C_6$ linear, branched, saturated and/or unsaturated)-ω-hydroxypolyoxyethylene polymer with or without polyoxypropylene, mixture of di- and monohydrogen phosphate esters and the corresponding ammonium, calcium, magnesium, monoethanolamine, potassium, sodium, and zinc salts of the phosphate esters; minimum oxyethylene content is 2 moles; minimum oxypropylene content is 0 moles (CAS Reg. Nos.: 9004–80–2, 9046–01–9, 26982–05–8, 31800–89–2, 37280–82–3, 37281–86–0, 39341–09–8, 39341–65–6, 39464–66–9, 39464–69–2, 42612–52–2, 50643–20–4, 50668–50–3, 51325–10–1, 51884–64–1, 52019–36–0, 57486–09–6, 58206–38–5, 58318–92–6, 58857–49–1, 59112–71–9, 60267–55–2, 61837–79–4, 62362–49–6, 62482–61–5, 63747–86–4, 63887–54–7, 63887–55–8, 66020–37–9, 66272–25–1, 66281–20–7, 67711–84–6, 67786–06–5, 67989–06–4, 68070–99–5, 68071–17–0, 68071–35–2, 68071–37–4, 68130–44–9, 68130–45–0, 68130–46–1, 68130–47–2, 68186–29–8, 68186–34–5, 68186–36–7, 68186–37–8, 68238–84–6, 68311–02–4, 68311–04–6, 68332–75–2, 68389–72–0, 68400–75–9, 68413–78–5, 68425–73–0, 68425–75–2, 68439–39–4, 68458–48–0, 68511–15–9, 68511–36–4, 68511–37–5, 68551–05–3, 68585–15–9, 68585–16–0, 68585–17–1, 68585–36–4, 68585–39–7, 68603–24–7, 68607–14–7, 68610–64–0, 68610–65–1, 68649–29–6, 68649–30–9, 68650–84–0, 68815–11–2, 68855–46–9, 68856–03–1, 68890–90–4, 68890–91–5, 68891–12–3, 68891–13–4, 68891–26–9, 68908–64–5, 68909–65–9, 68909–67–1, 68909–69–3, 68921–24–4, 68921–60–8, 68954–87–0, 68954–88–1, 68954–92–7, 68987–35–9, 69029–43–2, 69980–69–4, 70247–99–3, 70248–14–5, 70844–96–1, 70903–63–8, 71965–23–6, 71965–24–7, 72480–27–4, 72623–67–7, 72623–68–8, 72828–56–9, 72828–57–0, 73018–34–5, 73038–25–2, 73050–08–5, 73050–09–6, 73361–29–2, 73378–71–9, 73378–72–0, 73559–42–9, 73559–43–0, 73559–44–1, 73559–45–2, 74499–76–6, 76930–25–1, 78041–18–6, 78330–22–0, 78330–24–2, 82465–25–6, 84843–37–8, 91254–26–1, 93925–54–3, 95014–34–9, 96416–89–6, 99924–51–3, 103170–31–6, 103170–32–7, 106233–09–4, 106233–10–7, 108818–88–8, 110392–49–9, 111798–26–6, 111905–50–1, 116671–23–9, 117584–36–8, 119415–05–3, 120913–45–3, 121158–61–0, 121158–63–2, 123339–53–7, 125139–13–1, 125301–86–2, 125301–87–3, 126646–03–5, 129208–04–4, 129870–77–5, 129870–80–0, 130354–37–9, 136504–88–6, 143372–50–3, 143372–51–4, 144336–75–4, 146815–57–8, 151688–56–1, 154518–39–5, 154518–40–8, 155240–11–2, 157627–92–4, 159704–69–5, 160498–49–7, 160611–24–5, 171543–66–1, 172027–16–6, 172274–69–0, 176707–42–9, 181963–82–6, 188741–55–1, 191940–53–1, 210493–60–0, 210993–53–6, 246159–55–7, 251298–11–0, 261627–68–3, 290348–69–5, 290348–70–8, 317833–96–8, 340681–28–9 , 422563–19–7, 422563–26–6, 522613–09–8, 717140–06–2, 717140–09–5, 717827–29–7, 762245–80–7, 762245–81–8, 866538–89–8, 866538–90–1, 873662–29–4, 913068–96–9, 936100–29–7, 936100–30–0, 1072943–56–6, 1087209–87–7, 1174313–54–2, 1187742–89–7, 1187743–35–6, 1205632–03–6, 1233235–49–8, 1451002–50–8, 1456802–88–2, 1456802–89–3, 1456803–12–5). | | |
| * * * * * | * | * |

■ 3. In § 180.930, revise the inert ingredient(s) in the table to read as follows:

**§ 180.930 Inert ingredients applied to animals; exemptions from the requirement of a tolerance.**

* * * * *

TABLE 1 TO 180.910

| Inert ingredients | Limits | Uses |
|---|---|---|
| * * * * * | * | |
| α-alkyl($C_6$-$C_{15}$)-ω-hydroxypoly(oxyethylene)sulfate, and its ammonium, calcium, magnesium, potassium, sodium, and zinc salts, poly(oxyethylene) content averages 2–4 moles (CAS Reg. Nos.: 3088–31–1, 3694–74–4, 9004–82–4, 9004–84–6, 9021–91–4, 9086–52–6, 13150–00–0, 15826–16–1, 25446–78–0, 26183–44–8, 27140–00–7, 27731–61–9, 27731–61–9, 27731–62–0, 32612–48–9, 34431–25–9, 35015–74–8, 50602–06–7, 52286–18–7, 52286–19–8, 54116–08–4, 55901–67–2, 61702–79–2, 61894–66–4, 62755–21–9, 63428–85–3, 63428–86–4, 63428–87–5, 65086–57–9, 65086–79–5, 65104–74–7, 65122–38–5, 67674–66–2, 67762–19–0, 67762–21–4, 67845–82–3, 67845–83–4, 67923–90–4, 68037–05–8, 68037–06–9, 68171–41–5, 68424–50–0, 68511–39–7, 68585–34–2, 68610–66–2, 68611–29–0, 68611–55–2, 68649–53–6, 68890–88–0, 68891–29–2, 68891–30–5, 68891–38–3, 69011–37–6, 73665–22–2, 75422–21–8, 78330–16–2, 78330–17–3, 78330–25–3, 78330–26–4, 78330–27–5, 78330–28–6, 78330–29–7, 78330–30–0, 96130–61–9, 106597–03–9, 110392–50–2, 119432–41–6, 125301–88–4, 125301–89–5, 125301–92–0, 125736–54–1, 157627–92–4, 157707–85–2, 160104–51–8, 160901–27–9, 160901–28–0, 160901–29–1, 160901–30–4, 161025–28–1, 161074–79–9, 162063–19–6, 219756–63–5). | Not to exceed 30% of formulation. | Surfactants, related adjuvants of surfactants. |
| α-alkyl (minimum $C_6$ linear, branched, saturated and/or unsaturated)-ω-hydroxypolyoxyethylene polymer with or without polyoxypropylene, mixture of di- and monohydrogen phosphate esters and the corresponding ammonium, calcium, magnesium, monoethanolamine, potassium, sodium, and zinc salts of the phosphate esters; minimum oxyethylene content is 2 moles; minimum oxypropylene content is 0 moles (CAS Reg. Nos.: 9004–80–2, 9046–01–9, 26982–05–8, 31800–89–2, 37280–82–3, 37281–86–0, 39341–09–8, 39341–65–6, 39464–66–9, 39464–69–2, 42612–52–2, 50643–20–4, 50668–50–3, 51325–10–1, 51884–64–1, 52019–36–0, 57486–09–6, 58206–38–5, 58318–92–6, 58857–49–1, 59112–71–9, 60267–55–2, 61837–79–4, 62362–49–6, 62482–61–5, 63747–86–4, 63887–54–7, 63887–55–8, 66020–37–9, 66272–25–1, 66281–20–7, 67711–84–6, 67786–06–5, 67989–06–4, 68070–99–5, 68071–17–0, 68071–35–2, 68071–37–4, 68130–44–9, 68130–45–0, 68130–46–1, 68130–47–2, 68186–29–8, 68186–34–5, 68186–36–7, 68186–37–8, 68238–84–6, 68311–02–4, 68311–04–6, 68332–75–2, 68389–72–0, 68400–75–9, 68413–78–5, 68425–73–0, 68425–75–2, 68439–39–4, 68458–48–0, 68511–15–9, 68511–36–4, 68511–37–5, 68551–05–3, 68585–15–9, 68585–16–0, 68585–17–1, 68585–36–4, 68585–39–7, 68603–24–7, 68607–14–7, 68610–64–0, 68610–65–1, 68649–29–6, 68649–30–9, 68650–84–0, 68815–11–2, 68855–46–9, 68856–03–1, 68890–90–4, 68890–91–5, 68891–12–3, 68891–13–4, 68891–26–9, 68908–64–5, 68909–65–9, 68909–67–1, 68909–69–3, 68921–24–4, 68921–60–8, 68954–87–0, 68954–88–1, 68954–92–7, 68987–35–9, 69029–43–2, 69980–69–4, 70247–99–3, 70248–14–5, 70844–96–1, 70903–63–8, 71965–23–6, 71965–24–7, 72480–27–4, 72623–67–7, 72623–68–8, 72828–56–9, 72828–57–0, 73018–34–5, 73038–25–2, 73050–08–5, 73050–09–6, 73361–29–2, 73378–71–9, 73378–72–0, 73559–42–9, 73559–43–0, 73559–44–1, 73559–45–2, 74499–76–6, 76930–25–1, 78041–18–6, 78330–22–0, 78330–24–2, 82465–25–6, 84843–37–8, 91254–26–1, 93925–54–3, 95014–34–9, 96416–89–6, 99924–51–3, 103170–31–6, 103170–32–7, 106233–09–4, 106233–10–7, 108818–88–8, 110392–49–9, 111798–26–6, 111905–50–1, 116671–23–9, 117584–36–8, 119415–05–3, 120913–45–3, 121158–61–0, 121158–63–2, 123339–53–7, 125139–13–1, 125301–86–2, 125301–87–3, 126646–03–5, 129208–04–4, 129870–77–5, 129870–80–0, 130354–37–9, 136504–88–6, 143372–50–3, 143372–51–4, 144336–75–4, 146815–57–8, 151688–56–1, 154518–39–5, 154518–40–8, 155240–11–2, 157627–92–4, 159704–69–5, 160498–49–7, 160611–24–5, 171543–66–1, 172027–16–6, 172274–69–0, 176707–42–9, 181963–82–6, 188741–55–1, 191940–53–1, 210493–60–0, 210993–53–6, 246159–55–7, 251298–11–0, 261627–68–3, 290348–69–5, 290348–70–8, 317833–96–8, 340681–28–9 , 422563–19–7, 422563–26–6, 522613–09–8, 717140–06–2, 717140–09–5, 717827–29–7, 762245–80–7, 762245–81–8, 866538–89–8, 866538–90–1, 873662–29–4, 913068–96–9, 936100–29–7, 936100–30–0, 1072943–56–6, 1087209–87–7, 1174313–54–2, 1187742–89–7, 1187743–35–6, 1205632–03–6, 1233235–49–8, 1451002–50–8, 1456802–88–2, 1456802–89–3, 1456803–12–5). | | |
| * * * * * | * | |

[FR Doc. 2022–01486 Filed 2–1–22; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 180

**[EPA–HQ–OPP–2021–0139; FRL–9253–01–OCSPP]**

### Saccharomyces cerevisiae Strain LAS02; Exemption From the Requirement of a Tolerance

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes an exemption from the requirement of a tolerance for residues of *Saccharomyces cerevisiae* strain LAS02 in or on all food commodities when used in accordance with label directions and good agricultural practices. Lesaffre Yeast Corporation (c/o Wagner Regulatory Associates, Inc.) submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of *Saccharomyces cerevisiae* strain LAS02 under FFDCA when used in accordance with this exemption.

**DATES:** This regulation is effective February 2, 2022. Objections and requests for hearings must be received on or before April 4, 2022 and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2021–0139, is available at *https://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805.

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

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

**SUPPLEMENTARY INFORMATION:**

## I. General Information

*A. Does this action apply to me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

*B. How can I get electronic access to other related information?*

You may access a frequently updated electronic version of 40 CFR part 180 through the Office of the Federal Register's e-CFR site at *https://www.ecfr.gov/current/title-40.*

*C. How can I file an objection or hearing request?*

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2021–0139 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before April 4, 2022. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b), although EPA strongly encourages those interested in submitting objections or a hearing request, to submit objections and hearing requests electronically. *See* Order Urging Electronic Service and Filing (April 10, 2020), *https://www.epa.gov/sites/production/files/2020-05/documents/2020-04-10_-_order_urging_electronic_service_and_filing.pdf.* At this time, because of the COVID–19 pandemic, the judges and staff of the Office of Administrative Law Judges are working remotely and not able to accept filings or correspondence by courier, personal delivery, or commercial delivery, and the ability to receive filings or correspondence by U.S. Mail is similarly limited. When submitting documents to the U.S. EPA Office of Administrative Law Judges (OALJ), a person should utilize the OALJ e-filing system, at *https://yosemite.epa.gov/OA/EAB/EAB-ALJ_upload.nsf.*

Although EPA's regulations require submission via U.S. Mail or hand delivery, EPA intends to treat submissions filed via electronic means as properly filed submissions during this time that the Agency continues to maximize telework due to the pandemic; therefore, EPA believes the preference for submission via electronic means will not be prejudicial. If it is impossible for a person to submit documents electronically or receive service electronically, *e.g.,* the person does not have any access to a computer, the person shall so advise OALJ by contacting the Hearing Clerk at (202) 564–6281. If a person is without access to a computer and must file documents by U.S. Mail, the person shall notify the Hearing Clerk every time it files a document in such a manner. The address for mailing documents is U.S. Environmental Protection Agency, Office of Administrative Law Judges, Mail Code 1900R, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2021–0139 by one of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.

• *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *https://www.epa.gov/dockets/where-send-comments-epa-dockets.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets/where-send-comments-epa-dockets.*

## II. Background

In the **Federal Register** of September 22, 2021 (86 FR 52624) (FRL–8792–03), EPA issued a notice pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance exemption petition (PP 0F8841) by Lesaffre Yeast Corporation (c/o Wagner Regulatory Associates, Inc.,) P.O. Box 640, 7217 Lancaster Pike, Suite A, Hockessin, DE 19707. The petition requested that 40 CFR part 180 be amended by establishing an exemption from the requirement of a tolerance for residues of the bactericide and fungicide *Saccharomyces cerevisiae* strain LAS02 in or on all food commodities. That notice referenced a summary of the petition prepared by the petitioner Lesaffre Yeast Corporation and available in the docket via *https://www.regulations.gov.* No comments were received on the notice of filing.

## III. Final Rule

### *A. EPA's Safety Determination*

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement of a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings but does not include occupational exposure. Pursuant to FFDCA section 408(c)(2)(B), in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in FFDCA section 408(b)(2)(C), which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance or tolerance exemption and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .'' Additionally, FFDCA section 408(b)(2)(D) requires that EPA consider ''available information concerning the cumulative effects of [a particular pesticide's] . . . residues and other substances that have a common mechanism of toxicity.''

EPA evaluated the available toxicological and exposure data on *Saccharomyces cerevisiae* strain LAS02 and considered their validity, completeness, and reliability, as well as the relationship of this information to human risk. A full explanation of the data upon which EPA relied and its risk assessment based on those data can be found within the document entitled ''Human Health Risk Assessment of the New Active Ingredient *Saccharomyces cerevisiae* strain LAS02 in the Proposed End-use Product EPA File Symbol 91810–G with an Associated Tolerance Exemption Petition'' (*Saccharomyces cerevisiae* strain LAS02 Human Health Assessment). This document, as well as other relevant information, is available in the docket for this action as described under **ADDRESSES**.

The available data and rationale supported by existing scientific literature on *Saccharomyces cerevisiae* strain LAS02 and related *Saccharomyces cerevisiae* species demonstrate that, with regard to humans, *Saccharomyces cerevisiae* strain LAS02 is not toxic, pathogenic, or infective via any reasonably foreseeable route of exposure. Humans, including infants and children, are naturally exposed to *Saccharomyces cerevisiae* as this microorganism is commonly found in many habitats including soil, water, and plant surfaces. Furthermore, humans, including infants and children, have a long history of safe dietary exposure to strains of *Saccharomyces cerevisiae* through their use in food production, nutritional supplements, and bio-therapeutics. *Saccharomyces cerevisiae* strain LAS02 is expected to be non-toxic, non-pathogenic, and non-infective based on its genetic similarity to other food-use *Saccharomyces cerevisiae* strains and its lack of genetic modification.

Although there may be some dietary and non-occupational exposures to pesticide residues of *Saccharomyces cerevisiae* strain LAS02 when used in accordance with label directions and good agricultural practices, there is not a concern due to the lack of potential for adverse effects. Humans have a long history of dietary exposure of *Saccharomyces cerevisiae* through its use in food and supplement products and natural exposure through its presence in the environment with no reported significant adverse effects attributable to dietary or non-occupational exposure based on the proposed pesticide uses. Because there are no threshold levels of concern with the toxicity, pathogenicity, or infectivity of *Saccharomyces cerevisiae* strain LAS02, EPA determined that no additional margin of safety is necessary to protect infants and children as part of the qualitative assessment conducted. Based upon its evaluation in the *Saccharomyces cerevisiae* strain LAS02 Human Health Assessment, which concludes that there are no risks of concern from aggregate exposure to *Saccharomyces cerevisiae* strain LAS02, EPA concludes that there is a reasonable certainty that no harm will result to the U.S. population, including infants and children, from aggregate exposure to residues of *Saccharomyces cerevisiae* strain LAS02.

### *B. Analytical Enforcement Methodology*

An analytical method is not required for *Saccharomyces cerevisiae* strain LAS02 because EPA is establishing an exemption from the requirement of a tolerance without any numerical limitation.

### *C. Conclusion*

Therefore, an exemption from the requirement of a tolerance is established for residues of *Saccharomyces cerevisiae* strain LAS02 in or on all food commodities when used in accordance with label directions and good agricultural practices.

## IV. Statutory and Executive Order Reviews

This action establishes a tolerance exemption under FFDCA section 408(d) in response to a petition submitted to EPA. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive

Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance exemption in this action, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or Tribes. As a result, this action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, EPA has determined that this action will not have a substantial direct effect on States or Tribal Governments, on the relationship between the National Government and the States or Tribal Governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes. Thus, EPA has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require EPA's consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (15 U.S.C. 272 note).

### V. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule 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**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

### List of Subjects in 40 CFR Part 180

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

Dated: January 14, 2022.

**Edward Messina,**

*Director, Office of Pesticide Programs.*

Therefore, for the reasons stated in the preamble, EPA is amending 40 CFR chapter I as follows:

## PART 180—TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES IN FOOD

■ 1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346a and 371.

■ 2. Add § 180.1391 to subpart D to read as follows:

**§ 180.1391 Saccharomyces cerevisiae strain LAS02; exemption from the requirement of a tolerance.**

An exemption from the requirement of a tolerance is established for residues of *Saccharomyces cerevisiae* strain LAS02 in or on all food commodities when used in accordance with label directions and good agricultural practices.

[FR Doc. 2022–02099 Filed 2–1–22; 8:45 am]

BILLING CODE 6560–50–P

## GENERAL SERVICES ADMINISTRATION

## 41 CFR Part 102–77

**[FMR Case 2021–02; Docket No. GSA–FMR–2021–0024, Sequence No. 1]**

**RIN 3090–AK47**

## Federal Management Regulation; Art in Architecture

**AGENCIES:** Office of Government-wide Policy (OGP), General Services Administration (GSA).

**ACTION:** Final rule with 60-day comment period.

**SUMMARY:** GSA is issuing a final rule amending the Federal Management Regulation (FMR) to update certain provisions of the Art in Architecture program. These revisions clarify the policies to collect, manage, fund, and commission visual art in Federal buildings. The rule updates policies consistent with the requirements of the Executive Order (E.O.) issued May 14, 2021, titled ''Revocation of Certain Presidential Actions and Technical Amendment.'' The rule also supports the goals of the E.O. issued January 20, 2021, titled ''Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.''

**DATES:**

*Effective date:* January 31, 2022.

*Comments due date:* Please submit comments by the method listed in the **ADDRESSES** section by April 4, 2022 for consideration in future rulemaking.

**ADDRESSES:** Submit comments in response to FMR Case 2021–02 to: *Regulations.gov: https://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''FMR Case 2021–02.'' Select the link ''Comment Now'' that corresponds with FMR Case 2021–02. Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''FMR Case 2021–02'' 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 alternative instructions.

*Instructions:* Please submit comments only and cite FMR Case 2021–02 in all correspondence related to this case. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal or business confidential information, or both, provided. To confirm receipt of your comment(s), please check *www.regulations.gov* approximately two to three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Mr. Chris Coneeney, Director, Real Property Policy Division, Office of Government-wide Policy, at 202–208–2956 or *chris.coneeney@gsa.gov.* For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FMR Case 2021–02.

**SUPPLEMENTARY INFORMATION:**

### I. History of the Program

Art in U.S. public buildings has a long history, beginning in the 1850s in the U.S. Custom House in New Orleans and continuing at the U.S. Capitol and through the Beaux-Arts era when courthouses and custom houses throughout the Nation were embellished with works of art. In the 1930s, the Great Depression saw the creation of relief programs of the New Deal, including four art programs: The Public Works of Art, which employed artists to create artworks; the Section of Fine Arts (the Section), a Treasury Department effort that awarded commissions to artists through competitions to secure the best quality artwork for installation in public buildings, including Federal buildings, courthouses and post offices;

the Treasury Relief Art Project, which employed artists to create paintings and sculptures for existing Federal buildings; and the largest of the programs in scope and numbers of artists employed, the Works Progress Administration, which included the Federal Art Project (FAP). From 1935 to 1943, thousands of artists created over 200,000 works of art, and under the FAP, these artworks were distributed to State and municipal facilities. The New Deal art programs brought art into everyday life in places like post offices, schools, hospitals, and libraries, and showed the importance of art in a democracy. They also built up the public art collection in the U.S. and set the stage for Federal arts funding. The Section also instituted the influential percent-for-art policy idea: 1% of the total building construction cost would be set aside for the building's embellishment. In 1963, GSA started the Fine Arts in New Federal Buildings program, a percent-for-art policy that in 1972 became the Art in Architecture program. This has become a model for many State and municipal community art programs. These artworks enhance the civic meaning of Federal architecture and showcase the vibrancy of American visual arts. Together, the art and architecture of Federal buildings create a lasting cultural legacy. The activities of the Art in Architecture program addressed in this regulation apply only to federally owned facilities under the jurisdiction, custody and control of GSA. New art commissions are included in capital projects authorized by Congress for the construction or major modernization of a building by GSA. Other agencies, such as the U.S. Department of State, operate art programs under separate authorities.

Art programs in Federal buildings not only create a better environment for conducting Government business, they offer a space to represent equitably the diversity of the Nation and to support the arts in communities that have Federal buildings. In accordance with E.O. 13985, ''Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,'' issued January 20, 2021, all agencies are directed to ''promote [. . .] equitable opportunities'' for access to programs and services. Previous definitions of acceptable art styles limited participation in Art in Architecture programs, and thus art projects in the past did not necessarily reflect the diversity of the communities in which they were located. Increasing equitable access for artists of different backgrounds and art styles to participate in these programs is a priority for achieving the goals of E.O. 13985.

## II. Current Program and Discussion of Proposed Changes With This Final Rule

GSA reserves one-half of one percent of the estimated construction cost of each new Federal building and selects new prospectus-level modernization or repair and alteration projects to commission project artists. Artist candidates for Art in Architecture commissions are most often identified from GSA's National Artist Registry (Registry), which is a database of artists who have previously submitted digital images of their past portfolio work. Artists may also be identified through other sources, such as from posted solicitations for active procurements. There is no fee to join the Registry, which currently has approximately 1,700 artists and is open to all artists who are U.S. citizens or lawful permanent residents. Instructions for joining the Registry can be found at *https://www.gsa.gov/cdnstatic/National_Artist_Registry_Instructions_MAR_2016.pdf* and requires the submission of GSA Form 7437, a resume, images of completed artwork, and a script identifying the images.

During building construction, a panel of seven, composed of a GSA art peer from the GSA Commissioner of Public Buildings' National Register of Peer Professionals (distinguished private-sector design and art professionals appointed by the Commissioner of Public Buildings to critique concept designs under development), an art professional from the city or geographic region of the building project, a representative of the building project's primary Federal occupant agency, a community representative, the project's lead design architect, and two GSA representatives, one representing the Public Buildings Service (PBS) Regional Commissioner and the other the Art in Architecture program office, is convened.

The panel meets to discuss opportunities for artists to participate in the building project. Artists who receive Federal commissions work with the project architects and others as members of a design team are invited to participate to ensure that the artworks are meaningfully integrated into the overall project. GSA's current procedures for this program can be found at *https://www.gsa.gov/cdnstatic/FINAL%20FOR%20ISSUANCE%20081720%20-%20GSA%20ART%20IN%20ARCHITECTURE%20POLICIES%20AND%20PROCEDURES%20-%20Copy.pdf.* These procedures will be updated upon issuance of the final rule. The artist selection board is also referenced in the General Services Acquisition Manual (GSAM) section 536.7003–2, available at *https://www.acquisition.gov/content/part-536-construction-and-architect-engineer-contracts#GSAM_536-7003-2.*

GSA maintains a public website showing the installed artwork commissioned by the Art in Architecture program, which is available at *https://www.gsa.gov/fine-arts#/gallery/439.*

GSA's intent to modify PBS policies in the final rule will allow the removal of the currently restrictive requirement to prioritize the commissioning of monuments portraying historically significant Americans, significant events in American history or illustrating the ideals upon which the Nation was founded with preference for a realistic style, while soliciting comments to increase civic engagement and enhance the diversity and equity of the Art in Architecture program.

GSA recognizes this program is perhaps not as well known among various communities of artists and, with the publication of this rule, will be partnering with other Federal agencies to highlight the program across communities whose artists have not typically been represented in the Registry. With the publication of this rule, GSA is encouraging artists to apply to the Registry.

Once an artist is chosen to commission a work of art under the procedures in GSAM section 536.70 (available at *https://www.acquisition.gov/content/part-536-construction-and-architect-engineer-contracts#id201HD50D01N*), the artist must register in the System for Acquisition Management at *https://www.SAM.gov* in accordance with Federal Acquisition Regulation (FAR) section 52.204–7 (available at *https://www.acquisition.gov/far/part-52#FAR_52_204_7*).

## III. Discussion of the Final Rule

The elements GSA proposes to rescind are described in detail below together with the policy explanation in each instance. Section 1 of E.O. 14029, ''Revocation of Certain Presidential Actions and Technical Amendment,'' [1] revoked E.O. 13934, ''Building and Rebuilding Monuments to American Heroes.'' [2] Section 2 directed GSA to

[1] 86 FR 27025 (May 19, 2021), *https://www.federalregister.gov/documents/2021/05/19/2021-10691/revocation-of-certain-presidential-actions-and-technical-amendment.*

[2] 85 FR 41165 (July 8, 2020), *https://www.federalregister.gov/documents/2020/07/08/*

consider rescinding any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing E.O. 13934. *Id.*

To implement E.O. 13934, GSA issued a final rule on September 25, 2020.[3] GSA has now made a determination, consistent with E.O. 14029, to revoke the regulatory amendments that implemented subsections 4(c), (d) and (e) of E.O. 13934 and restore the policies that were previously contained in part 102–77 of the FMR.[4]

Subsection 4(c) of E.O. 13934 directed GSA, to the extent appropriate and consistent with applicable law, to prioritize projects resulting in the installation of a publicly accessible statue of historically significant Americans in communities where a statue depicting a historically significant American was removed or destroyed in 2020.

Subsection 4(d) of E.O. 13934 required GSA, in consultation with the Interagency Task Force for Building and Rebuilding Monuments to American Heroes, to revise its Art in Architecture program regulations to prioritize the commission of works of art that portray historically significant Americans or events of American historical significance or illustrate the ideals upon which our Nation was founded. Priority should be given to public-facing monuments to former Presidents of the United States and to individuals and events relating to the discovery of America, the founding of the United States, and the abolition of slavery. Such works of art should be designed to be appreciated by the general public and by those who use and interact with Federal buildings.

Subsection 4(e) of E.O. 13934 further required, ''When a statue or work of art commissioned pursuant to this section is meant to depict a historically significant American, the statue or work of art shall be a lifelike or realistic representation of that person, not an abstract or modernist representation.''

GSA Art in Architecture policy documents outline the specific process by which the Federal Government commissions a work of art for a Federal building. These policy documents detail when an artwork is commissioned, the makeup of the panel that will recommend and review artist candidates, how artists can participate in the program, the criteria for evaluating candidates, and the artist's development of an art concept.

With this rule, §§ 102–77.21, 102–77.22, and 102–77.23 are removed in their entirety to comply with the direction in E.O. 14029 to consider revoking regulations that implemented the provisions of E.O. 13934. The title of part 102–77 remains as ''Art in Architecture'' instead of ''Art-in-Architecture.'' GSA has not used the hyphens when referring to this program for more than 15 years, including in publications, online and in correspondence. The change reflects this usage.

GSA is also updating the definitions to be more inclusive of different visual arts styles and removing references to ''fine arts,'' which may be interpreted by some to exclude certain styles and mediums of art and, therefore, many artists from consideration for commission. The broader definition of ''visual arts'' better reflects current practice in the arts community and supports the goals of E.O. 13985.

## IV. Paperwork Reduction Act and Changes Proposed to the National Artist Registry

The Paperwork Reduction Act (44 U.S.C. 3501–3521) applies to this final rule.

The Office of Management and Budget (OMB) Control Number 9000–0159, ''Information Collection; Central Contractor Registration,'' supports FAR Clause 52.204–7, which requires an artist to register in the System for Award Management once they are selected and awarded a contract. GSA does not believe any revisions are needed to this information collection.

GSA requested, and OMB has approved, revisions to OMB Control Number 3090–0274, ''Art in Architecture Program National Artist Registry,'' which supports the GSA Form 7437 used for additions to the Registry. GSA believes these revisions to the form and the information collection are needed to support the goals of E.O. 13895.

The annual public reporting burden for this collection of information through OMB Control Number 3090–0274, ''Art in Architecture Program National Artist Registry'' (GSA Form 7437), is estimated based on the time for reviewing and completing the collection of information. GSA is planning to conduct an outreach program to promote the Art in Architecture program and the Registry. This is expected to increase the number of annual responses.

Assumptions for reporting burden:

- GSA estimates 850 responses in the first year of reporting based on half of the current Registry population.
- 0.25 hours per response is estimated by the current time to submit artist information to the Registry. The changes to the form include additions and removals with the net result being no increase in time to complete the form.
- GSA estimates 300 responses per year in the annual updates as estimated by the current annual responses.

The reporting burden for the first year is estimated as follows:

*1. Initial Disclosure based on increased outreach by GSA to the artist community*

*Estimated responses:* 850.

*Estimated hours per response:* 0.25.

*Total Initial Response Burden Hours:* 212.5.

*2. Annual Updates (years two and three)*

*Estimated annual responses:* 300.

*Estimated hours per response:* 0.25.

*Total Update Response Burden Hours:* 75.

Public comments are particularly invited on: Whether this collection of information is necessary; whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond through the use of appropriate technological collection techniques or other forms of information technology.

## V. Expected Impact of This Final Rule

This final rule revokes the regulatory amendments that implemented subsections 4(c), (d) and (e) of E.O. 13934 and restores policies that were previously contained in part 102–77 of the FMR. Accordingly, the only impact from the revocation of E.O. 13934 as effectuated by this final rule is the expansion of the styles of artwork under consideration for commissions within the Art in Architecture program. There are no other changes to the policies surrounding the consideration of artists. The number of new construction and prospectus-level renovation projects requiring an Art in Architecture commission per year depends on the number of prospectus-level new construction and major repairs and alterations projects approved by

*2020-14872/building-and-rebuilding-monuments-to-american-heroes.*

[3] 85 FR 60383 (Sept. 25, 2020), *https://www.federalregister.gov/documents/2020/09/25/2020-20453/federal-management-regulation-fmr-art-in-architecture.*

[4] 70 FR 67786 (Nov. 8, 2005), *https://www.federalregister.gov/documents/2005/11/08/05-21644/federal-management-regulation-real-property-policies-update.*

Congress. The number of commissions and their value was not affected by the implementation of the prior rule nor is it expected to be impacted by this final rule. Historical averages denote an annual rate of 5 Art in Architecture projects per year with an average cost of $482,335 per project.

*A. Costs to the Public for Art in Architecture Panels*

The only substantive change in procedures due to this final rule is the consideration of all styles of artwork for commissioning. GSA analyzed the associated costs of the prior rule and this final rule and determined there is no additional cost to the public for the operation and composition of members for the Art in Architecture panels. For the model for both the prior rule and this final rule, GSA assumes two small businesses and two large businesses will continue to be members of the panel. For the model, GSA used the lead designer and the art peer remaining as the large businesses and the community representative and the community art representatives as the small businesses. These assumptions were validated by Art in Architecture staff's review of the composition of previous panels.

GSA calculated the total estimated cost for the lead designer, assuming an average hourly rate of $127.69 for a senior principal architect, for this part of the rule to be *$10,215 (= 16 hours × $127.69 × 5)* each year.

GSA calculated the total estimated cost for the art peer, assuming an average hourly rate of $55.30, for this part of the rule to be *$1,106 (= 4 hours × $55.30 × 5)* each year.

GSA calculated the total estimated cost for the community representative, assuming an average hourly rate of $68.13, for this part of the rule to be *$1,363 (= 4 hours × $68.13 × 5)* each year.

GSA calculated the total estimated cost for the community art representative, assuming an average hourly rate of $55.30, for this part of the rule to be *$1,106 (= 4 hours × $55.30 × 5)* each year.

The cost to the public for the Art in Architecture panels remains the same from the prior rule and this final rule.

*B. Public Costs for the Submission of Artist Applications Containing Their Demographic Information to the National Artist Registry*

To align with the Administration's policies and directives, artists within the Registry will be able to submit their demographic information through the Art in Architecture website. The provision of this additional information is optional and will be used to report on the demographic make-up of participants and their reflection to the Nation as a whole. Artists will also be able to indicate their status as a U.S. citizen and, in a change to the form, a lawful permanent resident. The section on media has been updated to reflect current art practice and specifications on materials have been eliminated. GSA estimated the burden to the current artists to be *$11,807 (= 0.25 hours × $27.78 × 1,700)* in the second year. GSA estimated the hourly rate of $27.78 for the artists by using the Bureau of Labor Statistics December 2021 average hourly earnings for other services.[5]

To support the Administration's policies and directives, new artists will submit their information, including key demographic data points, through the Art in Architecture website. GSA estimated the burden to the new artists to be *$5,903 (= 0.25 hours × $27.78 × 850)* in the second year. GSA estimated the hourly rate of $27.78 for the artists by using the Bureau of Labor Statistics December 2021 average hourly earnings for other services.[6] GSA estimates the number of submissions will increase by 35% due to the Administration's efforts to heighten awareness of the Registry and motivate artists to register. This will help future assessments of the relationship between U.S. demographic trends and the composition of artists within the Registry.

GSA calculated the estimated number of annual submissions under the prior rule by applying the ratio of estimated annual submissions against the Registry's current population to the number of artists estimated by GSA to be able to be considered for a commission under the prior rule. GSA estimated 31 artists on an annual basis would have submitted information in year 2 of the analysis. Therefore, GSA calculated this cost to be *$215 (= 0.25 hours × $27.87 × 31).* This final rule results in an incremental cost of $5,688 in year 2 to the public.

To support the Administration's policies and directives, new artists will submit their information, including key demographic data points, through the Art in Architecture website. GSA estimated the burden to the new artists to be *$2,084 (= 0.25 hours × $27.78 × 300)* in years 3–10. GSA estimated the hourly rate of $27.78 for the artists by using the Bureau of Labor Statistics December 2021 average hourly earnings for other services.[7] GSA estimates the number of submissions will increase due to the Administration's efforts to heighten awareness of the Registry and motivate artists to register. This will help future assessments of the relationship between U.S. demographic trends and the composition of artists within the Registry.

GSA calculated the estimated number of annual submissions under the prior rule by applying the ratio of estimated annual submissions against the Registry's current population to the number of artists estimated by GSA to be able to be considered for a commission under the prior rule. GSA estimated 31 artists on an annual basis would have submitted information in years 3–10 of the analysis. Therefore, GSA calculated this cost to be *$215 (= 0.25 hours × $27.87 × 31).* This final rule results in an incremental cost of $1,869 per year in years 3–10 to the public.

The following is a summary of the estimated costs to the public calculated within a 10-year time horizon at a 3 and 7 percent discount rate, respectively:

| Summary | Total costs |
|---|---|
| Present Value (3 percent) .... | $28,857 |
| Annualized Costs (3 percent) | 2,833 |
| Present Value (7 percent) .... | 25,028 |
| Annualized Costs (7 percent) | 2,374 |

*C. Government Costs*

Below is a list of activities related to regulatory familiarization that GSA anticipates will occur.

1. Award of Art in Architecture Commissions

As noted above, GSA gathered details of its Art in Architecture projects over the past five years. It was determined an average of 5 projects per year occur with an average cost of $482,335 per project. Therefore, GSA calculated the total estimated cost for this part of the rule to be *$2,411,675 (= 5 × $482,335)* each year. However, the difference in estimated cost between the prior rule and this final rule is negligible since these commissions were scheduled to be awarded under the prior rule, but to fewer potential artists. This final rule does not change the amount of funding allocated for each project, the number of commissions or the cost of projects and commissions.

2. Workforce Training

GSA calculates it will take one hour in the first year to review and train the workforce on the requirements of this final rule. GSA estimates this cost by multiplying the time required to train the workforce (Art in Architecture staff estimated their workforce to be 18

[5] *https://www.bls.gov/news.release/empsit.t19.htm.*

[6] Id.

[7] Id.

individuals) by the estimated compensation, on average, of a GS–13. Therefore, GSA calculated the total estimated cost for this part of the rule to be *$1,227 (= 1 hour × $68.18 × 18).*

GSA calculates it will take eight hours in the first year to create material to train the workforce on the requirements of this final rule. GSA estimates this cost by multiplying the time required to develop the material by the estimated compensation, on average, of a GS–14. Therefore, GSA calculated the total estimated cost for this part of the rule to be *$644 (= 8 hours × $80.56 × 1).*

3. Procedures

For each commissioned work of art, a panel composed of art professionals, civic and community representatives, the project's lead design architect, GSA staff, and Federal occupant agency representatives will meet to discuss opportunities for artists to participate in the building project.

GSA calculated the total estimated cost for the Art in Architecture staff to meet the requirements of this final rule for this part of the rule to be *$128,896 (= 5 × $80.56 × 320 hours)* each year. GSA estimates this cost by multiplying the number of projects by the number of hours per project by the estimated compensation, on average, of a GS–14.

GSA calculated the total estimated cost for regional staff to meet the requirements of this final rule for this part of the rule to be *$34,090 (= 5 × $68.18 × 100 hours)* each year. GSA estimates this cost by multiplying the number of projects by the number of hours per project by the estimated compensation, on average, of a GS–13.

GSA calculated the total estimated cost for the United States District Court judges to meet the requirements of this final rule for this part of the rule to be *$4,582 (= 2 × $143.20 × 16 hours)* each year. GSA estimates this cost by multiplying the number of projects by the number of hours per project by the estimated compensation, on average, of a U.S. District Court judge.

GSA calculated the total estimated cost for the Federal agency representative to meet the requirements of this final rule for this part of the rule to be *$2,578 (= 2 × $80.56 × 16 hours)* each year. GSA estimates this cost by multiplying the number of projects by the number of hours per project by the estimated compensation, on average, of a GS–14.

GSA calculated the total estimated cost for the Federal occupant agency representative to meet the requirements of this final rule for this part of the rule to be *$1,516 (= 1 × $94.76 × 16 hours)* each year. GSA estimates this cost by multiplying the number of projects by the number of hours per project by the estimated compensation, on average, of a GS–15.

GSA calculated the total estimated cost for GSA staff to review demographic information submitted to the Registry on an annual basis to be *$1,150,542 (=2,550*[8] *× $68.18 × .5 hours)* for years 2–10 for the analysis. GSA estimated the data to be reviewed by a GS–13 based on historical GSA staff responsibilities.

GSA calculated the total estimated cost for GSA staff to compile a report of the submitted and reviewed demographic information from the Registry on an annual basis to be *$80.56 (= 1 × $80.56 × 1 hour)* each year. GSA estimated the report to be compiled by a GS–14, as the staff member issuing the report would be a senior staff member based on historical GSA staff responsibilities.

GSA calculated the total estimated cost for GSA staff to review available technologies to help automate data collection and production of artist demographics to be *$4,131 (= 1 × $57.33 × 8 hours).* GSA estimated the review will be completed by a GS–12 based on historical GSA staff responsibilities.

The estimated incremental effect of the change contemplated by this final rule is that the number of artists being considered would increase in year one from approximately 200 artists whose art would realistically depict a historically significant American to 2,550 artists, with incremental increases averaging 300 artists per year in the subsequent years. This effect results in an incremental cost for the government to receive and process additional submissions to the Registry. GSA compared the estimated incremental effects and costs of this final rule against the estimated costs of the prior rule over a 10-year analysis and determined this final rule would increase costs to the Federal Government by $995,225.[9]

*D. Government Total Costs*

It is assumed the government incurs a cost savings only in the first year after publication totaling $14,044.[10] This estimated cost savings is generated by a reduction of time spent on policies and procedures by Art in Architecture staff and Regional Fine Arts Officers in the first year due to the implementation of this final rule. Due to the expanded data collection within the Registry and review of collected data in years 2–10, the government does not estimate to incur a cost savings in any year after the first year. Each year after the first year of publication, the annual cost to the government is assumed to be $112,141.[11] The following is a summary of the estimated costs calculated for a 10-year time horizon at a 3 and 7 percent discount rate, respectively:

| Summary | Total costs |
|---|---|
| Present Value (3 percent) .... | $818,859 |
| Annualized Costs (3 percent) | 80,394 |
| Present Value (7 percent) .... | 641,787 |
| Annualized Costs (7 percent) | 60,887 |

*E. Benefits*

Art is a vital tool for civic engagement and participation, building social capital and encouraging civil discourse. It can be a critical investment in placemaking that engenders community pride and enables community development. Due to the prior rule's more restrictive requirements in terms of content and style of art to depict a person or event of historical significance realistically, only 201 artists met these requirements. With this final rule, the pool of artists will expand to all 1,700 members of the Registry regardless of style or medium used. The removal of the content and style requirements increases the opportunity for all artists to participate in the program and be considered for commissions. With GSA's additional outreach, which will begin with publication of this rule, GSA believes the number of artists within the Registry will grow each year, thereby furthering GSA's ability to select a style of art representative of the community in which it will be commissioned.

Therefore, this final rule will align the Registry and the Art in Architecture program with the goals of E.O. 13985. It will increase GSA's ability to connect with local communities and reflect the values, culture and composition of an area in the commissioned art. It will also allow for a potential expansion of professional opportunities for a more diverse set of artists, if their work is chosen.

*F. Overall Total Additional Costs of This Final Rule*

The overall total additional undiscounted cost of this final rule is estimated to be $1,027,672 over a ten-year period including the estimated cost savings in the first year.

[8] It is assumed the artist pool will increase by 300 artists each year, with the Registry starting with an estimated 2,550 artists in year two.

[9] Total costs calculated by GSA

[10] Id.

[11] Id.

Analysis of Alternatives

The preferred alternative is the process laid out in the analysis above. However, GSA has analyzed three alternatives to the preferred process.

*Alternative 1:* GSA could decide to take no regulatory action. No action from the government would lead to fewer artists and artistic styles considered for a commission and would be inconsistent with the President's direction to agencies in E.O. 13985. The public and Government would not incur the additional costs associated with this final rule; however, the benefits of an increased Registry outweigh the incremental costs. As a result, GSA rejected this alternative.

*Alternative 2:* GSA could take limited regulatory action based on the policy direction of E.O. 13985. However, this alternative would limit GSA's ability to select any medium of art and would limit the expected impact to communities and public buildings, which would not fully be consistent with the President's direction to agencies in E.O.13985. The public and Government would incur a lower cost associated with this final rule; however, the benefits of an increased Registry outweigh the incremental costs. As a result, GSA rejected this alternative.

*Alternative 3:* GSA could create its own standards in addition to the policy direction of E.O. 13985 to commission works of art. However, this alternative would possibly produce a burden to the Government and the community due to regulatory requirements. It is assumed the costs associated with this alternative would result in a greater incremental cost to the public and Government than what is deemed necessary by GSA to issue this final rule. As a result, GSA rejected this alternative.

## VI. Administrative Procedure Act

This rulemaking is exempt from the advance notice-and-comment and delayed-effective-date requirements of the Administrative Procedure Act pursuant to 5 U.S.C. 553(a)(2), because this rulemaking relates to agency management or personnel or to public property, loans, grants, benefits, or contracts. This rulemaking relates to GSA's agency management because it only involves the internal processes of the Art in Architecture program, which applies only to GSA or Federal agencies acting under a delegation of authority from GSA. This rulemaking also relates to public property because it applies to federally owned facilities under the jurisdiction, custody and control of GSA and the work of art itself is government-owned.

## VII. Request for Public Comment

In addition to the changes discussed with this final rule, GSA requests comment on the following questions to better understand how the Art in Architecture program can promote the goals articulated in E.O. 13985, as well as promoting civic engagement and participation and democratic values, and advancing social ties and economic development at the community level.

GSA is asking for public input on what steps the GSA Art in Architecture program can take that the agency is not already taking to:

- Consider the interests and perspectives of and proactively engage underserved communities during the commissioning process for a work of art?
- Increase the number and diversity of artists who are considered and shortlisted when commissioning a work of art?
- Understand the local community so that its interests and diversity can be taken into account in the commissioning process for a work of art?
- Quantify the benefits from increased diversity and equity of the artists considered for the Art in Architecture program?
- Enable the commissioned work of art to be accessed by all members of the community?
- Conduct outreach efforts to identify artists who are veterans, who are small or disadvantaged business owners, or who have a disability to encourage them to join the Registry?
- Strengthen public participation engagement of the local community in the commissioning process for a work of art?
- Define ''community'' for the purpose of reflecting the people and cultural aspects of a place in the commissioned art?
- Ensure that the commission reflects the community in which it will be located?
- Modify the information collected in the Registry beyond what is discussed in this rule to enable GSA to measure how the program aligns with the priorities of equity and inclusion of underserved communities?
- Actively promote the Registry to remove barriers for the widest possible spectrum of eligible artists (*i.e.,* U.S. citizens and lawful permanent residents) to learn about and join the Registry and be considered for commissions?
- Create more learning and professional opportunities for emerging artists through commissions or other steps?
- Take advantage of the expertise and capacities of other Federal agencies, including the National Endowment for the Arts, and State and local arts agencies in implementing the Art in Architecture program?
- Ensure the Art in Architecture program advances democratic values and strengthens the experience of democracy and inclusion in America?

To understand the exact scope of the impact of this final rule and the effect of this impact, GSA welcomes input on the following assumptions and questions regarding the anticipated impact on affected parties.

- Assumption 1: GSA estimates that this final rule will not impact the commissioning of works of art. If this assumption is not correct, are there artists to which this rule will cause significant impact or disruption?
- Assumption 2: The impact of this rule will not significantly change the way GSA interacts with the Registry. If this assumption is not correct, to what extent will this final rule, specifically the revised elements of part 102–77 of the FMR, change how GSA interacts with the Registry?

## VIII. Executive Orders 12866 and 13563

E.O.s 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule is a significant regulatory action and, therefore, was subject to review under subsection 6(b) of E.O. 12866, ''Regulatory Planning and Review,'' dated September 30, 1993.

## IX. Congressional Review Act

This final rule is not a major rule under 5 U.S.C. 804(2). Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (codified at 5 U.S.C. 801–808), also known as the Congressional Review Act or CRA, 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. A major rule under the CRA cannot take effect until 60 days after it is published in the **Federal Register**. The OMB Office of Information and Regulatory Affairs has determined that this final rule is not a

''major rule'' as defined by 5 U.S.C. 804(2).

**X. Regulatory Flexibility Act**

This final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* because it applies to agency management or personnel.

**List of Subjects in 41 CFR Part 102–77**

Federal buildings and facilities, Government property management, Rates and fares.

**Robin Carnahan,**

*Administrator of General Services.*

■ For the reasons set forth in the Preamble, GSA hereby revises 41 CFR part 102–77 to read as follows:

## PART 102–77—ART IN ARCHITECTURE

### Subpart A—General Provisions

Sec.

**Scope**

102–77.5 What is the scope of this part?

**Definition**

102–77.10 What definition applies to this part?

**Policy**

102–77.15 What basic Art in Architecture policy governs Federal agencies?

### Subpart B—Art in Architecture

102–77.20 Who funds the Art in Architecture efforts?

102–77.25 With whom should Federal agencies collaborate when commissioning visual art for Federal buildings?

102–77.30 Do Federal agencies have responsibilities to provide national, regional, and local visibility for Art in Architecture?

**Authority:** 40 U.S.C. 121 and 3306.

### Subpart A—General Provisions

**Scope**

**§ 102–77.5 What is the scope of this part?**

The real property policies contained in this part apply to Federal agencies, including GSA's Public Buildings Service, operating under, or subject to, the authorities of the Administrator of General Services.

**Definition**

**§ 102–77.10 What definition applies to this part?**

*Visual art* means works, including, but not limited to, painting, sculpture, architectural or environmental art, time-based media, and works on paper.

**Policy**

**§ 102–77.15 What basic Art in Architecture policy governs Federal agencies?**

Federal agencies must incorporate visual art as an integral part of the total building concept when designing new Federal buildings and when making substantial repairs and alterations to existing Federal buildings, as appropriate. The commissioned art must reflect the national, regional, or local cultural heritages, or any combination of the foregoing, within the United States, and emphasize the work of living American artists, including those in underserved communities.

### Subpart B—Art in Architecture

**§ 102–77.20 Who funds the Art in Architecture efforts?**

To the extent not prohibited by law, Federal agencies must fund the Art in Architecture efforts by allocating a portion of the estimated cost of constructing or purchasing new Federal buildings or of completing major repairs and alterations of existing buildings. Funding for qualifying projects, including new construction, building acquisitions, and prospectus-level repairs and alterations, must be in a range determined by the Administrator of General Services.

**§ 102–77.25 With whom should Federal agencies collaborate when commissioning visual art for Federal buildings?**

To the maximum extent practicable, Federal agencies should seek the support and involvement of local citizens in commissioning a work of visual art. Federal agencies should collaborate with the chosen artist to commission works of visual art that reflect the cultural, intellectual, and historic interests and values of the community in which the art is to be located. In addition, Federal agencies should work collaboratively with the architect of the building and art professionals in commissioning visual art for Federal buildings. Federal agencies should commission a work of visual art that is diverse in style and media and no official style or media are mandated.

**§ 102–77.30 Do Federal agencies have responsibilities to provide national, regional, and local visibility for Art in Architecture?**

Yes. Federal agencies should provide Art in Architecture that receives appropriate national, regional, and local visibility to encourage participation by a large, diverse, and equitable group of artists representing a wide variety of types of visual art.

[FR Doc. 2022–02158 Filed 1–31–22; 8:45 am]

BILLING CODE 6820–14–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### 48 CFR Parts 332 and 352

**RIN 0991–AC32**

### Department of Health and Human Services Acquisition Regulation—Electronic Submission and Processing of Payment Requests

**AGENCY:** Office of the Secretary, Department of Health and Human Services.

**ACTION:** Final rule.

**SUMMARY:** The Department of Health and Human Services (HHS or the Department) finalizes its proposed regulation amending the Department's Federal Acquisition Regulation Supplement, the HHS Acquisition Regulation (HHSAR), to support the HHS Electronic Invoicing Implementation Project and HHS's transition to the Department of the Treasury's Invoice Processing Platform. This complies with Office of Management and Budget (OMB) memorandum M–15–19, Improving Government Efficiency and Saving Taxpayer Dollars Through Electronic Invoicing, issued on July 17, 2015.

**DATES:** This final rule is effective February 2, 2022.

**FOR FURTHER INFORMATION CONTACT:** Shari Shor, Procurement Analyst, Department of Health and Human Services, Office of the Assistant Secretary for Financial Resources, Office of Acquisition Policy, 200 Independence Avenue SW, Washington, DC 20201. Email: *Shari.Shor@hhs.gov.* Telephone: (202) 731–3383.

**I. Provisions of the Proposed Rule and Analysis of and Response to Public Comments**

In the October 14, 2021 **Federal Register** (86 FR 57102), HHS published a proposed rule titled ''Department of Health and Human Services Acquisition Regulation—Electronic Submission and Processing of Payment Requests''. In response to the publication of that proposed rule, HHS received 2 comments from members of the public. In the following sections of this final rule, HHS includes a summary of the provisions of the October 14, 2021 proposed rule, the public comments received, HHS's responses to the

comments, and any changes made to the regulatory text as a result.

*Comment:* One commentor provided HHS with strong support for the proposed rule, indicating the proposed electronic submission and processing of payment requests will provide a more efficient and cost-effective solution for HHS and the general public.

*Response:* HHS appreciates the comments and agrees that the benefits of electronic submission and processing of payment requests to support the HHS Electronic Invoicing Implementation Project and HHS's transition to the Department of the Treasury's Invoice Processing Platform, will generally outweigh any administrative costs associated with the transition. The HHS Electronic Invoicing Implementation Project will bring HHS in compliance with the OMB Memorandum M–15–19, Improving Government Efficiency and Saving Taxpayer Dollars through Electronic Invoicing, issued on July 17, 2015 which directed federal agencies to transition to electronic invoicing for appropriate federal procurements. Implementation of these solutions will improve citizen and business facing services, improve consistency, automate workflows, improve the transparency of invoice status, and support specific business needs identified across HHS while maintaining compliance with the OMB and Treasury requirements.

*Comment:* One commenter raised concern with the timing of the inclusion of the clause in new and existing contracts and the confusion that may be caused with tracking payment requests submitted prior to and after the change in invoice submission requirements.

*Response:* HHS appreciates the commenters concern and agrees additional information on the invoice submission process is necessary to mitigate any administrative confusion for the tracking of payment requests during the transition period. Since the HHS operating divisions utilize various accounting systems and their internal processes and procedures may vary depending on the systems they utilize, the HHS operating divisions will be issuing Payment Instructions to their respective contractor community with specific invoice submission instructions related to their internal policies, procedures, and processes.

## II. Required Rulemaking Analyses

### *A. Executive Orders 12866 and 13563: Regulatory Planning and Review Analysis*

HHS examined the effects of this rule as required by E.O. 12866, ''Regulatory Planning and Review,'' 58 FR 51,735 (Oct. 4, 1993), E.O. 13563, ''Improving Regulation and Regulatory Review,'' 76 FR 3821, (Jan. 21, 2011), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

Executive Order 12866, ''Regulatory Planning and Review,'' and Executive Order 13563, ''Improving Regulation and Regulatory Review,'' direct agencies to assess all costs and benefits of available regulatory alternatives and, if the regulation is necessary, to select regulatory approaches that maximize net benefits. A Regulatory Impact Analysis must be prepared for major rules with economically significant effects. The Department has determined that this rulemaking is not a significant regulatory action under these Executive Orders. In addition, the Department does not anticipate that this rulemaking will impose measurable costs on regulated parties. The Office of Management and Budget (OMB) has waived review on this rule.

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

Section 202(a) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532(a), requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year.'' In 2020, that threshold was $158 million. HHS does not expect this rule to exceed the threshold.

### *B. Regulatory Flexibility Act and Executive Order 13272*

The Department has examined the economic implications of this final rule as required by the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.* The RFA and the Small Business Regulatory Enforcement and Fairness Act of 1996 (Pub. L. 104–121), which amended the RFA, require HHS to analyze options for regulatory relief of small businesses. If a rule has a significant economic effect on a substantial number of small entities, the Secretary must specifically consider the economic effect of the rule on small entities and analyze regulatory options that could lessen the impact of the rule. The Department considers a rule to have a significant impact on a substantial number of small entities if the rule has at least a three percent impact on revenue on at least five percent of small entities. As a result, the Department has determined, and the Secretary certifies, that this final rule does not have a significant impact on a substantial number of small entities.

### *C. Executive Order 13132 (Federalism)*

Executive Order 13132, ''Federalism,'' 64 FR 43,255 (Aug. 10, 1999), establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State, local, and tribal governments or has federalism implications. The Department has determined that this final rule does not impose such costs or have any federalism implications.

### *D. Paperwork Reduction Act of 1995*

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Department has reviewed this final rule and has determined that it does not create new collections of information.

### List of Subjects in 48 CFR Parts 332 and 352

Government procurement.

For the reasons set forth in the preamble, the Department of Health and Human Services amends 48 CFR chapter 3, parts 332 and 352, as follows:

## PART 332—CONTRACT FINANCING

■ 1. The authority citation for part 332 continues to read as follows:

**Authority:** 5 U.S.C. 301; 40 U.S.C. 121(c)(2).

■ 2. Add subpart 332.70 to read as follows:

### Subpart 332.70—Electronic Submission and Processing of Payment Requests

Sec.
332.7000 Scope of subpart.
332.7001 Definitions.
332.7002 Policy.
332.7003 Contract clause.

## Subpart 332.70—Electronic Submission and Processing of Payment Requests

### 332.7000 Scope of subpart.

This subpart prescribes policies and procedures for electronic submission and processing of payment requests.

### 332.7001 Definitions.

*Payment request,* as used in this subpart, is defined as a bill, voucher, invoice, or request for contract financing payment with associated supporting documentation. The payment request must comply with the requirements identified in FAR 32.905(b), Content of invoices, and the applicable Payment clause included in this contract.

**332.7002 Policy.**

(a) Contracts shall require the electronic submission of payment requests, except for—

(1) Purchases paid for with a Government-wide commercial purchase card; and

(2) Classified contracts or purchases when electronic submission and processing of payment requests could compromise classified information or national security.

(b) Where a contract otherwise requires the electronic submission of invoices, the Contracting Officer may authorize alternate procedures only if the Contracting Officer makes a written determination that:

(1) The Department of Health and Human Services (HHS) is unable to receive electronic payment requests or provide acceptance electronically;

(2) The contractor has demonstrated that electronic submission would be unduly burdensome; or

(3) The contractor is in the process of transitioning to electronic submission of payment requests, but needs additional time to complete such transition. Authorizations granted on the basis of this paragraph (b)(3) must specify a date by which the contractor will transition to electronic submission.

(c) Except as provided in paragraphs (a) and (b) of this section, HHS officials shall process electronic payment submissions through the Department of the Treasury Invoice Processing Platform or successor system.

(d) If the requirement for electronic submission of payment requests is waived under paragraph (a)(2) or (b) of this section, the contract or alternate payment authorization, as applicable, shall specify the form and method of payment request submission.

**332.7003 Contract clause.**

Except as provided in 332.7002(a), use the clause at 352.232–71, Electronic Submission of Payment Requests, in all solicitations and contracts.

## PART 352—SOLICITATIONS PROVISIONS AND CONTRACT CLAUSES

■ 3. The authority citation for part 352 continues to read as follows:

**Authority:** 5 U.S.C. 301; 40 U.S.C. 121(c)(2).

■ 4. Add section 352.232–71 to read as follows:

**352.232–71 Electronic submission of payment requests**

As prescribed in HHSAR 332.7003, use the following clause:

**Electronic Submission of Payment Requests**

(a) *Definitions.* As used in this clause—

*Payment request* means a bill, voucher, invoice, or request for contract financing payment with associated supporting documentation. The payment request must comply with the requirements identified in FAR 32.905(b), ''Content of Invoices'' and the applicable Payment clause included in this contract.

(b) Except as provided in paragraph (c) of this clause, the Contractor shall submit payment requests electronically using the Department of Treasury Invoice Processing Platform (IPP) or successor system. Information regarding IPP, including IPP Customer Support contact information, is available at *www.ipp.gov* or any successor site.

(c) The Contractor may submit payment requests using other than IPP only when the Contracting Officer authorizes alternate procedures in writing in accordance with HHS procedures.

(d) If alternate payment procedures are authorized, the Contractor shall include a copy of the Contracting Officer's written authorization with each payment request.

(End of Clause)

**Xavier Becerra,**

*Secretary.*

[FR Doc. 2022–02134 Filed 2–1–22; 8:45 am]

BILLING CODE 4151–19–P

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### 49 CFR Part 219

**[Docket No. FRA–2019–0071, Notice No. 2]**

**RIN 2130–AC80**

## Control of Alcohol and Drug Use: Coverage of Mechanical Employees and Miscellaneous Amendments

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** As mandated by the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act (SUPPORT Act or Act), FRA is expanding the scope of its alcohol and drug regulation to cover mechanical employees. This rule clarifies who FRA considers a mechanical employee for regulatory purposes, and adopts proposed technical amendments.

**DATES:** This rule is effective March 4, 2022.

**ADDRESSES:** *Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Gerald Powers, Drug and Alcohol Program Manager, Office of Railroad Safety—Office of Technical Oversight, telephone: 202–493–6313, email: *gerald.powers@dot.gov;* Sam Noe, Drug and Alcohol Specialist, Office of Railroad Safety—Office of Technical Oversight, telephone: 615–719–2951, email: *sam.noe@dot.gov;* or Patricia V. Sun, Attorney Adviser, Office of Safety Law, telephone: 202–493–6060, email: *patricia.sun@dot.gov.*

**SUPPLEMENTARY INFORMATION:**

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### I. Executive Summary

In Section 8102(a) of the SUPPORT Act,[1] Congress mandated FRA (as the Secretary of Transportation's delegate) include ''all employees of railroad carriers who perform mechanical activities'' (MECH employee(s)) in its alcohol and drug regulation, 49 CFR part 219. In section 8102(b) of the Act, Congress directed FRA to define mechanical activities for purposes of part 219 coverage. On January 8, 2021, FRA published a Notice of Proposed Rulemaking (NPRM) in response to this mandate.[2] FRA received comments on the NPRM from four organizations (including one joint filing) and 12

[1] Public Law 115–271, Oct. 24, 2018.

[2] 86 FR 1418.

individuals. This final rule addresses those comments and amends part 219, as proposed, by defining a MECH employee as any employee who, on behalf of a railroad, performs mechanical tests or inspections required by the following FRA regulations: Railroad Freight Car Safety Standards (49 CFR part 215), Rear End Marking Device—Passenger, Commuter and Freight Trains (49 CFR part 221), Railroad Locomotive Safety Standards (49 CFR part 229), Steam Locomotive Inspection and Maintenance Standards (49 CFR part 230), Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment; End-of-Train Devices (49 CFR part 232), and Passenger Equipment Safety Standards (49 CFR part 238). In addition, as discussed in the Section-by-Section Analysis, the definition also includes any such employee who performs mechanical tests or inspections required by the Texas Central Railroad High-Speed Rail Safety Standards (49 CFR part 299). Defining a MECH employee as one who performs these required tests or inspections properly limits part 219 coverage to those mechanical department employees who perform functions that most directly affect safety. An employee who conducts tests or inspections provides the last safety check on railroad rolling equipment before its operation. Final tests or inspections, if not performed or if performed improperly, could lead to single points of failure in the mechanical safety process. An employee who performs a Federally mandated ''last look'' at the equipment, whether or not it has undergone any repair, maintenance, or servicing work, is responsible for ensuring that the equipment is compliant with Federal regulations and safe for use.

By amending the term ''regulated employee'' to include MECH employees, FRA is making them subject to all part 219 prohibitions and testing (pre-employment, random, post-accident toxicological (PAT), reasonable suspicion, return-to-duty, and follow-up). Railroads, contractors, and subcontractors must comply with the same reporting, recordkeeping, and referral requirements for MECH employees, as for covered service and MOW employees.

In addition to changes to part 219 directly related to the addition of MECH employees, this final rule also makes other changes to part 219, as proposed in the NPRM.

FRA has analyzed the economic impact of this final rule. FRA estimated the costs associated with random testing, reasonable cause/reasonable suspicion testing, pre-employment drug testing, and Government administrative costs.[3] As shown in the following table, over the 10-year period of analysis, the final rule will result in total costs of approximately $10.7 million (Present Value (PV) 7%).

TOTAL 10-YEAR COSTS [4]

| Category | Total cost, 7 percent ($) | Total cost, 3 percent ($) | Annualized cost, 7 percent ($) | Annualized cost, 3 percent ($) |
|---|---|---|---|---|
| Pre-Employment | 1,621,930 | 1,896,210 | 230,926 | 222,294 |
| Random Testing | 7,987,551 | 9,038,433 | 1,137,248 | 1,059,580 |
| Reasonable Cause and Reasonable Suspicion | 261,670 | 305,921 | 37,256 | 35,863 |
| Government Administrative Cost | 866,431 | 1,012,950 | 123,360 | 118,749 |
| Total | 10,737,582 | 12,253,514 | 1,528,790 | 1,436,486 |

The benefits of the final rule will come from reducing the number of mechanical employees who have a substance use disorder (SUD). FRA has determined that testing programs provide a deterrent effect to the misuse of alcohol and use of illicit drugs. This deterrence will reduce the number of existing mechanical employees with an SUD. Employee SUDs have an array of associated costs, including lost productivity, absenteeism, low morale, increased illness, and accidents. The deterrent effect of testing will induce mechanical employees with an SUD to modify their behavior with regard to the misuse of alcohol and/or use of illicit drugs. Pre-employment drug testing will prevent individuals with SUDs from being hired as mechanical employees. Random testing and reasonable cause/suspicion testing will allow railroads to identify mechanical employees with SUDs so that they can address those safety issues through rehabilitation or termination of employment.

As shown in the following table, over a 10-year period of analysis, the final rule will result in total benefits of $41.0 million (PV 7%).

TOTAL 10-YEAR BENEFITS

| Category | Total benefit, 7 percent ($) | Total benefit, 3 percent ($) | Annualized benefit, 7 percent ($) | Annualized benefit, 3 percent ($) |
|---|---|---|---|---|
| Deterrent Effect | 37,732,478 | 44,113,296 | 5,372,256 | 5,171,424 |
| Pre-Employment | 1,759,972 | 2,096,798 | 250,580 | 245,809 |
| Random Testing | 1,251,224 | 1,432,169 | 178,146 | 167,894 |
| Reasonable Cause and Reasonable Suspicion | 209,520 | 249,619 | 29,831 | 29,263 |
| Total | 40,953,195 | 47,891,881 | 5,830,814 | 5,614,390 |

[3] The final rule will not create new costs associated with PAT testing for mechanical employees as they are already subject to part 219 PAT requirements.

[4] Note: In this and subsequent tables, numbers may not add due to rounding.

## II. Discussion of General Comments and Conclusions

FRA received comments from 12 individuals and 4 organizations in response to the NPRM. While FRA has considered all of the comments submitted, FRA is not identifying comments from individuals in the discussion below as they were generally supportive of the rule or raised unrelated issues outside of its scope such as the opioid epidemic and marijuana legalization.

The American Public Transportation Association (APTA), the National Transportation Safety Board (NTSB), and in a joint submission, the Association of American Railroads (AAR) and the American Short Line and Regional Railroad Association (ASLRRA), submitted comments on the NPRM. Rail labor did not comment on FRA's proposal.

### *A. FRA's Proposed Mechanical Employee Definition*

#### 1. Summary

A common thread among the railroad commenters was that FRA should expand its proposed MECH employee definition to include all mechanical department employees, without qualifications or limitations on the functions or duties these employees perform. APTA supported the addition of employees who repair, service, and maintain railroad rolling equipment, while the NTSB reiterated Safety Recommendation R–08–7, which advocates coverage of all employees who perform safety-sensitive functions, as defined in § 209.303. FRA will address the APTA and NTSB comments below.

AAR/ASLRRA asserted that FRA should include all employees who perform mechanical duties involving railroad rolling equipment in the definition of MECH employee, stating that other FRA safety regulations, such as training standards (49 CFR part 243) and blue signal protection (49 CFR part 218), define mechanical employees to include those who perform repair, service, and maintenance functions. AAR had submitted a petition for rulemaking requesting part 219 coverage of mechanical employees in 2018.[5]

AAR/ASLRRA also stated that employees who perform repair, service, and maintenance functions have the same risk exposure as employees who inspect and test rolling equipment, as they also work on, under or between rolling equipment. Moreover, employees who fuel locomotives, replenish engine oils and water, clean and/or supply locomotives, check car lading, and load/unload freight cars, perform work with and around railroad rolling equipment. According to AAR/ASLRRA, both groups are subject to personal injury if impaired while on-duty, and have the potential to cause safety-related accidents and incidents.

Finally, while laborers and hostlers who operate locomotives are already regulated employees under part 219, AAR/ASLRRA suggested that FRA consider them MECH employees even if railroads later decide to remove their locomotive operation duties, because they would continue to be exposed to the risks of working with and around rolling stock.

FRA is not persuaded that this rule should anticipate speculative railroad work policies. And, as discussed further below, although the purpose of part 219 in general, and random testing in particular, is to encourage safety by deterring workplace substance abuse, it is not an employee safety rule.

Moreover, if FRA were to include every employee who performs mechanical activities without qualifying distinctions, part 219 would cover employees whose tasks are too attenuated from rail safety to constitute a direct risk, such as employees who fuel, clean, and supply locomotives, or retrieve and fulfill parts orders. As discussed below, FRA has both 4th Amendment and programmatic concerns about subjecting these employees to random testing.

#### 2. Fourth Amendment Implications

In *Skinner* v. *Railway Labor Executives' Association*,[6] the Supreme Court held that the collection and analysis of biological samples for FRA mandated or authorized drug and alcohol tests are 4th Amendment searches. The Court, in upholding FRA PAT and reasonable suspicion testing, found both searches reasonable because FRA's compelling interest in rail safety outweighed the privacy interests of railroad employees performing safety-sensitive tasks.

Although *Skinner* did not address the Constitutionality of random testing, several months later, a decision by the U.S. District Court for the District of Columbia reinforced that a direct safety nexus was crucial to sustain the workplace testing of employees. In *Transportation Institute, et al.* v. *United States Coast Guard, et al.*,[7] the Court enjoined implementation of the random testing part of a U.S. Coast Guard final rule[8] that established its workplace testing program. The Coast Guard had required, with limited exceptions, all crewmembers serving on board a commercial vessel to be subject to random testing, to include not only those employees whose ordinary duties directly affected the safety of vessel navigation and operations, but also any who could be assigned safety-critical tasks in an emergency. In holding the program was over-inclusive and violative of the 4th Amendment, the Court found that the Coast Guard had impermissibly covered maintainers, cooks, messmen, and other employees whose tasks were insufficiently tied to safety to justify their inclusion in random testing. The Coast Guard, in lieu of appealing the decision, suspended implementation of its random testing program and published another final rule which narrowed the focus of its random testing program to employees who performed functions directly affecting the safety of vessel operations or the emergency safety of passengers.[9]

Similarly, the expansion of the MECH employee definition to include all employees who perform mechanical activities would add mechanical department employees who, as examples, fuel, clean, and supply locomotives, or retrieve and fulfill parts orders, as noted above. The addition of these employees, and others who perform mechanical activities that do not directly affect safety, would impermissibly broaden the scope of part 219 beyond the workplace testing limits set by these decisions.

#### 3. Decrease in Random Testing Deterrence

The inclusion of employees who repair, service, or maintain rail rolling stock would lessen the impact of random testing, FRA's strongest deterrence tool against railroad workplace substance abuse. The FRA random drug positive rate has declined from a high of 0.94% in 2004 to 0.51% in 2020, even with the addition of maintenance-of-way (MOW) activities to regulated service in 2017 and synthetic opioid pain medications to the testing panel in 2018. FRA has consistently refined its random testing pool design requirements to improve the probability of a railroad selecting and testing employees who directly affect safety. For example, a railroad must periodically review its random testing pools to detect and remove employees who perform regulated service on a de minimis (less than quarterly) basis. In

[5] 86 FR 1419.

[6] 489 U.S. 602 (1989).

[7] 727 F. Supp. 648 (D.D.C. 1989).

[8] 53 FR 47064, Nov. 21, 1988.

[9] 56 FR 31034, July 8, 1991.

its final rule adding MOW employees to part 219 coverage,[10] FRA specified pool size minimums and other requirements to improve the efficacy of random testing.

Adoption of the commenters' requested definition would add thousands of mechanical department employees, such as locomotive servicing employees and shop laborers, who perform functions only tangentially related to rail safety. The inclusion of these employees would ''dilute'' mechanical employee pools by adding random testing selections that would displace those of employees who directly impact rail safety.

4. Consistency With the SUPPORT Act

AAR/ASLRRA, APTA, and NTSB asserted that FRA's proposed definition, by covering some, but not all, mechanical department employees was inconsistent with section 8102 of the Act. FRA notes, however, that as a corollary to section 8102(a)'s mandate to cover MECH employees, section 8102(b) authorized FRA to define mechanical activities. Had Congress intended FRA to cover mechanical department employees without restrictions, the Act would not have qualified section 8102(a)'s mandate with section 8102(b)'s direction for FRA to determine, and thus limit, which functions constitute mechanical activities for purposes of part 219 coverage. Under the Act's own terms, the final rule complies with both subsections of section 8102.

5. Consistency With the MOW Employee Definition

APTA suggested an alternate definition, under which a MECH employee would be ''[a]ny employee of a railroad whose duties include inspection, testing, maintenance or repair of railroad rolling equipment or its components.'' As explanation, APTA stated that: This language would make FRA's MECH and MOW employee definitions more consistent; substituting ''whose duties include'' for ''performs'' would remove the need to track employees who perform tests and inspections for purposes of determining random testing pool inclusion; and poor performance of maintenance and repairs, which it asserts are safety-critical tasks, could go undetected during daily and periodic inspections and tests. AAR/ASLRRA also commented that FRA's proposed treatment of MECH employees differed from its treatment of MOW employees who, as ''roadway workers,'' are defined in § 214.7 to include employees who maintain or repair railroad track and other structures.

Yet, the Act neither addresses, nor requires, consistency between part 219's MECH employee and MOW employee definitions. In its final rule incorporating MOW employees,[11] FRA adopted the roadway worker definition in § 214.7 of its Railroad Workplace Safety regulation, Roadway Worker Protection (subpart C of 49 CFR part 214). FRA adopted this longstanding definition because the railroad industry was already familiar with its meaning and application. In contrast, there is no pre-existing definition of MECH employee, and FRA is authorized to define the term as it deems appropriate.

As FRA states in § 219.1, the purpose of its alcohol and drug regulation is to prevent accidents and casualties related to substance abuse in rail operations. In § 214.301, however, FRA states that the purpose of its roadway worker protection regulation is, as implied by its subpart's heading, to prevent moving equipment-related accidents and casualties to roadway workers. Part 219, like all workplace testing rules, focuses on deterrence and detection of on-duty use and impairment, to improve the safety of rail employees generally, while part 214 focuses on operating rules to improve the safety of roadway employees specifically. FRA's mechanical regulations (*e.g.,* part 215) set minimum Federal safety standards for rail equipment. While these rules specify equipment requirements that promote a safe working environment for all employees, their stated purposes do not specifically include MECH employee safety.

FRA is expanding the scope of part 219, a workplace safety rule, to include MECH employees who work with railroad equipment subject to numerous workplace safety rules. Subpart C of part 214's stated purpose, to protect the safety of an individual category of employees, is unique to roadway workers/MOW employees. Aside from their consecutive incorporation as non-covered service employee categories, there is no equivalency between MOW and MECH employees, and no reason to make their definitions consistent. In addition, part 214 and FRA's mechanical regulations do not have the burden of balancing 4th Amendment rights and safety that must be considered when defining a regulated service function in part 219.

6. Treatment of Employees Subject to Part 209

While pleased that FRA was proposing to expand the scope of part 219, the NTSB expressed disappointment that FRA's proposal would not satisfy Safety Recommendation R–08–7,[12] which recommends the inclusion not only of employees who repair or maintain railroad rolling equipment, but all railroad employees and agents who perform the training, testing, and supervision roles described in § 209.303 (subpart D of 49 CFR part 209, Railroad Safety Enforcement Procedures). However, the NTSB acknowledged that it may be appropriate, on a limited basis, to exempt certain employees who perform only specific minor repair or maintenance tasks from the MECH employee definition in the final rule, following the example of paragraph (1)(ii) of the proposed MECH employee definition.

As further background, on April 10, 2008, the NTSB issued Safety Recommendations R–08–5 through R–08–7 to FRA.[13] At that time, part 219 coverage extended only to covered service employees. All three recommendations stemmed from a January 9, 2007, Massachusetts Bay Transportation Authority accident, which killed two MOW employees and seriously injured two others. (FRA discussed this accident and its corresponding NTSB accident report (NTSB RAR–08/01 [14]) in its MOW rulemaking.[15]) The NTSB stated:

> The FRA data from postaccident alcohol and drug testing indicate that maintenance-of-way employees are about three times more likely to have positive test results than are covered employees (19.23 percent vs. 6.56 percent). This difference is attributable to the deterrent value of the FRA's random testing program to which covered employees are subject but maintenance-of-way employees are not. The Safety Board concludes that the FRA's random alcohol and drug testing program has been a deterrent to alcohol and drug use by covered employees, as evidenced by their significantly lower positive rate in postaccident tests than maintenance-of-way employees who are not subject to random testing. Limiting the applicability of alcohol and drug testing to only ''hours-of-service'' employees restricts the potential effectiveness of the FRA rule to control alcohol and drug use. All employees and agents in safety-sensitive positions should be

[10] 81 FR 37894, June 10, 2016.

[11] 81 FR 47894.

[12] *https://data.ntsb.gov/carol-main-public/sr-details/R-08-007.*

[13] *https://www.ntsb.gov/safety/safety-recs/recletters/R08_05_07.pdf.*

[14] *https://www.ntsb.gov/investigations/AccidentReports/Pages/RAR0801.aspx.*

[15] 79 FR 43830 (July 28, 2014), 81 FR 37894 (June 10, 2016).

subject to all the provisions of 49 *Code of Federal Regulations* (CFR) Part 219. Therefore, the Safety Board recommends that the FRA revise the definition of ''covered employee'' under 49 CFR part 219 for purposes of Congressionally mandated alcohol and controlled substances testing programs to encompass all employees and agents performing safety-sensitive functions, as described in 49 CFR 209.301 and 209.303.

In § 209.303, FRA identified the individuals in the rail industry who would be subject to disqualification by specifying the functions these individuals performed.[16] While § 209.303 includes individuals who train and test employees, individuals who conduct FRA-mandated training and testing may do so without approaching railroad track, equipment, or roadbed. Moreover, part 209 is a rule of general applicability, which lists the individuals subject to FRA's individual liability, disqualification, and subpoena powers. The NTSB does not provide a direct correlation between the functions identified for purposes of disqualification and individual liability and the functions identified for purposes of random alcohol or drug testing. Without further justification from the NTSB, it is unclear how the performance of the excluded § 209.303 functions impacts rail safety, or why FRA should include all employees subject to § 209.303 under part 219.

APTA also recommended that FRA include foremen, general foremen, supervisors, general supervisors, and others who directly supervise or oversee employees performing mechanical activities. Because FRA's MECH employee definition determines coverage by function, not title, these employees would be performing regulated service if they sign-off on inspections, or test safety-critical systems or components.

*B. Pre-Employment Testing*

APTA requested that FRA exempt MECH employees from the required two-year retrospective alcohol and drug records check for new and first-time transfers in § 40.25 of DOT's Procedures for Transportation Workplace Drug and Alcohol Testing Programs (49 CFR part 40, cross-referenced in part 219 in § 219.701(a)). Section 40.25 requires an employer to check an employee's previous two years of DOT drug and alcohol testing results within 30 days of when the employee performs safety-sensitive duties for that employer for the first time. FRA cannot grant an exemption from § 40.25 for MECH employees, which APTA acknowledged is a requirement set by DOT's Office of Drug and Alcohol Policy and Compliance (ODAPC). Section 40.5 authorizes only ODAPC and the DOT Office of General Counsel to issue official interpretations of part 40.

FRA is, however, exempting current MECH employees from pre-employment drug testing. Only MECH employees hired by a railroad, or a railroad contractor or subcontractor, after the effective date of this final rule will be required to have a negative DOT pre-employment drug test before performing regulated service for the first time. As with MOW employees, this exemption applies only so long as the MECH employee continues to perform work for the same DOT-regulated employer. An initially exempted MECH employee must have a negative DOT pre-employment drug test result before performing regulated service for a different or additional DOT-regulated employer.

Moreover, consistent with part 219's treatment of MOW employees, FRA is not requiring a contractor or subcontractor employee who performs MECH activities for multiple railroads to have a negative Federal pre-employment drug test result for each railroad, provided that the contractor or subcontractor employee has a negative Federal pre-employment drug test result on file with the contractor who is his or her direct employer.

*C. Initial Mechanical Employee Annual Random Testing Rates*

FRA is setting the initial minimum annual random testing rates for MECH employees at 50 percent for drugs and 25 percent for alcohol, as it did for MOW and covered service employees when they first became subject to FRA testing. *See* § 219.625(c). FRA will create an independent Management Information System (MIS) database of industry-wide MECH employee positive and violation rates to set future minimum annual random testing rates, and will maintain its initial random testing rates for MECH employees until it has received two complete years of MIS data for this new category. An employer who is required to submit an annual MIS report may place its MECH employees in a commingled pool so long as the employer reports its results under the correct safety-sensitive category.

*D. Post-Accident Toxicological Testing*

In 2019, FRA published on its website a PAT testing application (app) which can be downloaded for free in both iOS and Android formats. The app contains guidance, among other resources, for determining whether an accident or incident qualifies as a PAT testing event and, if it does, which employees should be tested. FRA had proposed to remove appendix B, which designates its PAT testing laboratory, and appendix C, which contains its PAT specimen collection procedures, from part 219, in favor of making the information contained in both appendices kept in traditional hardcopy form in the actual testing kits and available on its app, where PAT guidance is already available.

AAR/ASLRRA asserted that appendix C should remain in part 219 because railroads are responsible for compliance with its instructions and procedures. FRA notes that a railroad representative is unlikely to consult appendix C until a PAT testing event has occurred, and PAT testing kits will, as always, contain up-to-date and accurate reference copies of information otherwise contained in both appendices. Furthermore, an on-site supervisor conducting a preliminary field accident investigation can readily access the information contained in (former) appendix C on FRA's app, which is intended to be a one-stop resource for information on PAT determinations and collections.

AAR/ASLRRA also asked how FRA will notify railroads of future changes to the information otherwise contained in (former) appendices B and C. FRA will announce these changes on its drug and alcohol page, at *https://railroads.dot.gov/divisions/partnerships-programs/drug-and-alcohol,* and in its app. In addition, FRA maintains an individual inventory number for each PAT testing box it has issued, and will distribute updates to box holders (primarily railroad DERs (Designated Employee Representatives)) as necessary as it has done in the past. For example, all box holders will automatically receive new mailing labels upon FRA's selection of a different contracted PAT testing laboratory.

AAR/ASLRRA requested that FRA add PAT testing protocols specifically to address the PAT testing of MECH employees, noting that unlike other regulated employees who have real-time involvement with railroad accidents, MECH employees frequently perform their functions well in advance of a qualifying event. This is unnecessary. FRA's requirements for PAT drug testing to be conducted within four hours of an event, and no later than 24 hours after its occurrence, apply to all PAT testing events. If a railroad is unable to determine that a MECH employee may have contributed to a

[16] 54 FR 48924, Oct. 18, 1989, implementating in part the Rail Safety Improvement Act of 1988, Public Law 100–342 (June 22, 1988).

PAT testing event's cause or severity within those time limits, the railroad is prohibited from PAT testing the employee involved. FRA is not revising its PAT testing protocols. Further, as discussed below, the tracing back of repair and servicing records, beyond the mechanical test or inspection point, would make PAT testing of the employees who performed these functions unlikely.

*E. Effective Date of Final Rule and Timetable for Submitting Random Testing Plans for MECH Employees*

Noting that FRA had allowed 12 months for implementation of the MOW rule, APTA requested a minimum period of 18–24 months, asserting that due to the coronavirus pandemic, railroads need more time to meet the hiring needs required to staff the addition of MECH employees to random testing. FRA is not persuaded by this argument. Most railroads are required to conduct random testing. A railroad that does so will already have its selection method, DERs, service agents, and other program requirements and structures in place, so that the addition of one or more random testing pools should not require extensive hiring.

AAR/ASLRRA requested a 90-day implementation period, should FRA require railroads to submit revised or new random testing plans 30 days before the rule's effective date. FRA is meeting this requested timetable by making the rule effective 30 days after its publication, and then requiring random testing plan submissions to be submitted to FRA within 60 days after the rule becomes effective, instead of 30 days before, as proposed. Railroads may also submit random testing plans to FRA as soon as the rule becomes effective.

## III. Section-by-Section Analysis

Unless discussed below, FRA is adopting, as proposed, each provision of the NPRM for which it received no comment.

*Authority*

FRA is amending the authority citation for part 219 to add a reference to section 8102 of the SUPPORT Act.

*Subpart A—General*

*Section 219.3 Application*

Paragraph (b)

FRA received no comments on its proposal to remove and reserve paragraph (b) in its entirety, and is adopting this amendment as proposed. Former paragraph (b)(1) is redundant with § 219.800(a), and former paragraphs (b)(2) and (3) can now be found in new paragraph (g) of § 219.800.

Paragraph (c)

FRA received no comments on its proposal to except small railroads, defined as railroads with 15 or fewer covered employees with minimal joint operations, from the reasonable cause, random testing, and employee referral requirements found respectively in subparts E, G, and K. FRA will continue to count only covered employees, and not MECH or MOW employees, to determine whether a railroad is a small railroad for purposes of this exception. FRA will also treat MECH employees the same as MOW employees for purposes of contractor compliance. As with MOW employees, a contractor's level of part 219 compliance will be determined by the size of the railroad(s) for which it performs MECH activities, not its size as a contractor. A contractor who performs MECH activities exclusively for small railroads (15 or fewer covered employees) that are excepted from full compliance with part 219 is also excepted from full compliance. Whereas, a contractor who performs MECH activities for at least one railroad that is required to be in full compliance with part 219 must also be in full compliance with part 219.

*Section 219.5 Definitions*

Category of Regulated Employee

As amended, this definition includes the categories of covered service, MOW, and MECH employees (as defined in this section). For the purposes of determining random testing rates under § 219.625, if an individual performs covered service, maintenance-of-way activities, and/or mechanical activities, he or she belongs in the category of regulated employee that corresponds with the majority of the employee's regulated service.

Employee

FRA is amending this definition to include any individual who performs activities for a subcontractor to a railroad.

Mechanical or MECH Employee

For the reasons stated above, FRA is adopting its proposal to define a MECH employee as any employee who, on behalf of a railroad, performs mechanical tests or inspections required by parts 215, 221, 229, 230, 232, or 238 of this chapter on railroad rolling equipment, or its components. In addition, the term would also include any such employee who performs mechanical tests or inspections required by the Texas Central Railroad High-Speed Rail Safety Standards (49 CFR part 299). These employees working on behalf of the Texas Central Railroad may otherwise be inadvertently excluded from the application of this rule because part 299 is a rule of particular applicability with its own requirements for mechanical tests and inspections.[17] No such exclusion was intended.

Regulated Employee

FRA is expanding this definition to include a MECH employee (as defined in this section) who performs regulated service (as defined in this section).

Regulated Service

FRA is expanding this definition to include activities performed by a MECH employee (as defined in this section).

Rolling Equipment

FRA is defining rolling equipment as locomotives, railroad cars, and one or more locomotives coupled to one or more cars, based on the definition of rolling equipment provided in FRA's Railroad Operating Practices regulation (49 CFR 218.5).

Side Collision

The term ''side collision'' was formerly defined to mean ''a collision at a turnout where one consist strikes the side of another consist.'' FRA had proposed to clarify this term to include collisions at switches or ''highway-rail grade crossings.'' In this final rule, FRA is substituting ''railroad crossings at grade'' for its proposed addition of ''highway-rail grade crossings.'' This change more appropriately clarifies the intent to address side collisions between train consists, not those that occur at highway-rail grade crossings between trains and highway vehicles.

*Section 219.10 Penalties*

As proposed, FRA is substituting the term ''regulated employee'' for ''employee,'' to clarify that the requirements of this section apply to MOW, MECH, and covered employees.

*Section 219.11 General Conditions for Chemical Tests*

Paragraph (g)

FRA is removing references to appendices B and C.

*Section 219.23 Railroad Policies*

This section sets forth requirements for a railroad's Federal alcohol and drug testing policy, including requirements for railroads to provide employees educational materials explaining the requirements of this part, as well as the

[17] 85 FR 69731 (Nov. 3, 2020).

railroad's policies and procedures with respect to meeting those requirements.

Paragraph (a)

FRA is substituting the term ''regulated employee'' for ''employee,'' to clarify that the requirements of this section apply to MOW, MECH, and covered employees.

Paragraph (c)

FRA is revising paragraph (c)(2) to require railroads to make hard copies of the required educational materials in this section available to each MECH employee for a minimum of three years after the effective date of the final rule. When FRA added MOW employees to the scope of part 219, it required railroads to make the same hard copy distribution to those employees for the same three-year period to introduce them to part 219. Because that three-year period for MOW employees has ended, existing paragraph (c)(2) has become unnecessary. FRA is therefore revising paragraph (c)(2) to address the addition of MECH employees and remove the reference to MOW employees.

Paragraph (d)(2)

FRA is amending this paragraph to specify that MECH employees as subject to the provisions in this part.

*Subpart C—Post-Accident Toxicological Testing*

As discussed above, MECH employees are subject to the same PAT testing requirements as covered service and MOW employees. A MECH employee must be PAT tested if a railroad representative can immediately determine, based on the best information available at the time of the decision, that the employee's improper or omitted mechanical test or inspection may have contributed to the cause or severity of a PAT-qualifying accident or incident. FRA is not revising its PAT testing protocols. The tracing back of repair and servicing records, beyond the mechanical test or inspection point, would make PAT testing of the employees who performed these functions unlikely, since PAT drug testing must be conducted within four hours of an event, and no later than 24 hours after its occurrence. The on-duty and recall provisions for MECH employees are the same as for other employee categories.

As proposed, FRA is removing appendices B and C. The name and mailing address of FRA's designated PAT laboratory (former appendix B) and instructions for toxicological specimen collection (former appendix C) will be made available both in FRA's PAT testing kits and in its PAT testing app.

*Section 219.203 Responsibilities of Railroads and Employees*

Paragraph (a)

FRA is removing the reference to appendix C in this paragraph, consistent with the removal of appendix C from this part.

Paragraph (d)

FRA is eliminating the requirement for a railroad to submit a written explanation if a specimen collection is delayed for more than four hours after the occurrence of a PAT event. However, under § 219.209(b), a railroad must still provide immediate telephonic notification and submit a written follow-up report via email when it is unable to collect and provide PAT specimens to FRA.

*Section 219.205 Specimen Collection and Handling*

FRA is removing the references to appendices B and C in this section, consistent with the removal of these appendices from this part.

*Section 219.206 FRA Access to Breath Test Results*

FRA is removing the reference to appendix C, consistent with the removal of appendix C from this part.

*Section 219.207 Fatality*

This section contains the requirements for PAT testing in the case of an employee fatality in an accident or incident described in § 219.101.

Paragraph (c)

FRA is removing ''Aviation Medical Examiners'' (AMEs) from the list of professionals authorized to collect post-mortem body fluid and tissue samples from a deceased employee for FRA PAT testing.

Paragraph (d)

FRA is removing the reference to appendix C, consistent with the removal of appendix C from this part.

*Section 219.211 Analysis and Follow-Up*

As proposed in the NPRM, FRA is amending this section to simplify and clarify its language. Additionally, FRA is requiring the submission of reports and requests under this section to be sent to FRA solely by email. Although FRA had proposed to continue to allow such reports and requests to be submitted in hard copy, while additionally allowing the flexibility of email submissions, the onset of the coronavirus disease 2019 (COVID–19) pandemic has led both FRA and its stakeholders to increasingly rely on electronic communications and submissions, which has become even clearer since issuance of the NPRM. Therefore, requiring all submissions to be made electronically under this section effectively codifies existing practice. No substantive changes are intended other than the amendments discussed below.

Paragraph (a)

FRA is removing the reference to appendix B, consistent with the removal of appendix B from this part.

Paragraph (c)

As noted, FRA is requiring an MRO to submit a report by email to an email box specifically set up for receipt of MRO reports (*FRA-MROletters.email@dot.gov*).

Paragraph (e)

FRA is amending this paragraph to adopt its proposed clarifications and to require that an employee's response to the employee's PAT results be sent by email within 45 days of receipt to *FRA-DrugAlcoholProgram.email@dot.gov.*

Paragraph (i)

FRA is amending this paragraph to adopt its proposed clarifications and provide that an employee's request for a retest of PAT test specimens must be submitted by email to *FRA-DrugAlcoholProgram.email@dot.gov.* The employee's request must still be submitted within the 60-day time limit and specify the railroad, accident date, and location.

*Subpart E—Reasonable Cause Testing*

*Section 219.403 Requirements for Reasonable Cause Testing*

FRA is revising the introductory paragraph of this section to clarify that a railroad that elects to conduct reasonable cause testing under FRA authority may only use the rule violations listed in paragraph (b) as bases for testing.

Paragraph (b)

FRA is removing ''or other errors'' from this paragraph to clarify that a railroad that chooses to conduct reasonable cause testing for rule violations under FRA authority may do so only for a rule violation specified in paragraph (b). FRA is also clarifying the intent of the proposed language of rule violation § 219.403(b)(20), for ease of understanding. No substantive changes are intended.

As proposed, FRA is adding reasonable cause testing bases specifically applicable to MECH employee functions. FRA authorizes, but does not require, reasonable cause testing, and received no comments in response to these additional rule violations, which involve common mechanical activities such as setting derails, performing brake tests, and initiating appropriate blue flag protection, as well as a rule violation for positive train control (PTC) enforcement to address PTC requirements that became applicable after the publication of the MOW rule.

*Subpart F—Pre-Employment Tests*

*Section 219.501 Pre-employment Drug Testing*

Paragraph (e)

FRA is clarifying that: (1) Covered employees performing regulated service for small railroads are exempted from pre-employment drug testing only if they were performing regulated service for the railroad before June 12, 2017; and (2) MOW employees are exempted from pre-employment drug testing only if they were performing ''regulated service'' for a railroad before June 12, 2017, and not just ''duties'' that may not have qualified as ''regulated service.'' Both clarifying amendments are consistent with discussion in the MOW final rule preamble, which explained that FRA was exempting employees who, before June 12, 2017, were performing MOW activities for a railroad or covered service for a small railroad.[18]

FRA is also exempting from pre-employment drug testing MECH employees who were performing mechanical activities for a railroad, or contractor or subcontractor of a railroad, before March 4, 2022.

An exempted employee must have a negative pre-employment drug test before performing regulated service for a new or additional employing railroad, or contractor or subcontractor of a railroad, on or after June 12, 2017, for exempted covered employees and maintenance-of-way employees, and on or after March 4, 2022 for MECH employees.

Paragraph (f)

To clarify how the proposed revisions in this section fit with the existing requirements of part 40, as discussed above, this new paragraph specifies that § 40.25 of DOT's Workplace Testing Procedures (49 CFR part 40) applies to a MOW or MECH employee who was or would be exempted from FRA pre-employment drug testing. To comply with § 40.25, a railroad must conduct a drug and alcohol records check of a previously exempted MOW or MECH employee's previous two years of employment within 30 days of when the employee performs regulated service for the first time.

*Subpart G—Random Alcohol and Drug Testing Programs*

*Section 219.605 Submission and Approval of Random Testing Plans*

Paragraph (a)

Similar to the revisions made to the filing requirements of § 219.211, and to effectively codify current practice, this final rule revises this section to require a railroad to submit its random testing plan to FRA by email to *FRA-DrugAlcoholProgram.email@dot.gov.* The plan must include the name of the railroad or contractor in the subject line.

Paragraph (e)

FRA is amending this paragraph to subject an employee who performs MECH activities to the same random testing requirements as one who performs covered service or MOW activities. As discussed under section II.E. above, AAR/ASLRRA requested a 90-day implementation period. FRA is meeting this requested timetable by making the rule effective 30 days after its publication, and then requiring random testing plan submissions to be submitted to FRA within 60 days after the rule becomes effective. Railroads may submit random testing plans to FRA as soon as the rule becomes effective.

Each railroad or contractor or subcontractor to a railroad must submit for FRA approval or acceptance a random testing plan ensuring that each MECH employee reasonably anticipates that he or she is subject to random testing without advance warning each time the employee is on-duty and subject to performing MECH activities. A railroad can comply with its responsibility for ensuring that its MECH contractor and subcontractor employees are subject to random testing by including these contractor and subcontractor employees in its own random testing plan, or by requiring contractors and subcontractors to submit their own random testing plans to FRA for acceptance. FRA has developed model random testing plans for MOW employees and contractors that could also serve as templates for MECH employees and contractors.[19] In either case, contractors and subcontractors are also responsible for ensuring that their employees who perform MECH activities comply with the rule's random testing requirements.

*Section 219.607 Requirements for Random Testing Plans*

Paragraph (c)

FRA is revising paragraph (c) of this section to reflect the application of railroad random testing plans to MECH employees, and to make other, minor clarifications.

*Section 219.615 Random Testing Collections*

Paragraph (e)

FRA is revising paragraph (e)(3) to state that a railroad must inform ''each regulated employee'' that he or she has been selected for random testing at the time the employee is notified—rather than inform ''an regulated employee.'' FRA does not intend this as a substantive change but merely as a clarification and grammatical correction of an existing requirement.

*Section 219.617 Participation in Random Alcohol and Drug Testing*

Paragraph (a)

FRA is substituting the term ''regulated employee'' for ''employee'' in paragraph (a)(3), to clarify that the requirements of this section apply to MOW, MECH, and covered employees.

*Section 219.625 FRA Administrator's Determination of Random Alcohol and Drug Testing Rates*

Paragraph (c)(1)

As stated above, an employee who performs MECH activities is subject to the same random testing requirements as one who performs covered service. Formerly, this paragraph authorized the Administrator to amend the minimum annual random testing rates, which are initially set at 50 percent for drugs and 25 percent for alcohol, for a new category of regulated employee after the compilation of 18 months of Management Information System (MIS) data. To allow sufficient time for the implementation of random testing by MECH contractors, FRA is requiring two consecutive, full calendar years of MIS data before the minimum annual random testing rates for this category may be lowered, as it did with both MOW and covered employees when

[18] 81 FR 37911 (June 10, 2016).

[19] A Model Railroad Contractor Compliance Plan is available on the FRA Drug and Alcohol Program web page at *https://railroads.dot.gov/divisions/partnerships-programs/drug-and-alcohol.*

they first became subject to random testing.

*Subpart I—Annual Report*

*Section 219.800 Annual Reports*

Paragraph (a)

FRA is clarifying that a railroad must submit summary data for its alcohol misuse and drug abuse programs in its MIS report.

Paragraph (f)

FRA is requiring a railroad to submit its annual MIS report in the appropriate separate sections for its covered employees (*e.g.,* train, engine, signal, dispatch), MOW employees, and MECH employees.

Paragraph (g)

As proposed, FRA is moving § 219.3(b)'s annual MIS reporting requirements for contractors to this subpart to consolidate and clarify its railroad and contractor MIS reporting requirements.

Appendices B and C to Part 219

As discussed above, FRA is removing appendices B and C to this part, because these appendices duplicate information that can be found in FRA's PAT testing kits and PAT testing app. Every PAT testing kit includes the address of FRA's PAT testing laboratory and an address for mailing. For ease of reference, standard PAT testing kits contain instructions for the collection of urine, blood and breath specimens, while fatality PAT testing shipping kits contain instructions for the post-mortem collection of body fluid and tissue specimens.

## IV. Regulatory Impact and Notices

### *A. Executive Order 12866 and DOT Regulatory Policies and Procedures*

This final rule is not a significant regulatory action within the meaning of Executive Order 12866 and DOT Order 2100.6A (Rulemaking and Guidance Procedures).[20] Details on the 10-year estimated costs and benefits of this rule can be found in the rule's Regulatory Impact Analysis, which FRA has prepared and placed in the docket (docket number FRA–2019–0071).

FRA is expanding the definition of regulated employee to include mechanical employees in part 219, as mandated by section 8102 of the SUPPORT Act.[21] The final rule will subject mechanical employees to the provisions of part 219. The final rule will also include non-quantified miscellaneous amendments that will reduce reporting burdens, enhance a railroad's authority to conduct reasonable cause testing, and add clarity to part 219.

The final rule generates costs related to provisions on pre-employment, random testing, reasonable cause/reasonable suspicion testing, and Government administration. As shown in the following table, over the 10-year period of analysis, the final rule will result in a total discounted cost of approximately $10.7 million (PV 7%).

TOTAL 10-YEAR COSTS

| Category | Total cost, 7 percent ($) | Total cost, 3 percent ($) | Annualized cost, 7 percent ($) | Annualized cost, 3 percent ($) |
|---|---|---|---|---|
| Pre-Employment | 1,621,930 | 1,896,210 | 230,926 | 222,294 |
| Random Testing | 7,987,551 | 9,038,433 | 1,137,248 | 1,059,580 |
| Reasonable Cause and Reasonable Suspicion | 261,670 | 305,921 | 37,256 | 35,863 |
| Government Administrative Cost | 866,431 | 1,012,950 | 123,360 | 118,749 |
| Total | 10,737,582 | 12,253,514 | 1,528,790 | 1,436,486 |

The benefits of the final rule will come from reducing the number of mechanical employees who have an SUD. FRA has determined that testing programs provide a deterrent effect to the misuse of alcohol and illicit drugs. This deterrence will reduce the number of existing mechanical employees with an SUD. Employee SUDs have an array of associated costs, including lost productivity, absenteeism, low morale, increased illness, and accidents. The deterrent effect of testing will induce mechanical employees with an SUD to modify their behavior with regard to the misuse of alcohol and/or use drugs. Pre-employment drug testing will help prevent individuals with SUDs from being hired as mechanical employees. Random testing and reasonable cause/suspicion testing will help railroads identify mechanical employees with SUDs so that they can mitigate those issues through rehabilitation or termination of employment.

Over a 10-year period of analysis, this analysis estimates the final rule's benefits by multiplying the reduction in the number of employee work years that mechanical employees with an SUD are employed (17,036 employee work years) by the annual cost of having a mechanical employee with an SUD ($3,200) on the payroll. As shown in the following table, over a 10-year period of analysis, the final rule will result in total benefits of approximately $41.0 million (PV 7%).

TOTAL 10-YEAR BENEFITS

| Category | Total benefit, 7 percent ($) | Total benefit, 3 percent ($) | Annualized benefit, 7 percent ($) | Annualized benefit, 3 percent ($) |
|---|---|---|---|---|
| Deterrent Effect | 37,732,478 | 44,113,296 | 5,372,256 | 5,171,424 |
| Pre-Employment | 1,759,972 | 2,096,798 | 250,580 | 245,809 |
| Random Testing | 1,251,224 | 1,432,169 | 178,146 | 167,894 |

[20] *https://www.transportation.gov/sites/dot.gov/files/2021-06/DOT-2100.6A-Rulemaking-and-Guidance-%28003%29.pdf.*

[21] Public Law 115–271.

TOTAL 10-YEAR BENEFITS—Continued

| Category | Total benefit, 7 percent ($) | Total benefit, 3 percent ($) | Annualized benefit, 7 percent ($) | Annualized benefit, 3 percent ($) |
|---|---|---|---|---|
| Reasonable Cause and Reasonable Suspicion | 209,520 | 249,619 | 29,831 | 29,263 |
| Total | 40,953,195 | 47,891,881 | 5,830,814 | 5,614,390 |

*B. Regulatory Flexibility Act and Executive Order 13272; Certification*

The Regulatory Flexibility Act of 1980 ((RFA) 5 U.S.C. 601 *et seq.*) and Executive Order 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. When an agency issues a rulemaking proposal, the RFA requires the agency to ''prepare and make available for public comment an initial regulatory flexibility analysis'' which will ''describe the impact of the proposed rule on small entities.'' [22] Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. Out of an abundance of caution, FRA prepared an initial regulatory flexibility analysis (IRFA) to accompany the NPRM, which noted no expected significant economic impact on a substantial number of small entities; no comments were received on this analysis.

In this final rule, FRA is amending part 219 to include mechanical employees. Drug and alcohol testing will become applicable to employees who perform mechanical activities for railroads, contractors, and subcontractors. This will include pre-employment drug, random, and reasonable cause/reasonable suspicion testing.

The final rule will apply to all railroads, although not all requirements will be relevant to all railroads. FRA estimates there are 744 Class III railroads, of which 704 operate on the general system. These railroads are of varying size, with some belonging to larger holding companies.

Part 219 excepts small railroads, defined as railroads with 15 or fewer covered employees and having minimal joint operations with other railroads, from random testing. Small railroads are also exempt from FRA reasonable cause testing. FRA is not changing this small railroad exception to account for railroads' mechanical employees.

The final rule will impose statutorily required costs related to pre-employment drug testing, random testing, reasonable suspicion testing, recordkeeping, and annual report submission. The final rule will also impose discretionary costs related to reasonable cause testing, which FRA has included in its economic analysis supporting this rule. FRA expects that the costs borne by a railroad will be proportionate to the number of employees. As such, FRA expects the costs for small entities will be much less than those borne by large entities.

As enumerated in the IRFA, the final rule will result in an average annual cost for a full compliance small railroad of $449 in year 1 to year 3 and $242 in year 4 to year 10. Partial compliance small railroads will have an average annual burden of approximately $41 as they will only be subject to adding pre-employment testing.

When developing the final rule, FRA considered the impact that the final rule would have on small entities. To add clarity and narrow the scope of those employees subject to the final rule, FRA chose a definition for ''mechanical employees'' that listed explicit exclusions. This rule will benefit small railroads by reducing the number of employees with an SUD that remain on the payroll. FRA estimates this final rule will only minimally impact small railroads and, overall, the net benefit will be positive to small railroads.

Consistent with the findings in FRA's IRFA, and the lack of any comments received on it, the Deputy Administrator of FRA hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

*C. Paperwork Reduction Act*

FRA is submitting the information collection requirements in this final rule to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act of 1995.[23] The sections that contain the new information collection requirements are duly designated and the estimated time to fulfill each requirement is as follows:

| CFR section [24] | Respondent universe | Total annual responses | Average time per response | Total annual burden hours | Total annual dollar cost equivalent [25] |
|---|---|---|---|---|---|
| 219.4—Petition for recognition of a foreign railroad's workplace testing program. | 1 railroad | 1 petition | 40 hours | 40.00 | $3,097.60 |
| —Comments on petitions | 1 railroad | 2 comments + 2 copies. | 15 mins + 15 minutes. | 1.00 | 77.44 |
| 219.7—Waivers | 734 railroads [26] | 3 waiver letters | 90 minutes | 4.50 | 348.48 |
| 219.12(d)—RR Documentation on need to place employee on duty for follow-up tests. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 6 documents | 30 minutes | 3.00 | 232.32 |
| 219.23(a)—Notification to employees for testing. | 165,058 employees [27]. | 71,978 notices | 3 seconds + 30 seconds. | 194.94 | 15,096.15 |

[22] 5 U.S.C. 603(a).

[23] 44 U.S.C. 3501 *et seq.*

| CFR section [24] | Respondent universe | Total annual responses | Average time per response | Total annual burden hours | Total annual dollar cost equivalent [25] |
|---|---|---|---|---|---|
| —(c) and (e)—Educational materials ... | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 744 modified/revised educational documents. | 1 hour ..... | 744.33 | 57,640.92 |
| —Copies of educational materials to employees. | 165,058 employees | 22,052 copies of educational material documents. | 2 minutes ..... | 735.07 | 56,923.82 |
| 219.25(a)—Previous employer drug and alcohol checks—Employee testing records from previous employers and employee release of information (49 CFR 40.25(a) and (f)). | 19,058 MECH employees. | 7,623 reports ..... | 8 minutes ..... | 1,016.40 | 78,710.02 |
| 219.104(b)—Removal of employee from regulated service—Verbal notice + follow-up written letter. | 734 (railroads + 44,797 MOW + (New) 19,058 MECH employees. | 530 verbal notices + 530 letters. | 30 seconds + 2 minutes. | 22.08 | 1,709.88 |
| 219.105—RR's duty to prevent violations—Documents provided to FRA after agency request regarding RR's alcohol and/or drug use education/prevention program. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 3 document copies | 5 minutes ..... | .25 | 19.36 |
| —RR Supervisor Rule G observations and records of regulated employees. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 330,116 observation records. | 2 seconds ..... | 183.40 | 14,202.50 |
| 219.201(a)—Events for which testing is required—List of event (*Note: App on PAT testing*) [28]. | Supervisors of regulated employees. | 500 PAT testing determinations. | 5 minutes ..... | 41.67 | 3,226.92 |
| —(c) Report by RR concerning decision by person other than RR representative about whether an accident/incident qualifies for testing. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 2 reports ..... | 30 minutes ..... | 1.00 | 77.44 |
| 219.203/207—Verbal notification and subsequent written report of failure to collect urine/blood specimens within four hours (revision to the current CFR, removal of written notification reports). | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 80 notifications ..... | 2 minutes ..... | 2.67 | 206.76 |
| —Recall of employees for testing and Narrative Report Completion. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 4 reports ..... | 30 minutes ..... | 2.00 | 154.88 |
| —RR reference to part 219 requirements and FRA's post-accident toxicological kit instructions in seeking to obtain facility cooperation. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 98 references ..... | 5 minutes ..... | 8.17 | 632.68 |
| —RR notification to National Response Center of injured employee unconscious or otherwise unable to give testing consent. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 2 phone calls ..... | 10 minutes ..... | .33 | 25.56 |
| —RR notification to local authority ..... | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 5 phone calls ..... | 10 minutes ..... | .83 | 64.28 |
| 219.205 [29]—Post Accident Toxicological Testing Forms—Completion of FRA F 6180.73. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 103 forms ..... | 10 minutes ..... | 17.17 | 1,329.64 |
| —Specimen handling/collection—Completion of Form FRA F 6180.74 by train crew members after accident. | 165,058 employees | 219 forms ..... | 15 minutes ..... | 54.75 | 4,239.84 |

| CFR section [24] | Respondent universe | Total annual responses | Average time per response | Total annual burden hours | Total annual dollar cost equivalent [25] |
|---|---|---|---|---|---|
| —Completion of Form FRA 6180.75 | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 7 forms | 20 minutes | 2.33 | 180.44 |
| —Documentation of chain of custody of sealed toxicology kit from medical facility to lab delivery. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 103 chain of custody documents. | 2 minutes | 3.43 | 265.62 |
| —RR/medical facility record of kit error | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 10 written records | 2 minutes | .33 | 25.56 |
| 219.209(a)—Notification to NRC and FRA of accident/incident where samples were obtained. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 103 phone reports | 2 minutes | 3.43 | 265.62 |
| 219.211(b)—Results of post-accident toxicological testing to RR MRO and RR employee. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 7 reports | 15 minutes | 1.75 | 135.52 |
| —MRO report to FRA of positive test for alcohol/drugs of surviving employee. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 6 reports | 15 minutes | 1.50 | 116.16 |
| 219.303—RR written documentation of observed signs/symptoms for reasonable suspicion determination. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 33 written documents. | 5 minutes | 2.75 | 212.96 |
| 219.305—RR written record stating reasons test was not promptly administered. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 11 records | 2 minutes | .37 | 28.65 |
| 219.405—RR documentation describing basis of reasonable cause testing. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 2,314 written documents. | 5 minutes | 192.81 | 14,931.21 |
| 219.407(b)—Prompt specimen collection time limitation exceeded—Record. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 17 records | 15 minutes | 4.25 | 329.12 |
| 219.501—RR documentation of negative pre-employment drug tests. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 6,400 lists | 30 seconds | 53.33 | 4,129.88 |
| 219.605(a)—Submission of random testing plan: New RRs. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 12 plans | 1 hour | 12.00 | 929.28 |
| —Amendments to currently-approved FRA random testing plan. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 450 amendments | 1 hour | 450.00 | 34,848.00 |
| —Resubmitted random testing plans after notice of FRA disapproval of plan or amendment. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 56 resubmitted plans. | 30 minutes | 28.00 | 2,168.32 |

| CFR section [24] | Respondent universe | Total annual responses | Average time per response | Total annual burden hours | Total annual dollar cost equivalent [25] |
|---|---|---|---|---|---|
| —Non-substantive amendment to an approved plan. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 300 amendments | 15 minutes | 75.00 | 5,808.00 |
| 219.615—Incomplete random testing collections—Documentation. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 2,250 documents | 30 seconds | 18.75 | 1,452.00 |
| 219.617—Employee Exclusion from random alcohol/drug testing after providing verifiable evidence from credible outside professional. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 6 documents | 1 hour | 6.00 | 464.64 |
| 219.623—Random testing records | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 48,977 records | 1 minutes | 816.28 | 63,212.72 |
| 219.800—Annual reports—Management Information System (MIS) form for MECH employees (49 CFR 40.26—MIS form submission). | 38 railroads + 17 contractors. | 55 MIS reports | 90 minutes | 82.50 | 6,388.80 |
| 219–1001—Co-worker referral of employee who is unsafe to work with/in violation of part 219 or railroad's drug/alcohol rules. | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 24 referrals | 5 minutes | 2.00 | 154.88 |
| Total | 734 railroads + 44,797 MOW + (New) 19,058 MECH employees. | 495,744 responses | N/A | 4,830 | 374,064 |

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information.

For information or a copy of the paperwork package submitted to OMB, contact Ms. Hodan Wells, Information Collection Clearance Officer, Office of Railroad Safety, Federal Railroad Administration, at 202–493–0440.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them via email to Ms. Wells at *Hodan.Wells@dot.gov*.

OMB is required to make a decision concerning the collection of information requirements contained in this 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. FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required.

*D. Environmental Impact*

Consistent with the National Environmental Policy Act [30] (NEPA), the Council of Environmental Quality's NEPA implementing regulations at 40 CFR parts 1500–1508, and FRA's NEPA implementing regulations at 23 CFR part 771, FRA has evaluated this final rule and determined that it is categorically excluded from environmental review and therefore does not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Categorical exclusions (CEs) are actions identified in an agency's NEPA implementing regulations that do not normally have a significant impact on the environment and therefore do not require either an EA or EIS.[31] Specifically, FRA has determined that this final rule is categorically excluded from detailed

[24] The burdens under §§ 219.25(a) and 219.800(b), once approved by OMB, will fall under DOT's part 40 information collection (OMB No. 2105–0529). Additionally, the burdens under §§ 219.603, 219.607, 219.609, 219.611, 219.1001, 219.1003, 219.1005, and 219.1007 are included under § 219.605. Furthermore, the burdens under §§ 219.12(c), 219.104(d), 219.105(a)(2)–(a)(3), 219.107(a)–(b), 219.203(a)(3)(ii), 219.300, 219.301, 219.302, 219.502, 219.503, 219.608, 219.615(g), 219.617(b)(2), 219.621, 219.701, and 219.903 are covered under DOT's Part 40 (OMB No. 2105–0529).

[25] The dollar equivalent cost is derived from the 2020 Surface Transportation Board's Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes 75-percent overhead charges. Also, totals may not add due to rounding.

[26] For purposes of this table, the respondent universe of 734 railroads includes the estimated 30 contractor companies that will be newly subject to part 219 because they perform MECH activities on behalf of these railroads.

[27] The respondent universe of 165,058 employees includes an estimated 19,058 MECH employees who will be newly subject to part 219. Note: The number of employees changed from 171,410 to 165,058 due to a change in the estimated number of MECH employees from 25,410 to 19,058.

[28] FRA is adding the existing burden associated with the usage of FRA's PAT testing app.

[29] A public comment from AAR/ASLRRA asked FRA how it will notify railroads of future changes to the information otherwise contained in (former) appendices B and C. FRA will add any changes to information from these former appendices on its drug and alcohol page, at *https://railroads.dot.gov/divisions/partnerships-programs/drug-and-alcohol,* and in FRA's PAT testing app, in addition to its PAT testing kits, as appropriate. The burden associated with the review of the updated information is already covered under § 219.201(a).

[30] 42 U.S.C. 4321 *et seq.*

[31] 40 CFR 1508.4.

environmental review pursuant to 23 CFR 771.116(c)(15), ''[p]romulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise.''

The purpose of this rulemaking is to expand the scope of FRA's alcohol and drug regulation to cover MECH employees who test or inspect railroad rolling equipment. This rule will not directly or indirectly impact any environmental resources and will not result in significantly increased emissions of air or water pollutants or noise. Instead, the rule will likely result in safety benefits. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review.[32] FRA has concluded that no such unusual circumstances exist with respect to this final rule and it meets the requirements for categorical exclusion under 23 CFR 771.116(c)(15).

Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to affect historic properties.[33] FRA has also determined that this rulemaking will not approve a project resulting in a use of a resource protected by Section 4(f).[34]

*E. Executive Order 12898 (Environmental Justice)*

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a)[35] require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. The DOT Order instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order in rulemaking activities, as appropriate. FRA has evaluated this final rule under Executive Order 12898 and the DOT Order and has determined it will not cause disproportionately high and adverse human health and environmental effects on minority populations or low-income populations.

*F. Federalism Implications*

Executive Order 13132, ''Federalism,''[36] requires FRA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that 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.'' Under Executive Order 13132, an Agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the Agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has analyzed this final rule under the principles and criteria contained in Executive Order 13132. This rule, issued under a statutory mandate, 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. FRA has determined that the rule will not impose substantial direct compliance costs on State and local governments, and that the consultation and funding requirements of Executive Order 13132 do not apply. However, this rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970, repealed and recodified at 49 U.S.C. 20106. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the ''essentially local safety or security hazard'' exception to section 20106.

In sum, FRA has analyzed this rule under the principles and criteria in Executive Order 13132, and determined that it has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Therefore, preparation of a federalism summary impact statement is not required.

*G. Unfunded Mandates Reform Act of 1995*

Pursuant to section 201 of the Unfunded Mandates Reform Act of 1995,[37] each Federal agency shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law). Section 202 of the Act[38] further requires that before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the Agency shall prepare a written statement detailing the effect on State, local, and tribal governments and the private sector. This rule will not result in such an expenditure, and thus preparation of such a statement is not required.

*H. Energy Impact*

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.''[39] FRA has evaluated this rule in accordance with Executive Order 13211 and determined that this regulatory action is not a ''significant energy action'' within the meaning of the Executive Order.

Executive Order 13783, ''Promoting Energy Independence and Economic Growth,'' requires Federal agencies to

[32] 23 CFR 771.116(b).

[33] 16 U.S.C. 470.

[34] Department of Transportation Act of 1966, as amended (Pub. L. 89–670, 80 Stat. 931); 49 U.S.C. 303.

[35] 91 FR 27534 (May 10, 2012).

[36] 64 FR 43255 (Aug. 10, 1999).

[37] Public Law 104–4, 2 U.S.C. 1531.

[38] 2 U.S.C. 1532.

[39] 66 FR 28355 (May 22, 2001).

review regulations to determine whether they potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.[40] FRA has determined that this rule will not burden the development or use of domestically produced energy resources.

*I. Tribal Consultation*

FRA has evaluated this rule under the principles and criteria in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000. The rule will not have a substantial direct effect on one or more Indian tribes, impose substantial direct compliance costs on Indian tribal governments, or preempt tribal laws, and a tribal summary impact statement is not required.

**List of Subjects in 49 CFR Part 219**

Alcohol abuse, Drug abuse, Drug testing, Penalties, Railroad safety, Reporting and recordkeeping requirements, Safety, Transportation.

**The Final Rule**

For the reasons stated above, FRA amends part 219 of chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

## PART 219—CONTROL OF ALCOHOL AND DRUG USE

■ 1. Revise the authority citation for part 219 to read as follows:

**Authority:** 49 U.S.C. 20103, 20107, 20140, 21301, 21304, 21311; 28 U.S.C. 2461, note; Sec. 412, Pub. L. 110–432, 122 Stat. 4889; Sec. 8108, Div. A; Sec. 8102, Pub. L. 115–271; 132 Stat. 3894; and 49 CFR 1.89.

## Subpart A—General

■ 2. In § 219.3, remove and reserve paragraph (b) and revise and republish paragraph (c).

The revision reads as follows:

### § 219.3 Application.

* * * * *

(c) *Small railroad exception.* (1) Subparts E, G, and K do not apply to small railroads, and a small railroad may not perform the Federal requirements authorized by those subparts. For purposes of this part, a small railroad means a railroad that:

(i) Has a total of 15 or fewer employees who are covered by the hours of service laws at 49 U.S.C. 21103, 21104, or 21105, or who would be subject to the hours of service laws at 49 U.S.C. 21103, 21104, or 21105 if their services were performed in the United States; and

(ii) Does not have joint operations, as defined in § 219.5, with another railroad that operates in the United States, except as necessary for purposes of interchange.

(2) An employee performing only MOW or MECH activities, as defined in § 219.5, does not count towards a railroad's total number of covered employees for the purpose of determining whether it qualifies for the small railroad exception.

(3) A contractor performing MOW or MECH activities exclusively for small railroads also qualifies for the small railroad exception (*i.e.,* is excepted from the requirements of subparts E, G, and K of this part). A contractor is not excepted if it performs MOW or MECH activities for at least one railroad that is required to be in full compliance with this part.

(4) If a contractor is subject to all of part 219 because it performs regulated service for multiple railroads, not all of which qualify for the small railroad exception, the responsibility for ensuring that the contractor complies with subparts E and G of this part is shared between the contractor and any railroad using the contractor that does not qualify for the small railroad exception.

* * * * *

■ 3. In § 219.5:

■ a. Revise the definitions of ''Category of regulated employee'' and ''Employee''

■ b. Add in alphabetical order a definition for ''Mechanical employee'';

■ c. Revise the definitions of ''Regulated employee'' and ''Regulated service'';

■ d. Add in alphabetical order a definition for ''Rolling equipment''; and

■ e. Revise the definition of and ''Side collision''.

The revisions and additions read as follows:

### § 219.5 Definitions.

* * * * *

*Category of regulated employee* means a broad class of covered service, maintenance-of-way, or mechanical employees (as defined in this section). For the purposes of determining random testing rates under § 219.625, if an individual performs both covered service and maintenance-of-way activities, or covered service and mechanical activities, he or she belongs in the category of regulated employee that corresponds with the type of regulated service comprising the majority of his or her regulated service.

* * * * *

*Employee* means any individual, (including a volunteer or a probationary employee) performing activities for a railroad, a contractor to a railroad, or a subcontractor to a railroad.

* * * * *

*Mechanical employee* or *MECH employee* means—

(1) Any employee who, on behalf of a railroad, performs mechanical tests or inspections required by part 215, 221, 229, 230, 232, 238, or 299 of this chapter on railroad rolling equipment, or its components, except for:

(i) An employee who is a member of a train crew assigned to test or inspect railroad rolling equipment that is part of a train or yard movement the employee has been called to operate; or

(ii) An employee who only performs one or more of the following duties:

(A) Cleaning and/or supplying cabooses, locomotives, or passenger cars with ice, food concession items, drinking water, tools, sanitary supplies, or flagging equipment;

(B) Servicing activities on locomotives such as fueling, replenishing engine oils and engine water, sanding, and toilet discharge and recharge;

(C) Checking lading for pilferage or vandalism; or

(D) Loading, unloading, or shifting car loads.

(2) An employee who only performs work related to the original manufacturing, testing, or inspection of railroad rolling equipment, or its components, on the manufacturer's behalf, is not a mechanical employee or MECH employee.

* * * * *

*Regulated employee* means a covered employee, maintenance-of-way employee, or mechanical employee (as defined in this section) who performs regulated service for a railroad subject to the requirements of this part.

*Regulated service* means activities a covered employee, maintenance-of-way employee, or mechanical employee (as defined in this section) performs that makes such an employee subject to this part.

* * * * *

*Rolling equipment* means locomotives, railroad cars, and one or more locomotives coupled to one or more railroad cars.

*Side collision* means a collision when one consist strikes the side of another consist at a turnout, including a collision at a switch or at a railroad crossing at grade.

* * * * *

■ 4. Revise and republish § 219.10 to read as follows:

[40] 82 FR 16093 (Mar. 31, 2017).

**§ 219.10 Penalties.**

Any person, as defined by § 219.5, who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $919 and not more than $30,058 per violation, except that: Penalties may be assessed against individuals only for willful violations; where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury, or has caused death or injury, a penalty not to exceed $120,231 per violation may be assessed; and the standard of liability for a railroad will vary depending upon the requirement involved. See, *e.g.,* § 219.105, which is construed to qualify the responsibility of a railroad for the unauthorized conduct of a regulated employee that violates § 219.101 or § 219.102 (while imposing a duty of due diligence to prevent such conduct). Each day a violation continues constitutes a separate offense. See FRA's website at *www.fra.dot.gov* for a statement of agency civil penalty policy.

■ 5. In § 219.11, revise paragraph (g) to read as follows:

**§ 219.11 General conditions for chemical tests.**

* * * * *

(g) Each supervisor responsible for regulated employees (except a working supervisor who is a co-worker as defined in § 219.5) must be trained in the signs and symptoms of alcohol and drug influence, intoxication, and misuse consistent with a program of instruction to be made available for inspection upon demand by FRA. Such a program shall, at a minimum, provide information concerning the acute behavioral and apparent physiological effects of alcohol, the major drug groups on the controlled substances list, and other impairing drugs. The program must also provide training on the qualifying criteria for post-accident toxicological testing contained in subpart C of this part, and the role of the supervisor in post-accident collections described in subpart C.

* * * * *

■ 6. In § 219.23, revise the first sentence of paragraph (a) introductory text and revise paragraphs (c)(2) and (d)(2) to read as follows:

**§ 219.23 Railroad policies.**

(a) Whenever a breath or body fluid test is required of a regulated employee under this part, the railroad (either through a railroad employee or a designated agent, such as a contracted collector) must provide clear and unequivocal written notice to the employee that the test is being required under FRA regulations and is being conducted under Federal authority.

* * *

* * * * *

(c) * * *

(2) For a minimum of three years after March 4, 2022, also ensuring that a hard copy of these materials is provided to each mechanical employee.

(d) * * *

(2) The specific classes or crafts of employee who are subject to the provisions of this part, such as engineers, conductors, MOW employees, MECH employees, signal maintainers, or train dispatchers;

* * * * *

## Subpart C—Post-Accident Toxicological Testing

■ 7. In § 219.203, revise paragraphs (a) introductory text and (d)(1) to read as follows:

**§ 219.203 Responsibilities of railroads and employees.**

(a) *Employees tested.* A regulated employee subject to post-accident toxicological testing under this subpart must cooperate in the provision of specimens as described in this part.

* * * * *

(d) * * *

(1) A railroad must make every reasonable effort to assure that specimens are provided as soon as possible after the accident or incident, preferably within four hours. Specimens that are not collected within four hours after a qualifying accident or incident must be collected as soon thereafter as practicable. If a specimen is not collected within four hours of a qualifying event, the railroad must immediately notify the FRA Drug and Alcohol Program Manager at 202–493–6313 and provide detailed information regarding the failure (either in conversation or via a voicemail).

* * * * *

■ 8. In § 219.205, revise paragraphs (a) and (c)(1), the first sentence of paragraph (c)(2), paragraph (d), and the first sentence of paragraph (e) to read as follows:

**§ 219.205 Specimen collection and handling.**

(a) *General.* Urine and blood specimens must be obtained, marked, preserved, handled, and made available to FRA consistent with the requirements of this subpart and the instructions provided inside the FRA post-accident toxicological shipping kit.

* * * * *

(c) * * *

(1) FRA makes available for purchase a limited number of standard shipping kits for the purpose of routine handling of post-accident toxicological specimens under this subpart. Specimens must be placed in the shipping kit and prepared for shipment according to the instructions provided in the kit.

(2) Standard shipping kits may be ordered by requesting an order form from FRA's Drug and Alcohol Program Manager at 202–493–6313. * * *

(d) *Shipment.* Specimens must be shipped as soon as possible by pre-paid air express (or other means adequate to ensure delivery within 24 hours from time of shipment) to FRA's post-accident toxicological testing laboratory. However, if delivery cannot be ensured within 24 hours due to a suspension in air express delivery services, the specimens must be held in a secure refrigerator until delivery can be accomplished. In no circumstances may specimens be held for more than 72 hours. Where express courier pickup is available, the railroad must ask the medical facility to transfer the sealed toxicology kit directly to the express courier for transportation. If courier pickup is not available at the medical facility where the specimens are collected or if for any other reason a prompt transfer by the medical facility cannot be assured, the railroad must promptly transport the sealed shipping kit holding the specimens to the most expeditious point of shipment via air express. The railroad must maintain and document a secure chain of custody of the kit(s) from its release by the medical facility to its delivery for transportation.

(e) *Specimen security.* After a specimen kit or transportation box has been sealed, no entity other than FRA's post-accident toxicological testing laboratory may open it. * * *

■ 9. Revise § 219.206 to read as follows:

**§ 219.206 FRA access to breath test results.**

Documentation of breath test results must be made available to FRA consistent with the requirements of this subpart.

■ 10. In § 219.207, revise paragraphs (c) and (d) to read as follows:

**§ 219.207 Fatality.**

* * * * *

(c) A coroner, medical examiner, pathologist, or other qualified professional is authorized to remove the required body fluid and tissue specimens from the remains on request of the railroad or FRA pursuant to this part; and in so acting, such person is the delegate of the FRA Administrator

under sections 20107 and 20108 of title 49, United States Code (but not the agent of the Secretary for purposes of the Federal Tort Claims Act (chapter 71 of Title 28, United States Code). A qualified professional may rely upon the representations of the railroad or FRA representative with respect to the occurrence of the event requiring that toxicological tests be conducted and the coverage of the deceased employee under this part.

(d) The instructions included inside the shipping kits specify body fluid and tissue specimens required for toxicological analysis in the case of a fatality.

■ 11. In § 219.211, revise paragraphs (a), (c), (e), and (i) to read as follows:

**§ 219.211 Analysis and follow-up.**

(a) Specimens are analyzed for alcohol, controlled substances, and non-controlled substances specified by FRA under protocols specified by FRA. These substances may be tested for in any form, whether naturally or synthetically derived. Specimens may be analyzed for other impairing substances specified by FRA as necessary to the particular accident investigation.

* * * * *

(c) With respect to a surviving employee, a test reported as positive for alcohol or a controlled substance must be reviewed by the railroad's Medical Review Officer (MRO) with respect to any claim of use or administration of medications (consistent with § 219.103) that could account for the laboratory findings. The MRO must promptly report the results of each review by email to *FRA-MROletters.email@dot.gov.* The report must reference the employing railroad, accident/incident date, and location; and state whether the MRO reported the test result to the employing railroad as positive or negative and the basis of any determination that analytes detected by the laboratory derived from authorized use (including a statement of the compound prescribed, dosage/frequency, and any restrictions imposed by the authorized medical practitioner). Unless specifically requested by FRA in writing, the MRO may not disclose to FRA the underlying physical condition for which any medication was authorized or administered. The FRA is not bound by the MRO's determination, but that determination will be considered by FRA in relation to the accident/incident investigation and with respect to any enforcement action under consideration.

* * * * *

(e) An employee may respond within 45 days of receipt of his or her test results prior to the preparation of any final investigative report concerning the accident or incident by email to *FRA-DrugAlcoholProgram.email@dot.gov.* The employee's response must state the accident date, railroad, and location; the position the employee held on the date of the accident/incident; and any information the employee requests be withheld from public disclosure. FRA will decide whether to honor the employee's request to withhold information.

* * * * *

(i) An employee may, within 60 days of receipt of the toxicology report, request a retest of his or her PAT testing specimen. A request for retest must be emailed to *FRA-DrugAlcoholProgram.email@dot.gov.* The employee's request must specify the railroad, accident date, and location. Upon receipt of the employee's request, FRA will identify and select a qualified referee laboratory that has available an appropriate, validated assay for the specimen type and analyte(s) declared positive. Because some analytes may deteriorate during storage, if the referee laboratory detects levels above its Limit of Detection (as defined in 49 CFR 40.3), FRA will report the retest result as corroborative of the original PAT test result.

## Subpart E—Reasonable Cause Testing

■ 12. In § 219.403, revise the introductory text, revise and republish paragraph (b)(1), revise paragraphs (b)(17) and (18), and add paragraphs (b)(19) through (22) to read as follows:

**§ 219.403 Requirements for reasonable cause testing.**

Each railroad's decision process regarding whether reasonable cause testing is authorized must be completed before the reasonable cause testing is performed and documented according to the requirements of § 219.405. The following circumstances constitute reasonable cause for the administration of alcohol and/or drug tests under the authority of this subpart. For reasonable cause testing based on a rule violation as authorized in paragraph (b) of this section, a railroad that elects to test under FRA authority may only use the rule violations listed in paragraph (b) of this section as bases for reasonable cause testing.

* * * * *

(b) * * *

(1) Noncompliance with a train order, track warrant, track bulletin, track permit, stop and flag order, timetable, signal indication, special instruction or other directive with respect to movement of railroad on-track equipment that involves—

(i) Occupancy of a block or other segment of track to which entry was not authorized;

(ii) Failure to clear a track to permit opposing or following movements to pass;

(iii) Moving across a railroad crossing at grade without authorization;

(iv) Passing an absolute restrictive signal or passing a restrictive signal without stopping (if required); or

(v) Failure to take appropriate action, resulting in the enforcement of a positive train control system.

* * * * *

(17) Improper use of individual train detection in a manual interlocking or control point;

(18) Failure to apply three point protection (fully apply the locomotive and train brakes, center the reverser, and place the generator field switch in the off position) that results in a reportable injury to a regulated employee;

(19) Failure to display blue signals in accordance with § 218.25 through § 218.30 of this chapter;

(20) Failure to perform a required brake test, or having knowledge that a required brake test was not performed, pursuant to the Class I, Class IA, Class II, or Class III, or transfer train brake test provisions of part 232, or the running brake test provisions of part 238, of this chapter;

(21) Failure to comply with prohibitions against tampering with locomotive mounted safety devices, or permitting a train to be operated with an unauthorized disabled safety device in the controlling locomotive; or

(22) Failure to have a derailing device in proper position and locked if required in accordance with § 218.109 of this chapter.

## Subpart F—Pre-Employment Tests

■ 13. In § 219.501, revise paragraph (e) and add paragraph (f) to read as follows:

**§ 219.501 Pre-employment drug testing.**

* * * * *

(e)(1) The pre-employment drug testing requirements of this section do not apply to:

(i) Covered employees of railroads qualifying for the small railroad exception (see § 219.3(c)) who were performing regulated service for the qualifying railroad, or a contractor or subcontractor of a qualifying railroad, before June 12, 2017;

(ii) Maintenance-of-way employees who were performing regulated service

for a railroad, or a contractor or subcontractor of a railroad, before June 12, 2017; or

(iii) MECH employees who were performing regulated service for a railroad, or contractor or subcontractor of a railroad, before March 4, 2022.

(2) An exempted employee under paragraph (e)(1) of this section must have a negative pre-employment drug test before performing regulated service for a new or additional employing railroad, or contractor or subcontractor of a railroad:

(i) On or after June 12, 2017, for exempted covered employees and maintenance-of-way employees, and

(ii) On or after March 4, 2022 for MECH employees.

(f) A railroad, or contractor or subcontractor of a railroad, must comply with 49 CFR 40.25 by performing a records check on any of its MOW or MECH employees who have been exempted from pre-employment testing before the employee first performs regulated service. An employee may not perform regulated service after 30 days from the date on which the employee first performed regulated service, unless this information has been obtained or a good faith effort to obtain this information has been made and documented.

## Subpart G—Random Alcohol and Drug Testing Programs

■ 14. In § 219.605, revise and republish paragraphs (a) and (e) to read as follows:

### § 219.605 Submission and approval of random testing plans.

(a) *Plan submission.* (1) Each railroad must submit for review and approval a random testing plan meeting the requirements of §§ 219.607 and 219.609 by email to *FRA-DrugAlcoholProgram.email@dot.gov.* The submission must include the name of the railroad or contractor in the subject line. A railroad commencing start-up operations must submit its plan no later than 30 days before its date of commencing operations. A railroad that must comply with this subpart because it no longer qualifies for the small railroad exception under § 219.3 (due to a change in operations or its number of covered employees) must submit its plan no later than 30 days after it becomes subject to the requirements of this subpart. A railroad may not implement a Federal random testing plan or any substantive amendment to that plan before FRA approval.

(2) A railroad may submit separate random testing plans for each category of regulated employees (as defined in § 219.5), combine all categories into a single plan, or amend its current FRA-approved plan to add additional categories of regulated employees, as defined by this part.

* * * * *

(e) *Previously approved plans.* A railroad is not required to resubmit a random testing plan that FRA had approved before March 4, 2022, unless the railroad must amend the plan to comply with the requirements of this subpart. A railroad must submit new plans, combined plans, or amended plans incorporating new categories of regulated employees (*i.e.,* mechanical employees) for FRA approval at least 60 days after March 4, 2022.

■ 15. Revise § 219.607 by redesignating paragraphs (c)(3) through (14) as (c)(4) through (15), adding new paragraph (c)(3), and revising newly redesignated paragraphs (c)(7), (9), and (14) to read as follows:

### § 219.607 Requirements for random testing plans.

* * * * *

(c) * * *

(3) Total number of mechanical employees, including mechanical contractor employees and volunteers;

* * * * *

(7) Name, address, and contact information for any service providers, including the railroad's Medical Review Officers (MROs), Substance Abuse and Mental Health Services Administration (SAMHSA) certified drug testing laboratory(ies), Drug and Alcohol Counselors (DACs), Substance Abuse Professionals (SAPs), and Consortium/Third Party Administrators (C/TPAs) or collection site management companies. Individual collection sites do not have to be identified;

* * * * *

(9) Target random testing rates meeting or exceeding the minimum annual random testing rates;

* * * * *

(14) Designated testing window. A designated testing window extends from the beginning to the end of the designated testing period established in the railroad's FRA-approved random plan (see § 219.603), after which time any individual selections for that designated testing window that have not been collected are no longer active; and

* * * * *

■ 16. In § 219.615, revise the first sentence of paragraph (e)(3) to read as follows:

### § 219.615 Random testing collections.

* * * * *

(e) * * *

(3) A railroad must inform each regulated employee that he or she has been selected for random testing at the time the employee is notified. * * *

* * * * *

■ 17. In § 219.617, revise the first sentence of paragraph (a)(3) to read as follows:

### § 219.617 Participation in random alcohol and drug testing.

(a) * * *

(3) A railroad may excuse a regulated employee who has been notified of his or her selection for random testing only if the employee can substantiate that a medical emergency involving the employee or an immediate family member (*e.g.,* birth, death, or medical emergency) supersedes the requirement to complete the test. * * *

* * * * *

■ 18. In § 219.625, revise paragraph (c)(1) to read as follows:

### § 219.625 FRA Administrator's determination of random alcohol and drug testing rates.

* * * * *

(c) * * *

(1) These initial testing rates are subject to amendment by the Administrator in accordance with paragraphs (d) and (e) of this section after at least two consecutive calendar years of MIS data have been compiled for the category of regulated employee.

* * * * *

## Subpart I—Annual Report

■ 19. In § 219.800, revise the first sentence of paragraph (a), revise paragraph (f), and add paragraph (g) to read as follows:

### § 219.800 Annual reports.

(a) Each railroad that has a total of 400,000 or more employee hours (including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States), must submit to FRA by March 15 of each year a report covering the previous calendar year (January 1–December 31), summarizing the results of its alcohol misuse and drug abuse prevention program. * * *

* * * * *

(f) A railroad required to submit an MIS report under this section must submit separate reports for covered employees, MOW employees, and MECH employees.

(g)(1) This subpart does not apply to any contractor that performs regulated service exclusively for railroads with fewer than 400,000 total employee

annual work hours, including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States.

(2) When a contractor performs regulated service for at least one railroad with 400,000 or more total annual employee work hours, including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States, this subpart applies as follows:

(i) A railroad with 400,000 or more total employee annual work hours must comply with this subpart regarding any contractor employees it integrates into its own alcohol and drug program under this part; and

(ii) If a contractor establishes an independent alcohol and drug testing program that meets the requirements of this part and is acceptable to the railroad, the contractor must comply with this subpart if it has 200 or more regulated employees.

**Appendix B to Part 219—[Removed]**

■ 20. Remove appendix B to part 219.

**Appendix C to Part 219—[Removed]**

■ 21. Remove appendix C to part 219.

Issued in Washington, DC.

**Amitabha Bose,**

*Administrator.*

[FR Doc. 2022–01985 Filed 2–1–22; 8:45 am]

BILLING CODE 4910–06–P

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

**[Docket No. FWS–R2–ES–2012–0042; FF09E21000 FXES1111090FEDR 223]**

**RIN 1018–AX13**

## Endangered and Threatened Wildlife and Plants; Revision of the Critical Habitat Designation for the Jaguar in Compliance With a Court Order; Correction

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule; correction.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, are correcting an erroneous acreage amount presented twice in the preamble of our July 22, 2021, final rule that was issued to comply with a court order concerning the critical habitat designation for the jaguar (*Panthera onca*) under the Endangered Species Act of 1973, as amended (Act).

**DATES:** This correction is effective February 2, 2022.

**FOR FURTHER INFORMATION CONTACT:** U.S. Fish and Wildlife Service, Attn: Jeff Humphrey, at 9828 North 31st Avenue #C3, Phoenix, AZ 85051; by telephone at 602–242–0210; or by email at *incomingazcorr@fws.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### Correction

On July 22, 2021, we published in the **Federal Register** (86 FR 38570) a final rule that was issued to comply with a court order to vacate Unit 6 and the New Mexico portion of Unit 5 from the March 5, 2014, final rule designating approximately 764,207 acres (309,263 hectares) of land in New Mexico and Arizona as critical habitat for the jaguar under the Act (16 U.S.C. 1531 *et seq.*). In two places in the preamble of the July 22, 2021, final rule, we erroneously stated that the final rule removes approximately 110,438 acres (44,693 hectares) of land within New Mexico from the designation of critical habitat for the jaguar. This document corrects the preamble to state that the July 22, 2021, final rule removes approximately 59,286 acres (23,993 hectares) of land within New Mexico from the designation of critical habitat for the jaguar. We are not making any corrections to the maps we codified in the July 22, 2021, final rule; they are correct as published (86 FR 38570, July 22, 2021, pp. 86 FR 38571–38572).

Therefore, in the final rule published at 86 FR 38570, in the July 22, 2021, issue of the **Federal Register**, we make the following corrections to the preamble:

1. On page 38570 in the third column, second line, we remove the words ''110,438 acres (44,693 hectares)'' and add in their place the words ''59,286 acres (23,993 hectares)''.

2. On page 38571 in the first column, in the first sentence under Effects of the Rule, we remove the words ''110,438 acres (44,693 hectares)'' and add in their place the words ''59,286 acres (23,993 hectares)''.

### Administrative Procedure

We have determined, pursuant to 5 U.S.C. 553(b)(3)(B), that prior notice and opportunity for public comment are impractical and unnecessary. Public comment could not inform this correction process in any meaningful way. We have further determined that, under 5 U.S.C. 553(d)(3), the agency has good cause to make this rule effective upon publication, as it is important for the proper administration of our programs for our rulemaking documents published in the **Federal Register** to be complete and accurate.

### Authority

The authority for this action is the Endangered Species Act (16 U.S.C. 1531 *et seq.*)

**Martha Williams,**

*Principal Deputy Director, Exercising the Delegated Authority of the Director, U.S. Fish and Wildlife Service.*

[FR Doc. 2022–02054 Filed 2–1–22; 8:45 am]

BILLING CODE 4333–15–P

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 635

**[Docket No. 180117042–8884–02; RTID 0648–XB751]**

## Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries

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

**ACTION:** Temporary rule; Purse Seine category annual quota adjustment; inseason quota transfer.

**SUMMARY:** NMFS is adjusting the Atlantic bluefin tuna (BFT) Purse Seine and Reserve category quotas for 2022. NMFS also is transferring 26 metric tons (mt) of BFT quota from the Reserve category to the General category January through March 2022 subquota period. The transfer to the General category is based on consideration of the regulatory determination criteria regarding inseason adjustments and applies to Atlantic Tunas General category (commercial) permitted vessels and Highly Migratory Species (HMS) Charter/Headboat permitted vessels with a commercial sale endorsement when fishing commercially for BFT.

**DATES:** Effective January 28, 2022 through December 31, 2022.

**FOR FURTHER INFORMATION CONTACT:** Larry Redd, Jr., *larry.redd@noaa.gov,* 301–427–8503, Nicholas Velseboer, *nicholas.velsboer@noaa.gov,* 978–281–9260, or Thomas Warren, *thomas.warren@noaa.gov,* 978–281–9347.

**SUPPLEMENTARY INFORMATION:** Atlantic HMS fisheries, including BFT fisheries, are managed under the authority of the Atlantic Tunas Convention Act (ATCA; 16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*). The 2006 Consolidated Atlantic HMS Fishery Management Plan (FMP) and its amendments are implemented by regulations at 50 CFR part 635. Section 635.27 divides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) and as implemented by the United States among the various domestic fishing categories, per the allocations established in the 2006 Consolidated HMS FMP and its amendments. NMFS is required under the Magnuson-Stevens Act to provide U.S. fishing vessels with a reasonable opportunity to harvest quotas under relevant international fishery agreements such as the ICCAT Convention, which is implemented domestically pursuant to ATCA.

The 2022 baseline Purse Seine, General, and Reserve category quotas are 219.5 mt, 555.7 mt, and 29.5 mt, respectively. The General category baseline subquota for the January through March time period is 29.5 mt. Effective January 1, 2022, NMFS transferred 19.5 mt of BFT quota from the December 2022 subquota time period to the January through March 2021 subquota time period resulting in an adjusted subquota of 49 mt for the January through March 2022 subquota time period (86 FR 72857, December 23, 2021).

## Annual Adjustment of the BFT Purse Seine and Reserve Category Quotas

Consistent with § 635.27(a)(4), NMFS determines the amount of quota available to the Atlantic Tunas Purse Seine category participants in the current year, based on their BFT catch (landings and dead discards) in the previous year. As described in § 635.27(a)(4)(v)(A), NMFS makes available to each Purse Seine category participant either 100 percent, 75 percent, 50 percent, or 25 percent of the individual baseline quota allocations based on the previous year's catch, and reallocates the remainder to the Reserve category. NMFS has calculated the amounts of quota available to the Purse Seine category participants for 2022 based on their individual catch levels in 2021. NMFS did not open the Purse Seine fishery in 2021 because there were no purse seine vessels permitted to fish for BFT and thus no catch in 2021. As a result, each Purse Seine category participant will receive 25 percent of the individual baseline quota amount, which is the required distribution even with no fishing activity under the current regulations. The individual baseline amount is 43.9 mt (219.5 mt divided by five Purse Seine category participants), 25 percent of which is 11 mt. Consistent with § 635.27(a)(4)(v)(C), NMFS will notify Atlantic Tunas Purse Seine category participants of the amount of quota available for their use this year through the Individual Bluefin Quota electronic system established under § 635.15 and in writing.

By summing the individual available allocations, NMFS has determined that 55 mt are available to the Purse Seine category for 2022. Thus, the amount of Purse Seine category quota to be reallocated to the Reserve category is 164.5 mt (219.5 mt − 55 mt = 164.5 mt). This reallocation results in an adjusted 2022 Reserve category quota of 194 mt (29.5 mt + 164.5 mt = 194 mt), before any further transfers to other categories.

## Transfer of 26 mt From the Reserve Category to the General Category

Under § 635.27(a)(9), NMFS has the authority to transfer quota among fishing categories or subcategories after considering determination criteria provided under § 635.27(a)(8). NMFS has considered all of the relevant determination criteria and their applicability to this inseason quota transfer from the Reserve category to the General category. These considerations include, but are not limited to, the following:

Regarding the usefulness of information obtained from catches in the particular category for biological sampling and monitoring of the status of the stock (§ 635.27(a)(8)(i)), biological samples collected from BFT landed by General category fishermen and provided by tuna dealers provide NMFS with valuable parts and data for ongoing scientific studies of BFT age and growth, migration, and reproductive status. Additional opportunity to land BFT in the General category would support the continued collection of a broad range of data for these studies and for stock monitoring purposes.

NMFS also considered the catches of the General category quota to date (including during the winter fishery in the last several years) and the likelihood of closure of that segment of the fishery if no adjustment is made (§ 635.27(a)(8)(ii) and (ix)). To date, preliminary landings data indicate that the General category January through March fishery has landed 31.4 mt of the adjusted 49-mt subquota. Without a quota transfer at this time, NMFS would likely need to close the General category fishery, and participants would have to stop BFT fishing activities while commercial-sized BFT remain available in the areas where General category permitted vessels operate. Transferring 26 mt of quota from the Reserve category would result in 75 mt (49 mt + 26 mt = 75 mt) being available for the January through March 2022 subquota period and would provide limited additional opportunities to harvest the BFT quota while avoiding exceeding it.

Regarding the projected ability of the vessels fishing under the General category quota to harvest the additional amount of BFT quota transferred before the end of the fishing year (§ 635.27(a)(8)(iii)), NMFS considered General category landings over the last several years and landings to date this year. Landings are highly variable and depend on access to commercial-sized BFT and fishing conditions, among other factors. Thus, this quota transfer would allow fishermen to take advantage of the availability of BFT on the fishing grounds and provide a reasonable opportunity to harvest available U.S. BFT quota.

NMFS also considered the estimated amounts by which quotas for other gear categories of the BFT fishery might be exceeded (§ 635.27(a)(8)(iv)) and the ability to account for all 2022 landings and dead discards. In the last several years, total U.S. BFT landings have been below the available U.S. quota such that the United States has carried forward the maximum amount of underharvest allowed by ICCAT from one year to the next. NMFS will need to account for 2022 landings and dead discards within the adjusted U.S. quota, consistent with ICCAT recommendations, and anticipates having sufficient quota to do that.

NMFS also considered the effects of the transfer on the BFT stock and the effects of the adjustment on accomplishing the objectives of the 2006 Consolidated HMS FMP (§ 635.27(a)(8)(v) and (vi)). This transfer would be consistent with established quotas and subquotas, which are implemented consistent with ICCAT recommendations (established in Recommendation 17–06 and maintained in Recommendation 20–06), ATCA, and the objectives of the 2006 Consolidated HMS FMP and amendments. In establishing these quotas and subquotas and associated management measures, ICCAT and NMFS considered the best scientific information available, objectives for stock management and status, and effects on the stock. This quota transfer is in line with these established management measures.

Another principal consideration is the objective of providing opportunities to harvest the available General category quota, based on the objectives of the 2006 Consolidated HMS FMP and its amendments, including to achieve optimum yield on a continuing basis and to allow all permit categories a reasonable opportunity to harvest available BFT quota allocations (related to § 635.27(a)(8)(x)). For the General category, this includes providing opportunities equitably across all time-periods.

Given these considerations, NMFS is transferring 26 mt from the adjusted Reserve category quota to the General category January through March 2022 subquota time period. Therefore, NMFS adjusts the General category January through March subquota to 75 mt, and adjusts the Reserve category quota to 168 mt (194 mt − 26 mt = 168 mt). The General category fishery will remain open until March 31, 2022, or until the adjusted General category quota is reached, whichever comes first.

**Monitoring and Reporting**

NMFS will continue to monitor the BFT fisheries closely. Dealers are required to submit landing reports within 24 hours of a dealer receiving BFT. Late reporting by dealers compromises NMFS' ability to timely implement actions such as quota and retention limit adjustments, as well as closures, and may result in enforcement actions. Additionally, and separate from the dealer reporting requirement, General and HMS Charter/Headboat category vessel owners are required to report the catch of all BFT retained or discarded dead within 24 hours of the landing(s) or end of each trip, by accessing *hmspermits.noaa.gov,* using the HMS Catch Reporting app, or calling (888) 872–8862 (Monday through Friday from 8 a.m. until 4:30 p.m.).

Depending on the level of fishing effort and catch rates of BFT, NMFS may determine that additional adjustments (*e.g.,* quota adjustment, daily retention limit adjustment, or closure) are necessary to ensure available quota is not exceeded or to enhance scientific data collection from, and fishing opportunities in, all geographic areas. If needed, subsequent adjustments will be published in the **Federal Register**. In addition, fishermen may call the Atlantic Tunas Information Line at (978) 281–9260, or access *hmspermits.noaa.gov,* for updates on quota monitoring and inseason adjustments.

**Classification**

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act and regulations at 50 CFR part 635, and it is exempt from review under Executive Order 12866.

The Assistant Administrator for NMFS finds that it is impracticable and contrary to the public interest to provide prior notice of, and an opportunity for public comment on, the transfer from the Reserve category to the General category for the following reasons:

The regulations implementing the 2006 Consolidated HMS FMP and amendments provide for inseason adjustments to respond to the unpredictable nature of BFT availability on the fishing grounds, the migratory nature of this species, and the regional variations in the BFT fishery. This fishery is currently underway and delaying this action would be contrary to the public interest as BFT landings could otherwise exceed the adjusted January through March 2022 General category quota and result in an earlier closure of the fishery while fish are available on the fishing grounds. Transferring quota from the Reserve category to the General category does not affect the overall U.S. BFT quota, and available data shows the adjustment would have a minimal risk of exceeding the ICCAT-allocated quota. NMFS notes that the public had an opportunity to comment on the underlying rulemakings that established the U.S. BFT quota, measures to reallocate quota, and the inseason adjustment criteria. For all of the above reasons, there is good cause under 5 U.S.C. 553(d) to waive the 30-day delay in effectiveness.

**Authority:** 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: January 28, 2022.

**Ngagne Jafnar Gueye,**

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

[FR Doc. 2022–02123 Filed 1–28–22; 4:15 pm]

BILLING CODE 3510–22–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 648

**[Docket No. 220126–0034; RTID 0648–XX073]**

### Fisheries of the Northeastern United States; Atlantic Bluefish Fishery; 2022 and Projected 2023 Specifications

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues final specifications for the 2022 Atlantic bluefish fishery, and projected specifications for 2023, as recommended by the Mid-Atlantic Fishery Management Council. This action is necessary to establish allowable harvest levels to prevent overfishing while enabling optimum yield, using the best scientific information available. This rule also informs the public of the final fishery specifications for the 2022 fishing year.

**DATES:** Effective February 2, 2022.

**ADDRESSES:** The Mid-Atlantic Fishery Management Council prepared an environmental assessment (EA) for these specifications that describes the action and other considered alternatives. The EA provides an analysis of the biological, economic, and social impacts of the preferred measures and other considered alternatives. Copies of these specifications, including the EA, Regulatory Flexibility Act Analyses, and other supporting documents for the action are available upon request from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 N State Street, Dover, DE 19901. These documents are also accessible via the internet at *https://www.mafmc.org/supporting-documents.*

**FOR FURTHER INFORMATION CONTACT:** Cynthia Ferrio, Fishery Policy Analyst, (978) 281–9180.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Mid-Atlantic Fishery Management Council and the Atlantic States Marine Fisheries Commission jointly manage the Atlantic Bluefish Fishery Management Plan (FMP). The FMP requires the specification of an acceptable biological catch (ABC), commercial and recreational annual catch limits (ACL), commercial and recreational annual catch targets (ACT), a commercial quota, a recreational harvest limit (RHL), and any other management measures, for up to 3 years at a time. This action implements bluefish specifications for the 2022 fishing year, and projects specifications for 2023, based on Council and Commission recommendations.

These specifications incorporate several revised measures from Amendment 7 to the FMP (86 FR 66977; November 24, 2021), including the rebuilding plan for the stock, and phased-in reallocation of commercial

quota among the states in the management unit. There was also an overage of the fishery ACL caused by recreational catch in 2020, which will be accounted for through a pound-for-pound payback from the 2022 recreational ACT according to the accountability measures (AM) defined in the FMP (50 CFR 648.163(d)(1)). There is no sector transfer in these specifications because the stock is overfished. This action contains no changes to the recreational management measures because the expected recreational landings under the existing measures are likely to fully achieve the RHL.

The proposed rule for this action published in the **Federal Register** on December 2, 2021 (86 FR 68456), and comments were accepted through December 17, 2021. NMFS received two comments from the public, and no changes were made to the final rule as a result of those comments (see Comments and Responses for additional detail). Additional background information regarding the development of these specifications was provided in the proposed rule and is not repeated here.

**Final Specifications**

This action implements the Council and Commission's recommended 2022 and projected 2023 bluefish catch specifications, as outlined in the proposed rule. These specifications increase the 2022 fishery ABC by about 55 percent, and raise the 2022 commercial quota and RHL by 28 percent and 67 percent, respectively (Table 1).

TABLE 1—COMPARISON OF 2021, 2022, AND 2023 BLUEFISH SPECIFICATIONS *

| | 2021 | | 2022 | | 2023 | |
|---|---|---|---|---|---|---|
| | Million lb | Metric tons | Million lb | Metric tons | Million lb | Metric tons |
| Overfishing Limit | 32.98 | 17,228 | 40.56 | 18,399 | 45.17 | 20,490 |
| ABC = Fishery ACL | 16.28 | 7,385 | 25.26 | 11,460 | 30.62 | 13,890 |
| Commercial ACL = Commercial ACT | 2.77 | 1,255 | 3.54 | 1,604 | 4.29 | 1,945 |
| Recreational ACL = Recreational ACT | 13.51 | 6,130 | 21.73 | 9,856 | 26.34 | 11,945 |
| Recreational Accountability Measures | 0 | 0 | 3.65 | 1,656 | 0 | 0 |
| Commercial Total Allowable Landings (TAL) | 2.77 | 1,255 | 3.54 | 1,604 | 4.29 | 1,945 |
| Recreational TAL | 8.34 | 3,785 | 13.89 | 6,298 | 22.14 | 10,044 |
| Sector Transfer | 0 | 0 | 0 | 0 | 0 | 0 |
| Commercial Quota | 2.77 | 1,255 | 3.54 | 1,604 | 4.29 | 1,945 |
| RHL | 8.34 | 3,785 | 13.89 | 6,298 | 22.14 | 10,044 |

* Specifications are derived from the ABC in metric tons (mt). When values are converted to millions of pounds the numbers may slightly shift due to rounding. The conversion factor used is 1 mt = 2,204.6226 lb.

The final commercial quota is allocated among the states from Maine to Florida based on percent shares specified in the FMP; however, Amendment 7 reallocated those percent shares, to be phased in over 7 years. Table 2 provides the commercial state allocations for 2022 and 2023 based on the final coastwide commercial quotas for each year, and the applicable reallocated changes to the percent shares specified in Amendment 7. No states exceeded their allocated quota in 2020, or are projected to do so in 2021; therefore, no accountability measures for the commercial fishery are required for the 2022 fishing year.

TABLE 2—2022 AND 2023 BLUEFISH STATE COMMERCIAL QUOTA ALLOCATIONS

| State | 2022 | | | 2023 | | |
|---|---|---|---|---|---|---|
| | Percent share | Quota (lb) | Quota (kg) | Percent share | Quota (lb) | Quota (kg) |
| Maine | 0.59 | 20,819 | 9,443 | 0.51 | 21,807 | 9,892 |
| New Hampshire | 0.39 | 13,655 | 6,194 | 0.36 | 15,331 | 6,954 |
| Massachusetts | 7.20 | 254,748 | 115,552 | 7.69 | 329,578 | 149,494 |
| Rhode Island | 7.21 | 254,956 | 115,646 | 7.61 | 326,165 | 147,946 |
| Connecticut | 1.24 | 43,885 | 19,906 | 1.22 | 52,094 | 23,629 |
| New York | 11.72 | 414,693 | 188,102 | 13.06 | 560,031 | 254,026 |
| New Jersey | 14.68 | 519,158 | 235,486 | 14.54 | 623,295 | 282,722 |
| Delaware | 1.68 | 59,442 | 26,962 | 1.48 | 63,572 | 28,836 |
| Maryland | 2.85 | 100,698 | 45,676 | 2.69 | 115,409 | 52,349 |
| Virginia | 11.02 | 389,802 | 176,811 | 10.16 | 435,625 | 197,596 |
| North Carolina | 32.06 | 1,133,855 | 514,308 | 32.05 | 1,374,077 | 623,271 |
| South Carolina | 0.04 | 1,590 | 721 | 0.05 | 2,344 | 1,063 |
| Georgia | 0.02 | 805 | 365 | 0.04 | 1,544 | 700 |
| Florida | 9.31 | 329,137 | 149,294 | 8.55 | 366,585 | 166,280 |
| Total | 100.00 | 3,537,096 | 1,604,400 | 100.01 | 4,287,109 | 1,944,600 |

As previously mentioned, this action makes no changes to the recreational management measures, as the expected recreational landings of 13.58 million pounds (6,160 metric tons) under the existing measures are likely to achieve the proposed RHL. The specifications for 2023 are projected based on the available data and the second year of the

rebuilding plan model. However, there is a research track stock assessment scheduled for bluefish in 2022. The Council will review the projected 2023 specifications in light of any new information, including this assessment, to determine if changes need to be made prior to their implementation. NMFS will publish a notification prior to the 2023 fishing year to confirm these limits as projected or propose any necessary changes.

## Comments and Responses

The public comment period for the proposed rule ended on December 17, 2021, and NMFS received two comments from the public. One commenter stated that beach replenishment efforts are destroying coastal habitats and disrupting the coastal food chain, and this is negatively affecting the bluefish stock and biomass numbers; especially inshore where most of the recreational fishery occurs. This action affects the annual catch limits and quotas in the bluefish fishery. Environmental impacts and habitat conditions are analyzed in the EA for this action. The second commenter supported the action, and is in favor of overall increased quotas for the bluefish fishery. They commented that Florida should receive a higher percentage of the commercial quota, but support these specifications overall. State commercial quota allocations were the subject of a recent amendment to the Bluefish FMP, and changes to these allocations are beyond the scope of this specifications action. No changes to the proposed specifications were made as a result of these comments.

## Changes From the Proposed Rule

There are no substantive changes from the proposed rule.

## Classification

Pursuant to section 304(b)(3) of the Magnuson Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the NMFS Assistant Administrator, Greater Atlantic Region, has determined that these final specifications are necessary for the conservation and management of the Atlantic bluefish fishery, and that they are consistent with the Atlantic Bluefish FMP, the Magnuson-Stevens Act, and other applicable law.

The Assistant Administrator for Fisheries, NOAA, also finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date for this rule to ensure that the final specifications are in place as close as practicable to the start of the 2022 bluefish fishing year, which began on January 1, 2022. A delay in effectiveness well beyond the start of this fishing year would be contrary to the public interest as it could create confusion in the bluefish industry, and compromise the effectiveness of the new measures to reallocate commercial quota among the states. Because the commercial quota is increasing, a delay too long into the new fishing year could also cause potential economic harm to the commercial bluefish fishery through lost opportunity to fish under the higher limits.

Furthermore, this rule is being issued at the earliest possible date. These specifications include several changes that were implemented by Amendment 7 to the Bluefish FMP, and were delayed until after the final rule for the amendment published on November 24, 2021 (86 FR 66977). The proposed rule for these specifications published on December 2, 2021, with a 15-day comment period ending December 17, 2021. Because of these administrative delays, this final rule will not be effective for the January 1 start of the fishing year; however, a 30-day delay in effectiveness would postpone implementation of final 2022 specifications well into the fishing year, which is contrary to the public interest. State agencies also use commercially-allocated quotas to set annual state management measures. The longer these specifications are delayed, the longer it will take for some states to implement their respective regulations.

Finally, regulated parties do not require any additional time to come into compliance with this rule, and thus, a 30-day delay would not benefit the regulated community in this regard. Unlike actions that require an adjustment period, bluefish fishery participants will not have to purchase new equipment or otherwise expend time or money to comply with these management measures. Rather, complying with this final rule simply means adhering to the new catch limits set for the fishing year. Fishery stakeholders have also been involved in the development of this action and are anticipating this rule. Therefore, NMFS finds good cause not to delay this final rule's effectiveness, consistent with 5 U.S.C. 553(d)(3).

For these reasons, NMFS finds that a 30-day delay in effectiveness would be contrary to the public interest, and therefore, waives the requirement consistent with 5 U.S.C. 553(d)(1) and (3). As a result, there is good cause to implement this action on February 2, 2022.

This final rule is exempt from review under Executive Order 12866 because the action contains no implementing regulations.

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

This final rule does not duplicate, conflict, or overlap with any existing Federal rules.

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

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

Dated: January 26, 2022.

**Samuel D. Rauch, III,**

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

[FR Doc. 2022–01996 Filed 2–1–22; 8:45 am]

BILLING CODE 3510–22–P

# Proposed Rules

Federal Register
Vol. 87, No. 22
Wednesday, February 2, 2022

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 ENERGY

### 10 CFR Part 430

**[EERE–2022–BT–TP–0005]**

**RIN 1904–AF11**

## Energy Conservation Program: Test Procedure for Uninterruptible Power Supplies

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Request for information.

**SUMMARY:** The U.S. Department of Energy (''DOE'') is undertaking the preliminary stages of a rulemaking to consider amendments to the test procedure for uninterruptible power supplies. This request for information(''RFI'') seeks data and information regarding issues pertinent to whether amended test procedures would more accurately or fully comply with the requirement that the test procedure produces results that measure energy use during a representative average use cycle or period of use for the product without being unduly burdensome to conduct, or reduce testing burden. DOE welcomes written comments from the public on any subject within the scope of this document (including topics not raised in this document), as well as the submission of data and other relevant information.

**DATES:** Written comments and information are requested and will be accepted on or before March 4, 2022.

**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–2022–BT–TP–0005, by any of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.

2. *Email:* to *UPS2022TP0005@ee.doe.gov.* Include docket number EERE–2022–BT–TP–0005 in the subject line of the message.

No telefacsimiles (''faxes'') will be accepted. For detailed instructions on submitting comments and additional information on this process, see section III of this document.

Although DOE has routinely accepted public comment submissions through a variety of mechanisms, including postal mail and hand delivery/courier, the Department has found it necessary to make temporary modifications to the comment submission process in light of the ongoing corona virus 2019 (''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 for this activity, which includes **Federal Register** notices, 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 *www.regulations.gov/docket/EERE-2022-BT-TP-0005.* The docket web page contains instructions on how to access all documents, including public comments, in the docket. See section III 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–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–9870. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Mr. Michael Kido, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–8145. Email: *Michael.kido@hq.doe.gov.*

For further information on how to submit a comment or review other public comments and the docket, contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

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## I. Introduction

Uninterruptible power supplies (''UPSs'') are a class of battery chargers and fall among the consumer and industrial equipment for which DOE is authorized to establish and amend test procedures and energy conservation standards. (42 U.S.C. 6295(u)) DOE's test procedures for UPSs are prescribed in the Code of Federal Regulation (''CFR'') at appendix Y to subpart B of 10 CFR part 430 (''appendix Y''). The following sections discuss DOE's authority to establish and amend test procedures for UPSs, as well as relevant background information regarding DOE's consideration of test procedures for this product.

### *A. Authority and Background*

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

[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.

improve energy efficiency. These products include UPSs, the subject of this RFI. (42 U.S.C. 6295(u))

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).

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))

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))

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 that 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 into the overall energy efficiency, energy consumption, or other energy descriptor, taking into consideration the most current versions of Standards 62301 and 62087 of the International Electrotechnical Commission (''IEC''), unless the current test procedure already incorporates the standby mode and off mode energy consumption, or if such integration is technically infeasible. (42 U.S.C. 6295(gg)(2)(A)) If an integrated test procedure is technically infeasible, DOE must prescribe separate standby mode and off mode energy use test procedures for the covered product, if a separate test is technically feasible. (*Id.*)

EPCA also requires that, at least once every 7 years, DOE review test procedures for all types of covered products, including UPSs, to determine whether amended test procedures would more accurately or fully comply with the requirements that the test procedures 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 and to not be unduly burdensome to conduct. (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 procedure. DOE is publishing this RFI to collect data and information to inform its decision in satisfaction of the 7-year review requirement specified in EPCA. (42 U.S.C. 6293(b)(1)(A))

DOE has established a process to develop energy conservation standards and test procedures for covered products and equipment. 10 CFR part 430, subpart C, appendix A, *Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Certain Commercial/Industrial Equipment* (''Appendix A''). While the procedures, interpretations, and policies laid out in the appendix A are generally applicable to DOE's rulemaking program, application of these guidelines to a specific rulemaking is determined on a case-by-case basis. 86 FR 70892, 70900–70901, 70925 (December 13, 2021). DOE may, as necessary, deviate from the appendix A to account for the specific circumstances of a particular rulemaking. See appendix A, section 3(a).

DOE's general procedure is to follow an early assessment process for test procedure rulemakings, in which DOE will first publish a notice in the **Federal Register** whenever DOE is considering initiation of a rulemaking to amend a test procedure. In that notice, DOE will request submission of comments, including data and information on whether an amended test procedure would: (1) More accurately measure energy efficiency, energy use, water use (as specified in EPCA), or estimated annual operating cost of a covered product during a representative average use cycle or period of use without being unduly burdensome to conduct; or (2) reduce testing burden. Appendix A, section 8(a). DOE will review comments submitted and determine whether it agrees with the submitted information. If DOE determines that an amended test procedure is not justified at that time, it will not pursue the rulemaking and will publish a notice in the **Federal Register** to that effect. If DOE receives sufficient information suggesting an amended test procedure (1) could more accurately measure energy efficiency, energy use, water use (as specified in EPCA), 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, (2) reduce testing burden, or (3) the information received is inconclusive with regard to these points, DOE would undertake the preliminary stages of a rulemaking to amend the test procedure. *Id.* If DOE determines that it is appropriate to continue the test procedure rulemaking after the early assessment process, DOE would provide further opportunities for early public input through **Federal Register** documents, including notices of data availability and/or RFIs. See appendix A, section 8(b).

Based on the identification of key issues described in section II of this document, DOE has determined that it is appropriate to initiate a test procedure rulemaking for UPSs and is providing opportunity for public input through this RFI. In particular, as discussed in section II.B.1 of this RFI, DOE has identified relevant and substantive updates to industry test standards that are incorporated by reference in DOE's test procedure for UPSs. These updates warrant consideration by DOE through the

notice and comment rulemaking process.

*B. Rulemaking History*

On December 12, 2016, DOE amended its battery charger test procedure by adding a discrete test procedure for UPSs. 81 FR 89806 (''December 2016 Final Rule''). The December 2016 Final Rule incorporated by reference specific sections of the relevant industry standard for UPSs, with additional instructions, into the current battery charger test procedure published at appendix Y. *Id.* The December 2016 Final Rule also established definitions related to UPSs and revised the compliance certification requirements for battery chargers more generally at 10 CFR 429.39. *Id.*

**II. Request for Information**

In the following sections, DOE has identified a variety of issues on which it seeks input to determine whether, and if so how, an amended test procedure for UPSs would: (1) More accurately or fully comply with the requirements in EPCA that test procedures be reasonably designed to produce test results that reflect energy use during a representative average use cycle or period of use, without being unduly burdensome to conduct (42 U.S.C. 6293(b)(3)); or (2) reduce testing burden.

Additionally, DOE welcomes comments on any aspect of the existing test procedure for UPSs that may not specifically be identified in this document.

*A. Scope and Definitions*

DOE defines a UPS as a battery charger consisting of a combination of convertors, switches and energy storage devices (such as batteries), constituting a power system for maintaining continuity of load power in case of input power failure. Appendix Y, section 2.27. The scope of the current test procedure at appendix Y, as applicable to UPSs, covers UPSs that utilize the standardized National Electrical Manufacturer Association (''NEMA'') plug, 1–15P or 5–15P,[3] and have an alternating current (''AC'') output. Appendix Y, section 1.

*Issue 1:* DOE seeks information on whether the current definition for UPS is still appropriate or whether DOE should consider an amended definition. DOE additionally seeks comment on whether the scope of the test procedure as it pertains to UPSs is still appropriate or whether DOE should consider any changes in scope. If either the definition of UPS or scope of the test procedure should be updated, DOE seeks comment and information on how these should be updated.

*B. Test Procedure*

Section 4 of appendix Y specifies testing requirements specific to UPSs, summarized as follows.

Section 4.1.1 of appendix Y specifies requirements for the power or energy measuring meter, including uncertainty requirements, calibration requirements, and a requirement that the meter must measure input and output values simultaneously. Section 4.1.2 of appendix Y specifies maximum air speed requirements within the test room; specifies allowable ambient air temperature conditions; prohibits the use of intentional cooling of the unit under test (''UUT''); and requires testing the UUT on a thermally non-conductive surface. Section 4.1.3 of appendix Y specifies that the AC input voltage and frequency must be within 3 percent of the highest rated voltage and within 1 percent of the highest rated frequency of the UUT.

Section 4.2.1 of appendix Y specifies general setup requirements and requires configuring the UPS according to Annex J.2 of International Electrotechnical Commission's (''IEC'') Standard 62040–3 Edition 2.0 (''IEC 62040–3 Ed. 2.0''),[4] with additional specified requirements. Specifically, section 4.2.1(a) of appendix Y specifies that if the UPS can operate in two or more distinct normal modes as more than one UPS architecture, conduct the test in its lowest input dependency as well as in its highest input dependency mode where voltage and frequency dependent (''VFD'') represents the lowest possible input dependency, followed by voltage independent (''VI'') and then voltage and frequency independent (''VFI''). Section 4.2.1(b) of appendix Y specifies that the UPS must not be modified or adjusted to disable energy storage charging features. This section also provides specific instructions for ensuring that the energy storage system is fully charged at the start of testing in order to minimize the transfer of energy to and from the energy storage system. Section 4.2.1(c) specifies that all direct current (''DC'') output ports of the UUT must remain unloaded during testing.

Section 4.2.2 of appendix Y addresses additional features that may be present on the UUT; specifically: (a) Any feature unrelated to maintaining the energy storage system at full charge or delivery of load power (*e.g.,* LCD display) shall be switched off; or, if it is not possible to switch such features off, they shall be set to their lowest power-consuming mode during the test; (b) if the UPS takes (*i.e.,* accepts) any physically separate connectors or cables not required for maintaining the energy storage system at full charge or delivery of load power but associated with other features (such as serial or USB connections, Ethernet, etc.), these connectors or cables shall be left disconnected during the test; and (c) any manual on-off switches specifically associated with maintaining the energy storage system at full charge or delivery of load power shall be switched on for the duration of the test.

Section 4.3 of appendix Y specifies that efficiency can be calculated from either average power or accumulated energy. Section 4.3.1 specifies the calculation method if efficiency is to be calculated using average power and requires sampling the power at a rate of at least one sample per second. Section 4.3.2 requires operating the UUT and the load for a sufficient length of time to reach steady state conditions and specifies a procedure for determining if steady state conditions have been attained. Section 4.3.3 of appendix Y specifies measuring either the input and output power of the UUT according to Section J.3 of Annex J of IEC 62040–3 Ed. 2.0, or measuring the input and output energy of the UUT for efficiency calculations, with the following exceptions: (a) Test the UUT at the following reference test load conditions, in the following order: 100 percent, 75 percent, 50 percent, and 25 percent of the rated output power; and (b) perform the test at each of the reference test loads by simultaneously measuring the UUT's input and output power in Watts (''W''), or input and output energy in Watt-Hours (''Wh'') over a 15-minute test period at a rate of at least 1 Hertz. Equations for calculating the efficiency for each reference load are provided. Section 4.3.4 of appendix Y specifies an optional test for the determination of UPS architecture by performing the tests specified in the definitions of VI, VFD, and VFI (sections 2.28.1 through 2.28.3 of appendix Y).

Section 4.3.5 of appendix Y specifies equations for calculating output efficiency of the UUT. This section includes a table of weightings applied to the measured efficiency at each reference test load, as discussed further in section II.B.2 of this RFI.

*Issue 2:* DOE requests comment on any aspect of the current test procedure

[3] Plug designations are as specified in American National Standards Institute (''ANSI'')/NEMA WD 6–2016 incorporated by reference at 10 CFR 430.2.

[4] IEC 62040–3, ''Uninterruptible power systems (UPS)—Part 3: Methods of specifying the performance and test requirements,'' Edition 2.0, available on IEC webstore at *webstore.iec.ch.*

requirements provided in Section 4 of appendix Y for testing UPSs, including whether DOE should consider any amendments to these procedures. If any amendments should be considered, DOE requests data and specific information to provide justification for considering such amendments.

1. Updates to Industry Standards

As discussed, the current UPS test procedure incorporates by reference certain sections of IEC 62040–3 Ed. 2.0 regarding test setup, input and output power measurement, and for the optional determination of UPS architecture. Since publication of the December 2016 Final Rule, IEC has updated the IEC 62040–3 standard to its third edition (''IEC 62040–3 Ed. 3.0''). The following paragraphs summarize the key changes from the second edition, based on DOE's initial review of the revised standard.

Section 4 of IEC 62040–3 Ed. 3.0 includes updates to various environmental conditions, such as the general test environment and operating conditions when testing UPSs. Appendix Y, however, does not refer to section 4 of the IEC 62040–3 standard but instead provides its own environmental and operating conditions for testing purposes. DOE has therefore determined that its test procedure for measuring the efficiency of UPSs will remain unaffected by the updates to section 4 of the IEC 62040–3 Ed. 3.0.

Section 5.2 of IEC 62040–3 Ed. 2.0 addresses UPS input specifications, such as the input voltage range, input frequency range and total harmonic distortions during which the UPS under test must remain in normal mode of operation. While an initial review of IEC 62040–3 Ed. 3.0 shows significant editorial changes to the sections that define these parameters, except for Table 3, which provides the maximum level of individual harmonic voltages allowed, the remainder of the parameters remain unchanged. Similarly, section 5.3 of IEC 62040–3 Ed. 3.0 provides the minimum output specifications for UPSs that must be declared by manufacturers such as its input dependency, rated output voltage and RMS output voltage tolerance band, rated frequency tolerance band, rated output active and apparent power, total harmonic distortion, etc. As before, the majority of the changes to this section are editorial except for the criteria in section 5.3.4 of Edition 2.0 that are used to classify the output waveform shape when paired with linear and reference non-linear loads (reorganized to section 5.3.4.3 in Edition 3.0).

*Issue 3:* DOE requests detailed comment on the updates made to sections 5.2 and 5.3 of IEC 62040–3 Ed. 3.0 and whether DOE should revise all or parts of its incorporation by reference to harmonize with these changes. DOE also requests feedback on whether any of the specific updates found in the new standard has the potential to alter the recorded efficiency of UPSs as currently measured by appendix Y. As an example, DOE requests comment on whether updating its reference to the revised total harmonic distortion requirements found in Table 3 of IEC 62040–3 Ed. 3.0 is necessary and would doing so alter the recorded efficiency as currently measured by appendix Y.

Section 6 of IEC 62040–3 Ed. 2.0 previously provided instructions for performing the AC input failure test (subsection 6.2.2.7), the steady-state input voltage tolerance test (subsection 6.4.1.1), and the input frequency tolerance test (subsection 6.4.1.2) that are used to classify the input dependency of a UPS as VFD, VI or VFI. IEC 62040–3 Ed. 3.0 has since updated these subsections with the following changes: Subsection titles and numbering have been updated to specifically refer to them as VI, VFD and VFI input dependency tests, additional criteria have been added for meeting the VI, VFD and VFI classifications and a new test load condition at 0% (*i.e.,* no-load) has been added.

*Issue 4:* DOE requests comment on the benefits and consequences of aligning its test procedure with the above changes to section 6 of IEC 62040–3 Ed. 3.0. Specifically, DOE requests information on whether incorporating the additional no-load test and updated criteria for determining input dependency of a UPS has the potential to cause currently reported UPS input-dependency classifications to change.

Additional updates to Annex J to IEC 62040–3 Ed. 3.0 require multi-mode UPSs to be tested at all dependency modes, whereas DOE's current test procedure explicitly requires UPSs to be tested at only their highest and lowest input dependency modes, as discussed previously in section II.B of this RFI. Annex J has also been updated to allow manufacturers to test UPSs with functions or ports set to the lowest power consuming mode or disconnected if they are not related to maintaining the energy storage device (*i.e.,* batteries) at full charge, along with added reporting requirements for manufacturers to report these features, interfaces, or ports that have been turned off or set to the lowest power consuming mode. This updated clarification regarding additional features is similar to DOE's current test procedure, which requires UPSs to be tested with such features off or disconnected, as discussed previously; however, DOE currently does not require manufacturers to report these manually switched off features.

*Issue 5:* DOE requests comment on the updates to Annex J—and more specifically on whether DOE should align its own certification requirements with the additional criteria in IEC 62040–3 Ed. 3.0 to report features, interfaces, or ports that have been turned off or set to the lowest power consuming mode during testing.

*Issue 6:* DOE requests comment on its summary of changes in IEC 62040–3 Ed. 3.0, and whether any other changes not discussed in this RFI would be relevant to DOE's test procedure for UPSs. DOE requests comment on whether DOE should further align any aspects of appendix Y with IEC 62040–3 Ed. 3.0, and on any impact such alignments may have on test results, test procedure representativeness, and test burden.

2. Load Weightings

As discussed, section 4.3.3 of appendix Y specifies determining the UPS's efficiency at four reference loading points: 25%, 50%, 75%, and 100%. The measured efficiency values from each reference test load are multiplied with their respective load weightings, shown in Table 1, to determine the average load adjusted efficiency. The load weightings represent the portion of time spent at the specified loading point. These weightings were established in the December 2016 Final Rule consistent with the load weightings specified in ENERGY STAR UPS Specification Version 1.0.[5] 81 FR 89806, 89816 (December 12, 2016).

[5] The ENERGY STAR UPS Specification Version 1.0 can be found at *https://www.energystar.gov/products/spec/uninterruptible_power_supplies_specification_version_1_0_pd.*

TABLE 1—LOAD WEIGHTINGS SPECIFIED IN TABLE 4.3.1 OF APPENDIX Y

| Rated output power (W) | UPS architecture | Portion of time spent at reference load | | | |
|---|---|---|---|---|---|
| | | 25% | 50% | 75% | 100% |
| P ≤1500 W | VFD | 0.2 | 0.2 | 0.3 | 0.3 |
| | VI or VFI | 0* | 0.3 | 0.4 | 0.3 |
| P >1500 W | VFD, VI, or VFI | 0* | 0.3 | 0.4 | 0.3 |

* Measuring efficiency at loading points with 0 time-weighting is not required.

*Issue 7:* DOE requests comment on whether the UPS load weightings specified in Table 4.3.1 are representative of current UPS usage patterns. DOE also requests data on the consumer usage profile of UPSs with respect to each architecture (*i.e.,* VFD, VI, and VFI).

*C. Test Procedure Waivers*

A person may seek a waiver from the test procedure requirements for a particular basic model of a type of covered product upon the grounds that the basic model for which the petition for waiver is submitted contains one or more design characteristics that: (1) Prevent testing of the basic model according to the prescribed test procedure, or (2) cause the prescribed test procedures to evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1). DOE has not granted any test procedure waivers for the current UPS test procedure.

**III. Submission of Comments**

DOE invites all interested parties to submit in writing by the date specified under the **DATES** heading, comments and information on matters addressed in this RFI and on other matters relevant to DOE's consideration of amended test procedures for UPSs. These comments and information will aid in the development of a test procedure notice of proposed rulemaking for UPSs if DOE determines that amended test procedures may be appropriate for these products.

*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. Following this instruction, 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 also 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. Faxes will not be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, 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.* According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: One copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. 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).

DOE considers public participation to be a very important part of the process for developing test procedures and energy conservation standards. DOE actively encourages the participation

and interaction of the public during the comment period in each stage of this process. Interactions with and between members of the public provide a balanced discussion of the issues and assist DOE in the process. Anyone who wishes to be added to the DOE mailing list to receive future notices and information about this process should contact Appliance and Equipment Standards Program staff at (202) 287–1445 or via email at *ApplianceStandardsQuestions@ee.doe.gov.*

**Signing Authority**

This document of the Department of Energy was signed on January 26, 2022, by Kelly J. Speakes-Backman, Principal Deputy 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 January 26, 2022.

**Treena V. Garrett,**

*Federal Register Liaison Officer, U.S. Department of Energy.*

[FR Doc. 2022–01921 Filed 2–1–22; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 71

**[Docket No. FAA–2022–0025; Airspace Docket No. 21–ACE–2]**

**RIN 2120–AA66**

## Proposed Amendment of Multiple Air Traffic Service (ATS) Routes and Establishment of Area Navigation (RNAV) Routes in the Vicinity of Liberal, KS

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to amend Jet Routes J–19, J–20, J–52, J–98, J–134, and J–231; amend RNAV route Q–176; amend VHF Omnidirectional Range (VOR) Federal airways V–210, V–234, V–304, V–350, and V–507; and establish Area Navigation (RNAV) routes T–418 and T–431. The FAA is proposing this action due to the planned decommissioning of the VOR portion of the Liberal, KS, VOR/Tactical Air Navigation (VORTAC) navigational aid (NAVAID). The Liberal VOR is being decommissioned in support of the FAA's VOR Minimum Operational Network (MON) program.

**DATES:** Comments must be received on or before March 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; telephone: 1(800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2022–0025; Airspace Docket No. 21–ACE–2 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 Rules and Regulations 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:** Colby Abbott, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

**SUPPLEMENTARY INFORMATION:**

**Authority for This Rulemaking**

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify the National Airspace System (NAS) as necessary to preserve the safe and efficient flow of air traffic.

**Comments Invited**

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

Communications should identify both docket numbers (FAA Docket No. FAA–2022–0025; Airspace Docket No. 21–ACE–2) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *https://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2022–0025; Airspace Docket No. 21–ACE–2.'' The postcard will be date/time stamped and returned to the commenter.

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

**Availability of NPRMs**

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

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see

**ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the office of the Operations Support Group, Central Service Center, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX, 76177.

**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.

**Background**

The FAA is planning to decommission the Liberal, KS, VOR in September 2022. The Liberal VOR was one of the candidate VORs identified for discontinuance by the FAA's VOR MON program and listed in the Final policy statement notice, ''Provision of Navigation Services for the Next Generation Air Transportation System (NextGen) Transition to Performance-Based Navigation (PBN) (Plan for Establishing a VOR Minimum Operational Network),'' published in the **Federal Register** of July 26, 2016 (81 FR 48694), Docket No. FAA–2011–1082.

Although the VOR portion of the Liberal VORTAC is planned for decommissioning, the co-located Distance Measuring Equipment (DME) portion of the NAVAID is being retained to support NextGen PBN flight procedure requirements.

The air traffic service (ATS) routes effected by the Liberal VOR decommissioning are Jet Routes J–19, J–20, J–52, J–98, J–134, and J–231; RNAV route Q–176; and VOR Federal airways V–210, V–234, V–304, V–350, and V–507. With the planned decommissioning of the Liberal VOR, the remaining ground-based NAVAID coverage in the area is insufficient to enable the continuity of the affected ATS routes. As such, proposed modifications to J–20, J–52, J–134,V–210, and V–234 would result in a gap being created in the ATS routes; to J–19, J–98, J–231, V–304, V–350, and V–507 would result in the airway being shortened; and to Q–176 would result in two route points listed as NAVAIDs being redefined as waypoints (WPs). To overcome the proposed modifications to the affected ATS routes, instrument flight rules (IFR) traffic could use portions of adjacent ATS routes, including J–8, J–18, J–26, J–96, J–168, and Q–176 in the high altitude enroute structure and V–10, V–17, V–81, and V–190 in the low altitude enroute structure, or receive air traffic control (ATC) radar vectors to fly around or through the affected area. Additionally, pilots equipped with RNAV capabilities could also navigate point to point using the existing NAVAIDs and fixes that would remain in place to support continued operations though the affected area. Visual flight rules (VFR) pilots who elect to navigate via the affected ATS routes could also take advantage of the adjacent ATS routes or ATC services listed previously.

Further, the FAA proposes to establish RNAV route T–418 between the Lamar, CO, VOR/DME and Mitbee, OK, VORTAC and T–431 between the KENTO, NM, WP being established in northeastern New Mexico and the RREDD, KS, WP being established in the vicinity of the Makato, KS, VORTAC. The new T-routes would, in part, mitigate the proposed removal of airway segments affected by the planned Liberal VOR decommissioning, reduce ATC sector workload and complexity, and reduce pilot-to-controller communication. The new routes would also increase NAS capacity in the route's vicinity and assist ATC when non-radar procedures are required due to frequent radar outages west of the Liberal, KS, VORTAC. Finally, the new T-routes would provide airspace users equipped with RNAV ATS routes that support the FAA's NextGen efforts to modernize the NAS navigation system from a ground-based system to a satellite-based system.

**The Proposal**

The FAA is proposing an amendment to 14 CFR part 71 to amend Jet Routes J–19, J–20, J–52, J–98, J–134, and J–231; amend RNAV route Q–176; amend VOR Federal airways V–210, V–234, V–304, V–350, and V–507; and establish RNAV routes T–418 and T–431 due to the planned decommissioning of the Liberal, KS, VOR. The proposed ATS route actions are described below.

*J–19:* J–19 currently extends between the Phoenix, AZ, VORTAC and the Northbrook, IL, VOR/Distance Measuring Equipment (VOR/DME). The FAA proposes to remove the route segment between the Phoenix, AZ, VORTAC and the St. Louis, MO, VORTAC. The route segment between the Phoenix, AZ, VORTAC and the Zuni, NM, VORTAC is proposed to be removed as it overlaps J–244, which will remain. The route segment between the Zuni, NM, VORTAC and the Fort Union, NM, VORTAC is proposed to be removed since J–244 provides a shorter, more efficient routing between the two NAVAIDs, as well as, the portion of that route segment between the intersection of the Zuni, NM, VORTAC 059° and Fort Union, NM, VORTAC 268° radials (BUKKO fix) and the Fort Union, NM, VORTAC overlaps J–8, which will remain. The route segment overlying the Liberal VORTAC between the Fort Union, NM, VORTAC and the Wichita, KS, VORTAC is proposed to be removed due to the planned Liberal VOR decommissioning. Finally, the route segment between the Wichita, KS, VORTAC and the St. Louis, MO, VORTAC is proposed to be removed as it overlaps J–134 completely and J–110 between the Butler, MO, VORTAC and St. Louis, MO, VORTAC. The unaffected portions of the existing route would remain as charted.

*J–20:* J–20 currently extends between the Seattle, WA, VORTAC and the Montgomery, AL, VORTAC. The FAA proposes to remove the route segment overlying the Liberal VORTAC between the Lamar, CO, VOR/DME and the Will Rogers, OK, VORTAC. Additional changes to other portions of the route have been proposed in a separate NPRM. The unaffected portions of the existing route would remain as charted.

*J–52:* J–52 currently extends between the Vancouver, BC, Canada VOR/DME and the Vulcan, AL, VORTAC; and between the intersection of the Columbia, SC, VORTAC 042° and Flat Rock, VA, VORTAC 212° radials (TUBAS fix) and the Richmond, VA, VORTAC. The portion within Canada is excluded. The FAA proposes to remove the route segment overlying the Liberal VORTAC between the Lamar, CO, VOR/DME and the Ardmore, OK, VORTAC. The unaffected portions of the existing route would remain as charted.

*J–98:* J–98 currently extends between the Liberal, KS, VORTAC and the Farmington, MO, VORTAC. The FAA proposes to remove the route segment overlying the Liberal VORTAC between the Liberal, KS, VORTAC and the Mitbee, OK, VORTAC. The unaffected portions of the existing route would remain as charted.

*J–134:* J–134 currently extends between the Los Angeles, CA, VORTAC and the Falmouth, KY, VOR/DME. The FAA proposes to remove the route segment overlying the Liberal VORTAC between the Cimarron, NM, VORTAC and the Wichita, KS, VORTAC. The unaffected portions of the existing route would remain as charted.

*J–231:* J–231 currently extends between the Twentynine Palms, CA, VORTAC and the Liberal, KS, VORTAC. The FAA proposes to remove the route segment overlying the Liberal VORTAC between the Anton Chico, NM, VORTAC and Liberal, KS, VORTAC. The unaffected portions of the existing route would remain as charted.

*Q–176:* Q–176 currently extends between the Cimarron, NM, VORTAC and the OTTTO, VA, WP. The FAA proposes to replace the Liberal, KS, VORTAC and the Wichita, KS, VORTAC route points with the TOTOE, KS, WP and the WRIGL, KS, WP, respectively. The two new WPs are being established in the immediate vicinity of the NAVAIDs they are proposed to replace. Additionally, the FAA proposes to change the type of the GBEES route point from ''FIX'' to ''WP'' to match the FAA's aeronautical database information and charted depiction. The unaffected portions of the existing route would remain as charted.

*V–210:* V–210 currently extends between the Los Angeles, CA, VORTAC and the Okmulgee, OK, VOR/DME; between the Brickyard, IN, VORTAC and the Rosewood, OH, VORTAC; and between the Revloc, PA, VOR/DME and the Yardley, PA, VOR/DME. The FAA proposes to remove the airway segment overlying the Liberal VORTAC between the Lamar, CO, VOR/DME and the Will Rogers, OK, VORTAC. The unaffected portions of the existing airway would remain as charted.

*V–234:* V–234 currently extends between the St. Johns, AZ, VORTAC and the Centralia, IL, VORTAC. The airspace at and above 8,000 feet MSL between the Vichy, MO, VOR/DME and the intersection of the Vichy, MO, VOR/DME 091° and St. Louis, MO, VORTAC 171° radials is excluded when the Meramec Military Operations Area (MOA) is activated by NOTAM. The FAA proposes to remove the airway segment overlying the Liberal VORTAC between the Dalhart, TX, VORTAC and the Hutchinson, KS, VOR/DME. Additionally, the Meramec MOA no longer exists; therefore, the exclusion language in the airway description would also be removed. The unaffected portions of the existing airway would remain as charted.

*V–304:* V–304 currently extends between the Panhandle, TX, VORTAC and the Lamar, CO, VOR/DME. The FAA proposes to remove the airway segment overlying the Liberal VORTAC between the Borger, TX, VORTAC and the Lamar, CO, VOR/DME. Additional changes to other portions of the route have been proposed in a separate NPRM which would result in the proposed removal of V–304 in its entirety.

*V–350:* V–350 currently extends between the Liberal, KS, VORTAC and the Chanute, KS, VORTAC. The airspace at and above 6,000 feet MSL from 8 NM to 54 NM west of Chanute VOR is excluded when the Eureka High MOA is activated. The FAA proposes to remove the airway segment overlying the Liberal VORTAC between the Liberal, KS, VORTAC and the Wichita, KS, VORTAC. The unaffected portions of the existing airway would remain as charted.

*V–507:* V–507 currently extends between the Ardmore, OK, VORTAC and the Garden City, KS, VORTAC. The FAA proposes to remove the airway segment overlying the Liberal VORTAC between the Mitbee, OK, VORTAC and the Garden City, KS, VORTAC. The unaffected portions of the existing airway would remain as charted.

*T–418:* T–418 is a new RNAV route proposed to extend between the Lamar, CO, VOR/DME and the Mitbee, OK, VORTAC. This new T-route would mitigate the proposed removal of the V–210 airway segment between the Lamar, CO, VOR/DME and Liberal, KS, VORTAC and the proposed removal of the V–507 airway segment between the Liberal, KS, VORTAC and Mitbee, OK, VORTAC. The new T-route would provide RNAV routing capability from the Lamar, CO, area, southeastward to the Gage, OK, area.

*T–431:* T–431 is a new RNAV route proposed to extend between two new WPs being established; the KENTO, NM, WP and the RREDD, KS, WP. This T-route would provide non-radar routing from northeastern New Mexico eastward to the Liberal, KS, VORTAC area to address frequent radar outages and support the general aviation community in the area, as well as provide RNAV routing between the Liberal, KS, VORTAC area and the Mankato, KS, VORTAC area. The new T-route would provide RNAV routing capability from the northeastern New Mexico area northeastward to the Mankato, KS, area.

All NAVAID radials listed in the ATS route descriptions below are unchanged and stated in True degrees.

Jet Routes are published in paragraph 2004, RNAV Q-routes are published in paragraph 2006, VOR Federal airways are published in paragraph 6010(a), and RNAV T-routes are published in paragraph 6011 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 ATS routes listed in this document would 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 Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**Environmental Review**

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

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

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

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

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

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

**§ 71.1 [Amended]**

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

*Paragraph 2004 Jet Routes.*

* * * * *

**J–19 [Amended]**

From St. Louis, MO; Roberts, IL; to Northbrook, IL.

* * * * *

**J–20 [Amended]**

From Seattle, WA; Yakima, WA; Pendleton, OR; Donnelly, ID; Pocatello, ID; Rock Springs, WY; Falcon, CO; Hugo, CO; to Lamar, CO. From Will Rogers, OK; Belcher, LA; Magnolia, MS; Meridian, MS; to Montgomery, AL.

* * * * *

**J–52 [Amended]**

From Vancouver, BC, Canada; Spokane, WA; Salmon, ID; Dubois, ID; Rock Springs, WY; Falcon, CO; Hugo, CO; to Lamar, CO. From Ardmore, OK; Texarkana, AR; Sidon, MS; Bigbee, MS; to Vulcan, AL. From INT Columbia, SC, 042° and Flat Rock, VA, 212° radials; Raleigh-Durham, NC; to Richmond, VA. The portion within Canada is excluded.

* * * * *

**J–98 [Amended]**

From Mitbee, OK; Will Rogers, OK; Tulsa, OK; Springfield, MO; to Farmington, MO.

* * * * *

**J–134 [Amended]**

From Los Angeles, CA; Seal Beach, CA; Thermal, CA; Parker, CA; Drake, AZ; Gallup, NM; to Cimarron, NM. From Wichita, KS; Butler, MO; St Louis, MO; to Falmouth, KY.

* * * * *

**J–231 [Amended]**

From Twentynine Palms, CA; INT Twentynine Palms 075° and Drake, AZ, 262° radials; Drake; INT Drake 111° and St. Johns, AZ, 268° radials; St. Johns; to Anton Chico, NM.

* * * * *

*2006 United States Area Navigation Routes.*

* * * * *

**Q–176 Cimarron, NM (CIM) to OTTTO, VA [Amended]**

| | | |
|---|---|---|
| Cimarron, NM (CIM) | VORTAC | (Lat. 36°29′29.03″ N, long. 104°52′19.20″ W) |
| KENTO, NM | WP | (Lat. 36°44′19.10″ N, long. 103°05′57.13″ W) |
| TOTOE, KS | WP | (Lat. 37°02′40.21″ N, long. 100°58′16.87″ W) |
| WRIGL, KS | WP | (Lat. 37°44′42.79″ N, long. 097°35′02.52″ W) |
| Butler, MO (BUM) | VORTAC | (Lat. 38°16′19.49″ N, long. 094°29′17.74″ W) |
| St Louis, MO (STL) | VORTAC | (Lat. 38°51′38.48″ N, long. 090°28′56.52″ W) |
| GBEES, IN | WP | (Lat. 38°41′54.72″ N, long. 085°10′13.03″ W) |
| BICKS, KY | WP | (Lat. 38°38′29.92″ N, long. 084°25′20.82″ W) |
| Henderson, WV | (HNN) DME | (Lat. 38°45′14.85″ N, long. 082°01′34.20″ W) |
| OTTTO, VA | WP | (Lat. 38°51′15.81″ N, long. 078°12′20.01″ W) |

* * * * *

*Paragraph 6010(a) Domestic VOR Federal Airways.*

* * * * *

**V–210 [Amended]**

From Los Angeles, CA; INT Los Angeles 083° and Pomona, CA, 240° radials; Pomona; INT Daggett, CA, 229° and Hector, CA, 263° radials; Hector; Goffs, CA; 13 miles, 23 miles 71 MSL, 85 MSL, Peach Springs, AZ; Grand Canyon, AZ; Tuba City, AZ; 10 miles 90 MSL, 91 miles 105 MSL, Rattlesnake, NM; Alamosa, CO; INT Alamosa 074° and Lamar, CO, 250° radials; 40 miles, 51 miles 65 MSL, to Lamar. From Will Rogers, OK; INT Will Rogers 113° and Okmulgee, OK, 238° radials; to Okmulgee. From Brickyard, IN; Muncie, IN; to Rosewood, OH. From Revloc, PA; INT Revloc 096° and Harrisburg, PA, 285° radials; Harrisburg; Lancaster, PA; INT Lancaster 095° and Yardley, PA, 255° radials; to Yardley.

* * * * *

**V–234 [Amended]**

From St. Johns, AZ; INT St. Johns 085° and Albuquerque, NM, 229° radials; Albuquerque; INT Albuquerque 103° and Anton Chico, NM, 249° radials; Anton Chico; to Dalhart, TX. From Hutchinson, KS; Emporia, KS; Butler, MO; Vichy, MO; INT Vichy 091° and Centralia, IL, 253° radials; to Centralia.

* * * * *

**V–304 [Amended]**

From Panhandle, TX; to Borger, TX.

* * * * *

**V–350 [Amended]**

From Wichita, KS; to Chanute, KS. The airspace at and above 6,000 feet MSL from 8 NM to 54 NM west of Chanute VOR is excluded during the time that the Eureka High MOA is activated.

* * * * *

**V–507 [Amended]**

From Ardmore, OK; Will Rogers, OK; INT Will Rogers 284° and Mitbee, OK, 152° radials; to Mitbee.

* * * * *

*Paragraph 6011 United States Area Navigation Routes.*

* * * * *

**T–418 Lamar, CO (LAA) to Mitbee, OK (MMB) [New]**

| | | |
|---|---|---|
| Lamar, CO (LAA) | VOR/DME | (Lat. 38°11′49.53″ N, long. 102°41′15.12″ W) |
| TOTOE, KS | WP | (Lat. 37°02′40.21″ N, long. 100°58′16.87″ W) |
| Mitbee, OK (MMB) | VORTAC | (Lat. 36°20′37.44″ N, long. 099°52′48.44″ W) |

* * * * *

**T–431 KENTO, NM to RREDD, KS [New]**

| | | |
|---|---|---|
| KENTO, NM | WP | (Lat. 36°44′19.10″ N, long. 103°05′57.13″ W) |
| TOTOE, KS | WP | (Lat. 37°02′40.21″ N, long. 100°58′16.87″ W) |
| MOZEE, KS | WP | (Lat. 38°50′51.20″ N, long. 099°16′35.85″ W) |
| RREDD, KS | WP | (Lat. 39°48′22.62″ N, long. 098°15′36.62″ W) |

Issued in Washington, DC, on January 27, 2022.

**Michael R. Beckles,**

*Manager, Rules and Regulations Group.*

[FR Doc. 2022–02025 Filed 2–1–22; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

## 17 CFR Parts 229, 240, and 249

**[Release No. 34–94074; File No. S7–07–15]**

**RIN 3235–AL00**

## Reopening of Comment Period for Pay Versus Performance

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** The Securities and Exchange Commission (''Commission'') is reopening the comment period for its proposal to implement Section 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''). The proposed rule would amend the current executive compensation disclosure rule to require a description of how executive compensation actually paid by a registrant related to the financial performance of that company (''proposed rules''). The proposed rules were first set forth in a release published in the **Federal Register** on May 7, 2015 (Release No. 34–74835) (''Proposing Release''), and the related comment period ended on July 6, 2015. The reopening of this comment period is intended to allow interested persons further opportunity to analyze and comment upon the proposed pules in light of developments since the publication of the Proposing Release and our further consideration of the Section 953(a) mandate, including by responding to the additional requests for comment included in this release.

**DATES:** The comment period for the proposed rule published May 7, 2015, at 80 FR 26329, is reopened. Comments should be received on or before March 4, 2022.

**ADDRESSES:** Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*https://www.sec.gov/rules/submitcomments.htm*).

*Paper Comments*

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–07–15. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (*http://www.sec.gov/rules/proposed.shtml*). Comments also are available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549–1090 on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's public reference room. 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.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

**FOR FURTHER INFORMATION CONTACT:** John Byrne, Special Counsel, in the Office of Small Business Policy, at (202) 551–3460, Division of Corporation Finance, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:**

### I. Background

Section 953(a) of the Dodd-Frank Act added Section 14(i) to the Securities Exchange Act of 1934 [1] (''Exchange Act''). Section 14(i) requires that the Commission adopt rules requiring issuers to disclose in any proxy or consent solicitation material for an annual meeting of shareholders a clear description of any compensation required to be disclosed under 17 CFR 229.402 (''Item 402 of Regulation S–K''), including information that shows the relationship between executive compensation actually paid and the financial performance of the issuer, taking into account any change in the value of the shares of stock and dividends of the issuer and any distributions. Section 14(i) further provides that the disclosure may include a graphic representation of the information required to be disclosed.

As described more fully in the Proposing Release,[2] the proposed rules would add new 17 CFR 229.402(v) (''Item 402(v) of Regulation S–K''), which would require registrants to describe how the executive compensation actually paid by the registrant related to the financial performance of the registrant over the time horizon of the disclosure. The proposed rules would use cumulative total shareholder return (''TSR''), as defined in 17 CFR 229.201(e) (''Item 201(e) of Regulation S–K''),[3] as the measure of financial performance. Under the proposed rules, the following tabular disclosures would be required, with the asterisked items indicating portions of the proposed rules from which smaller reporting companies (''SRCs'') [4] would be exempt: [5]

[1] 15 U.S.C. 78a *et seq.*

[2] *See Pay Versus Performance,* Release No. 34–74835 (Apr. 29, 2015) [80 FR 26329 (May 7, 2015)].

[3] Item 201(e) of Regulation S–K sets forth the specific disclosure requirements for the issuer's stock performance graph, which is required to be included in the annual report to security holders required by 17 CFR 240.14a–3 and 240.14c–3. The Item provides that cumulative total shareholder return is calculated by ''dividing the sum of the cumulative amount of dividends for the measurement period, assuming dividend reinvestment, and the difference between the registrant's share price at the end and the beginning of the measurement period; by the share price at the beginning of the measurement period.''

[4] A ''smaller reporting company'' means an issuer that is not an investment company, an asset-backed issuer, or a majority-owned subsidiary of a parent that is not a smaller reporting company and that: (1) Had a public float of less than $250 million (as of the last business day of the issuer's most recently completed second fiscal quarter); or (2) had annual revenues of less than $100 million (as of the most recently completed fiscal year for which audited financial statements are available) and either: (i) No public float (as of the last business day of the issuer's most recently completed second fiscal quarter); or (ii) a public float of less than $700 million (as of the last business day of the issuer's most recently completed second fiscal quarter). 17 CFR 240.12b–2. Business development companies, which are a type of closed-end investment company that is not registered under the Investment Company Act, do not fall within the SRC definition.

[5] The Commission amended the SRC definition effective September 2018. *See* Amendments to the Smaller Reporting Company Definition, Release No. 33–10513 (June 28, 2018) [83 FR 31992 (July 10, 2018)]. Based on staff analysis of filings in 2019, approximately 45 percent of registrants subject to the Proposed Rules would be SRCs and thus would be exempt from the asterisked disclosure, compared to approximately 40 percent at the time of publication of the Proposed Rules. Estimates based on 2020 filings would reflect a more modest change in the proportion of SRCs, but may undercount SRCs due to a greater number of registrants, particularly small ones, being late to file than in prior years.

| Year | Summary compensation table total for PEO | Compensation actually paid to PEO | Average summary compensation table total for non-PEO NEO | Average compensation actually paid to non-PEO NEO | Total shareholder return | Peer group total shareholder return * |
|---|---|---|---|---|---|---|
| (a) | (b) | (c) | (d) | (e) | (f) | (g) |
| Y1 | ..... | ..... | ..... | ..... | ..... | ..... |
| Y2 | ..... | ..... | ..... | ..... | ..... | ..... |
| Y3 | ..... | ..... | ..... | ..... | ..... | ..... |
| Y4 * | ..... | ..... | ..... | ..... | ..... | ..... |
| Y5 * | ..... | ..... | ..... | ..... | ..... | ..... |

Specifically, the proposed rules would:

• Apply to a registrant's ''named executive officers'' (''NEOs'') as defined in 17 CFR 229.402(a)(3); [6]

• Address the Section 953(a) of the Dodd-Frank Act required measure of ''executive compensation *actually paid*'' (emphasis added) by using, as a starting point, the total compensation that is already required to be disclosed in the Summary Compensation Table.[7] For the PEO, the total PEO compensation from the Summary Compensation Table would be disclosed in column (b) of the new table; and, for NEOs, the average of their total compensation from the Summary Compensation Table would be disclosed in column (d) of the new table. The following two adjustments to the disclosure in the Summary Compensation Table would be made to determine the executive compensation amounts ''actually paid'' (columns (c) and (e) of the new table):

1. Exclude changes in actuarial present value of benefits under defined benefit and actuarial pension plans that are not attributable to the applicable year of service; [8] and

2. Include the value of equity awards at vesting rather than when granted.

• Require the executive compensation amounts actually paid to be presented separately for the PEO, and as an average for the remaining NEOs;

• Require a registrant's TSR, as defined in Item 201(e) of Regulation S–K, and the TSR of the registrant's peer group as measures of financial performance (columns (f) and (g) of the new table);

• Require a registrant to use the information in the above table to provide a clear description of (1) the relationship between executive compensation actually paid to the registrant's NEOs and the cumulative TSR of the registrant, and (2) the relationship between the registrant's TSR and the TSR of a peer group chosen by the registrant, in each case over the registrant's five most recently completed fiscal years;

• For SRCs, require the disclosure of the relationship between executive compensation actually paid and TSR over the registrant's three most recently completed fiscal years, without requiring these registrants to provide disclosure of peer group TSR; and

• Require that the disclosure be provided in a structured data language using the Inline eXtensible Business Reporting Language (''Inline XBRL'').[9]

Registrants would also be permitted to provide supplemental measures of compensation and/or financial performance, or other supplemental disclosures, so long as any additional disclosure is clearly identified, not misleading and not presented with greater prominence than the required disclosure.

The Commission proposed applying the rule to all reporting companies except foreign private issuers, registered investment companies, and Emerging Growth Companies (''EGCs'').[10]

## II. Reopening of Comment Period

Section 953(a) of the Dodd-Frank Act was enacted in 2010 and the proposed rules were published in 2015. Since the proposed rules were published, executive compensation practices related to company performance have continued to develop and evolve,[11] to

[6] 17 CFR 229.402(a)(3) defines the NEOs for whom Item 402 of Regulation S–K executive compensation is required as (1) all individuals serving as the registrant's principal executive officer (''PEO'') or acting in a similar capacity during the last completed fiscal year, regardless of compensation level, (2) all individuals serving as the registrant's principal financial officer (''PFO'') or acting in a similar capacity during the last completed fiscal year, regardless of compensation level, (3) the registrant's three most highly compensated executive officers other than the PEO and PFO who were serving as executive officers at the end of the last completed fiscal year, and (4) up to two additional individuals for whom Item 402 of Regulation S–K disclosure would have been provided but for the fact that the individual was not serving as an executive officer of the registrant at the end of the last completed fiscal year. For SRCs, the Proposed Rules would apply to the scaled number of NEOs included in 17 CFR 229.402(m)(2).

[7] 17 CFR 229.402(c). SRCs would provide the scaled Summary Compensation Table disclosure in 17 CFR 229.402(n).

[8] As proposed, SRCs would not be required to disclose and exclude amounts related to pensions for purposes of disclosing executive compensation actually paid because they are subject to scaled compensation disclosure that does not include pension plans.

[9] In 2015, the Commission proposed requiring the structured, machine-readable eXtensible Business Reporting Language (''XBRL'') for the tagging requirements in the Proposed Rule. The Commission subsequently adopted rules replacing XBRL tagging requirements for registrant financial statements with Inline XBRL tagging requirements. As a result of those changes, we are considering using Inline XBRL, rather than XBRL, for the proposed tagging requirements. *See infra* footnote 25.

[10] ''Emerging growth company'' means an issuer that had total annual gross revenues of less than $1.07 billion during its most recently completed fiscal year. An issuer that is an emerging growth company as of the first day of that fiscal year shall continue to be deemed an emerging growth company until the earliest of: (i) The last day of the fiscal year of the issuer during which it had total annual gross revenues of $1.07 billion or more; (ii) the last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act of 1933 [15 U.S.C. 77a *et seq.*]; (iii) the date on which such issuer has, during the previous three year period, issued more than $1 billion in non-convertible debt; or (iv) the date on which such issuer is deemed to be a large accelerated filer. 17 CFR 240.12b–2. Section 102(a)(2) of the Jumpstart Our Business Startups Act amended Exchange Act Section 14(i) to exclude registrants that are EGCs from the pay-versus-performance disclosure requirements. Public Law 112–106, 126 Stat. 306 (2012). In accordance with this provision, the Commission did not propose to require EGCs to provide pay-versus-performance disclosure. As proposed, business development companies would be treated in the same manner as issuers other than registered investment companies and, therefore, would be subject to the disclosure requirement of proposed new Item 402(v) of Regulation S–K.

[11] For example, there has been a continued increase in the prevalence of performance-contingent share plans and a decrease in the use of stock options to compensate CEOs among S&P 500 and Russell 3000 companies. *See, e.g.,* Pay Governance (Jan. 2021), *S&P 500 CEO Compensation Increase Trends, available at www.paygovernance.com/viewpoints/s-p-500-ceo-compensation-increase-trends-4; and Gallagher (February 2021), CEO and Executive Compensation Practices Report: 2020 Edition, available at www.ajg.com/us/news-and-insights/2021/feb/ceo-executive-compensation-practices-report-2020/. See also,* Meridian Compensation Partners, LLC, *2020 Trends and Developments in Executive Compensation* (April 30, 2020), *available at https://www.meridiancp.com/wp-content/uploads/*

the point that we believe interested persons should be given a further opportunity to analyze and comment upon the proposed rules. In addition, as described below, we are considering whether additional requirements would better implement the Section 953(a) mandate by providing investors with additional decision-relevant data.

Section 953(a) of the Dodd-Frank Act does not specify how to measure an issuer's ''financial performance.'' However, the statutory language requires that ''financial performance . . . [take] into account any change in the value of the shares of stock and dividends of the issuer and any distributions.'' Consistent with this language, the Commission proposed requiring TSR (as defined in Item 201(e) of Regulation S–K) as the measure of ''financial performance'' of the registrant. The Commission also proposed TSR because, among other reasons, it is:

- Consistently calculated and should increase comparability across registrants;
- Objectively determinable and not open to subjective determinations of performance; and
- A measure for which disclosure is already required and with which shareholders are familiar, so its use was intended to mitigate the burdens both to registrants to provide the disclosure and to investors to analyze the new disclosure.

We are considering requiring registrants to disclose, in addition to their TSR and the TSR of their peer group, certain other measures of performance, which could provide additional clarity to investors as to the relation between executive compensation and financial performance. Specifically, we are considering requiring disclosure in tabular form of the following three additional measures: Pre-tax net income, net income, and a measure specific to a particular registrant, chosen by said registrant (the ''Company-Selected Measure''). As noted in the Proposing Release, registrants would be required to provide a clear description of the relationship among the measures provided in the tabular form (including these three additional measures we are considering requiring), but would be allowed to choose the format used to present the relationship, such as a graph or narrative description.

The first two additional measures of financial performance under consideration—pre-tax net income and net income—are already provided for under U.S. Generally Accepted Accounting Principles (''U.S. GAAP'') [12] and, accordingly, are familiar to investors and registrants. We are considering whether to require registrants to disclose these measures in two additional columns to the table described in the Proposing Release and shown above. Because these measures reflect a registrant's overall profits and are net of costs and expenses, we believe they are additional important measures of company financial performance that may be relevant to investors in evaluating executive compensation. We believe using a company's pre-tax net income and net income could complement the market-based performance measure required in the Proposing Release by also providing accounting-based measures of financial performance. To the extent that these measures would otherwise be considered by investors when evaluating the alignment of pay with performance, including pre-tax net income and net income as additional measures of performance in the proposed table may lower the burden of analysis for those investors by presenting this existing information together in a way that could make it easier to understand how pay relates to performance.

We are also considering whether to require registrants to disclose, as an additional column to the above table, a third new measure—the Company-Selected Measure—that in the registrant's assessment represents the most important performance measure (that is not already included in the table) [13] used by the registrant to link compensation actually paid during the fiscal year to company performance, over the time horizon of the disclosure. We believe that requiring registrants to select their own measure rather than mandating a further specific measure may elicit additional useful disclosure while reducing the risk, identified by commenters on the Proposing Release,[14] of misrepresenting or providing an incomplete picture of how pay relates to performance given the differences across companies in terms of performance measures that companies or investors care about and the questions about whether a ''one size fits all'' benchmark is appropriate for all companies.

For reference, the three additional measures we are considering requiring would be part of the table in the proposed rules as follows: [15]

*Meridian-2020-Trends-and-Developments-Survey-Final.pdf* (summarizing responses to a survey from 108 companies, and discussing, among other developments, a decline in the use of TSR as the sole performance metric in long-term incentive plans, from 47% in 2016 to 30% in 2020, and the recent use by some companies of TSR as a modifier to results initially determined by one or more other financial metrics). Also, the COVID–19 pandemic has affected both how and the extent to which companies recently have tied executive compensation to company performance. *See, e.g.,* A. Batish, et al., *Sharing the Pain: How Did Boards Adjust CEO Pay in Response to COVID–19?,* Rock Center for Corporate Governance at Stanford University Closer Look Series: Topics, Issues and Controversies in Corporate Governance No. CGRP–86 (Sep. 1, 2020), *available at https://ssrn.com/abstract=3682766* (analyzing compensation disclosure from all Russell 3000 companies between January 1 and June 30, 2020, and finding ''502 companies (17 percent) made adjustments to CEO salary, bonus, or long-term incentive programs (LTIPs), or director fees during this measurement period,'' with 92 companies making adjustments to annual bonus programs and 33 companies making changes to their long-term incentive programs).

[12] Net income is required to be disclosed in financial statements. While some registrants are not explicitly required to present pre-tax net income in their financial statements, U.S. GAAP includes presentation and disclosure requirements that result in information sufficient to calculate pre-tax net income, and these registrants often do present pre-tax net income.

[13] If the registrant's most important performance measure were already included in the table, the registrant would disclose its next-most important measure as its Company-Selected Measure. For example, if the registrant's most important measure were TSR, its second most important measure were pre-tax net income, and its third most important measure were EBITDA, the registrant would include EBITDA as its Company-Selected Measure. If a registrant did not use any measures other than those already included in the table, it would indicate that fact in its disclosure.

[14] *See, e.g.,* letters from Business Roundtable dated July 6, 2015, Celanese Corp. dated June 12, 2015, Steven Hall & Partners dated July 6, 2015, Hyster-Yale Materials Handling, Inc. dated June 10, 2015, PNC Financial Services Group, Inc. dated July 6, 2015, and Simpson Thacher & Bartlett LLP dated July 6, 2015 (each opposing the use of TSR as the sole measure of financial performance and suggesting providing registrants the ability to choose their own performance measure). Comment letters received in response to the Proposing Release are available at *https://www.sec.gov/comments/s7-07-15/s70715.shtml.* In addition, in a review of the CD&As of around 20 of the largest Fortune 500 companies, the staff noted that, among these companies, there were over 100 unique performance measures, almost all of which were company-specific or adjusted measures.

[15] The title of column (j) of the table, ''Company-Selected Measure,'' would be replaced with the name of the registrant's most important measure, and that column would include the numerically quantifiable performance of the issuer under such measure for each covered fiscal year. For example, if the Company Selected Measure for the most recent fiscal year was EBITDA, the company would disclose its quantified EBITDA performance in each covered fiscal year. The asterisked items indicate disclosures we are considering not requiring SRCs to provide. See below for a discussion of our considerations with respect to SRC disclosure requirements.

| Year | Summary compensation table total for PEO | Compensation actually paid to PEO | Average summary compensation table total for non-PEO NEOs | Average compensation actually paid to non-PEO NEOs | Total shareholder return | Peer group total shareholder return * | Pre-tax net income (loss) | Net income (loss) | [Company-selected measure] * |
|---|---|---|---|---|---|---|---|---|---|
| (a) | (b) | (c) | (d) | (e) | (f) | (g) | (h) | (i) | (j) |
| Y1 | | | | | | | | | |
| Y2 | | | | | | | | | |
| Y3 | | | | | | | | | |
| Y4 * | | | | | | | | | |
| Y5 * | | | | | | | | | |

In addition to potentially including the Company-Selected Measure in the table described in the Proposing Release, we are considering whether to separately require registrants to provide a list of their five most important performance measures used by the registrant to link compensation actually paid during the fiscal year to company performance, over the time horizon of the disclosure, in order of importance. If the registrant considers fewer than five performance measures when it links compensation actually paid during the fiscal year to company performance, the registrant would be required to disclose only the number of measures it actually considers.[16] We are considering whether to require this list to be in a tabular format. We note that some commenters to the Proposing Release suggested revising the Proposed Rules to require, in addition to TSR, the quantitative metrics or key performance targets companies actually use to set executive pay.[17] Currently, the Compensation Discussion and Analysis (''CD&A'') requirements in Item 402 of Regulation S–K include requiring a registrant to explain all material elements of the compensation paid to its NEOs.[18] The item further specifies that examples of this material information may include how executive compensation relates to company performance such as:

- What specific items of corporate performance are taken into account in setting compensation policies and making compensation decisions;
- How specific forms of compensation are structured and implemented to reflect these items of corporate performance; and
- How specific forms of compensation are structured and implemented to reflect the NEOs' individual performance and/or individual contribution to these items of the company's performance.[19]

Generally, discussion of these topics in the CD&A tends to be prospective in nature and focused on the design of the registrant's compensation program. However, there is no existing rule that specifically mandates disclosure of the performance measures that actually determined the level of recent NEO compensation actually paid. Tabular disclosure of a list of the five most important performance measures that drove compensation actually paid may be useful to investors in addition to the more detailed disclosure related to the consideration of the registrant's corporate performance and individual performance in the design of NEO compensation required in the CD&A. This tabular disclosure may enable investors to more easily assess which performance metrics actually have the most impact on compensation actually paid and make their own judgments as to whether compensation appropriately incentivizes management. The disclosure of the five most important performance measures that drove compensation actually paid may also provide investors with context that could be useful in interpreting the remainder of the pay versus performance disclosure.

For reference, we are considering requiring the five performance measures, as applicable, to be disclosed in the following tabular format:

FIVE MOST IMPORTANT COMPANY PERFORMANCE MEASURES FOR DETERMINING NEO COMPENSATION

| | |
|---|---|
| 1. | Measure 1. |
| 2. | Measure 2. |
| 3. | Measure 3. |
| 4. | Measure 4. |
| 5. | Measure 5. |

In our consideration of such a tabular requirement, we note that registrants would be able to cross-reference to existing disclosures elsewhere in the disclosure document that describe the various processes and calculations that go into determining NEO compensation as it relates to these performance measures, if they elected to do so.

We believe that including a tabular list of those performance measures that drove recent compensation actually paid may help address concerns that using only TSR may mislead investors or provide an incomplete picture of performance. In addition, as referenced above with respect to the Company-Selected Measure, we believe the inclusion of a registrant's five most important performance measures may better reflect the differences across companies.

We believe that the proposed rules, along with the additional disclosures we are considering, as detailed above, may facilitate the analysis of registrants' executive compensation actually paid in relation to company performance. In particular, as discussed above, each of the additional disclosures under consideration may broaden the picture of financial performance presented in the disclosure. This additional detail and context could enhance the usefulness of the disclosure by certain registrants or for certain investors. We recognize that the benefits of such disclosure would depend on the degree to which the elements of the disclosure align with the factors that investors seek to understand when considering pay in relation to performance.

As is the case with the proposed rules, we recognize that it is possible that shareholders may bear information processing costs resulting from any additional elements required to be included in the disclosure, if the new requirements increase the length and complexity of existing disclosures without significantly adding to the ease of interpretation. The additional elements under consideration could also reduce the benefits of the disclosure required by the Proposed Rules if they complicate or obscure the elements of

[16] Throughout this release, we reference the ''five'' most important performance measures. If the registrant considers fewer than five performance measures, all references to the ''five'' most important performance measures should be read as the number of performance measures the registrant considers, if less than five.

[17] *See, e.g.,* letters from the American Federation of Labor and Congress of Industrial Organizations dated June 30, 2015, Council of Institutional Investors dated June 25, 2015, and Public Citizen dated July 6, 2015.

[18] *See* 17 CFR 229.402(b)(1).

[19] These specific examples are set forth in 17 CFR 229.402(b)(2)(v) through (vii).

the proposed disclosure that would be most helpful to investors.

We also acknowledge that each additional requirement could increase reporting costs for registrants. However, we believe the costs to registrants of providing the disclosures we are considering in addition to those described in the proposed rules likely would be relatively low. Specifically, pre-tax net income and net income are generally presented in the financial statements of registrants, and, therefore, we believe there should be minimal additional costs to include those measures in the proposed new table. That said, prescribing additional measures whose relation to compensation must be clearly described increases the cost of producing the disclosure as well as the risk that some of these measures may not be as relevant for some issuers and that these issuers may therefore feel the need to include clarifying disclosures. The Company-Selected Measure and the other four most important performance measures are already considered by registrants in making executive compensation determinations and may already be discussed, in a different form, in the CD&A. While identifying and ranking the Company-Selected Measure and the other four measures may require some incremental consideration and additional computations, we expect that their disclosure should result in limited additional costs, though registrants with more complex compensation packages involving more performance measures may bear relatively greater costs.

As is the case with the proposed rules, we expect the effect of the additional disclosures we are considering to have limited other effects on efficiency, competition and capital formation. If the proposed disclosures were either to facilitate or complicate the task of understanding executive pay policies, they may marginally increase or decrease the informational efficiency of markets, respectively. The proposed amendments and the additional disclosures we are considering could also lead to indirect effects if the disclosures lead to changes in compensation packages. As discussed in the Proposing Release, we believe such changes are unlikely due to the high level of existing attention to pay practices and the limited new information that would be disclosed. Finally, the disclosure of the ranking of the list of the most important performance measures could negatively affect competition if this information is sensitive and has competitive value.

To address concerns about burdens on smaller registrants, we are considering whether and how the proposed rules and the potential disclosure of additional measures we are considering would apply to SRCs. Under existing rules, SRCs are subject to abbreviated executive compensation disclosure requirements.[20] For example, SRCs are not required to provide a CD&A but are instead permitted to produce a more limited, narrative disclosure. To minimize costs for SRCs and consistent with the treatment of SRCs in many other areas, the Commission proposed permitting SRCs to provide scaled disclosure under the proposed rules. For example, and as indicated by the asterisked portions of the table described in the Proposing Release and shown above in Section I of this release, under the Proposed Rules, SRCs would not be required to provide the peer group TSR, as they are exempt from providing this disclosure under existing rules.[21]

With respect to the potential disclosure of additional measures, pre-tax net income and net income are already provided for under U.S. GAAP, and therefore we are considering requiring SRCs to disclose such measures. In contrast, the current abbreviated executive compensation disclosure requirements applicable to SRCs do not require them to provide a CD&A, and thus do not specifically call for disclosure about how executive compensation relates to company performance. Accordingly, and unlike other reporting companies, requiring SRCs to disclose a Company-Selected Measure and a list of their five most important performance measures would be a new disclosure obligation that SRCs would not be able to satisfy by drawing upon or cross-referencing to existing disclosures. We therefore are considering not requiring SRCs to disclose a Company-Selected Measure and a list of their five most important performance measures.

In light of developments in executive compensation practices related to company performance since the publication of the Proposing Release, and our further consideration of how best to implement the mandate of Section 953(a) of the Dodd-Frank Act, we are reopening the comment period for the proposed rules until March 4, 2022 to provide the public with an additional opportunity to analyze and comment on the proposed rules as well as the additional measures we are considering. Commenters may submit, and the Commission will consider, comments on any aspect of the proposed rules or the additional measures we are considering. All comments received to date on the proposed rules will be considered and need not be resubmitted. Comments are particularly helpful if accompanied by quantified estimates or other detailed analysis and supporting data about the issues addressed in those comments. In addition to the requests for comment included in the Proposing Release, the Commission specifically seeks comments on the following:

*Request for Comment*

1. Should disclosure of additional financial performance measures beyond TSR be required? Specifically, would investors find it useful to have pre-tax net income and net income presented in tabular format alongside the other metrics that would be required by the Proposing Release? Would these two additional metrics help investors to appropriately evaluate the relationship between executive compensation actually paid and the financial performance of the registrant? Would the inclusion of these measures alleviate concerns previously raised by commenters on the proposed rules about including only TSR and peer group TSR in this disclosure? Would their inclusion complicate the disclosure such that its usefulness could be reduced? Should we also require that these measures, if any, be discussed in the required description (which may be, *e.g.,* narrative or graphical) that accompanies the tabular disclosure? Instead of requiring additional financial performance measures, should we instead include pre-tax net income and net income as examples of additional measures registrants could elect to disclose if they believed such disclosure would be beneficial for them? What would the benefits or drawbacks be of that approach?

2. Are there other measures of company performance that we should consider mandating in addition to or in lieu of pre-tax net income and/or net income? If so, which additional or alternative measures should we require and why? How would these additional or alternative measures be useful for investors in measuring company performance? Should we also require that these measures, if any, be discussed in the required description (which may be, *e.g.,* narrative or graphical) that accompanies the tabular disclosure?

3. How should we define the Company-Selected Measure, if we were to require its disclosure? We are considering defining the Company-Selected Measure as the measure that in

[20] *See* 17 CFR 229.402(l) through (r).

[21] *See* Instructions to Item 201(e) of Regulation S–K.

the registrant's assessment represents the most important performance measure (that is not already included in the table) used by the registrant to link compensation actually paid during the fiscal year to company performance. Would such a definition provide sufficient clarity to a registrant as to what to disclose? What computations or considerations would be required in determining the Company-Selected Measure and what would be the associated costs for registrants? Should we require registrants to disclose the methodology used to calculate the Company-Selected Measure? Should that consideration depend on whether the measure is already disclosed in the Company's financial statements?

4. Should we require the Company-Selected Measure to be the most important measure used by the registrant in a performance or market condition in the context of an incentive plan as defined in 17 CFR 229.402(a)(6)(iii)? [22] Would including such a measure in the tabular disclosure allow investors to better evaluate the extent to which the total compensation reported as actually paid reflects the performance the company explicitly chose to incentivize, and if so would such an evaluation be useful to investors? Should the Company-Selected Measure instead be the performance measure that is deemed most important by the registrant whether or not it is used in a performance or market condition in the context of an incentive plan (*i.e.,* including the effect of stock price movements on equity incentive plan compensation, even in the absence of a market condition; or measures that affect non-incentive plan compensation, such as the retrospective use of performance measures in determining compensation reportable in the bonus column of the Summary Compensation Table [23])?

5. We recognize that there could be varying methods of evaluating which measures are the most important. Should we define ''most important'' for the purpose of the selection of the Company-Selected Measure, as well as for the ranking of any other measures, if required? If so, how? For example, should the ''most important'' measure be the one on which the highest aggregate dollars of compensation actually paid were contingent? Or should ''importance'' be based on the dollar impact of the measure's variation from its initial or expected level on compensation actually paid, whether positive or negative? Instead, should ''importance'' be weighed based on what considerations drove the registrant's executive compensation decisions rather than its executive compensation outcomes? Alternatively, should we not specify a particular method to use to evaluate the relative importance of a performance measure in driving compensation actually paid or define ''most important,'' and instead allow registrants to determine what they consider to be ''important'' for this purpose and select the Company-Selected Measure accordingly, with disclosure explaining how they made their choice? Instead of requiring that the ''most important'' measure be the measure generally used by the registrant to link compensation actually paid to company performance, should we require that the ''most important'' measure be the measure specifically used by the registrant to link only PEO compensation actually paid to company performance? What would the benefits and drawbacks be of narrowing the definition of ''most important'' to only PEO compensation?

6. What disclosure should be required if different measures are important in different years or if different measures determine compensation actually paid for the different NEOs? Would aggregating the NEOs for purposes of determining the most important measure be difficult, given that some NEOs may have their compensation linked to industry- or segment-specific performance measures, which are not used for other NEOs? If so, are there ways to mitigate these differences to provide useful disclosures for investors? What if different measures contribute equally to determining compensation actually paid? If the measure deemed most important is already included among the performance measures in the Proposed Rules or among the additional measures we are considering in this release, should the company be permitted to designate that measure as the Company-Selected Measure, or should the company be required to disclose an additional significant measure, such as the next-most important measure not already disclosed, as the Company-Selected Measure? What would the impact of either approach be on the usefulness of disclosure of the Company-Selected Measure? If we permit a registrant to designate TSR, peer group TSR, pre-tax net income, or net income as the Company-Selected Measure, or if a registrant did not use any measures other than those already included in the table, how should it indicate that fact in its disclosure? For example, should the registrant be required to include in the Company-Selected Measure column duplicate disclosure of the measure already included in the table, or should the registrant be required to include a note to the measure already included in the table indicating that measure is also the registrant's Company-Selected Measure?

7. Would mandated disclosure of the Company-Selected Measure be useful to investors when placed alongside the metrics that would be required by the Proposing Release? How would these benefits, if any, compare to those of any supplemental financial performance measures that would voluntarily be disclosed by registrants in the absence of such a mandate? Would there be challenges to registrants to presenting information about the Company-Selected Measure in tabular form? If so, how could we elicit comparable disclosure while also allowing registrants flexibility in presenting this information to accommodate their particular facts and circumstances? Is there another format we should consider for the Company-Selected Measure? Should we specifically limit any Company-Selected Measure only to those measures that relate to the financial performance of the registrant? Or should we allow the Company-Selected measure to be any measure that could be disclosed under the existing CD&A requirements, including financial performance measures; environmental, social and governance related measures; or any other measures used by the registrant to link compensation actually paid during the fiscal year to company performance?

8. We are considering requiring the one Company-Selected Measure that is the most important measure over the time horizon of the disclosure to be identified in the table, and issuers would provide information about that measure, including the numerically quantifiable performance of the issuer with respect to that measure, for all of the years in the table. Would investors find such a presentation useful? Would there be challenges to registrants to presenting this information for all years? Should we instead allow companies to change their Company-Selected Measure from year to year, such that they would disclose in the table a potentially different Company-Selected

[22] *See also* Release No. 33–8732A, *Executive Compensation and Related Person Disclosure* (Aug. 29, 2006) [71 FR 53158] (''2006 Adopting Release'') at n. 167 (discussing the use of performance conditions and market conditions in equity incentive plans).

[23] *See* 2006 Adopting Release at Section II.C.1.f for a discussion of the distinction between compensation reportable as bonuses and compensation reportable as non-equity incentive plan compensation.

Measure for each respective year? Would doing so have any impact on investors' ability to understand how pay relates to performance and compare across different years? If we do require a registrant to disclose one Company-Selected Measure to be identified in the table, and that registrant elects to change what that measure is in consecutive years, should we require that registrant to separately disclose in additional columns, or narratively, the Company-Selected Measures used in the table in prior years? How often do registrants change, from year to year, their primary performance measures used by the registrant to link executive compensation during a fiscal year to company performance?

9. Would a tabular list of a registrant's five most important performance measures used to determine compensation actually paid be useful to investors in addition to existing disclosures? As in the case of the Company-Selected Measure above, how should we define ''importance'' and how should performance measures be ranked for this purpose, particularly if multiple performance targets apply to the same elements of compensation? Should we require disclosure of the five most important performance measures or some other number of performance measures? Would the inclusion of an additional tabular list of a registrant's five most important performance measures dilute the impact of, or otherwise lead to confusion regarding, the table that would be required by the Proposing Release? Should we require that the five measures be listed in order of importance? How could we increase the usefulness of the tabular list of a registrant's five most important performance measures for investors? Should there be disclosure of the methodology behind those measures?

10. What would be the cost to registrants of any computations required to identify and rank the five most important performance measures? If registrants do not currently rank their performance measures, would requiring them to list their five most important performance measures in order of importance be unduly burdensome? Would such disclosure contain information that is sensitive or has competitive value to a registrant? Should an exemption from any requirement to disclose the five most important performance measures be available if the disclosure would contain such sensitive or competitive information? If so, how should we specify the scope of any such exemption?

11. What if a registrant's five most important performance measures include measures that are included in the proposed rules or the additional measures we are considering? Should registrants be permitted to disclose fewer than five measures if they deem fewer than five to be important or if they consider fewer than five measures?

12. Would a tabular format help investors locate, use and understand disclosure of the five most important performance measures? Are there practical or other considerations that would make such tabular disclosure challenging or unduly burdensome for registrants? Would this format impede registrants from providing meaningful disclosure about their primary performance measures that factor into determining pay?

13. Should we, either in addition to or in lieu of the proposed rules and the disclosure of the additional measures we are considering, revise Item 402 of Regulation S–K to explicitly require registrants to disclose all of the performance measures that actually determine NEO compensation? If registrants are already providing this disclosure, are there ways we could improve this disclosure? For example, do investors find current disclosures about executive compensation performance measures complicated or difficult to analyze? If so, how could we make these disclosures less complicated or facilitate their analysis while also meeting the requirements of Section 953(a) of the Dodd-Frank Act?

14. To what extent would the ability of registrants to voluntarily supplement the disclosure required by the proposed rules obviate the need for additional mandated elements of disclosure considered in this re-opening release? Should we rely on investor demand and individual registrant circumstances to drive any additional disclosures? Would such voluntary disclosures be more useful than the additional contemplated disclosures? Would such disclosures lack comparability or be overly subjective relative to the additional contemplated disclosures?

15. As noted above, based on staff analysis of filings in 2019, approximately 45 percent of registrants subject to the proposed rules would be SRCs, compared to approximately 40 percent at the time of publication of the proposed rules.[24] In light of this, should we reconsider the scaled requirements for SRCs in the proposed rules and/or the additional measures we are considering?

16. For SRCs, would disclosure of either pre-tax net income or net income be useful to investors when placed alongside the metrics included in the Proposing Release? Are there different measures of financial performance that would be more appropriate for SRCs? Should we require SRCs to disclose a Company-Selected Measure and the list of their five most important performance measures used to set NEO compensation? Why or why not? What would be the burdens on SRCs of providing this additional disclosure and would the benefits of requiring this disclosure for SRCs justify the burdens? Would any such burdens be mitigated by the fact that the Company-Selected Measure and the list of a company's five most important performance measures are by definition measures that the company already uses to link compensation actually paid to financial performance? Is there relevant data on the long-term costs from diminished transparency that we should consider in this regard?

17. The Commission proposed to require that registrants use XBRL to tag separately the values disclosed in the required table, and separately block-text tag the disclosure of the relationship among the measures, the footnote disclosure of deductions and additions used to determine executive compensation actually paid, and the footnote disclosure regarding vesting date valuation assumptions. We are considering requiring registrants to also tag specific data points (such as quantitative amounts) within the footnote disclosures that would be block-text tagged. In addition, we are considering requiring registrants to use Inline XBRL rather than XBRL to tag their pay versus performance disclosure.[25] Would additional detail tagging of some or all of those specific data points within the footnote disclosures be valuable to investors? If so, which specific data points within the footnote disclosures should we require registrants to detail tag and

[24] *See supra* footnote 5.

[25] Subsequent to the proposal, the Commission adopted rules replacing XBRL tagging requirements for registrant financial statements with Inline XBRL tagging requirements. Inline XBRL embeds the machine-readable tags in the human-readable document itself, rather than in a separate exhibit. *See* Inline XBRL Filing of Tagged Data, Release No. 33–10514 (June 28, 2018) [83 FR 40846 (Aug. 16, 2018)]. The Commission also has subsequently adopted rules requiring structured data reporting using Inline XBRL format for certain business development company disclosures. *See* Securities Offering Reform for Closed-End Investment Companies, Release No. IC–33836 (Apr. 8, 2020) [85 FR 33290 (June 1, 2020)]. As a result of those changes, we are considering using Inline XBRL, rather than XBRL, for the proposed tagging requirements.

why? What would be the incremental costs of such a requirement? Should we require registrants to use Inline XBRL rather than XBRL to tag the proposed new pay versus performance disclosures? Is there an alternative machine-readable language to Inline XBRL that we should consider? Should we enable more flexibility by accommodating other machine-readable languages? If we were to require Inline XBRL detail tagging of the disclosures, should we exempt smaller reporting companies from that requirement? [26] Would the costs be different for smaller reporting companies to comply with such a requirement as compared to other registrants? Should we, as was proposed with respect to the original XBRL tagging requirement, provide a phase-in for smaller reporting companies for any Inline XBRL requirement that includes additional detail tagging?

18. Some commenters to the Proposing Release noted that the definition of compensation actually paid may result in some misalignment between the time period to which pay is attributed and the time period in which the associated performance is reported, but they generally disagreed on whether and how to revise the definition to improve such alignment.[27] Is there an alternative approach that would reduce the risk of misalignment of compensation actually paid with the associated financial performance and still provide for appropriate comparability across registrants, including the additional measures of financial performance discussed above? Would the inclusion of additional measures of financial performance as contemplated above affect this potential mismatch?

19. Some commenters to the Proposing Release noted potential challenges with using the pension service cost as defined in FASB ASC Topic 715 to determine the amount attributable to pension plans to be included in compensation actually paid.[28] As discussed in the Proposing Release, the service cost for services rendered by the executive in the applicable year is meant to approximate the value that would be set aside currently by the registrant to fund the pension benefits payable upon retirement for the service provided during the applicable year, and is intended to provide a more meaningful comparison across registrants of the amounts ''actually paid'' under both defined benefit and defined contribution plans. Is there an alternative measure of the change in pension value attributable to the applicable fiscal year that is better representative of the ''actually paid'' amount of pension benefits for an executive and would reduce the burden of computing compensation actually paid while preserving the benefits of the measure for investors? If so, describe how that amount would be calculated and what assumptions or new or additional data would be necessary for such calculation.

20. Some commenters to the Proposing Release noted potential challenges associated with computing the fair value of options at the vesting date as opposed to the grant date.[29] Are there simplifications or other adjustments that we could permit for this purpose in order to mitigate such challenges? How, if at all, would any such simplifications or adjustments affect the cost of producing the disclosure and the usefulness of the disclosure? For example, are there certain assumptions used in the valuation of options that we should allow to be carried forward from the grant date rather than re-computed as of the vesting date? What is the likelihood that assumptions would vary significantly between grant date and vesting date? To what extent could any new assumptions required for a valuation as of the vesting date be determined based on computations that would be made for another purpose, such as the valuation of new grants made around the same time?

21. Some commenters to the Proposing Release had questions about which time periods should be disclosed in the TSR portions of the table.[30] Should we clarify what time periods should be disclosed? For example, should we require TSR to be a five-year cumulative and rolling average (*i.e.,* the TSR for the first year would be the average TSR over the five years preceding and including the first year, the TSR for the second year would be the average TSR over the five years preceding and including the second year, *etc.*); [31] should we require TSR to be a cumulative average within the five-year period in the table (*i.e.,* the TSR for the first year would be an average of the TSR over that first year, the TSR for the second year would be an average of the TSR over the first year and the second year, *etc.*); [32] or should we require TSR to be an annual year-over-year figure (*i.e.,* the TSR for the first year would be the average TSR over the first year, the TSR for the second year would be the average TSR for the second year, *etc.*)? [33] What would the benefits and drawbacks be of each of these approaches?

22. Are there any other developments (including with respect to executive compensation practices) since the Proposing Release that should affect our consideration of the proposed rules or their potential economic effects? How have qualitative measures in executive compensation packages changed and/or developed since the Proposing Release? How should we contemplate such changes in our consideration of the disclosures discussed above and in the Proposing Release? How have environmental, social and governance related metrics changed and/or developed since the Proposing Release? How should we contemplate such changes in our consideration of the disclosures discussed above and in the Proposing Release? Are there changes in market practices with respect to disclosures in the CD&A or voluntary

[26] Smaller reporting companies are currently subject to the Commission's Inline XBRL tagging requirements, including detail tagging requirements.

[27] *See, e.g.,* letters from Allison Transmission Holdings, Inc. dated July 6, 2015, Celanese Corp. dated June 12, 2015, Center On Executive Compensation dated July 6, 2015, Frederick W. Cook & Co., Inc. dated June 24, 2015, Corporate Governance Coalition for Investor Value dated July 23, 2015, Farient Advisors dated July 6, 2015, Jon Faulkner dated May 4, 2015, Financial Services Roundtable dated July 6, 2015, Honeywell International Inc. dated July 2, 2015, NACCO Industries, Inc. dated June 9, 2015, National Association of Corporate Directors dated July 10, 2015, National Association of Manufacturers dated July 6, 2015, Pearl Meyer & Partners dated July 6, 2015, Ross Stores, Inc. dated June 26, 2015, Shareholder Value Advisors Inc. dated July 6, 2015, State Board of Administration of Florida dated July 6, 2015, Teachers Insurance Annuity Association of America dated July 6, 2015, Technical Compensation Advisors, Inc. dated July 6, 2015, and WorldatWork dated July 6, 2015.

[28] *See, e.g.,* letters from AON Hewitt dated July 6, 2015, Exxon Mobil Corp. dated June 23, 2015, Towers Watson dated July 6, 2015, and WorldatWork dated July 6, 2015.

[29] *See, e.g.,* letters from Celanese Corp. dated June 12, 2015, Center for Capital Markets Competitiveness dated June 30, 2015, Frederick W. Cook & Co., Inc. dated June 24, 2015, and National Association of Corporate Directors dated July 10, 2015. *But see* letters from American Federation of Labor and Congress of Industrial Organizations dated June 30, 2015, Council of Institutional Investors dated June 25, 2015, Honeywell International Inc. dated July 2, 2015, and Teachers Insurance Annuity Association of America dated July 6, 2015.

[30] *See* letters from Center On Executive Compensation dated July 6, 2015, Frederick W. Cook & Co., Inc. dated June 24, 2015, Steven Hall & Partners dated July 6, 2015, Honeywell International Inc. dated July 2, 2015, Mercer LLC dated July 6, 2015, Pearl Meyer & Partners dated July 6, 2015, and Technical Compensation Advisors, Inc. dated July 6, 2015.

[31] *See, e.g.,* letter from Honeywell International Inc. dated July 2, 2015.

[32] *See, e.g.,* letter from Pearl Meyer & Partners dated July 6, 2015.

[33] *See, e.g.,* letters from Pearl Meyer & Partners dated July 6, 2015, and Technical Compensation Advisors, Inc. dated July 6, 2015.

disclosures that should affect our approach or affect our consideration of the economic effects of any rule changes? Are there any changes we should consider in the methodologies and estimates used to analyze the economic effects of the proposed rules in the Proposing Release?

We request and encourage any interested person to submit comments regarding the Proposed Rules, specific issues discussed in this release or the Proposing Release, and other matters that may have an effect on the proposed rules or the additional disclosure requirements we have noted here that we are considering. We request comment from the point of view of registrants, shareholders, directors, executives, investors, other market participants, and anyone else with an interest in this issue. If alternatives to the Proposed Rules are suggested, supporting data and analysis and quantitative information as to the costs and benefits of those alternatives are of particular assistance. Commenters are urged to be as specific as possible; when commenting, it would be most helpful if you include the reasoning behind your position or recommendation.

If any commenters who have already submitted a comment letter wish to provide supplemental or updated comments, we encourage them to do so.

By the Commission.

Dated: January 27, 2022.

**Vanessa A. Countryman,**

*Secretary.*

[FR Doc. 2022–02024 Filed 2–1–22; 8:45 am]

**BILLING CODE 8011–01–P**

## DEPARTMENT OF STATE

### 22 CFR Parts 120, 126, and 127

**[Public Notice: 11532]**

**RIN 1400–AF39**

### International Traffic in Arms Regulations: Corrections and Clarifications for Export and Reexport; Canadian Exemptions; Exemptions Regarding Intra-Company, Intra-Organization, and Intra-Governmental Transfers to Employees Who Are Dual Nationals or Third-Country Nationals; and Voluntary Disclosures

**AGENCY:** Department of State.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of State (DOS) proposes to amend the International Traffic in Arms Regulations (ITAR) to clarify the definitions of export and reexport. Further, the Department proposes to replace the term ''national'' with ''person'' in the Canadian exemptions; revise the exemption for intra-company, intra-organization, and intra-governmental transfers to dual nationals or third-country nationals; and correct administrative errors in the section on voluntary disclosures.

**DATES:** The Department of State will accept comments on this proposed rule until April 4, 2022.

**ADDRESSES:** Interested parties may submit comments by one of the following methods:

- *Email: DDTCPublicComments@state.gov* with the subject line: ''Regulatory Change: ITAR Sections 120, 126 and 127''
- *Internet:* At *www.regulations.gov,* search for this notice, Docket DOS–2021–0031. Comments received after that date may be considered if feasible, but consideration cannot be assured. Those submitting comments should not include any personally identifying information they do not desire to be made public or information for which a claim of confidentiality is asserted, because comments and/or transmittal emails will be made available for public inspection and copying after the close of the comment period via the Directorate of Defense Trade Controls website at *www.pmddtc.state.gov.* Parties who wish to comment anonymously may do so by submitting their comments via *www.regulations.gov,* leaving the fields that would identify the commenter blank and including no identifying information in the comment itself.

**FOR FURTHER INFORMATION CONTACT:** Ms. Engda Wubneh, Foreign Affairs Officer, Office of Defense Trade Controls Policy, U.S. Department of State, telephone (202) 663–1809; email *DDTCCustomerService@state.gov.* ATTN: Regulatory Change, ITAR parts 120, 126, and 127.

**SUPPLEMENTARY INFORMATION:** The Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to revise the definitions of export (ITAR § 120.17) and reexport (ITAR § 120.19) to clarify that any release of technical data to a foreign person described within the respective definitions is a release only to any countries in which that foreign person currently holds citizenship or permanent residency. Since the Department published ''International Traffic in Arms Regulations: Revisions to Definition of Export and Related Definitions'' (81 FR 35611) in 2016, the Department has changed its assessment that inclusion of prior citizenship or permanent residency in ITAR §§ 120.17(b) and 120.19(b) is necessary based on its experience with this provision. The Department assesses that a foreign person's former citizenship or permanent residency status in a country should not be deemed to automatically result in an export or reexport to that country. The Department proposes this change to better align with our policy and requirements in Section 126.18 and to provide greater opportunities for foreign persons who are no longer citizens or permanent residents of certain countries to participate in ITAR-regulated activities.

Further, the Department proposes to replace the term ''national'' with the ITAR-defined term ''person'' in ITAR § 126.5(b) of the Canadian exemption to be consistent with how foreign persons are defined in the ITAR. The Department also proposes to remove the phrase ''although nationality does not, in and of itself, prohibit access to defense articles'' from ITAR § 126.18(c)(2) as the definitions of export and reexport provide that a release to a foreign person constitutes an export or reexport, as applicable, to all countries in which the foreign person holds citizenship or permanent residency. This proposed change is not intended to convey any change to the Department's long-standing position that the purpose of vetting employees from countries listed in ITAR § 126.1 is to mitigate diversion. Further, simply identifying nationalities with no substantive contacts with ITAR § 126.1 countries is not a precondition to rely on to use the exemption for intra-company, intra-organization, and intra-governmental transfers to dual or third-country nationals. The Department also proposes to clarify ITAR § 126.18(c)(2) by stating that the screened employee, not the end-user or consignee, must execute a nondisclosure agreement to provide assurances that said employee will not transfer any unclassified defense articles to unauthorized persons.

Lastly, the Department proposes to correct administrative errors in the voluntary disclosures section of the ITAR by providing the correct references to exemptions pursuant to the Defense Trade Cooperation Treaties between the United States and Australia and the United States and the United Kingdom in ITAR §§ 126.16 and 126.17, respectively. Additionally, the Department proposes to streamline the section on voluntary disclosures by simply referencing the relevant ITAR sections, §§ 126.1(e), 126.16(h)(8), and 126.17(h)(8), that describe the duties of persons to notify the Directorate of

Defense Trade Controls of particular activities.

**Regulatory Analysis and Notices**

*Administrative Procedure Act*

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules implementing this function are exempt from sections 553 (rulemaking) and 554 (adjudications) of the Administrative Procedure Act (APA), pursuant to 5 U.S.C. 553(a)(1). Since the Department is of the opinion that this rule is exempt from 5 U.S.C. 553, it is the view of the Department that the provisions of Section 553(d) do not apply to this rulemaking.

*Regulatory Flexibility Act*

Notwithstanding the Department's publication of this rulemaking as a proposed rule, this rule is exempt from the notice-and-comment rulemaking provisions of 5 U.S.C. 553 as a foreign affairs function. Therefore, it does not require analysis under the Regulatory Flexibility Act.

*Unfunded Mandates Reform Act of 1995*

This rulemaking does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

*Executive Orders 12372 and 13132*

This rulemaking 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 Executive Order 13132, it is determined that this proposed amendment does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this rulemaking.

*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, distributed impacts, and equity). This rule's scope does not impose additional regulatory requirements or obligations; therefore, the Department believes costs associated with this rule will be minimal. Although the Department cannot determine based on available data how many fewer licenses will be submitted as a result of this rule, the amendments to the definitions of export and reexport will inherently relieve the licensing burden for some exporters. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated as a ''nonsignificant regulatory action'' by the Office and Information and Regulatory Affairs under Executive Order 12866.

*Executive Order 12988*

The Department of State has reviewed this rulemaking in light of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

*Executive Order 13175*

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, Executive Order 13175 does not apply to this rulemaking.

*Paperwork Reduction Act*

This rulemaking does not impose or revise any information collections subject to 44 U.S.C. Chapter 35.

**List of Subjects in 22 CFR Parts 120, 126, and 127**

Arms and munitions, Classified information, Crime, Exports, Penalties, Seizures and forfeitures.

For the reasons set forth above, the Department of State proposes to amend 22 CFR parts 120, 126, and 127 as follows:

## PART 120—PURPOSE and DEFINITIONS

■ 1. The authority citation for part 120 continues to read as follows:

**Authority:** Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2794; 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920; Pub. L. 111–266; Section 1261, Pub. L. 112–239; E.O. 13637, 78 FR 16129.

■ 2. Amend § 120.17 by revising paragraph (b) to read as follows:

**§ 120.17 Export.**

* * * * *

(b) Any release in the United States of technical data to a foreign person is deemed to be an export to all countries in which the foreign person holds citizenship or permanent residency.

* * * * *

■ 3. Amend § 120.19 by revising paragraph (b) to read as follows:

**§ 120.19 Reexport.**

* * * * *

(b) Any release outside the United States of technical data to a foreign person is deemed to be a reexport to all countries in which the foreign person holds citizenship or permanent residency.

* * * * *

## PART 126—GENERAL POLICIES AND PROVISIONS

■ 4. The authority citation for part 126 continues to read as follows:

**Authority:** 22 U.S.C. 2752, 2778, 2780, 2791, and 2797; 22 U.S.C. 2651a; 22 U.S.C. 287c; Sec. 1225, Pub. L. 108–375; Sec. 7089, Pub. L. 111–117; Pub. L. 111–266; Sections 7045 and 7046, Pub. L. 112–74; E.O. 13637, 78 FR 16129.

■ 5. Amend § 126.5 by revising paragraph (b) to read as follows:

**§ 126.5 Canadian exemptions.**

* * * * *

(b) *Permanent and temporary export of defense articles.* Except as provided in Supplement No. 1 to part 126 of this subchapter and for exports that transit third countries, Port Directors of U.S. Customs and Border Protection and postmasters shall permit, when for end-use in Canada by Canadian Federal or Provincial governmental authorities acting in an official capacity or by a Canadian-registered person, or for return to the United States, the permanent and temporary export to Canada without a license of unclassified defense articles and defense services identified on the U.S. Munitions List (22 CFR 121.1). The exceptions are subject to meeting the requirements of this subchapter, to include 22 CFR 120.1(c) and (d), parts 122 and 123 (except insofar as exemption from licensing requirements is herein authorized) and § 126.1, and the requirement to obtain non-transfer and use assurances for all significant military equipment. For purposes of this section, ''Canadian-registered person'' is any Canadian person (including Canadian business entities organized under the laws of

Canada), dual citizen of Canada and a third country other than a country listed in § 126.1 of this subchapter unless the conditions of § 126.18(c) are satisfied, or permanent resident registered in Canada in accordance with the Canadian Defense Production Act, and such other Canadian Crown Corporations identified by the Department of State in a list of such persons publicly available through the website of the Directorate of Defense Trade Controls and by other means.

* * * * *

■ 6. Amend § 126.18 by revising paragraph (c)(2) to read as follows:

**§ 126.18 Exemptions regarding intra-company, intra-organization, and intra-governmental transfers to employees who are dual nationals or third-country nationals.**

* * * * *

(c) * * *

(2) The end-user or consignee to have in place a process to screen its employees and for the employees to have executed a nondisclosure agreement that provides assurances that the employee will not transfer any defense articles to persons unless specifically authorized. The end-user or consignee must screen its employees for substantive contacts with restricted or prohibited countries listed in § 126.1. Substantive contacts include regular travel to such countries, recent or continuing contact with agents, brokers, and nationals of such countries, continued demonstrated allegiance to such countries, maintenance of business relationships with persons from such countries, maintenance of a residence in such countries, receiving salary or other continuing monetary compensation from such countries, or acts otherwise indicating a risk of diversion. An employee who has substantive contacts with persons from countries listed in § 126.1(d)(1) shall be presumed to raise a risk of diversion, unless DDTC determines otherwise. End-users and consignees must maintain a technology security/clearance plan that includes procedures for screening employees for such substantive contacts and maintain records of such screening for five years. The technology security/clearance plan and screening records shall be made available to DDTC or its agents for civil and criminal law enforcement purposes upon request.

* * * * *

## PART 127—VIOLATIONS AND PENALTIES

■ 7. The authority citation for part 127 continues to read as follows:

**Authority:** Sections 2, 38, and 42, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2791); 22 U.S.C. 401; 22 U.S.C. 2651a; 22 U.S.C. 2779a; 22 U.S.C. 2780; E.O. 13637, 78 FR 16129; Pub. L. 114–74, 129 Stat. 584.

■ 8. Amend § 127.12 by revising paragraph (b)(5) to read as follows:

**§ 127.12 Voluntary disclosures.**

* * * * *

(b) * * *

(5) Nothing in this section shall be interpreted to negate or lessen the obligations imposed pursuant to §§ 126.1(e), 126.16(h)(8), and 126.17(h)(8) of this subchapter.

* * * * *

**Bonnie Jenkins,**

*Under Secretary, Arms Controls and International Security, Department of State.*

[FR Doc. 2022–01889 Filed 2–1–22; 8:45 am]

BILLING CODE 4710–25–P

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## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R07–OAR–2021–0913; FRL–9351–01–R7]**

## Air Plan Approval; State of Missouri; Revised Plan for 1978 and 2008 Lead NAAQS

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to take action to approve the State of Missouri's request to remove its State Implementation Plan (SIP) for maintaining the 1978 Lead National Ambient Air Quality Standards (NAAQS) in portions of Iron County, Missouri, surrounding the former Glover smelter, and replace the maintenance plan with a plan for continued attainment of the 2008 Lead NAAQS. Missouri has entered into a Consent Agreement with the facility's current owner, the Doe Run Company (Doe Run), and has submitted the Consent Agreement for approval into the SIP along with a plan demonstrating continued attainment of the 2008 Lead NAAQS in the area. The EPA's proposed approval of the request is based on the determination that the area continues to meet the 1978 and 2008 Lead NAAQS and that the plan provides additional protections to air quality regardless of ownership and/or operational status of the Glover facility.

**DATES:** Comments must be received on or before March 4, 2022.

**ADDRESSES:** You may send comments, identified by Docket ID No. EPA–R07–OAR–2021–0913 to *https://www.regulations.gov.* Follow the online instructions for submitting comments.

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

**FOR FURTHER INFORMATION CONTACT:** Ms. Stephanie Doolan, Environmental Protection Agency, Region 7 Office, Air Quality Planning Branch, 11201 Renner Boulevard, Lenexa, KS 66219 at (913) 551–7719 or by email at *doolan.stephanie@epa.gov.*

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

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### I. Written Comments

Submit your comments, identified by Docket ID No. EPA–R07–OAR–2021–0913, at *https://www.regulations.gov.* Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not

consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

## II. Background for the EPA's Proposed Action

American Smelting and Refining Company Incorporated (ASARCO) constructed the Glover facility in 1968 prior to the Clean Air Act (CAA) and any associated permitting or air pollution control requirements. In 1978, the EPA promulgated a national ambient air quality standard (NAAQS) for lead of 1.5 micrograms per cubic meter (μg/m$^3$) averaged over a calendar quarter (43 FR 46246, October 5, 1978). To comply with the 1978 standard, in 1980 the state submitted its attainment plan which was approved by EPA into the Missouri State Implementation Plan (SIP) (46 FR 23412, April 27, 1981). The area surrounding the facility was subsequently designated as nonattainment for the 1978 Lead NAAQS on November 6, 1991 (56 FR 56694). On August 14, 1996, Missouri submitted a second attainment plan for the area that was approved by EPA into Missouri's SIP (62 FR 9970, March 5, 1997). On August 30, 1998, the Doe Run Company (Doe Run) acquired all ASARCO's Missouri lead interests including the Glover facility. The transfer of ownership was approved into the Missouri SIP on April 16, 2002, in a SIP approval action that primarily pertains to the Herculaneum primary lead smelter (67 FR 18497). On October 29, 2004, the EPA redesignated the area surrounding the Glover facility to attainment of the 1978 Lead NAAQS and approved the maintenance plan for ensuring continued maintenance of the standard (69 FR 63072). As part of the 2004 maintenance plan approval, the EPA approved the Settlement Agreement between Missouri and Doe Run, dated October 31, 2003, into the SIP.

Doe Run ceased smelting operations at the facility in November 2003. Subsequent to ceasing operations, monitors recorded 3-month rolling calendar quarter average lead concentrations in the area that were continuously below 0.15 μg/m$^3$, the level of the 2008 Lead NAAQS. Because the lead concentrations monitored in ambient air were less than the 2008 Lead NAAQS level, EPA designated the area as unclassifiable/attainment for that NAAQS (75 FR 71033, November 21, 2010).

In 2013, Doe Run initiated demolition of buildings and other structures at the facility. During these activities, ambient air monitors in the Glover area violated the 2008 Lead NAAQS. Doe Run ceased these activities temporarily to implement more stringent dust control measures before resuming demolition. There were no subsequent violations of the 2008 Lead NAAQS.

In its October 7, 2020 SIP revision request, Missouri reports that as of December 2019, most of the deconstruction and removal activities at the Glover facility are complete. Doe Run demolished the sinter plant and associated baghouses; removed the furnaces, feed conveyors, kettles and casting line; and capped and vegetated the ASARCO slag pile. In its October 7, 2020 SIP revision request, Missouri also reports that Doe Run has filed closure plans for the Glover facility with Missouri's Land Reclamation Program. In January 2018, the Land Reclamation Program approved Doe Run's Metallic Minerals Waste Management Closure Plan for the Glover facility. Two stacks still stand on the premises. Additionally, the unloading building is still in use as a lead concentrate storage and transfer station.

## III. Missouri's Submission

On October 7, 2020, Missouri submitted a request to strengthen the SIP by replacing its maintenance plan and associated Consent Agreement for the 1978 Lead NAAQS for the former Doe Run Glover lead smelter in Iron County, Missouri, with a plan for continued attainment of the 2008 Lead NAAQS (hereinafter ''2020 Plan''). Missouri's request includes a June 6, 2020 Consent Agreement between Missouri and Doe Run (hereinafter ''2020 Consent Agreement'') as a replacement for the 2003 Settlement Agreement. The 2020 Consent Agreement restricts lead emitting activities, requires fugitive emissions controls and contingency measures, and applies to current and future owners of the facility. Once incorporated into the SIP, any change to the 2020 Consent Agreement would require a SIP revision and accompanying determination by the EPA that the revision remains at least as protective as the current agreement under the CAA before the changes could take effect.

As discussed in section II, the maintenance plan for the facility approved by the EPA in 2004 and its federally enforceable Settlement Agreement contain emission controls and contingency measures based on the facility's operation as a lead smelter. The 2004 maintenance plan and 2003 Settlement Agreement no longer represent the types of controls and contingency measures necessary to ensure the control of fugitive lead containing dust and to secure the facility against re-entrainment due to future demolition of on-site structures and/or disturbance of lead-contaminated soil that may cause a violation of the lead standard. For these reasons, Missouri and Doe Run executed the 2020 Consent Agreement that updates the emissions controls to work practice standards for the control of fugitive lead-contaminated dust, revises the contingency measures to be implemented in the event of a future violation to include fugitive dust controls that can be immediately implemented, and makes the controls and contingency measures applicable and binding on any future property owner and/or operator. The 2020 Consent Agreement contains provisions for restarting ambient air monitoring should conditions at the facility change and pose a potential for a future 2008 Lead NAAQS violation.

Section IV describes the EPA's analysis of Missouri's submission and rationale for its proposed approval demonstrating how the 2020 plan and 2020 Consent Agreement meet the general SIP submission requirements for approval pursuant section 110 of the CAA and specifically the requirements of section 110(l) which are described below.

## IV. The EPA's Analysis of the State's Request

As discussed above, the EPA's action to redesignate the area under the 1978 Lead NAAQS also contained EPA's approval of a maintenance plan to ensure that the area continues to attain the 1978 Lead NAAQS. On November 12, 2008, the EPA promulgated the 2008 Lead NAAQS and stated that the 1978 Lead NAAQS would continue to apply for a period of one year following the effective date of designations, except that for areas in nonattainment of the 1978 Lead NAAQS that standard would continue to be in effect until EPA approved a SIP for the 2008 Lead NAAQS (73 FR 66964, 67043). As explained above, EPA redesignated the Glover area to attainment of the 1978 Lead NAAQS on October 29, 2004. Thus, the 1978 Lead NAAQS was revoked for the Glover area one year following its attainment designation for the 2008 Lead NAAQS. While the 1978 Lead NAAQS was revoked for the Glover area, the 1978 Lead NAAQS

maintenance plan for the Glover area remained part of Missouri's SIP.

The state has requested that the EPA approve the October 7, 2020 submittal as a replacement for the SIP-approved maintenance plan for the 1978 Lead NAAQS and the 2020 Consent Agreement as a replacement for the 2004 Settlement Agreement.[1] The EPA is evaluating the request to ensure the request satisfies the requirement of section 110(l) of the CAA that the plan revision not interfere with any applicable requirement concerning attainment, reasonable further progress or any other applicable CAA requirement. The following paragraphs present the EPA's analysis of how the state's plan meets the requirements of CAA section 110(l).

*1. Air Monitoring Demonstrates Attainment of the 2008 Lead NAAQS*

The State of Missouri operated a State and Local Air Monitoring Stations (SLAMS) ambient air monitor for lead for the Glover nonattainment area to demonstrate attainment of the 1978 Lead NAAQS. The data from this monitor were also used to designate the Glover area as unclassifiable/attainment for the 2008 Lead NAAQS. From January 2014 to May 2019, ambient air monitors recorded data that was below the level of the 2008 Lead NAAQS. The maximum annual three-month rolling average lead concentration for 2018 for the monitor operated by Missouri is 0.02 $\mu g/m^3$.

In its 2018 Monitoring Network Plan, Missouri requested to cease operating its ambient lead monitor downwind from the Glover facility on the basis that the monitor met the regulatory requirements for monitor shutdown of 40 CFR 58.14(c), namely that the area has shown attainment of the lead standard for the previous five years and that the probability that 80 percent of the standard will be exceeded is less than 10 percent. In an approval letter dated April 19, 2019, EPA approved Missouri's request noting that EPA may require monitoring to be restarted in the future if a change in the facility status occurs (such as demolition, site cleanup or construction) that could result in increased re-entrainment of lead dust.[2] Missouri discontinued sampling at the site in May 2019.

Doe Run currently operates two air monitors for lead in the area classified as non-ambient industrial source monitors. The sites are named the Glover Post Office Site and the Glover Big Creek Site. These air monitors also have not recorded violations of the 2008 Lead NAAQS since the violation that occurred during the 2013 demolition activities. The 2020 Consent Agreement states that Doe Run shall continue monitoring for airborne lead at the Glover Post Office site and the Glover Big Creek site until EPA approves the 2020 Plan and 2020 Consent Agreement into the Missouri SIP.

The 2020 Consent Agreement provides a process for resumption of monitoring should certain lead-emitting activities resume at the facility. Through this action, the EPA is proposing to allow Doe Run to discontinue sampling at these two monitoring sites per the 2020 Consent Agreement based on EPA's determination that historical monitoring demonstrates that air quality in the area will remain in compliance with the 2008 Lead NAAQS based upon the facility operations allowed by the 2020 Consent Agreement.

*2. Demonstration That the Plan Will Protect the 2008 Lead NAAQS*

Missouri has demonstrated the continued attainment of the standard through fugitive emission controls and work practice standards that have been verified by the ongoing attainment of the 2008 Lead NAAQS at the ambient air monitor. The 2008 Lead NAAQS, 0.15 $\mu g/m^3$ averaged over a rolling calendar quarter, is more stringent than the 1978 Lead NAAQS, 1.5 $\mu g/m^3$ averaged over a calendar quarter. The activities at the facility are limited under paragraph 1.A of the 2020 Consent Agreement to handling and storage of lead concentrate material. Under paragraph 1.A Doe Run shall not resume or recommence any lead smelting, refining, molding, casting, or any other activity at the Glover facility that will result in production-related lead emissions without Missouri's written approval.

Other requirements from the 2020 Plan and 2020 Consent Agreement between Missouri and Doe Run (and its successors) include continued operation of a vehicle wash station, street cleaning, road sprinkler systems, and the requirement to maintain the fence line surrounding the facility to preclude public access.

Paragraph 1.B. of the 2020 Consent Agreement requires Doe Run to continue to operate a vehicle wash station designed to wash a vehicle's undercarriage, sides, backs and tailgates, tires, and wheels. Every vehicle leaving the Glover facility after loading or unloading concentrate or lead-bearing materials must be washed in the wash station prior to exiting the facility. The vehicle wash requirement was a contingency measure in the 2004 maintenance plan; whereas, it is a requirement of the 2020 Consent Agreement.

Paragraph 1.C. of the 2020 Consent Agreement requires Doe Run to continue to conduct street cleaning using a regenerative air sweeper or a device of comparable efficiency. Street cleaning will continue for all interior roads traveled by trucks transporting concentrate or lead-bearing material trucks from the loading or unloading area to the wash station at least once each week that loading or unloading occurs. During periods when freezing temperatures may form snow, ice or hazardous conditions, street cleaning operations may be suspended. This requirement differs from the 2004 maintenance plan only in that Doe Run was previously required to conduct street cleaning once per day; the 2020 Consent Agreement requires street cleaning once per week. The 2004 maintenance plan requirement was based on the assumption that the facility would continue to operate as a lead smelter. Since November 2003 the facility has been used to store lead concentrate, a process that emits less lead, reducing the frequency of street cleaning will remain protective of the NAAQS.

Paragraph 1.D., of the 2020 Consent Agreement requires Doe Run to continue operating its sprinkler system to reduce lead emissions from transportation activities within the Glover Facility. The sprinkler system shall be operated for truck haul routes when there are 10 or more trucks carrying concentrate or lead-bearing material that have loaded or unloaded at the facility on any calendar day, except on days when there is precipitation or the ambient temperature is less than 39 degrees Fahrenheit. The 2020 Consent Agreement requirements to operate the sprinkler system are the same as the 2003 Settlement Agreement except that the Work Practice Manual containing these requirements was an attachment to the 2003 Agreement, while the requirements of the sprinkler system operations are included within

[1] Because the Glover Area was designated as an unclassifiable/attainment area for the 2008 Lead NAAQS, Missouri is not required to submit a plan for attaining the 2008 Lead NAAQS. See 75 FR 71033, November 22, 2010. While Missouri's submittal is entitled ''*Plan for Continued Attainment of the 2008 Lead Standard in Liberty and Arcadia Townships in Iron County Doe Run—Glover Facility*'', the plan is not an attainment plan subject to the requirements of section 172 of the CAA or a maintenance plan subject to the requirements of section 175A of the CAA.

[2] The April 19, 2019 EPA approval letter of Missouri's 2018 monitoring network plan is included in the docket for this action.

paragraph 1.D of the 2020 Consent Agreement. The 2020 Consent Agreement also provides Missouri the authority to request Doe Run to develop a new work practice manual or standard operating procedures for the sprinkler system that ensures these minimum requirements are met.

All deliveries of concentrate shall unload only at the unloading building per paragraph 1.E. of the 2020 Consent Agreement. The siding, roll-up doors, and roof monitor enclosure of this building shall be maintained to minimize fugitive emissions of lead containing dust. Doe Run shall repair or cover any hole, rip, or tear in the siding or roll-up doors that are larger than one foot (12 inches) in any dimension within 24 hours after discovery. Doe Run must ensure all personnel access and roll-up doors remain closed except as needed for employees or vehicles to enter or exit the building. At least weekly during loading or unloading activity, Doe Run shall inspect all doors, siding, and openings to ensure compliance and maintain a record documenting compliance with Paragraphs 1.D. and 1.E. The 2020 Consent Agreement requirements are more specific about the inspection for leaks and the requirements to address them than the 2003 Settlement Agreement.

Per paragraph 1.H. of the 2020 Consent Agreement Doe Run shall continue to maintain a fence that precludes public access to the general Glover Facility area. The minimum fence line Doe Run shall maintain is identified in Appendix A of the 2020 Consent Agreement. The purpose of the fence line is to maintain a distinction between ambient and non-ambient air to prevent public access to the area. The 2020 Consent Agreement requires Doe Run or its successor to continue to maintain the fence line until Missouri determines in writing that all closure and remediation activities in the area surrounding the Glover facility are complete. The 2020 Consent Agreement is more specific in requiring any successor(s) to maintain the fencing until the remediation is complete to prevent public access to lead contaminated areas.

*3. Verification of Continued Attainment*

The state has the legal authority to enforce and implement the requirements of the 2020 Consent Agreement to ensure ongoing attainment of the 2008 Lead NAAQS, which will be permanent and enforceable upon approval into Missouri's SIP.

The state commits in its 2020 plan to ensure that Doe Run or its successor will continue to operate the facility only for lead concentrate transport and storage under the emission controls described above. If facility operations change, Doe Run or its successor is required to follow the requirements of paragraph 1.G of the 2020 Consent Agreement for deconstruction or demolition activities described in the next section. The limitations on future deconstruction or demolition activities at the facility is not included in the 2004 plan or 2003 Settlement Agreement; these documents were written with the expectation that the facility would continue to operate as a lead smelter; the 2020 Consent Agreement is more comprehensive as it addresses deconstruction and demolition activities.

*4. Deconstruction or Demolition of Remaining Structures*

If any demolition or deconstruction is planned at the facility by Doe Run or its successors for the remaining structures at the Glover Facility, per paragraph 1.G of the 2020 Consent Agreement, Doe Run or its successor shall notify Missouri's Air Director. Concurrent with its notification, Doe Run shall either:

a. Submit to the Missouri Air Director a plan for fugitive dust control related to such activities and a schedule for restarting air lead monitoring at the Glover Post Office and Glover Big Creek monitoring sites under the approved *Quality Assurance Project Plan for Ambient Air Quality Monitoring for the Lead Monitoring Network at the Doe Run Company Glover Division, Version 2.0, December 2019;* or

b. Submit to the Missouri Air Director a plan for fugitive dust control prior to the commencement of demolition or deconstruction activities, and if requested, include a new plan and schedule for new temporary monitoring sites at locations other than the Glover Post Office and Glover Big Creek monitoring sites and an accompanying Quality Assurance Project Plan (QAPP) for any such sites.

For either option listed above, monitoring will be conducted every other day starting a minimum of five calendar days in advance of the demolition or deconstruction activities and must continue for a minimum of three months following the completion of the activities.

If Doe Run restarts monitoring or installs new temporary monitors pursuant paragraph 1.G of the 2020 Consent Agreement, the following shall apply:

a. If an air monitor measures any of the following concentrations of lead in the air, Doe Run shall cease the activities that led to the high concentrations as expediently as practicable:

*1.* A 24-hour average concentration of 1.5 μg/m$^3$ or higher;

*2.* two consecutive measurements where the average concentration of the two days is 0.5 μg/m$^3$ or higher;

*3.* four consecutive measurements where the average concentration of the four days is 0.25 μg/m$^3$ or higher;

*4.* 15 consecutive measurements where the average concentration of the 15 days is 0.15 μg/m$^3$ or higher.

b. Doe Run shall notify Missouri's Air Director in writing within seven calendar days after the day in which the measured lead concentration triggered an exceedance of any of these levels. The notification shall include all measured lead concentrations that contributed to the exceedance, an explanation of the activities that led to the exceedance, and the steps Doe Run took to cease such activities as expediently as practicable.

c. Following an exceedance of any of the levels Missouri has established listed above in subparagraph 5.a., Doe Run must submit an updated dust control plan and obtain Missouri's approval before resuming on-site activities. At a minimum, any such update to the dust control plan must consider measures to control lead containing dust including the use of water mister-type dust control devices, installation of temporary physical barriers around the activity site to block fugitive dust emissions, increased road washing and sweeping, and intensive washing of interiors of structures subject to demolition or deconstruction.

The fugitive dust controls and lead monitoring requirements listed above are necessary in the event that the facility use changes from its current status as a lead concentrate transportation and storage facility and Doe Run or its successor initiates on-site activities that would disturb lead containing dust, such as demolition or deconstruction. If Doe Run is required to resume air monitoring based upon a change in activities at the facility and the area violates the NAAQS, the 2020 Consent Agreement specifies steps to be taken to control the lead containing dust and return the area to compliance with the standard. The 2003 Settlement Agreement does not address deconstruction or demolition activities.

*5. Other Differences Between the 2004 Maintenance Plan and 2003 Settlement Agreement and the 2020 Plan and 2020 Consent Agreement*

Since the Glover facility no longer smelts lead, Missouri did not include

items specific to Doe Run's former smelter operations from the 2004 maintenance plan and 2003 Settlement Agreement to the 2020 Plan and 2020 Consent Agreement. These items are listed below:

- Requirements for the operation of the former Sinter Plant and Blast Furnace;
- Limits on stack emissions for lead;
- Limits on hours of operation; and
- Weight limits for how much lead may be produced.

The previous contingency measures were also not carried forward because they were focused on the lead smelting process, such as lowering stack lead emission limits, increasing the Sinter baghouse efficiency, and modification of the refinery skims handling procedures. The implementation of a vehicle wash station was a previous contingency measure that was implemented and carried forward as a requirement of the 2020 Consent Agreement. Expansion of the sprinkler system use was a previous contingency measure that was modified in the 2020 Consent Agreement by making the sprinkler system a requirement for specific haul roads, under dry conditions with temperatures greater than 39 degrees Fahrenheit and when 10 or more trucks will be loaded or unloaded on a given day.

As discussed in this section, lead emissions are not expected to increase provided that activities remain the same and Doe Run (and any future owner) complies with the requirements of the 2020 Consent Agreement. In the case that activities at the facility do change, the 2020 Consent Agreement provides a process for resumption of monitoring should certain lead-emitting activities resume at the facility. This requirement to resume monitoring provides an additional measure to ensure continued attainment of both the 1978 NAAQS and the 2008 NAAQS.

For the reasons explained in this section, the EPA proposes to find that approval of the 2020 plan and 2020 Consent Agreement replacing the 2004 plan and 2003 Settlement Agreement will not interfere with attainment or maintenance of the NAAQS, and thus satisfies CAA section 110(l). Additionally, the EPA proposes to approve the 2020 plan and 2020 Consent Agreement into Missouri's SIP because they include controls and contingency measures that will ensure protection of the 2008 Lead NAAQS under the current and future operating status of the facility.

## V. Requirements for Approval of a SIP Revision

Pursuant to section 110(l) of the CAA, any SIP revision must ensure that it does not interfere with attainment or reasonable further progress towards attainment for any NAAQS, or with any other applicable requirement of the Act. For the reasons explained above, the EPA proposes to find Missouri's 2020 plan and 2020 Consent Agreement, as submitted to the EPA on October 7, 2020, as a replacement to the 2004 plan and 2003 Settlement Agreement, does not interfere with attainment or maintenance of the NAAQS, and thus satisfies CAA section 110(l). If future activities include demolition or deconstruction of any of the remaining structures, the 2020 Plan and 2020 Consent Agreement provide for re-instating air monitors to ensure that deconstruction or demolition of the facility, activities that are known to re-entrain lead dust, do not lead to violations of the 2008 Lead NAAQS, and thereby protect human health and the environment. All the requirements of the 2020 Consent Agreement are also imposed on Doe Run's successors in the event of a future property transaction.

Further, the State submission has met the public notice requirements for SIP submissions in accordance with 40 CFR 51.102. The submission also satisfied the completeness criteria of 40 CFR part 51, appendix V. The State provided public notice on this SIP revision from June 30, 2020 to August 6, 2020. A public hearing was held by the Missouri Air Conservation Commission (MACC) on July 30, 2020 before approval of the SIP revision request and submittal to EPA. No comments were received. In addition, as explained above in the analysis of the state's submittal, the proposed SIP revision meets the substantive requirements of the CAA, including section 110 of the CAA and implementing regulations.

## VI. The EPA's Proposed Action

The EPA is proposing to approve Missouri's request to strengthen the State Implementation Plan (SIP) by removing its maintenance plan and associated Consent Agreement for the 1978 Lead NAAQS for the former Doe Run Glover lead smelter in Iron County, Missouri, and replacing it with a plan for continued attainment of the 2008 Lead NAAQS and a new Consent Agreement. On October 29, 2004, the area surrounding the Glover facility was redesignated to attainment for the 1978 lead NAAQS, which is 1.5 micrograms per cubic meter ($\mu g/m^3$) averaged over a calendar quarter (69 FR 63072). On October 7, 2020, the state submitted a request to replace the maintenance plan to ensure that the area continues to maintain the 2008 Lead NAAQS, for which the area was designated unclassifiable/attainment in 2010. The 2008 Lead NAAQS replaced the 1978 NAAQS and is 0.15 $\mu g/m^3$ averaged over a rolling calendar quarter. Based on EPA's review of the state's submittal which is described in detail in the previous sections, EPA proposes to approve Missouri's request. Missouri's request includes a 2020 Consent Agreement that restricts lead emitting activities, requires fugitive emissions controls and contingency measures, and applies to current and future owners of the facility. Once incorporated into the SIP, any change to the agreement would require a SIP revision and accompanying determination by EPA that the revision remains at least as protective as the current agreement under the CAA before the changes could take effect.

## VII. Incorporation by Reference

In this document, the EPA is proposing to approve regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing the incorporation by reference of the Missouri Source-Specific Orders described as follows: The Doe Run Glover Facility Consent Agreement, APCP–2020–002, dated February 2, 2020, replaces the Doe Run Lead Smelter (Glover, MO) Settlement Agreement, dated October 31, 2003 (approved by EPA on October 29, 2004). The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 7 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

Therefore, these materials will be approved by the EPA for inclusion in the State implementation plan, will be incorporated by reference by EPA into that plan, and will be fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[3]

Also, in this document, as described in the amendments to 40 CFR part 52 set forth below, the EPA is removing provisions of the EPA-Approved Missouri Source-Specific Permits and Orders from the Missouri State Implementation Plan, which is

[3] 62 FR 27968 (May 22, 1997).

incorporated by reference in accordance with the requirements of 1 CFR part 51.

**VIII. Environmental Justice Concerns**

When the EPA establishes a new or revised NAAQS, the CAA requires the EPA to designate all areas of the U.S. as either nonattainment, attainment, or unclassifiable. Area designations address environmental justice concerns by ensuring that the public is properly informed about the air quality in an area. If an area is designated nonattainment of the NAAQS, the CAA provides for the EPA to redesignate the area to attainment upon a demonstration by the state authority that the criteria for a redesignation are met, including a showing that air quality is attaining the NAAQS and will continue to maintain the NAAQS in order to ensure that all those residing, working, attending school, or otherwise present in those areas are protected, regardless of minority and economic status.

The EPA utilized the EJSCREEN tool to evaluate environmental and demographic indicators within the area. The tool outputs are contained in the docket for this action. The results indicate there are vulnerable populations in the area such as low-income individuals.

This action addresses a plan for continued attainment of the 2008 Lead NAAQS for the Glover, Missouri area. As discussed in this document, Missouri has demonstrated that the air quality in the Glover area is attaining the 2008 Lead NAAQS and will ensure continued attainment of the NAAQS. The 2020 Plan and 2020 Consent Agreement are as protective or more protective of vulnerable populations in the area than the 2004 maintenance plan and 2003 Settlement Agreement because they include broader provisions for the activities, including deconstruction and demolition, that are most likely to cause a future NAAQS violation. For these reasons, this proposed action does not result in disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples.

**IX. Statutory and Executive Order Reviews**

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

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

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, and Lead.

Dated: January 20, 2022.

**Meghan A. McCollister,**

*Regional Administrator, Region 7.*

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

## PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

### Subpart—AA Missouri

■ 2. In § 52.1320:

■ a. Remove and reserve paragraph (d)(22) and add paragraph (d)(34); and

■ b. Remove and reserve paragraph (e)(49) and add paragraph (e)(81).

The revisions and additions read as follows:

**§ 52.1230 Identification of plan.**

* * * * *

(d) * * *

EPA-APPROVED MISSOURI SOURCE-SPECIFIC PERMITS AND ORDERS

| Name of source | Order/permit number | State effective date | EPA approval date | Explanation |
|---|---|---|---|---|
| * | * | * | * | * |

(22) Reserved

EPA-APPROVED MISSOURI SOURCE-SPECIFIC PERMITS AND ORDERS—Continued

| Name of source | Order/permit number | State effective date | EPA approval date | Explanation |
|---|---|---|---|---|
| * * * | * | * | * | * |
| (34) Doe Run Glover Facility | Consent Agreement, APCP–2020–002. | 6/2/2020 | [Date of publication of the final rule in the **Federal Register**], [**Federal Register** citation of the final rule]. | |

(e) * * *

EPA-APPROVED MISSOURI NONREGULATORY SIP PROVISIONS

| Name of nonregulatory SIP provision | Applicable geographic or nonattainment area | State submittal date | EPA approval date | Explanation |
|---|---|---|---|---|
| * * * | * | * | * | * |
| (49) Reserved | | | | |
| * * * | * | * | * | * |
| (81) Glover Lead Plan for Continued Attainment of the 2008 Lead NAAQS. | Iron County (part) within boundaries of Liberty and Arcadia Townships. | 10/7/2020 | [Date of publication of the final rule in the **Federal Register**], [**Federal Register** citation of the final rule]. | [EPA–R07–OAR–2021–0913; FRL–9351–01–R7]. |

[FR Doc. 2022–01500 Filed 2–1–22; 8:45 am]

BILLING CODE 6560–50–P

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

**[Docket No. FWS–R6–ES–2018–0055; FF09E21000 FXES1111090FEDR 223]**

**RIN 1018–BD17**

## Endangered and Threatened Wildlife and Plants; Threatened Species Status for Chapin Mesa Milkvetch and Designation of Critical Habitat; Withdrawal

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; withdrawal.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), withdraw the proposed rule to list the Chapin Mesa milkvetch (*Astragalus schmolliae*) as a threatened species under the Endangered Species Act of 1973, as amended (Act). We concurrently withdraw the proposed rule to designate critical habitat for the species. This withdrawal is based on our conclusion that the conservation plan for Chapin Mesa milkvetch at Mesa Verde National Park, and its associated implementation plan, in addition to new standard operating procedures for fire management at Mesa Verde National Park, reduce the threats to the species such that it no longer meets the Act's definition of an ''endangered species'' or a ''threatened species.'' Therefore, we are withdrawing our proposal to list the Chapin Mesa milkvetch as a threatened species and our proposal to designate critical habitat for the species.

**DATES:** The proposed rule that published on September 17, 2020 (85 FR 58224), to list the Chapin Mesa milkvetch as a threatened species and to designate critical habitat for the Chapin Mesa milkvetch is withdrawn on February 2, 2022.

**ADDRESSES:** Relevant documents used in the preparation of this withdrawal are available on the internet at *http://www.regulations.gov* at Docket No. FWS–R6–ES–2018–0055.

**FOR FURTHER INFORMATION CONTACT:** Ann Timberman, Western Colorado Field Supervisor, U.S. Fish and Wildlife Service, Colorado Ecological Services Office, 445 West Gunnison Ave., Suite 240, Grand Junction, CO 81501; telephone 970–243–2778. Persons who use a telecommunications device for the deaf may call the Federal Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### Previous Federal Actions

On September 17, 2020, we proposed to list Chapin Mesa milkvetch as a threatened species under the Act (16 U.S.C. 1531 *et seq.*), and to designate critical habitat (85 FR 58224). Please refer to that proposed rule for a detailed description of previous Federal actions concerning Chapin Mesa milkvetch prior to 2020. The September 17, 2020, proposed rule had a 60-day comment period, ending November 16, 2020. During this public comment period, we invited the public to comment on the proposed rule in light of draft conservation plans for the species from Mesa Verde National Park (Park) and the Ute Mountain Ute Tribe. Since publication of the proposed rule, the Park provided supplemental information to their plan that allowed the Service to conclude the plan is sufficiently certain to be implemented and effective, and we consider this in making our final listing determination, in accordance with the Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE) (68 FR 15100; March 28, 2003).

### Supporting Documents

Prior to publishing the proposed listing rule (85 FR 58224; September 17, 2020), we conducted a species status assessment (SSA) for the Chapin Mesa milkvetch, with input and information provided by the Park, the Colorado Natural Heritage Program, and the Ute Mountain Ute Tribe. The results of this assessment are summarized in an SSA report, which represents a compilation of the best scientific and commercial data available concerning the status of the species, including the past, present, and future stressors to this species (Service 2021a, entire). Additionally, the SSA report contains our analysis of required habitat and the existing conditions of that habitat. After

publication of the September 17, 2020, proposed listing rule, we updated the SSA with newly available information, including the latest precipitation data and updated values for seedling survival in the burned subunit of the Chapin Mesa representative unit (Service 2021a, entire).

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we sought the expert opinions of six appropriate subject matter specialists regarding our SSA report for Chapin Mesa milkvetch. We received responses from five specialists. We incorporated the results of this peer review process into the final SSA report, which informed the underlying analysis and scientific basis for this finding.

**Summary of Comments and Recommendations**

As stated above under Previous Federal Actions, on September 17, 2020, we published a proposed rule to list Chapin Mesa milkvetch as a threatened species under the Act, and to designate critical habitat (85 FR 58224). The proposed rule had a 60-day comment period, ending November 16, 2020. We also contacted appropriate State, Federal, and Tribal agencies and other interested parties and invited them to comment on the proposal. A newspaper notice inviting general public comment was published in The Journal, a newspaper servicing Cortez, Mancos, and Dolores, Colorado. We also sought peer review on the SSA report (see Supporting Documents, above). All substantive information regarding the listing of Chapin Mesa milkvetch that was provided during peer reviews and the comment period has been incorporated directly into this final determination or into our SSA report, as appropriate, or is addressed below. Comments concerning the proposed critical habitat designation for the species are not addressed here; given the decision to withdraw the listing proposal, no further assessment of the proposed critical habitat designation is necessary at this time.

*Peer Review Comments*

We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding Chapin Mesa milkvetch. The peer reviewers provided additional information, clarifications, and suggestions to improve the SSA report, which we incorporated directly into the SSA report, or address in the responses to comments below. We only address substantive comments from these reviewers below; we resolved minor editorial comments in the text of the SSA report.

*(1) Comment:* One reviewer suggested that we needed more detail to describe the methods researchers used to collect the monitoring data we include in the SSA report.

*Our Response:* The purpose of the SSA is to gather and compile information on the status of this species in order to assess its current condition and project the species' future condition. Adding detailed information on the monitoring methodologies our partners use is not necessary to assess the current and future conditions for this species in the SSA report, because these methods are adequately described in other papers. More details on monitoring methods are available in Anderson (2004), Rondeau et al. (2016), and Rondeau (2017), which are cited throughout our SSA report.

*(2) Comment:* Some reviewers commented that we needed to incorporate additional quantitative data, as qualitative data cannot answer the questions that are most relevant to ensuring persistence and survival of the species.

*Our Response:* Section 4 of the Act directs the Service to make determinations on whether any species is an endangered or a threatened species ''solely on the basis of the best scientific and commercial data available'' (16 U.S.C. 1533(b)(1)(A)). In the SSA, we used quantitative data when available, but, in some cases, qualitative data is the best available information. We used this quantitative and qualitative data to evaluate multiple metrics relevant to assessing the resiliency of each representative unit. In the case of Chapin Mesa milkvetch, given limited availability of quantitative data, we evaluated the level of intact native understory and presence of exotic plants qualitatively. However, even with qualitative evaluations for these metrics, we were able to evaluate the resiliency of each representative unit and summarize the current and future viability of the species (Service 2021a, pp. 32–41); we acknowledge the uncertainties inherent in this method in the SSA (Service 2021a, p. 33). These evaluations of current and future viability, which were based on the best available scientific data, informed our determination of species' status.

*(3) Comment:* One reviewer expressed concern that the only monitoring data included in the SSA report are from monitoring that has occurred on Chapin Mesa, and therefore does not cover the entire range of the species.

*Our Response:* We agree that monitoring information from the rest of the species' range would be useful. However, section 4 of the Act directs the Service to make determinations whether any species is an endangered or a threatened species ''solely on the basis of the best scientific and commercial data available'' (16 U.S.C. 1533(b)(1)(A)). Monitoring data from other representative units are not available to us at this time.

*(4) Comment:* One reviewer commented that the SSA has no discussion of current or future conservation actions being implemented.

*Our Response:* When the SSA report was originally written (2018), we were not aware of any ongoing conservation actions. Following the completion of the first version of the SSA report, draft conservation plans from the Park and the Ute Mountain Ute Tribe became available that discussed future conservation activities. However, we had not yet evaluated these plans under our PECE policy, and the Park had not yet completed its implementation plan. We have since updated our discussion of conservation efforts in the SSA to incorporate relevant ongoing conservation activities and information from the Park's conservation plan and implementation plan for Chapin Mesa milkvetch at Mesa Verde National Park; these conservation efforts also informed updated analysis on species' status in this notice, in accordance with the provisions of the PECE policy (Service 2021b, entire).

*(5) Comment:* One reviewer commented that Anderson (2004) includes a plausible boundary for the population south of the Park based on records and observations in the Ute Mountain Ute Tribal Park.

*Our Response:* The Anderson (2004) plausible boundary on Ute Mountain Ute Tribal land was determined using an element occurrence record from the Colorado Natural Heritage Program from 1987, and was adapted to include major landscape features and jurisdictional boundaries, because surveyors were not granted access to Ute Mountain Ute land to conduct formal surveys. In order to accurately update or expand this element occurrence record polygon for the Ute Mountain Ute Tribal Park representative unit, we would need additional surveying on Tribal lands and access to survey results. These data are not available to us at this time; therefore, we consider the polygon used in the SSA report to represent the best available scientific information on the

location of the species on Ute Mountain Ute Tribal lands.

*(6) Comment:* One reviewer suggested that the use of herbarium specimens could confirm the historical distribution of the species, as several regional herbaria hold specimens of Chapin Mesa milkvetch collected prior to the 1945 description.

*Our Response:* We agree that such information could further confirm our existing understanding of the historical distribution of this species. However, the peer reviewer noted that the SSA's description of historical distribution, which was based on information from sources other than these herbarium records, was accurate, even without consideration of these early herbarium specimens. These early specimens were all collected from within or near Mesa Verde National Park, so they only further confirm the accuracy of the information we cited from other sources regarding where the species historically occurred. Thus, referencing these herbarium specimen is not necessary in our SSA since this additional detail would not have changed our understanding of the species' range and viability.

*(7) Comment:* One reviewer commented that the reference to a personal communication from Clow (2017, pers. comm.) implies that survey work has been done recently on Ute Mountain Ute land.

*Our Response:* The Tribe has communicated to us that Chapin Mesa milkvetch is present on Tribal land and we know that they have begun to conduct surveys on their Tribal lands; however, no survey data were provided to us for the SSA report or this final determination.

*(8) Comment:* One reviewer suggested including information from literature on other species in the genus *Astragalus,* as many of the references used in the SSA report are not peer-reviewed, nor publicly available.

*Our Response:* For the purposes of the SSA report, we considered references that are specific to Chapin Mesa milkvetch to be the best available information, even though some were not peer-reviewed. We considered information on closely related species, where applicable. We have reviewed and considered the suggested references on the *Astragalus* genus. Most of the references provided insights into other narrow endemics that were not closely related to Chapin Mesa milkvetch. However, one species, *Astragalus microcymbus,* occurs nearby and exhibits prolonged dormancy, like Chapin Mesa milkvetch; as such, we added this citation to the SSA report.

*(9) Comment:* One reviewer suggested including additional climate-related information from the Climate Change Vulnerability Assessments developed by the Colorado Natural Heritage Program and the Bureau of Land Management (CNHP 2021).

*Our Response:* Because the species only occurs on Mesa Verde National Park and the Ute Mountain Ute Tribal Park, we used climate data specific to this region; therefore, we consider the information we used in the SSA report to be the best available scientific information on downscaled climate impacts. For more information on the climate change analysis we considered, see the discussion of future climate projections under Summary of Biological Status and Threats, below.

*(10) Comment:* One reviewer requested that we add more detailed information about proposed fire management activities.

*Our Response:* We have included a table in section 3.1 of the SSA report that describes existing and proposed impacts from fire management activities in Mesa Verde National Park (Service 2021a, pp. 19–22).

*(11) Comment:* One reviewer commented that post-fire mitigation could influence Chapin Mesa milkvetch if mitigation is conducted with herbicides on a large scale.

*Our Response:* We consider the effects of post-fire herbicide application in Appendix A of the SSA report. While direct effects from herbicide use have occurred to individual Chapin Mesa milkvetch plants in the past, there has not been evidence of population-level effects. Additionally, the Park currently does not use herbicides on a large scale (NPS 2018, p. 11). Therefore, we do not consider herbicides to be a major driver of the species' condition and do not discuss them further in the SSA report. For more detail on herbicides, see Appendix A of the SSA report.

*Public Comments*

We received several comments in support of listing Chapin Mesa milkvetch and designating critical habitat for the species. These comments offered general support but did not provide additional information for us to consider in our final listing decision. We address substantive comments we received from public commenters below.

*(12) Comment:* The Ute Mountain Ute Tribe provided a comment stating their commitment to taking an active role in conservation and asked the Service to recognize the Tribe's right to manage plants and wildlife on Tribal lands. The Tribe also requested that the Service review their ''Conservation Plan for the Chapin Mesa Milkvetch (*Astragalus schmolliae*)'' (Ute Mountain Ute Tribe 2020, entire). The Tribe also provided a list of conservation efforts that they have undertaken that benefit the species.

*Our Response:* As requested, we reviewed the Tribal ''Conservation Plan for the Chapin Mesa Milkvetch (*Astragalus schmolliae*)'' (Tribal Plan). We commend the Tribe's commitment to conservation and appreciate the efforts they have already undertaken to aid the species. We find that this Tribal Plan, if implemented, would likely provide benefit to the species; although, due to uncertainty in future levels of implementation and effectiveness, future conservation efforts outlined in the Tribal Plan were not considered in our final listing decision. We do, however, recognize and value the conservation actions that the Ute Mountain Ute Tribe has already completed and is currently implementing to conserve this species, and we incorporated consideration of these activities in our final listing determination.

*(13) Comment:* One commenter provided a comment in support of listing the species as endangered rather than threatened. They indicated that, as the species has only one potentially viable population that could be wiped out by a single catastrophic event (*i.e.,* fire, fuel spill, illegal grazing) and as the species has low adaptability, the Service should list it as an endangered species rather than a threatened species.

*Our Response:* An ''endangered species'' is defined by the Act as any species which is in danger of extinction throughout all or a significant portion of its range. Our determination about whether Chapin Mesa milkvetch warrants listing as endangered was informed by our analysis of the species' current condition in our SSA, rather than the projected future condition of the species, because the definition of an ''endangered species'' states that the species is in danger of extinction now. The species currently has a large representative subunit (the unburned Chapin Mesa subunit) that is considered highly resilient. Additionally, the species currently has more than one extant population; all four representative units are currently in moderate condition, providing for some additional redundancy and adaptive capacity. Therefore, we determine that the current risk of extinction is low, and the species is not currently in danger of extinction throughout its range. For more information on our determination that Chapin Mesa milkvetch does not

meet the Act's definition of an ''endangered species,'' see *Determination of Species Status,* below.

However, even when we examine the projected future condition of the species, in light of the new information in the Park's conservation plan for Chapin Mesa milkvetch at Mesa Verde National Park, associated implementation plan, and wildfire emergency response procedure, we now find that Chapin Mesa milkvetch does not warrant listing as a threatened species under the Act. First, we conclude it is not plausible that a fuel spill or illegal grazing could occur to such an extent that it extirpates the entire Chapin Mesa milkvetch representative unit, particularly given its protected location on National Park and Tribal Park lands. Thus, we did not consider these stressors as part of our plausible future scenarios. Additionally, based on the Park's commitments to maintain and restore pinyon-juniper overstory, to conduct fire management such that it reduces the risk of catastrophic wildfire in the Park while also minimizing impacts to the species, and to quickly suppress fire, the resiliency, redundancy, and representation of Chapin Mesa milkvetch, including the resiliency of the Chapin Mesa representative unit, will likely remain the same or better than current condition into the foreseeable future; thus, the risk of extinction remains low for Chapin Mesa milkvetch into the foreseeable future. Therefore, after assessing the best available information, we conclude that Chapin Mesa milkvetch is not in danger of extinction throughout all of its range nor is it likely to become so in the foreseeable future. For more information on our determination that Chapin Mesa milkvetch does not meet the Act's definition of a ''threatened species,'' see *Determination of Species Status,* below.

## Background

A thorough review of the taxonomy, range and distribution, life history, and ecology of the Chapin Mesa milkvetch is presented in the SSA report (Service 2021a, pp. 3–14; available at *http://www.regulations.gov* at Docket No. FWS–R6–ES–2018–0055) and is briefly summarized here. Chapin Mesa milkvetch is a narrow endemic, upright, perennial herb primarily found on the tops of mesas in southwestern Colorado in Montezuma County on land administered by the National Park Service (NPS) and the Ute Mountain Ute Tribe. Chapin Mesa milkvetch is a member of the family Fabaceae (legume family) and was known by the common name Schmoll's milkvetch prior to 2015. The stems of Chapin Mesa milkvetch are purplish below, green above, tall (45 to 60 centimeters (cm) (18 to 24 inches)), branching from the base, with short, stiff, appressed hairs (lying closely and flatly against the plant's surface) on the foliage. Leaves are pinnate with 11 to 13 linear leaflets, 1 to 2 millimeters (0.04 to 0.08 inches) wide, and 1 to 3 cm (0.4 to 0.8 inches) long. Flowers are yellowish-white or cream colored, and 12 to 13 cm (4.7 to 5.1 inches) long with bracts that extend under the flower that have black hairs. The distinguishing characteristic of the species is the leathery pod (Service 2021a, pp. 3–4).

Chapin Mesa milkvetch plants emerge in early spring and usually begin flowering in late April or early May. Flowering continues into early or mid-June; fruit set begins in late May and occurs through June; and, by late June, most fruits, while still attached to the plant, have opened and released their seeds (Service 2021a, p. 6). During very dry years, like many other *Astragalus* species, the plants can remain dormant with no above-ground growth (Colyer 2003 in Anderson 2004, p. 11). Chapin Mesa milkvetch requires pollination by insects to set fruit; the flowers require a strong insect for pollination because the insect must force itself between the petals of the papilionaceous (butterfly-shaped) flowers (Green 2012, p. 2).

The emergence and density of Chapin Mesa milkvetch are strongly tied to winter precipitation. Years with ''wet'' winters (precipitation falling primarily as snow) precede high density counts, and years with dry winters translate to low or no emergence (Rondeau 2017, p. 3). Climate requirements for seedling emergence and survival are not well known; however, we infer that spring moisture is also critical, as seedling survival relies on growing deep roots quickly (Rondeau 2017, p. 9). It is likely that winter moisture coupled with winter temperature is also important for seedlings due to available soil moisture for seedling survival (Rondeau 2017, p. 16).

Chapin Mesa milkvetch's global distribution is constrained almost entirely to the Chapin Mesa within the Park and the Ute Mountain Ute Tribal Park in southern Colorado, with some outlying areas on neighboring Park Mesa and West Chapin Spur, both of which are within the boundaries of the Park (Rondeau 2017, p. 1). Chapin Mesa milkvetch habitat occupies approximately 2,000 acres (ac) (809 hectares (ha)) in the Park (CNHP 2010, pp. 12–19; Anderson 2004, pp. 25, 30). While the species has been observed on the Ute Mountain Ute Tribal Park, we do not know how much occupied habitat occurs there.

The habitat for Chapin Mesa milkvetch is dense pinyon-juniper woodland of mesa tops, with deep, reddish, loess soil (Service 2021a, p. 7). Pinyon-juniper trees are easily killed by fires and are slow to regenerate (Romme et al. 2003, p. 344.). The historical fire regime of the pinyon-juniper woodlands on the mesa tops of the Mesa Verde area is characterized by lightning-caused, infrequent (around a 400-year rotation), stand-replacing fires, as opposed to low-severity, stand-thinning fires (Romme et al. 2003, p. 338; Floyd et al. 2004, p. 286).

The best available information indicates that the species consists of one large, interconnected population. Like many rare plants, Chapin Mesa milkvetch is globally rare, but is locally abundant throughout its occupied habitat (Rondeau 2017, p. 1). Regular monitoring has occurred in the Park since 2001 in established monitoring plots; however, the best available scientific information does not allow estimating a global population size or overall population density (Service 2021a, p. 4). The existing monitoring reports provide insights into the levels of seedling survival in the Chapin Mesa representative unit, which we used to characterize resiliency in the SSA (Rondeau 2020, entire). They also provide information on the relationship between fire, seasonal precipitation, and various demographic characteristics (*e.g.,* plant density and recruitment), which furthered our understanding of how and when wildfire impacts the plant (Rondeau 2020, entire). Finally, these monitoring reports provide information on plant density over time; levels of germination over time; amount of fruit production over time; age class ratios; and mortality rates over time in certain parts of the species' range (Rondeau 2020, entire).

## Regulatory and Analytical Framework

### *Regulatory Framework*

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

''endangered species'' or a ''threatened species'' because of any of the following five factors:

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

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

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

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

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

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

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

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as the Service can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction (see 84 FR 45020, August 27, 2019, p. 45027). Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics (50 CFR 424.11(d)). Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

*Analytical Framework*

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent a decision by the Service on whether the species should be listed as an endangered or threatened species under the Act. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies. The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket No. FWS–R6–ES–2018–0055 on *http://www.regulations.gov.*

To assess Chapin Mesa milkvetch's viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency supports the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy supports the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation supports the ability of the species to adapt over time to long-term changes in the environment (for example, climate changes). In general, the more resilient and redundant a species is and the more representation it has, the more likely it is to sustain populations over time, even under changing environmental conditions. Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the species' life-history needs at the individual, population, and species level. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

**Summary of Biological Status and Threats**

Below, we review the biological condition of the species and its needed resources, as well as stressors and conservation efforts that influence its condition, to assess the species' overall viability and the risks to that viability. To evaluate the biological status of the Chapin Mesa milkvetch both currently and into the future, we assessed a range of conditions to consider the species' resiliency, redundancy, and representation. Because Chapin Mesa milkvetch is considered to consist of one large population, for the purposes of our analysis, we divided the range of Chapin Mesa milkvetch into four representative units, which are further broken down into subunits (Service 2021a, p. 24). The Chapin Mesa milkvetch needs multiple, sufficiently resilient subunits distributed across its range to maintain populations into the future and to avoid extinction (Service 2021a, pp. 7–13).

We evaluated a number of stressors with the potential to influence the

health and resiliency of Chapin Mesa milkvetch populations, such as competition with nonnative, invasive plant species (*i.e.,* cheatgrass, musk thistle, etc.); wildfire; drought; fire management activities; development of infrastructure; trampling; herbivory; and effects of climate change (Service 2021a, pp. 13–22). We found that the primary drivers influencing the species' condition are the increased frequency of large, high-intensity wildfires; increasing presence of invasive, nonnative plants, especially cheatgrass; and the interaction between these elements, as explained further under *Summary of Factors Influencing Viability,* below, and in the SSA report (Service 2021a, pp. 27–33).

As described above, we divided the range of Chapin Mesa milkvetch into four representative units (Chapin Mesa, West Chapin Spur, Park Mesa, and Ute Mountain Ute Tribal Park) (Service 2021a, p. 24). We considered representative units to be most resilient when (1) they do not contain nonnative, invasive species or infrastructure development; (2) the unit has sufficient pinyon-juniper canopy cover and intact native understory; (3) seedling survival is sufficient in the unit; and (4) winter and spring precipitation levels are sufficient in the unit (Service 2021a, pp. 24–33). Our analysis found that all four Chapin Mesa milkvetch analysis units currently have moderate levels of resiliency, with one large, unburned subunit in good condition.

Given our uncertainty regarding the future effects of climate change, as well as the other stressors, we projected the future resiliency, redundancy, and representation of Chapin Mesa milkvetch under three plausible future scenarios. Our three future scenarios incorporate three climate scenarios developed by the North Central Climate Science Center in Fort Collins, Colorado, for the San Juan Basin in southwestern Colorado: (1) Hot and dry, (2) moderately hot, and (3) warm and wet (Rondeau et al. 2017, Appendix D, pp. 15–21). ''Wet'' winters are correlated with high Chapin Mesa milkvetch density counts, while dry winters translate to low or no emergence of Chapin Mesa milkvetch in the spring (Rondeau 2017, p. 15). Data collected over 14 years of monitoring reveal a strong correlation between winter precipitation (as snow) and the density of Chapin Mesa milkvetch plants (Rondeau 2017, p. 15). However, climate change models forecast warmer temperatures and a decrease in precipitation, or change in the timing and type of precipitation, as compared to historical levels, by 2035 and through the end of the century (Rondeau et al. 2017, Appendix D, pp. 15–21; Service 2021a, pp. 34–35).

We evaluated each of our three future scenarios in terms of how it would be expected to impact resiliency, redundancy, and representation of the species by the year 2035. We selected the year 2035 for our evaluation of future scenarios based on available climate projections specific to the San Juan Basin in southwestern Colorado, where Chapin Mesa milkvetch habitat occurs, and based on available analyses on the response of pinyon-juniper communities to these climate changes. These climate models used downscaled data that model the range of plausible future climate conditions for the region to project changes in certain climate variables over time, predict the impact of these changes in climate variables on wildfire frequency and extent, and illustrate the impact of these climate changes and increased wildfire risk on the specific pinyon-juniper communities that support Chapin Mesa milkvetch under three climate scenarios (*i.e.,* (1) hot and dry, (2) moderately hot, and (3) warm and wet) (Rondeau et al, 2017, pp. 9–11; Appendix D, pp. 15–21). However, these downscaled analyses provided insight into the threat of wildfire and the response of pinyon-juniper communities only through the year 2035 (pp. 9–11).

Under the same three climate scenarios, trends for temperature and precipitation projected through 2035 will continue through 2100 in southwestern Colorado (Appendix C, pp. 11–14); climate conditions could still range from warm and wet to hot and dry by 2100 (Rondeau et al. 2017, Appendix C, pp. 11–14). More specifically, all three climate scenarios predict conditions will warm even further by 2100, although the extent to which the climate could warm by the end of the century varies between scenarios (Rondeau et al. 2017, Appendix C, pp. 12–13). Like the projections of climate conditions for 2035, these projections of climate conditions through 2100 present uncertainty as to the extent that precipitation patterns could change, with some scenarios predicting wetter conditions and others predicting drier conditions (Rondeau et al. 2017, Appendix C, p. 14). While projections for temperature and precipitation in southwestern Colorado are available further into the future than 2035, we do not know specifically how these conditions could alter wildfire frequency or extent in pinyon-juniper communities in southwestern Colorado nor how these communities would respond to these climate conditions by the end of the century. Thus, the best available information on how potential future climate conditions could affect the specific ecological communities on which Chapin Mesa milkvetch depends consider this ecological response only through 2035 (Rondeau et al. 2017, pp. 9–11). Given the uncertainties regarding wildfire risk and species' response past 2035, future conditions further into the 21st century are less reliable and foreseeable (see 84 FR 45020, August 27, 2019, p. 45027). We can, however, make reliable predictions about the threats to and response of Chapin Mesa milkvetch through 2035.

The future scenarios we evaluated for Chapin Mesa milkvetch through 2035 are as follows (scenarios are discussed in greater detail in the SSA report (Service 2021a, pp. 34– 36)):

- Scenario 1 (''Optimistic''): Continuation of the current land management conditions under a ''warm and wet'' future climate change model;
- Scenario 2 (''Moderate''): Slight increase in fire management activities (*i.e.,* fuels reduction) and infrastructure development under a ''moderately hot'' future climate change model; and
- Scenario 3 (''Pessimistic''): Significant increase in fire management activities and infrastructure development under a ''hot and dry'' future climate change model.

Based on our analysis of future condition, the ''Pessimistic'' scenario is the only scenario under which resiliency could decrease for the species within the foreseeable future, primarily due to the increased risk of wildfire. Having a greater number of self-sustaining units distributed across the known range of the species is associated with an overall higher viability of the species into the future, as it increases redundancy. We anticipate that the largest Chapin Mesa milkvetch representative unit, Chapin Mesa, will continue to be occupied under all three future scenarios, but with reduced levels of resiliency under the ''Pessimistic'' scenario (Service 2021a, pp. 37–41). This species inherently has, and has likely always had, a low level of redundancy and representation due to its endemism. Because there is only one large representative unit (Chapin Mesa) and three very small representative units (West Chapin Spur, Park Mesa, and Ute Mountain Ute Tribal Park), this species is at some risk from stochastic and catastrophic events and may have low adaptability to changing conditions (Service 2021a, p. 41). These future resiliency, redundancy, and representation projections in the SSA also do not take into account the

potential mitigating effects of the Park's conservation efforts, which we discuss in additional detail below.

The SSA report (Service 2021a, entire) contains a more detailed discussion of our evaluation of the biological status of the Chapin Mesa milkvetch and the influences that may affect its continued existence. Our conclusions are based upon the best available scientific and commercial data.

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. To assess the current and future condition of the species, we undertake an iterative analysis that encompasses and incorporates the threats individually and then accumulates and evaluates the effects of all the factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

*Summary of Factors Influencing Viability*

As mentioned above under *Regulatory Framework,* a species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act. Potential stressors to the Chapin Mesa milkvetch that we evaluated include invasive, nonnative plants (Factor A); wildfires (Factor A); post-fire mitigation (Factor A); wildfire and fuels management (Factor A); trampling and herbivory (Factors A and C); development of infrastructure (Factor A); drought (Factor A and Factor E); and effects of climate change (Factor A and Factor E) (Service 2021a, pp. 13–22). There is no evidence that overutilization (Factor B) of Chapin Mesa milkvetch, disease (Factor C), or other natural or manmade factors affecting the species (Factor E) are occurring. Existing regulatory mechanisms (Factor D) are discussed further below.

We evaluated each potential stressor, including its source, affected resources, exposure, immediacy, geographic scope, magnitude, and impacts on individuals and populations, and our level of certainty regarding this information, to determine which stressors were likely to be drivers of the species' current condition (Service 2021a, Appendix A). Our analysis found that the primary drivers of Chapin Mesa milkvetch current and future condition are the increased frequency of large, high-intensity wildfires; increasing presence of invasive, nonnative plants, especially cheatgrass; and the interaction between these elements, as explained further in the SSA report (Service 2021a, pp. 14–33). We offer a summary of the analysis here.

Invasive, nonnative plants compete with Chapin Mesa milkvetch for space, nutrients, and water, and their invasion has been facilitated by the increased frequency of burns, as well as the creation of fire breaks, that has occurred within Chapin Mesa milkvetch habitat (CNHP 2006, p. 4). Wildfire affects Chapin Mesa milkvetch and its habitat by eliminating the fire-sensitive pinyon-juniper woodlands and native understory that the species needs (Service 2021a, p. 15), thereby opening up habitat to be colonized by nonnative grasses and clonal shrub species. Pinyon-juniper woodlands that have been burned extensively by wildfires in the past two decades are being replaced by significant invasions of nonnative species (Floyd et al. 2006, p. 1). Cheatgrass was not found in unburned woodland monitoring plots, whereas cheatgrass invasion ranges from 8 to 58 percent cover in the burned monitoring plots (Rondeau 2017, p. 11). We do not have percent cover information on other invasive species within Chapin Mesa milkvetch habitat at this time. The abundance of grasses, especially cheatgrass, western wheatgrass (*Pascopyrum smithii*), and smooth brome (*Bromus inermis*), within the species' habitat is outside the natural range of variation, resulting in a lack of bare ground and biological soil crust, preventing natural succession or return to the pinyon-juniper woodland habitat that Chapin Mesa milkvetch needs, and also reducing the reproductive vigor of Chapin Mesa milkvetch (Rondeau 2017, pers. comm.).

Cheatgrass and other invasive, nonnative plant species have already invaded different parts of the species' range to varying degrees. Five large, high-intensity fires have occurred in the Park and on a large portion of the adjacent Mesa Verde cuesta (*i.e.,* long, sloping ridge) in the last two decades (Floyd et al. 2004, pp. 270, 283). A total of approximately 760.5 ac (307.8 ha) has burned out of the approximately 2,000 ac (809 ha) of Chapin Mesa milkvetch habitat in the Park; this amounts to 38 percent of Chapin Mesa milkvetch habitat in the Park. Climate projections for the San Juan Basin, Colorado, where Chapin Mesa milkvetch occurs, include increased temperatures, more intense and longer lasting heat waves, a longer fire season with greater frequency and extent of fires, and an increased probability of drought, although the extent of these increases varies between climate models and depends partly on future management (Rondeau et al. 2017, p. 8). These factors could exacerbate the frequency and extent of catastrophic wildfires and the invasion of cheatgrass on Chapin Mesa milkvetch habitat in the future.

Conservation and Management Activities

In this determination, we consider both existing ongoing conservation and management activities that benefit Chapin Mesa milkvetch and future conservation efforts that comply with the Service's PECE policy. The Service's PECE policy (68 FR 15100; March 28, 2003) provides a policy framework and criteria for evaluating, within a listing determination, conservation efforts that have not yet been implemented or have not yet demonstrated whether they are effective. For us to consider that a formalized conservation effort contributes to forming a basis for not listing a species or for listing a species as a threatened species rather than an endangered species, we must find that the conservation effort is sufficiently certain to be implemented and effective so as to have contributed to the elimination or adequate reduction of one or more threats to the species identified through the section 4(a)(1) analysis.

First, existing regulatory mechanisms (Factor D) and other ongoing management efforts by the NPS and Ute Mountain Ute Tribe provide benefits to Chapin Mesa milkvetch and lessen the influence of large, high-intensity wildfire, invasive species, and development on species' viability, as the species is located entirely within the Park and the Ute Mountain Ute Tribal Park. Both the Park and the Tribe already implement activities that reduce wildfire risk and preserve Chapin Mesa milkvetch habitat. For example, since we published the proposed listing rule for this species, the Park shared a wildfire emergency response procedure with the Service, which governs all wildfire response in the Park (NPS 2020, entire). According to the Park's wildfire emergency response procedure, the Park will immediately and fully suppress wildfires ''while minimizing damage to resources from fire or suppression

operations'' (NPS 2020, p. 2). The Park also has multiple on-site wildland firefighters, which facilitates quick response and suppression of fire (Spencer 2021, pers. comm). The Park will incorporate fire management measures currently in the conservation plan for Chapin Mesa milkvetch at Mesa Verde National Park, in the associated implementation plan, and in the wildfire emergency response procedure into a fire management plan by 2022 (Spencer 2021, pers. comm., p. 2; NPS 2020, entire).

*Ute Mountain Ute Tribe:* In January 2020, the Ute Mountain Ute Tribe finalized a conservation plan (Tribal plan) for Chapin Mesa milkvetch, which was adopted by Resolution by the Ute Mountain Ute Tribal Council in February 2020 (Ute Mountain Ute Tribe 2020, entire). The Tribal plan identifies conservation strategies that the Tribe will use on the Ute Mountain Ute Indian Reservation to enhance the resiliency, redundancy, and representation of Chapin Mesa milkvetch. The Tribal plan calls for management decisions that mitigate direct and indirect impacts to the species and result in the distribution of the species across high-quality, contiguous habitat spanning a range of ecological conditions. While we conclude that this Tribal plan, if implemented, would likely provide benefit to the species, due to uncertainty in future levels of implementation and effectiveness, future conservation efforts outlined in the Tribal plan were not relied upon in our final listing decision.

However, we can consider the conservation actions that the Ute Mountain Ute Tribe has completed and is currently undertaking to conserve this species in our final determination, because conservation actions already implemented and shown to be effective are not subject to PECE. For example, in 2006, 2011, and 2018–2019, the Tribe created fire breaks on the northern end of Chapin Mesa within the Tribal Park to prevent the spread of large wildfires throughout the area (Ute Mountain Ute Tribe 2021, p. 2). The Tribe is also participating in a collaborative research project with the Park, the U.S. Geological Survey, and Northern Arizona University ''to identify strategies to enhance Pinyon-juniper resilience in the context of fuels management, wildfire, and climate change'' and is beginning to monitor the species on an annual basis (Ute Mountain Ute Tribe 2021, p. 1). Additionally, the fact that the species' habitat occurs within a Tribal Park provides additional protections, as the Tribe restricts human activities and land uses within this area (Ute Mountain Ute Tribe 2021, p. 2). The Tribal Park unit has limited road access in Chapin Mesa milkvetch habitat; however, this road is not often used, except for guided tours (Service 2021a, p. 31). This has likely limited the extent of any habitat loss or other human-caused disturbances to the species' habitat within the Tribal Park. Thus, both the Park and the Tribe are currently managing their lands in a way that also benefits the species.

*Future Conservation Effort: NPS Conservation Plan:* In addition to the activities that the Park and Tribe currently implement to protect pinyon-juniper habitat and reduce wildfire risk, the Park also finalized and approved the ''Conservation Plan for Chapin Mesa milkvetch (*Astragalus schmolliae*) at Mesa Verde National Park'' (NPS 2018, entire; referred to as ''conservation plan'') in September 2018, which details how the Park plans to conserve Chapin Mesa milkvetch in the future. To provide further clarity on the objectives and strategies in the conservation plan, the Park developed an implementation plan in February 2021 (NPS 2021, entire), which ''takes objectives outlined in the Chapin Mesa milkvetch Conservation Plan and outlines strategies to meet these desired objectives. The goal of [the implementation plan] is to provide a planned strategy to execute the Chapin Mesa milkvetch conservation plan'' (NPS 2021, p. 3). The conservation plan, and associated implementation plan, describe the Park's conservation effort through detailing clear objectives, the strategies the Park will implement to achieve the objectives, estimated timelines for carrying out the strategies, funding sources, and Park staff responsible for implementing each strategy. The implementation plan is a key component in our determination that future conservation efforts within the Park under the conservation plan meet the requirements of the PECE policy (see analysis below).

The conservation plan's goal is to ''reduce threats and stressors to the species to ensure the resiliency, redundancy and representation of the species leading to a self-sustaining healthy population of Chapin Mesa milkvetch. The most intact habitat and densest occurrences will receive the highest level of protection coupled with restoration of altered habitat'' (NPS 2018, p. 24). Conservation actions in the conservation plan focus on identification and protection of intact habitat, limitation of development, wildfire prevention, prompt response to and restoration after wildfire, enhanced connectivity, control of invasive plant species, and support of pollinators.

The Service evaluated the Park's conservation plan in accordance with the PECE policy (68 FR 15100; March 28, 2003). Based on our analysis (Service 2021b, entire), which is available at *http://www.regulations.gov* at Docket No. FWS–R6–ES–2018–0055 and which we summarize here, we concluded that the Park's conservation plan, and associated implementation plan, are sufficiently certain to be implemented and effective such that they could be considered as part of the basis for our final listing determination for the species. Using the criteria in PECE (68 FR 15100; March 28, 2003), we evaluated the certainty of implementation and effectiveness of conservation measures in the conservation plan, and associated implementation plan. We determined that the measures will be implemented and effective at eliminating or reducing threats to the species because they will protect intact pinyon-juniper habitat, reduce wildfire risk, and restore degraded habitat (Service 2021b, entire). We have a high degree of certainty that the measures will be implemented because the NPS has a strong track record of implementing conservation measures similar to those covered in the conservation plan, has the legal authority to implement the plan, has detailed the funding source for each planned activity, has provided an implementation schedule (*i.e.,* the implementation plan), and has approved the conservation plan (Service 2021b, entire). The Park has already dedicated portions of its base budget towards carrying out Chapin Mesa milkvetch conservation and monitoring (Spencer 2021, pers. comm., entire). The Park also has already leveraged partnerships to secure funding and support of projects that benefit the species (Spencer 2021, pers. comm., entire). In both the implementation plan and the Superintendent's January 2021 letter to the Service, the Park indicates that it will use Park budgets and recreation fees to implement the majority of measures in the conservation plan, while pursuing additional funding through partnerships (NPS 2021, p. 3; Spencer 2021, pers. comm., entire).

Further supporting the certainty of implementation, since the Park finalized and approved the conservation plan in September 2018, the Park has been implementing the strategies prescribed in the conservation plan, activities they summarize in a January 20, 2021, letter to the Service (Spencer 2021, pers. comm., entire). For example, the Park has identified key areas for Chapin Mesa conservation and is limiting disturbance

and development in these areas, has developed a wildfire emergency response procedure, has funded a genetic study of the species, is conducting soil analyses to determine suitable conditions for the plant, has drafted a livestock removal implementation plan, and is investigating methods to manage and restore pinyon-juniper habitat (Spencer 2021, pers. comm., pp. 1–3). Over the past 3 years, the Park has also successfully kept development below the limits established for each of the three different types of habitat described in the conservation plan, preserving important habitat for Chapin Mesa milkvetch. The conservation plan has sufficient monitoring and adaptive management provisions to ensure that all of the conservation measures are implemented as planned and are effective at reducing threats to the Chapin Mesa milkvetch.

Due to the certainty of implementation and effectiveness of the conservation plan in accordance with PECE, we considered the conservation plan's impacts on the species in our listing determination. This conservation plan, and its associated implementation plan, alter our understanding of the range of plausible future scenarios presented in the SSA report; the projections of future resiliency, redundancy, and representation in the SSA report; and the risk associated with future stressors. In the SSA, Scenario 3 (the ''Pessimistic'' scenario) is the only scenario that would result in worsened conditions for the plant. However, as we explain in additional detail below, based on the commitments and strategies in the PECE-compliant conservation plan, we know that the negative impacts of fire management captured in the ''Pessimistic'' future scenario (Scenario 3) will not occur (Service 2021b, entire).

In the September 17, 2020, proposed rule to list Chapin Mesa milkvetch as a threatened species (85 FR 58224), we expressed uncertainty regarding the benefits of the Park's management efforts, specifically how development and fuels management activities in the Park could impact the plant. In the proposed rule, we stated that management activities conducted within the Park, such as fuels and fire management, and the development of visitor-related infrastructure, may have direct and indirect impacts to the species (85 FR 58224, September 17, 2020, p. 58230). In the proposed rule, we stated that while fuels reduction activities may help decrease the likelihood of catastrophic fires, they may also have detrimental impacts such as trampling, creating surface disturbances and altering ecological conditions, or facilitating nonnative species invasion, and that the development of existing infrastructure, such as roads, parking lots, a wastewater treatment facility, and buildings within the Park has resulted in a loss of approximately 2 percent of Chapin Mesa milkvetch habitat (85 FR 58224, September 17, 2020, p. 58230). We also noted that several additional infrastructure and fire management projects were planned or under consideration within Mesa Verde National Park (85 FR 58224, September 17, 2020, p. 58230).

The provisions in the Park's conservation plan now provide assurances that alleviate these concerns about potential negative impacts from development and fuels management. We know that any increases in development predicted under Scenarios 2 and 3 would be within the limits established in the conservation plan and any fire management activities would be carried out with conservation measures that minimize impacts to Chapin Mesa milkvetch (NPS 2018, pp. 24–30; NPS 2021, pp. 4–22). For example, the conservation plan only allows the Park to develop an additional 1.8 percent of Chapin Mesa milkvetch ''Level 1'' habitat (intact, old-growth pinyon juniper woodland) (NPS 2018, p. 27). Moreover, this development will incorporate minimization measures to reduce impacts of any development on the species and its habitat (Objectives 3 and 10 in NPS 2021, pp. 10–11, 21–22). The conservation plan also limits the areas in which the Park will conduct fuels treatments and details measures to minimize the impacts of these treatments; while fuels treatments can help prevent catastrophic fire, these activities can also incidentally negatively impact Chapin Mesa milkvetch habitat through trampling, facilitation of cheatgrass invasion, and small-scale burning of plants if Park staff members burn excess fuel on top of Chapin Mesa milkvetch habitat. The conservation plan dictates that the Park will only conduct fuels reduction management in an additional 19 percent of Chapin Mesa milkvetch habitat in the Park and that all of these treatments will include the adoption of minimization measures to protect Chapin Mesa milkvetch and its habitat, such as hand-carrying out fuels instead of pile burning, when possible (NPS 2018, p. 14; Objectives 4, 5, 6, 8, and 10 in NPS 2021, pp. 11–27, 18–19, 21–22). These minimization measures lessen the potentially negative side-effects that fuels management could have on Chapin Mesa milkvetch and its habitat and will result in a 50 percent reduction of impacts to the species from fuels management in the future (NPS 2018, p. 14; Objectives 4, 5, 6, 8, and 10 in NPS 2021, pp. 11–27, 18–19, 21–22). By reducing the intensity of treatments and incorporating minimization measures, the fuels management detailed in the conservation plan will likely provide a net benefit to Chapin Mesa milkvetch because it will protect the species and its habitat from large-scale, stand-replacing wildfires while reducing direct impacts of treatments on the plant and its habitat.

Furthermore, according to the implementation plan, the Park ''will not plan development or fuels management treatments on Park Mesa or West Chapin Mesa Spur so that these sites can be retained for future introductions or range expansions'' (NPS 2018, p. 27); in the conservation plan, the Park commits to developing a plan for reintroduction on Park Mesa (NPS 2018, pp. 30–31). The Park will research and pursue an *ex situ* conservation effort (NPS 2018, p. 33; NPS 2021, p. 27). Pending the outcomes of soil and habitat suitability studies, the Park is also preserving 6,264 acres on North Chapin Mesa, Park Mesa, and Moccasin Mesa in sufficient condition to allow for introduction if necessary (Spencer 2021, pers. comm., p. 2; NPS 2018, p. 31). If the Park deems reintroduction projects necessary and pursues them, this reintroduction could provide additional redundancy for the species in the future, though this remains uncertain and we did not rely on these potential increases in our analysis of species status (NPS 2021, pp. 11–12).

Additionally, the conservation plan's provisions address the threat of nonnative, invasive vegetation that we identified as a concern in the proposed rule. The risk of invasion of nonnative vegetation is already low in areas with intact pinyon-juniper overstory. In the conservation plan, the Park commits to maintaining minimal disturbance and development in these areas with intact pinyon-juniper overstory to reduce the likelihood of nonnative plant invasion in these highly resilient areas. The Park also commits to recovering burned, degraded areas such that pinyon-juniper trees are restored ''to more than 10 percent canopy cover'' and invasive plants are reduced ''to less than 5 percent cover,'' further reducing the risk invasive vegetation poses to the species (NPS 2018, pp. 26, 29; NPS 2021, pp. 7–9, 19–21). The Park is collaborating with the Tribe to research effective methods of restoring pinyon-juniper habitat

(Spencer 2021, pers. comm., p. 3; NPS 2021, pp. 7–9).

The September 17, 2020, proposed rule (85 FR 58224) also attributed risk of extinction in the foreseeable future to the high potential for a future catastrophic event, such as a catastrophic wildfire, that could affect all or a large portion of the species' range, given the species' inherently limited redundancy and the fact that 97 percent of the species' known range is concentrated in the Park. The conservation plan, implementation plan, and the Park's new standard operating procedures for wildfire management, which are documented in their 2020 wildfire emergency response procedure, also shed new light on these concerns. As we explain above, the strategies and commitments in the conservation plan and implementation plan indicate that the management actions predicted in Scenario 3 will not occur in the future; we know that the Park will not do less invasive species control, will not significantly increase potentially detrimental fire management activities, will not significantly increase development, and will not open currently closed roads and trails (NPS 2018, pp. 24–30; NPS 2021, pp. 4–22). Scenario 3 was the only scenario in the SSA report that would result in worsened conditions for the species. However, while the provisions in the conservation plan ensure that the management components of this ''pessimistic'' future scenario will not occur, the ''hot and dry'' climate conditions associated with this scenario could still happen (Service 2021a, p. 39). These climate conditions could increase the frequency of wildfire 8-fold and the amount of area burned 11-fold, which partially influenced the worsened resiliency in this future scenario in the SSA (Rondeau et al. 2017, pp. 10–11, 15–17, Appendices C and D). However, these projected increased risks and impacts of catastrophic wildfire assume no fire management or prevention. Wildfire management and response measures in the Park's conservation plan, implementation plan, and wildfire emergency response procedure, which the Park has committed to incorporating into a long-term fire management plan by 2022, ensure that the Park will take action to prevent fire, while minimizing impacts of this management on the species; they also ensure that the Park will respond to fire immediately with the intent to fully suppress it (NPS 2018, pp. 27–29; NPS 2020, entire; NPS 2021, pp. 12–17). These efforts decrease the potential influence of climate change and associated wildfire on the species in all future scenarios, further reducing the plausibility and likelihood of the resiliency outcomes of the ''Pessimistic'' future scenario, the only scenario in which the species' future resiliency would worsen relative to current condition.

**Determination of Species Status**

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

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

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

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

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

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Chapin Mesa milkvetch. Potential stressors to the Chapin Mesa milkvetch that we evaluated include invasive, nonnative plants (Factor A); wildfires (Factor A); post-fire mitigation (Factor A); wildfire and fuels management (Factor A); trampling and herbivory (Factors A and C); development of infrastructure (Factor A); drought (Factor A and Factor E); and effects of climate change (Factor A and Factor E) (Service 2021a, pp. 13–22). There is no evidence that overutilization (Factor B) of Chapin Mesa milkvetch, disease (Factor C), or other natural or manmade factors affecting the species (Factor E) are occurring. Existing regulatory mechanisms (Factor D) are discussed above.

We evaluated each potential stressor, including its source, affected resources, exposure, immediacy, geographic scope, magnitude, and impacts on individuals and populations, and our level of certainty regarding this information, to determine which stressors were likely to be drivers of the species' current condition (Service 2021a, Appendix A). Our analysis found that the primary drivers of the Chapin Mesa milkvetch's current and future condition are the increased frequency of large, high-intensity wildfires; increasing presence of invasive, nonnative plants, especially cheatgrass; and the interaction between these elements, as explained further in the SSA report (Service 2021a, pp. 13–22).

*Status Throughout All of Its Range*

In our September 17, 2020, proposed rule to list Chapin Mesa milkvetch as a threatened species (85 FR 58224), we concluded that the species did not meet the definition of an endangered species under the Act. The new information we received since we published that proposed rule does not change our original conclusion regarding the species' current risk of extinction. We still find that the Chapin Mesa milkvetch is not currently in danger of extinction throughout its range. The species currently has a large representative subunit (the unburned Chapin Mesa subunit) that is considered highly resilient, based on the quality of habitat conditions for Chapin Mesa milkvetch. This large area of habitat (1,265 ac (512 ha)) in a highly resilient subunit likely provides the Chapin Mesa milkvetch some ability to withstand stochastic events, such as drought, that are within the normal range of yearly variation, and to complete its life cycle. Additionally, all four representative units are currently in moderate condition, providing for some additional redundancy and representation, given the relatively healthy status of multiple representative units across the species' range. Moreover, three of these four units occur on geographically separate mesa tops; the steep cliffs between these mesa tops provide natural fire breaks between the representative units, reducing the likelihood that a single wildfire could impact all four representative units at the same time. In addition to these natural fire breaks, the constructed fire break between the Park and the Ute Mountain Ute Tribal Park further enhances redundancy of the species, limiting the ability of a catastrophic wildfire to spread along Chapin Mesa and impact representative units in both the Park and on Tribal lands. Therefore, the risk of extinction now is low, and the species is not currently in danger of extinction throughout its range.

The Act defines an ''endangered species'' as any species that is in danger of extinction throughout all or a

significant portion of its range and a ''threatened species'' as any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. As we discuss in detail under Summary of Biological Status and Threats, the best available information on how potential future climate conditions could affect the specific ecological communities on which Chapin Mesa milkvetch depends considers this ecological response only through 2035 (Rondeau et al. 2017, pp. 9–11). Given the uncertainties regarding wildfire risk and species' response past 2035, future conditions further into the 21st century are less reliable and foreseeable (see 84 FR 45020, August 27, 2019, p. 45027). We can, however, make reliable predictions about the threats to and response of Chapin Mesa milkvetch through 2035. We thus consider the foreseeable future for the Chapin Mesa milkvetch to be to the year 2035, given the available climate data specific to the San Juan Basin in southwestern Colorado, where Chapin Mesa milkvetch occurs, and based on the available analyses on the response of pinyon-juniper communities to these climate changes.

Based on the new information in the Park's conservation plan, implementation plan, and wildfire emergency response procedure, we find that the Chapin Mesa milkvetch is not likely to become endangered within the foreseeable future throughout all of its range. First, we now know that any increases in development predicted under Scenarios 2 and 3 would be within the limits established in the conservation plan and any fire management activities would be carried out with conservation measures that minimize impacts to Chapin Mesa milkvetch (NPS 2018, pp. 24–30; NPS 2021, pp. 4–22). More generally, we know that the Park's conservation plan and implementation plan indicate that the management components of Scenario 3 will not come to fruition; we know that the Park will not do less invasive species control, will not significantly increase potentially detrimental fire management activities, will not significantly increase development, and will not open currently closed roads and trails (NPS 2018, pp. 24–30; NPS 2021, pp. 4–22). Second, the Park's conservation plan, implementation plan, and new wildfire emergency response procedure, which the Park has committed to incorporating into a long-term fire management plan by 2022, ensure that the Park will take action to prevent fire, while minimizing impacts of this management on the species; they also ensure that the Park will respond to fire immediately with the intent to fully suppress it (NPS 2018, pp. 27–29; NPS 2020, entire; NPS 2021, pp. 12–17). These conservations efforts decrease the potential influence of climate change and associated wildfire on the species in all future scenarios, further reducing the plausibility and likelihood of the outcomes of Scenario 3, the only scenario in which the species' future condition would worsen relative to current condition.

Given the Park's commitments in the conservation plan and implementation plan, which we describe in additional detail in *Summary of Factors Influencing Viability* above, it is likely that the resiliency of the representative units in the Park (Chapin Mesa, Park Mesa, and West Chapin Spur) will remain the same as current condition or improve in the foreseeable future due to habitat restoration efforts and management of wildfire risk. These maintained or improved levels of resiliency would continue to provide for reduced catastrophic risk and enhanced ability to adapt to future environmental change, especially considering the inherently limited range of this narrow endemic plant. The four extant representative units distributed across three geographically distinct mesa tops reduces the risk of losing all individuals in a catastrophic fire, especially considering that the separate mesa tops provide natural fire breaks that would prevent fire from spreading between representative units. The constructed fire break between Mesa Verde National Park and the Tribal Park further reduces the likelihood of fire spreading along Chapin Mesa, between the Park and Tribal land.

Even though much uncertainty remains as to the condition of Chapin Mesa milkvetch occurrences on Tribal lands, both now and into the future, we analyzed the status of the species based on the best available information on the future of species' threats and conservation efforts. While the Tribe is actively providing conservation for the species, information about the future of the species' threats and conservation is currently only available and certain for the occurrences in the Park. However, the certainty of implementation and effectiveness of conservation efforts in the Park, in addition to the fire breaks between Mesa Verde National Park and the Tribal Park, provided confidence that the species would maintain sufficient levels of resiliency, redundancy, and representation into the foreseeable future, even without similarly certain future conservation commitments on Tribal lands.

The Park's implementation plan, which was provided after we published the proposed rule, in addition to new standard operating procedures for fire management at the Park, documented in the wildfire emergency response procedure, thus reduce the likelihood of Chapin Mesa milkvetch becoming an endangered species in the foreseeable future. Therefore, based on the Park's commitments to maintain and restore pinyon-juniper overstory, to conduct fire management such that it reduces the risk of catastrophic wildfire in the Park while also minimizing impacts to the species, and to quickly suppress fire, the resiliency, redundancy, and representation of Chapin Mesa milkvetch will likely remain the same or better than current condition into the foreseeable future; thus, the risk of extinction remains low for Chapin Mesa milkvetch into the foreseeable future. Therefore, after assessing the best available information, we conclude that the Chapin Mesa milkvetch is not in danger of extinction now nor is it likely to become so in the foreseeable future throughout all of its range.

*Status Throughout a Significant Portion of Its Range*

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

In undertaking this analysis for the Chapin Mesa milkvetch, we choose to address the status question first—we consider information pertaining to the geographic distribution of both the species and the threats that the species

faces to identify any portions of the range where the species is endangered or threatened.

Chapin Mesa milkvetch is a narrow endemic that functions as a single, contiguous population and occurs within a very small area. As described in the SSA report (Service 2021a, pp. 4–5), the species' global distribution is constrained almost entirely to Chapin Mesa in southern Colorado, with some outlying subunits on neighboring Park Mesa and West Chapin Spur (Rondeau 2017, p. 1). Chapin Mesa milkvetch habitat occupies approximately 2,000 ac (809 ha) in the Park (CNHP 2010, pp. 12–19; Anderson 2004, p. 25, 30). This species is considered to consist of one large, interconnected population, and like many rare plants, Chapin Mesa milkvetch is globally rare, but is locally abundant throughout its occupied habitat (Rondeau 2017, p. 1). Thus, there is no biologically meaningful way to break this limited range into portions, and the threats that the species faces affect the species throughout its entire range. This means that no portions of the species' range have a different status from its rangewide status. Therefore, no portion of the species' range can provide a basis for determining that the species is in danger of extinction now or likely to become so in the foreseeable future in a significant portion of its range, and we find the species is not in danger of extinction now or likely to become so in the foreseeable future in any significant portion of its range. This is consistent with the courts' holdings in *Desert Survivors* v. *Department of the Interior,* No. 16–cv–01165–JCS, 2018 WL 4053447 (N.D. Cal. Aug. 24, 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d, 946, 959 (D. Ariz. 2017).

*Determination of Status*

We have reviewed the best available scientific and commercial information regarding the past, present, and future threats to the Chapin Mesa milkvetch, and we have determined that Chapin Mesa milkvetch does not meet the definition of an ''endangered species'' or a ''threatened species'' in accordance with sections 3(6) and 3(20), respectively, of the Act. Therefore, we are withdrawing our proposed rule to list the Chapin Mesa milkvetch as a threatened species and to designate critical habitat.

## References Cited

A complete list of references cited in this document and the Chapin Mesa milkvetch SSA report are available on the internet at *http://www.regulations.gov* at Docket No. FWS–R6–ES–2018–0055 and upon request from the Colorado Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

## Authors

The primary authors of this document are the staff members of the Colorado Ecological Services Office and the Mountain-Prairie Regional Office.

## Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

**Martha Williams,**

*Principal Deputy Director, Exercising the Delegated Authority of the Director, U.S. Fish and Wildlife Service.*

[FR Doc. 2022–02041 Filed 2–1–22; 8:45 am]

**BILLING CODE 4333–15–P**

# Notices

Federal Register
Vol. 87, No. 22
Wednesday, February 2, 2022

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

January 24, 2022.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding: Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by March 4, 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:* American Rescue Plan Act, 2021 Emergency Rural Health Care Grant Program.

*OMB Control Number:* 0575–0200.

*Summary of Collection:* On March 11, 2021, the President signed the American Rescue Plan Act that appropriated $500 million in grant funding for the establishment of an Emergency Pilot Program for eligible Community Facilities (CF) applicants and eligible CF facilities to assist rural hospitals and local communities broaden access to COVID–19 vaccines, health care services, and food assistance through food banks and food distribution facilities, and projects supporting the long-term sustainability of rural health care. Making these funds available through the issuance of this NOFA, as authorized in Section 1002 of the American Rescue Plan Act, will provide funding to eligible applicants to offer support for rural health care services in the form of immediate relief, and longer-term funding to advance ideas and solutions to support the long-term sustainability of rural health and provide expeditious relief to address the current economic conditions arising from the COVID–19 emergency.

Community Facilities Programs, a division of the Rural Housing Service (RHS), hereinafter referred to as Agency, is part of the United States Department of Agriculture's Rural Development mission area. The Agency is authorized by Section 306(a) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926), as amended, to make grants to public agencies, nonprofit corporations, and Indian tribes to develop essential community facilities and services for public use in rural areas. The Emergency Rural Health Care Grant NOFA outlines the policies and responsibilities, including the collection and use of information necessary to effectively implement this program.

Need and Use of the Information: This information is used to determine whether applicants meet the eligibility requirements to be a recipient of grant funds, determine project eligibility, conduct technical evaluation, calculate a priority score, and rank and compete the application, as applicable, in order to be considered. Lack of adequate information to make the determination could result in the improper administration and appropriation of the Federal grant funds.

Applications are submitted through the applicable USDA Rural Development State Office.

*Description of Respondents:* State, Local, or Tribal Government.

*Number of Respondents:* 1,092.

*Frequency of Responses:* Annually.

*Total Burden Hours:* 71,681.

**Levi S. Harrell,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 2022–01601 Filed 2–1–22; 8:45 am]

BILLING CODE 3410–XV–P

## DEPARTMENT OF AGRICULTURE

### Food Safety and Inspection Service

**[Docket No. FSIS–2021–0028]**

### National Advisory Committee on Microbiological Criteria for Foods: Committee and Charter Reestablishment

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Notice of intent to reestablish the committee and its charter.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, this notice is announcing the intention of the USDA and the U.S. Department of Health and Human Services (HHS) to reestablish the committee for the National Advisory Committee on Microbiological Criteria for Foods (NACMCF) and its charter. The purpose of NACMCF is to provide impartial, scientific advice and peer reviews to Federal food safety agencies for use in the development of an integrated national food safety systems approach that assures the safety of domestic, imported, and exported foods.

**FOR FURTHER INFORMATION CONTACT:** John Jarosh, Designated Federal Officer, U.S. Department of Agriculture (USDA), Food Safety and Inspection Service (FSIS), Room 9–180 Patriots Plaza III, 1400 Independence Avenue SW, Washington, DC 20250–3700. Telephone number: (202) 690–6128. Email: *NACMCF@usda.gov.*

**SUPPLEMENTARY INFORMATION:**

**Background**

The NACMCF was established in 1988, in response to a recommendation of the National Academy of Sciences for an interagency approach to microbiological criteria for foods, and in response to a recommendation of the U.S. House of Representatives Committee on Appropriations, as expressed in the Rural Development, Agriculture, and Related Agencies Appropriation Bill for fiscal year 1988. The charter for the NACMCF is available for viewing on the FSIS internet web page at *https://www.fsis.usda.gov/policy/advisory-committees/national-advisory-committee-microbiological-criteria-foods-nacmcf.* A change was made in the charter to replace 'consumer group' with 'consumer organization' in reference to the representative on the Committee providing the viewpoint of consumers. This change addresses feedback received during the NACMCF membership appointment process for the consumer representative on the Committee to be a member of a consumer organization. The NACMCF provides scientific advice and recommendations to the Secretary of Agriculture and the Secretary of Health and Human Services on public health issues relative to the safety and wholesomeness of the U.S. food supply, including development of microbiological criteria and review and evaluation of epidemiological and risk assessment data and methodologies for assessing microbiological hazards in foods. The Committee also provides scientific advice and recommendations to the Departments of Commerce and Defense. The Committee reports to the Secretary of Agriculture through the Under Secretary for Food Safety, the Committee's Chair, and to the Secretary of Health and Human Services through the Assistant Secretary for Health, the Committee's Vice-Chair. Currently, Ms. Sandra Eskin, Deputy Under Secretary for Food Safety, USDA, is the Committee Chair; Dr. Susan T. Mayne, Director of the Food and Drug Administration's Center for Food Safety and Applied Nutrition (CFSAN), is the Vice-Chair; and Mr. John J. Jarosh, FSIS, is the Director of the NACMCF Secretariat and Designated Federal Officer.

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Dated: January 28, 2022.

**Cikena Reid,**

*USDA Committee Management Officer.*

[FR Doc. 2022–02139 Filed 2–1–22; 8:45 am]

BILLING CODE 3410–DM–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[C–580–898]**

### Large Diameter Welded Pipe From the Republic of Korea: Final Results of Countervailing Duty Administrative Review; 2018–2019

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

**SUMMARY:** The Department of Commerce (Commerce) determines that producers and/or exporters of large diameter welded pipe (welded pipe) from the Republic of Korea (Korea) received countervailable subsidies during the period of review (POR), June 29, 2018, through December 31, 2019.

**DATES:** Applicable February 2, 2022.

**FOR FURTHER INFORMATION CONTACT:** George Ayache, 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) 482–2623.

**SUPPLEMENTARY INFORMATION:**

## Background

On August 5, 2021, Commerce published the *Preliminary Results* of this administrative review.[1] On November 18, 2021, Commerce extended the deadline for the final results of this review to no later than January 28, 2022.[2] For a complete description of the events that followed the *Preliminary Results, see* the Issues and Decision Memorandum.[3]

We are conducting this review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

## Scope of the Order[4]

The merchandise covered by the *Order* is welded pipe. For a complete description of the scope of the *Order, see* the Issues and Decision Memorandum.

## Analysis of Comments Received

All issues raised in interested parties' briefs are addressed in the Issues and Decision Memorandum. A list of the issues addressed is attached to this notice at Appendix I. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

## Changes Since the Preliminary Results

Based on our analysis of the case and rebuttal briefs and the evidence on the record, we made certain changes from the *Preliminary Results.* These changes are explained in the Issues and Decision Memorandum.

## Companies Not Selected for Individual Review

Section 705(c)(5)(A) of the Act states that for companies not investigated, in general, we will determine an all-others rate by weight-averaging the countervailable subsidy rates established for each of the companies individually investigated, excluding zero and *de minimis* rates or any rates based solely on the facts available. For the final results of this review, we determine that only Hyundai RB Co., Ltd. (Hyundai RB) received countervailable subsidies that are above *de minimis* in both 2018 and 2019. However, because the 2018 subsidy rate is based entirely on facts available, we are applying the 2019 subsidy rate calculated for Hyundai RB to the non-selected companies for 2018 and 2019, as it is the only rate calculated for a mandatory respondent that was above *de minimis* and not based entirely on facts available.[5] For a list of the 19 companies for which a review was requested, and which were not selected as mandatory respondents or found to be cross-owned with a mandatory respondent, *see* Appendix II to this notice.

## Final Results of Administrative Review

In accordance with 19 CFR 351.221(b)(4)(i), we calculated an individual net countervailable subsidy rate for Hyundai RB and SeAH Steel Corporation. Commerce determines that, during the POR, the net countervailable subsidy rates for the producers/exporters under review are as follows:

| Company | Subsidy rate for June 29 to December 31, 2018 (percent *ad valorem*) | Subsidy rate for January 1 to December 31, 2019 (percent *ad valorem*) |
|---|---|---|
| Hyundai RB Co., Ltd. | 0.51 | 0.51. |
| SeAH Steel Corporation[6] | 0.24 (*de minimis*) | 0.24 (*de minimis*). |
| Non-Examined Companies Under Review[7] | 0.51 | 0.51. |

## Disclosure

Commerce intends to disclose the calculations performed for these final results of review within five days of the date of publication of this notice in the **Federal Register**.[8]

## Assessment Rates

Pursuant to 19 CFR 351.212(b)(2), Commerce will determine, and U.S. Customs and Border Protection (CBP) shall assess, countervailing duties on all appropriate entries of subject merchandise in accordance with the final results of this review, for the above-listed companies at the applicable *ad valorem* assessment rates listed for the corresponding time period (*i.e.,* June 29, 2018, to October 26, 2018, and April 19, 2019, to December 31, 2019). For entries made during the gap period (*i.e.,* on or after October 27, 2018, through April 18, 2019), we will continue to instruct CBP to liquidate the entries without regard to countervailing duties pursuant to section 703(d) of the Act. We intend 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 Instructions

In accordance with section 751(a)(1) of the Act, Commerce intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown for each of the respective companies listed above for 2019, the second year covered by the period of the review, on shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of

[1] *See Large Diameter Welded Pipe from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review; 2018–2019,* 86 FR 42779 (August 5, 2021) (*Preliminary Results*).

[2] *See* Memorandum, ''Extension of Deadline for Final Results,'' dated November 18, 2021.

[3] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review of Large Diameter Welded Pipe from the Republic of Korea; 2018–2019,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] *See Large Diameter Welded Pipe from the Republic of Korea: Countervailing Duty Order,* 84 FR 18773 (May 2, 2019) (*Order*).

[5] *See* Issues and Decision Memorandum at Comment 7.

[6] Commerce has found the following companies to be cross-owned with SeAH Steel Corporation: SeAH Holdings Corporation and ESAB SeAH Corporation. SeAH Steel Corporation's subsidy rate applies to each of its cross-owned companies.

[7] *See* Appendix II.

[8] *See* 19 CFR 351.224(b).

publication of the final results of this administrative review.[9] For all non-reviewed firms subject to the *Order,* we will instruct CBP to continue to collect cash deposits of estimated countervailing duties at the most recent company-specific rate or the all-others rate (9.29 percent), as appropriate.[10] These cash deposit requirements, effective upon publication of these final results, shall remain in effect until further notice.

## Notification Regarding Administrative Protective Order

This notice also serves as a reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

## Notification to Interested Parties

We are issuing and publishing these final results in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: January 27, 2022.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix I

**List of Topics Discussed in the Issues and Decision Memorandum**

I. Summary
II. Background
III. Scope of the Order
IV. Subsidies Valuation Information
V. Analysis of Programs
VI. Discussion of Comments
- Comment 1: Whether the Government of Korea (GOK) Provided Electricity for Less than Adequate Remuneration (LTAR)
- Comment 2: Whether the Demand Response Resources (DRR) Program Is Countervailable
- Comment 3: Whether the Discount Electricity Charges for Energy Storage Systems (ESS) Program Is Specific
- Comment 4: Whether Restriction of Special Taxation Act (RSTA) Article 25(1)(6) Is Specific
- Comment 5: Whether Restriction of Special Local Taxation Act (RSLTA) Article 57(2) Is Specific
- Comment 6: Whether to Adjust the Calculated Benefit under RSLTA Article 57(2) to Account for the Payment of the Special Rural Development Tax (SRDT)
- Comment 7: Whether Commerce Should Calculate Separate Ad Valorem Subsidy Rates for 2018 and 2019
- Comment 8: Whether Commerce Should Allocate the Benefits of the Busan Investment Promotion (BIP) Fund over the AUL
- Comment 9: Whether Commerce Erred in Its Allocation Calculation for the 2007 Grant Programs
- Comment 10: Whether Commerce Should Allocate the Benefits Received Under the Overseas Standard Certification Acquisition Support (OSCAS) Project over Hyundai RB's Export Sales

VII. Recommendation

## Appendix II

TABLE OF RATES FOR NON-EXAMINED COMPANIES UNDER REVIEW

| Company | Net countervailable subsidy rate for June 29 to December 31, 2018 (percent *ad valorem*) | Net countervailable subsidy rate for January 1 to December 31, 2019 (percent *ad valorem*) |
|---|---|---|
| AJU Besteel Co., Ltd | 0.51 | 0.51 |
| Chang Won Bending Co., Ltd | 0.51 | 0.51 |
| Daiduck Piping Co., Ltd | 0.51 | 0.51 |
| Dong Yang Steel Pipe Co., Ltd | 0.51 | 0.51 |
| Dongbu Incheon Steel Co., Ltd | 0.51 | 0.51 |
| EEW KHPC Co., Ltd | 0.51 | 0.51 |
| EEW Korea Co., Ltd | 0.51 | 0.51 |
| HiSteel Co., Ltd | 0.51 | 0.51 |
| Husteel Co., Ltd [11] | 0.51 | 0.51 |
| Hyundai Steel Company [12] | 0.51 | 0.51 |
| Kiduck Industries Co., Ltd | 0.51 | 0.51 |
| Kum Kang Kind. Co., Ltd | 0.51 | 0.51 |
| Kumsoo Connecting Co., Ltd | 0.51 | 0.51 |
| Nexteel Co., Ltd | 0.51 | 0.51 |
| Samkang M&T Co., Ltd | 0.51 | 0.51 |
| Seonghwa Industrial Co., Ltd | 0.51 | 0.51 |
| SIN-E B&P Co., Ltd | 0.51 | 0.51 |
| Steel Flower Co., Ltd | 0.51 | 0.51 |
| WELTECH Co., Ltd | 0.51 | 0.51 |

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[9] *See, e.g., Honey from Argentina: Results of Countervailing Duty Administrative Review,* 69 FR 29518 (May 24, 2004), and accompanying Issues and Decision Memorandum at Issue 4.

[10] *See Order,* 84 FR at 18775.

[11] As stated in the *Initiation Notice,* subject merchandise both produced and exported by Husteel Co., Ltd. (Husteel) is excluded from the countervailing duty order. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 85 FR 41540, 41551 n.9 (July 10, 2020) (*Initiation Notice*). Thus, Husteel's inclusion in this administrative review is limited to entries for which Husteel was the producer or exporter of the subject merchandise, but not both the producer and exporter.

[12] As stated in the *Initiation Notice,* subject merchandise both produced and exported by Hyundai Steel Company (Hyundai Steel) and subject merchandise produced by Hyundai Steel and exported by Hyundai Corporation are excluded from the countervailing duty order. *See Initiation Notice,* 85 FR at 41551 n.10. Thus, Hyundai Steel's inclusion in this administrative review is limited to entries for which Hyundai Steel was not the producer and exporter of the subject merchandise and for which Hyundai Steel was not the producer and Hyundai Corporation was not the exporter of subject merchandise.

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–274–808]**

# Urea Ammonium Nitrate Solutions From the Republic of Trinidad and Tobago: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

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

**SUMMARY:** The Department of Commerce (Commerce) preliminarily determines that urea ammonium nitrate solutions (UAN) from the Republic of Trinidad and Tobago (Trinidad) is being, or is likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is April 1, 2020, through March 31, 2021. Interested parties are invited to comment on this preliminary determination.

**DATES:** Applicable February 2, 2022.

**FOR FURTHER INFORMATION CONTACT:** Lilit Astvatsatrian, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6412.

**SUPPLEMENTARY INFORMATION:**

## Background

This preliminary determination is 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 investigation on July 26, 2021.[1] On November 23, 2021, Commerce postponed the preliminary determination of this investigation and the revised deadline is now January 26, 2022.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II 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 Investigation

The product covered by this investigation is UAN from Trinidad. For a complete description of the scope of this investigation, *see* Appendix I.

## Scope Comments

In accordance with the preamble to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] No interested party commented on the scope of the investigation as it appeared in the *Initiation Notice.* Commerce is not preliminarily modifying the scope language as it appeared in the *Initiation Notice.*

## Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated constructed export prices in accordance with section 772(b) of the Act. Normal value (NV) is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

## All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act.

In this investigation, Commerce calculated an estimated weighted-average dumping margin for the sole mandatory respondent, Methanol Holdings (Trinidad) Ltd. (MHTL), that is not zero, *de minimis,* or based entirely on facts otherwise available. Because the only individually calculated dumping margin is not zero, *de minimis,* or based entirely on facts otherwise available, the estimated weighted-average dumping margin calculated for MHTL is the dumping margin assigned to all other producers and exporters, pursuant to section 735(c)(5)(A) of the Act.

## Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

| Exporter/producer | Estimated weighted-average dumping margin (percent) |
|---|---|
| Methanol Holdings (Trinidad) Ltd | 63.08 |
| All Others | 63.08 |

## Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

Commerce normally adjusts cash deposits for estimated antidumping duties by the amount of export subsidies countervailed in a companion countervailing duty (CVD) proceeding, when CVD provisional measures are in effect. However, Commerce did not make an affirmative preliminary determination for countervailable export

[1] *See Urea Ammonium Nitrate Solutions from the Russian Federation and the Republic of Trinidad and Tobago: Initiation of Less-Than-Fair-Value Investigations,* 86 FR 40008 (July 26, 2021) (*Initiation Notice*).

[2] *See Urea Ammonium Nitrate Solutions from the Republic of Trinidad and Tobago and the Russian Federation: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 86 FR 66530 (November 23, 2021).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Urea Ammonium Nitrate Solutions from the Republic of Trinidad and Tobago,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

subsidies. Therefore, we have not offset the estimated weighted-average dumping margin by the CVD rate for export subsidies.

These suspension of liquidation instructions will remain in effect until further notice.

## Disclosure

Commerce intends to disclose its calculations and analysis performed to interested parties in this preliminary determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

## Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination. 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.

## Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. A timeline for the submission of case briefs and written comments will be notified to interested parties at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[6] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[7] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation 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, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. 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 intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

## Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On December 10, 2021 and January 21, 2022, pursuant to 19 CFR 351.210(e), the petitioner and MHTL, respectively, requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[8] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) The preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination.

## International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

## Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act, and 19 CFR 351.205(c).

Dated: January 26, 2022.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix I

### Scope of the Investigation

The merchandise covered by this investigation is all mixtures of urea and ammonium nitrate in aqueous or ammonia solution, regardless of nitrogen concentration by weight, and regardless of the presence of additives, such as corrosion inhibiters and soluble micro or macronutrients (UAN).

Subject merchandise includes merchandise matching the above description that has been processed in a third country, including by commingling, diluting, adding or removing additives, or performing any other processing that would not otherwise remove the merchandise from the scope of the investigations if performed in the subject country.

The scope also includes UAN that is commingled with UAN from sources not subject to this investigation. Only the subject component of such commingled products is covered by the scope of this investigation.

The covered merchandise is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 3102.80.0000. Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope is dispositive.

## Appendix II

### List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Scope of the Investigation
V. Discussion of the Methodology
VI. Currency Conversion

[6] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

[7] *See 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).

[8] *See* MHTL's Letter, ''Urea Ammonium Nitrate Solutions from the Republic of Trinidad and Tobago: MHTL's Request for Postponement of Final Determination and Provisional Measures Period,'' dated December 10, 2021; and Petitioner's Letter, ''Urea Ammonium Nitrate Solutions from the Republic of Trinidad and Tobago (A–274–808): Petitioner's Request for Postponement of Final Antidumping Determination,'' dated January 21, 2022.

VII. Recommendation

[FR Doc. 2022–02060 Filed 2–1–22; 8:45 am]

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## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–821–831]**

### Urea Ammonium Nitrate Solutions From the Russian Federation: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

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

**SUMMARY:** The Department of Commerce (Commerce) preliminarily determines that urea ammonium nitrate solutions (UAN) from the Russian Federation are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is April 1, 2020, through March 31, 2021. Interested parties are invited to comment on this preliminary determination.

**DATES:** Applicable February 2, 2022.

**FOR FURTHER INFORMATION CONTACT:** Krisha Hill or Drew Jackson, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4037 or (202) 482–4406, respectively.

**SUPPLEMENTARY INFORMATION:**

### Background

This preliminary determination is 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 investigation on July 26, 2021.[1] On November 23, 2021, Commerce postponed the preliminary determination in this investigation until January 26, 2022.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of the sections in the Preliminary Decision Memorandum is in Appendix II 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 Investigation

The products covered by this investigation are UAN from Russia. For a complete description of the scope of this investigation, *see* Appendix I.

### Scope Comments

In accordance with the preamble to Commerce's regulations,[4] in the *Initiation Notice,* Commerce set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] No interested party commented on the scope of the investigation as it appeared in the *Initiation Notice.* Commerce is not preliminarily modifying the scope language as it appeared in the *Initiation Notice.*

### Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce calculated constructed export prices in accordance with section 772(b) of the Act. Commerce calculated normal value in accordance with section 773 of the Act. Furthermore, pursuant to section 776(a) and (b) of the Act, Commerce preliminarily based the dumping margins for PJSC Kuibyshev Azot and SBU Azot upon facts otherwise available, with adverse inferences, because these companies failed to timely respond to Commerce's quantity and value questionnaire. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

### All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination, Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* dumping margins, and any dumping margins determined entirely under section 776 of the Act.

In this investigation, Commerce calculated estimated weighted-average dumping margins for the mandatory respondents, Public Joint Stock Company Acron (Acron) and EuroChem,[6] that are not zero, *de minimis,* or based entirely on facts otherwise available. Commerce calculated the all-others rate by weight averaging the estimated weighted-average dumping margins that it calculated for the individually examined respondents. Commerce weight averaged these dumping margins by the publicly-ranged total values of their sales of subject merchandise to the United States during the POI.[7]

### Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

[1] *See Urea Ammonium Nitrate Solutions from the Russian Federation and the Republic of Trinidad and Tobago: Initiation of Less-Than-Fair-Value Investigations,* 86 FR 40008 (July 26, 2021) (*Initiation Notice*).

[2] *See Urea Ammonium Nitrate Solutions from the Republic of Trinidad and Tobago and the Russian Federation: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 86 FR 66530 November 23, 2021).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Urea Ammonium Nitrate Solutions from the Russian Federation,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

[6] We used ''EuroChem'' to refer to the collapsed entity comprising the following companies: Azot, Joint Stock Company; Joint Stock Company ''Nevinnomyssky Azot''; Mineral and Chemical Company EuroChem, Joint Stock Company; and EuroChem Trading Rus, Limited Liability Company.

[7] With two respondents under examination, Commerce normally calculates (A) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents; (B) a simple average of the estimated weighted-average dumping margins calculated for the examined respondents; and (C) a weighted-average of the estimated weighted-average 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 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). As complete publicly ranged sales data was available, Commerce based the all-others rate on the publicly ranged sales data of the mandatory respondents. For a complete analysis of the data, please *see* the All-Others Rate Calculation Memorandum.

[8] *See* Memorandum, ''Antidumping Duty Investigation of Urea Ammonium Nitrate Solutions from the Russian Federation: Preliminary Calculations and Analysis for PJSC Acron,'' dated concurrently with this memorandum; *see also* Memorandum, ''Less-Than-Fair-Value Investigation of Urea Ammonium Nitrate Solutions from the Russian Federation: Preliminary Calculations and Analysis for EuroChem,'' dated concurrently with this memorandum; and Memorandum, ''Preliminary Determination Calculation for the All-Others,'' dated concurrently with this memorandum.

| Exporter/producer | Estimated weighted-average dumping margin (percent) | Cash deposit rate (adjusted for subsidy offset(s)) (percent) [8] |
|---|---|---|
| Public Joint Stock Company Acron | 9.15 | 9.01 |
| Azot, Joint Stock Company/Joint Stock Company "Nevinnomyssky Azot"/Mineral and Chemical Company EuroChem, Joint Stock Company/EuroChem Trading Rus, Limited Liability Company | 23.98 | 23.98 |
| PJSC Kuibyshev Azot * | 127.19 | 127.10 |
| SBU Azot * | 127.19 | 127.10 |
| All Others | 15.48 | 15.39 |

* Rate is based on facts otherwise available with an adverse inference.

**Suspension of Liquidation**

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require the following cash deposits for such entries: (1) The cash deposit rate for each of the respondents listed in the table above is the company-specific cash deposit rate listed for the respondent in the table; (2) if the exporter is not a respondent listed in the table above, but the producer is, then the cash deposit rate is the company-specific cash deposit rate listed for the producer of the subject merchandise in the table above; and (3) the cash deposit rate for all other producers and exporters is the ''All Others'' cash deposit rate listed in the table above.

Commerce normally adjusts cash deposits for estimated antidumping duties by the amount of export subsidies countervailed in a companion countervailing duty (CVD) investigation when CVD provisional measures are in effect. Accordingly, where Commerce made a preliminary affirmative determination of countervailable export subsidies in the companion CVD investigation, we offset the estimated weighted-average dumping margins listed in the table above by the appropriate CVD rates to determine the cash deposit rates. Any such adjusted cash deposit rate may be found in the table in the ''Preliminary Determination'' section above.

Should provisional measures in the companion CVD investigation expire prior to the expiration of provisional measures in this LTFV investigation, Commerce will direct CBP to begin collecting estimated antidumping duty cash deposits unadjusted for countervailed export subsidies at the time that the provisional CVD measures expired. These suspension of liquidation instructions will remain in effect until further notice.

**Disclosure**

Commerce intends to disclose its preliminary calculations and related analysis to interested parties within five days of any public announcement of the preliminary determination or, if there is no public announcement, within five days of the date of publication of this notice in the **Federal Register** accordance with 19 CFR 351.224(b).

**Verification**

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination. 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.

**Public Comment**

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. A timeline for the submission of case briefs and written comments will be provided to interested parties at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[9] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[10]

Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation 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, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice in the **Federal Register**. Requests for a hearing should contain: (1) The requesting party's name, address, and telephone number; (2) the number of individuals from the requesting party that will attend the hearing, including, whether any individuals are foreign nationals; and (3) a list of the issues the party intends to discuss at the hearing. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date and time of the hearing two days before the scheduled hearing date.

**Postponement of Final Determination and Extension of Provisional Measures**

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination in the **Federal Register** if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-

[9] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

[10] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020) (Temporary Rule); and *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

month period to a period not more than six months in duration.

On January 14, 2022, and January 20, 2022, pursuant to 19 CFR 351.210(e), Acron and EuroChem, respectively, requested that Commerce postpone the final determination in this investigation up to 135 days after publication of this notice and that provisional measures be extended to a period not to exceed six months.[11] Additionally, on January 21, 2022, the petitioner requested that Commerce postpone the final determination in this investigation in the event of a negative preliminary determination.[12] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) The preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination in this investigation and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination in this investigation no later than 135 days after the date of publication of this preliminary determination in the **Federal Register**.

## International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination, or 45 days after the final determination, whether U.S. imports of UAN are materially injuring, or threaten material injury to, the U.S. industry.

## Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act, and 19 CFR 351.205(c).

[11] *See* Acron's Letter, ''Urea Ammonium Nitrate Solutions from the Russian Federation: Request for Extension of Final Determination an Provisional Measures,'' dated January 14, 2022; *see also* EuroChem's Letter, ''Urea Ammonium Nitrate Solutions from the Russian Federation,'' dated January 21, 2022.

[12] *See* Petitioner's Letter, ''Urea Ammonium Nitrate Solutions from the Russian Federation (A–821–831): Petitioner's Request for Postponement of Final Antidumping Determination,'' dated January 21, 2022.

Dated: January 26, 2022.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix I—Scope of the Investigation

The merchandise covered by this investigation is all mixtures of urea and ammonium nitrate in aqueous or ammonia solution, regardless of nitrogen concentration by weight, and regardless of the presence of additives, such as corrosion inhibiters and soluble micro or macronutrients (UAN).

Subject merchandise includes merchandise matching the above description that has been processed in a third country, including by commingling, diluting, adding or removing additives, or performing any other processing that would not otherwise remove the merchandise from the scope of the investigations if performed in the subject country.

The scope also includes UAN that is commingled with UAN from sources not subject to this investigation. Only the subject component of such commingled products is covered by the scope of this investigation.

The covered merchandise is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 3102.80.0000. Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope is dispositive.

## Appendix II—List of Sections in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Scope of the Investigation
V. Application of Facts Available and Use of Adverse Inferences
VI. Affiliation/Single Entity
VII. Discussion of the Methodology
VIII. Currency Conversion
IX. Adjustments to Cash Deposit Rates for Export Subsidies in Companion CVD Investigation
X. Recommendation

[FR Doc. 2022–02061 Filed 2–1–22; 8:45 am]

BILLING CODE 3510–DS–P

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## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–427–832]**

# Acrylonitrile-Butadiene Rubber From France: Preliminary Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, Postponement of Final Determination, and Extension of Provisional Measures

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

**SUMMARY:** The Department of Commerce (Commerce) preliminarily determines that acrylonitrile-butadiene rubber (AB rubber) from France is being, or is likely to be, sold in the United States at less than fair value (LTFV). Commerce also preliminarily determines that critical circumstances exist with respect to certain imports of subject merchandise. The period of investigation is April 1, 2020, through March 31, 2021. Interested parties are invited to comment on this preliminary determination.

**DATES:** Applicable February 2, 2022.

**FOR FURTHER INFORMATION CONTACT:** Patrick Barton, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0012.

**SUPPLEMENTARY INFORMATION:**

## Background

This preliminary determination is 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 investigation on July 27, 2021.[1] On November 17, 2021, Commerce postponed the preliminary determination in this investigation from December 7, 2021, to January 26, 2022.[2]

For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II 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.*

[1] *See Acrylonitrile-Butadiene Rubber from France, the Republic of Korea, and Mexcio: Initiation of Less-Than-Fair-Value Investigations,* 86 FR 40192 (July 27, 2021) (*Initiation Notice*).

[2] *See Acrylonitrile-Butadiene Rubber from France, the Republic of Korea, and Mexico: Postponement of Preliminary Determinations in the Less-Than-Fair Value Investigations,* 86 FR 64185 (November 17, 2021).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Acrylonitrile-Butadiene Rubber from France,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

**Scope of the Investigation**

The product covered by this investigation is AB rubber from France. For a complete description of the scope of this investigation, *see* Appendix I.

**Scope Comments**

In accordance with the preamble to Commerce's regulations,[4] in the *Initiation Notice,* Commerce set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of this investigation as it appeared in the *Initiation Notice.* For a summary of the product coverage comments and rebuttal responses submitted to the record for this investigation, and accompanying analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum.[6] Based on Commerce's analysis of the parties' comments, Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

**Methodology**

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated constructed export prices in accordance with section 772(b) of the Act. Normal value (NV) is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

**Preliminary Affirmative Determination of Critical Circumstances, in Part**

On January 5, 2022, the petitioner[7] timely filed a critical circumstances allegation, pursuant to section 733(e)(1) of the Act and 19 CFR 351.206(c)(1), alleging that critical circumstances exist with respect to imports of the subject merchandise from France.[8] Section 733(e)(1) of the Act provides that Commerce will preliminarily determine that critical circumstances exist in an LTFV investigation if there is a reasonable basis to believe or suspect that: (A) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales; and (B) there have been massive imports of the subject merchandise over a relatively short period.

In accordance with section 733(e) of the Act and 19 CFR 351.206, Commerce preliminarily determines that critical circumstances do not exist with respect to imports of AB rubber produced and exported by Arlanxeo Emulsion Rubber France S.A.S. (Arlanxeo France). Furthermore, we preliminarily determine that critical circumstances exist with respect to imports of AD Rubber produced and exported by all other producers and exporters from France. For a full description of Commerce's preliminary critical circumstances determination, *see* the Preliminary Decision Memorandum.

**All-Others Rate**

Sections 733(d)(1)(A)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act.

In this investigation, Commerce preliminarily calculated an individual estimated weighted-average dumping margin for Arlanxeo France, the sole mandatory respondent, that is not zero, *de minimis,* or based entirely on facts otherwise available. Consequently, the rate calculated for Arlanxeo France is also assigned as the rate for all other producers and exporters in France, pursuant to section 735(c)(5)(A) of the Act.

**Preliminary Determination**

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

| Exporter/producer | Estimated weighted-average dumping margin (percent) |
|---|---|
| Arlanxeo Emulsion Rubber France S.A.S. | 164.13 |
| All Others | 164.13 |

**Suspension of Liquidation**

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise described in Appendix I on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

Section 733(e)(2) of the Act provides that, given an affirmative determination of critical circumstances, the suspension of liquidation shall apply to unliquidated entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the later of: (a) The date which is 90 days before the date on which the suspension of liquidation was first ordered; or (b) the date on which notice of initiation of the investigation was published. As noted above, Commerce preliminarily finds that critical circumstances exist for imports of subject merchandise produced and exported by all other producers and exporters from France. In accordance with section 733(e)(2)(A) of the Act, the suspension of liquidation shall apply to unliquidated entries of shipments of AB rubber that were produced and exported by all other producers and exporters that were entered, or withdrawn from warehouse, for consumption on or after the date which is 90 days before the publication date of this notice in the **Federal Register**.

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice,* 86 FR at 40193.

[6] *See* Memorandum, ''Antidumping Duty Investigations of Acrylonitrile-Butadiene Rubber from France, the Republic of Korea, and Mexico: Preliminary Scope Decision Memorandum,'' dated concurrently with this notice (Preliminary Scope Decision Memorandum).

[7] The petitioner in this investigation is Zeon Chemicals L.P. and Zeon GP, LLC (collectively, the petitioner).

[8] *See* Petitioner's Letter, ''Acrylonitrile-Butadiene Rubber from France: Petitioner's Allegation of Critical Circumstances,'' dated January 5, 2022.

These suspension of liquidation instructions will remain in effect until further notice.

**Disclosure**

Commerce intends to disclose to interested parties any calculations performed in connection with this preliminary determination within five days of its public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

**Verification**

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination. 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.

**Public Comment**

The deadlines for the submission of case and rebuttal briefs with respect to scope issues are specified in the Preliminary Scope Decision Memorandum. Interested parties will be notified of the deadline for the submission of case briefs with respect to non-scope issues at a later date. Rebuttal briefs, limited to issues raised in non-scope related case briefs, may be submitted no later than seven days after the deadline date for case briefs.[9] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation 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. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information until further notice.[10]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. 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 intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date of the hearing.

**Postponement of Final Determination and Extension of Provisional Measures**

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination in the **Federal Register** if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On December 20, 2021, pursuant to 19 CFR 351.210(e), Arlanxeo France requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[11] In accordance with sections 735(a)(2)(A) and 733(d)(3) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) The preliminary determination is affirmative; (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, pursuant to section 735(a)(2) of the Act, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination.

**International Trade Commission Notification**

In accordance with section 733(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether imports of AB rubber from France are materially injuring, or threaten material injury to, the U.S. industry.

**Notification to Interested Parties**

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act, and 19 CFR 351.205(c) and 19 CFR 351.210(g).

Dated: January 26, 2022.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix I

**Scope of the Investigation**

The product covered by this investigation is commonly referred to as acrylonitrile butadiene rubber or nitrile rubber (AB Rubber). AB Rubber is a synthetic rubber produced by the emulsion polymerization of butadiene and acrylonitrile with or without the incorporation of a third component selected from methacrylic acid or isoprene. This scope covers AB Rubber in solid or non-aqueous liquid form. The scope also includes carboxylated AB Rubber.

Excluded from the scope of this investigation is AB Rubber in latex form (commonly classified under Harmonized Tariff Schedule of the United States (HTSUS) subheading 4002.51.0000). Latex AB Rubber is commonly either (a) acrylonitrile/butadiene polymer in latex form or (b) acrylonitrile/butadiene/methacrylic acid polymer in latex form. The broader definition of latex refers to a water emulsion of a synthetic rubber obtained by polymerization.

Also excluded from the scope of this investigation is: (a) AB Rubber containing additives incorporated during the compounding, mixing, molding, or use of AB Rubber comprising greater than twenty percent of the total weight of the product. Additives would include, but are not limited to, fillers (*e.g.,* carbon black, silica, clay); reinforcement agents (*e.g.,* fibers, carbon black, silica); vulcanization agents (*e.g.,* sulfur, sulfur complexes, peroxide); or AB Rubber containing extension oils making up greater than forty percent of the total weight of the product. Such products would be generally classified under HTSUS subheading 4005; (b) AB Rubber containing polyvinyl chloride (PVC) making up greater than twenty percent of total weight of the product; (c) hydrogenated AB Rubber (commonly referred to as AB Rubber)

[9] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

[10] *See 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).

[11] *See* Arlanxeo France's Letter, ''Acrylonitrile-Butadiene Rubber from France, Case No. A–427–832: Request to Postpone Final Determination,'' dated December 20, 2021.

produced by subsequent dissolution and hydrogenation of AB Rubber; and (d) reactive liquid polymers containing acrylonitrile and butadiene with amine, epoxy, carboxyl or methacrylate vinyl chemical functionality.

Subject merchandise includes material matching the above description that has been finished, packaged, or otherwise processed in a third country, including by modifying physical form or packaging with another product, or performing any other finishing, packaging, or processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the AB Rubber.

The merchandise subject to this investigation is classified in the HTSUS at subheading 4002.59.0000. While the HTSUS subheading numbers are provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.

## Appendix II

**List of Topics Discussed in the Preliminary Decision Memorandum**

I. Summary
II. Background
III. Period of Investigation
IV. Discussion of the Methodology
V. Date of Sale
VI. Product Comparisons
VII. Constructed Export Price
VIII. Normal Value
IX. Preliminary Determination of Critical Circumstances
X. Currency Conversion
XI. Recommendation

[FR Doc. 2022–02112 Filed 2–1–22; 8:45 am]

**BILLING CODE 3510–DS–P**

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## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–201–855]**

### Acrylonitrile-Butadiene Rubber From Mexico: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

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

**SUMMARY:** The Department of Commerce (Commerce) preliminarily determines that acrylonitrile-butadiene rubber (AB rubber) from Mexico is being, or is likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is April 1, 2020, through March 31, 2021. Interested parties are invited to comment on this preliminary determination.

**DATES:** Applicable February 2, 2022.

**FOR FURTHER INFORMATION CONTACT:** Dennis McClure or Faris Montgomery, 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) 482–5973 or (202) 482–1537, respectively.

**SUPPLEMENTARY INFORMATION:**

### Background

This preliminary determination is 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 investigation on July 27, 2021.[1] On November 17, 2021, Commerce postponed the preliminary determination of this investigation and the revised deadline is now January 26, 2022.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II 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 Investigation

The product covered by this investigation is AB rubber from Mexico. For a complete description of the scope of this investigation, *see* Appendix I.

### Scope Comments

In accordance with the preamble to Commerce's regulations,[4] in the *Initiation Notice* Commerce set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice.* For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination, and accompanying analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum.[6] Based on Commerce's analysis of the parties' comments, Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

### Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Constructed export prices have been calculated in accordance with section 772(b) of the Act. Normal value (NV) is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

### All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act.

Commerce calculated an individual estimated weighted-average dumping margin for Industrias Negromex S.A. de C.V. (Negromex), the only individually examined exporter/producer in this investigation. Because the only individually calculated dumping margin is not zero, *de minimis,* or based entirely on facts otherwise available, the estimated weighted-average dumping margin calculated for Negromex is the margin assigned to all other producers and exporters, pursuant to section 735(c)(5)(A) of the Act.

### Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

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[1] *See Acrylonitrile-Butadiene Rubber from France, the Republic of Korea, and Mexico: Initiation of Less-Than-Fair-Value Investigations,* 86 FR 40192 (July 27, 2021) (*Initiation Notice*).

[2] *See Acrylonitrile-Butadiene Rubber from France, the Republic of Korea, and Mexico: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 86 FR 64185 (November 17, 2021).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Acrylonitrile-Butadiene Rubber from Mexico,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

[6] *See* Memorandum, ''Antidumping Duty Investigations of Acrylonitrile-Butadiene Rubber from France, the Republic of Korea, and Mexico: Preliminary Scope Decision Memorandum,'' dated concurrently with this preliminary determination (Preliminary Scope Decision Memorandum).

| Exporter/producer | Estimated weighted-average dumping margin (percent) |
|---|---|
| Industrias Negromex S.A. de C.V. | 18.43 |
| All Others | 18.43 |

## Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondent listed above will be equal to the company-specific estimated weighted-average dumping margin determined in this preliminary determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin. These suspension of liquidation instructions will remain in effect until further notice.

## Disclosure

Commerce intends to disclose its calculations and analysis performed to interested parties in this preliminary determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

## Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination. 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.

## Public Comment

The deadlines for the submission of case and rebuttal briefs with respect to scope issues are specified in the Preliminary Scope Decision Memorandum. Interested parties will be notified of the deadline for the submission of case briefs with respect to non-scope issues at a later date. Rebuttal briefs, limited to issues raised in non-scope-related case briefs, may be submitted no later than seven days after the deadline date for case briefs.[7] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[8] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation 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, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. 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 intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

## Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On January 7, 2022, pursuant to 19 CFR 351.210(e), Negromex requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[9] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) The preliminary determination is affirmative; (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination.

## International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

## Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act, and 19 CFR 351.205(c).

Dated: January 26, 2022.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix I

### Scope of the Investigation

The product covered by this investigation is commonly referred to as acrylonitrile butadiene rubber or nitrile rubber (AB

[7] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

[8] *See 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).

[9] *See* Negromex's Letter, ''Request to Postpone Final Determination,'' dated January 7, 2022.

Rubber). AB Rubber is a synthetic rubber produced by the emulsion polymerization of butadiene and acrylonitrile with or without the incorporation of a third component selected from methacrylic acid or isoprene. This scope covers AB Rubber in solid or non-aqueous liquid form. The scope also includes carboxylated AB Rubber.

Excluded from the scope of this investigation is AB Rubber in latex form (commonly classified under Harmonized Tariff Schedule of the United States (HTSUS) subheading 4002.51.0000). Latex AB Rubber is commonly either (a) acrylonitrile/butadiene polymer in latex form or (b) acrylonitrile/butadiene/methacrylic acid polymer in latex form. The broader definition of latex refers to a water emulsion of a synthetic rubber obtained by polymerization.

Also excluded from the scope of this investigation is: (a) AB Rubber containing additives incorporated during the compounding, mixing, molding, or use of AB Rubber comprising greater than twenty percent of the total weight of the product. Additives would include, but are not limited to, fillers (*e.g.* carbon black, silica, clay); reinforcement agents (*e.g.* fibers, carbon black, silica); vulcanization agents (*e.g.* sulfur, sulfur complexes, peroxide); or AB Rubber containing extension oils making up greater than forty percent of the total weight of the product. Such products would be generally classified under HTSUS subheading 4005; (b) AB Rubber containing polyvinyl chloride (PVC) making up greater than twenty percent of total weight of the product; (c) hydrogenated AB Rubber (commonly referred to as AB Rubber) produced by subsequent dissolution and hydrogenation of AB Rubber; (d) reactive liquid polymers containing acrylonitrile and butadiene with amine, epoxy, carboxyl or methacrylate vinyl chemical functionality.

Subject merchandise includes material matching the above description that has been finished, packaged, or otherwise processed in a third country, including by modifying physical form or packaging with another product, or performing any other finishing, packaging, or processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the AB Rubber.

The merchandise subject to this investigation is classified in the HTSUS at subheading 4002.59.0000. While the HTSUS subheading numbers are provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.

## Appendix II

### List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Discussion of the Methodology
V. Date of Sale
VI. Product Comparisons
VII. Constructed Export Price
VIII. Normal Value
IX. Currency Conversion
X. Recommendation

[FR Doc. 2022–02114 Filed 2–1–22; 8:45 am]

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## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–580–891]**

## Carbon and Alloy Steel Wire Rod From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2019–2020

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

**SUMMARY:** The Department of Commerce (Commerce) determines that POSCO, the sole producer and exporter subject to this review, made sales of subject merchandise at less than normal value during the period of review (POR), May 1, 2019, through April 30, 2020.

**DATES:** Applicable February 2, 2022.

**FOR FURTHER INFORMATION CONTACT:** Lingjun Wang, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2316.

**SUPPLEMENTARY INFORMATION:**

### Background

On August 4, 2021, Commerce published the *Preliminary Results* [1] of this administrative review. POSCO is the sole producer and exporter subject to the review. For a complete description of the events that followed the *Preliminary Results, see* the Issues and Decision Memorandum.[2] Commerce conducted this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

### Scope of the Order [3]

The scope of the *Order* includes certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, less than 19.00 mm in actual solid cross-sectional diameter. On April 8, 2019, Commerce excluded from the scope of the *Order* grade 1078 and higher tire cord quality wire rod used in the production of tire cord wire.[4] On June 13, 2019, Commerce excluded from the scope of the *Order* valve spring quality steel products defined as wire rod.[5] For a complete description of the scope of the *Order, see* the Issues and Decision Memorandum.

### Analysis of Comments Received

We addressed all issues raised in the case and rebuttal briefs in the Issues and Decision Memorandum. A list of these issues is attached in an appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

### Change Since the Preliminary Results

Based on our analysis of the comments received from interested parties, a review of the record, and for the reasons explained in the Issues and Decision Memorandum, we revised the general and administrative expenses ratio and changed the preliminary margin calculation.

### Final Results of the Review

We determine that the following weighted-average dumping margin exists for the period May 1, 2019, through April 30, 2020:

| Producer and/or Exporter | Weighted-Average Dumping Margin (percent) |
|---|---|
| POSCO | 7.46 |

### Disclosure

We intend to disclose the calculations performed for the final results within five days of the publication date of this notice in the **Federal Register**, in

[1] *See Carbon and Alloy Steel Wire Rod from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2019–2020,* 86 FR 41951 (August 4, 2021) (*Preliminary Results*).

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of Administrative Review of the Antidumping Duty Order on Carbon and Alloy Steel Wire Rod from the Republic of Korea; 2019–2020,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See Carbon and Alloy Steel Wire Rod from Italy, the Republic of Korea, Spain, the Republic of Turkey, and the United Kingdom: Antidumping Duty Orders and Amended Final Affirmative Antidumping Duty Determinations for Spain and the Republic of Turkey,* 83 FR 23417 (May 21, 2018) (*Order*).

[4] *See Carbon and Alloy Steel Wire Rod from the Republic of Korea and the United Kingdom: Notice of Final Results of Antidumping Duty Changed Circumstances Review,* 84 FR 13888 (April 8, 2019).

[5] *See Carbon and Alloy Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Changed Circumstances Review,* 84 FR 27582 (June 13, 2019).

accordance with section 751(a) of the Act and 19 CFR 351.224(b).

**Assessment Rates**

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b), Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review.[6] In accordance with 19 CFR 351.212(b)(1), Commerce calculated an importer-specific *ad valorem* antidumping assessment rate for POSCO that is not zero or *de minimis,* and will instruct CBP to assess antidumping duties on all appropriate entries covered by this review.

Consistent with Commerce's assessment practice, for entries of subject merchandise during the POR produced by POSCO for which it did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[7]

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 for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for POSCO is equal to the weighted-average dumping margin established in the final results of this review; (2) for previously investigated companies not participating in this review, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding; (3) if the exporter was not covered in this review or the investigation, but the producer was covered, the cash deposit rate will be the rate established in the most recently completed segment of this proceeding for the producer of subject merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 41.10 percent, the all-others rate established in the original less-than-fair-value investigation.[8] These cash deposit requirements, when imposed, shall remain in effect until further notice.

**Notification to Importers**

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

**Administrative Protective Order**

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

**Notification to Interested Parties**

We are issuing and publishing these final results in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(h) and 351.221(b)(5).

Dated: January 27, 2022.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix

**List of Topics Discussed in the Issues and Decision Memorandum**

I. Summary
II. Background
III. Scope of the Order
IV. Change Since the Preliminary Results
V. Discussion of Issues
Comment 1: Whether a Constructed Export Price (CEP) Offset is Warranted
Comment 2: Whether the POR is the Correct Reporting Period for Cost of Production
Comment 3: Whether Cost Adjustments for Purchases of Inputs from Affiliated Suppliers are Warranted
Comment 4: Whether Commerce Should Exclude Four Items from POSCO's General and Administrative Expenses (G&A) Ratio
VI. Recommendation

[FR Doc. 2022–02140 Filed 2–1–22; 8:45 am]

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[6] *See Antidumping Proceeding: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012).

[7] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[8] *See Order.*

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## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–979]**

### Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2018–2019; Correction

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

**ACTION:** Notice; correction.

**SUMMARY:** The Department of Commerce (Commerce) published a notice in the **Federal Register** of October 25, 2021, in which Commerce announced the final results of the 2018–2019 administrative review of the antidumping duty (AD) order on certain crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China (China). This notice inadvertently omitted Wuxi Suntech Power Co., Ltd/Luoyang Suntech Power Co., Ltd. from the list of companies with no shipments of subject merchandise to the United States during the period of review (POR).

**FOR FURTHER INFORMATION CONTACT:** Jeff Pedersen, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2769.

**SUPPLEMENTARY INFORMATION:**

**Correction**

In the **Federal Register** of October 25, 2021, in FR Doc 2021– 23181, on page 58872, in the first column, correct the sentence under the caption ''Final Determination of No Shipments'' by replacing the portion of the sentence after the last semicolon, which currently reads: ''and (3) Shanghai BYD Co., Ltd'' with ''(3) Shanghai BYD Co., Ltd.; and (4) Wuxi Suntech Power Co., Ltd/ Luoyang Suntech Power Co., Ltd.''

## Background

On October 25, 2021, Commerce published in the **Federal Register** the final results of the 2018–2019 administrative review of the AD order on certain crystalline silicon photovoltaic cells, whether or not assembled into modules, from China.[1] Commerce inadvertently omitted Wuxi Suntech Power Co., Ltd/Luoyang Suntech Power Co., Ltd. from the list of companies that did not ship subject merchandise to the United States during the POR.[2] We hereby notify the public that in the final results of 2018–2019 administrative review of the AD order on certain crystalline silicon photovoltaic cells, whether or not assembled into modules from China, Commerce continued to find that, during the POR, there were no entries of subject merchandise into the United States from, or exports or sales of subject merchandise to the United States by, Wuxi Suntech Power Co., Ltd/Luoyang Suntech Power Co., Ltd.[3] Therefore, Wuxi Suntech Power Co., Ltd/Luoyang Suntech Power Co., Ltd. should be included in the list of companies that did not ship subject merchandise to the United States during the POR.

## Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.221(b)(5).

Dated: January 27, 2022.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2022–02106 Filed 2–1–22; 8:45 am]

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[1] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2018–2019,* 86 FR 58871 (October 25, 2021).

[2] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Antidumping Administrative Review, and Preliminary Determination of No Shipments; 2018–2019,* 86 FR 21277 (April 22, 2021), and accompanying Preliminary Decision Memorandum at 5.

[3] *Id.*

# DEPARTMENT OF COMMERCE

## International Trade Administration

**[A–557–816]**

## Certain Steel Nails From Malaysia: Final Results of Antidumping Duty Administrative Review; 2019–2020

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

**SUMMARY:** The Department of Commerce (Commerce) determines that certain steel nails from Malaysia were not sold at less than normal value during the period of review (POR), July 1, 2019, through June 30, 2020.

**DATES:** Applicable February 2, 2022.

**FOR FURTHER INFORMATION CONTACT:** Preston Cox, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5041.

**SUPPLEMENTARY INFORMATION:**

## Background

On August 3, 2021, Commerce published the *Preliminary Results* of the 2019–2020 administrative review of the antidumping duty order on certain steel nails from Malaysia.[1] We invited interested parties to comment on the *Preliminary Results.*[2] On November 22, 2021, we extended the deadline for these final results until January 28, 2022.[3] This review covers one mandatory respondent: Region.[4] The producers/exporters not selected for individual examination are listed in the ''Final Results of the Administrative Review'' section of this notice. For a complete description of the events that followed the *Preliminary Results, see* the Issues and Decision Memorandum.[5] Commerce conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

## Scope of the Order

The products covered by the scope of the order are certain steel nails from Malaysia. For a complete description of the scope of this administrative review, *see* the Issues and Decision Memorandum.[6]

## Analysis of Comments Received

All issues raised in the case and rebuttal briefs filed by interested parties in this review are discussed in the Issues and Decision Memorandum. The Issues and 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 Issues and Decision Memorandum can be found at *https://access.trade.gov/public/FRNoticesListLayout.aspx.* A list of the topics included in the Issues and Decision Memorandum is attached as an appendix to this notice.

## Changes Since the Preliminary Results

Based on the comments received from interested parties regarding our *Preliminary Results,* and for the reasons explained in the Issues and Decision memorandum, we made no changes to the margin calculation methodology used in the *Preliminary Results;* however, we have changed the margin for these final results of review, as discussed in the Issues and Decision Memorandum.

## Rates for Non-Selected Respondents

The statute and Commerce's regulations do not address the establishment of a rate to be applied to companies not selected for individual 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

[1] *See Certain Steel Nails from Malaysia: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2019–2020,* 86 FR 41813 (August 3, 2021) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See Preliminary Results,* 86 FR at 41814.

[3] *See* Memorandum, ''Certain Steel Nails from Malaysia: Extension of Deadline for Final Results of Antidumping Duty Administrative Review; 2019–2020,'' dated November 22, 2021.

[4] Commerce continues to treat affiliates Region International Co. Ltd. and Region System Sdn. Bhd. (collectively, Region) as a collapsed single entity for the final results of this review. *See Preliminary Results* PDM at 5–6.

[5] *See* Memorandum, ''Decision Memorandum for the Final Results of the 2019–2020 Administrative Review of the Antidumping Duty Order on Certain Steel Nails from Malaysia,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[6] *See* Issues and Decision Memorandum at 2–4.

individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely {on the basis of facts available}.

For these final results, we have calculated a weighted-average dumping margin for Region that is zero or *de minimis,* and we have not calculated any margins which are not zero, *de minimis,* or determined entirely on the basis of facts available. Accordingly, we have assigned to the companies not individually examined a margin of zero percent.

## Final Results of the Administrative Review

We determine that the following estimated weighted-average dumping margins exist for the period July 1, 2019, through June 30, 2020:

| Producer/exporter | Estimated weighted-average dumping margin (percent) |
|---|---|
| Region International Co., Ltd. and Region System Sdn. Bhd | 0.00 |
| Inmax Sdn. Bhd. and Inmax Industries Sdn. Bhd[7] | 0.00 |
| Tag Fasteners Sdn. Bhd | 0.00 |

## Disclosure of Calculations

Normally, Commerce discloses to the parties in a proceeding the calculations performed in connection with the final results of review in accordance with 19 CFR 351.224(b). However, because Commerce made no adjustments to the margin calculation methodology used in the *Preliminary Results,* there are no calculations to disclose for the final results of review.

## Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act, and 19 CFR 351.212(b)(1), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. Because we calculated a margin for Region which is zero or *de minimis* in the final results of this review, we intend to instruct CBP to liquidate the appropriate entries without regard to antidumping duties. For the companies identified above that were not selected for individual examination, we will instruct CBP to liquidate entries at the rates established in these final results of review.

For entries of subject merchandise during the period of review produced by any of these companies for which it did not know its merchandise was destined for the United States, we will instruct CBP to liquidate such entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[8]

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). The final results of this administrative review shall be the basis for the assessment of antidumping duties on entries of merchandise under review and for future cash deposits of estimated antidumping duties, where applicable.

## Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication in the **Federal Register** of the notice of these final results for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2) of the Act: (1) The cash deposit rate for companies subject to this review will be equal to the company-specific weighted-average dumping margin established in the final results of the review; (2) for merchandise exported by producers or exporters 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 in the completed segment for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation but the producer has been covered in a prior completed segment of this proceeding, then the cash deposit rate will be the rate established in the completed segment for the most recent period for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 2.66 percent, the all-others rate established in the less-than-fair-value investigation.[9] These cash deposit requirements, when imposed, shall remain in effect until further notice.

## Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

## Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

## Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221.

Dated: January 26, 2022.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix

### List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Changes Since the Preliminary Results
V. Discussion of the Issues
  Comment 1: Application of Adverse Facts Available
  Comment 2: Clerical Error
  Comment 3: Correction to Draft Liquidation Instructions
VI. Recommendation

[FR Doc. 2022–02103 Filed 2–1–22; 8:45 am]

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[7] Commerce continues to treat Inmax Sdn. Bhd. and Inmax Industries Sdn. Bhd. as a collapsed single entity for the final results of this review. *See Preliminary Results,* 86 FR at 41814.

[8] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[9] *See Certain Steel Nails from Malaysia: Amended Final Determination of Sales at Less Than Fair Value,* 80 FR 34370 (June 16, 2015).

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–580–912]**

# Acrylonitrile-Butadiene Rubber From the Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, in Part, Postponement of Final Determination, and Extension of Provisional Measures

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

**SUMMARY:** The Department of Commerce (Commerce) preliminarily determines that acrylonitrile-butadiene rubber (AB rubber) from the Republic of Korea (Korea) is being, or is likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is April 1, 2020, through March 31, 2021. Interested parties are invited to comment on this preliminary determination.

**DATES:** Applicable February 2, 2022.

**FOR FURTHER INFORMATION CONTACT:** Melissa Kinter, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1413.

**SUPPLEMENTARY INFORMATION:**

## Background

This preliminary determination is 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 investigation on July 27, 2021.[1] On November 17, 2021, Commerce postponed the preliminary determination of this investigation and the revised deadline is now January 26, 2022.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II 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 Investigation

The product covered by this investigation is AB rubber from Korea. For a complete description of the scope of this investigation, *see* Appendix I.

## Scope Comments

In accordance with the preamble to Commerce's regulations,[4] in the *Initiation Notice* Commerce set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice.* For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination, and accompanying analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum.[6] Based on Commerce's analysis of the parties' comments, Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

## Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export price in accordance with section 772(a) of the Act. Normal value is calculated in accordance with section 773 of the Act. Furthermore, pursuant to section 776(a) and (b) of the Act, Commerce has preliminarily relied upon facts otherwise available to assign the estimated weighted-average dumping margin to mandatory respondent LG Chemical, Ltd. (LG Chem) because it did not submit a response to Commerce's antidumping duty questionnaire. Further, Commerce preliminarily determined that LG Chem failed to cooperate by not acting to the best of its ability to comply with a request for information and is using an adverse inference when selecting from among the facts otherwise available, in accordance with section 776(b) of the Act. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

## Preliminary Affirmative Determination of Critical Circumstances, in Part

In accordance with section 733(e) of the Act and 19 CFR 351.206, Commerce preliminarily finds that critical circumstances do not exist for Kumho Petrochemical Co., Ltd. (Kumho), but do exist for LG Chem and the companies covered by the all-others rate. For a full description of the methodology and results of Commerce's critical circumstances analysis, *see* the Preliminary Decision Memorandum.

## All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act.

In this investigation, Commerce preliminarily assigned a rate based entirely on facts available to LG Chem. Therefore, the only rate that is not zero, *de minimis* or based entirely on facts otherwise available is the rate calculated for Kumho. Consequently, the rate calculated for Kumho is also assigned as the rate for all other producers and exporters.

## Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

| Exporter/producer | Estimated weighted-average dumping margin (percent) |
|---|---|
| Kumho Petrochemical Co., Ltd. | 19.20 |
| LG Chemical, Ltd | 35.21 |
| All Others | 19.20 |

[1] *See Acrylonitrile-Butadiene Rubber from France, the Republic of Korea, and Mexico: Initiation of Less-Than-Fair-Value Investigations,* 86 FR 40192 (July 27, 2021) (*Initiation Notice*).

[2] *See Acrylonitrile-Butadiene Rubber from France, the Republic of Korea, and Mexico: Postponement of Preliminary Determinations of Antidumping Duty Investigations,* 86 FR 64185 (November 17, 2021).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Acrylonitrile-Butadiene Rubber from the Republic of Korea,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

[6] *See* Memorandum, ''Antidumping Duty Investigations of Acrylonitrile-Butadiene Rubber from France, the Republic of Korea, and Mexico: Preliminary Scope Decision Memorandum,'' dated concurrently with this preliminary determination (Preliminary Scope Decision Memorandum).

**Suspension of Liquidation**

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

Section 733(e)(2) of the Act provides that, given an affirmative determination of critical circumstances, any suspension of liquidation shall apply to unliquidated entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the later of (a) the date which is 90 days before the date on which the suspension of liquidation was first ordered, or (b) the date on which notice of initiation of the investigation was published. Commerce preliminarily finds that critical circumstances exist for imports of subject merchandise produced or exported by LG Chem and the companies covered by the all-others rate. In accordance with section 733(e)(2)(A) of the Act, the suspension of liquidation shall apply to unliquidated entries of shipments of subject merchandise from the producers or exporters identified in this paragraph that were entered, or withdrawn from warehouse, for consumption on or after the date which is 90 days before the publication of this notice. These suspension of liquidation instructions will remain in effect until further notice.

**Disclosure**

Commerce intends to disclose its calculations and analysis performed to interested parties in this preliminary determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

**Verification**

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination. 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.

**Public Comment**

The deadlines for the submission of case and rebuttal briefs with respect to scope issues are specified in the Preliminary Scope Decision Memorandum. Interested parties will be notified of the deadline for the submission of case briefs with respect to non-scope issues at a later date. Rebuttal briefs, limited to issues raised in non-scope-related case briefs, may be submitted no later than seven days after the deadline date for case briefs.[7] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[8] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation 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, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. 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, parties will be notified of the time and date for the hearing.[9]

**Postponement of Final Determination and Extension of Provisional Measures**

Section 735(a)(2) of the Act provides that a final determination may be postponed until no later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On January 14, 2022, pursuant to 19 CFR 351.210(e), Kumho requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[10] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) The preliminary determination is affirmative; (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination.

**International Trade Commission Notification**

In accordance with section 733(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

[7] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

[8] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020) (Temporary Rule); and *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[9] *See* 19 CFR 351.310(d).

[10] *See* Kumho's Letter, ''Request to Postpone the Final Determination,'' dated January 14, 2022.

## Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act, and 19 CFR 351.205(c).

Dated: January 26, 2022.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix I—Scope of the Investigation

The product covered by this investigation is commonly referred to as acrylonitrile butadiene rubber or nitrile rubber (AB Rubber). AB Rubber is a synthetic rubber produced by the emulsion polymerization of butadiene and acrylonitrile with or without the incorporation of a third component selected from methacrylic acid or isoprene. This scope covers AB Rubber in solid or non-aqueous liquid form. The scope also includes carboxylated AB Rubber.

Excluded from the scope of this investigation is AB Rubber in latex form (commonly classified under Harmonized Tariff Schedule of the United States (HTSUS) subheading 4002.51.0000). Latex AB Rubber is commonly either (a) acrylonitrile/butadiene polymer in latex form or (b) acrylonitrile/butadiene/methacrylic acid polymer in latex form. The broader definition of latex refers to a water emulsion of a synthetic rubber obtained by polymerization.

Also excluded from the scope of this investigation is: (a) AB Rubber containing additives incorporated during the compounding, mixing, molding, or use of AB Rubber comprising greater than twenty percent of the total weight of the product. Additives would include, but are not limited to, fillers (*e.g.* carbon black, silica, clay); reinforcement agents (*e.g.* fibers, carbon black, silica); vulcanization agents (*e.g.* sulfur, sulfur complexes, peroxide); or AB Rubber containing extension oils making up greater than forty percent of the total weight of the product. Such products would be generally classified under HTSUS subheading 4005; (b) AB Rubber containing polyvinyl chloride (PVC) making up greater than twenty percent of total weight of the product; (c) hydrogenated AB Rubber (commonly referred to as AB Rubber) produced by subsequent dissolution and hydrogenation of AB Rubber; (d) reactive liquid polymers containing acrylonitrile and butadiene with amine, epoxy, carboxyl or methacrylate vinyl chemical functionality.

Subject merchandise includes material matching the above description that has been finished, packaged, or otherwise processed in a third country, including by modifying physical form or packaging with another product, or performing any other finishing, packaging, or processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the AB Rubber.

The merchandise subject to this investigation is classified in the HTSUS at subheading 4002.59.0000. While the HTSUS subheading numbers are provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.

## Appendix II

**List of Topics Discussed in the Preliminary Decision Memorandum**

I. Summary
II. Background
III. Period of Investigation
IV. Application of Facts Available and Use of Adverse Inferences
V. Discussion of the Methodology
VI. Date of Sale
VII. Product Comparisons
VIII. Export Price
IX. Normal Value
X. Preliminary Determination of Critical Circumstances
XI. Currency Conversion
XII. Recommendation

[FR Doc. 2022–02113 Filed 2–1–22; 8:45 am]

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## DEPARTMENT OF COMMERCE

## National Institute of Standards and Technology

## Open Meeting of the Information Security and Privacy Advisory Board

**AGENCY:** National Institute of Standards and Technology, Department of Commerce.

**ACTION:** Notice of open meeting.

**SUMMARY:** The Information Security and Privacy Advisory Board (ISPAB) will meet Wednesday, March 09, 2022 and Thursday, March 10, 2022 from 10:00 a.m. until 4:30 p.m., Eastern Time. All sessions will be open to the public.

**DATES:** The meeting will be held on Wednesday, March 09, 2022 and Thursday, March 10, 2022 from 10:00 a.m. until 4:30 p.m., Eastern Time.

**ADDRESSES:** The meeting will be a virtual meeting via webinar. Please note admittance instructions under the **SUPPLEMENTARY INFORMATION** section of this notice.

**FOR FURTHER INFORMATION CONTACT:** Jeff Brewer, Information Technology Laboratory, National Institute of Standards and Technology, Telephone: (301) 975–2489, Email address: *jeffrey.brewer@nist.gov.*

**SUPPLEMENTARY INFORMATION:** Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C. App., notice is hereby given that the ISPAB will hold an open meeting Wednesday, March 09, 2022 and Thursday, March 10, 2022 from 10:00 a.m. until 4:30 p.m., Eastern Time. All sessions will be open to the public. The ISPAB is authorized by 15 U.S.C. 278g–4, as amended, and advises the National Institute of Standards and Technology (NIST), the Secretary of Homeland Security, and the Director of the Office of Management and Budget (OMB) on information security and privacy issues pertaining to Federal government information systems, including through review of proposed standards and guidelines developed by NIST. Details regarding the ISPAB's activities are available at *https://csrc.nist.gov/projects/ispab.*

The agenda is expected to include the following items:

—Briefing from NIST on recent activities from the Information Technology Laboratory,
—Presentation from NIST on the Artificial Intelligence Risk Management Framework,
—Discussion on Cryptographic Brittleness and issues in implementations,
—Presentation from NIST on Open Source Cybersecurity Assessment Language (OSCAL),
—Discussion on the United States Government participation in National and International Standards Development Organizations,
—Briefing on NIST Cybersecurity Updates,
—Public Comments.

Note that agenda items may change without notice. The final agenda will be posted on the ISPAB event page at: *https://csrc.nist.gov/Events/2022/ispab-march-2022-meeting.*

*Public Participation:* Written questions or comments from the public are invited and may be submitted electronically by email to Jeff Brewer at the contact information indicated in the **FOR FURTHER INFORMATION CONTACT** section of this notice by 5 p.m. on Tuesday, March 08, 2022.

The ISPAB agenda will include a period, not to exceed thirty minutes, for submitted questions or comments from the public between 3:30 p.m. and 4:00 p.m. on Wednesday, March 09, 2022. Submitted questions or comments from the public will be selected on a first-come, first-served basis and limited to five minutes per person.

Members of the public who wish to expand upon their submitted statements, those who had wished to submit a question or comment but could not be accommodated on the agenda, and those who were unable to attend the meeting via webinar are invited to submit written statements. In addition, written statements are invited and may be submitted to the ISPAB at any time. All written statements should be directed to the ISPAB Secretariat, Information Technology Laboratory by email to: *Jeffrey.Brewer@nist.gov.*

*Admittance Instructions:* All participants will be attending via webinar and must register via the

instructions found on ISPAB's event page at: *https://csrc.nist.gov/Events/2022/ispab-march-2022-meeting* by 5 p.m. Eastern Time, Tuesday, March 08, 2022.

**Alicia Chambers,**

*NIST Executive Secretariat.*

[FR Doc. 2022–02064 Filed 2–1–22; 8:45 am]

**BILLING CODE 3510–13–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XB506]**

### Determination of Overfishing or an Overfished Condition

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

**ACTION:** Notice.

**SUMMARY:** This notice announces that NMFS, acting on behalf of the Secretary of Commerce (Secretary), has found that Northwest Atlantic porbeagle is still overfished.

**FOR FURTHER INFORMATION CONTACT:** Kathryn Frens, (301) 427–8523.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 304(e)(2) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1854(e)(2), NMFS, on behalf of the Secretary, must publish a notice in the **Federal Register** whenever it determines that a stock or stock complex is subject to overfishing, overfished, or approaching an overfished condition.

NMFS has determined that Northwest Atlantic porbeagle is still overfished. This determination is based on the most recent assessment, conducted in 2020 and using data through 2018, which indicates that this stock is overfished because the biomass is below the threshold. NMFS manages Northwest Atlantic porbeagle sharks under the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan and its amendments. NMFS continues to work with the International Commission for the Conservation of Atlantic Tunas to rebuild this stock through an international rebuilding program.

Dated: January 28, 2022.

**Ngagne Jafnar Gueye,**

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

[FR Doc. 2022–02156 Filed 2–1–22; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XB765]**

### Western Pacific Fishery Management Council; Public Meetings

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

**ACTION:** Notice of public meetings.

**SUMMARY:** The Western Pacific Fishery Management Council (Council) will hold meetings of its Archipelagic Plan Team (APT) by web conference to discuss fishery management issues and develop recommendations for future management of fisheries in the Western Pacific Region.

**DATES:** The APT will meet on Wednesday, February 16, 2022, between 1 p.m. and 4 p.m., Hawaii Standard Time (HST). For specific times and agendas, see **SUPPLEMENTARY INFORMATION**.

**ADDRESSES:** Audio and visual portions for Archipelagic Plan Team meeting can be accessed at: *https://wprfmc.webex.com/wprfmc/j.php?MTID=m379247624d6bec8c8f40ed3a14c8d5fb.* Web conference access information and instructions for providing public comments will be posted on the Council website at *www.wpcouncil.org.* For assistance with the web conference connection, contact the Council office at (808) 552–8220.

**FOR FURTHER INFORMATION CONTACT:** Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council; phone: (808) 522–8220 (voice) or (808) 522–8226 (fax).

**SUPPLEMENTARY INFORMATION:** The APT meeting will be held on February 16, 2022, from 1 p.m. to 4 p.m. Hawaii Standard Time (HST) (noon to 3 p.m. Samoa Standard Time (SST); 9 a.m. to 12 p.m. on February 17, 2022, Chamorro Standard Time (ChST)). Opportunities to present oral public comment will be provided throughout the agendas. The order of the agenda may change, and will be announced in advance at the meetings. The meetings may run past the scheduled times noted above to complete scheduled business.

#### Agenda for the Archipelagic Plan Team Meeting

*Wednesday, February 16, 2022, 1 p.m.–4 p.m. HST (noon–3 p.m. SST; Thursday, February 17, 2022, 9 a.m.–12 p.m. ChST)*

1. Welcome and Introductions
2. Approval of Draft Agenda & Assignment of Rapporteurs
3. Analysis of Available Data for the Reclassification of the Territory Bottomfish Management Unit Species (BMUS) Complex
4. Developing the Options for the Reclassification of the Territorial BMUS
5. Review of the Non-Commercial Module for the Annual Stock Assessment Fishery Evaluation Report
6. Public Comment
7. Other Business
8. Plan Team Discussion and Recommendations

#### Special Accommodations

These meetings are accessible to people with disabilities. Please direct requests for sign language interpretation or other auxiliary aids to Kitty M. Simonds (see **FOR FURTHER INFORMATION CONTACT** section above) at least 5 days prior to the meeting date.

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

Dated: January 27, 2022.

**Tracey L. Thompson,**

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

[FR Doc. 2022–02087 Filed 2–1–22; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Draft Revised Management Plan for the Grand Bay National Estuarine Research Reserve

**AGENCY:** Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

**ACTION:** Request for comments on draft revised management plan.

**SUMMARY:** The National Oceanic and Atmospheric Administration (NOAA) is soliciting comments from the public regarding a proposed revision of the management plan for the Grand Bay National Estuarine Research Reserve. A management plan provides a framework for the direction and timing of a reserve's programs; allows reserve managers to assess a reserve's success in meeting its goals and to identify any necessary changes in direction; and is used to guide programmatic evaluations of the reserve. Plan revisions are required of each reserve in the National Estuarine Research Reserve System at least every five years. This revised plan

is intended to replace the plan approved in 2018.

**DATES:** Comments are due by March 4, 2022.

**ADDRESSES:** The draft revised management plan is available at: *grandbaynerr.org/reserve-management-plan/,* or by emailing Matt Chasse of NOAA's Office for Coastal Management at *matt.chasse@noaa.gov.*

You may submit comments by the following method:

*Electronic Submission:* Submit all electronic public comments by email to *matt.chasse@noaa.gov* and *ayesha.gray@dmr.ms.gov.* Include ''Comments on draft Grand Bay Reserve Management Plan'' in the message's subject line.

**FOR FURTHER INFORMATION CONTACT:** Matt Chasse of NOAA's Office for Coastal Management at *matt.chasse@noaa.gov* or (240) 628–5417.

**SUPPLEMENTARY INFORMATION:** Pursuant to 15 CFR 921.33(c), a State must revise the management plan for the research reserve at least every five years. If approved by NOAA, the Grand Bay Reserve's revised plan will replace the plan previously approved in 2013.

The draft revised management plan outlines the reserve's strategic goals and objectives; administrative structure; programs for conducting research and monitoring, education, and training; resource protection, restoration, and manipulation plans; public access and visitor use plans; consideration for future land acquisition; and facility development to support reserve operations. In particular, this draft of the revised management plan focuses on addressing specific research priorities, including restoration effectiveness monitoring; understating physical and hydrological processes within the reserve; sources and impacts of contaminants; and the socio-economic impacts of ecosystem restoration. There is also an added focus related to monitoring programs as a valued regional and national reference site through the use of abiotic parameters, sentinel sites, atmospheric mercury, and restoration monitoring. Furthermore, the plan prioritizes improving public access and the visitor experience through enhanced trail and debris management efforts, and a greater focus on habitat restoration, especially upland habitats (*e.g.,* wet pine savannas and flatwoods) and along the marsh upland interface. Much of the effort in this plan is linked to the multi-year Grand Bay Land Acquisition and Habitat Management project. The reserve will also pursue research designed to protect shorelines and re-establish viable oyster populations in this area of the Mississippi coast. Another priority identified in the plan calls for reserve investments in the maintenance and upgrade of the existing facilities and monitoring infrastructure.

The reserve's training program will design trainings around priority issues, such as invasive species, habitat restoration, coastal and estuarine processes, marsh and uplands ecology, coastal habitats, sea level rise, and community resilience. A new focus area of the reserve identified in the plan is the transfer of skills and knowledge relating to flood mitigation to nearby disadvantaged communities. Education programming will have a continued emphasis on place-based learning for students, teachers, non-traditional audiences (*i.e.,* artists, veterans, seniors and others). New programs will be added to target non-traditional reserve audiences, such as, pre-K students, people with disabilities, seniors, and other groups. These new programs will create opportunities for people who do not typically use the reserve or participate in reserve events.

Reserve research continues to generate peer-reviewed and published research about the estuary. The reserve has expanded its role in restoring coastal habitats through the Natural Resource Damage Assessment funded 'Land Acquisition and Habitat Management Project' in areas adjacent to the reserve. Reserve research and monitoring capabilities have also been integrated into habitat restoration projects and bring a new level of monitoring effectiveness for this type of project. In recent years, the reserve's monitoring efforts have confirmed the nitrogen limitations of the estuary, contributed to a national analyses of sediment elevation table data, and helped create digital elevation models for the reserve's sentinel sites.

The reserve successfully conducted a 2019 assessment of municipal officials that identified priorities for coastal training programming. These results were incorporated into the revised plan. In addition to success of the K–12 student-focused 'On the Road' program, the reserve has emphasized place-based learning opportunities for the public, K–12 students, teachers, and non-traditional audiences (*i.e.,* artists, veterans, seniors, pre-K students, people with disabilities, and other non-traditional groups). Engaging with non-traditional audiences has been a successful endeavor for this reserve.

Since the last management plan, the reserve has prioritized the comprehensive management of upland and estuarine resources at a landscape scale. Public trails were created or maintained, and boat access was improved. The reserve has actively used fire management to restore wet pine savanna in collaboration with State and Federal partners. The revised management plan, once approved, would serve as the guiding document for the 18,049-acre research reserve for the next five years.

NOAA's Office for Coastal Management analyzes the environmental impacts of the proposed approval of this draft revised management plan in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4332(2)(C), and the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA (40 CFR 1500–1508). The public is invited to comment on the draft revised management plan. NOAA will take these comments into consideration in deciding whether to approve the draft revised management plan in whole or in part.

(Authority: 16 U.S.C. 1451 *et seq.;* 15 CFR 921.33.)

**Keelin S. Kuipers,**

*Deputy Director, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration.*

[FR Doc. 2022–02074 Filed 2–1–22; 8:45 am]

**BILLING CODE 3510–NK–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XB774]**

### Endangered Species; File No. 25602

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

**ACTION:** Notice; withdrawal of application.

**SUMMARY:** Notice is hereby given that Coonamessett Farm Foundation, Inc., 277 Hatchville Road, East Falmouth, MA 02536 (Responsible Party: Ronald Smolowitz) has withdrawn its application for a permit to conduct research on leatherback sea turtles (*Dermochelys coriacea*) and unidentified sea turtles.

**ADDRESSES:** The application and related documents are available for review upon written request via email to *NMFS.Pr1Comments@noaa.gov.*

**FOR FURTHER INFORMATION CONTACT:** Amy Hapeman or Erin Markin, (301) 427–8401.

**SUPPLEMENTARY INFORMATION:** On July 20, 2021, notice was published in the **Federal Register** (86 FR 38296) that a request for a permit to conduct research on leatherback and unidentified sea turtles had been submitted by the above-named applicant. The applicant has withdrawn the application from further consideration.

Dated: January 27, 2022.

**Julia M. Harrison,**

*Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2022–02117 Filed 2–1–22; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XB302]**

### Draft 2021 Marine Mammal Stock Assessment Reports; Correction

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

**ACTION:** Notice; correction.

**SUMMARY:** NMFS published a document in the **Federal Register** on October 25, 2021 requesting comments on the Draft 2021 Marine Mammal Stock Assessment Reports. The document contained incorrect link for submitting electronic comments.

**DATES:** Comments must be received by February 16, 2022.

**FOR FURTHER INFORMATION CONTACT:** Dr. Zachary Schakner, Office of Science and Technology, 301–427–8106, *Zachary.Schakner@noaa.gov.*

**SUPPLEMENTARY INFORMATION:**

#### Correction

In the **Federal Register** of October 25, 2021 (86 FR 58887), in FR Doc 2021–23225 on page 58887 in the second column, correct the '*electronic submission*' directions to read:

You may submit comments or new information, identified by NOAA–NMFS–2022–0013, through the Federal e-Rulemaking Portal:

*Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2022–0013 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.

Dated: January 27, 2022.

**Evan Howell,**

*Director, Office of Science and Technology, National Marine Fisheries Service.*

[FR Doc. 2022–02102 Filed 2–1–22; 8:45 am]

**BILLING CODE 3510–22–P**

## BUREAU OF CONSUMER FINANCIAL PROTECTION

**[Docket No.: CFPB–2022–0003]**

### Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Request for public comment.

**SUMMARY:** The Consumer Financial Protection Bureau (Bureau or CFPB) is seeking comments from the public related to fees that are not subject to competitive processes that ensure fair pricing. The submissions to this request for information will serve to assist the CFPB and policymakers in exercising its enforcement, supervision, regulatory, and other authorities to create fairer, more transparent, and competitive consumer financial markets.

**DATES:** Comments must be received on or before March 31, 2022.

**ADDRESSES:** You may submit comments, identified by Docket No. CFPB–2022–0003, by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: CFPB_FederalRegisterComments@cfpb.gov.* Include Docket No. CFPB–2022–0003 in the subject line of the message.
- *Mail/Hand Delivery/Courier:* Comment Intake—Fee Assessment, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552. Please note that due to circumstances associated with the COVID–19 pandemic, the CFPB discourages the submission of comments by hand delivery, mail, or courier.

*Instructions:* The CFPB encourages the early submission of comments. All submissions should include document title and docket number. Because paper mail in the Washington, DC area and at the CFPB is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *https://www.regulations.gov.* In addition, once the CFPB's headquarters reopens, comments will be available for public inspection and copying at 1700 G Street NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. At that time, you can make an appointment to inspect the documents by telephoning 202–435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Comments will not be edited to remove any identifying or contact information.

**FOR FURTHER INFORMATION CONTACT:** Brian Shearer, Senior Advisor; Grace Bouwer, Advisor, Public Engagement, Director's Front Office, Office of the Director at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Consumers can only realize the benefits of competition if companies transparently advertise the true price of their products or services, and the full price is subject to the competitive process. Both empirical studies and theoretical models suggest that when companies use hidden back-end fees—which are mandatory or quasi-mandatory fees added at some point in the transaction after a consumer has chosen the product or service based on a front-end price—it can lure consumers into making purchasing decisions based on a perceived lower price.[1] In addition, when a company charges for individual activities that are typical attributes of a product or service, it can give the company the power to substantially overcharge for those activities because consumers are not choosing a provider at the time they choose to engage in the activity. Well-known examples of such ''junk fees'' include resort fees added to hotel bills and service fees added to concert ticket prices. Government agencies and economists have raised concerns about the ways in which America's growing ''fee economy'' undermines competition.[2]

[1] *https://www.ucl.ac.uk/~uctpbwa/papers/price-framing.pdf; https://pages.stern.nyu.edu/~xgabaix/papers/shrouded.pdf.*

[2] *https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/hiddenfeesreport_12282016.pdf.*

The Consumer Financial Protection Act (CFPA) directs the CFPB to enforce Federal consumer law for the purpose of ensuring consumer financial markets are fair, transparent, and competitive.[3] The CFPB has grown increasingly concerned that consumer finance has become part of this ''fee economy.'' Exploitative junk fees charged by banks and non-bank financial institutions have become widespread, with the potential effect of shielding substantial portions of the true price of consumer financial products and services from competition. The CFPB is concerned about fees that far exceed the marginal cost of the service they purport to cover, implying that companies are not just shifting costs to consumers, but rather, taking advantage of a captive relationship with the consumer to drive excess profits. Excessive and exploitative fees, whether predictable and transparent to the customer or not, can add up and pose significant costs to people, especially those with low wealth and income.

Many Americans have experienced inflated or surprise fees that, however nominally voluntary, are not meaningfully avoidable or negotiable in the moment. These fees in consumer finance can take many forms: Penalty fees such as late fees, overdraft fees, non-sufficient funds (NSF) fees, convenience fees for processing payments, minimum balance fees, return item fees, stop payment fees, check image fees, fees for paper statements, fees to replace a card, fees for out-of-network ATMs, foreign transaction fees, ACH transfer fees, wire transfer fees, account closure fees, inactivity fees, fees to investigate fraudulent activity, ancillary fees in the mortgage closing process, and more. These fees have become the norm among financial services that Americans rely on every day, and a substantial amount of the revenue earned by financial services companies comes from these fees. The following are a few examples from select products and markets:

Deposit Accounts. The price of a deposit account is made up of, among other fees, account maintenance fees, minimum balance fees, savings transfer fees, NSF fees, overdraft fees, and ATM fees. Overdraft and NSF fees are back-end fees that make up the majority of total revenue banks derive from deposit accounts. Overdraft and NSF fees exceeded $15.4 billion in 2019.[4] By comparison, banks make only about $1 billion annually in account maintenance fees. Since the back-end fees are the bulk of the price, there is effectively no price competition amongst the major banks for deposit accounts. Only recently have companies started to substantially vary their overdraft practices. This is of course a positive development, but these changes will not reverse the trend of pricing deposit accounts primarily through back-end fees.

Credit Cards. Fees represent about 20% of the total cost of credit cards. Card issuers charged $23.6 billion in fees in 2019 alone and nearly $14 billion of those fees were late fees not subject to competitive pricing pressure.[5] Nearly every bank charges the same for late fees—the maximum allowed by law of $30 for the first late payment and $41 for subsequent late payments—and the average late fee has increased to $31, nearing the average of $33 before the Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009.[6]

Remittances and Payments. Financial institutions charge ''convenience'' fees on payment transfers, return item fees, stop payment fees, check image fees, online or telephone bill pay fees, ACH transfer fees, and wire transfer fees. International transfers are subject to a significant number of fees as well. In 2017, after observing many abuses, the CFPB issued a Compliance Bulletin on unfair, deceptive, and abusive acts or practices relating to fees for making payments over the telephone, and potential violations of the Fair Debt Collection Practices Act (FDCPA).[7] These kinds of convenience fees are still common.

Prepaid Accounts. Prepaid cards represent a way for many unbanked consumers and individuals with limited resources to have access to basic financial services—yet many accounts carry fee structures that make it challenging for consumers to pick the right product based on their needs. Consumers frequently select a product based on a monthly rate only to find out that the ''add-on'' fees for regular activities such as transaction fees, cash reload fees, balance-inquiry fees, inactivity fees, monthly service fees, and card cancellation fees, among others, overshadow the quoted monthly charge.

Mortgages. Mortgages facilitate homeownership for millions of people, and, through homeownership, allow millions of families to build and maintain intergenerational wealth. But priced into most mortgages are thousands of dollars in application fees and closing costs, which few people are well-positioned to shop on. These fees can act as a barrier to homeownership, strip wealth from homeowners accessing their equity through refinancing or home sales, and deter some homeowners from refinancing when doing so would lower total housing costs and be financially advantageous. Advocates and reporters have noted that many closing costs, like title insurance,[8] may not always be subject to standard or appropriate competitive forces. Even aside from inflated and padded fees rolled into the mortgage at closing, homeowners can find themselves forced to pay fees for making payments over the phone or online or even for the servicer's bill pay service. Borrowers who face financial hardship and struggle to make mortgage payments can find themselves unable to catch up due to the snowballing of a plethora of fees related to the mortgage delinquency. Monthly property inspection fees, new title fees, legal fees, appraisals and valuations, broker price opinions, force-placed insurance, foreclosure fees, and miscellaneous, unspecified ''corporate advances'' can all price a homeowner out of a home.

Other Loans. The CFPB is interested in other loan origination and loan servicing fees, including for student loans, auto loans, installment loans, payday loans, and other types of loans. For example, some servicers charge fees to reschedule payment dates or make online or phone payments. Loan originators often charge application fees and some even charge to receive loan proceeds in an expedited manner.

## II. Request for Comment

This request for information seeks information from the public on how junk fees—exploitative, back-end, hidden, or excessive fees—have impacted peoples' lives. The CFPB is particularly interested in hearing from individuals (including older consumers, students, servicemembers, consumers of color, and lower-income consumers), social services organizations, consumer rights and advocacy organizations, legal

[3] 12 U.S.C. 5511(a).

[4] *https://www.consumerfinance.gov/about-us/newsroom/cfpb-research-shows-banks-deep-dependence-on-overdraft-fees/.*

[5] *https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf,* at 46.

[6] *https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf,* at 54–57.

[7] CFPB Compliance Bulletin 2017–01, Phone Pay Fees (July 31, 2017), *available at https://files.consumerfinance.gov/f/documents/201707_cfpb_compliance-bulletin-phone-pay-fee.pdf.*

[8] *https://www.nclc.org/images/pdf/foreclosure_mortgage/archive/title_insurance_testimony042606.pdf; https://www.texasobserver.org/entitled-to-profit-in-texas-title-insurance-is-a-total-scam/.*

aid attorneys, academics and researchers, small businesses, financial institutions, and state and local government officials.

The CFPB welcomes stakeholders to submit stories, data, and information about fees. To assist commenters in developing responses, the CFPB has crafted the below questions that commenters may answer. However, the CFPB is interested in receiving any comments relating to fees in consumer finance.

1. If you are a consumer, please tell us about your experiences with fees associated with your bank, credit union, prepaid or credit card account, credit card, mortgage, loan, or payment transfers, including:

a. Fees for things you believed were covered by the baseline price of a product or service.

b. Unexpected fees for a product or service.

c. Fees that seemed too high for the purported service.

d. Fees where it was unclear why they were charged.

2. What types of fees for financial products or services obscure the true cost of the product or service by not being built into the upfront price?

3. What fees exceed the cost to the entity that the fee purports to cover? For example, is the amount charged for NSF fees necessary to cover the cost of processing a returned check and associated losses to the depository institution?

4. What companies or markets are obtaining significant revenue from back-end fees, or consumer costs that are not incorporated into the sticker price?

5. What obstacles, if any, are there to building fees into up-front prices consumers shop for? How might this vary based on the type of fee?

6. What data and evidence exist with respect to how consumers consider back-end fees, both inside and outside of financial services?

7. What data and evidence exist that suggest that consumers do, or do not, understand fee structures disclosed in fine-print or boilerplate contracts?

8. What data and evidence exist that suggest that consumers do or do not make decisions based on fees, even if well disclosed and understood?

9. What oversight and/or policy tools should the CFPB use to address the escalation of excessive fees or fees that shift revenue away from the front-end price?

**Rohit Chopra,**

*Director, Bureau of Consumer Financial Protection.*

[FR Doc. 2022–02071 Filed 2–1–22; 8:45 am]

BILLING CODE 4810–AM–P

## BUREAU OF CONSUMER FINANCIAL PROTECTION

**[Docket No. CFPB–2022–0007]**

## Agency Information Collection Activities: Comment Request

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Notice and request for comment.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (PRA), the Consumer Financial Protection Bureau (CFPB or Bureau) is publishing this notice seeking comment on a Generic Information Collection titled ''Financial Well-Being Scale Malleability Survey'' prior to requesting the Office of Management and Budget's (OMB's) approval of this collection under the Generic Information Collection ''Generic Information Collection Plan for Studies of Consumers using Controlled Trials in Field and Economic Laboratory Settings'' under OMB Control Number 3170–0048.

**DATES:** Written comments are encouraged and must be received on or before March 4, 2022 to be assured of consideration.

**ADDRESSES:** You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: PRA_Comments@cfpb.gov.* Include Docket No. CFPB–2022–0007 in the subject line of the email.
- *Mail/Hand Delivery/Courier*: Comment Intake, Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552.

Please note that due to circumstances associated with the COVID–19 pandemic, the Bureau discourages the submission of comments by mail, hand delivery, or courier. Please note that comments submitted after the comment period will not be accepted. In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

**FOR FURTHER INFORMATION CONTACT:** Documentation prepared in support of this information collection request is available at *www.regulations.gov.* Requests for additional information should be directed to Anthony May, Paperwork Reduction Act Officer, at (202) 841–0544, or email: *CFPB_PRA@cfpb.gov.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.* Please do not submit comments to these email boxes.

**SUPPLEMENTARY INFORMATION:**

*Title of Collection:* Financial Well-Being Scale Malleability Survey.

*OMB Control Number:* 3170–0048.

*Type of review:* Submission of an IC under a generic information collection.

*Affected Public:* Individuals.

*Estimated Number of Respondents:* 4,000.

*Estimated Total Annual Burden Hours:* 1,000.

*Abstract:* The proposed research examines the malleability of individuals' responses to CFPB's Financial Well-Being Scale and/or changes to attitudes and behaviors based on completion of the scale. Financial practitioners and researchers use the CFPB Financial Well-Being Scale to measure financial well-being. This experiment will illustrate whether completion of the Financial Well-Being Scale immediately after using a financial tool (*e.g.,* creating a budget) results in either higher or lower Financial Well-Being scores than completing the Scale without such a tool. The experiment will also test the robustness of the type of instrument used by testing both versions of the instrument (the five item Financial Well-Being Scale and the 10 item Financial Well-Being Scale). A maximum of 4,000 participants will be recruited from the panel maintained by the Understanding America Study (UAS) to complete the Financial Well-Being Scale Malleability Survey. The Bureau will collect information on financial well-being and information related to the budgeting tool including an assessment of the respondent's experience using the tool, estimates of monthly income and spending, as well as questions about financial goals, budgeting, self-efficacy, and willingness to use such a tool in the future. The CFPB will not receive any personal identifiable information (PII).

*Request for Comments:* The Bureau is publishing this notice and soliciting comments on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be

collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be submitted to OMB as part of its review of this request. All comments will become a matter of public record.

**Anthony May,**

*Paperwork Reduction Act Officer, Consumer Financial Protection Bureau.*

[FR Doc. 2022–02090 Filed 2–1–22; 8:45 am]

**BILLING CODE 4810–AM–P**

## DEPARTMENT OF EDUCATION

### Applications for New Awards; Fulbright-Hays Doctoral Dissertation Research Abroad Fellowship Program

**AGENCY:** Office of Postsecondary Education, Department of Education.

**ACTION:** Notice.

**SUMMARY:** The Department of Education is issuing a notice inviting applications for fiscal year (FY) 2022 for the Fulbright-Hays Doctoral Dissertation Research Abroad (DDRA) Fellowship Program, Assistance Listing Number 84.022A. This notice relates to the approved information collection under OMB control number 1840–0005.

**DATES:**

*Applications Available:* February 2, 2022.

*Deadline for Transmittal of Applications:* April 6, 2022.

*Pre-Application Webinar information:* The Department will hold a pre-application meeting via webinar for prospective applicants. Detailed information regarding this webinar will be provided on the Doctoral Dissertation Research Abroad website at *https://www2.ed.gov/programs/iegpsddrap/applicant.html.* Additional information for new potential grantees who are unfamiliar with grantmaking at the Department may read about the discretionary grant process and funding basics resources at *https://www2.ed.gov/documents/funding-101/funding-101-basics.pdf (Funding 101 Basics).*

**ADDRESSES:** The addresses pertinent to this competition—including the addresses for obtaining and submitting an application—can be found under **SUPPLEMENTARY INFORMATION.**

**FOR FURTHER INFORMATION CONTACT:** Amy Marrion, U.S. Department of Education, 400 Maryland Avenue SW, Room 258–24, Washington, DC 20202. Telephone: (202) 453–5628. Email: *DDRA@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:**

**Full Text of Announcement**

**I. Funding Opportunity Description**

*Purpose of Program:* The Fulbright-Hays DDRA Fellowship Program provides opportunities for doctoral students to engage in dissertation research abroad in modern foreign languages and area studies. The program is designed to contribute to the development and improvement of the study of modern foreign languages and area studies in the United States.

*Priorities:* This notice contains one absolute priority and three competitive preference priorities. In accordance with 34 CFR 75.105(b)(2)(ii), the Absolute Priority and Competitive Preference Priorities 1 and 2 are from the regulations for this program (34 CFR 662.21(d)). Competitive Preference Priority 3 is from the Secretary's Notice of Final Supplemental Priorities and Definitions for Discretionary Grant Programs, published in the **Federal Register** on December 10, 2021 (86 FR 70612) (Supplemental Priorities).

*Absolute Priority:* For FY 2022, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

*Specific Geographic Regions of the World.*

A research project that focuses on one or more of the following geographic areas: Africa, East Asia, Southeast Asia and the Pacific Islands, South Asia, the Near East, Central and Eastern Europe and Eurasia, and the Western Hemisphere (excluding the United States and its territories).

*Competitive Preference Priorities:* For FY 2022, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award an additional two points to an application that meets Competitive Preference Priority 1; an additional two points to an application that meets Competitive Preference Priority 2; and an additional two points to an application that meets Competitive Priority 3 (up to 6 additional points possible).

These priorities are:

*Competitive Preference Priority 1—Focus on Less Commonly Taught Languages (2 points).*

A research project that focuses on any modern foreign language except French, German, or Spanish.

*Competitive Preference Priority 2—Thematic Focus on Academic Fields (2 points).*

Applications that propose dissertation research projects in modern foreign languages and area studies with an academic focus on any of the following academic fields: Science (including climate change), technology, engineering (including infrastructure studies), mathematics, computer science, education (comparative or international), international development, political science, public health (including epidemiology), or economics.

*Competitive Preference Priority 3—Promoting Equity in Student Access to Educational Resources and Opportunities (2 points).*

Projects implemented by one of the following entities:

- Historically Black colleges and universities (as defined in this notice);
- Minority-serving institutions (as defined in this notice); or
- Tribal colleges and universities (as defined in this notice).

*Definitions:* The following definitions are from the Supplemental Priorities, to provide clarity for applicants addressing Competitive preference Priority 3.

*Historically Black colleges and universities* means colleges and universities that meet the criteria set out in 34 CFR 608.2.

*Minority-serving institutions* means an institution that is eligible to receive assistance under sections 316 through 320 of part A of title III, under part B of title III, or under title V of the Higher Education Act of 1965 (HEA).

*Tribal colleges or universities* has the meaning ascribed it in section 316(b)(3) of the HEA.

*Program Authority:* 22 U.S.C. 2452(b)(6).

*Note:* Projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in Federal civil rights laws.

*Applicable Regulations:* (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for this program in 34

CFR part 662. (e) The Supplemental Priorities.

*Note:* The open licensing requirement in 2 CFR 3474.20 does not apply to this program.

## II. Award Information

*Type of Award:* Discretionary grants redistributed as fellowships to individual beneficiaries.

*Note:* The Administration has requested $8,811,000 for awards under the Fulbright-Hays Overseas program for FY 2022, of which the DDRA Fellowship Program is one part; we intend to use an estimated $4,153,390 for this DDRA competition. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process before the end of the current fiscal year if Congress appropriates funds for this program.

*Estimated Available Funds:* $4,153,390.

*Estimated Range of Awards:* $15,000–$60,000.

*Estimated Average Size of Awards:* $46,000.

*Estimated Number of Awards:* 90.

*Note:* The Department is not bound by any estimates in this notice.

*Project Period:* The institutional project period is 18 months. Doctoral students may request funding for a period of no less than six months and no more than 12 months.

## III. Eligibility Information

1. *Eligible Applicants:* Institutions of higher education (IHEs). Eligible doctoral students submit their individual research narratives and forms to the project director at their home IHE, who then compiles the doctoral student submissions and incorporates them into the institutional grant application that is submitted electronically to the Department through the G5 system.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application.

4. *Other:* Under 34 CFR 662.22(b), no DDRA Fellowship Program applicant concurrently may receive a grant from the Fulbright U.S. Student Program (FUSP) and a grant from the Fulbright-Hays DDRA Fellowship Program. For this reason, when applying for a grant under the Fulbright-Hays DDRA Fellowship Program, a doctoral student must indicate in the application whether he or she also has applied for a FUSP grant. At any time during the U.S. Department of Education Fulbright-Hays DDRA Fellowship Program competition process, if a doctoral student accepts a fellowship award from the FUSP, or the FUSP disperses funds to provide training services to a doctoral student, that doctoral student is automatically ineligible for consideration for a grant under the Fulbright-Hays DDRA Fellowship Program. Also, if the FUSP notifies the Fulbright-Hays DDRA Fellowship Program that it has awarded funds or provided training to a potential recipient of a Fulbright-Hays DDRA Fellowship, the Department will automatically deem the doctoral student ineligible for further consideration. Doctoral students thus should notify the person listed under **FOR FURTHER INFORMATION CONTACT** prior to accepting any grant support or training from the FUSP.

## IV. Application and Submission Information

1. *Address to Request Application Package:* Both IHEs and doctoral student applicants can obtain an application package via the internet or from the Education Publications Center (ED Pubs). To obtain a copy via the internet, use the following address: *www.G5.gov.* To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. FAX: (703) 605–6794. If you use a TDD or a TTY, call, toll free: 1–877–576–7734.

You also can contact ED Pubs at its website at *https://www.ed.gov/edpubs/,* or at its email address at *edpubs@inet.ed.gov.*

If you request an application package from ED Pubs, be sure to identify this program as follows: Assistance Listing Number 84.022A.

2. *Submission Dates and Times:*

Submit applications for grants under the program electronically using *G5.gov*. For information (including dates and times) about how to submit your application electronically, please refer to *Other Submission Requirements* below.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT**. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

3. *Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

4. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

5. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 10 pages and the bibliography to no more than two pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger, or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet, budget section, including the narrative budget justification; the assurance and certifications; or the one-page abstract, the resumes, the biography, or letters of support. However, the recommended page limit does apply to all of the application narrative.

6. *DUNS/UEI Number, Taxpayer Identification Number, and System for Award Management:*

To do business with the Department, you must—

a. Have a Data Universal Numbering System (DUNS) number/Unique Entity Identifier (UEI) and a Taxpayer Identification Number (TIN);

b. Register both your DUNS/UEI number and TIN with the System for Award Management (SAM), the Government's primary registrant database;

c. Provide your DUNS/UEI number and TIN on your application; and

d. Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

Until April 3, 2022, you can obtain a DUNS number from Dun and Bradstreet at the following website: *http://fedgov.dnb.com/webform.* A DUNS number can be created within one to two business days. Beginning on April 4, 2022, we will transition to using UEI numbers instead of DUNS numbers. If you are not already registered in SAM at that time, you can obtain a UEI directly through the SAM system.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow two to five weeks for your TIN to become active.

The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data you enter into the SAM database. Thus, if you think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your DUNS/UEI number and TIN. We strongly recommend that you register early.

*Note:* Once your SAM registration is active, it may be 24 to 48 hours before you can submit an application through G5.

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS/UEI number is correct. Also note that you will need to update your registration annually. This may take three or more business days.

Information about SAM is available at *www.SAM.gov.* To further assist you with obtaining and registering your DUNS/UEI number and TIN in SAM or updating your existing SAM account, we have prepared a *SAM.gov* Tip Sheet, which you can find at *www2.ed.gov/fund/grant/apply/sam-faqs.html.*

7. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless an IHE qualifies for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Submit applications for grants under the Fulbright-Hays DDRA Fellowship Program, Assistance Listing Number 84.022A, electronically using the G5 system, accessible through the Department's G5 site at: *www.G5.gov.* While completing the electronic application, both the IHE and the doctoral student applicant will be entering data online that will be saved into a database. Neither the IHE nor the doctoral student applicant may email an electronic copy of a grant application to us.

Please note the following:

• The process for submitting applications electronically under the Fulbright-Hays DDRA Fellowship Program requires several steps. The following is a brief overview of the process; however, all applicants should review the detailed description of the application process in the application package. In summary, the major steps are:

(1) IHEs must email the name of the institution and the full name and email address of the project director to *DDRA@ed.gov.* We suggest that applicant IHEs submit this information no later than two weeks prior to the application deadline date to ensure that they obtain access to G5 well before that date;

(2) Doctoral students must complete their individual applications and submit them to their home IHE project director using G5;

(3) Persons providing references for individual doctoral students must complete and submit reference forms for the doctoral students and submit them to the IHE's project director using G5; and

(4) The IHE's project director must officially submit the IHE's application, including all eligible individual doctoral student applications, reference forms, and other required forms, using G5.

• The IHE must complete the electronic submission of the grant application by 4:30 p.m., Eastern Time, on the application deadline date. G5 will not accept an application for this competition after 4:30 p.m., Eastern Time, on the application deadline date. Therefore, we strongly recommend that both the IHE and the doctoral student applicant not wait until the application deadline date to begin the application process. The table below shows the days and times that the G5 website will be available.

G5 HOURS OF OPERATION IN EASTERN TIME

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| Unavailable from 3:00 p.m.–11:59 p.m. | Unavailable from 12:00 a.m.–6:00 a.m. | Available 24 hours | Unavailable from 9:00 p.m.–11:59 p.m. | Unavailable from 12:00 a.m.–6:00 a.m. | Available 24 hours | Available 24 hours. |

• Doctoral student applicants will not receive additional point value because the doctoral student submits his or her application in electronic format, nor will we penalize the IHE or doctoral student applicant if the applicant qualifies for an exception to the electronic submission requirement, as described elsewhere in this section, and submits an application in paper format.

• IHEs must upload all application documents electronically, including the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.

• Both IHEs and doctoral student applicants must upload their applications, including the required narrative sections and all required attachments to their applications, as files in a read-only flattened Portable Document Format (PDF), meaning any fillable documents must be saved and submitted as non-fillable PDF files. Do not upload any interactive or fillable PDF files. If you upload a file type other than a read-only, non-modifiable PDF (*e.g.,* Word, Excel, WordPerfect, etc.) or submit a password-protected file, we will be unable to review that material. Please note that this will likely result in your application not being considered for funding. The Department will not convert material from other formats to PDF.

• Submit doctoral student transcripts electronically through the G5 system.

• Prior to submitting your electronic application, you may wish to print a copy of it for your records.

• After the individual doctoral student electronically submits his or her application to the IHE, the doctoral student will receive an automatic acknowledgment from the G5 system. After a person submits a reference electronically, he or she will receive an online confirmation from the G5 system. After the applicant IHE submits its

application to the Department, including all eligible individual doctoral student applications, the applicant IHE will receive an automatic acknowledgment from G5 that will include a unique PR/Award number for the IHE's application.

• Within three working days after submitting its electronic application, the applicant IHE must—

(1) Print the SF 424 from G5;

(2) Have the Authorizing Representative sign this form;

(3) Place the PR/Award number in the upper right-hand corner of the hard-copy signature page of the SF 424; and

(4) Email the signed SF 424 to the Application Control Center at *DDRA@ed.gov.*

• We may request that you provide us hard copies with original signatures for other forms in the application at a later date.

*Application Deadline Date Extension in Case of System Unavailability:* If an IHE is prevented from electronically submitting its application on the application deadline date because the G5 system is unavailable, we will grant the IHE an extension until 4:30 p.m., Eastern Time, the following business day to enable the IHE to transmit its application electronically, by mail, or by hand delivery. We will grant this extension if—

(1) The IHE is a registered user of the G5 system and the IHE has initiated an electronic application for this competition; and

(2)(a) G5 is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Eastern Time, on the application deadline date; or

(b) G5 is unavailable for any period of time between 3:30 p.m. and 4:30 p.m., Eastern Time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting the IHE an extension. To request this extension or to confirm our acknowledgment of any system unavailability, an IHE may contact either (1) the person listed under **FOR FURTHER INFORMATION CONTACT** or (2) the e-Grants help desk at 1–888–336–8930. If G5 is unavailable due to technical problems with the system and, therefore, the application deadline is extended, an email will be sent to all registered users who have initiated a G5 application. Extensions referred to in this section apply only to the unavailability of the G5 system.

b. *Submission of Paper Applications.*

We discourage paper applications, but if electronic submission is not possible (*e.g.,* you do not have access to the internet), you must provide a written statement that you intend to submit a paper application. Send this written statement no later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday) to Amy Marrion, U.S. Department of Education, 400 Maryland Ave. SW, Room 258–24, Washington, DC 20202–4260. Telephone: (202) 453–5628. Email: *DDRA@ed.gov.* If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date.

If you submit a paper application, you must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education, Application Control Center, Attention: (Assistance Listing Number 84.022A), LBJ Basement Level 1, 400 Maryland Avenue SW, Washington, DC 20202–4260

The IHE must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If the IHE mails its application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

*Note:* The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, the IHE should check with its local post office.

We will not consider applications postmarked after the application deadline date.

c. *Note for Mail or Hand Delivery of Paper Applications:* If an IHE mails or hand delivers its application to the Department—

(1) The IHE must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424, the Assistance Listing Number, including suffix letter, if any, of the competition under which the IHE is submitting its application; and

(2) The Application Control Center will mail a notification of receipt of the IHE's grant application. If the IHE does not receive this grant notification within 15 business days from the application deadline date, the IHE should call the U.S. Department of Education Application Control Center at (202) 245–6288.

## V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from the regulations for this program in 34 CFR 662.21 and are as follows:

(a) *Quality of proposed project.* (60 points) The Secretary reviews each application to determine the quality of the research project proposed by the applicant. The Secretary considers—

(1) The statement of the major hypotheses to be tested or questions to be examined, and the description and justification of the research methods to be used;

(2) The relationship of the research to the literature on the topic and to major theoretical issues in the field, and the project's originality and importance in terms of the concerns of the discipline;

(3) The preliminary research already completed in the United States and overseas or plans for such research prior to going overseas, and the kinds, quality and availability of data for the research in the host country or countries;

(4) The justification for overseas field research and preparations to establish appropriate and sufficient research contacts and affiliations abroad;

(5) The applicant's plans to share the results of the research in progress and a copy of the dissertation with scholars and officials of the host country or countries; and

(6) The guidance and supervision of the dissertation advisor or committee at all stages of the project, including guidance in developing the project, understanding research conditions abroad, and acquainting the applicant with research in the field.

(b) *Qualifications of the applicant.* (40 points) The Secretary reviews each application to determine the qualifications of the applicant. The Secretary considers—

(1) The overall strength of the applicant's graduate academic record;

(2) The extent to which the applicant's academic record demonstrates strength in area studies relevant to the proposed project;

(3) The applicant's proficiency in one or more of the languages (other than English and the applicant's native language) of the country or countries of research, and the specific measures to be taken to overcome any anticipated language barriers; and

(4) The applicant's ability to conduct research in a foreign cultural context, as evidenced by the applicant's references

or previous overseas experience, or both.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

For FY 2022, doctoral student applications will be divided into seven categories based on the world area focus of their research projects, as described in the absolute priority. Foreign language and area studies experts on discrete world area-based panels will review the doctoral student applications. Each panel will review, score, and rank its applications separately from the applications assigned to the other world area panels. At the conclusion of the peer review process, however, all fellowship applications in the competition will be ranked from the highest to the lowest score for funding purposes.

If there are applications on the rank order slate with the same average score, the Fulbright Foreign Scholarship Board's (FFSB) policy governing veteran's preference will be used in the tiebreaker and selection process. Veteran's preference will be used first to determine which application to recommend for funding. This means that in instances where two or more applications have the same average score on the rank order slate, and there are insufficient funds to support all of the equally-ranked applications, the veteran's application will be given preference.

For applications that have tied average scores but are not subject to veteran's preference consideration, we will use the average score assigned on the Technical Review Forms for the ''Quality of the Proposed Project'' selection criterion. If a tie still exists, the average score for Competitive Preference Priority 1 will be used as the tiebreaker. A final tiebreaker, should it become necessary, will use the average score assigned for the ''Qualifications of the Applicant'' selection criterion.

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions and, under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.205(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115—232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

## VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The objective for the Fulbright-Hays DDRA Fellowship Program is to provide grants to colleges and universities to fund individual doctoral students to conduct research in other countries in modern foreign languages and area studies for periods of 6 to 12 months.

For the purpose of Department reporting under 34 CFR 75.110, the Department will use the following measures to evaluate its success in meeting this objective:

*DDRA Measure 1:* The percentage of DDRA fellows who increased their foreign language scores in speaking, reading, or writing by at least one proficiency level.

*DDRA Measure 2:* The percentage of DDRA fellows who complete their degree in their program of study within four years of receipt of the fellowship.

*DDRA Measure 3:* The percentage of DDRA fellows who found employment that utilized their language and area studies skills within eight years of receiving their award.

*DDRA Measure 4:* Efficiency Measure—The cost per DDRA fellow who found employment that utilized their language and area studies skills within eight years.

The information provided by grantees in their performance reports submitted via the International Resource Information System (IRIS) will be the source of data for these measures. Reporting screens for institutions and fellows may be viewed at *http://iris.ed.gov/iris/pdfs/DDRA_director.pdf*, and *http://iris.ed.gov/iris/pdfs/DDRA_fellow.pdf*.

## VII. Other Information

*Accessible Format:* On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, Braille, large print, audiotape, or compact disc, or other accessible format.

*Electronic Access to This Document:* The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

**Michelle Asha Cooper,**

*Deputy Assistant Secretary for Higher Education Programs, Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary, Office of Postsecondary Education.*

[FR Doc. 2022–02147 Filed 2–1–22; 8:45 am]

BILLING CODE 4000–01–P

# DEPARTMENT OF ENERGY

## Reinstatement of a Previously Approved Information Collection for the Weatherization Assistance Program

**AGENCY:** Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy.

**ACTION:** Notice and request for comments.

**SUMMARY:** The U.S. Department of Energy (DOE), pursuant to the Paperwork Reduction Act of 1995, intends to reinstate a previously approved collection, with change, for three years with the Office of Management and Budget (OMB). The information collection request, Weatherization Assistance Program Sub-Programs, was previously approved on May 31, 2014, under OMB Control No. 1910–5157 and expired on May 31, 2017.

**DATES:** Comments regarding this collection must be received on or before March 4, 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) 395–4650.

**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; or you can send comments to Brittany Price by email to the following address: *Brittany.Price@ee.doe.gov* with the subject line '' Weatherization Assistance Program Sub-Programs (OMB No. 1910–5157)'' included in the message. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption. No telefacsimiles (faxes) will be accepted. For detailed instructions on submitting comments, see section III (Submission of Comments) of this document. Although DOE has routinely accepted public comment submissions through a variety of mechanisms, including postal mail and hand delivery/courier, the Department has found it necessary to make temporary modifications to the comment submission process in light of the ongoing Covid–19 pandemic. DOE is currently accepting only electronic submissions at this time. If a commenter finds that this change poses an undue hardship, please contact the DOE staff person listed in this notice.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Brittany Price, EE–5W, U.S. Department of Energy, 1000 Independence Ave. SW, Washington, DC 20585–0121, or by email or phone at *brittany.price@ee.doe.gov,* 240–306–7252.

**SUPPLEMENTARY INFORMATION:**

*Comments are invited on:* (a) Whether the extended collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

*This information collection request contains:* (1) *OMB No.:* 1910–5157;

(2) *Information Collection Request Title:* ''Weatherization Enhancement and Innovation (E&I), Sustainable Energy Resources for Consumers (SERC), and Community Scale Weatherization Pilot Grants'';

(3) *Type of Review:* Reinstatement, with change, of a previously approved collection for which approval has expired;

(4) *Purpose:* To collect information on the status of grantee activities, including

but not limited to weatherized units, total people assisted with grant funds, expenditures, and results, to ensure that program funds are being used appropriately, effectively and expeditiously. All information collection proposed under these programs is necessary for their implementation, and thus necessary for the function of the Agency as a whole. The information collected will be used by program staff to track the recipients of E&I, SERC, and Community Scale activities, their progress in achieving scheduled milestones, and funds expended (including expenditure rates). The information also enables program staff to provide required or requested information on program activities to OMB, Congress and the public.

(5) *Annual Estimated Number of Respondents:* 50;

(6) *Annual Estimated Number of Total Responses:* 406;

(7) *Annual Estimated Number of Burden Hours:* 2336 hours;

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $147,932.85.

*Statutory Authority:* Statutes 42 U.S.C. 6864d and 42 U.S.C. 6872, H.R. 133, Estimate for Division N—Additional Coronavirus Response and Relief Consolidated Appropriations Act, 2021 Public Law 116–260.

**Signing Authority**

This document of the Department of Energy was signed on January 27, 2022, by Kelly J. Speakes-Backman, Principal Deputy 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 January 28, 2022.

**Treena V. Garrett,**

*Federal Register Liaison Officer, U.S. Department of Energy.*

[FR Doc. 2022–02118 Filed 2–1–22; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Environmental Management Site-Specific Advisory Board, Hanford

**AGENCY:** Office of Environmental Management, Department of Energy.

**ACTION:** Notice of open virtual meeting.

**SUMMARY:** This notice announces an online virtual meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Hanford. The Federal Advisory Committee Act requires that public notice of this online virtual meeting be announced in the **Federal Register**.

**DATES:**

Wednesday, March 23, 2022; 9:00 a.m.–4:30 p.m.

Thursday, March 24, 2022; 9:00 a.m.–4:30 p.m.

**ADDRESSES:** Online Virtual Meeting. To receive the meeting access information and call-in number, please contact the Federal Coordinator, Gary Younger, at the telephone number or email listed below by five days prior to the meeting.

**FOR FURTHER INFORMATION CONTACT:** Gary Younger, Federal Coordinator, U.S. Department of Energy, Hanford Office of Communications, Richland Operations Office, P.O. Box 550, Richland, WA, 99354; Phone: (509) 372–0923; or Email: *gary.younger@rl.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Board:* The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

*Tentative Agenda:*

- Tri-Party Agreement Agencies' Updates
- Board Committee Reports
- Discussion of Board Business

*Public Participation:* The meeting is open to the public. The EM SSAB, Hanford, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Gary Younger at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board either before or within five business days after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Gary Younger. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

*Minutes:* Minutes will be available at the following website: *http://www.hanford.gov/page.cfm/hab/FullBoardMeetingInformation.*

Signed in Washington, DC, on January 27, 2022.

**LaTanya Butler,**

*Deputy Committee Management Officer.*

[FR Doc. 2022–02104 Filed 2–1–22; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. CP21–474–000]**

### Rover Pipeline LLC; Notice of Availability of the Environmental Assessment for the Proposed North Coast Interconnect Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the North Coast Interconnect Project, proposed by Rover Pipeline LLC (Rover) in the above-referenced docket. Rover requests authorization to construct and operate an interconnection along its Mainlines A and B to deliver 108,000 dekatherms per day to North Coast Gas Transmission (NCGT). The Project would include construction of a new delivery meter station and ancillary facilities at milepost 19.5 in Seneca County, Ohio.

The EA assesses the potential environmental effects of the construction and operation of the North Coast Interconnect Project in accordance with the requirements of the National Environmental Policy Act (NEPA). The FERC staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The proposed North Coast Interconnect Project includes the following facilities:

- A hot tap, valve, and 140 feet of interconnecting pipe off the Mainline B Pipeline,
- A meter station including ultrasonic meter skids, flow control skids, gas quality building, measurement building, and condensate storage tank, and

• NCGT's metering and regulation facilities including gas odorizer, odorant tank, and measurement computer.

The Commission mailed a copy of the *Notice of Availability* to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups; and newspapers and libraries in the project area. The EA is only available in electronic format. It may be viewed and downloaded from the FERC's website (*www.ferc.gov*), on the natural gas environmental documents page (*https://www.ferc.gov/industries-data/natural-gas/environment/environmental-documents*). In addition, the EA may be accessed by using the eLibrary link on the FERC's website. Click on the eLibrary link (*https://elibrary.ferc.gov/eLibrary/search*), select ''General Search'' and enter the docket number in the ''Docket Number'' field, excluding the last three digits (*i.e.* CP21–474). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

The EA is not a decision document. It presents Commission staff's independent analysis of the environmental issues for the Commission to consider when addressing the merits of all issues in this proceeding. Any person wishing to comment on the EA may do so. Your comments should focus on the EA's disclosure and discussion of potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that the Commission has the opportunity to consider your comments prior to making its decision on this project, it is important that we receive your comments in Washington, DC on or before 5:00 p.m. Eastern Time on February 28, 2022.

For your convenience, there are three methods you can use to file your comments to the Commission. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208–3676 or *FercOnlineSupport@ferc.gov.* Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the eComment feature on the Commission's website (*www.ferc.gov*) under the link to FERC Online. This is an easy method for submitting brief, text-only comments on a project;

(2) You can also file your comments electronically using the eFiling feature on the Commission's website (*www.ferc.gov*) under the link to FERC Online. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the Commission. Be sure to reference the project docket number (CP21–474–000) on your letter. 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.

Filing environmental comments will not give you intervenor status, but you do not need intervenor status to have your comments considered. Only intervenors have the right to seek rehearing or judicial review of the Commission's decision. At this point in this proceeding, the timeframe for filing timely intervention requests has expired. Any person seeking to become a party to the proceeding must file a motion to intervene out-of-time pursuant to Rule 214(b)(3) and (d) of the Commission's Rules of Practice and Procedures (18 CFR 385.214(b)(3) and (d)) and show good cause why the time limitation should be waived. Motions to intervene are more fully described at *https://www.ferc.gov/ferc-online/ferc-online/how-guides.*

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website (*www.ferc.gov*) using the eLibrary link. 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. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

Dated: January 27, 2022.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2022–02150 Filed 2–1–22; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

*Docket Numbers:* EC22–12–000.
*Applicants:* Calhoun Power Company, LLC, Alabama Power Company.
*Description:* Calhoun Power, LLC and Alabama Power Company submit response to the December 22, 2021 Deficiency Letter and Request for Shortened Comment Period and Confidential Treatment.
*Filed Date:* 1/21/22.
*Accession Number:* 20220121–5146.
*Comment Date:* 5 p.m. ET 2/11/22.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER10–2290–010.
*Applicants:* Avista Corporation.
*Description:* Amendment to January 21, 2021 Notice of Non-Material Change in Status of Avista Corporation.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5239.
*Comment Date:* 5 p.m. ET 2/17/22.

*Docket Numbers:* ER12–1470–011; ER18–836–004.
*Applicants:* Energia Sierra Juarez 2 U.S., LLC, Energia Sierra Juarez U.S., LLC.
*Description:* Notice of Non-Material Change in Status of Energia Sierra Juarez U.S., LLC, et al.
*Filed Date:* 1/26/22.
*Accession Number:* 20220126–5241.
*Comment Date:* 5 p.m. ET 2/16/22.

*Docket Numbers:* ER20–277–003.
*Applicants:* Southwestern Public Service Company.
*Description:* Compliance filing: ER20–277 Errata to be effective 1/1/2020.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5070.
*Comment Date:* 5 p.m. ET 2/17/22.

*Docket Numbers:* ER20–1713–002.
*Applicants:* Evergy Kansas Central, Inc.
*Description:* Compliance filing: Order No. 864 Compliance to be effective 1/27/2020.

*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5196.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER20–2040–003.
*Applicants:* Southwest Power Pool, Inc.
*Description:* Compliance filing: Prairie Wind Transmission LLC submits tariff filing per 35: Prairie Wind Order No. 864 Compliance Filing to be effective 1/27/2020.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5143.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER20–2041–003.
*Applicants:* Southwest Power Pool, Inc.
*Description:* Compliance filing: Evergy Metro, Inc. submits tariff filing per 35: KCPL Order No. 864 Compliance Filing to be effective 1/27/2020.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5184.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER20–2042–003.
*Applicants:* Southwest Power Pool, Inc.
*Description:* Compliance filing: Evergy Missouri West, Inc. submits tariff filing per 35: KCPL–GMO Order No. 864 Compliance Filing to be effective 1/27/2020.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5235.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER20–2044–004.
*Applicants:* Southwest Power Pool, Inc.
*Description:* Compliance filing: Evergy Kansas Central, Inc. submits tariff filing per 35: Westar Energy, Inc. Order No. 864 Compliance Filing to be effective 1/27/2020.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5176.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER21–9–001; ER21–86–001; ER21–88–001.
*Applicants:* Orange County Energy Storage 3 LLC, Orange County Energy Storage 2 LLC, Henrietta D Energy Storage LLC.
*Description:* Triennial Market Power Analysis for Southwest Region of Henrietta D Energy Storage LLC, et al.
*Filed Date:* 1/26/22.
*Accession Number:* 20220126–5239.
*Comment Date:* 5 p.m. ET 3/28/22.
*Docket Numbers:* ER21–1273–001.
*Applicants:* Oleander Power Project, Limited Partnership.
*Description:* Compliance filing: Oleander Power Project, Limited Partnership PPA with Seminole Compliance Filing to be effective 1/1/2022.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5122.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER22–871–001.
*Applicants:* Jicarilla Solar 2 LLC.
*Description:* Tariff Amendment: Amendment to Market-Based Rate Application to be effective 2/7/2022.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5091.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER22–892–000.
*Applicants:* Atlantic City Electric Company.
*Description:* § 205(d) Rate Filing: Chambers Temporary Interconnection Arrangement to be effective 3/28/2022.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5001.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER22–893–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: Original ISA, Service Agreement No. 6315; Queue No. AE2–084 to be effective 12/29/2021.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5026.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER22–894–000.
*Applicants:* APX, Inc.
*Description:* Tariff Amendment: Notice of Cancellation of FERC Electric Tariff to be effective 1/28/2022.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5031.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER22–895–000.
*Applicants:* Southwest Power Pool, Inc.
*Description:* § 205(d) Rate Filing: 3908 T.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5032.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER22–896–000.
*Applicants:* American Electric Power Service Corporation, PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: American Electric Power Service Corporation submits tariff filing per 35.13(a)(2)(iii: AEP submits Update to Attachment 1 of ILDSA, SA No. 1336 (1/27/22) to be effective 1/1/2022.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5048.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER22–897–000.
*Applicants:* ITC Midwest LLC.
*Description:* § 205(d) Rate Filing: Filing of Crystal Lake CIAC Agreement to be effective 3/29/2022.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5058.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER22–898–000.
*Applicants:* Southwest Power Pool, Inc.
*Description:* § 205(d) Rate Filing: 3211R3 North Iowa Municipal Electric Cooperative Association NITSA and NOA to be effective 1/1/2022.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5074.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER22–899–000.
*Applicants:* Dominion Energy South Carolina, Inc.
*Description:* § 205(d) Rate Filing: Generator Replacement Coordinator Agr—GRC to be effective 3/29/2022.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5080.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER22–900–000.
*Applicants:* Diamond Leaf Energy, LLC.
*Description:* Tariff Amendment: Cancellation of MBR Tariff to be effective 1/28/2022.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5083.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER22–901–000.
*Applicants:* Atlantic City Electric Company.
*Description:* § 205(d) Rate Filing: Logan Generating Company Temporary Interconnection Arrangement to be effective 3/28/2022.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5092.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER22–902–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: PJM submits NJ State Agreement Approach Agreement as Rate Sch. No. 49 to be effective 4/15/2022.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5112.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER22–903–000.
*Applicants:* Northern Indiana Public Service Company LLC.
*Description:* § 205(d) Rate Filing: Rosebud CIAC Agreement to be effective 4/1/2022.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5142.
*Comment Date:* 5 p.m. ET 2/17/22.
*Docket Numbers:* ER22–904–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: Amendment to WMPA, Service Agreement No. 4563; Queue No. AA2–048 to be effective 9/22/2016.
*Filed Date:* 1/27/22.

*Accession Number:* 20220127–5171.
*Comment Date:* 5 p.m. ET 2/17/22.

*Docket Numbers:* ER22–905–000.
*Applicants:* Sagebrush, a California partnership.
*Description:* Tariff Amendment: Notice of Cancellation to be effective 12/27/2021.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5181.
*Comment Date:* 5 p.m. ET 2/17/22.

*Docket Numbers:* ER22–906–000.
*Applicants:* California Independent System Operator Corporation.
*Description:* § 205(d) Rate Filing: 2022–01–27 Transmission Service and Market Schedules to be effective 6/1/2022.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5188.
*Comment Date:* 5 p.m. ET 2/17/22.

*Docket Numbers:* ER22–907–000.
*Applicants:* Indeck Niles, LLC.
*Description:* Initial rate filing: Reactive Power Rate Schedule to be effective 3/15/2022.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5191.
*Comment Date:* 5 p.m. ET 2/17/22.

*Docket Numbers:* ER22–908–000.
*Applicants:* Mulberry Farm, LLC.
*Description:* § 205(d) Rate Filing: Notice of Change in Category Seller Status in the SE Region to be effective 1/28/2022.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5234.
*Comment Date:* 5 p.m. ET 2/17/22.

*Docket Numbers:* ER22–909–000.
*Applicants:* Selmer Farm, LLC.
*Description:* § 205(d) Rate Filing: Notice of Change in Category Seller Status in the SE Region to be effective 1/28/2022.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5237.
*Comment Date:* 5 p.m. ET 2/17/22.

Take notice that the Commission received the following electric securities filings:
*Docket Numbers:* ES22–26–000.
*Applicants:* MidAmerican Energy Company.

*Description:* Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of MidAmerican Energy Company.
*Filed Date:* 1/27/22.
*Accession Number:* 20220127–5236.
*Comment Date:* 5 p.m. ET 2/17/22.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 27, 2022.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2022–02142 Filed 2–1–22; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 4202–025]**

### KEI (Maine) Power Management (II) LLC; Notice Soliciting Scoping Comments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Subsequent Minor License.
b. *Project No.:* 4202–025.
c. *Date Filed:* September 28, 2021.
d. *Applicant:* KEI (Maine) Power Management (II), LLC (KEI Power).
e. *Name of Project:* Lowell Tannery Project (project).
f. *Location:* On the Passadumkeag River in Penobscot County, Maine. The project does not occupy any federal land.
g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).
h. *Applicant Contact:* Mr. Lewis C. Loon, KEI (Maine) Power Management (II), LLC c/o KEI (USA) Power Management Inc., 423 Brunswick Avenue, Gardiner, ME 04345; Phone at (207) 203–3025, or email at *LewisC.Loon@kruger.com.*
i. *FERC Contact:* Arash Barsari at (202) 502–6207, or *arash.jalalibarsari@ferc.gov.*
j. *Deadline for filing scoping comments:* February 26, 2022.

The Commission strongly encourages electronic filing. Please file scoping comments using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.aspx.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/QuickComment.aspx.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. All filings must clearly identify the project name and docket number on the first page: Lowell Tannery Project (P–4202–025).

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. The application is not ready for environmental analysis at this time.

l. *The existing project consists of:* (1) A 230-foot-long, 21.5-foot-high concrete gravity dam that includes the following sections: (a) A left abutment section; (b) a 30-foot-long primary spillway with 42-inch-high flashboards and a crest elevation of 187.5 feet mean sea level (msl) at the top of the flashboards; (c) a 30.2-foot-long section with a seven-foot-wide log sluice and a ten-foot-wide tainter gate; (d) an 89-foot-long auxiliary spillway with 42-inch-high flashboards and a crest elevation of 187.5 feet msl at the top of the flashboards; (e) a 22.2-foot-long intake structure with two 15.5-foot-wide, 15.8-foot-high, angled trashracks with 1.5-inch clear bar spacing; and (f) a right abutment section; (2) an impoundment with a surface area of approximately 341 acres at an elevation of 187.5 feet msl; (3) a 69.4-foot-long, 26.7-foot-wide concrete powerhouse containing a 1,000-kilowatt vertical Kaplan turbine-generator unit; (4) a tailrace channel that discharges into the Passadumkeag River; (5) a 2.3/12.5-kilovolt (kV) step-up transformer and a 200-foot-long, 12.5-kV transmission line that connects the generator to the local utility distribution

system; and (6) appurtenant facilities. The project creates an approximately 70-foot-long bypassed reach of the Passadumkeag River.

As required by Article 19 of the current license, KEI Power operates the project as a run-of-river (ROR) facility. Downstream fish passage is provided by a bypass facility located adjacent to the left side of the intake structure and powerhouse, and consists of a 3.7-foot-wide log sluice, a 5.1-foot-wide, 5.8-foot-long concrete fish collection box, and a 69.7-foot-long, 18-inch-diameter fiberglass fish passage pipe that discharges into a plunge pool next to the tailrace. Upstream fish passage is provided by a 3-foot-wide Denil fishway located adjacent to the right side of the intake structure and powerhouse.

*KEI Power proposes to:* (1) Continue operating the project as a ROR facility; (2) install upstream and downstream eel passage facilities; (3) install seasonal trashrack overlays with 0.875 inch diameter holes; (4) modify the discharge location of the existing downstream fish passage pipe to discharge adjacent to the existing upstream fish passage entrance; and (5) develop a fishway operation and management plan.

The average annual generation of the project was approximately 4,144 megawatt-hours from 2016 through 2020.

m. 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 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. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TYY, (202) 502–8659.

n. You may also register online at *https://ferconline.ferc.gov/FERCOnline.aspx* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. Scoping Process.

Commission staff will prepare either an environmental assessment (EA) or an Environmental Impact Statement (EIS) that describes and evaluates the probable effects, if any, of the licensee's proposed action and alternatives. The EA or EIS will consider environmental impacts and reasonable alternatives to the proposed action. The Commission's scoping process will help determine the required level of analysis and satisfy the NEPA scoping requirements, irrespective of whether the Commission prepares an EA or an EIS. At this time, we do not anticipate holding on-site scoping meetings. Instead, we are soliciting written comments and suggestions on the preliminary list of issues and alternatives to be addressed in the NEPA document, as described in scoping document 1 (SD1), issued January 27, 2022.

Copies of the SD1 outlining the subject areas to be addressed in the NEPA document were distributed to the parties on the Commission's mailing list and the applicant's distribution list. Copies of SD1 may be viewed on the web at *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. For assistance, call 1–866–208–3676 or for TTY, (202) 502–8659.

Dated: January 27, 2022.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2022–02152 Filed 2–1–22; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. CD22–3–000]**

## Municipality of Anchorage Water & Wastewater Utility; Notice of Preliminary Determination of a Qualifying Conduit Hydropower Facility and Soliciting Comments and Motions To Intervene

On January 24, 2022, the Municipality of Anchorage Water & Wastewater Utility filed a notice of intent to construct a qualifying conduit hydropower facility, pursuant to section 30 of the Federal Power Act (FPA). The proposed 92nd Avenue Pressure Relief Valve (PRV) Facility Project would have an installed capacity of 45 kilowatts (kW), and would be located along an existing 30-inch pipeline feeding the 92nd Avenue PRV Station in Anchorage, Anchorage Borough, Alaska.

*Applicant Contact:* Will O'Malley, Anchorage Water & Wastewater Utility, 3000 Artic Boulevard, Anchorage, AK 99503, 907–564–2767, *willie.omalley@awwu.biz.*

*FERC Contact:* Christopher Chaney, 202–502–6778, *christopher.chaney@ferc.gov.*

*Qualifying Conduit Hydropower Facility Description:* The proposed project would consist of: (1) One 45 kW turbine/generator unit; (2) intake and discharge pipes connecting to the 30-inch pipeline; and (3) appurtenant facilities. The proposed project would have an estimated annual generation of approximately 306 megawatt-hours.

A qualifying conduit hydropower facility is one that is determined or deemed to meet all the criteria shown in the table below.

TABLE 1—CRITERIA FOR QUALIFYING CONDUIT HYDROPOWER FACILITY

| Statutory provision | Description | Satisfies (Y/N) |
|---|---|---|
| FPA 30(a)(3)(A) | The conduit the facility uses is a tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity. | Y |
| FPA 30(a)(3)(C)(i) | The facility is constructed, operated, or maintained for the generation of electric power and uses for such generation only the hydroelectric potential of a non-federally owned conduit. | Y |
| FPA 30(a)(3)(C)(ii) | The facility has an installed capacity that does not exceed 40 megawatts | Y |
| FPA 30(a)(3)(C)(iii) | On or before August 9, 2013, the facility is not licensed, or exempted from the licensing requirements of Part I of the FPA. | Y |

*Preliminary Determination:* The proposed 92nd Avenue Pressure Relief Valve Facility Project will not alter the primary purpose of the conduit, which is to transport water for municipal use. Therefore, based upon the above criteria, Commission staff preliminarily determines that the proposal satisfies the requirements for a qualifying

conduit hydropower facility, which is not required to be licensed or exempted from licensing.

*Comments and Motions to Intervene:* Deadline for filing comments contesting whether the facility meets the qualifying criteria is 30 days from the issuance date of this notice.

Deadline for filing motions to intervene is 30 days from the issuance date of this notice.

Anyone may submit comments or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210 and 385.214. Any motions to intervene must be received on or before the specified deadline date for the particular proceeding.

*Filing and Service of Responsive Documents:* All filings must (1) bear in all capital letters the ''COMMENTS CONTESTING QUALIFICATION FOR A CONDUIT HYDROPOWER FACILITY'' or ''MOTION TO INTERVENE,'' as applicable; (2) state in the heading the name of the applicant and the project number of the application to which the filing responds; (3) state the name, address, and telephone number of the person filing; and (4) otherwise comply with the requirements of sections 385.2001 through 385.2005 of the Commission's regulations.[1] All comments contesting Commission staff's preliminary determination that the facility meets the qualifying criteria must set forth their evidentiary basis.

The Commission strongly encourages electronic filing. Please file motions to intervene and comments using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may send 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, MD 20852. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

*Locations of Notice of Intent:* 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 website at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (*i.e.,* CD22–3) in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. Copies of the notice of intent can be obtained directly from the applicant. For assistance, call toll-free 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659.

Dated: January 27, 2022.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2022–02151 Filed 2–1–22; 8:45 am]

BILLING CODE 6717–01–P

[1] 18 CFR 385.2001–2005 (2021).

## 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 Number:* PR22–19–000.

*Applicants:* Columbia Gas of Ohio, Inc.

*Description:* Submits tariff filing per 284.123(b),(e)/: COH SOC Rates effective 12–30–2021 to be effective 12/30/2021.

*Filed Date:* 1/26/2022.

*Accession Number:* 20220126–5101.

*Comments/Protests Due:* 5 p.m. ET 2/16/22.

*Docket Numbers:* RP22–497–000.

*Applicants:* Boardwalk Storage Company, LLC.

*Description:* Compliance filing: GMS Pro Forma ''Go Live'' Tariff Records to be effective 12/31/9998.

*Filed Date:* 1/26/22.

*Accession Number:* 20220126–5064.

*Comment Date:* 5 p.m. ET 2/7/22.

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.

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: January 27, 2022.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2022–02143 Filed 2–1–22; 8:45 am]

BILLING CODE 6717–01–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2017–0751; FRL–9452–01–OCSPP]**

### Pesticide Registration Review; Interim Decisions and Case Closures for Several Pesticides; Notice of Availability

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces the availability of EPA's interim registration review decisions for the following chemicals: Amitraz, cinnamaldehyde, farnesol and nerolidol, fenbuconazole, isoxaflutole, mesotrione, metaldehyde, *nosema locustae,* rotenone, sodium cyanide, sodium fluoroacetate, spiromesifen, tembotrione, topramezone, and *ulocladium oudemansii* (U3 Strain).

**FOR FURTHER INFORMATION CONTACT:** *For pesticide specific information, contact:* The Chemical Review Manager for the pesticide of interest identified in the Table in Unit IV.

*For general information on the registration review program, contact:* Melanie Biscoe, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; email address: *biscoe.melanie@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, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the pesticide specific contact person listed in the Table in Unit IV.

*B. How can I get copies of this document and other related information?*

The dockets these cases, identified by the docket identification (ID) number for the specific pesticide of interest provided in the Table in Unit IV., are available at *http://www.regulations.gov.* Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is open to visitors by appointment only. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

## II. Background

Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. As part of the registration review process, the Agency has completed interim decisions for all pesticides listed in the Table in Unit IV. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

## III. Authority

EPA is conducting its registration review of the chemicals listed in the Table in Unit IV pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA, a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5) (7 U.S.C. 136a(c)(5)). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

## IV. What action is the Agency taking?

Pursuant to 40 CFR 155.58, this notice announces the availability of EPA's interim registration review decisions for the pesticides shown in Table 1. The interim registration review decisions are supported by rationales included in the docket established for each chemical.

TABLE—REGISTRATION REVIEW INTERIM DECISIONS BEING ISSUED

| Registration review case name and No. | Docket ID No. | Chemical review manager and contact information |
|---|---|---|
| Amitraz, Case Number 0234 | EPA–HQ–OPP–2009–1015 | Veronica Dutch, *dutch.veronica@epa.gov*, (202) 566–2352. |
| Cinnamaldehyde, Case Number 6032 | EPA–HQ–OPP–2010–0918 | Bibiana Oe, *oe.bibiana@epa.gov*, (202) 566–1538. |
| Farnesol and Nerolidol, Case Number 6061 | EPA–HQ–OPP–2021–0275 | Joseph Mabon, *mabon.joseph@epa.gov*, (202) 566–1535. |
| Fenbuconazole, Case Number 7016 | EPA–HQ–OPP–2015–0716 | Ben Tweed, *tweed.benjamin@epa.gov*, (202) 566–2274. |
| Isoxaflutole, Case Number 7242 | EPA–HQ–OPP–2010–0979 | Rachel Eberius, *eberius.rachel@epa.gov*, (202) 566–2223. |
| Mesotrione, Case Number 7256 | EPA–HQ–OPP–2013–0779 | Samantha Thomas, *thomas.samantha@epa.gov*, (202) 566–2368. |
| Metaldehyde, Case Number 0576 | EPA–HQ–OPP–2015–0649 | Rachel Eberius, *eberius.rachel@epa.gov*, (202) 566–2223. |
| *Nosema locustae,* Case Number 4104 | EPA–HQ–OPP–2021–0065 | Andrew Queen, *queen.andrew@epa.gov*, (202) 566–1539. |
| Rotenone, Case Number 0255 | EPA–HQ–OPP–2015–0572 | Anna Senninger, *senninger.anna@epa.gov*, (202) 566–2216. |
| Sodium Cyanide, Case Number 8002 | EPA–HQ–OPP–2010–0752 | Michelle Nolan, *nolan.michelle@epa.gov*, (202) 566–2237. |
| Sodium Fluoroacetate, Case Number 3073 | EPA–HQ–OPP–2010–0753 | Natalie Bray, *bray.natalie@epa.gov*, (202) 566–2222. |
| Spiromesifen, Case Number 7442 | EPA–HQ–OPP–2014–0263 | Veronica Dutch, *dutch.veronica@epa.gov*, (202) 566–2352. |
| Tembotrione, Case Number 7273 | EPA–HQ–OPP–2016–0063 | Carolyn Smith, *smith.carolyn@epa.gov*, (202) 566–2273. |
| Topramezone, Case Number 7268 | EPA–HQ–OPP–2015–0127 | Kelsi Grogan, *grogan.kelsi@epa.gov*, (202) 566–2228. |
| *Ulocladium oudemansii* (U3 Strain), Case Number 6520 | EPA–HQ–OPP–2021–0313 | Monica Thapa, *thapa.monica@epa.gov*, (202) 566–1543. |

The proposed interim registration review decisions for the chemicals in the table above were posted to the docket and the public was invited to submit any comments or new information. EPA addressed the comments or information received during the 60-day comment period for the proposed interim decisions in the discussion for each pesticide listed in the table. Comments from the 60-day comment period that were received may or may not have affected the Agency's interim decision. Pursuant to 40 CFR 155.58(c), the registration review case docket for the chemicals listed in Table 1 will remain open until all actions required in the interim decision have been completed.

Sodium cyanide (Case Number 8002, Docket ID Number EPA–HQ–OPP–2010–0752) and sodium fluoroacetate (Case Number 3073, Docket ID Number EPA–HQ–OPP–2010–0753) interim decision amendments include updated endangered species language developed

in informal consultation with Fish and Wildlife Services (FWS) which completes the Endangered Species Act (ESA) evaluation.

Background on the registration review program is provided at: *https://www.epa.gov/pesticide-reevaluation.*

*Authority:* 7 U.S.C. 136 *et seq.*

Dated: January 27, 2022.

**Mary Reaves,**

*Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.*

[FR Doc. 2022–02110 Filed 2–1–22; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2017–0720; FRL–9449–01–OCSPP]**

## Pesticide Registration Review; Pesticide Dockets Opened for Review and Comment; Notice of Availability

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces the availability of the EPA's preliminary work plans for the following chemicals: Cyflufenamid, fluopyram, and pyroxasulfone. With this document, the EPA is opening the public comment period for registration review for these chemicals.

**DATES:** Comments must be received on or before April 4, 2022.

**ADDRESSES:** Submit your comments to the docket identification (ID) number for the specific pesticide of interest provided in the Table in Unit IV. using 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.*

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is open to visitors by appointment only. For the latest status information on EPA/DC services and access, visit *https://www.epa.gov/dockets.*

**FOR FURTHER INFORMATION CONTACT:** *For pesticide specific information, contact:* The Chemical Review Manager for the pesticide of interest identified in the Table in Unit IV.

*For general questions on the registration review program, contact:* Melanie Biscoe, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; email address: *biscoe.melanie@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, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the Chemical Review Manager identified in Table 1 in Unit IV.

*B. What should I consider as I prepare my comments for the EPA?*

1. *Submitting CBI.* Do not submit this information to the 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 the EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *https://www.epa.gov/dockets/commenting-epa-dockets.*

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

### II. Background

Registration review is the EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. Registration review dockets contain information that will assist the public in understanding the types of information and issues that the Agency may consider during the course of registration reviews. As part of the registration review process, the Agency has completed preliminary workplans for all pesticides listed in Table 1 in Unit IV. Through this program, the EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

### III. Authority

The EPA is conducting its registration review of the chemicals listed in the Table in Unit IV. pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA, a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5) (7 U.S.C. 136a(c)(5)). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

### IV. Registration Reviews

*A. What action is the Agency taking?*

A pesticide's registration review begins when the Agency establishes a docket for the pesticide's registration review case and opens the docket for public review and comment. Pursuant to 40 CFR 155.50, this notice announces

the availability of the EPA's preliminary work plans for the pesticides shown in Table 1 and opens a 60-day public comment period on the work plans.

TABLE 1—PESTICIDE REGISTRATION REVIEW PRELIMINARY WORK PLANS BEING MADE AVAILABLE FOR PUBLIC COMMENT

| Registration review case name and No. | Docket ID No. | Chemical review manager and contact information |
|---|---|---|
| *Cyflufenamid,* Case Number 7068 | EPA–HQ–OPP–2021–0733 | Carolyn Smith, *smith.carolyn@epa.gov,* (202) 566–2273. |
| *Fluopyram,* Case Number 7067 | EPA–HQ–OPP–2021–0350 | Kelsi Grogan, *grogan.kelsi@epa.gov,* (202) 566–2228. |
| *Pyroxasulfone,* Case Number 7282 | EPA–HQ–OPP–2021–0384 | Tiffany Green, *green.tiffany@epa.gov,* (202) 566–2224. |

*B. What is in the docket?*

The registration review docket contains information that the Agency may consider in the course of the registration review. The Agency may include information from its files including, but not limited to, the following information:

- An overview of the registration review case status.
- A list of current product registrations and registrants.
- **Federal Register** notices regarding any pending registration actions.
- **Federal Register** notices regarding current or pending tolerances.
- Risk assessments.
- Bibliographies concerning current registrations.
- Summaries of incident data.
- Any other pertinent data or information.

Each docket contains a document summarizing what the Agency currently knows about the pesticide case and a preliminary work plan for anticipated data and assessment needs. Additional documents provide more detailed information. During this public comment period, the Agency is asking that interested persons identify any additional information they believe the Agency should consider during the registration reviews of these pesticides. The Agency identifies in each docket the areas where public comment is specifically requested, though comment in any area is welcome.

The registration review final rule at 40 CFR 155.50(b) provides for a minimum 60-day public comment period on all preliminary registration review work plans. This comment period is intended to provide an opportunity for public input and a mechanism for initiating any necessary changes to a pesticide's workplan. All comments should be submitted using the methods in **ADDRESSES** and must be received by the EPA on or before the closing date. These comments will become part of the docket for the pesticides included in the Table in Unit IV. Comments received after the close of the comment period will be marked ''late.'' The EPA is not required to consider these late comments.

The Agency will carefully consider all comments received by the closing date and may provide a ''Response to Comments Memorandum'' in the docket. The final registration review work plan will explain the effect that any comments had on the final work plan and provide the Agency's response to significant comments.

Background on the registration review program is provided at: *https://www.epa.gov/pesticide-reevaluation.*

*Authority:* 7 U.S.C. 136 *et seq.*

Dated: January 27, 2022.

**Mary Elissa Reaves,**

*Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.*

[FR Doc. 2022–02109 Filed 2–1–22; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OAR–2012–0103; FRL 9478–01–OAR]**

## Proposed Information Collection Request; Comment Request; Diesel Emissions Reduction Act (DERA) and Clean School Bus (CSB) Rebate Programs; EPA ICR No. 2461.04, OMB Control No. 2060–0686 Renewal

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), ''Diesel Emissions Reduction Act (DERA) and Clean School Bus (CSB) Rebate Programs'' (EPA ICR No. 2461.04, OMB Control No. 2060–0686) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through April 30, 2022. 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.

**DATES:** Comments must be submitted on or before April 4, 2022.

**ADDRESSES:** Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2012–0103, online using *www.regulations.gov* (our preferred method), by email to *a-and-r-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

**FOR FURTHER INFORMATION CONTACT:** Jason Wilcox, Office of Transportation and Air Quality, (6406A), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–343–9571; fax number: 202–343–2803; email address: *wilcox.jason@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) 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; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) 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. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

*Abstract:* This is an extension of the Information Collection Request (ICR) for the Diesel Emission Reduction Act program (DERA) authorized by title VII, subtitle G (sections 791 to 797) of the Energy Policy Act of 2005 (Pub. L. 109–58), as amended by the Diesel Emissions Reduction Act of 2010 (Pub. L. 111–364) and Division S (section 101) of the Consolidated Appropriations Act, 2021 (Pub. L. 116–260), codified at 42 U.S.C. 16131 *et seq.* DERA provides the Environmental Protection Agency (EPA) with the authority to award grants, rebates or low-cost revolving loans on a competitive basis to eligible entities to fund the costs of a retrofit technology that significantly reduces diesel emissions from mobile sources through implementation of a certified engine configuration, verified technology, or emerging technology. Eligible mobile sources include buses (including school buses), medium heavy-duty or heavy heavy-duty diesel trucks, marine engines, locomotives, or nonroad engines or diesel vehicles or equipment used in construction, handling of cargo (including at port or airport), agriculture, mining, or energy production. In addition, eligible entities may also use funds awarded for programs or projects to reduce long-duration idling using verified technology involving a vehicle or equipment described above. The objective of the assistance under this program is to achieve significant reductions in diesel emissions in terms of tons of pollution produced and reductions in diesel emissions exposure, particularly from fleets operating in areas designated by the Administrator as poor air quality areas.

EPA uses approved procedures and forms to collect necessary information to operate a grant program, and has been providing grants under DERA since Fiscal Year 2008 and rebates since Fiscal Year 2012. EPA is requesting an extension to the existing approved ICR for forms needed to collect necessary information to operate a rebate program as authorized by Congress under the DERA program.

As part of this extension, EPA is revising the ICR to address the needs of the Clean School Bus (CSB) Program. This program is authorized by title XI, section 71101 of the Infrastructure Investment and Jobs Act (Pub. L. 117–58). The new program, like DERA, allows for rebates and grants for school bus replacement projects that reduce emissions. EPA will collect information from applicants who wish to apply for a rebate under DERA or CSB. Information collected from applicants will ensure that they are eligible to receive funds, that funds are provided for eligible activities, and to satisfy the reporting requirements of DERA and CSB.

*Form Numbers:* 2060–0686.

*Respondents/affected entities:* Entities potentially affected by this action are those interested in applying for a rebate under EPA's Diesel Emission Reduction Act (DERA) or Clean School Bus (CSB) Program and include but are not limited to the following NAICS (North American Industry Classification System) codes: 23 Construction; 482 Rail Transportation; 483 Water Transportation; 484 Truck Transportation; 485 Transit and Ground Passenger Transportation; 4854 School and Employee Bus Transportation; 48831 Port and Harbor Operations; 61111 Elementary and Secondary Schools; 61131 Colleges, Universities, and Professional Schools; 9211 Executive, Legislative, and Other Government Support; and 9221 Justice, Public Order, and Safety Activities.

*Respondent's obligation to respond:* Voluntary.

*Estimated number of respondents:* 3000 (total).

*Frequency of response:* Voluntary as needed.

*Total estimated burden:* 17,287 hours (per year). Burden is defined at 5 CFR 1320.03(b).

*Total estimated cost:* $732,996.58 (per year), includes $0 annualized capital or operation & maintenance costs.

*Changes in Estimates:* There is an increase of 14,342 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is the result of a significant increase in the expected number of annual responses in the new Clean School Bus Program.

**Michael Moltzen,**

*Deputy Director, Transportation and Climate Division, Office of Air and Radiation.*

[FR Doc. 2022–02148 Filed 2–1–22; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–ORD–2021–0561; FRL–9486–01–ORD]**

## Availability of the Draft IRIS Toxicological Review of Perfluorohexanoic Acid (PFHxA) and Related Salts

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of public comment period.

**SUMMARY:** The Environmental Protection Agency (EPA) is announcing a 60-day public comment period associated with release of the draft Integrated Risk Information System (IRIS) Toxicological Review of Perfluorohexanoic Acid (PFHxA) and Related Salts. The draft document was prepared by the Center for Public Health and Environmental Assessment (CPHEA) within EPA's Office of Research and Development (ORD). EPA is releasing this draft IRIS assessment for public comment in advance of an independent external peer review organized by ERG, a contractor to EPA. The external peer reviewers will be provided with all written comments submitted in response to this notice for their consideration as they conduct their review. To receive future notification about the peer review, sign up for EPA's IRIS listserv, as described in this notice. EPA will consider all comments received when revising the document post-peer review. This draft assessment is not final as described in EPA's information quality guidelines, and it does not represent, and should not be construed to represent Agency policy or views.

**DATES:** The 60-day public comment period begins February 2, 2022 and ends April 4, 2022. Comments must be received on or before April 4, 2022.

**ADDRESSES:** The IRIS Toxicological Review of Perfluorohexanoic Acid (PFHxA) and Related Salts will be available via the internet on the IRIS website at *https://www.epa.gov/iris/iris-recent-additions* and in the public docket at *http://www.regulations.gov,* Docket ID No. EPA–HQ–ORD–2021–0561.

**FOR FURTHER INFORMATION CONTACT:** For information on the public comment period, contact the ORD Docket at the EPA Headquarters Docket Center; telephone: 202–566–1752; facsimile: 202–566–9744; or email: *Docket_ORD@epa.gov.*

For technical information on the IRIS Toxicological Review of Perfluorohexanoic Acid (PFHxA) or information on the public comment period, contact Dr. Andrew Kraft, CPHEA; telephone: 202–564–0286; or email: *kraft.andrew@epa.gov.* The IRIS Program will provide updates through the IRIS website (*https://www.epa.gov/iris*) and via EPA's IRIS listserv. To register for the IRIS listserv, visit the IRIS website (*https://www.epa.gov/iris*) or visit *https://www.epa.gov/iris/forms/staying-connected-integrated-risk-information-system#connect.*

For questions about the peer review, please contact: Laurie Waite, ERG, by email at *laurie.waite@erg.com* (subject line: EPA PFHxA peer review); or by phone: 781–674–7362.

**SUPPLEMENTARY INFORMATION:**

## I. Background

*Information on IRIS PFAS Assessments*

Per- and polyfluoroalkyl substances (PFAS) are a large class of man-made chemicals widely used in consumer products and industrial processes. The basic structure of PFAS consists of a carbon chain surrounded by fluorine atoms, with different chemicals possessing different end groups. The five IRIS toxicity assessments are being developed according to the scope and methods outlined in the publicly posted systematic review protocol (*https://cfpub.epa.gov/ncea/iris_drafts/recordisplay.cfm?deid=345065*) and they build upon several other PFAS assessments that have already been developed, and represent only one component of the broader PFAS action plan underway at the U.S. EPA (*https://www.epa.gov/pfas/epas-pfas-action-plan*).

EPA previously announced peer review activities related to five IRIS five per- and polyfluoroalkyl substances (PFAS) Integrated Risk Information System (IRIS) assessments including: Perfluorodecanoic acid (PFDA; CASRN 335–76–2), perfluorononanoic acid (PFNA; CASRN 375–24–4), perfluorohexanoic acid (PFHxA, CASRN 307–24–4), perfluorohexanesulfonic acid (PFHxS, CASRN 355–46–4), and perfluorobutanoic acid (PFBA, CASRN 375 22 4) and their related salts. These documents will undergo independent external scientific peer review managed by ERG, a contractor to EPA. EPA will provide updates on the status of the peer review for PFHxA via the IRIS website (*https://www.epa.gov/iris*) and IRIS listserv. EPA encourages all interested stakeholders to register for the IRIS listserv by visiting the IRIS website at *https://www.epa.gov/iris/forms/staying-connected-integrated-risk-information-system#connect.* Specific questions or comments on the peer review process should be directed to ERG.

## II. How To Submit Technical Comments to the Docket at https://www.regulations.gov

Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2021–0561 for the Perfluorohexanoic Acid (PFHxA) IRIS Assessment, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: Docket_ORD@epa.gov.*
- Fax: 202–566–9744. Due to COVID–19, there may be a delay in processing comments submitted by fax.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center (ORD Docket), Mail Code: 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460. The phone number is 202–566–1752. Due to COVID–19, there may be a delay in processing comments submitted by mail.

For information on visiting the EPA Docket Center Public Reading Room, visit *https://www.epa.gov/dockets.* Due to public health concerns related to COVID–19, the EPA Docket Center and Reading Room may be closed to the public with limited exceptions. The telephone number for the Public Reading Room is 202–566–1744. The public can submit comments via *www.regulations.gov* or email.

*Instructions:* Direct your comments to docket number EPA–HQ–ORD–2021–0561 for the Perfluorohexanoic Acid (PFHxA) IRIS Assessment.

Please ensure that your comments are submitted within the specified comment period. Comments received after the closing date will be marked ''late,'' and may only be considered if time permits. It is EPA's policy to include all comments it receives in the public docket without change and to make the comments available online at *www.regulations.gov,* including any personal information provided, unless a comment includes information claimed to be Confidential Business Information (CBI) or other information for which disclosure is restricted by statute. Do not submit information through *www.regulations.gov* or email that you consider to be CBI or otherwise protected. The *www.regulations.gov* website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. 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. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *www.epa.gov/epahome/dockets.htm.*

*Docket:* Documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other materials, such as copyrighted material, are publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the ORD Docket in the EPA Headquarters Docket Center.

**Timothy Watkins,**

*Acting Director, Center for Public Health & Environmental Assessment.*

[FR Doc. 2022–02050 Filed 2–1–22; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9462–01–R3]**

## Delegation of Authority to the State of West Virginia To Implement and Enforce Additional or Revised National Emission Standards for Hazardous Air Pollutants Standards and New Source Performance Standards

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of delegation of authority.

**SUMMARY:** On December 7, 2021, the Environmental Protection Agency (EPA) sent the State of West Virginia (West Virginia) a letter acknowledging that West Virginia's delegation of authority to implement and enforce the National Emissions Standards for Hazardous Air Pollutants (NESHAP) and New Source Performance Standards (NSPS) had been updated, as provided for under previously approved delegation mechanisms. To inform regulated facilities and the public, EPA is making available a copy of EPA's letter to West Virginia through this notice.

**DATES:** On December 7, 2021, EPA sent West Virginia a letter acknowledging that West Virginia's delegation of authority to implement and enforce Federal NESHAPs and NSPS had been updated.

**ADDRESSES:** Copies of documents pertaining to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103–2029. Copies of West Virginia's submittal are also available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE, Charleston, West Virginia 25304.

**FOR FURTHER INFORMATION CONTACT:** Yongtian He, Permits Branch (3AD10), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814–2339. Mr. He can also be reached via electronic mail at *He.Yongtian@epa.gov.*

**SUPPLEMENTARY INFORMATION:** On May 4, 2021, West Virginia notified EPA that West Virginia had updated its incorporation by reference of Federal NESHAP and NSPS to include many such standards as found in Title 40 of the Code of Federal Regulations (CFR), parts 60, 61, and 63 as of June 1, 2020. On December 7, 2021, EPA sent West Virginia a letter acknowledging that effective June 1, 2021, West Virginia has the authority to implement and enforce the NESHAP and NSPS as specified by West Virginia in its notices to EPA, as provided for under previously approved automatic delegation mechanisms (49 FR 48692, 67 FR 15486, EPA delegation letters dated March 19, 2001 and January 8, 2002). All notifications, applications, reports, and other correspondence required pursuant to the delegated NESHAP and NSPS must be submitted to both EPA Region III and to the West Virginia Department of Environmental Protection, unless the delegated standard specifically provides that such submittals may be sent to EPA or a delegated State. In such cases, the submittals should be sent only to the West Virginia Department of Environmental Protection. A copy of EPA's December 7, 2021 letter to West Virginia follows:

''Ms. Laura M. Crowder, Director
Division of Air Quality
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, West Virginia 25304
Via email at *laura.m.crowder@wv.gov*

Dear Ms. Crowder:

This letter acknowledges your letter dated May 4, 2021, in which the West Virginia Department of Environmental Protection (WVDEP) Division of Air Quality (DAQ) informed the United States Environmental Protection Agency (EPA) that West Virginia had updated its incorporation by reference of federal National Emissions Standards for Hazardous Air Pollutants (NESHAPs) and New Source Performance Standards (NSPSs) to include many such standards as found in 40 CFR parts 60, 61, and 63 as of June 1, 2020. WVDEP DAQ noted in the letter that it understood it was automatically delegated the authority to implement these standards. WVDEP DAQ stated its intent to enforce the standards in conformance with the terms of EPA's previous delegations of authority pursuant to the EPA final rules published at 49 FR 48692 and 67 FR 15486, and EPA delegation letters.

In two rulemakings, 49 FR 48692 (December 14, 1984) and 67 FR 15486 (April 2, 2002), EPA established the basis for delegation to West Virginia of specified federal standards at 40 CFR parts 60, 61 and 63. Subsequently, in a letter dated March 19, 2001 (enclosed), to WVDEP Director Michael Callaghan, EPA delegated to the State of West Virginia the authority to implement and enforce various federal NESHAPs found in 40 CFR part 63. In another letter to Director Callaghan dated January 8, 2002 (enclosed), EPA delegated to the State of West Virginia the authority to implement and enforce various federal NESHAPs found in 40 CFR part 61 and NSPSs found in 40 CFR part 60). In those letters, EPA also established that future Part 60, Part 61 and Part 63 standards would be automatically delegated to West Virginia subject to the conditions set forth in those letters. Those rulemakings and letters continue to control the conditions of delegation of future standards and their terms should be consulted for the specific conditions that apply to each regulatory program. However, in general terms, for automatic delegation to take effect, the letters establish conditions that can be paraphrased as requiring: legal adoption the standards; restrictions on the kinds of wording changes West Virginia may make to the federal standards when adopting them; and specific notification from West Virginia to EPA when a standard has been adopted.

WVDEP DAQ provided copies of the revised West Virginia Legislative Rules which specify the NESHAP and NSPS regulations West Virginia has adopted by reference. These revised Legislative Rules are entitled 45 CSR 34—''Emission Standards for Hazardous Air Pollutants,'' and 45 CSR 16—''Standards of Performance for New Stationary Sources.'' These revised Rules have an effective date of June 1, 2021. EPA has reviewed the Revised rules and determined that they meet the conditions for automatic delegation as established by EPA in its prior letters and rulemakings.

Accordingly, EPA acknowledges that West Virginia now has the authority, as provided for under the terms of EPA's previous delegation actions, to implement and enforce the NESHAP and NSPS standards which West Virginia adopted by reference in West Virginia's revised Legislative Rules 45 CSR 34 and 45 CSR 16, effective on June 1, 2021.

Please note that on December 19, 2008 in *Sierra Club* vs. *EPA* (551 F.3rd 1019, D.C. Circuit 2008), the United States Court of Appeals for the District of Columbia Circuit vacated certain provisions of the General Provisions of 40 CFR part 63 relating to exemptions for startup, shutdown, and malfunction (SSM). On October 16, 2009, the Court issued the mandate vacating these SSM exemption provisions, which are found at 40 CFR part 63, 63.6(f)(1), and (h)(1).

Accordingly, EPA no longer allows sources to use the SSM exemption as provided for in the vacated provisions at 40 CFR 63.6(f)(1), and (h)(1), even though EPA has not yet formally removed the SSM exemption provisions from the General Provisions of 40 CFR part 63. Because West Virginia incorporated 40 CFR part 63 by reference, West Virginia should also no longer allow sources to use the former SSM exemption from the General Provisions of 40 CFR part 63 due to the Court's ruling in *Sierra Club* vs. *EPA.*

If you have any questions, please contact me or Ms. Mary Cate Opila, Chief, Permits Branch, at 215–814–2041.

Sincerely,
Cristina Fernández,
*Director, Air and Radiation Division*''

Enclosures
cc: Renu Chakrabarty (via email at *renu.m.chakrabarty@wv.gov*)
Mike Egnor (via email at *michael.egnor@wv.gov*)

This notice acknowledges the updates of West Virginia's delegation of

authority to implement and enforce NESHAP and NSPS.

Dated: January 26, 2022.

**Cristina Fernández,**

*Director, Air and Radiation Division, Region III.*

[FR Doc. 2022–02052 Filed 2–1–22; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL ELECTION COMMISSION

**[NOTICE 2022–03]**

## Price Index Adjustments for Expenditure Limitations and Lobbyist Bundling Disclosure Threshold

**AGENCY:** Federal Election Commission.

**ACTION:** Notice of adjustments to expenditure limitations and lobbyist bundling disclosure threshold.

**SUMMARY:** As mandated by provisions of the Federal Election Campaign Act (''the Act''), the Federal Election Commission (''the Commission'') is adjusting certain expenditure limitations and the lobbyist bundling disclosure threshold set forth in the Act, to index the amounts for inflation. Additional details appear in the supplemental information that follows.

**DATES:** The new limitations apply beginning on January 1, 2022.

**FOR FURTHER INFORMATION CONTACT:** Ms. Elizabeth S. Kurland, Information Division, 1050 First Street NE, Washington, DC 20463; (202) 694–1100 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** Under the Federal Election Campaign Act, 52 U.S.C. 30101–45, coordinated party expenditure limits (52 U.S.C. 30116(d)(2)–(3)) and the disclosure threshold for contributions bundled by lobbyists (52 U.S.C. 30104(i)(3)(A)) are adjusted periodically to reflect changes in the consumer price index. *See* 52 U.S.C. 30104(i)(3)(B), 30116(c); 11 CFR 109.32(a)(2), (b)(3), 110.17(a), (f). The Commission is publishing this notice to announce the adjusted limits and disclosure threshold for 2022.

### Coordinated Party Expenditure Limits for 2022

Under 52 U.S.C. 30116(c), the Commission must adjust the expenditure limitations established by 52 U.S.C. 30116(d) (the limits on expenditures by national party committees, state party committees, or their subordinate committees in connection with the general election campaign of candidates for Federal office) annually to account for inflation. This expenditure limitation is increased by the percent difference between the price index, as certified to the Commission by the Secretary of Labor, for the 12 months preceding the beginning of the calendar year and the price index for the base period (calendar year 1974). 52 U.S.C. 30116(c)(1)(B)(i), (2)(B)(i).

*1. Expenditure Limitation for House of Representatives in States With More Than One Congressional District*

Both the national and state party committees have an expenditure limitation for each general election held to fill a seat in the House of Representatives in states with more than one congressional district. *See* 52 U.S.C. 30116(d)(3)(B). This limitation also applies to the District of Columbia and territories that elect individuals to the office of Delegate or Resident Commissioner.[1] *Id.* The formula used to calculate the expenditure limitation in such states and territories multiplies the base figure of $10,000 by the difference in the price index (5.49563), rounding to the nearest $100. *See* 52 U.S.C. 30116(c)(1)(B), (d)(3)(B); 11 CFR 109.32(b), 110.17. Based upon this formula, the expenditure limitation for 2022 general elections for House candidates in these states, districts, and territories is $55,000.

*2. Expenditure Limitation for Senate and for House of Representatives in States With Only One Congressional District*

Both the national and state party committees have an expenditure limitation for a general election held to fill a seat in the Senate or in the House of Representatives in states with only one congressional district. *See* 52 U.S.C. 30116(d)(3)(A). The formula used to calculate this expenditure limitation considers not only the price index but also the voting age population (''VAP'') of the state. *Id.* The VAP figures used to calculate the expenditure limitations were certified by the U.S. Census Bureau. The VAP of each state is also published annually in the **Federal Register** by the U.S. Department of Commerce. 11 CFR 110.18. The general election expenditure limitation is the greater of: The base figure ($20,000) multiplied by the difference in the price index, 5.49563 (which totals $109,900); or $0.02 multiplied by the VAP of the state, multiplied by 5.49563. *See* 52 U.S.C. 30116(c)(1)(B), (d)(3)(A); 11 CFR 109.32(b), 110.17. Amounts are rounded to the nearest $100. 52 U.S.C. 30116(c)(1)(B)(iii); 11 CFR 109.32(b)(3), 110.17(c). The chart below provides the state-by-state breakdown of the 2022 general election expenditure limitations for Senate elections. The expenditure limitation for 2022 House elections in states with only one congressional district[2] is $109,900.

SENATE GENERAL ELECTION COORDINATED EXPENDITURE LIMITS—2022 ELECTIONS[3]

| State | Voting age population (VAP) | VAP × .02 × the price index (5.49563) | Senate expenditure limit (the greater of the amount in column 3 or $109,900) |
|---|---|---|---|
| Alabama | 3,917,625 | $430,600 | $430,600 |
| Alaska | 553,317 | 60,800 | 109,900 |
| Arizona | 5,662,328 | 622,400 | 622,400 |
| Arkansas | 2,322,502 | 255,300 | 255,300 |
| California | 30,465,205 | 3,348,500 | 3,348,500 |
| Colorado | 4,568,613 | 502,100 | 502,100 |
| Connecticut | 2,875,887 | 316,100 | 316,100 |
| Delaware | 795,090 | 87,400 | 109,900 |
| Florida | 17,491,848 | 1,922,600 | 1,922,600 |
| Georgia | 8,275,264 | 909,600 | 909,600 |
| Hawaii | 1,137,154 | 125,000 | 125,000 |
| Idaho | 1,431,897 | 157,400 | 157,400 |
| Illinois | 9,868,245 | 1,084,600 | 1,084,600 |
| Indiana | 5,218,979 | 573,600 | 573,600 |

[1] Currently, these are Puerto Rico, American Samoa, Guam, the United States Virgin Islands and the Northern Mariana Islands. *See http://www.house.gov/representatives.*

[2] Currently, these states are: Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont and Wyoming. *See http://www.house.gov/representatives/.*

SENATE GENERAL ELECTION COORDINATED EXPENDITURE LIMITS—2022 ELECTIONS [3]—Continued

| State | Voting age population (VAP) | VAP × .02 × the price index (5.49563) | Senate expenditure limit (the greater of the amount in column 3 or $109,900) |
|---|---|---|---|
| Iowa | 2,456,703 | 270,000 | 270,000 |
| Kansas | 2,231,518 | 245,300 | 245,300 |
| Kentucky | 3,493,482 | 384,000 | 384,000 |
| Louisiana | 3,541,104 | 389,200 | 389,200 |
| Maine | 1,120,338 | 123,100 | 123,100 |
| Maryland | 4,801,825 | 527,800 | 527,800 |
| Massachusetts | 5,622,590 | 618,000 | 618,000 |
| Michigan | 7,897,432 | 868,000 | 868,000 |
| Minnesota | 4,389,823 | 482,500 | 482,500 |
| Mississippi | 2,257,130 | 248,100 | 248,100 |
| Missouri | 4,783,630 | 525,800 | 525,800 |
| Montana | 869,201 | 95,500 | 109,900 |
| Nebraska | 1,480,808 | 162,800 | 162,800 |
| Nevada | 2,445,243 | 268,800 | 268,800 |
| New Hampshire | 1,132,616 | 124,500 | 124,500 |
| New Jersey | 7,244,002 | 796,200 | 796,200 |
| New Mexico | 1,642,656 | 180,500 | 180,500 |
| New York | 15,722,590 | 1,728,100 | 1,728,100 |
| North Carolina | 8,249,659 | 906,700 | 906,700 |
| North Dakota | 589,247 | 64,800 | 109,900 |
| Ohio | 9,174,388 | 1,008,400 | 1,008,400 |
| Oklahoma | 3,025,109 | 332,500 | 332,500 |
| Oregon | 3,384,804 | 372,000 | 372,000 |
| Pennsylvania | 10,290,047 | 1,131,000 | 1,131,000 |
| Rhode Island | 886,783 | 97,500 | 109,900 |
| South Carolina | 4,073,613 | 447,700 | 447,700 |
| South Dakota | 674,947 | 74,200 | 109,900 |
| Tennessee | 5,434,544 | 597,300 | 597,300 |
| Texas | 22,052,508 | 2,423,800 | 2,423,800 |
| Utah | 2,390,732 | 262,800 | 262,800 |
| Vermont | 528,594 | 58,100 | 109,900 |
| Virginia | 6,757,448 | 742,700 | 742,700 |
| Washington | 6,062,570 | 666,400 | 666,400 |
| West Virginia | 1,423,928 | 156,500 | 156,500 |
| Wisconsin | 4,621,152 | 507,900 | 507,900 |
| Wyoming | 446,379 | 49,100 | 109,900 |

**Limitations on Contributions by Individuals, Non-Multicandidate Committees and Certain Political Party Committees Giving to U.S. Senate Candidates for the 2021–2022 Election Cycle**

For the convenience of the readers, the Commission is also republishing the contribution limitations for individuals, non-multicandidate committees and for certain political party committees giving to U.S. Senate candidates and national party committees for the 2021–2022 election cycle:

| Statutory provision | Statutory amount | 2021–2022 limit |
|---|---|---|
| 52 U.S.C. 30116(a)(1)(A) | $2,000 | $2,900 |
| 52 U.S.C. 30116(a)(1)(B) | 25,000 | 36,500 |
| 52 U.S.C. 30116(h) | 35,000 | 51,200 |

[3] This expenditure limit does not apply to the District of Columbia, Puerto Rico, American Samoa, Guam, the United States Virgin Islands, and the Northern Mariana Islands because those jurisdictions do not elect Senators. *See* 52 U.S.C. 30116(d)(3)(A); 11 CFR 109.32(b)(2)(i).

**Lobbyist Bundling Disclosure Threshold for 2022**

The Act requires certain political committees to disclose contributions bundled by lobbyists/registrants and lobbyist/registrant political action committees once the contributions exceed a specified threshold amount. 52 U.S.C. 30104(i)(1), (i)(3)(A). The Commission must adjust this threshold amount annually to account for inflation. 52 U.S.C. 30104(i)(3)(B). The disclosure threshold is increased by multiplying the $15,000 statutory disclosure threshold by 1.34410, the difference between the price index, as certified to the Commission by the Secretary of Labor, for the 12 months preceding the beginning of the calendar year and the price index for the base period (calendar year 2006). *See* 52 U.S.C. 30104(i)(3), 30116(c)(1)(B); 11 CFR 104.22(g). The resulting amount is rounded to the nearest multiple of $100. 52 U.S.C. 30104(i)(3)(B), 30116(c)(1)(B)(iii); 11 CFR 104.22(g)(4). Based upon this formula ($15,000 × 1.34410), the lobbyist bundling disclosure threshold for calendar year 2022 is $20,200.

Dated: January 27, 2022.

On behalf of the Commission,

**Allen J. Dickerson,**

*Chairman, Federal Election Commission.*

[FR Doc. 2022–02070 Filed 2–1–22; 8:45 am]

BILLING CODE 6715–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

**[OMB #0970–0389]**

### Submission for OMB Review; Tribal Maternal, Infant, and Early Childhood Home Visiting Program Form 1: Demographic and Service Utilization Data

**AGENCY:** Office of Child Care, Administration for Children and Families, HHS.

**ACTION:** Request for public comment.

**SUMMARY:** The Administration for Children and Families (ACF), Office of Child Care (OCC) is requesting a 3-year extension of the Tribal Maternal, Infant, and Early Childhood Home Visiting (MIECHV) Program's Form 1: Demographic and Service Utilization

Data (OMB #0970–0389; expiration 6/30/2022). There are minor updates to the existing Form 1.

**DATES:** *Comments due within 30 days of publication.* OMB must make a decision about the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. You can also obtain copies of the proposed collection of information by emailing *infocollection@acf.hhs.gov.* Identify all emailed requests by the title of the information collection.

**SUPPLEMENTARY INFORMATION:**

*Description:* Section 511(h)(2)(A) of Title V of the Social Security Act created the MIECHV Program and authorizes the Secretary of HHS to award grants to Indian tribes (or a consortium of Indian tribes), tribal organizations, or urban Indian organizations to conduct an early childhood home visiting program. The legislation set aside 3 percent of the total MIECHV program appropriation for grants to tribal entities. Tribal MIECHV grants, to the greatest extent practicable, are to be consistent with the requirements of the MIECHV grants to states and jurisdictions and include conducting a needs assessment and establishing quantifiable, measurable benchmarks. ACF's OCC, in collaboration with the Health Resources and Services Administration, Maternal and Child Health Bureau, awards grants for the Tribal MIECHV Program. The Tribal MIECHV grant awards support 5-year cooperative agreements to conduct community needs assessments; plan for and implement high-quality, culturally relevant, evidence-based home visiting programs in at-risk tribal communities; and participate in research and evaluation activities to build the knowledge base on home visiting among Native populations.

In Year 1 of the cooperative agreement, grantees must (1) conduct a comprehensive community needs and readiness assessment, and (2) develop a plan to respond to identified needs. Following each year that Tribal MIECHV grantees implement home visiting services, they must submit Form 1: Demographic and Service Utilization Data. The Form 1 data are used to help ACF better understand the population receiving services from Tribal MIECHV grantees and the degree to which they are using services, as well as better understand the Tribal MIECHV workforce. Overall, this information collection will provide valuable information to HHS that will guide understanding of the Tribal MIECHV Program and the provision of technical assistance to Tribal MIECHV Program grantees. Changes from the previous form are minor, including adding a virtual home visit field and revising certain terms and definitions to make reporting on the areas more concise and easier for grantees to report.

*Respondents:* Tribal MIECHV Program Grantees.

ANNUAL BURDEN ESTIMATES

| Instrument | Total number of respondents | Annual number of responses per respondent | Average burden hours per response | Annual burden hours |
|---|---|---|---|---|
| Tribal MIECHV Form 1 | 23 | 1 | 500 | 11,500 |

*Estimated Total Annual Burden Hours:* 11,500.

*Authority:* Title V of the Social Security Act, sections 511(e)(8)(A) and 511(h)(2)(A).

**Mary B. Jones,**

*ACF/OPRE Certifying Officer.*

[FR Doc. 2022–02157 Filed 2–1–22; 8:45 am]

**BILLING CODE 4184–43–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2012–D–0429]**

### Agency Information Collection Activities; Proposed Collection; Comment Request; Guidance on Meetings With Industry and Investigators on the Research and Development of Tobacco Products

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection aspects of the ''Guidance on Meetings with Industry and Investigators on the Research and Development of Tobacco Products.''

**DATES:** Submit either electronic or written comments on the collection of information by April 4, 2022.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before April 4, 2022. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of April 4, 2022. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

*Electronic Submissions*

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such

as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

*Written/Paper Submissions*

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

*Instructions:* All submissions received must include the Docket No. FDA–2012–D–0429 for ''Guidance on Meetings with Industry and Investigators on the Research and Development of Tobacco Products.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

**FOR FURTHER INFORMATION CONTACT:** Amber Sanford, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–8867, *PRAStaff@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

**Guidance on Meetings With Industry and Investigators on the Research and Development of Tobacco Products**

*OMB Control Number 0910–0731—Extension*

The Family Smoking Prevention and Tobacco Control Act (Pub. L. 111–31) offers tobacco product manufacturers several pathways to obtain an order from FDA to authorize the marketing of a new tobacco product before it may be introduced or delivered into interstate commerce. To provide assistance with these pathways to market products, FDA will meet with tobacco product manufacturers, importers, researchers, and investigators (or their representatives) when appropriate as described in ''Guidance on Meetings with Industry and Investigators on the Research and Development of Tobacco Products.'' This guidance is intended to assist persons who seek meetings with FDA relating to their research to inform the regulation of tobacco products, or to support the development or marketing of tobacco products. The original guidance issued in 2012 was revised for updating and clarity in July 2016.

In the guidance, the Agency discusses, among other things:

• What information FDA recommends persons include in a meeting request;

• How and when to submit a request; and

• What information FDA recommends persons submit prior to a meeting.

This guidance describes two collections of information: (1) The submission of a meeting request containing certain information and (2) the submission of an information package in advance of the meeting. The purpose of this proposed information collection is to allow FDA to conduct meetings with tobacco manufacturers, importers, researchers, and investigators in an effective and efficient manner. FDA issued this guidance and the revisions consistent with FDA's good guidance practices regulations (21 CFR 10.115).

*Meeting Requests:* The guidance sets forth FDA's recommendations for materials to be included in a request for a meeting with FDA to discuss the research and development of tobacco products. In the guidance, FDA recommends that the following

information be included in the meeting request:

1. Product name
2. FDA-assigned Submission Tracking Number(s) of prior submissions (*e.g.,* premarket applications, meeting requests) for the product and relevant product version(s) (if applicable);
3. Product category (*e.g.,* cigarettes, smokeless tobacco) (if applicable);
4. Product use (indicate for consumer use or for further manufacturing);
5. Contact information for the authorized point of contact for the company requesting the meeting;
6. The topic of the meeting being requested (*e.g.,* a new tobacco product application, an application for permission to market a modified risk tobacco product, or investigational use of a new tobacco product);
7. A brief statement of the purpose of the meeting, which could include a discussion of the types of studies or data to be discussed at the meeting, the general nature of the primary questions to be asked, and where the meeting fits in the overall product development plans;
8. A preliminary list of the specific objectives/outcomes expected from the meeting;
9. A preliminary proposed agenda, including an estimate of the time needed and a designated speaker for each agenda item;
10. A preliminary list of specific critical questions, grouped by discipline (*e.g.,* chemistry, clinical, nonclinical);
11. A list of all individuals who will attend the meeting on behalf of the tobacco product manufacturer, importer, researcher, or investigator, including titles and responsibilities;
12. The date on which the meeting information package will be received by FDA; and
13. Suggested format of the meeting (*e.g.,* conference call, in-person meeting at FDA offices, video conference, or written response) and suggested dates and times for the meeting. Meetings are usually scheduled for 1 hour. FDA is proposing a meeting request include the FDA-assigned submission tracking numbers of relevant product version(s), if applicable, to allow for FDA to reference such information to better assess and respond to the issues and questions raised in the meeting request.

This information will be used by the Agency to: (1) Determine the utility of the meeting, (2) identify Agency staff necessary to discuss proposed agenda items, and (3) schedule the meeting.

*Meeting Information Packages:* An individual submitting a meeting information package to FDA in advance of a meeting should provide summary information relevant to the product and supplementary information pertaining to any issue raised by the individual or FDA to be discussed at the meeting. As stated in the guidance, FDA recommends that meeting information packages generally include updates of information that was submitted with the meeting request and, as applicable:

1. Product composition and design data summary;
2. Manufacturing and process control data summary;
3. Nonclinical data summary;
4. Clinical data summary;
5. Behavioral and product use data summary;
6. User and nonuser perception data summary; and
7. Investigational plans for studies and surveillance of the tobacco product, including a summary of proposed study protocols containing the following information (as applicable):

a. Study objective(s);

b. Study hypotheses;

c. Study design;

d. Study population (inclusion/exclusion criteria, comparison group(s));

e. Human subject protection information, including Institutional Review Board information;

f. Primary and secondary endpoints (definition and success criteria);

g. Sample size calculation;

h. Data collection procedures;

i. Duration of follow up and baseline and follow up assessments, and

j. Data analysis plan(s).

The purpose of the information package is to provide Agency staff the opportunity to adequately prepare for the meeting, including the review of relevant data concerning the product. In the Agency's experience, reviewing such information is critical to achieving a productive meeting. If the information package was previously submitted in the meeting request, it should be revised, as applicable, so that the information reflects the most current and accurate information available.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

| Activity | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response | Total hours |
|---|---|---|---|---|---|
| **Meeting Requests** | | | | | |
| Combining and Sending Meeting Request Letters for Manufacturers, Importers, and Researchers | 60 | 1 | 60 | 10 | 600 |
| **Meeting Information Packages** | | | | | |
| Combining and Submitting Meeting Information Packages for Manufacturers, Importers, and Researchers | 60 | 1 | 60 | 18 | 1,080 |
| Total | | | | | 1,680 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

FDA's estimate of the number of respondents for meeting requests in table 1 is based on the number of meeting requests received and projected over the next 3 years. FDA estimates that 60 preapplication meetings will be requested.

The hours per response for combining and sending meeting request letters are estimated at 10 hours each, and the total burden hours for meeting requests are expected to be 600 hours. Based on FDA's experience, the Agency expects it will take respondents this amount of time to prepare, gather, copy, and submit brief statements about the product and a description of the purpose and details of the meeting.

FDA estimates that 60 respondents will compile meeting information packages and submit to FDA at 18 hours per response. Based on FDA's experience, the Agency expects that it

will take respondents, collectively, 1,080 hours to gather, copy, and submit brief statements about the product, a description of the details of the anticipated meeting, and data and information, including identifying prior FDA submissions for the product or relevant versions of the product, that generally would already have been generated for the planned research and/or product development.

The total number of burden hours for this collection of information is estimated to be 1,680 hours (600 hours to prepare and submit meeting requests and 1,080 hours to prepare and submit information packages). Our estimated burden for the information collection reflects an overall decrease of 644 hours. We attribute this adjustment to a decrease in the number of submissions we received over the last few years and our projections for the next 3 years.

Dated: January 25, 2022.

**Lauren K. Roth,**

*Associate Commissioner for Policy.*

[FR Doc. 2022–02055 Filed 2–1–22; 8:45 am]

BILLING CODE 4164–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2022–N–0079]**

### Hikma Pharmaceuticals USA, Inc., et al.; Withdrawal of Approval of 29 New Drug Applications

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is withdrawing approval of 29 new drug applications (NDAs) from multiple applicants. The applicants notified the Agency in writing that the drug products were no longer marketed and requested that the approval of the applications be withdrawn.

**DATES:** Approval is withdrawn as of March 4, 2022.

**FOR FURTHER INFORMATION CONTACT:** Kimberly Lehrfeld, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6226, Silver Spring, MD 20993–0002, 301–796–3137, *Kimberly.Lehrfeld@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** The applicants listed in the table have informed FDA that these drug products are no longer marketed and have requested that FDA withdraw approval of the applications under the process in § 314.150(c) (21 CFR 314.150(c)). The applicants have also, by their requests, waived their opportunity for a hearing. Withdrawal of approval of an application or abbreviated application under § 314.150(c) is without prejudice to refiling.

| Application No. | Drug | Applicant |
|---|---|---|
| NDA 006134 | Dolophine (methadone hydrochloride (HCl)) Tablets, 5 milligrams (mg), and 10 mg.<br>Dolophine (methadone HCl) Syrup, 10 mg/30 milliliter (mL). | Hikma Pharmaceuticals USA, Inc., 1809 Wilson Rd., Columbus, OH 43228. |
| NDA 006882 | Phisohex (hexachlorophene) Emulsion, 3% | Sanofi-aventis U.S. LLC, 55 Corporate Dr., Bridgewater, NJ 08807. |
| NDA 009818 | Kemadrin (procyclidine HCl) Tablets, 2 mg, and 5 mg | Monarch Pharmaceuticals, LLC, c/o Pfizer, Inc., 235 East 42nd St., New York, NY 10017. |
| NDA 012301 | Librium (chlordiazepoxide HCl), Injection, 100 mg/ampule. | Bausch Health US, LLC, 400 Somerset Corporate Blvd., Bridgewater, NJ 08807. |
| NDA 013416 | Norgesic (orphenadrine citrate, aspirin, and caffeine) Tablets, 25 mg/385 mg/30 mg.<br>Norgesic Forte (orphenadrine citrate, aspirin, and caffeine) Tablets, 50 mg/770 mg/60 mg. | Bausch Health US, LLC. |
| NDA 014228 | Spandin (aspirin and sodium salicylate) Time-released Tablets, 7.5 grains/2.5 grains. | Abbott Healthcare Pvt. Ltd., c/o G&L Scientific, Independence Blvd., 4th Floor, Warren, NJ 07059. |
| NDA 016194 | Talwin (pentazocine lactate) Injection, equivalent to (EQ) 30 mg base/mL. | Hospira Inc., 275 North Field Dr., Bldg. H1, Lake Forest, IL 60045. |
| NDA 016418 | Inderal (propranolol HCl) Tablets, 10 mg, 20 mg, 40 mg, 60 mg, 80 mg, and 90 mg. | Wyeth Pharmaceuticals LLC, 235 E. 42nd St., New York, NY 10017. |
| NDA 016704 | Resectisol (mannitol) Irrigation Solution, 5 grams (g)/100 mL. | B. Braun Medical Inc., 901 Marcon Blvd., Allentown, PA 18109. |
| NDA 016762 | Inderal (propranolol HCl) Tablets, 10 mg, 20 mg, 40 mg, 60 mg, and 80 mg. | Wyeth Pharmaceuticals LLC. |
| NDA 016954 | Micronor (norethindrone) Tablets, 0.35 mg | Janssen Pharmaceuticals, Inc., 1125 Trenton-Harbourton Rd., Titusville, NJ 08560. |
| NDA 017013 | Sodium Chloride Injection, 20 g/100 mL | Abbott Healthcare Pvt. Ltd., c/o G&L Scientific. |
| NDA 017683 | Inderal (propranolol HCL) Tablets, 10 mg, 20 mg, 40 mg, 60 mg, and 80 mg. | Wyeth Pharmaceuticals LLC. |
| NDA 018423 | Hibiclens (chlorhexidine gluconate) Sponge, 4% | Mölnlycke Health Care, 5445 Triangle Pkwy., Suite 400, Peachtree Corners, GA 30092. |
| NDA 018703 | Zantac (ranitidine HCl) Tablets, EQ 150 mg base, and EQ 300 mg base. | GlaxoSmithKline Intellectual Property Ltd. England, c/o GlaxoSmithKline, 5 Crescent Dr., Philadelphia, PA 19112. |
| NDA 019387 | Profenal (suprofen) Ophthalmic Solution, 1% | Alcon Laboratories, Inc., 6201 South Freeway, Fort Worth, TX 76134–2099. |
| NDA 019530 | Ucephan (sodium benzoate and sodium phenylacetate) Solution, 100 mg/mL; 100 mg/mL. | B. Braun Medical Inc. |
| NDA 019675 | Zantac (ranitidine HCl) Syrup, EQ 15 mg base/mL | GlaxoSmithKline Intellectual Property Ltd. England, c/o GlaxoSmithKline. |
| NDA 019814 | Betagan (levobunolol HCl) Ophthalmic Solution, 0.25% | Allergan, Inc. |
| NDA 019927 | Nizoral (ketoconazole) Shampoo, 2% | Janssen Pharmaceuticals, Inc. |

| Application No. | Drug | Applicant |
|---|---|---|
| NDA 020037 | Voltaren (diclofenac sodium) Ophthalmic Solution, 0.1% | Novartis Pharmaceuticals Corp., 1 Health Plaza, East Hanover, NJ 07936–1080. |
| NDA 021169 | Razadyne (galantamine hydrobromide) Tablets, EQ 4 mg base, EQ 8 mg base, and EQ 12 mg base. | Janssen Research & Development, LLC, 1125 Trenton-Harbourton Rd., Titusville, NJ 08560. |
| NDA 021204 | Starlix (nateglinide) Tablets, 60 mg, and 120 mg | Novartis Pharmaceuticals Corp. |
| NDA 021406 | Fortical (calcitonin-salmon recombinant) Nasal Spray, 200 International Units/Spray. | Upsher-Smith Laboratories, LLC, 6701 Evenstad Dr., Maple Grove, MN 55369. |
| NDA 021860 | Sarafem (fluoxetine HCl) Tablets, EQ 10 mg base, EQ 15 mg base, and EQ 20 mg base. | Allergan Pharmaceuticals International Ltd., c/o Allergan Sales, LLC, 5 Giralda Farms, Madison, NJ 07940. |
| NDA 202833 | Picato (ingenol mebutate) Gel, 0.015%, and 0.05% | LEO Laboratories Ltd., c/o LEO Pharma Inc., 7 Giralda Farms, Madison, NJ 07940. |
| NDA 202880 | Zohydro ER (hydrocodone bitartrate) Extended-release Capsules, 10 mg, 15 mg, 20 mg, 30 mg, 40 mg, and 50 mg. | Recro Gainesville LLC, 1300 Gould Dr., Gainesville, GA 30504. |
| NDA 204683 | Khedezla (desvenlafaxine) Extended-Release Tablets, 50 mg, and 100 mg. | Osmotica Pharmaceutical US LLC, 400 Crossing Blvd., Bridgewater, NJ 08807. |
| NDA 207916 | Cetylev (acetylcysteine) Effervescent Tablets, 500 mg, and 2.5 g. | Arbor Pharmaceuticals, LLC, 6 Concourse Pkwy., Suite 1800, Atlanta, GA 30328. |

Therefore, approval of the applications listed in the table, and all amendments and supplements thereto, is hereby withdrawn as of March 4, 2022. Approval of each entire application is withdrawn, including any strengths and dosage forms inadvertently missing from the table. Introduction or delivery for introduction into interstate commerce of products without approved new drug applications violates section 301(a) and (d) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331(a) and (d)). Drug products that are listed in the table that are in inventory on March 4, 2022 may continue to be dispensed until the inventories have been depleted or the drug products have reached their expiration dates or otherwise become violative, whichever occurs first.

Dated: January 25, 2022.

**Lauren K. Roth,**

*Associate Commissioner for Policy.*

[FR Doc. 2022–02059 Filed 2–1–22; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2022–N–0074]**

### Watson Laboratories, Inc., et al.; Withdrawal of Approval of Eight Abbreviated New Drug Applications

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is withdrawing approval of eight abbreviated new drug applications (ANDAs) from multiple applicants. The applicants notified the Agency in writing that the drug products were no longer marketed and requested that the approval of the applications be withdrawn.

**DATES:** Approval is withdrawn as of March 4, 2022.

**FOR FURTHER INFORMATION CONTACT:** Martha Nguyen, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 1676, Silver Spring, MD 20993–0002, 240–402–6980, *Martha.Nguyen@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** The applicants listed in the table have informed FDA that these drug products are no longer marketed and have requested that FDA withdraw approval of the applications under the process described in § 314.150(c) (21 CFR 314.150(c)). The applicants have also, by their requests, waived their opportunity for a hearing. Withdrawal of approval of an application or abbreviated application under § 314.150(c) is without prejudice to refiling.

| Application No. | Drug | Applicant |
|---|---|---|
| ANDA 075152 | Diclofenac Potassium Tablets, 50 milligrams (mg) | Watson Laboratories, Inc. (an indirect, wholly owned subsidiary of Teva Pharmaceuticals USA, Inc.), 400 Interpace Pkwy., Bldg. A, Parsippany, NJ 07054. |
| ANDA 091376 | Topotecan Hydrochloride (HCl) for Injection, Equivalent to (EQ) 4 mg base/vial. | Fresenius Kabi USA, LLC, Three Corporate Dr., Lake Zurich, IL 60047. |
| ANDA 091471 | Efavirenz Tablets, 600 mg | Mylan Pharmaceuticals Inc., a Viatris Company, 3711 Collins Ferry Rd., Morgantown, WV 26505. |
| ANDA 200463 | Itraconazole Capsules, 100 mg | Mylan Pharmaceuticals Inc., a Viatris Company, 781 Chestnut Ridge Rd., Morgantown, WV 26504. |
| ANDA 202395 | Ziprasidone HCl Capsules, EQ 20 mg base, EQ 40 mg base, EQ 60 mg base, and EQ 80 mg base. | Do. |
| ANDA 203170 | Docetaxel Injection, 40 mg/milliliter | Jiangsu Hengrui Pharmaceuticals Co., Ltd., U.S. Agent, eVenus Pharmaceutical Laboratories Inc., 506 Carnegie Center, Suite 100, Princeton, NJ 08540. |
| ANDA 203574 | Mesalamine Delayed Release Tablets, 1.2 grams | Mylan Pharmaceuticals Inc., a Viatris Company, 781 Chestnut Ridge Rd., Morgantown, WV 26504. |
| ANDA 208177 | Atazanavir Sulfate Capsules, EQ 150 mg base, EQ 200 mg base, and EQ 300 mg base. | Do. |

Therefore, approval of the applications listed in the table, and all amendments and supplements thereto, is hereby withdrawn as of March 4, 2022. Approval of each entire application is withdrawn, including any strengths and dosage forms inadvertently missing from the table. Introduction or delivery for introduction into interstate commerce of products without approved new drug applications violates section 301(a) and (d) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331(a) and (d)). Drug products that are listed in the table that are in inventory on March 4, 2022 may continue to be dispensed until the inventories have been depleted or the drug products have reached their expiration dates or otherwise become violative, whichever occurs first.

Dated: January 25, 2022.

**Lauren K. Roth,**

*Associate Commissioner for Policy.*

[FR Doc. 2022–02053 Filed 2–1–22; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Library of Medicine; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Literature Selection Technical Review Committee.

The meeting is devoted to the review and evaluation of journals for potential indexing by the National Library of Medicine and will be closed to the public in accordance with the provisions set forth in section 552b(c)(9)(B), Title 5 U.S.C., as amended. Premature disclosure of the titles of the journals as potential titles to be indexed by the National Library of Medicine, the discussions, and the presence of individuals associated with these publications could significantly frustrate the review and evaluation of individual journals.

*Name of Committee:* Literature Selection Technical Review Committee.

*Date:* June 23–24, 2022.

*Time:* 9:30 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate journals as potential titles to be indexed by the National Library of Medicine.

*Place:* Virtual Meeting.

*Contact Person:* Dianne Babski, Associate Director, Division of Library Operations, National Library of Medicine, 8600 Rockville Pike, Building 38, Room 4S404, Bethesda, MD 20894, 301–827–4729, *babskid@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS).

Dated: January 28, 2022.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2022–02128 Filed 2–1–22; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Imaging Guided Interventions and Surgery Study Section.

*Date:* March 3–4, 2022.

*Time:* 9:00 a.m. to 8:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Yuanna Cheng, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4138, MSC 7814, Bethesda, MD 20892, (301) 435–1195, *Chengy5@csr.nih.gov.*

*Name of Committee:* Biology of Development and Aging Integrated Review Group; Drug Discovery and Molecular Pharmacology Study Section.

*Date:* March 3–4, 2022.

*Time:* 9:00 a.m. to 8:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Jeffrey Smiley, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6194, MSC 7804, Bethesda, MD 20892, 301–594–7945, *smileyja@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Fellowships: Chemistry, Biochemistry and Biophysics A.

*Date:* March 3, 2022.

*Time:* 9:00 a.m. to 8:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Shan Wang, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 496–4390, *shan.wang@nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Hypersensitivity, Allergies and Mucosal Immunology (HAMI).

*Date:* March 3–4, 2022.

*Time:* 9:30 a.m. to 8:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Deborah Hodge, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4207, MSC 7812, Bethesda, MD 20892, (301) 435–1238, *hodged@mail.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; AREA/REAP: Cardiovascular and Respiratory Sciences.

*Date:* March 3, 2022.

*Time:* 11:00 a.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:* Sara Ahlgren, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, RM 4136, Bethesda, MD 20892, 301–435–0904, *sara.ahlgren@nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Antiviral Drug Discovery and Mechanisms of Resistance.

*Date:* March 7–8, 2022.

*Time:* 9:00 a.m. to 8:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Shinako Takada, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301–402–9448, *shinako.takada@nih.gov.*

*Name of Committee:* Population Sciences and Epidemiology Integrated Review Group; Infectious Diseases, Reproductive Health, Asthma and Pulmonary Conditions Study Section.

*Date:* March 7–8, 2022.

*Time:* 9:00 a.m. to 8:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Mohammed F.A. Elfaramawi, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1007F, Bethesda, MD 20892, (301) 402–6746, *elfaramawimf@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 28, 2022.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2022–02127 Filed 2–1–22; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of General Medical Sciences; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* NIGMS Initial Review Group Training and Workforce Development Study Section—A; Review of NIGMS Predoctoral Basic Biomedical Sciences Training Program Applications.

*Date:* February 28, 2022.

*Time:* 1:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of General Medical Sciences, Building 45/Natcher, 45 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Isaah S. Vincent, Ph.D. Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12L, Bethesda, MD 20892, (301) 594–2948, *isaah.vincent@nih.gov.*

*Name of Committee:* National Institute of General Medical Sciences Special Emphasis Panel; Review of NIGMS Medical Scientist Training Program Applications.

*Date:* March 1, 2022.

*Time:* 1:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of General Medical Sciences, Building 45/Natcher, 45 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Isaah S. Vincent, Ph.D. Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12L, Bethesda, MD 20892, (301) 594–2948, *isaah.vincent@nih.gov.*

*Name of Committee:* National Institute of General Medical Sciences Special Emphasis Panel; Review of R01 applications on Research on Interventions the Promote the Careers of Individuals in the Biomedical Research Workforce.

*Date:* March 23, 2022.

*Time:* 10:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of General Medical Sciences, Building 45/Natcher, 45 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Isaah S. Vincent, Ph.D. Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12L, Bethesda, MD 20892, (301) 594–2948, *isaah.vincent@nih.gov.*

*Name of Committee:* National Institute of General Medical Sciences Special Emphasis Panel; Review of R16 SuRE applications.

*Date:* March 24, 2022,

*Time:* 8:30 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of General Medical Sciences, Building 45/Natcher, 45 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Lee Warren Slice, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12L, Bethesda, MD 20892, 301–435–0807, *slicelw@mail.nih.gov.*

*Name of Committee:* NIGMS Initial Review Group Training and Workforce Development Study Section—C; Review of IRACDA and Bridges to the Doctorate applications.

*Date:* March 28, 2022.

*Time:* 9:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of General Medical Sciences, Building 45/Natcher, 45 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Lee Warren Slice, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12L, Bethesda, MD 20892, 301–435–0807, *slicelw@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: January 28, 2022.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2022–02126 Filed 2–1–22; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**[Docket No. USCG–2022–0046]**

### Information Collection Request to Office of Management and Budget; OMB Control Number: 1625–0095

**AGENCY:** Coast Guard, DHS.

**ACTION:** Sixty-day notice requesting comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit an Information Collection Request (ICR) to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting an extension of its approval for the following collection of information: 1625–0095, Oil and Hazardous Material Pollution Prevention and Safety Records, Equivalents/Alternatives and Exemptions; without change. Our ICR describes the information we seek to collect from the public. Before submitting this ICR to OIRA, the Coast Guard is inviting comments as described below.

**DATES:** Comments must reach the Coast Guard on or before April 4, 2022.

**ADDRESSES:** You may submit comments identified by Coast Guard docket number [USCG–2022–0046] to the Coast Guard using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public participation and request for comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

A copy of the ICR is available through the docket on the internet at *https://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–6P), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2703 Martin Luther King Jr. Ave SE, Stop 7710, Washington, DC 20593–7710.

**FOR FURTHER INFORMATION CONTACT:** A.L. Craig, Office of Privacy Management,

telephone 202–475–3528, or fax 202–372–8405, for questions on these documents.

**SUPPLEMENTARY INFORMATION:**

## Public Participation and Request for Comments

This notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. 3501 *et seq.,* chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology.

In response to your comments, we may revise this ICR or decide not to seek an extension of approval for the Collection. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this request, [USCG–2022–0046], and must be received by April 4, 2022.

## Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. Documents mentioned in this notice, and all public comments, are in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted.

We accept anonymous comments. All comments received will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

## Information Collection Request

*Title:* Oil and Hazardous Material Pollution Prevention and Safety Records, Equivalents/Alternatives and Exemptions.

*OMB Control Number:* 1625–0095.

*Summary:* The information is used by the Coast Guard to ensure that an oil or hazardous material requirement alternative or exemption provides an equivalent level of safety and protection from pollution.

*Need:* Under 33 U.S. Code 1321 and Executive Order 12777 the Coast Guard is authorized to prescribe regulations to prevent the discharge of oil and hazardous substances from vessels and facilities and to contain such discharges. Coast Guard regulations in 33 CFR parts 154–156 are intended to: (1) Prevent or mitigate the results of an accidental release of bulk liquid hazardous materials being transferred at waterfront facilities; (2) ensure that facilities and vessels that use vapor control systems are in compliance with the safety standards developed by the Coast Guard; (3) provide equipment and operational requirements for facilities and vessels that transfer oil or hazardous materials in bulk to or from vessels with a 250 or more barrel capacity; and (4) provide procedures for vessel or facility operators who request exemption or partial exemption from the requirements of the pollution prevention regulations.

*Forms:* None.

*Respondents:* Owners and operators of bulk oil and hazardous materials facilities and vessels.

*Frequency:* On occasion.

*Hour Burden Estimate:* The estimated burden remains 1,720 hours a year.

*Authority:* The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended.

Dated: January 27, 2022.

**Kathleen Claffie,**

*Chief, Office of Privacy Management, U.S. Coast Guard.*

[FR Doc. 2022–02121 Filed 2–1–22; 8:45 am]

BILLING CODE 9110–04–P

# DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

**[Docket No. USCG–2022–0045]**

## Information Collection Request to Office of Management and Budget; OMB Control Number: 1625–0001

**AGENCY:** Coast Guard, DHS.

**ACTION:** Sixty-day notice requesting comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit an Information Collection Request (ICR) to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting an extension of its approval for the following collection of information: 1625–0001, Report of Marine Casualty & Chemical Testing of Commercial Vessel Personnel; without change. Our ICR describes the information we seek to collect from the public. Before submitting this ICR to OIRA, the Coast Guard is inviting comments as described below.

**DATES:** Comments must reach the Coast Guard on or before April 4, 2022.

**ADDRESSES:** You may submit comments identified by Coast Guard docket number [USCG–2022–0045] to the Coast Guard using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public participation and request for comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

A copy of the ICR is available through the docket on the internet at *https://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–6P), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2703 Martin Luther King Jr. Ave. SE, Stop 7710, Washington, DC 20593–7710.

**FOR FURTHER INFORMATION CONTACT:** A.L. Craig, Office of Privacy Management, telephone 202–475–3528, or fax 202–372–8405, for questions on these documents.

**SUPPLEMENTARY INFORMATION:**

## Public Participation and Request for Comments

This notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. 3501 *et seq.,* chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the

Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology.

In response to your comments, we may revise this ICR or decide not to seek an extension of approval for the Collection. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this request, [USCG–2022–0045], and must be received by April 4, 2022.

**Submitting Comments**

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. Documents mentioned in this notice, and all public comments, are in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted.

We accept anonymous comments. All comments received will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

**Information Collection Request**

*Title:* Report of Marine Casualty & Chemical Testing of Commercial Vessel Personnel.

*OMB Control Number:* 1625–0001.

*Summary:* Marine casualty information is needed for CG investigations of commercial vessel casualties involving death, vessel damage, etc., as mandated by Congress. Chemical testing information is needed to improve CG detection/reduction of drug use by mariners.

*Need:* Section 6101 of 46 U.S. Code, as delegated by the Secretary of Homeland Security to the Commandant, authorizes the Coast Guard to prescribe regulations for the reporting of marine casualties involving death, serious injury, material loss of property, material damage affecting the seaworthiness of a vessel, or significant harm to the environment. It also requires information on the use of alcohol be included in a marine casualty report. Section 7503 of 46 U.S.C. authorizes the Coast Guard to deny the issuance of licenses, certificates of registry, and merchant mariner's documents (seaman's papers) to users of dangerous drugs. Similarly, 46 U.S.C. 7704 requires the Coast Guard to revoke such papers unless a holder provides satisfactory proofs that the holder has successfully completed a rehabilitation program acceptable to the U.S. Coast Guard and is determined to be, by a competent substance abuse professional, free from misuse of chemical substances and that the risk of subsequent misuse of chemical substances is sufficiently low to justify returning to safety-sensitive positions.

*Forms:*

- CG–2692, Report of Marine Casualty, Commercial Diving Casualty, or OCS-related Casualty;
- CG–2692A, Barge Addendum;
- CG–2692B, Report of Mandatory Chemical Testing Following a Serious Marine Incident Involving Vessels in Commercial Service;
- CG–2692C, Personnel Casualty Addendum;
- CG–2692D, Involved Persons and Witnesses Addendum.

*Respondents:* Vessel owners and operators.

*Frequency:* On occasion.

*Hour Burden Estimate:* The estimated burden has decreased from 28,597 hours to 21,525 hours a year, due to a decrease in the estimated number of responses.

*Authority:* The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended.

Dated: January 27, 2022.

**Kathleen Claffie,**

*Chief, Office of Privacy Management, U.S. Coast Guard.*

[FR Doc. 2022–02120 Filed 2–1–22; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R8–ES–2021–N201; FXES11130800000–223–FF08E00000]**

## Endangered and Threatened Wildlife and Plants; Initiation of 5-Year Status Reviews of 40 Species in California, Nevada, and Oregon

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of initiation of reviews; request for information.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, are initiating 5-year status reviews of 40 species in California, Nevada, and Oregon under the Endangered Species Act. A 5-year review is based on the best scientific and commercial data available at the time of the review; therefore, we are requesting submission of any new information on these species that has become available since the last review.

**DATES:** To ensure consideration in our reviews, we are requesting submission of new information no later than April 4, 2022. However, we will continue to accept new information about any species at any time.

**ADDRESSES:** For how and where to send information and comments, see Request for New Information.

**FOR FURTHER INFORMATION CONTACT:** Bjorn Erickson at 916–414–6741. For whom to contact for species-specific information, see Request for New Information. Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 800–877–8337 for TTY assistance.

**SUPPLEMENTARY INFORMATION:**

**Why do we conduct 5-year reviews?**

Under the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*), we maintain lists of endangered and threatened wildlife and plant species (referred to as the List) in the Code of Federal Regulations (CFR) at 50 CFR 17.11 (for wildlife) and 17.12 (for plants). Section 4(c)(2)(A) of the Act requires us to review each listed species' status at least once every 5 years. For additional information about 5-year reviews, refer to our factsheet at

*http://www.fws.gov/endangered/what-we-do/recovery-overview.html.*

**What information do we consider in our review?**

A 5-year review considers all new information available at the time of the review. In conducting these reviews, we consider the best scientific and commercial data that have become available since the listing determination or most recent status review, such as:

(A) Species biology, including but not limited to population trends, distribution, abundance, demographics, and genetics;

(B) Habitat conditions, including but not limited to amount, distribution, and suitability;

(C) Conservation measures that have been implemented to benefit the species;

(D) Threat status and trends in relation to the five listing factors (as defined in section 4(a)(1) of the Act); and

(E) Other new information, data, or corrections, including but not limited to taxonomic or nomenclatural changes, identification of erroneous information contained in the List, and improved analytical methods.

Any new information will be considered during the 5-year review and will also be useful in evaluating the ongoing recovery programs for the species.

**Which species are under review?**

This notice announces our active review of the species listed in the table below.

| Common name | Scientific name | Status | States where species is known to occur | Final listing rule (**Federal Register** citation and publication date) | Lead fish and wildlife office |
|---|---|---|---|---|---|
| | | **Plants** | | | |
| Buckwheat, steamboat | *Eriogonum ovalifolium* var. *williamsiae.* | E | NV | 51 FR 24669; 7/7/1986 | Reno. |
| Ivesia, Webber's | *Ivesia webberi* | T | CA and NV | 79 FR 31878; 6/3/2014 | Reno. |
| Allocarya, Calistoga | *Plagiobothrys strictus* | E | CA | 62 FR 55791; 10/22/1997 | Sacramento. |
| Alopecurus, Sonoma | *Alopecurus aequalis* var. *sonomensis.* | E | CA | 62 FR 55791; 10/22/1997 | Sacramento. |
| Bird's beak, palmate-bracted | *Cordylanthus palmatus* | E | CA | 51 FR 23765; 7/1/1986 | Sacramento. |
| Bluegrass, Napa | *Poa napensis* | E | CA | 62 FR 55791; 10/22/1997 | Sacramento. |
| Clover, showy Indian | *Trifolium amoenum* | E | CA | 62 FR 55791; 10/22/1997 | Sacramento. |
| Goldfields, Contra Costa | *Lasthenia conjugens* | E | CA | 62 FR 33029; 6/18/1997 | Sacramento. |
| Grass, Colusa | *Neostapfia colusana* | T | CA | 62 FR 14338; 3/26/1997 | Sacramento. |
| Grass, Solano | *Tuctoria mucronata* | E | CA | 43 FR 44810; 9/28/1978 | Sacramento. |
| Lupine, clover | *Lupinus tidestromii* | E | CA | 57 FR 27848; 6/22/1992 | Sacramento. |
| Meadowfoam, Butte County | *Limnanthes floccosa* ssp. *californica.* | E | CA | 57 FR 24192; 6/8/1992 | Sacramento. |
| Navarretia, few-flowered | *Navarretia leucocephala* ssp. *pauciflora* (=*N. pauciflora*). | E | CA | 62 FR 33029; 6/18/1997 | Sacramento. |
| Navarretia, many-flowered | *Navarretia leucocephala* ssp. *plieantha.* | E | CA | 62 FR 33029; 6/18/1997 | Sacramento. |
| Orcutt grass, hairy | *Orcuttia pilosa* | E | CA | 62 FR 14338; 3/26/1997 | Sacramento. |
| Orcutt grass, Sacramento | *Orcuttia viscida* | E | CA | 62 FR 14338; 3/26/1997 | Sacramento. |
| Orcutt grass, San Joaquin | *Orcuttia inaequalis* | T | CA | 62 FR 14338; 3/26/1997 | Sacramento. |
| Orcutt grass, slender | *Orcuttia tenuis* | T | CA and OR | 62 FR 14338; 3/26/1997 | Sacramento. |
| Owl's-clover, fleshy | *Castilleja campestris* ssp. *succulenta.* | T | CA | 62 FR 14338; 3/26/1997 | Sacramento. |
| Spineflower, Sonoma | *Chorizanthe valida* | E | CA | 57 FR 27848; 6/22/1992 | Sacramento. |
| Spurge, Hoover's | *Chamaesyce hooveri* | T | CA | 62 FR 14338; 3/26/1997 | Sacramento. |
| Stonecrop, Lake County | *Parvisedum leiocarpum* | E | CA | 62 FR 33029; 6/18/1997 | Sacramento. |
| Thistle, Loch Lomond coyote | *Eryngium constancei* | E | CA | 51 FR 45904; 12/23/1986 | Sacramento. |
| Tuctoria, Greene's | *Tuctoria greenei* | E | CA | 62 FR 14338; 3/26/1997 | Sacramento. |
| Clarkia, Pismo | *Clarkia speciosa* ssp. *immaculata* | E | CA | 59 FR 64613; 12/15/1994 | Ventura. |
| Cypress, Santa Cruz | *Cupressus abramsiana* | T | CA | 52 FR 675; 1/8/1987 | Ventura. |
| Dudleya, Conejo | *Dudleya abramsii* ssp. *parva* | T | CA | 62 FR 4172; 1/29/1997 | Ventura. |

| Common name | Scientific name | Status | States where species is known to occur | Final listing rule (**Federal Register** citation and publication date) | Lead fish and wildlife office |
|---|---|---|---|---|---|
| Dudleya, marcescent | *Dudleya cymosa* ssp. *marcescens* | T | CA | 62 FR 4172; 1/29/1997 | Ventura. |
| Dudleya, Verity's | *Dudleya verityi* | T | CA | 62 FR 4172; 1/29/1997 | Ventura. |
| Malacothrix, island | *Malacothrix squalida* | E | CA | 62 FR 40954; 7/31/1997 | Ventura. |
| Malacothrix, Santa Cruz Island | *Malacothrix indecora* | E | CA | 62 FR 40954; 7/31/1997 | Ventura. |
| Paintbrush, soft-leaved | *Castilleja mollis* | E | CA | 62 FR 40954; 7/31/1997 | Ventura. |
| Seablite, California | *Suaeda californica* | E | CA | 59 FR 64613; 12/15/1994 | Ventura. |
| Spineflower, Robust | *Chorizanthe robusta* var. *robusta* | E | CA | 59 FR 5499; 2/4/1994 | Ventura. |
| Thistle, Chorro Creek bog | *Cirsium fontinale* var. *obispoense* | E | CA | 59 FR 64613; 12/15/1994 | Ventura. |
| Watercress, Gambel's | *Rorippa gambellii* | E | CA | 58 FR 41378; 8/3/1993 | Ventura. |
| **Animals** | | | | | |
| Cui-ui | *Chasmistes cujus* | E | CA and NV | 32 FR 4001; 3/11/1967 | Reno. |
| Skipper, Carson wandering | *Pseudocopaeodes eunus obscurus.* | E | CA and NV | 66 FR 59537; 11/29/2001 | Reno. |
| Trout, Lahontan cutthroat | *Oncorhynchus clarkii henshawi* | T | CA, NV, OR, and UT. | 35 FR 16047; 10/13/1970 | Reno. |
| Toad, arroyo (=arroyo southwestern). | *Anaxyrus californicus* | E | CA | 59 FR 64859; 12/16/1994 | Ventura. |

## Request for New Information

To ensure that a 5-year review is complete and based on the best available scientific and commercial information, we request new information from all sources. See what information do we consider in our review? for specific criteria. If you submit information, please support it with documentation such as maps, bibliographic references, methods used to gather and analyze the data, and/or copies of any pertinent publications, reports, or letters by knowledgeable sources.

To get more information on a species, submit information on a species, or review information we receive, please use the contact information for the lead Fish and Wildlife Office for the species specified in the table above.

- *Reno Fish and Wildlife Office:* Justin Barrett, 775–861–6338 (phone); *RFWOmail@fws.gov* (email); or 1340 Financial Boulevard, Suite 234, Reno, NV 89502 (U.S. mail).
- *Sacramento Fish and Wildlife Office:* Eric Tattersall, 916–414–6723 (phone); *fw8sfwocomments@fws.gov* (email); or 2800 Cottage Way, Suite W2605, Sacramento, CA 95825 (U.S. mail).
- *Ventura Fish and Wildlife Office:* Cat Darst, 805–644–1766 (phone); *cat_darst@fws.gov* (email); or 2493 Portola Road, Suite B, Ventura CA 93003 (U.S. mail).

## 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.

## Authority

This document is published under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

**Jill Russi,**

*Acting Regional Director, California Great Basin Region, U.S. Fish and Wildlife Service.*

[FR Doc. 2022–02154 Filed 2–1–22; 8:45 am]

**BILLING CODE 4333–15–P**

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

**[FWS–R2–ES–2021–N215; FXES11130200000–223–FF02ENEH00]**

## Endangered and Threatened Wildlife and Plants; Initiation of 5-Year Status Reviews of 35 Species in the Southwest

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of initiation of reviews; request for information.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, are conducting 5-year status reviews under the Endangered Species Act of 35 animal and plant species. A 5-year status review is based on the best scientific and commercial data available at the time of the review; therefore, we are requesting submission of any such information that has become available since the last review for the species.

**DATES:** To ensure consideration, we are requesting submission of new information no later than March 4, 2022. However, we will continue to accept new information about any listed species at any time.

**ADDRESSES:** For how to request or submit information, see Request for Information and How do I ask questions

or provide information? in the **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:** For information on a particular species, contact the appropriate person or office listed in the table in the **SUPPLEMENTARY INFORMATION** section. For general information, contact Beth Forbus, by telephone at 505–248–6681; or by email at *Beth_Forbus@fws.gov.* Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 800–877–8339 for TTY assistance.

**SUPPLEMENTARY INFORMATION:**

## Why do we conduct a 5-year review?

Under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), we maintain Lists of Endangered and Threatened Wildlife and Plants (which we collectively refer to as the List) in the Code of Federal Regulations (CFR) at 50 CFR 17.11 (for animals) and 17.12 (for plants). Section 4(c)(2)(A) of the ESA requires us to review each listed species' status at least once every 5 years. Our regulations at 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing those species under active review. For additional information about 5-year reviews, refer to our factsheet at *http://www.fws.gov/endangered/what-we-do/recovery-overview.html.*

## What information do we consider in our review?

A 5-year review considers all new information available at the time of the review. In conducting these reviews, we consider the best scientific and commercial data that have become available since the listing determination or most recent status review, such as:

(A) Species biology, including but not limited to population trends, distribution, abundance, demographics, and genetics;

(B) Habitat conditions, including but not limited to amount, distribution, and suitability;

(C) Conservation measures that have been implemented that benefit the species;

(D) Threat status and trends in relation to the five listing factors (as defined in section 4(a)(1) of the ESA); and

(E) Other new information, data, or corrections, including but not limited to taxonomic or nomenclatural changes, identification of erroneous information contained in the List, and improved analytical methods.

## Which species are under review?

The species in the following table are under active 5-year status review.

| Common name | Scientific name | Listing status | Current range | Final listing rule (**Federal Register** citation and publication date) | Contact person, phone, email | Contact person's U.S. mail address |
|---|---|---|---|---|---|---|
| **ANIMALS** | | | | | | |
| Chiricahua leopard frog | *Rana chiricahuensis* | Threatened | Arizona and New Mexico (USA), and Mexico. | 67 FR 40790; 6/13/2002 | Mark Lamb, Acting Field Supervisor, *Mark_Lamb@fws.gov* (email). | U.S. Fish and Wildlife Service, Arizona Ecological Services Office, 9828 North 31st Avenue, #C3, Phoenix, AZ 85051–2518. |
| Desert pupfish | *Cyprinodon macularius* | Endangered | | 51 FR 10842; 3/31/1986 | | |
| Loach minnow | *Tiaroga cobitis* | Endangered | Arizona and California (USA), and Mexico. Arizona and New Mexico (USA), and Mexico. | 51 FR 39468; 10/28/1986 | | |
| Mexican spotted owl | *Strix occidentalis lucida* | Threatened | Arizona, Colorado, New Mexico, Texas, Utah (USA), and Mexico. | 58 FR 14248; 3/16/1993 | | |
| Mount Graham red squirrel. | *Tamiasciurus hudsonicus grahamensis.* | Endangered | Arizona | 52 FR 20994; 6/3/1987 | | |
| Sonora chub | *Gila ditaenia* | Threatened | Arizona (USA), and Mexico | 51 FR 16042; 4/30/1986 | | |
| Sonoran tiger salamander | *Ambystoma tigrinum stebbinsi.* | Endangered | Arizona (USA), and Mexico | 62 FR 665; 1/6/1997 | | |
| Spikedace | *Meda fulgida* | Endangered | Arizona and New Mexico (USA), and Mexico. | 51 FR 23769; 7/1/1986 | | |
| Three Forks springsnail | *Pyrgulopsis trivialis* | Endangered | Arizona | 77 FR 23060; 4/17/2012 | | |
| Yuma clapper rail | *Rallus longirostris yumanensis.* | Endangered | Arizona, California, and Nevada (USA), and Mexico. | 32 FR 4001; 3/11/1967 | | |
| Northern Aplomado falcon | *Falco femoralis septentrionalis.* | Endangered | Texas (USA), Mexico and Guatemala. | 51 FR 6686; 2/25/1986 | Chuck Ardizzone, Field Supervisor, 281–286–8282 x26506 (phone) or *Chuck_Ardizzone@fws.gov* (email). | U.S. Fish and Wildlife Service, Texas Coastal Ecological Services Field Office, 17629 El Camino Real, Suite 211, Houston, TX 77058. |
| | | Nonessential experimental. | Arizona, New Mexico, and Texas. | 71 FR 42298; 7/26/2006 | | |
| Braken Bat Cave meshweaver. | *Cicurina venii.* | Endangered. | Texas | 65 FR 81419; 12/26/2000. | | |
| Clear Creek gambusia | *Gambusia heterochir* | Endangered | Texas | 32 FR 4001; 3/11/1967 | | |
| Devils River minnow | *Dionda diaboli* | Threatened | Texas (USA), and Mexico | 64 FR 56596; 10/20/1999 | | |
| Leopard darter | *Percina pantherina* | Threatened | Arkansas and Oklahoma | 43 FR 3711; 1/27/1978 | Ken Collins, Acting Field Office Supervisor, 918–382–4510 (phone), or *Ken_Collins@fws.gov* (email). | U.S. Fish and Wildlife Service, Oklahoma Ecological Services Field Office, 9014 East 21st Street, Tulsa, Oklahoma 74129. |
| **PLANTS** | | | | | | |
| Mesa Verde cactus | *Sclerocactus mesaeverdae.* | Threatened | Colorado and New Mexico | 44 FR 62471; 10/30/1979 | Shawn Sartorious, Field Supervisor, 505–761–4781 (phone) or *Shawn_Sartorious@fws.gov* (email). | U.S. Fish and Wildlife Service, 2105 Osuna Rd. NE, Albuquerque, NM 87113–1001. |
| Mancos milk-vetch | *Astragalus humillimus* | Endangered | Colorado and New Mexico | 50 FR 26568; 6/27/1985 | | |
| Sacramento Mountains thistle. | *Cirsium vinaceum* | Threatened | New Mexico | 52 FR 22933; 6/16/1987 | | |
| Sacramento prickly poppy | *Argemone pleiacantha* ssp. *pinnatisecta.* | Endangered | New Mexico | 54 FR 35302; 8/24/1989 | | |
| Todsen's pennyroyal | *Hedeoma todsenii* | Endangered | New Mexico | 46 FR 5730; 1/19/1981 | | |
| Arizona cliffrose | *Purshia* (=*Cowania*) *subintegra.* | Endangered | Arizona | 49 FR 22326; 5/29/1984 | Mark Lamb, Acting Field Supervisor, *Mark_Lamb@fws.gov* (email). | U.S. Fish and Wildlife Service, Arizona Ecological Services Office, 9828 North 31st Avenue, #C3, Phoenix, AZ 85051–2517. |
| Arizona hedgehog cactus | *Echinocereus triglochidiatus* var. *arizonicus.* | Endangered | Arizona | 44 FR 61556; 10/25/1979 | | |
| Brady pincushion cactus | *Pediocactus bradyi* | Endangered | Arizona | 44 FR 61784; 10/26/1979 | | |
| Peebles Navajo cactus | *Pediocactus peeblesianus* var. *peeblesianus.* | Endangered | Arizona | 44 FR 61922; 10/26/1979 | | |

| | | | | | | |
|---|---|---|---|---|---|---|
| Texas wild-rice | *Zizania texana* | Endangered | Texas | 43 FR 17910; 4/26/1978 | Chuck Ardizzone, Field Supervisor, 281–286–8282 X26506 (phone) or *Chuck_Ardizzone@fws.gov* (email). | U.S. Fish and Wildlife Service, Texas Coastal Ecological Services Field Office, 17629 El Camino Real, Suite 211, Houston, TX 77058. |
| Ashy dogweed | *Thymophylla tephroleuca.* | Endangered | Texas | 49 FR 29232; 7/19/1984 | | |
| Black lace cactus | *Echinocereus reichenbachii* var. *albertii.* | Endangered | Texas | 44 FR 61918; 10/26/1979 | | |
| Large-fruited sand-verbena. | *Abronia macrocarpa* | Endangered | Texas | 53 FR 37975; 9/28/1988 | | |
| Navasota ladies-tresses | *Spiranthes parksii* | Endangered | Texas | 47 FR 19539; 5/6/1982 | | |
| Slender rush-pea | *Hoffmannseggia tenella* | Endangered | Texas | 50 FR 45614; 11/1/1985 | | |
| South Texas ambrosia | *Ambrosia cheiranthifolia* | Endangered | Texas | 59 FR 43648; 8/24/1994 | | |
| Star cactus | *Astrophytum asterias* | Endangered | Texas (USA), and Mexico | 58 FR 53804; 10/18/1993 | | |
| Texas ayenia (Tamaulipan Kidneypetal). | *Ayenia limitaris* | Endangered | Texas (USA), and Mexico | 59 FR 43648; 8/24/1994 | | |
| Texas prairie dawn-flower | *Hymenoxys texana* | Endangered | Texas | 51 FR 8681; 3/13/1986 | | |
| Walker's manioc | *Manihot walkerae* | Endangered | Texas (USA), and Mexico | 56 FR 49850; 10/2/1991 | | |

**Request for Information**

To ensure that a 5-year review is complete and based on the best available scientific and commercial information, we request new information from all sources. See What Information do we consider in our review? for specific criteria. If you submit information, please support it with documentation such as maps, bibliographic references, methods used to gather and analyze the data, and/or copies of any pertinent publications, reports, or letters by knowledgeable sources.

**How do I ask questions or provide information?**

If you wish to provide information for any species listed above, please submit your comments and materials to the appropriate contact in the table above. You may also direct questions to those contacts. Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 800–877–8339 for TTY assistance.

**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.

**Completed and Active Reviews**

A list of all completed and currently active 5-year reviews can be found at *https://ecos.fws.gov/ecp/report/species-five-year-review.*

**Authority**

This document is published under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

**Amy L. Lueders,**

*Regional Director, Southwest Region, U.S. Fish and Wildlife Service.*

[FR Doc. 2022–02135 Filed 2–1–22; 8:45 am]

BILLING CODE 4333–15–P

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–1283]**

## Certain Composite Baseball and Softball Bats and Components Thereof; Commission Determination Not To Review Two Initial Determinations Granting Complainant's Motion To Amend the Complaint and Notice of Investigation To Add a Respondent and Extending the Target Date for Completion of This Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission (the ''Commission'') has determined not to review two initial determinations (''ID'') issued by the then-presiding, former chief administrative law judge (''CALJ'') granting the complainant's motion to amend the complaint and notice of investigation to add a new respondent (Order No. 8) and extending the target date for completion of this investigation to May 2, 2023 (Order No. 9).

**FOR FURTHER INFORMATION CONTACT:** Carl P. Bretscher, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2382. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket system (''EDIS'') at *https://edis.usitc.gov*. For help accessing EDIS, please email *EDIS3Help@usitc.gov*. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal, telephone (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on November 2, 2021, based on a complaint filed and supplemented by Easton Diamond Sports, LLC of Thousand Oaks, California (''Easton''). 86 FR 60468–469 (Nov. 2, 2021). The complaint alleges a violation of section 337 of the Tariff Act, as amended, 19 U.S.C. 1337, based on the importation, sale for importation, or sale in the United States after importation of certain composite baseball and softball bats and components thereof by reason of infringement of one or more asserted claims of U.S. Patent No. 6,997,826. *Id.* The complaint further alleges the existence of a domestic industry. *Id.*

The Commission's notice of investigation names Juno Athletics LLC of Aventura, Florida (''Juno''); Monsta Athletics LLC of Calimesa, California (''Monsta''); and Proton Sports Inc. of Scottsdale, Arizona as respondents. *Id.* at 60469. The Office of Unfair Import Investigations is not participating as a party to this investigation. *Id.*

On November 30, 2021, Easton moved pursuant to Commission Rule 210.14 (19 CFR 210.14) for leave to amend the complaint and notice of investigation to add TianChang Zhengmu Aluminum Co., Ltd. (''TZA'') as a respondent because TZA is allegedly [[ ]] composite softball and baseball bats and components thereof, *e.g.,* handles and barrels. On December 9, 2021, Monsta filed a response stating that it did not oppose Easton's motion, provided the target date is extended. No other response was filed.

On December 28, 2021, the CALJ issued the first of the subject IDs (Order No. 8) granting Easton's motion on the basis that a single proceeding will promote judicial efficiency, conserve Commission's resources, and best serve the public interest. Order No. 8 at 2 (Dec. 28, 2021). The subject ID further agrees with Monsta that a two-month extension of time is appropriate, which the ALJ addressed in a separate ID. *Id.* at 2 n.5.

On December 29, 2021, the former CALJ issued the second of the subject IDs (Order No. 9) pursuant to Commission Rule 210.51 (19 CFR 210.51), extending the target date to May 2, 2023. Order No. 9 at 1 (Dec. 29, 2021). Order No. 9 also reschedules the evidentiary hearing to October 3–7, 2022, and the deadline for issuing the final initial determination to January 3, 2023. *Id.*

On January 5, 2022, Easton filed a motion to terminate TZA by withdrawing the complaint against it. Easton also moved for reconsideration of Order Nos. 8 and 9 as moot and to stay all proceedings with respect to TZA. On January 18, 2022, Monsta and Juno filed responses in opposition to Easton's motion. On January 20, Easton filed a motion for leave to file a reply to Monsta's and Juno's oppositions.

On January 5, 2022, Easton filed a petition for review and vacatur of Order Nos. 8 and 9 in view of its motion to withdraw its complaint with respect to TZA and to terminate TZA from this investigation.

On January 12, 2022, Monsta filed an opposition to Easton's petition for review. No other response to Easton's petition was filed.

Upon review of the subject ID and the parties' submissions, the Commission has determined not to review, and thereby adopts, both Order No. 8 and Order No. 9 without prejudice to Easton's pending motion to terminate the investigation with respect to TZA. The target date for completion of this investigation is hereby extended to May 2, 2023.

The Commission voted to approve this determination on January 25, 2022.

The authority for the Commission's determinations is contained in Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: January 27, 2022.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2022–02056 Filed 2–1–22; 8:45 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Proposed Modification to Consent Decree Under the Clean Water Act

On January 27, 2022, the Department of Justice lodged a proposed modification to the consent decree with the United States District Court for the District of New Jersey in *United States* v. *Jersey City Municipal Utilities Authority,* Civil Action No. 2:11–cv–04120 (D.N.J.).

The United States filed this lawsuit in 2011 under the Clean Water Act (''Act''). The complaint sought injunctive relief and civil penalties for violations of the Act related to discharges of pollutants from Jersey City Municipal Utilities Authority's (''JCMUA'') combined sewer system (''CSS'') through numerous outfalls into Penhorn Creek, the Hackensack River, Newark Bay, and the Lower Hudson River. The consent decree entered by the Court on September 27, 2011 provides for JCMUA to perform injunctive measures as described in the consent decree, to pay a civil penalty, and to perform a supplemental environmental project. The proposed modification to the consent decree, among other things: (1) Expands injunctive relief requirements to ensure that three projects under the consent decree—*i.e.,* (a) repairs to the CSS to address flooding and sewer backups; (b) the cleaning and replacement as necessary of certain city sewer lines; and (c) improvements to pump stations—are completed in a manner necessary to bring the CSS into compliance with the Clean Water Act; (2) extends the time periods for JCMUA to complete these projects; and (3) creates a schedule for JCMUA to perform voluntary removal of numerous lead drinking water service lines.

The publication of this notice opens a period for public comment on the modification to the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Jersey City Municipal Utilities Authority,* D.J. Ref. No. 90–5–1–1–09499. All comments must be submitted no later than sixty (60) days after the publication date of this notice. Comments may be submitted either by email or by mail:

| *To submit comments:* | *Send them to:* |
|---|---|
| By email ..... | *pubcomment-ees.enrd@usdoj.gov.* |
| By mail ..... | Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611. |

During the public comment period, the proposed modification to the 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 modification 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 $6.00 (25 cents per page reproduction cost) payable to the United States Treasury.

**Henry S. Friedman,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2022–02075 Filed 2–1–22; 8:45 am]

**BILLING CODE 4410–15–P**

## DEPARTMENT OF LABOR

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; International Price Program U.S. Import and Export Price Indexes

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting this Bureau of Labor Statistics (BLS)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that the agency receives on or before March 4, 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.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

**FOR FURTHER INFORMATION CONTACT:** Mara Blumenthal by telephone at 202–693–8538, or by email at *DOL_PRA_PUBLIC@dol.gov.*

**SUPPLEMENTARY INFORMATION:** The U.S. Import and Export Price Indexes, produced by the Bureau of Labor Statistics' International Price Program (IPP), measure price change over time for all categories of imported and exported products, as well as selected services. The IPP has produced the U.S. Import Price Indexes (MPI) continuously since 1973 and the U.S. Export Price Indexes (XPI) continuously since 1971. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on November 1, 2021 (86 FR 60293).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of

law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

*Agency:* DOL–BLS.

*Title of Collection:* International Price Program U.S. Import and Export Price Indexes.

*OMB Control Number:* 1220–0025.

*Affected Public:* Private Sector—Businesses or other for-profits.

*Total Estimated Number of Respondents:* 6,050.

*Total Estimated Number of Responses:* 36,765.

*Total Estimated Annual Time Burden:* 17,832 hours.

*Total Estimated Annual Other Costs Burden:* $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Dated: January 27, 2022.

**Mara Blumenthal,**

*Senior PRA Analyst.*

[FR Doc. 2022–02098 Filed 2–1–22; 8:45 am]

**BILLING CODE 4510–24–P**

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

**[NARA–2022–026]**

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Notice.

**SUMMARY:** We have submitted a request to the Office of Management and Budget (OMB) for approval to continue to use a currently approved information collection. Independent researchers use OMB 3095–0054, Independent Researchers Listing Application (NA Form 14115), to provide their contact information so we can make the information available to people looking for a researcher. We invite you to comment on this proposed information collection.

**DATES:** OMB must receive written comments on or before March 4, 2022.

**ADDRESSES:** Send any comments and recommendations on the proposed information collection in writing to *www.reginfo.gov/public/do/PRAMain.* You can 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:** Tamee Fechhelm, Paperwork Reduction Act Officer, by email at *tamee.fechhelm@nara.gov* or by telephone at 301.837.1694 with any requests for additional information.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), we invite the public and other Federal agencies to comment on proposed information collections. We published a notice of proposed collection for this information collection on November 23, 2021 (86 FR 66595) and we received no comments. We are therefore submitting the described information collections to OMB for approval.

If you have comments or suggestions, they should address one or more of the following points: (a) Whether the proposed information collection is necessary for NARA to properly perform its functions; (b) our estimate of the burden of the proposed information collection and its accuracy; (c) ways we could enhance the quality, utility, and clarity of the information we collect; (d) ways we could minimize the burden on respondents of collecting the information, including through information technology; and (e) whether this collection affects small businesses.

In this notice, we solicit comments concerning the following information collection:

*Title:* Independent researcher listing application.

*OMB number:* 3095–0054.

*Agency form numbers:* NA Form 14115 (Independent Researcher Listing Application).

*Type of review:* Regular.

*Affected public:* Individuals or households.

*Estimated number of respondents:* 300.

*Estimated time per response:* 10 minutes.

*Frequency of response:* On occasion.

*Estimated total annual burden hours:* 50 hours.

*Abstract:* Collecting information to populate the independent researcher application listing is a service we provide to researchers and those who wish to hire them. In the past, at the request of customers, the National Archives made use of various lists of independent researchers who perform freelance research for hire in the Washington, DC, area. We sent these lists upon request to researchers who could not travel to the metropolitan area to conduct their own research. To better accommodate both the public and NARA staff in this process, the Archival Operations division of the National Archives began to maintain a listing of independent researchers who wished to participate. To populate that list, we allow interested independent researchers to provide their contact information for this purpose on NA Form 14115. Collecting contact and other key information from each independent researcher and providing such information to the public when appropriate increases researcher business. This form is voluntary and is not a burden to an independent researcher who chooses to submit one. Inclusion on the list is not an endorsement by NARA. The listing is compiled and disseminated as a service to the public.

**Swarnali Haldar,**

*Executive for Information Services/CIO.*

[FR Doc. 2022–02097 Filed 2–1–22; 8:45 am]

**BILLING CODE 7515–01–P**

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

**[NARA–2022–025]**

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Notice.

**SUMMARY:** We have submitted a request to the Office of Management and Budget (OMB) for approval to continue to use three currently approved information collections. People use the first information collection to request permission to film, photograph, or videotape at a NARA facility for news purposes. People use the second and third information collections to request permission to use NARA facilities for events in the Washington, DC, area, at a Federal records center, or at a Presidential library. Previously, we have handled each of these last two items as separate information collections, but we have recently revised the underlying regulation and the processes for requesting use of different kinds of NARA facilities, so we are proposing to combine these two into one ICR. All three collections are based on requirements in the same regulation. We invite you to comment on the proposed information collections.

**DATES:** OMB must receive written comments on or before March 4, 2022.

**ADDRESSES:** Send any comments and recommendations on the proposed information collection in writing to *www.reginfo.gov/public/do/PRAMain.* You can 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:** Tamee Fechhelm, Paperwork Reduction Act Officer, by email at *tamee.fechhelm@nara.gov* or by telephone at 301.837.1694 with any requests for additional information.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), we invite the public and other Federal agencies to comment on proposed information collections. We published a notice of proposed collection for these information collections on November 22, 2021 (86 FR 66339) and we received no comments. We are therefore submitting the described information collections to OMB for approval.

If you have comments or suggestions, they should address one or more of the following points: (a) Whether the proposed information collections are necessary for NARA to properly perform its functions; (b) our estimate of the burden of the proposed information collections and its accuracy; (c) ways we could enhance the quality, utility, and clarity of the information we collect; (d) ways we could minimize the burden on respondents of collecting the information, including through information technology; and (e) whether these collections affect small businesses.

In this notice, we solicit comments concerning the following information collections:

1. *Title:* Request to film, photograph, or videotape at a NARA facility for news purposes.

*OMB number:* 3095–0040.

*Agency form number:* None.

*Type of review:* Regular.

*Affected public:* Business or other for-profit, not-for-profit institutions.

*Estimated number of respondents:* 350.

*Estimated time per response:* 10 minutes.

*Frequency of response:* On occasion.

*Estimated total annual burden hours:* 58.

*Abstract:* The information collection is prescribed by 36 CFR 1280.48. The collection is prepared by organizations that wish to film, photograph, or videotape on NARA property for news purposes. We need the information to determine if the request complies with NARA regulations, to ensure protection of archival holdings, and to schedule the filming appointment.

2. *Title:* Request to use NARA facilities in the Washington, DC, area, public spaces at Federal records centers, or Presidential library and grounds, for events.

*OMB number:* 3095–0043.

*Agency form number:* NA Form 16011 (Application and permit for use of space in Presidential library and grounds).

*Type of review:* Regular.

*Affected public:* Not-for-profit institutions, individuals or households, business or other for-profit, private organizations, Federal Government.

*Estimated number of respondents:* 300 for facilities in the Washington, DC, area and Federal records centers; 600 for Presidential library facilities and grounds.

*Estimated time per response:* 30 minutes for facilities in the Washington DC, area and Federal records centers; 20 minutes for Presidential library facilities and grounds.

*Frequency of response:* On occasion.

*Estimated total annual burden hours:* 150 hours for facilities in the Washington, DC, area and Federal records centers; 200 hours for Presidential library facilities and grounds.

*Abstract:* The information collection is prescribed by 36 CFR 1280.64. Requesters submit the information when they wish to use NARA public areas in the Washington, DC, area or public spaces at Federal records centers for an event, or they submit the application to request the use of space in a Presidential library for a privately sponsored activity. We use the information to determine whether or not we can accommodate the request and date, whether the requested use meets the criteria in 36 CFR 1280, and to ensure that the proposed event complies with NARA regulations.

**Swarnali Haldar,**

*Executive for Information Services/CIO.*

[FR Doc. 2022–02096 Filed 2–1–22; 8:45 am]

BILLING CODE 7515–01–P

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

**[NARA–2022–024]**

## Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Notice.

**SUMMARY:** We are proposing to request an extension from the Office of Management and Budget (OMB) of a currently approved information collection, 3095–0060, Volunteer Service Application (NA Form 6045), used by individuals who wish to volunteer at the National Archives Building, the National Archives at College Park, regional records services facilities, and Presidential libraries. We invite you to comment on this proposed information collection pursuant to the Paperwork Reduction Act of 1995.

**DATES:** We must receive written comments on or before April 4, 2022.

**ADDRESSES:** Send comments to Paperwork Reduction Act Comments (MP), Room 4100; National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740–6001, or email them to *tamee.fechhelm@nara.gov.*

**FOR FURTHER INFORMATION CONTACT:** Tamee Fechhelm, Paperwork Reduction Act Officer, by email at *tamee.fechhelm@nara.gov* or by telephone at 301.837.1694 with requests for additional information or copies of the proposed information collection and supporting statement.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), we invite the public and other Federal agencies to comment on proposed information collections. If you have comments or suggestions, they should address one or more of the following points: (a) Whether the proposed information collection is necessary for NARA to properly perform its functions; (b) our estimate of the burden of the proposed information collection and its accuracy; (c) ways we could enhance the quality, utility, and clarity of the information we collect; (d) ways we could minimize the burden on respondents of collecting the information, including through information technology; and (e) whether the collection affects small businesses.

We will summarize any comments you submit and include the summary in our request for OMB approval. All comments will become a matter of public record.

In this notice, we solicit comments concerning the following information collection:

*Title:* Volunteer Service Application.

*OMB number:* 3095–0060.

*Agency form numbers:* NA Form 6045 (Volunteer Service Application).

*Type of review:* Regular.

*Affected public:* Individuals or households.

*Estimated number of respondents:* 500.

*Estimated time per response:* 25 minutes.

*Frequency of response:* On occasion.

*Estimated total annual burden hours:* 208 hours.

*Abstract:* We use volunteer resources to enhance our services to the public and to further our mission of providing ready access to essential evidence. Volunteers assist in outreach and public programs and provide technical and research support for administrative, archival, library, and curatorial staff, as well as other programs. We use a standard form for volunteers to apply and to assess the qualifications of potential volunteers. Members of the public who are interested in being a NARA volunteer use NA Form 6045, to signal their interest and to identify their qualifications for the work. Once we have selected someone as a volunteer, they fill out NA Form 6045a, Standards of Conduct for Volunteers, NA Form 6045b, Volunteer or Intern Emergency and Medical Consent, and NA Form 6045c, Volunteer or Intern Confidentiality Statement.

**Swarnali Haldar,**

*Executive for Information Services/CIO.*

[FR Doc. 2022–02095 Filed 2–1–22; 8:45 am]

**BILLING CODE 7515–01–P**

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

**[NARA–22–0003; NARA–2022–023]**

## Records Schedules; Availability and Request for Comments

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Notice of availability of proposed records schedules; request for comments.

**SUMMARY:** The National Archives and Records Administration (NARA) publishes notice of certain Federal agency requests for records disposition authority (records schedules). We publish notice in the **Federal Register** and on regulations.gov for records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on such records schedules.

**DATES:** We must receive responses on the schedules listed in this notice by March 21, 2022.

**ADDRESSES:** To view a records schedule in this notice, or submit a comment on one, use the following address: *https://www.regulations.gov/docket/NARA-22-0003/document.* This is a direct link to the schedules posted in the docket for this notice on regulations.gov. You may submit comments by the following method:

- *Federal eRulemaking Portal: http://www.regulations.gov.* On the website, enter either of the numbers cited at the top of this notice into the search field. This will bring you to the docket for this notice, in which we have posted the records schedules open for comment. Each schedule has a 'comment' button so you can comment on that specific schedule. For more information on regulations.gov and on submitting comments, see their FAQs at *https://www.regulations.gov/faq.*

Due to COVID–19 building closures, we are currently temporarily not accepting comments by mail. However, if you are unable to comment via regulations.gov, you may email us at *request.schedule@nara.gov* for instructions on submitting your comment. You must cite the control number of the schedule you wish to comment on. You can find the control number for each schedule in parentheses at the end of each schedule's entry in the list at the end of this notice.

Due to COVID–19 building closures, we are currently temporarily not accepting comments by mail. However, if you are unable to comment via regulations.gov, you may contact *request.schedule@nara.gov* for instructions on submitting your comment. You must cite the control number of the schedule you wish to comment on. You can find the control number for each schedule in parentheses at the end of each schedule's entry in the list at the end of this notice.

**FOR FURTHER INFORMATION CONTACT:** Kimberly Keravuori, Regulatory and External Policy Program Manager, by email at *regulation_comments@nara.gov.* For information about records schedules, contact Records Management Operations by email at *request.schedule@nara.gov* or by phone at 301–837–1799.

**SUPPLEMENTARY INFORMATION:**

### Public Comment Procedures

We are publishing notice of records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on these records schedules, as required by 44 U.S.C. 3303a(a), and list the schedules at the end of this notice by agency and subdivision requesting disposition authority.

In addition, this notice lists the organizational unit(s) accumulating the records or states that the schedule has agency-wide applicability. It also provides the control number assigned to each schedule, which you will need if you submit comments on that schedule.

We have uploaded the records schedules and accompanying appraisal memoranda to the *regulations.gov* docket for this notice as ''other'' documents. Each records schedule contains a full description of the records at the file unit level as well as their proposed disposition. The appraisal memorandum for the schedule includes information about the records.

We will post comments, including any personal information and attachments, to the public docket unchanged. Because comments are public, you are responsible for ensuring that you do not include any confidential or other information that you or a third party may not wish to be publicly posted. If you want to submit a comment with confidential information or cannot otherwise use the regulations.gov portal, you may contact *request.schedule@nara.gov* for instructions on submitting your comment.

We will consider all comments submitted by the posted deadline and consult as needed with the Federal agency seeking the disposition authority. After considering comments, we will post on regulations.gov a ''Consolidated Reply'' summarizing the comments, responding to them, and noting any changes we have made to the proposed records schedule. We will then send the schedule for final approval by the Archivist of the United States. You may elect at *regulations.gov* to receive updates on the docket, including an alert when we post the Consolidated Reply, whether or not you submit a comment. If you have a question, you can submit it as a comment, and can also submit any concerns or comments you would have to a possible response to the question. We will address these items in consolidated replies along with any other comments submitted on that schedule.

We will post schedules on our website in the Records Control Schedule (RCS) Repository, at *https://www.archives.gov/records-mgmt/rcs,* after the Archivist approves them. The RCS contains all schedules approved since 1973.

### Background

Each year, Federal agencies create billions of records. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these

schedules for NARA's approval. Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. The records schedules authorize agencies to preserve records of continuing value in the National Archives or to destroy, after a specified period, records lacking continuing administrative, legal, research, or other value. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

Agencies may not destroy Federal records without the approval of the Archivist of the United States. The Archivist grants this approval only after thorough consideration of the records' administrative use by the agency of origin, the rights of the Government and of private people directly affected by the Government's activities, and whether or not the records have historical or other value. Public review and comment on these records schedules is part of the Archivist's consideration process.

*Schedules Pending:*

1. Department of Defense, Defense Threat Reduction Agency, Counterintelligence Activities (DAA–0374–2019–0002).
2. Department of Transportation, Federal Aviation Administration, The Aviation Safety Voluntary Safety Reporting Program (DAA–0237–2020–0028).
3. Department of Treasury, Bureau of Engraving and Printing, Banknote Development Process Records (DAA–0318–2020–0001).
4. Court Services and Offender Supervision Agency, Pretrial Services Agency for the District of Columbia, Projects and Reports (DAA–0562–2021–0028).

**Laurence Brewer,**

*Chief Records Officer for the U.S. Government.*

[FR Doc. 2022–02089 Filed 2–1–22; 8:45 am]

BILLING CODE 7515–01–P

## NATIONAL LABOR RELATIONS BOARD

### Privacy Act of 1974; System of Records

**AGENCY:** National Labor Relations Board.

**ACTION:** Notice; new system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974, the National Labor Relations Board (''NLRB'' or ''Agency'') proposes to issue a National Labor Relations Board system of records notice titled, ''Backpay Management System'' (NLRB–36). The Agency is authorized by the National Labor Relations Act to remedy unfair labor practices by issuing a backpay remedy to an individual, called a ''discriminatee,'' for a monetary loss that results from an unfair labor practice. A charged party that owes backpay is generally referred to as a ''respondent.'' The Agency uses the Backpay Management System (BMS) to record received funds from respondents, to effectuate disbursements of backpay and certain related tax forms to discriminatees, and to facilitate providing certain tax forms, tax reports, and tax payments to the Internal Revenue Service (IRS) and the Social Security Administration. This system notice will be included in the Agency inventory of record systems. All persons are advised that, in the absence of submitted comments considered by the Agency as warranting modification of the notice as here proposed, it is the intention of the Agency that the notice shall be effective upon expiration of the comment period without further action.

**DATES:** Written comments on the system's routine uses must be submitted on or before March 4, 2022. This system will be effective upon publication. The routine uses in this action will become effective on March 4, 2022 unless written comments are received that require a contrary determination.

**ADDRESSES:** All persons who desire to submit written comments for consideration by the Agency in connection with this proposed notice of the system of records shall mail them to the Agency's Senior Agency Official for Privacy, National Labor Relations Board, 1015 Half Street SE, Third Floor, Washington, DC 20570–0001, or submit them electronically to *privacy@nlrb.gov.* Comments may also be submitted electronically through *http://www.regulations.gov,* which contains a copy of this proposed notice.

**FOR FURTHER INFORMATION CONTACT:** For general questions and privacy issues please contact: NLRB's Privacy Officer, Office of the Chief Information Officer, National Labor Relations Board, 1015 Half Street SE, Third Floor, Washington, DC 20570–0001, (202) 273–3733, or *privacy@nlrb.gov.*

**SUPPLEMENTARY INFORMATION:** In accordance with 5 U.S.C. 552a(r), the NLRB has provided a report of this system of records to Congress and to the Office of Management and Budget.

**SYSTEM NAME AND NUMBER:**

NLRB–36, Backpay Management System.

**SECURITY CLASSIFICATION:**

None of the records in this system are classified.

**SYSTEM LOCATION:**

Records are maintained at the National Labor Relations Board Headquarters in Washington, DC and in NLRB field locations, which are available at *https://www.nlrb.gov,* and in electronic databases.

**SYSTEM MANAGER(S):**

Associate Chief Financial Officer, Finance, Office of the Chief Financial Officer, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

44 U.S.C. 3101; 5 U.S.C. 552a(e)(10); 29 U.S.C. 160(c); 29 CFR 101.16; E.O. 9397 (8 FR 16094, Nov. 30, 1943), as amended by E.O. 13478 (73 FR 70239, Nov. 20, 2008), relating to federal use of Social Security Numbers.

**PURPOSE(S) OF THE SYSTEM:**

The purpose of the Backpay Management System (BMS) is to enable the Agency to record funds received from respondents and to effectuate disbursements of backpay and issuance of certain tax forms to discriminatees. The Agency uses the BMS to create disbursement files that are transmitted to the Department of the Treasury for the issuance of payment to discriminatees. The system also facilitates the efforts and responsibility of the Agency to send certain tax forms, tax reports, and tax payments to the Internal Revenue Service (IRS) and the Social Security Administration. The system also generates reports that are used to support and verify the activities being processed.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

The system covers individuals who are ''discriminatees,'' to whom the Agency is issuing a backpay remedy for a monetary loss as part of an unfair labor practice case under the National Labor Relations Act. The system also covers sole proprietor respondents.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Records in the system may include the following types of information about individuals:

- *For each discriminatee:* Name; Social Security number; mailing address; home phone number; cell phone number; email address; work

phone number; work email address; Taxpayer Identification Number (TIN); date of death if applicable; bank name, address, and routing information; payment amount (including wages, interest and dues); related tax information; information about the discriminatee's employer; and heir relationship (which may include name and contact information about the discriminatee's potential heirs for purposes of disbursing backpay funds to them as appropriate in the event of a discriminatee's death).

▪ *For sole proprietor respondents:* Business name; Employer Identification Number (EIN); business address; business phone; business fax; and name of business's main person to contact for communications.

**RECORD SOURCE CATEGORIES:**

The record source categories may include: The Agency's electronic case management system (NxGen); information submitted by discriminatees; information submitted by discriminatees' employers; information submitted by unions and law firms representing discriminatees; disbursement requests uploaded by Agency regional compliance officers; and payment processing data from the Treasury Department, which is manually entered into the BMS by the Agency's Office of the Chief Financial Officer as a result of a payment returned to the Agency primarily due to incorrect banking information, invalid address, or uncashed check after one year.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b), all or a portion of the records or information contained in this system may be disclosed outside the NLRB as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

1. To the Department of the Treasury for issuance of payment to discriminatees.

2. To the IRS and the Social Security Administration for tax reporting purposes as part of the NLRB's processing of backpay payments to discriminatees.

3. To the Department of Justice for use in litigation when either (a) the Agency or any component thereof, (b) any employee of the Agency in his or her official capacity, or (c) the United States Government is a party to litigation or has an interest in such litigation, and the Agency determines that the records are both relevant and necessary to the litigation.

4. To a court or other adjudicative body before which the Agency is authorized to appear, when either (a) the Agency or any component thereof, (b) any employee of the Agency in his or her official capacity, or (c) the United States Government is a party to litigation or has an interest in such litigation, and the Agency determines that the records are both relevant and necessary to the litigation.

5. To a Member of Congress or to a Congressional staff member in response to an inquiry of the Congressional office made at the written request of the constituent about whom the record is maintained. However, the investigative file, or parts thereof, will only be released to a Congressional office if the Agency receives a signed statement under 28 U.S.C. 1746 from the subject of the investigation.

6. To the National Archives and Records Administration (NARA) pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

7. To the National Archives and Records Administration, Office of Government Information Services (OGIS), to the extent necessary to fulfill its responsibilities in 5 U.S.C. 552(h), to review administrative agency policies, procedures, and compliance with the Freedom of Information Act (FOIA), and to facilitate OGIS's offering of mediation services to resolve disputes between persons making FOIA requests and administrative agencies.

8. To appropriate agencies, entities, and persons when:

a. The National Labor Relations Board determines that the use of information from this system of records is reasonably necessary and otherwise compatible with the purpose of collection to assist another federal recipient agency or entity in (a) responding to a suspected or confirmed breach of private information, or (b) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security resulting from a suspected or confirmed breach; or

b. The National Labor Relations Board suspects or has confirmed there has been a breach of this system of records; and (a) the NLRB has determined that as a result of the suspected or confirmed breach, there is a risk of harm to individuals, the NLRB (including its information systems, programs, and operations), the Federal Government, or national security; and (b) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the NLRB's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

9. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for NLRB, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to the NLRB employees.

10. To an appropriate federal, state, tribal, or local law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations, and such disclosure is proper and consistent with the official duties of the person making the disclosure.

11. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or pursuant to the order of a court of competent jurisdiction.

12. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the officer making the disclosure.

13. To the news media and the public, with the approval of the Senior Agency Official for Privacy in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information, when disclosure is necessary to preserve confidence in the integrity of the NLRB, or when disclosure is necessary to demonstrate the accountability of the NLRB's employees or individuals covered by the system, except to the extent the Senior Agency Official for Privacy determines that release of the specific information in the context of a particular case would constitute a clearly unwarranted invasion of personal privacy.

**POLICIES AND PRACTICES FOR STORAGE OF RECORDS:**

Records are maintained in electronic databases.

**POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:**

Records may be retrieved by individual name or other personal identifier listed in ''Categories of Records,'' when applicable.

**POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:**

Records will be retained and disposed of in accordance with the NLRB's Request for Records Disposition Authority, Records Schedule Number DAA–0025–2017–0001, under the Back Pay Administration disposition (Disposition Authority Number DM–0025–2017–0001–0006), approved by NARA on April 9, 2018.

**ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:**

Access to this application is controlled by administrators who determine users' authorized access based on each user's office and position within the office.

**RECORD ACCESS PROCEDURES:**

An individual seeking to gain access to records in this system pertaining to him or her should contact the System Manager at the address above, in accordance with the procedures set forth in 29 CFR 102.119(b) and (c).

An individual requesting access in person must provide identity documents sufficient to satisfy the custodian of the records that the requester is entitled to such access, such as a government-issued photo ID. Individuals requesting access via mail must furnish, at minimum, name, date of birth, and home address in order to establish identity. Requesters should also reasonably specify the record contents being sought.

**CONTESTING RECORD PROCEDURES:**

An individual may request amendment of a record pertaining to such individual maintained in this system by directing a request to the System Manager at the address above, in accordance with the procedures set forth in 29 CFR 102.119(d).

An individual seeking to contest records in person must provide identity documents sufficient to satisfy the custodian of the records that the requester is entitled to contest such records, such as a government-issued photo ID. Individuals seeking to contest records via mail must furnish, at minimum, name, date of birth, and home address in order to establish identity. Requesters should also reasonably identify the record, specify the information they are contesting, state the corrective action sought and the reasons for the correction along with supporting justification showing why the record is not accurate, timely, relevant, or complete.

**NOTIFICATION PROCEDURES:**

An individual may inquire as to whether this system contains a record pertaining to such individual by sending a request in writing, signed, to the System Manager at the address above, in accordance with the procedures set forth in 29 CFR 102.119(a).

An individual requesting notification of records in person must provide identity documents sufficient to satisfy the custodian of the records that the requester is entitled to such notification, such as a government-issued photo ID. Individuals requesting notification via mail must furnish, at minimum, name, date of birth, and home address in order to establish identity.

**EXEMPTIONS PROMULGATED FOR THE SYSTEM:**

None.

**HISTORY:**

None.

Dated: January 28, 2022.

**Roxanne L. Rothschild,**

*Executive Secretary, National Labor Relations Board.*

[FR Doc. 2022–02107 Filed 2–1–22; 8:45 am]

BILLING CODE 7545–01–P

## NATIONAL SCIENCE FOUNDATION

### Notice of Intent To Seek Approval To Establish an Information Collection System

**AGENCY:** National Science Foundation.

**ACTION:** Notice and request for comments.

**SUMMARY:** Under the Paperwork Reduction Act of 1995, and as part of its continuing effort to reduce paperwork and respondent burden, the National Science Foundation (NSF) is inviting the general public or other Federal agencies to comment on this proposed continuing information collection.

**DATES:** Written comments on this notice must be received by April 4, 2022, to be assured consideration. Comments received after that date will be considered to the extent practicable. Send comments to address below.

**FOR FURTHER INFORMATION CONTACT:** Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Suite W18200, Alexandria, Virginia 22314; telephone (703) 292–7556; or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including federal holidays).

*Comments:* Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Foundation, including whether the information will have practical utility; (b) the accuracy of the Foundation's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

**SUPPLEMENTARY INFORMATION:**

*Title of Collection:* Program Monitoring Data Collections for the National Science Foundation (NSF) Innovation Corps (I-Corps) Program.

*OMB Number:* 3145–NEW.

*Expiration Date of Approval:* Not applicable.

*Type of Request:* Intent to seek approval to establish an information collection for post-award output and outcome monitoring system.

*Abstract:* The National Science Foundation (NSF) Innovation Corps (I-Corps) Program was started in 2011 to develop and nurture a national innovation ecosystem built upon fundamental research that guides the output of scientific and engineering discoveries closer to the development of technologies, products, and services that benefit society.

The goal of the I-Corps Program is to use experiential education to help entrepreneurial researchers reduce the time necessary to translate promising ideas from the laboratory bench to widespread implementation. In addition to accelerating technology translation, the NSF I-Corps program also seeks to reduce the risk associated with technology development conducted without insight into industry requirements and challenges.

The NSF I-Corps Program is designed to support the commercialization of ''deep technologies,'' those revolving around fundamental discoveries in science and engineering. The program addresses the skill and knowledge gaps associated with the transformation of

basic research into deep technology ventures. The program enables entrepreneurial researchers in deep technologies to receive support in the form of entrepreneurial education, industry mentoring, and funding to accelerate the translation of knowledge derived from fundamental research into emerging products and services that may attract subsequent third-party funding. I-Corps training and infrastructure together represent an important investment for NSF and the Nation, as directed by the American Innovation and Competitiveness Act (AICA), Public Law 114–329, Section 601.

These selected researchers form teams and participate in the I-Corps Teams Program Curriculum. An I-Corps team includes the Entrepreneurial Lead (EL), Technical Lead (TL) or the Principal Investigator (PI), and the Industrial Mentor (IM). During the training program, the team is expected to spend significant time conducting active customer discovery, including interviewing potential customers and potential partners. The outcomes of I-Corps Teams projects will be threefold: (1) A decision on a clear path forward based on an assessment of the business model, (2) substantial first-hand evidence for or against product-market fit, with the identification of customer segments and corresponding value propositions, and (3) a narrative of a compelling technology demonstration for potential partners.

The NSF I-Corps program requests the Office of Management and Budget (OMB) approval of this clearance that will allow the programs to improve the rigor of our surveys for evaluations and program monitoring, as well as to initiate new data collections to monitor the immediate, intermediate, and long-term outcomes of our investments by periodically surveying the I-Corps teams and their members. The clearance will allow the program to rigorously develop, test, and implement survey instruments and methodologies.

The primary objective of this clearance is to allow the NSF I-Corps program to collect characteristics, inputs, outputs, and outcomes information from the I-Corps teams funded by the program. This collection will enable the evaluation of the impacts on the four themes as outlined in the FY 2021 NSF I-Corps biennial report to Congress:

1. Training an Entrepreneurial Workforce
2. Translating Technologies
3. Nurturing an Innovation Ecosystem
4. Enabling Economic Impact

The second, related objective is to improve our questionnaires and/or data collection procedures through pilot tests and other survey methods used in these activities. Under this clearance a variety of surveys could be pre-tested, modified, and used.

Following standard OMB requirements, NSF will submit to OMB an individual request for each survey project we undertake under this clearance. NSF will request OMB approval in advance and provide OMB with a copy of the questionnaire and materials describing the project.

Data collected will be used for planning, management, evaluation, and audit purposes. Summaries of output and outcome monitoring data are used to respond to queries from Congress, the public, NSF's external merit reviewers who serve as advisors, including Committees of Visitors (COVs), NSF's Office of the Inspector General, and other pertinent stakeholders. These data are needed for effective administration, program monitoring, evaluation, outreach/marketing roadmaps, and for strategic reviews and measuring attainment of NSF's program and strategic goals, as identified by the President's Accountable Government Initiative, the Government Performance and Results Act Modernization Act of 2010, Evidence-Based Policymaking Act of 2018, and NSF's Strategic Plan.

All questions asked in the data collection are questions that are NOT included in the annual, final or outcomes reports, and the intention is to ask the grantees even beyond the period of performance on voluntary basis in order to capture impacts of the research that occur during and beyond the life of the award.

Grantees will be invited to submit information on a periodic basis to support the management of the NSF I-Corps investment portfolio. Once the survey tool is tested, grantees will be invited to submit these indicators to NSF via data collection methods that include, but are not limited to, online surveys, interviews, focus groups, phone interviews, etc. These indicators are both quantitative and descriptive and may include, for example, the characteristics of project personnel, sources of funding and support, knowledge transfer and technology translation activities, patents, licenses, publications, descriptions of significant advances, and other outcomes of the funded efforts.

*Use of the Information:* The data collected will be used for NSF internal and external reports, historical data, program level studies and evaluations, and for securing future funding for the maintenance and growth of the NSF I-Corps program. Evaluation designs could make use of metadata associated with the award and other characteristics to identify a comparison group to evaluate the impact of the program funding and other relevant research questions.

ESTIMATE OF PUBLIC BURDEN

| Collection title | Number of respondents | Annual number of responses/ respondent | Annual hour burden |
|---|---|---|---|
| Program Monitoring Data Collections for the National Science Foundation (NSF) Innovation Corps (I-Corps) Program. | 400 I-Corps teams (1,200 members) per year ..... | 3 | 900 |

For life-of-award monitoring, the data collection burden to awardees will be limited to no more than 15 minutes of the respondents' time in each instance.

*Respondents:* The respondents are consisted of Technical Lead (TL) of the I-Corps Project or Principal Investigator (PI) of NSF I-Corps Program awards, Entrepreneurial Lead (EL), and Industry Mentor (IM).

*Estimates of Annualized Cost to Respondents for the Hour Burdens:* The overall annualized cost to the respondents is estimated to be $30,000.

The following table shows the annualized estimate of costs to PIs or TLs/ELs/IMs respondents.

The annualized estimate of cost to both the PIs/TLs and IMs, who are generally University Professors, is calculated using the hourly rate based on a report from the American

Association of University Professors, ''Annual Report on the Economic Status of the Profession, 2020–21,'' *Academe,* March–April 2021, Survey Report Table 1. According to this report, the average salary of an assistant professor across all types of doctoral-granting institutions (public, private-independent, religiously affiliated) was $91,408. When divided by the number of standard annual work hours (2,080), this calculates to approximately $44 per hour. Similarly, the annualized estimate of costs to the ELs, who are generally graduate students, can be calculated using the data published in the 2017 *Science* magazine article that a typical annual stipend for graduate students in the sciences is around $25,000. When divided by the number of standard annual work hours (2,080), this calculates to approximately $12 per hour.

| Respondent type | Number of respondents | Burden hours per respondent | Average hourly rate | Estimated annual cost |
|---|---|---|---|---|
| PIs | 400 | 0.75 | $44 | $13,200 |
| ELs/TLs | 400 | 0.75 | 12 | 3,600 |
| Industry Mentors | 400 | 0.75 | 44 | 13,200 |
| Total | 1,200 | | | 30,000 |

*Estimated Number of Responses per Report:* Data collections involve all awardees in the programs.

Dated: January 28, 2022.

**Suzanne H. Plimpton,**

*Reports Clearance Officer, National Science Foundation.*

[FR Doc. 2022–02160 Filed 2–1–22; 8:45 am]

BILLING CODE 7555–01–P

## NUCLEAR REGULATORY COMMISSION

**[NRC–2022–0020]**

## Monthly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations; Correction

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Monthly notice; correction.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is correcting a notice that was published in the **Federal Register** on January 25, 2022, regarding an incorrect name of the attorney for the licensee referenced in the License Amendment Request table as ''Steven Hamrick, Managing Attorney—Nuclear, Florida Power and Light Company, P.O. Box 14000, Juno Beach, FL 33408–0420'' to read ''Rick Giannantonio, General Counsel, Energy Harbor Nuclear Corp., Mail Stop A–GO–15, 76 South Main Street, Akron, OH 44308.''

**DATES:** February 2, 2022.

**ADDRESSES:** Please refer to Docket ID NRC–2022–0020 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0020. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.*
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. (ET), Monday through Friday, except Federal holidays

**FOR FURTHER INFORMATION CONTACT:** Karen Zeleznock, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–1118, email: *Karen.Zeleznock@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### Correction

In the **Federal Register** (FR) on January 25, 2022, in FR Doc. 2022–00765, on page 3847, in the table ''License Amendment Request (s),'' for license amendment ''Energy Harbor Nuclear Corp. and Energy Harbor Nuclear Generation LLC; Beaver Valley Power Station, Units 1 and 2; Beaver County, PA'' correct ''Name of Attorney for Licensee, Mailing Address,'' to read ''Rick Giannantonio, General Counsel, Energy Harbor Nuclear Corp., Mail Stop A–GO–15, 76 South Main Street, Akron, OH 44308.''

Dated: January 27, 2022.

For the Nuclear Regulatory Commission.

**Caroline L. Carusone,**

*Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2022–02069 Filed 2–1–22; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 72–32; NRC–2022–0024]**

## NextEra Energy Duane Arnold, LLC; Duane Arnold Energy Center Independent Spent Fuel Storage Installation

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Environmental assessment and finding of no significant impact; issuance.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is publishing this notice regarding the issuance of an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for its review and potential approval of an exemption to NextEra Energy Duane Arnold, LLC (NEDA) for the Duane Arnold Energy Center (DAEC) Independent Spent Fuel Storage Installation (ISFSI). The exemption would allow a failed fuel can (FFC) and its contents at DAEC to exceed the limits specified in Table 1–1t in Appendix B, Technical Specifications, of NRC Certificate of Compliance (CoC) No. 1004, Renewed Amendment No. 17.

**DATES:** The EA and FONSI referenced in this document are available on February 2, 2022.

**ADDRESSES:** Please refer to Docket ID NRC–2022–0024 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0024. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. (ET), Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Tilda Liu, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 404–997–4730, email: *Tilda.Liu@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Introduction

The NRC is considering the issuance of an exemption to NEDA for the DAEC ISFSI located in Palo, Iowa. Therefore, as required by sections 51.21 and 51.30(a) of title 10 of the *Code of Federal Regulations* (10 CFR), the NRC performed an EA. The exemption, if granted, would allow a FFC and its contents at DAEC to exceed the limits specified in Table 1–1t in Appendix B, Technical Specifications, of NRC Certificate of Compliance (CoC) No. 1004, Renewed Amendment No. 17. Based on the results of the EA, discussed in this notice, the NRC has determined not to prepare an environmental impact statement for the exemption request and is issuing a FONSI.

## II. Background

By letter dated October 21, 2021, as supplemented by letters dated December 10, 2021 and January 6, 2022, NEDA submitted a one-time exemption request to the NRC for the DAEC ISFSI, in accordance with 10 CFR 72.7, ''Specific exemptions,'' from the requirements of 10 CFR 72.212(a)(2), (b)(2), (b)(3), (b)(4), (b)(5)(i), (b)(11), and 72.214. Specifically, the one-time exemption request would, if granted, permit an FFC and its contents at DAEC to exceed the limits specified in Table 1–1t in Appendix B of NRC Certificate of Compliance (CoC) No. 1004, Renewed Amendment No. 17.

DAEC began operation in 1974 and is owned and operated by NEDA. DAEC permanently shut down its reactor on August 10, 2020. By letter dated August 27, 2020, NEDA submitted its certification of permanent cessation of power operations, and by letter dated October 12, 2020, NEDA certified that all fuel had been removed from the reactor as required under the provisions of 10 CFR 50.82.

The NRC staff reviewed and approved the Standardized NUHOMS® 61BTH Type 2 dry shielded canister (DSC), and the related basket structural analysis, as part of Amendment No. 10 to CoC No. 1004, and the FFC as part of Amendment No. 13 to CoC No. 1004. The Standardized NUHOMS® System FFC consists of a liner with an integral bottom lid assembly, and a removable top lid, designed to contain a failed fuel assembly and any associated fuel fragments/rubble to ensure assumptions made in the criticality analysis for the quantity and location of fuel rod material are maintained.

As discussed in its October 21, 2021 request, as supplemented on December 10, 2021, and January 6, 2022, NEDA identified a failed fuel assembly which, when stored with a modified FFC, will exceed the CoC Appendix B Technical Specifications (TS) Table 1–1t requirement that ''[t]he total weight of each failed fuel can plus all its content shall be less than 705 lb.'' The modifications to the relevant FFC will be evaluated against the criteria in 10 CFR 72.48 to determine whether they require either a license or CoC amendment.

NEDA is proposing to modify an FFC to accommodate a damaged bail handle on a certain boiling water reactor failed fuel assembly. The proposed modification to the FFC would provide the damaged bail handle adequate clearance during loading operations to lower the failed fuel assembly into place without interference from surrounding components, allowing the fuel assembly to be safely lowered into its final position. Because of its proposed modification to the FFC, NEDA cannot lift the FFC in the normal manner. Instead, it will have to use additional lifting hardware to accomplish this. The additional hardware to be used will cause the relevant FFC and its contents to exceed the 705-pound weight limit in CoC No. 1004, Renewed Amendment No. 17. If the exemption is granted, NEDA would be allowed to load a failed fuel assembly in an FCC, within a DAEC DSC No. 30 fuel cell, where the combined weight of the failed fuel assembly plus the FCC exceeds the 705-pound limit. As a condition of this exemption, however, NEDA would also be required to leave at least two adjacent DSC fuel cells empty to increase the available margin for weight.

The NRC staff is performing both a safety evaluation and an environmental review to determine whether to grant this exemption request. The NRC staff will prepare a separate safety evaluation report to document its safety review and analysis. The NRC's safety evaluation report will evaluate the proposed exemption to ensure reasonable assurance of adequate protection of public health and safety, and the common defense and security. This EA documents the environmental review that the NRC staff prepared in accordance with 10 CFR 51.21 and 51.30(a). The NRC's decision whether to grant the exemption will be based on the results of the NRC staff's review documented in this EA, and the staff's safety review to be documented in the safety evaluation report.

## III. Environmental Assessment

### *Description of the Proposed Action*

CoC No. 1004 constitutes the approval and contains the conditions for the use of the Standardized NUHOMS® Horizontal Modular Storage System for the storage of spent nuclear fuel under the general licensing provisions of 10 CFR 72.210. The proposed action is for the NRC to grant NEDA an exemption from the requirements of 10 CFR 72.212(b)(3), (b)(5)(i), (b)(11), and 72.214, which require general licensees to comply with the terms, conditions, and specifications of the CoC No. 1004,

Renewed Amendment No. 17 and from the requirements of 10 CFR 72.212(a)(2), (b)(2), and (b)(4) to the extent those three provisions require licensees to use casks exactly as described in the relevant TS.

In its October 21, 2021, exemption request, supplemented on December 10, 2021, and January 6, 2022, NEDA identified a failed fuel assembly that weighs nominally 676 pounds. As previously discussed, this failed fuel assembly must be stored in a modified FFC because of a bent bail handle extending beyond the perimeter of the dry shielded canister fuel compartment. When this failed fuel assembly is stored with the modified FFC, the total weight will exceed the physical parameter limit for failed fuel, specified in CoC No. 1004, Renewed Amendment No. 17, Appendix B, TS Table 1–1t, which states: ''The total weight of each failed fuel can plus all its content shall be less than 705 lb.'' As a result, NEDA is requesting an exemption to load an FFC such that the FFC and its contents exceed the TS limit for the DAEC ISFSI.

More specifically, NEDA is requesting NRC's approval for the FFC in question, plus all its contents, to weigh up to 800 lbs. NEDA further states that, should this exemption be granted, the FFC in question would be loaded within DSC No. 30, which is the final DSC in the near-term loading campaign and the final loading campaign for DAEC. In addition, as the NRC staff's safety evaluation will discuss, NEDA stated that it is committing to leave a minimum of two adjacent fuel cells in DSC No. 30 empty.

*Need for the Proposed Action*

The proposed action is limited to allowing Standardized NUHOMS® 61BTH Type 2 DSC, No. 30, to be loaded and maintained at DAEC ISFSI in the storage condition such that the FCC and its contents weigh up to 800 pounds. This cask will remain in this condition for the duration of its use and will not meet the 705-pound weight limit for failed fuel specified in CoC No. 1004, Renewed Amendment No. 17, Appendix B, TS Table 1–1t, ''BWR Fuel Specification for the Fuel to be Stored in the NUHOMS®-61BTH DSC.''

DAEC is currently undergoing decommissioning. For NEDA to decommission the facility, it must place the failed fuel assembly in a storage cask. NEDA could dismantle the failed fuel assembly and place the dismantled component pieces of the failed fuel assembly into separate FFCs within a DSC to meet the total weight requirement specified in CoC No. 1004, Renewed Amendment No. 17, Appendix B, TS Table 1–1t. Dismantling the failed fuel assembly and placing the dismantled portions in multiple FFCs, however, would result in increased risk to plant personnel and the environment, including additional occupational radiation dose and the generation of additional radiological waste.

*Environmental Impacts of the Proposed Action*

This EA evaluates the potential environmental impacts of granting the exemption to allow Standardized NUHOMS® 61BTH Type 2 DSC, No. 30, to be loaded and maintained at DAEC ISFSI in the storage condition such that the FCC and its contents weigh up to 800 pounds for the duration of its use without restoring compliance with the weight limit for failed fuel as specified in CoC No. 1004, Renewed Amendment No. 17, Appendix B, TS Table 1–1t.

The potential environmental impacts of spent fuel storage under CoC No. 1004, Renewed Amendment No. 17, for the Standardized NUHOMS® 61BTH System, were evaluated by the NRC staff prior to Renewed Amendment No. No. 17 being added to the list of approved spent fuel storage casks in 10 CFR 72.214 (86 FR 26651). For the proposed action, the only potential impacts from granting the exemption will be as discussed as follows. Nothing about increasing the weight of this FFC would cause any corresponding changes to the environmental impacts discussed during the original amendment. In addition, non-radiological impacts will not be greater than those considered in the EA for CoC No. 1004, Renewed Amendment No. 17.

On July 18, 1990 (55 FR 29181), the NRC amended 10 CFR part 72 to provide for the storage of spent fuel under a general license in cask designs approved by the NRC. The EA for the 1990 final rule analyzed the potential environmental impact of using NRC-approved storage casks. The EA for the NUHOMS® 61BTH System, CoC No. 1004, Renewed Amendment No. No. 17, tiers off the EA issued for the July 18, 1990, final rule. Tiering off earlier EAs is a standard process under the National Environmental Policy Act of 1969 (NEPA) by which the impact analyses of previous EAs can be cited by a subsequent EA, such as this one, to include the impacts of the proposed action within the scope of the previous EA.

On December 22, 1994 (59 FR 65898), the NRC amended 10 CFR part 72 to add the Standardized NUHOMS® Horizontal Modular System to the list of approved spent fuel storage casks under a general license. The EA for the December 22, 1994, final rule concluded that there would be no significant environmental impact to adding the Standardized NUHOMS® System, and therefore, the NRC issued a FONSI, which was validated through issuance of Renewed Amendment No. 17 to the CoC on June 7, 2021.

This exemption request involves neither the disturbance of land, the construction of new facilities, nor modifications to current operating practices. The EA for NUHOMS® 61BTH System, CoC No. 1004, Renewed Amendment No. 17, analyzed the effects of design-basis accidents that could occur during storage. Design-basis accidents account for human-induced events and the most severe natural phenomena reported for the site and surrounding area and the resultant effects on the storage cask. The NRC staff evaluated the exemption request and concludes that the structural integrity and confinement of the NUHOMS® 61BTH System are maintained within regulatory requirements and the environmental impacts of the proposed action will be insignificant. In addition, the NRC staff determined that the higher weight limit for failed fuel, requested under this exemption, would not adversely affect structural performance, and the Type 2 DSC structural performance would not be affected by the exemption request. Therefore, there would be no significant change in the types or amounts of any effluent released, no significant increase in individual or cumulative radiation exposures, and no significant increase in the potential for, or consequences of, radiological accidents will occur. The NRC staff also finds that occupational exposure and offsite dose rates from this exemption request will remain within applicable 10 CFR part 20 limits. Therefore, the proposed exemption request will not result in radiological or non-radiological environmental impacts that significantly differ from impacts evaluated in the EA supporting the NUHOMS® 61BTH System, CoC No. 1004, Renewed Amendment No. 17, Direct Final Rule. For these reasons, the NRC concludes there are no significant environmental impacts associated with the exemption request for the NUHOMS® 61BTH System Type 2 DSC.

*Environmental Impacts of the Alternatives to the Proposed Action*

In addition to the proposed action, the NRC staff also considered the no-action alternative of denial of the proposed exemption request. Denial of the exemption request would require NEDA to dismantle the failed fuel assembly and place the resulting dismantled

component pieces into separate FFCs within a DSC to meet the total weight requirement specified in CoC No. 1004, Renewed Amendment No. 17, Appendix B, TS Table 1–1t. Dismantling the failed fuel assembly and placing its dismantled components in multiple FFCs would result in increased risk to plant personnel and the environment, including additional occupational radiation dose and the generation of additional radiological waste. Therefore, the alternative could result in equal or greater environmental impacts.

*Agencies Consulted*

By email dated December 17, 2021, the NRC provided a copy of this draft EA to the Bureau of Radiological Health, Iowa Department of Public Health, for review. By email dated January 4, 2022, the Iowa Department of Public Health indicated that it had no comments.

*Endangered Species Act Section 7 Consultation*

Section 7 of the Endangered Species Act requires Federal agencies to consult with the U.S. Fish and Wildlife Service or National Marine Fisheries Service regarding actions that may affect listed species or designated critical habitats. The Endangered Species Act is intended to prevent further decline of endangered and threatened species and restore those species and their critical habitat.

The NRC staff determined that a consultation under Section 7 of the Endangered Species Act is not required because the proposed action will not affect listed species or critical habitat.

*National Historic Preservation Act Section 106 Consultation*

Section 106 of the National Historic Preservation Act (NHPA) requires Federal agencies to consider the effects of their undertakings on historic properties. As stated in the NHPA, historic properties are any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in the National Register of Historic Places.

The NRC determined that the scope of activities described in this exemption request do not have the potential to cause effects on historic properties because the NRC's approval of this exemption request will not authorize new construction or land disturbance activities. The NRC staff also determined that the proposed action is not a type of activity that has the potential to impact historic properties because the proposed action would occur within the established DAEC site boundary. Therefore, in accordance with 36 CFR 800.3(a)(1), no consultation is required under Section 106 of NHPA.

## IV. Finding of No Significant Impact

The environmental impacts of the proposed action, an exemption allowing NEDA to load and maintain a modified FFC for DAEC ISFSI in the storage condition such that the FCC and its contents weigh up to 800 pounds instead of the current limit specified in CoC No. 1004, Renewed Amendment No. No. 17, Appendix B, TS Table 1–1t, have been reviewed under the requirements in 10 CFR part 51, which implement NEPA.

In this EA, the NRC determined that the environmental impacts of granting this exemption will be no greater than those described in the EA for the NUHOMS® 61BTH System, CoC No. 1004, Renewed Amendment No. 17, Direct Final Rule, and that nothing about increasing the weight of this FFC would cause any corresponding changes to the environmental impacts discussed during the original amendment. No changes are being made in the types or quantities of effluents that may be released offsite, and there is no significant increase in occupational or public radiation exposures. Accordingly, the NRC has determined that a FONSI is appropriate, and an environmental impact statement is not warranted.

## V. Availability of Documents

The documents identified in the following table are available to interested persons through one or more of the following methods, as indicated.

| Document description | ADAMS accession No./**Federal Register** citation |
|---|---|
| Final Rule: Storage of Spent Fuel in NRC-Approved Storage Casks at Power Reactor Sites, dated July 18, 1990 | 55 FR 29181 |
| Final Rule: List of Approved Spent Fuel Storage Casks: Addition, dated December 22, 1994 | 59 FR 65898 |
| Direct Final Rule: List of Approved Spent Fuel Storage Casks: TN Americas LLC Standardized NUHOMS® Horizontal Modular Storage System, Certificate of Compliance No. 1004, Renewed Amendment No. 17, dated May 17, 2021. | 86 FR 26651 |
| Letter from NextEra Energy to NRC, ''Certification of Permanent Cessation of Power Operations'' dated August 27, 2020 | ML20240A067 |
| Letter from NextEra Energy to NRC, ''Certification of Permanent Removal of Fuel from the Reactor Vessel for Duane Arnold Energy Center,'' dated October 12, 2020. | ML20286A317 |
| Letter from NextEra Energy to NRC, ''Exemption Request for Failed Fuel Can Weight in a Certificate of Compliance 1004 Renewed Amendment 17 61BTH Type 2 Dry Shielded Canister,'' dated October 21, 2021. | ML21294A280 |
| Letter from NextEra Energy to NRC, ''Supplement to Exemption Request for Failed Fuel Can Weight in a Certificate of Compliance 1004 Renewed Amendment 17 61BTH Type 2 Dry Shielded Canister,'' dated December 10, 2021. | ML21344A186 |
| Letter from NextEra Energy to NRC, ''Supplement to Exemption Request for Failed Fuel Can Weight in a Certificate of Compliance 1004 Renewed Amendment 17 61BTH Type 2 Dry Shielded Canister,'' dated January 6, 2022. | ML22006A105 |
| Renewal of Initial Certificate and Amendment Nos. 1 Through 11 and 13, Revision 1, and Amendment No. 14 of Certificate of Compliance No. 1004 for the Standardized NUHOMS® Horizontal Modular Storage System. Enclosure 25, Renewed Certificate of Compliance No. 1004, Amendment 13, Revision 1; Enclosure 26, Conditions for Cask Use and Technical Specifications, Renewed Amendment 13, Revision 1, dated December 4, 2017. | ML17338A117 and ML17338A118, respectively |
| Issuance of Certificate of Compliance No. 1004, Renewed Amendment No. 17, for the Standardized NUHOMS® Horizontal Modular Storage System, dated May 5, 2021. | ML21109A325 (Package) |
| Email from NRC to Iowa Department of Public Health Transmitting ''State Consolation—Draft Environmental Assessment Regarding the Exemption Request for NextEra Energy Duane Arnold, LLC, Duane Arnold Energy Center ISFSI in Palo, Iowa,'' dated December 17, 2021. | ML21354A672 |
| Email from State of Iowa Department of Public Health regarding ''State Consultation—Draft Environmental Assessment Regarding the Exemption Request for NextEra Energy Duane Arnold, LLC, Duane Arnold Energy Center ISFSI in Palo, Iowa,'' dated January 4, 2022. | ML22021B505 |

Dated: January 27, 2022.

For the Nuclear Regulatory Commission.

**Yoira K. Diaz-Sanabria,**

*Chief, Storage and Transportation Licensing Branch, Division of Fuel Management, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 2022–02122 Filed 2–1–22; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 52–026; NRC–2008–0252]**

## Vogtle Electric Generating Plant, Unit 4; Hearing Opportunity Associated With Inspections, Tests, Analyses, and Acceptance Criteria

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of intended operation; opportunity for hearing on conformance with the acceptance criteria in the combined license; and associated orders.

**SUMMARY:** By letter dated January 18, 2022, Southern Nuclear Operating Company (SNC) informed the U.S. Nuclear Regulatory Commission (NRC) that its scheduled date for initial loading of fuel into the reactor for Vogtle Electric Generating Plant (VEGP) Unit 4 is September 2, 2022. The Atomic Energy Act of 1954, as amended (AEA), and NRC regulations provide the public with an opportunity to request a hearing regarding the licensee's conformance with the acceptance criteria in the combined license (COL) for the facility. This document announces the public's opportunity to request a hearing and includes orders imposing procedures for the hearing process.

**DATES:** A request for a hearing must be filed by April 4, 2022. Any potential party as defined in section 2.4 of title 10 of the *Code of Federal Regulations* (10 CFR), who believes access to Sensitive Unclassified Non-Safeguards Information (SUNSI) or Safeguards Information (SGI) is necessary for contention preparation must request access by February 14, 2022.

**ADDRESSES:** Please refer to Docket ID NRC–2008–0252 or NRC Docket No. 52–026 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2008–0252. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. (ET), Monday through Friday, except Federal holidays.

The inspections, tests, analyses, and acceptance criteria (ITAAC) for this COL, the licensee's ITAAC closure notifications, uncompleted ITAAC notifications, and ITAAC post-closure notifications; associated NRC inspection and review documents; and other supporting documents pertaining to ITAAC closure for VEGP Unit 4 are available electronically at *https://www.nrc.gov/reactors/new-reactors/col-holder/vog4.html.*

**FOR FURTHER INFORMATION CONTACT:** Cayetano Santos, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–7270, email: *Cayetano.Santos@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Introduction

Pursuant to the AEA, and the regulations in 10 CFR part 2, ''Agency Rules of Practice and Procedure,'' and 10 CFR part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants,'' notice is hereby given that (1) the licensee intends to operate VEGP Unit 4; (2) the NRC is considering whether to find that the acceptance criteria in the COL are met; and (3) interested persons have an opportunity to request a hearing regarding conformance with the acceptance criteria. This notice is accompanied by an ''Order Imposing Additional Procedures for ITAAC Hearings Before a Commission Ruling on the Hearing Request'' (Additional Procedures Order) and an ''Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information [SUNSI] and Safeguards Information [SGI] for Contention Preparation'' (SUNSI–SGI Access Order).

### *A. Information on SNC's Intent To Operate VEGP Unit 4 and on the Hearing Opportunity Associated With Facility Operation*

SNC was issued a COL for VEGP Unit 4 on February 10, 2012. Under the provisions of Section 185b. of the AEA and NRC regulations in 10 CFR 52.97(b), ITAAC are included in a COL for the purpose of establishing a means to verify whether the facility has been constructed and will be operated in conformance with the license, the AEA, and NRC rules and regulations. The ITAAC are included as Appendix C to the COL. Section 185b. of the AEA requires that, after issuance of the COL, the Commission shall ensure that the prescribed inspections, tests, and analyses are performed and, prior to operation of the facility, shall find that the prescribed acceptance criteria are met. This AEA requirement is also set forth in 10 CFR 52.103(g), which expressly provides that operation of the facility may not begin unless and until the NRC finds that the acceptance criteria for all ITAAC are met as required by 10 CFR 52.103(g). Once the 10 CFR 52.103(g) finding is made, the licensee may proceed to the operational phase, which includes initial fuel load.

The NRC is considering whether to make the 10 CFR 52.103(g) finding that the acceptance criteria for all ITAAC are met. Prior to making this finding, Section 189a.(1)(B)(i) of the AEA provides that the NRC shall publish in the **Federal Register** a notice of intended operation that shall provide that any person whose interest may be affected by operation of the plant may within 60 days request the Commission to hold a hearing on whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license. In the licensee's notification dated January 18, 2022 (ADAMS Accession No. ML22018A075), the licensee informed the NRC that its scheduled date for initial loading of fuel into the reactor is September 2, 2022.

*B. Information on SNC's Completion of ITAAC*

For every ITAAC, the licensee is required by 10 CFR 52.99(c)(1) to submit to the NRC an ITAAC closure notification explaining the licensee's basis for concluding that the inspections, tests, and analyses have been performed and that the acceptance criteria are met. These ITAAC closure notifications are submitted throughout construction as ITAAC are completed. If an event occurring after the submission of an ITAAC closure notification materially alters the basis for determining that the inspections, tests, and analyses were successfully performed or that the acceptance criteria are met, then the licensee is required by 10 CFR 52.99(c)(2) to submit an ITAAC post-closure notification documenting its successful resolution of the issue. The licensee must also notify the NRC when all ITAAC are complete as required by 10 CFR 52.99(c)(4). These notifications, together with the results of the NRC's inspection process, serve as the basis for the NRC's finding regarding whether the acceptance criteria in the COL are met.

One other required notification, the uncompleted ITAAC notification, must be submitted at least 225 days before scheduled initial fuel load and must provide sufficient information, including the specific procedures and analytical methods to be used in performing the ITAAC, to demonstrate that the uncompleted inspections, tests, and analyses will be performed and the corresponding acceptance criteria will be met. 10 CFR 52.99(c)(3). The licensee has submitted the uncompleted ITAAC notifications, and these notifications cover all ITAAC not completed as of 225 days prior to scheduled fuel load.[1] These uncompleted ITAAC notifications provide information to members of the public for the purposes of requesting a hearing and submitting contentions on uncompleted ITAAC within the required time frames. In the final rule entitled ''Licenses, Certifications, and Approvals for Nuclear Power Plants'' (72 FR 49367; August 28, 2007), the Commission stated that it ''expects that any contentions submitted by prospective parties regarding uncompleted ITAAC would focus on any inadequacies of the specific procedures and analytical methods described by the licensee'' in its uncompleted ITAAC notification.

Members of the public must submit hearing requests by the deadline specified in this notice, and the hearing request must address any deficiencies with respect to uncompleted ITAAC based on the information available to the petitioner, including the uncompleted ITAAC notifications required by 10 CFR 52.99(c)(3).[2] Members of the public may not defer the submission of hearing requests or contentions because there are ITAAC that have not yet been completed. The licensee must submit an ITAAC closure notification pursuant to 10 CFR 52.99(c)(1) after it completes these uncompleted ITAAC.

The supporting documents pertaining to ITAAC closure for VEGP Unit 4 are available electronically at *https://www.nrc.gov/reactors/new-reactors/col-holder/vog4.html.* These include the ITAAC and the licensee's ITAAC closure notifications, uncompleted ITAAC notifications, and any ITAAC post-closure notifications. The licensee has not yet submitted the 10 CFR 52.99(c)(4) ''all ITAAC complete notification'' required under 10 CFR 52.99(c)(4). This notification will be included at *https://www.nrc.gov/reactors/new-reactors/col-holder/vog4.html* when it is submitted. If a petitioner wishes to compare a subsequent ITAAC closure notification with an earlier uncompleted ITAAC notification on the same ITAAC, then the petitioner should first locate the ITAAC index number for that ITAAC in the ITAAC closure notification. ITAAC index numbers run from 1 to 881.[3] Then, the petitioner should access the ITAAC Status Report, available at *https://www.nrc.gov/reactors/new-reactors/col-holder/vog4.html,* and locate the ITAAC index number entry in the report. Each ITAAC index number entry includes links to ITAAC notifications associated with that ITAAC, including the uncompleted ITAAC notifications and the ITAAC closure notifications.[4]

The ITAAC Status Report also includes links to NRC inspection reports and ITAAC Closure Verification Evaluation Forms generated by the NRC staff and citations to periodically issued **Federal Register** notices of the NRC staff's determinations that certain inspections, tests, and analyses have been successfully completed. The NRC staff determinations made in these documents are interim determinations that do not become final unless and until the NRC makes the 10 CFR 52.103(g) finding at the end of construction that all acceptance criteria are met. The 10 CFR 52.103(g) finding, which will be made by the Director of the Office of Nuclear Reactor Regulation (NRR) if all the acceptance criteria are met, will be accompanied by a document providing the rationale supporting the 10 CFR 52.103(g) finding. As stated in NRR Office Instruction LIC–114 Revision 1 (ADAMS Accession No. ML20055E800), the staff intends to make the 10 CFR 52.103(g) finding within 17 days of the licensee submitting the ''all ITAAC complete notification'' if all prerequisites for this finding are met.

The ITAAC Status Report will be periodically updated to reflect the submission of additional licensee ITAAC notifications and future NRC inspection reports and review documents. In addition, to provide additional background information to members of the public, *https://www.nrc.gov/reactors/new-reactors/col-holder/vog4.html* includes other supporting documents, such as the final safety analysis report for the facility, the NRC's final safety evaluation report for the COL review, and the design control document for the AP1000 design certification, which the facility references. Although the ITAAC Status Report and *https://www.nrc.gov/reactors/new-reactors/col-holder/vog4.html* will be periodically updated to reflect new information, there may be relevant documents (including licensee ITAAC notifications) that have been submitted or created after the most recent update and are publicly available in ADAMS. To search for documents in ADAMS using the VEGP Unit 4 docket number, 52–026, one should enter the term ''05200026'' in the ''Docket Number'' field when using the web-based search (advanced search) engine in ADAMS.

SNC provided numerous uncompleted ITAAC notifications earlier than required; the staff was therefore able to review these notifications, which contributed to the ITAAC closure process. The staff's review of an uncompleted ITAAC notification focuses on the ITAAC completion methodology described in the notification and is documented in an Uncompleted ITAAC Notification

[1] The licensee's cover letter for the uncompleted ITAAC notifications is available at ADAMS Accession No. ML22018A075.

[2] As used in this notice and in the associated orders, the term ''petitioner'' refers to any person who (1) is contemplating the filing of a hearing request, (2) has filed a hearing request but is not admitted as a party to this proceeding, or (3) has had a hearing request granted.

[3] Because ITAAC have been deleted and consolidated through license amendments, there are fewer than 881 ITAAC in the COL.

[4] To reduce burdens on petitioners, the NRC staff has streamlined the ITAAC Status Report by removing those ITAAC notifications that have been entirely superseded by later ITAAC notifications on the same ITAAC. These superseded ITAAC notifications are still available in ADAMS.

Checklist; these checklists are available in the ITAAC Status Report.

In accordance with 10 CFR 2.105(b)(3)(iv), the notice of intended operation must identify any conditions, limitations, or restrictions to be placed on the license in connection with the finding under 10 CFR 52.103(g), and the expiration date or circumstances (if any) under which the conditions, limitations or restrictions will no longer apply. As of the date of this notice, the NRC staff has not identified any such conditions, limitations, or restrictions.

*II. Hearing Requests*

Any person whose interest may be affected by this proceeding and who desires to participate as a party to this proceeding must file a hearing request with the NRC. This section sets forth the requirements for requesting a hearing on whether acceptance criteria in the COL for VEGP Unit 4 have been or will be met. This section references the requirements for hearing requests found in 10 CFR 2.309, ''Hearing requests, petitions to intervene, requirements for standing, and contentions,'' with certain additional procedures included in the orders issued with this notice. Interested persons should consult 10 CFR 2.309, which is available at the NRC's Public Document Room and electronically at *https://www.nrc.gov/reading-rm/doc-collections/cfr/part002/part002-0309.html.* All hearing requests must be filed in accordance with the filing instructions in Section III of this notice.

*A. A Hearing Request Must Show Standing*

As required by 10 CFR 2.309(d), a hearing request shall show standing by setting forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding. The hearing request must provide the name, address, and telephone number of the petitioner and specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the AEA to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be entered in the proceeding on the petitioner's interest. Discretionary intervention pursuant to 10 CFR 2.309(e) does not apply to this proceeding because 10 CFR 2.309(a) requires a showing of standing and contention admissibility in an ITAAC hearing, and 10 CFR 2.309(a) does not provide a discretionary intervention exception for hearings under 10 CFR 52.103 as it provides for other proceedings.

*B. A Hearing Request Must Include an Admissible Contention*

A hearing request must also include the contentions that the petitioner seeks to have litigated in the hearing. The contention standards for an ITAAC hearing under 10 CFR 52.103(b), which are in some respects different from the contention standards in other NRC proceedings, are as follows.

For each contention, the petitioner must meet the following requirements from 10 CFR 2.309(f)(1)(i) through (v) and (vii): [5]

- Provide a specific statement of the issue of law or fact to be raised or controverted, as required by 10 CFR 2.309(f)(1)(i). The issue of law or fact to be raised must be directed at demonstrating that one or more of the acceptance criteria in the COL have not been, or will not be, met and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety; [6]
- Provide a brief explanation of the basis for the contention, as required by 10 CFR 2.309(f)(1)(ii);
- Demonstrate that the issue raised by each contention is within the scope of the proceeding and is material to the 10 CFR 52.103(g) finding, as required by 10 CFR 2.309(f)(1)(iii) and (iv);
- Include a concise statement of the alleged facts or expert opinions that support the petitioner's position and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely, as required by 10 CFR 2.309(f)(1)(v); and
- Submit sufficient information showing, *prima facie*, that one or more of the acceptance criteria in the COL have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety, as required by 10 CFR 2.309(f)(1)(vii). This information must include the specific portion of the notification required by 10 CFR 52.99(c) that the petitioner believes is inaccurate, incorrect, and/or incomplete (*i.e.,* fails to contain the necessary information required by § 52.99(c)).[7]

As provided in the Additional Procedures Order issued with this notice, any declarations of eyewitnesses or expert witnesses offered in support of contention admissibility need to be signed by the eyewitness or expert witness in accordance with 10 CFR 2.304(d). If declarations are not signed, their content will be considered, but they will not be accorded the weight of an eyewitness or an expert witness, as applicable, with respect to satisfying the *prima facie* showing required by 10 CFR 2.309(f)(1)(vii). The purpose of this provision is to ensure that a position that is purportedly supported by an expert witness or an eyewitness is actually supported by that witness.

Because the licensee references the AP1000 design certification rule (10 CFR part 52, appendix D), the provisions in this design certification rule pertaining to proceedings under 10 CFR 52.103 also apply to hearing requests and contentions submitted in this proceeding. These provisions include 10 CFR part 52, appendix D, sections VI, VIII.B.5.g, and VIII.C.5.

*C. Claims of Incompleteness*

If the petitioner identifies a specific portion of the § 52.99(c) notification as incomplete and contends that the incomplete portion prevents the petitioner from making the necessary *prima facie* showing, then 10 CFR 2.309(f)(1)(vii) requires the petitioner to explain why this deficiency prevents the petitioner from making the *prima facie* showing. Such a claim is called a ''claim of incompleteness.'' The process for claims of incompleteness is intended to address situations in which the licensee's 10 CFR 52.99(c) notification is incomplete (*i.e.,* fails to contain the necessary information required by § 52.99(c)) and this incompleteness prevents the petitioner from making the necessary *prima facie* showing with respect to one or more aspects of 10 CFR 2.309(1)(i) through (v) and (vii).[8] To

[5] The requirements of 10 CFR 2.309(f)(1)(vi) do not apply to this proceeding.

[6] In accordance with 10 CFR 51.108, the Commission will not admit any contentions on environmental issues in this proceeding, and the NRC is not making any environmental finding in connection with a finding under 10 CFR 52.103(g) that the acceptance criteria are met.

[7] Consistent with 10 CFR 2.309(f)(1)(vii), a purported incompleteness in the 10 CFR 52.99(c) notification might be the basis for a petitioner's *prima facie* showing. However, if the petitioner believes that the purported incompleteness *prevents* the petitioner from making the necessary *prima facie* showing, then the petitioner may submit a claim of incompleteness as described later in this section.

[8] 10 CFR 2.309(f)(1)(i) through (v) are essential elements in making the *prima facie*showing required by the AEA and NRC regulations, and it is conceivable that an incompleteness in the

Continued

establish a valid claim of incompleteness, the petitioner (1) must specifically identify the portion of the 10 CFR 52.99(c) notification that the petitioner asserts is incomplete, (2) must provide an adequately supported showing that the 10 CFR 52.99(c) notification fails to include information required by 10 CFR 52.99(c), and (3) must provide an adequately supported explanation of why this deficiency prevents the petitioner from making the necessary *prima facie* showing.[9] This explanation must include a demonstration that the allegedly missing information is reasonably calculated to support a *prima facie* showing.

However, the petitioner's ability to file a claim of incompleteness does not obviate the need for the petitioner to show standing and, to the extent it can based on the available information, satisfy the contention requirements. Thus, the petitioner must make all of its claims regarding the ITAAC and satisfy the contention admissibility requirements of 10 CFR 2.309(f)(1)(i) through (v) and (vii) in its hearing request to the extent possible but for the petitioner's claim of incompleteness. A claim of incompleteness does not toll a petitioner's obligation to make a timely *prima facie* showing. If the petitioner is unsure whether to file a contention or a claim of incompleteness on an ITAAC notification, the petitioner can submit both a contention and a claim of incompleteness at the same time, arguing in the alternative that if the contention is not admissible, then the claim of incompleteness is valid.

In addition, to the extent that a petitioner is able to make a *prima facie* showing with respect to one aspect of an ITAAC, it must do so even if there is a different aspect of the ITAAC for which a *prima facie* showing cannot be made because of an incompleteness in the licensee's 10 CFR 52.99(c) notification. Furthermore, because the *prima facie* showing must address two issues—conformance with the acceptance criteria and whether the operational consequences of nonconformance are contrary to reasonable assurance of adequate protection of the public health and safety—a valid claim of incompleteness must either explain why the incompleteness in the 10 CFR 52.99(c) notification prevents the petitioner from making the *prima facie* showing with respect to both issues, or the petitioner must make the *prima facie* showing with respect to one issue and explain why the incompleteness in the 10 CFR 52.99(c) notification prevents the petitioner from making the *prima facie* showing with respect to the other issue.

To expedite the proceeding and prevent the unnecessary expenditure of resources that might occur from litigating claims of incompleteness that could have been resolved through negotiation, the Commission is requiring consultation between the petitioner and the licensee regarding information purportedly missing from the licensee's 10 CFR 52.99(c) ITAAC notifications. This consultation must occur in a timely fashion prior to the filing of any claim of incompleteness. Specifically, the petitioner must initiate consultation with the licensee regarding any claims of incompleteness within 21 days of the notice of intended operation for all ITAAC notifications that were publicly available (or for which a redacted version was publicly available) when the notice of intended operation was published. If the ITAAC notification (or a redacted version thereof) becomes publicly available after the notice of intended operation is published, then the petitioner must initiate consultation with the licensee regarding any claims of incompleteness on such notifications within 7 days of the notification (or a redacted version thereof) becoming available to the public, except that consultation need not be commenced earlier than 21 days after publication of the notice of intended operation. If agreement is not reached before the deadline for filing the claim of incompleteness, then the petitioner must file the claim of incompleteness by the required deadline. Further requirements regarding consultation on claims of incompleteness, including requirements related to SUNSI or SGI and to deadlines for filing contentions once access to information is granted, are in Section II.B.2 of the Additional Procedures Order issued with this notice.

If the Commission determines that the petitioner has submitted a valid claim of incompleteness, then it will issue an order requiring the licensee to provide the additional information and setting forth a schedule for the petitioner to file a contention that meets the *prima facie* standard based on the additional information. If the petitioner files an admissible contention thereafter, and all other hearing request requirements (*e.g.,* standing) have been met, then the hearing request will be granted.

*D. Access to SUNSI or SGI*

A petitioner seeking access to SUNSI or SGI in the possession of the NRC for the purposes of contention formulation shall make this request in accordance with the SUNSI–SGI Access Order issued with this notice. A petitioner who seeks access to SUNSI or SGI in the possession of the licensee through the process for consultation on claims of incompleteness shall do so in accordance with Section II.B.2 of the Additional Procedures Order issued with this notice. Petitioners are required to take advantage of these processes for seeking access to SUNSI or SGI, and their failure to do so will be taken into account by the NRC.

*E. Participation by Interested States, Local Governments, and Federally-Recognized Indian Tribes*

A request for hearing submitted by a State, local government body, Federally-recognized Indian Tribe, or an agency thereof must comply with the provisions of 10 CFR 2.309(h)(1). The hearing request must meet the requirements for hearing requests set forth in this section, except that a State, local government body, Federally-recognized Indian Tribe, or an agency thereof does not need to address the standing requirements in 10 CFR 2.309(d) if the facility is located within its boundaries or jurisdiction. A State, local government body, Federally-recognized Indian Tribe, or an agency thereof may also seek to participate in a hearing in accordance with 10 CFR 2.315(c).

*F. Hearing Requests From the Licensee*

The licensee may file a request for hearing if it disputes an NRC staff determination that an ITAAC has not been successfully completed. If the licensee requests a hearing, it must specifically identify the ITAAC subject to this dispute and the specific issues that are being disputed.[10]

licensee's 10 CFR 52.99(c) notification would prevent the petitioner from satisfying the elements in 10 CFR 2.309(f)(1)(i) through (v).

[9] For claims of incompleteness, the ''incompleteness'' refers to a lack of required information in a licensee's ITAAC notification, not to whether the ITAAC has yet to be completed. Thus, a valid claim of incompleteness with respect to an uncompleted ITAAC notification must identify, among other things, an insufficient description in the notification of how the licensee will successfully complete the ITAAC.

[10] A hearing request from the licensee need not address the standards in 10 CFR 2.309(d) or (f). In particular, the licensee's interest in the proceeding is established by the fact that its authority to operate the facility depends on its compliance with the ITAAC. Also, the *prima facie* showing requirement does not apply to a licensee hearing request because the licensee would be asserting that an ITAAC has been successfully completed rather than asserting that the acceptance criteria have not been, or will not be, met. Licensees requesting a hearing would be challenging an NRC staff determination that an ITAAC has not been successfully completed; this NRC staff determination is analogous to a *prima facie*

*G. Deadlines for Hearing Requests and Answers to Hearing Requests*

Hearing requests must be filed no later than April 4, 2022. Hearing requests, intervention petitions, and motions for leave to file new or amended contentions or claims of incompleteness that are filed after this date must meet the requirements for such filings that are set forth in Section II.G of the Additional Procedures Order issued with this notice. As provided by 10 CFR 2.309(i), answers to a petitioner's hearing request must be filed within 25 days of service of the hearing request, and the petitioner is not permitted to reply to these answers. For hearing requests from the licensee, the NRC staff may file an answer within 10 days of service of the hearing request, and the licensee is not permitted to reply to the NRC staff's answer.

The Commission will expeditiously rule on all hearing requests, and the milestone for this ruling is 30 days from the filing of answers. If the petitioner's hearing request is granted, the petitioner becomes a party to the contested proceeding, subject to any limitations in the order granting the hearing request. Concurrent with the granting of the hearing request, the Commission would designate the presiding officer for the hearing and issue an order specifying the hearing procedures that would apply to the proceeding. The party's participation would be governed by the applicable procedures set forth in the Commission order and may include the opportunity to present the party's legal and technical views, introduce evidence, and propose questions to be asked of witnesses. The hearing procedures will be selected from those described in the ''Final Procedures for Conducting Hearings on Conformance with the Acceptance Criteria in Combined Licenses'' (Final ITAAC Hearing Procedures) (81 FR 43266; July 1, 2016), and may include any additional or modified case-specific procedures that the Commission designates.[11]

*H. Interim Operation*

If a hearing request is granted, AEA § 189a.(1)(B)(iii) directs the Commission to determine whether to allow interim operation, which is operation of the facility for an interim period before completion of the adjudicatory hearing. Interim operation will be allowed if the NRC staff makes the 10 CFR 52.103(g) finding for all ITAAC and if the Commission determines, after considering the petitioner's *prima facie* showing and any answers thereto, that there will be reasonable assurance of adequate protection of the public health and safety during a period of interim operation. AEA §§ 185b. and 189a.(1)(B)(iii); 10 CFR 52.103(c). As provided by 10 CFR 52.103(c), the Commission will make this adequate protection determination acting as the presiding officer.

The Commission is reserving its flexibility to make the interim operation determination at a time of its discretion. Because the purpose of the interim operation provision is to prevent an ITAAC hearing from unnecessarily delaying plant operation if the hearing extends beyond scheduled fuel load, the Commission intends to make an adequate protection determination for interim operation by scheduled fuel load if the hearing is not completed by that time.

In making the adequate protection determination for interim operation, the Commission will follow the legislative intent underlying the interim operation provision. The pertinent legislative history indicates that Congress did not intend that the Commission would rule on the merits of the petitioner's *prima facie* showing when making the adequate protection determination for interim operation. Instead, Congress intended interim operation for situations in which the petitioner's *prima facie* showing relates to an asserted adequate protection issue that does not present adequate protection concerns during the interim operation period or for which mitigation measures can be taken to preclude potential adequate protection issues during the period of interim operation.[12]

As stated previously, the adequate protection determination for interim operation is based on the parties' initial filings, *i.e.,* the hearing request and answers thereto. Thus, the petitioner should include in its hearing request information regarding the time period and modes of operation during which the adequate protection concern arises. Likewise, the NRC staff and the licensee should include such information in their answers to the hearing request, and the licensee should also include any proposed mitigation measures to address the adequate protection concerns raised by the petitioner. The petitioners, the NRC staff, and the licensee are reminded that, ordinarily, their initial filings will be their only opportunity to address adequate protection during interim operation.

Because the Commission's interim operation determination is a technical finding, a proponent's views regarding adequate protection during interim operation must be supported with alleged facts or expert opinion, including references to the specific sources and documents on which the proponent relies. Any expert witness or eyewitness declarations, including a statement of the qualifications and experience of the expert, must be signed in accordance with 10 CFR 2.304(d). The probative value that the NRC accords to a proponent's position on adequate protection during interim operation will depend on the level and specificity of support provided by the proponent, including the qualifications and experience of each expert providing expert opinion.

If the Commission grants a hearing request, it may order additional briefing as a matter of discretion to support a determination on whether there will be adequate protection during interim operation. Such a briefing order will be issued concurrently with the granting of the hearing request. In addition, if mitigation measures are proposed by the licensee in its answer to the hearing request, then the Commission will issue a briefing order allowing the NRC staff and the petitioners an opportunity to address adequate protection during interim operation in light of the mitigation measures proposed by the licensee in its answer.

More information on the interim operation process can be found in the Final ITAAC Hearing Procedures (81 FR 43266).

*I. Limited Appearance Statements*

Any person who does not wish, or is not qualified, to become a party to this proceeding may request permission to make a limited appearance pursuant to 10 CFR 2.315(a). In the discretion of the presiding officer, a person making a limited appearance may make an oral or written statement of position on the issues at any session of the hearing or any prehearing conference within the

showing that the acceptance criteria have not been met.

[11] In accordance with 10 CFR 2.309(g), participants to this proceeding may not address the selection of hearing procedures in their initial filings. The NRC provided the public with an opportunity to comment on generic hearing procedures during the comment period on the proposed generic procedures. *See* Final ITAAC Hearing Procedures, 81 FR 43266; Proposed Procedures for Conducting Hearings on Whether Acceptance Criteria in Combined Licenses Are Met, 79 FR 21958 (Apr. 18, 2014) (Proposed ITAAC Hearing Procedures). This prohibition, however, does not apply to a licensee's hearing request because such hearing requests are not subject to 10 CFR 2.309 and because the generic procedures did not address the procedures for hearings requested by the licensee.

[12] Additional background information regarding interim operation can be found in the **Federal Register** notice for the Final ITAAC Hearing Procedures (81 FR 43266).

limits and on the conditions fixed by the presiding officer. However, the presiding officer will not provide for oral limited appearance statements unless an oral hearing is held. In addition, a person making a limited appearance statement may not otherwise participate in the proceeding. Such limited appearance statements shall not be considered evidence in the proceeding.

**III. Electronic Submissions (E-Filing)**

Except for an initial request for access to SUNSI or SGI made pursuant to the SUNSI–SGI Access Order, all documents filed in this proceeding, including a request for hearing, any motion or other document filed in the proceeding prior to the submission of a request for hearing, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012) as modified by the procedures in the orders issued with this notice.[13] Participants to this proceeding must submit and serve all adjudicatory documents over the internet, or in some cases mail copies on electronic storage media by overnight mail. The user's guide for electronic adjudicatory submissions is available at *https://www.nrc.gov/site-help/e-submittals/adjudicatory-eie-submission-user-guide.pdf.* Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described later in this section.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should (1) obtain a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for this proceeding and (2) contact the Office of the Secretary by email at *Hearing.Docket@nrc.gov,* or by telephone at 301–415–1677, to advise the Secretary that the participant will be submitting a request for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit adjudicatory documents. Submissions should be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html.*

A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding so that the filer need not serve the documents on those participants separately. Therefore, the licensee and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9:00 a.m. and 6:00 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by overnight mail to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Attention: Rulemaking and Adjudications Staff, Mail Stop OWFN 16–B33, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by overnight mail upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Any person who files a motion pursuant to 10 CFR 2.323 (as modified by the Additional Procedures Order issued with this notice) must consult with counsel for the licensee and counsel for the NRC staff. Counsel for the licensee is M. Stanford Blanton, Balch & Bingham LLP, 205–226–3417, *sblanton@balch.com.* Counsel for the NRC staff in this proceeding is Michael Spencer, 301–287–9115, *Michael.Spencer@nrc.gov.*

Documents submitted in this proceeding will appear in the NRC's electronic hearing docket, which is available to the public at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the Commission or the presiding officer. If you do not have an NRC-issued digital ID certificate as described above, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. However, a hearing request will require that the petitioner include information on local residence in order to demonstrate a proximity assertion of interest in this proceeding. With respect to copyrighted works, except for limited excerpts that support the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

For the Nuclear Regulatory Commission.

[13] The initial request for access to SUNSI or SGI must be made in accordance with the procedures set forth in the SUNSI–SGI Access Order that accompanies this notice.

Dated: January 27, 2022.

**Annette L. Vietti-Cook,**

*Secretary of the Commission.*

## Attachment 1: Orders Associated With the Notice of Intended Operation

## Order Imposing Additional Procedures for ITAAC Hearings Before a Commission Ruling on the Hearing Request

### I. Background

The Atomic Energy Act of 1954, as amended (AEA), grants the NRC discretion to establish appropriate procedures for conducting a hearing on whether a facility as constructed complies, or upon completion will comply, with the acceptance criteria in the combined license, provided that the NRC explains its reasoning for establishing those procedures. AEA § 189a.(1)(B)(iv). As provided by 10 CFR 2.310(j), the Commission designates on a case-specific basis the procedures for proceedings on a Commission finding under 10 CFR 52.103(c) and (g), which includes the Commission determination on a hearing request under 10 CFR 52.103(c).[14] This order contains the procedures that govern requests for hearings on conformance with the prescribed acceptance criteria in the combined license, as well as other filings that may be submitted before a Commission ruling on the hearing request.[15] The procedures in this order were approved by the Commission for use on a general basis in the ''Final Procedures for Conducting Hearings on Conformance with the Acceptance Criteria in Combined Licenses'' (Final ITAAC [inspections, tests, analyses, and acceptance criteria] Hearing Procedures) (81 FR 43266; July 1, 2016).

The Commission developed the procedures in this order based on the NRC's rules of practice in 10 CFR part 2, primarily subpart C, adopting or modifying them as necessary to conform to the expedited schedule and specialized nature of hearings on ITAAC. The Commission modeled these procedures on the existing rules because they have proven effective in promoting a fair and efficient process in adjudications and there is a body of experience and precedent interpreting and applying these provisions. In addition, using the existing rules to the extent possible could make it easier for potential participants in the hearing to apply the procedures in this order if they are already familiar with the existing rules. To the extent that the Commission has substantively modified these rules, the basis for the Commission's decision is set forth in this order.[16] And to the extent that the Commission has adopted the rules with little or no substantive change, the Commission incorporates by reference the basis for their promulgation in 10 CFR part 2.

Many of the modifications the Commission has made to the hearing procedures in existing regulations are to account for the requirement in the AEA that, to the maximum possible extent, decisions resolving issues raised by an ITAAC hearing request shall be rendered within 180 days of the publication of the notice of intended operation or the anticipated date for initial loading of fuel, whichever is later. AEA § 189a.(1)(B)(v). Therefore, the Commission has established a narrow time frame for hearings on ITAAC, which is reflected in reduced time limits for certain adjudicatory actions. The Commission has also made appropriate changes to the ''Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information [SUNSI] and Safeguards Information [SGI] for Contention Preparation'' (SUNSI–SGI Access Order), which immediately follows this order. The participants are obligated to ensure that their representatives and witnesses are available during the hearing process to perform all of their hearing-related tasks on time. The competing obligations of the participants' representatives or witnesses will not be considered good cause for any delays in the schedule.

### II. Hearing Procedures

The procedures set forth herein and in the SUNSI–SGI Access Order issued with this notice are exclusive—in other words, no procedures other than those stated in the orders issued with the notice of intended operation apply to this proceeding, unless modified by a later Commission order. Thus, if a provision of 10 CFR part 2 is not expressly referenced in this order, then it does not apply to this proceeding, unless modified by a later Commission order.

*A. Briefing of Legal Issues in Filings*

In order to expedite the proceeding and ensure sound decision making by the presiding officer, participants must fully brief all relevant legal issues in their filings.

*B. Hearing Requests and Answers to Hearing Requests*

1. *Requirements for Hearing Requests*

a. Hearing requests must be filed within 60 days of the publication of the notice of intended operation. Section II.G of this order governs hearing requests, intervention petitions, and motions for leave to file new or amended contentions or claims of incompleteness that are filed after 60 days from the publication of the notice of intended operation.

b. Hearing requests from petitioners must meet the requirements of 10 CFR 2.309(f)(1)(i) through (v) and 10 CFR 2.309(f)(1)(vii). The requirements of 10 CFR 2.309(f)(1)(vi) do not apply to this proceeding.

c. The requirements of Sections VI, VIII.B.5.g and VIII.C.5 of the AP1000 design certification rule apply to this proceeding.

d. A hearing request from a petitioner must include a demonstration that the petitioner has standing in accordance with the requirements of 10 CFR 2.309(d). Additionally, the provisions of 10 CFR 2.309(h) apply to this proceeding. However, discretionary intervention pursuant to 10 CFR 2.309(e) does not apply to this proceeding because 10 CFR 2.309(a) requires a showing of standing and contention admissibility in an ITAAC hearing, and 10 CFR 2.309(a) does not provide a discretionary intervention exception for hearings under 10 CFR 52.103 as it provides for other proceedings.

e. Any declarations of eyewitnesses or expert witnesses offered in support of contention admissibility need to be signed by the eyewitness or expert witness in accordance with 10 CFR 2.304(d). If declarations are not signed, their content will be considered, but they will not be accorded the weight of an eyewitness or an expert witness, as applicable, with respect to satisfying the *prima facie* showing required by 10 CFR 2.309(f)(1)(vii). The purpose of this provision is to ensure that a position that is purportedly supported by an expert witness or an eyewitness is actually supported by that witness.

f. Hearing requests from the licensee must specifically identify the ITAAC

[14] *See* Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 FR 49352, 49414 (August 28, 2007) (final rule).

[15] This order contains only procedures governing the period prior to a ruling on the hearing request. If the Commission grants a hearing request or determines that a claim of incompleteness is valid, then the Commission will issue procedures governing the resolution of these issues concurrently with its decision on the hearing request.

[16] The procedures and schedule imposed by this order are based on a set of general procedures that the Commission approved after the consideration of public comments. *See* Final ITAAC Hearing Procedures, 81 FR 43266; Proposed Procedures for Conducting Hearings on Whether Acceptance Criteria in Combined Licenses Are Met, 79 FR 21958 (Apr. 18, 2014). The notice in the **Federal Register** accompanying those general procedures provides a further explanation of their bases.

whose successful completion is being disputed by the NRC staff and identify the specific issues that are being disputed.

2. *Consultation on Claims of Incompleteness:* To expedite the proceeding and prevent the unnecessary expenditure of resources that might occur from litigating claims of incompleteness that could have been resolved through negotiation, the Commission is requiring consultation between the petitioner and the licensee regarding information purportedly missing from the licensee's 10 CFR 52.99(c) ITAAC notifications. This consultation must occur prior to the filing of any claim of incompleteness and must be in accordance with the provisions set forth below.

a. The petitioner must make a sincere effort to timely initiate and meaningfully engage in consultation with the licensee, and the licensee must make a sincere effort to listen to and respond to the petitioner. Both the petitioner and the licensee must make sincere efforts to resolve the petitioner's request and must complete consultations (and any delivery of documents) with due dispatch.

b. The petitioner must initiate consultation with the licensee regarding any claims of incompleteness within 21 days of the notice of intended operation for all ITAAC notifications that were publicly available (or for which a redacted version was publicly available) when the notice of intended operation was published. If the ITAAC notification (or a redacted version thereof) becomes publicly available after the notice of intended operation is published, then the petitioner must initiate consultation with the licensee regarding any claims of incompleteness on such notifications within 7 days of the notification (or a redacted version thereof) becoming available to the public, except that consultation need not be commenced earlier than 21 days after publication of the notice of intended operation.

c. Within one day of the licensee discovering that consultation on a claim of incompleteness involves SUNSI or SGI, the licensee must inform the petitioner of this fact. Within one day of the licensee discovering that security-related SUNSI or SGI is involved, the licensee must also inform the NRC staff with a brief explanation of the situation.

d. If consultation on a claim of incompleteness involves security-related SUNSI or SGI, then the licensee shall not provide the security-related SUNSI or SGI unless and until the NRC has determined that such access is appropriate. Also, if SGI is involved and the petitioner continues to seek access to it, then, in order to expedite the proceeding, the petitioner must complete and submit to the NRC the background check forms and fee in accordance with Sections D.(2)(a) though D.(2)(e) of the SUNSI–SGI Access Order issued with this notice. The background check forms and fee must be submitted within 5 days of notice from the licensee that SGI is involved. Petitioners are expected to have forms completed prior to this date to allow for expeditious submission of the required forms and fee. The petitioner should review all submitted materials for completeness and accuracy (including legibility) before submitting them to the NRC.

e. In determining whether access to SUNSI or SGI is appropriate as part of the consultation process, the NRC staff shall employ the standards in Section F of the SUNSI–SGI Access Order with respect to likelihood of establishing standing, need for SUNSI, and need to know for SGI. For access to SGI, the NRC Office of Administration will also determine, based upon completion of the background check, whether the proposed recipient is trustworthy and reliable, as required by 10 CFR 73.22(b) for access to SGI. Before making a final adverse trustworthiness and reliability determination, the NRC Office of Administration will employ the process set forth in Section K.(2) of the SUNSI–SGI Access Order. If the NRC Office of Administration makes a final adverse determination on trustworthiness and reliability, any request for review of this determination must be filed with the Chief Administrative Judge within 7 days of receipt of the adverse determination, any NRC staff response must be filed within 7 days of receipt of the request for review, and such requests for review shall be resolved in accordance with Section K.(4) of the SUNSI–SGI Access Order.[17]

f. If access to SUNSI or SGI is granted, the presiding officer for any non-disclosure agreement or affidavit or protective order will be designated in accordance with Sections G and H of the SUNSI–SGI Access Order. The approved protective order templates announced in ''Protective Order Templates for Hearings on Conformance With the Acceptance Criteria in Combined Licenses'' (84 FR 3515; Feb. 12, 2019), should serve as a basis for case-specific protective orders, as appropriate. Release and storage of SGI shall be in accordance with Section I of the SUNSI–SGI Access Order.

g. Any contention based on additional information provided to the petitioner by the licensee through consultation on claims of incompleteness shall be due within 20 days of the petitioner's access to the additional information, unless more than 20 days remains between the petitioner's access to the additional information and the deadline for the hearing request, in which case the contention shall be due by the later hearing request deadline.

h. If agreement is not reached before the deadline for filing the claim of incompleteness, then the petitioner must file the claim of incompleteness by the required deadline.

i. If a claim of incompleteness is filed, the petitioner must include with its claim of incompleteness a certification by the attorney or representative of the petitioner that the petitioner (1) complied with the timeliness requirements for consultation and (2) made a sincere effort to meaningfully engage in consultation with the licensee on access to the purportedly missing information prior to filing the claim of incompleteness. This certification may include any additional discussion that the petitioner believes is necessary to explain the situation.

j. A claim of incompleteness involving SUNSI or SGI must (1) specifically identify the extent to which the petitioner believes that any requested information might be SUNSI or SGI, and (2) include a showing of the need for the information (for access to SUNSI) or need to know (for access to SGI). The showing of need for SUNSI must satisfy the standard in Section D.(1)(iii) of the SUNSI–SGI Access Order, and the showing of need to know for SGI must satisfy the standard in Section D.(1)(iv) of the SUNSI–SGI Access Order. A claim of incompleteness involving SGI must also state that the required forms and fee for the background check have been submitted to the NRC in accordance with Sections D.(2)(a) through D.(2)(e) of the SUNSI–SGI Access Order.

k. A licensee answer to a claim of incompleteness must include a certification by the licensee's attorney or representative that the licensee (1) complied with the timeliness requirements for consultation and (2) made a sincere effort to listen to and respond to the petitioner and to resolve the petitioner's request prior to the filing of the claim of incompleteness. This certification may include any

[17] If consultations are not successful because the NRC staff makes an adverse determination on the petitioner's likelihood of establishing standing, need for SUNSI, or need to know for SGI, then the issues of standing, need for SUNSI, and need to know for SGI (as applicable) will be resolved in a ruling on the claim of incompleteness if the petitioner decides to file a claim of incompleteness.

additional discussion that the licensee believes is necessary to explain the situation. An answer from the licensee must also specifically identify the extent to which the licensee believes that any requested information might be SUNSI or SGI.

l. In determining whether a claim of incompleteness is valid, the Commission will consider all of the information available to the petitioner, including any information provided by the licensee. The Commission will also consider whether the participants have discharged their consultation obligations in good faith.

3. *Effect of Hearing Requests on Interim Operation*

a. If the petitioner argues that the information raised in the hearing request will affect adequate protection during interim operation, then, in order for its views to be considered before the Commission makes the interim operation determination, the petitioner shall provide its views on this issue, including the time periods and modes of operation in which the adequate protection concern arises, at the same time it submits the hearing request.[18]

b. Because the Commission's interim operation determination is a technical finding, a petitioner's views regarding adequate protection during interim operation must be supported with alleged facts or expert opinion, including references to the specific sources and documents on which it relies. Any expert witness or eyewitness declarations, including a statement of the qualifications and experience of the expert, must be signed in accordance with 10 CFR 2.304(d). The probative value that the NRC accords to a petitioner's position on adequate protection during interim operation will depend on the level and specificity of support provided by the petitioner, including the qualifications and experience of each expert providing expert opinion.

4. *Answers*

a. Answers to a petitioner's hearing request shall be filed within 25 days of service of the hearing request in accordance with 10 CFR 2.309(i)(1). An answer to a licensee's hearing request may be filed by the NRC staff within 10 days of service of the hearing request.

b. Any answers to the proffered contention from the NRC staff and the licensee shall include their views regarding the impact of the issues raised in the hearing request on adequate protection during interim operation, including the licensee's plans, if any, to propose mitigation measures to ensure adequate protection during interim operation. NRC staff filings addressing interim operation should address any terms and conditions that should be imposed to assure adequate protection during the interim period. Because the Commission's interim operation determination is a technical finding, the NRC staff's and the licensee's views regarding adequate protection during interim operation must be supported with alleged facts or expert opinion, including references to the specific sources and documents on which they rely. Any expert witness or eyewitness declarations, including a statement of the qualifications and experience of the expert, must be signed in accordance with 10 CFR 2.304(d). The probative value that the NRC accords to the NRC staff's or the licensee's position on adequate protection during interim operation will depend on the level and specificity of support provided, including the qualifications and experience of each expert providing expert opinion.

c. As provided by 10 CFR 2.309(i)(2)–(3), replies to answers are not permitted. If the Commission grants the hearing request, it may determine that additional briefing is necessary to support an adequate protection determination on interim operation. If the Commission makes determinations that additional briefing is necessary on the adequate protection determination, then it intends to issue a briefing order concurrently with the granting of the hearing request. In addition, if mitigation measures are proposed by the licensee in its answer to the hearing request, then the Commission intends to issue a briefing order allowing the NRC staff and the petitioner an opportunity to address adequate protection during interim operation in light of the mitigation measures proposed by the licensee in its answer.

5. *Timing for Decision on Hearing Requests*

a. Unless the Commission extends its time for review, the Commission will rule on a hearing request within 30 days of the filing of answers.

b. A Commission interim operation determination need not be made in conjunction with a ruling on the hearing request.

*C. General Motions*

To accommodate the expedited timeline for the hearing, the time period for filing and responding to motions must be shortened from the time periods set forth in 10 CFR part 2, subpart C. Therefore, all motions, except for motions for leave to file new or amended contentions or claims of incompleteness filed after the deadline, shall be filed within 7 days after the occurrence or circumstance from which the motion arises, or earlier, as prescribed by the presiding officer. Answers to motions shall be filed within 7 days after service of the motion, or earlier, as prescribed by the presiding officer. Except for the filing deadlines, motions and answers shall otherwise conform to the requirements of 10 CFR 2.323(a) through (d). The provisions of 10 CFR 2.323(g) apply to this proceeding.

*D. Motions for Extension of Time*

1. Except as otherwise provided, the presiding officer may, for good cause shown, extend the time fixed or the period of time prescribed for an act that is required or allowed to be done at or within a specified time. A showing of good cause must be based on an event occurring before the deadline in question.

2. When determining whether the requesting participant has demonstrated good cause, the presiding officer shall take into account the factors in 10 CFR 2.334(b):

a. Whether the requesting participant has exercised due diligence to adhere to the schedule;

b. Whether the requested change is the result of unavoidable circumstances; and

c. Whether the other participants have agreed to the change and the overall effect of the change on the schedule of the case.

3. In furtherance of the statutory direction regarding the expeditious completion of the hearing, ''good cause'' is to be interpreted strictly, and a showing of ''unavoidable and extreme circumstances'' [19] is required for any extension, no matter how minor. Because good cause will be interpreted strictly, meritorious motions will likely be based on events outside the participant's control.

4. Motions for extension of time shall be filed as soon as possible but no later than 3 days before the deadline, with one limited exception. If the participant is unable to file an extension request by 3 days before the deadline, then the participant must (1) file its request as soon as possible thereafter, (2) demonstrate that unavoidable and

[18] A claim of incompleteness does not bear on interim operation because interim operation is intended to address whether operation shall be allowed notwithstanding the petitioner's *prima facie* showing, while a claim of incompleteness is premised on the petitioner's inability to make a *prima facie* showing.

[19] This standard is taken from the Policy on Conduct of Adjudicatory Proceedings, CLI–98–12, 48 NRC 18, 21 (1998).

extreme circumstances prevented the participant from filing its extension request by 3 days before the deadline, and (3) demonstrate that the participant filed its extension request as soon as possible thereafter.[20]

*E. Requests for Reconsideration and Motions for Clarification*

Motions for reconsideration are not allowed for decisions on the hearing request or any presiding officer decisions prior to the decision on the hearing request. Instead, reconsideration will only be allowed for a presiding officer's initial decision after hearing and Commission decisions on appeal of a presiding officer's initial decision. Reconsideration is allowed in these narrow instances because these are the most important decisions in the proceeding and motions for reconsideration of these decisions do not prevent them from taking effect. Reconsideration is not permitted for other decisions because (1) reconsideration is unlikely to be necessary for other decisions, which are interlocutory in nature, (2) the resources necessary to prepare, review, and rule on requests for reconsideration would take time away from other hearing-related tasks, (3) participants who disagree with an order of the presiding officer may seek redress through the process for appeals and petitions for review, and (4) the appellate process will not cause undue delay given the expedited nature of the proceeding. Motions for clarification are allowed for these other decisions, but to prevent them from becoming de facto motions for reconsideration, motions for clarification will be limited to ambiguities in a presiding officer order. In addition, a motion for clarification must explain the basis for the perceived ambiguity and may offer possible interpretations of the purportedly ambiguous language.

*F. Presiding Officer Notifications*

1. *Notification of Relevant New Developments in the Proceeding*

a. Given the potential for circumstances to change over the course of this unique proceeding, we remind the participants of their continuing obligation to notify the other participants, the presiding officer, and the Commission of relevant new developments in the proceeding.[21]

2. *Additional Notification Procedures for Pending Contentions*

a. For several reasons, it is possible for the factual predicate of a proposed contention to change before a decision on its admissibility. First, NRC regulations require for uncompleted ITAAC that hearing requests be submitted on the predictive question of whether one or more of the acceptance criteria in the combined license will not be met.[22] When the ITAAC is later completed, this may affect the basis for the proposed contention. Second, a licensee might choose to re-perform an inspection, test, or analysis for ITAAC maintenance or to dispute a proposed contention.[23] Third, events subsequent to the performance of an ITAAC might be relevant to the continued validity of the earlier ITAAC performance. To account for these possibilities, and to ensure that the presiding officer and the participants are timely notified of a change in circumstances, the NRC establishes the following additional procedures for proposed contentions that might be affected by such an event.

b. To ensure that the presiding officer and the other participants stay fully informed of the status of challenged ITAAC as a proposed contention is being considered, any answers to the proposed contention from the NRC staff and the licensee must discuss any changes in the status of challenged ITAAC.

c. After answers are filed, the participants must notify the presiding officer and the other participants in a timely fashion as to any changes in the status of a challenged ITAAC up to the time that the presiding officer rules on the admissibility of the contention. This would include notifying the presiding officer and the other participants of information related to re-performance of an ITAAC that might bear on the proposed contention. In addition, after answers are filed, the licensee must notify the presiding officer and the other participants of the submission of any ITAAC closure notification or ITAAC post-closure notification for a challenged ITAAC. This notice must be filed within one day of the submission of the ITAAC closure notification or ITAAC post-closure notification to the NRC.

*G. Hearing Requests, Intervention Petitions, and Motions for Leave To File New or Amended Contentions or Claims of Incompleteness Filed After the Original Deadline*

1. *Presiding Officer:* Hearing requests, intervention petitions, and motions for leave to file new or amended contentions or claims of incompleteness after the original deadline must be filed with the Commission.

a. The Commission will rule upon all hearing requests, intervention petitions, and motions for leave to file new contentions or claims of incompleteness that are filed after the original deadline. If the Commission grants the hearing request, intervention petition, or motion for leave to file new contentions, the Commission will designate the hearing procedures and schedule for the newly admitted contentions and will determine whether there will be adequate protection during interim operation with respect to the newly admitted contentions. If the Commission determines that a new or amended claim of incompleteness demonstrates a need for additional information in accordance with 10 CFR 2.309(f)(1)(vii), the Commission will designate separate procedures for resolving the claim.

b. For motions for leave to file amended contentions, the Commission may rule on the amended contentions or may delegate rulings on such contentions to a licensing board or a single legal judge (assisted as appropriate by technical advisors). For amended contentions, a Commission ruling may not be necessary to lend predictability to the hearing process because the Commission will have provided guidance on the admissibility of the relevant issues when it ruled on the original contention. If a hearing request is granted, additional procedures governing presiding officer rulings on amended contentions will be included in a Commission order issued concurrently with its decision on the hearing request.

2. *Good Cause Required, as Defined in 10 CFR 2.309(c)*

a. Hearing requests, intervention petitions, and motions for leave to file new or amended contentions or claims of incompleteness that are filed by petitioners after the original deadline will not be entertained absent a determination by the Commission or the presiding officer that the petitioner has

[20] Consistent with practice under 10 CFR 2.307, a motion for extension of time might be filed shortly after a deadline has passed, *e.g.,* an unanticipated event on the filing deadline prevented the participant from filing. *See* Amendments to Adjudicatory Process Rules and Related Requirements, 77 FR 46562, 46571 (August 3, 2012) (final rule).

[21] *USEC Inc.* (American Centrifuge Plant), CLI–06–10, 63 NRC 451, 470 (2006).

[22] *See* 10 CFR 2.309(f)(1)(vii).

[23] The AEA provisions on combined licenses and ITAAC were added by the Energy Policy Act of 1992 (EPAct), Public Law Number 102–486. The legislative history of the EPAct suggests that re-performing the ITAAC would be a simpler way to resolve disputes involving competing eyewitness testimony. 138 Cong. Rec. S1143–44 (Feb. 6, 1992) (statement of Sen. Johnston). In addition, ITAAC re-performance might occur as part of the licensee's maintenance of the ITAAC, and might also result in an ITAAC post-closure notification.

demonstrated good cause by showing that:

(i) The information upon which the filing is based was not previously available;

(ii) The information upon which the filing is based is materially different from information previously available; and

(iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information. To be deemed timely, hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the original deadline must be filed within 20 days of the availability of the information upon which the filing is based. To be deemed timely, motions for leave to file new or amended claims of incompleteness under 10 CFR 2.309(f)(1)(vii) must be filed within 20 days of the date that the challenged 10 CFR 52.99(c) notification (or a redacted version thereof) becomes available to the public.

3. *Additional Requirements*

a. Hearing requests, intervention petitions, and motions for leave to file new or amended contentions or claims of incompleteness that are filed by petitioners after the original deadline must meet the requirements set forth in Sections II.B.1.b through II.B.1.e of this order, except that a showing of standing is not required for participants who have already addressed the standing criteria.

b. Claims of incompleteness filed after the original deadline are subject to the requirements of Section II.B.2 of this order except that Section II.B.2.b is clarified to provide that the petitioner must initiate consultation with the licensee regarding any claims of incompleteness on such notifications within 7 days of the notification (or a redacted version thereof) becoming available to the public.

c. Licensee hearing requests after the original deadline must be filed within 20 days of formal correspondence from the NRC staff communicating its position that a particular ITAAC has not been successfully completed. Licensee hearing requests after the original deadline must also satisfy Section II.B.1.f of this order.

d. If a petitioner submitting a hearing request, intervention petition, or motion for leave to file new or amended contentions or claims of incompleteness after the deadline believes that some aspect of operation must be stayed until action is taken in the hearing process, then that petitioner has the burden of submitting its stay request simultaneously with the hearing request, intervention petition, or motion for leave to file new or amended contentions or claims of incompleteness. If the petitioner does not include a stay request with its pleading, the petitioner will have constructively waived its right to request a stay at a later time.

4. *Effect of Hearing Requests, Intervention Petitions, and New or Amended Contentions Filed After the Original Deadline on Interim Operation*

a. The provisions in Sections II.B.3 of this order also apply to hearing requests, intervention petitions, and motions for leave to file new or amended contentions that are filed by petitioners after the original deadline.

5. *Answers*

a. The provisions in Sections II.B.4.a and II.B.4.b of this order also apply to answers to hearing requests, intervention petitions, and motions for leave to file new or amended contentions or claims of incompleteness filed after the original deadline, except that answers to filings from petitioners are due within 14 days of service of the hearing request, intervention petition, or motion for leave to file a new or amended contention or claim of incompleteness filed after the original deadline.

b. Replies to answers are not permitted. If the Commission grants the hearing request, intervention petition, or motion for leave to file new or amended contentions filed after the original deadline, the Commission may determine that additional briefing is necessary to support an adequate protection determination on interim operation in accordance with Section II.B.4.c of this order.

6. *Timing for Decision on Hearing Requests, Intervention Petitions, and Motions for Leave to File New or Amended Contentions or Claims of Incompleteness Filed After the Original Deadline*

a. Unless the Commission extends the time for its review, the Commission will rule on a hearing request, intervention petition, or motion for leave to file a new or amended contention or claim of incompleteness filed after the original deadline within 30 days of the filing of answers. If a decision on the admissibility of an amended contention is delegated to a licensing board or a single legal judge (assisted as appropriate by technical advisors), the Commission expects the presiding officer to rule on the amended contention within 30 days of the filing of answers. Further procedures governing presiding officer rulings on amended contentions would be included in a Commission order issued concurrently with its decision on the hearing request.

b. A Commission interim operation determination need not be made in conjunction with a ruling on a hearing request, intervention petition, or new or amended contention after the deadline.

*H. Reopening the Record*

1. The NRC's existing rule in 10 CFR 2.326 will apply to any effort to reopen the record.

*I. Commission Review of Presiding Officer Decisions*

1. Because the Commission, itself, will be ruling on the hearing request, the only possible decision before this ruling that would not be made by the Commission would be on requests for review of NRC staff determinations on access to SUNSI or SGI. Any appeals of such decisions will be governed by Section II.I.2 of this order; 10 CFR 2.311 does not apply to this proceeding.

2. *Interlocutory Appeals*

a. Participants or petitioners may appeal to the Commission a presiding officer ruling with respect to a request for access to SUNSI (including, but not limited to, proprietary, confidential commercial, and security-related information) or SGI. Because of the expedited nature of the proceeding, such an appeal shall be filed within 7 days after service of the order. The appeal shall be initiated by the filing of a notice of appeal and accompanying supporting brief. Any participant or petitioner may file a brief in opposition within 7 days after service of the appeal. The supporting brief and any answer shall conform to the requirements of 10 CFR 2.341(c)(3). A presiding officer order denying a request for access to SUNSI or SGI may be appealed by the requestor only on the question of whether the request should have been granted in whole or in part. A presiding officer order granting a request for access to SUNSI or SGI may only be appealed on the question of whether the request should have been denied in whole or in part. However, such a question with respect to SGI may only be appealed by the NRC staff, and such a question with respect to SUNSI may be appealed only by the NRC staff or by a person whose interest independent of the proceeding would be harmed by the release of the information.

b. The Commission does not expect appeals seeking to overturn a denial of access to SUNSI or SGI to delay any aspect of the proceeding unless the requestor can show irreparable harm.

3. *Certified Questions/Referred Rulings*

a. The Commission recognizes that there may be unusual cases that merit a certified question or referred ruling from the presiding officer, notwithstanding the potential for delay. Therefore, the provisions regarding certified questions or referred rulings in 10 CFR 2.323(f) and 2.341(f)(1) apply to this proceeding. However, the proceeding is not stayed by the presiding officer's referral of a ruling or certification of a question. Where practicable, the presiding officer should first rule on the matter in question and then seek Commission input in the form of a referred ruling to minimize delays in the proceeding during the pendency of the Commission's review.

*J. Stays of Decisions or Actions*

1. 10 CFR 2.342 and 2.1213 are applicable to this proceeding with the following exceptions:

a. The deadline in § 2.342 for filing either a stay application or an answer to a stay application is shortened to 7 days.

b. The deadline in § 2.1213(c) to file an answer supporting or opposing a stay application is shortened to 7 days.

c. A request to stay the effectiveness of the Commission's decision on interim operation will not be entertained. The Commission's decision on interim operation becomes final agency action once the NRC staff makes the finding under 10 CFR 52.103(g) that the acceptance criteria are met and issues an order allowing interim operation.

*K. Additional Provisions*

1. *The following provisions in 10 CFR part 2 apply to this proceeding as written and in accordance with Commission case law, except as otherwise noted:*

a. 10 CFR 2.4 (Definitions): With the clarification that this proceeding is considered a ''contested proceeding.''

b. 10 CFR 2.8 (Information collection requirements: OMB approval).

c. 10 CFR 2.111 (Prohibition on sex discrimination).

d. 10 CFR 2.302 (Filing of documents): The initial request for access to SUNSI or SGI under the SUNSI–SGI Access Order will be made in accordance with the provisions of the SUNSI–SGI Access Order. For all other filings, 10 CFR 2.302 applies with the exception that subsections (b)(1) and (d)(2), which relate to first-class mail delivery, do not apply. When the presiding officer has approved a method other than electronic filing through the E-Filing system, documents filed in this proceeding must be transmitted either by fax, email, or overnight mail to ensure expedited delivery. Use of overnight mail will only be allowed if fax or email is impractical. In addition, for documents that are too large for the E-Filing system but could be filed through the E-Filing system if segmented into smaller files, the filer must segment the document and file the segments separately.

e. 10 CFR 2.303 (Docket).

f. 10 CFR 2.304 (Formal requirements for documents; signatures; acceptance for filing).

g. 10 CFR 2.305 (Service of documents, methods, proof): The initial request for access to SUNSI or SGI under the SUNSI–SGI Access Order will be made in accordance with the provisions of the SUNSI–SGI Access Order. For all other filings, 10 CFR 2.305 applies with the exception that when the presiding officer has approved a method other than electronic service through the E-Filing system, service must be made either by fax, email, or overnight mail in order to ensure expedited delivery. Use of overnight mail will only be allowed if fax or email is impractical.

h. 10 CFR 2.306 (Computation of time): With the exception that subsections (b)(1) through (b)(4), which allow additional time for mail delivery, do not apply. Because overnight delivery will result in only minimal delay, it is not necessary to extend the time for a response.

i. 10 CFR 2.313 (Designation of presiding officer, disqualification, unavailability, and substitution): With the exception that subsection (a) does not apply because this order governs the selection of the presiding officer.

j. 10 CFR 2.314 (Appearance and practice before the Commission in adjudicatory proceedings): With the exception that, to expedite the proceeding, the time to appeal a disciplinary sanction under subsection (c)(3) is modified to 10 days after the issuance of the order imposing sanctions.

k. 10 CFR 2.315 (Participation by a person not a party).

l. 10 CFR 2.316 (Consolidation of parties).

m. 10 CFR 2.317 (Separate hearings; consolidation of proceedings).

n. 10 CFR 2.318 (Commencement and termination of jurisdiction of presiding officer).

o. 10 CFR 2.319 (Power of the presiding officer): Subsections (a), (c), (d), (e), (g), (h), (i), (j), (k), (l), (m), (p), (q), (r), and (s) apply in their entirety. Subsection (b) applies with the clarification that this provision will not be used for purposes of discovery since there is no discovery before a contention is admitted. Subsection (f) does not apply because depositions are not allowed in this proceeding. Subsections (n) and (o) do not apply because they concern matters arising after a contention is admitted.

p. 10 CFR 2.320 (Default).

q. 10 CFR 2.321 (Atomic Safety and Licensing Boards).

r. 10 CFR 2.324 (Order of procedure).

s. 10 CFR 2.329 (Prehearing conference).

t. 10 CFR 2.330 (Stipulations).

u. 10 CFR 2.331 (Oral argument before the presiding officer).

v. 10 CFR 2.335 (Consideration of Commission rules in adjudications).

w. 10 CFR 2.343 (Oral argument).

x. 10 CFR 2.346 (Authority of the Secretary).

y. 10 CFR 2.347 (Ex parte communications).

z. 10 CFR 2.348 (Separation of functions).

aa. 10 CFR 2.390 (Public inspections, exemptions, requests for withholding).

**Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation**

A. This order contains instructions regarding how potential parties to this proceeding may request access to documents containing sensitive unclassified information (including sensitive unclassified non-safeguards information (SUNSI) and Safeguards Information (SGI)). Requirements for access to SGI are primarily set forth in 10 CFR parts 2 and 73. Nothing in this order is intended to conflict with the SGI regulations unless this order expressly provides otherwise.

B. Within 10 days after publication of this notice of intended operation, any potential party who believes access to SUNSI or SGI is necessary to formulate contentions may request access to SUNSI or SGI. A ''potential party'' is any person who intends to participate as a party by demonstrating standing and filing an admissible contention in accordance with the instructions in the notice of intended operation.

C. Requests for access to SUNSI or SGI submitted later than 10 days after the publication of this notice will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier. To show good cause, the potential party must demonstrate that its request for access to SUNSI or SGI has been filed by the later of (a) 10 days from the date that the existence of the SUNSI or SGI document becomes public information, or (b) 10 days from the availability of new information giving rise to the need for the SUNSI or SGI to formulate the contention.

D. (1) The requestor shall request permission to access SUNSI, SGI, or both by email submitted to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Attention: Rulemakings and Adjudications Staff, *Hearing.Docket@nrc.gov;* with copies being sent to the Deputy General Counsel for Licensing, Hearings, and Enforcement, Office of the General Counsel, *RidsOgcMailCenter.Resource@nrc.gov;* and Michael Spencer, Counsel for the NRC staff, *Michael.Spencer@nrc.gov.* If it is impractical for the requestor to email its request, then the requestor must submit the letter by overnight mail on the date the request is due. The addresses for overnight mail are as follows: (a) Office of the Secretary, U.S. Nuclear Regulatory Commission, Attention: Rulemakings and Adjudications Staff, Mail Stop OWFN 16–B33, 11555 Rockville Pike, Rockville, Maryland 20852; (b) Deputy General Counsel for Licensing, Hearings, and Enforcement, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Mail Stop OWFN 14–A44, 11555 Rockville Pike, Rockville, Maryland 20852; and (c) Michael Spencer, Counsel for the NRC staff, U.S. Nuclear Regulatory Commission, Mail Stop OWFN 14–A44, 11555 Rockville Pike, Rockville, Maryland 20852.[24] The request must include the following information:

(i) A citation to this **Federal Register** notice and a statement that the information is being requested with respect to a hearing on conformance with the acceptance criteria in the combined license for Vogtle Electric Generating Plant Unit 4;

(ii) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by a finding by the NRC that the acceptance criteria in the combined license are met;

(iii) If the request is for SUNSI, the identity of the individual or entity requesting access to SUNSI and the requestor's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly-available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention;

(iv) If the request is for SGI, the identity of each individual who would have access to SGI if the request is granted, including the identity of any expert, consultant, or assistant who will aid the requestor in evaluating the SGI. The request should state that the background check forms and fees required by Section D.(2) of this order have been submitted for these individuals. In addition, the request must contain a statement that explains each individual's ''need to know'' the SGI, as required by 10 CFR 73.2 and 10 CFR 73.22(b)(1). Consistent with the definition of ''need to know'' as stated in 10 CFR 73.2, the statement must explain:

(A) Specifically why the requestor believes that the information is necessary to enable the requestor to proffer and/or adjudicate a specific contention in this proceeding;[25] and

(B) The technical competence (demonstrable knowledge, skill, training or education) of the requestor to effectively utilize the requested SGI to provide the basis and specificity for a proffered contention. The technical competence of a potential party or its counsel may be shown by reliance on a qualified expert, consultant, or assistant who satisfies these criteria.

(2) If the request is for access to SGI, certain forms and fees shall be submitted as specified by Sections D.(2)(a) through D.(2)(e) of this order to support an NRC determination on trustworthiness and reliability. To initiate the background check, Form FD–258 (fingerprint card) and Form SF–85, ''Questionnaire for Non-Sensitive Positions,'' must be completed and submitted. The requestor should contact the NRC's Office of Administration at (301) 415–3710 to request a package containing the Form FD–258 and to obtain access to Form SF–85. To obtain access to Form SF–85, each individual for whom a background check is being requested will be asked to provide the individual's full legal name, social security number, date and place of birth, telephone number, and email address.[26] Instructions for completing these two forms will be provided directly to the individual for whom the background check is being requested.

(a) A completed Form SF–85 shall be submitted for each individual who would have access to SGI and who did not submit this form as part of the pre-clearance process announced at 85 FR 75380. The completed Form SF–85 will be used by the Office of Administration to conduct the background check required for access to SGI, as required by 10 CFR part 2, subpart C, and 10 CFR 73.22(b)(2), to determine the requestor's trustworthiness and reliability. For security reasons, Form SF–85 can only be submitted electronically through a secure website that is owned and operated by the investigative agency performing the background check.

(b) A completed Form FD–258 (fingerprint card), signed in original ink, shall be submitted in accordance with Section D.(2)(e) for each individual who would have access to SGI and who did not submit this form as part of the pre-clearance process announced at 85 FR 75380. The fingerprint card will be used to satisfy the requirements of 10 CFR part 2, 10 CFR 73.22(b)(1), and Section 149 of the Atomic Energy Act of 1954, as amended, which mandates that all persons with access to SGI must be fingerprinted for a Federal Bureau of Investigation identification and criminal history records check.

(c) A check or money order payable in the amount of $318.00 to the U.S. Nuclear Regulatory Commission shall be submitted in accordance with Section D.(2)(e) for each individual for whom the request for access is being submitted and who did not pay this fee as part of the pre-clearance process announced at 85 FR 75380.

(d) If the requestor or any individual who will have access to SGI believes they belong to one or more of the categories of individuals that are exempt from the criminal history records check and background check requirements in 10 CFR 73.59, the requestor should also provide a statement identifying which exemption the requestor is invoking and explaining the requestor's basis for believing that the exemption applies. This statement shall be submitted in accordance with Section D.(2)(e). While processing the request, the Office of Administration will make a final determination on whether the claimed exemption applies. Alternatively, the requestor may contact the Office of Administration for an evaluation of their exemption status prior to submitting their request. Persons who are exempt from the background check are not required to complete the SF–85 or Form FD–258; however, all other requirements for access to SGI, including the need to know, still apply.

[24] While a request for hearing and other filings in this proceeding must be made through the E-Filing system in accordance with the provisions set forth in this notice, the initial request to access SUNSI and/or SGI under these procedures should be submitted as described in this paragraph.

[25] Broad SGI requests under these procedures are unlikely to meet the standard for need to know; furthermore, staff redaction of information from requested documents before their release may be appropriate to comport with this requirement. These procedures do not authorize unrestricted disclosure or less scrutiny of a requestor's need to know than ordinarily would be applied in connection with an already-admitted contention or non-adjudicatory access to SGI.

[26] After providing this information, the individual usually should be able to obtain access to the online Form SF–85 within two business days.

(e) Copies of documents and materials required by Sections D.(2)(b), (c), and (d) of this order must be sent to the following address by overnight mail: U.S. Nuclear Regulatory Commission, Office of Administration, Personnel Security Branch, ATTN: SGI Background Check Materials for ITAAC Hearing, Mail Stop TWFN 07–D04M, 11555 Rockville Pike, Rockville, MD 20852.

These documents and materials should *not* be included with the request letter to the Office of the Secretary.

E. To avoid delays in processing requests for access to SGI, the requestor should review all submitted materials for completeness and accuracy (including legibility) before submitting them to the NRC. The NRC will return incomplete packages to the sender without processing.

F. Based on an evaluation of the information submitted under Section D.(1), the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the requestor is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need for access to SUNSI or established a need to know the SGI requested.

G. For requests for access to SUNSI, if the NRC staff determines that the requestor satisfies both Sections F.(1) and F.(2), the NRC staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of the requested documents and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a non-disclosure agreement or affidavit, or protective order [27] setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI. The approved protective order templates announced at 84 FR 3515 should serve as a basis for case-specific protective orders, as appropriate. In addition, the NRC staff must also inform any person whose interest independent of the proceeding would be harmed by the release of the information.

H. For requests for access to SGI, if the NRC staff determines that the requestor has satisfied both Sections F.(1) and F.(2), the Office of Administration will then determine, based upon completion of the background check, whether the proposed recipient is trustworthy and reliable, as required for access to SGI by 10 CFR 73.22(b). If the Office of Administration determines that the individual or individuals are trustworthy and reliable, the NRC will promptly notify the requestor in writing. The notification will provide the names of approved individuals as well as the conditions under which the SGI will be provided. Those conditions may include, but are not limited to, the signing of a non-disclosure agreement or affidavit, or protective order [28] by each individual who will be granted access to SGI. The approved protective order templates announced at 84 FR 3515 should serve as a basis for case-specific protective orders, as appropriate.

I. Release and Storage of SGI. Prior to providing SGI to the requestor, the NRC staff will conduct (as necessary) an inspection to confirm that the recipient's information protection system is sufficient to satisfy the requirements of 10 CFR 73.22. Alternatively, recipients may opt to view SGI at an approved SGI storage location rather than establish their own SGI protection program to meet SGI protection requirements.

J. Filing of Contentions. Any contentions in this proceeding that are based upon the information received as a result of a request for SUNSI or SGI must be filed by the requestor no later than 20 days after the requestor receives access to that information. However, if more than 20 days remain between the date the petitioner receives access to the information and the deadline for filing the hearing request (as established in the notice of intended operation), the petitioner may file its SUNSI or SGI contentions by that later deadline.

K. Review of Denials of Access.

(1) If the request for access to SUNSI or SGI is denied by the NRC staff either after a determination on standing and requisite need, or after a determination on trustworthiness and reliability, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) Before the Office of Administration makes a final adverse determination regarding the proposed recipient(s) trustworthiness and reliability for access to SGI, the Office of Administration, in accordance with 10 CFR 2.336(f)(1)(iii), must provide the proposed recipient(s) any records that were considered in the trustworthiness and reliability determination, including those required to be provided under 10 CFR 73.57(e)(1), so that the proposed recipient(s) have an opportunity to correct or explain the record. A recipient's challenge under 10 CFR 2.336(f)(1)(iii)(B) to the completeness and accuracy of the records relied on by the Office of Administration in making its initial adverse trustworthiness and reliability determination must be submitted within 7 days of the recipient's receipt of the records from the Office of Administration.[29]

(3) The requestor may challenge the NRC staff's adverse determination with respect to access to SUNSI by filing a request for review within 5 days of receipt of that determination with the Chief Administrative Judge, who will designate a single legal judge (assisted as appropriate by technical advisors) to rule on the challenge.[30] The NRC staff may respond to a request for review within 5 days of service of the request.

(4) The requestor may challenge the NRC staff's adverse determination on need to know or likelihood of establishing standing with respect to access to SGI by filing a request for review with the Chief Administrative Judge within 5 days of receipt of the adverse determination, and the NRC staff may file a response within 5 days of receipt of the request for review. The requestor may challenge the NRC Office of Administration's adverse determination on trustworthiness and reliability for access to SGI by filing a request for review with the Chief Administrative Judge within 7 days of receipt of the adverse determination, and the NRC staff may file a response within 7 days of receipt of the request

[27] Any motion for protective order or draft non-disclosure affidavit or agreement for SUNSI must be filed with the single legal judge designated to rule on the request (or the Chief Administrative Judge if a single legal judge has not yet been designated) within 10 days after a positive access determination is made. If such motion is filed with the Chief Administrative Judge, the Chief Administrative Judge will designate a single legal judge to rule on the motion.

[28] Any motion for protective order or draft non-disclosure affidavit or agreement for SGI must be filed with the single legal judge designated to rule on the request (or the Chief Administrative Judge if a single legal judge has not yet been designated) within 10 days after a positive access determination is made. If such a motion is filed with the Chief Administrative Judge, the Chief Administrative Judge will designate a single legal judge to rule on the motion.

[29] The time period for a challenge under 10 CFR 2.336(f)(1)(iii)(B) has been reduced from 10 days to 7 days in order to expedite the proceeding and to be consistent with the 7-day period given in this order for interlocutory appeals of presiding officer determinations on access to SUNSI or SGI.

[30] Requestors should note that appeals of NRC staff determinations and other filings must be made through the E-Filing system in accordance with the provisions set forth in this notice even though the initial SUNSI/SGI request submitted to the NRC staff under these procedures was made by other means.

for review.[31] The Chief Administrative Judge will assign a single legal judge (assisted as appropriate by technical advisors) to rule on the challenge. If the challenge relates to an adverse determination by the NRC Office of Administration on trustworthiness and reliability for access to SGI, then consistent with 10 CFR 2.336(f)(1)(iv), neither the single legal judge chosen to rule on the challenge nor any technical advisors supporting a ruling on the challenge can serve as the presiding officer for the ITAAC proceeding.

(5) Appeals of presiding officer decisions on access to SUNSI or SGI must be made pursuant to the provisions of the ''Order Imposing Additional Procedures for ITAAC Hearings Before a Commission Ruling on the Hearing Request'' (Additional Procedures Order) that was issued with this notice.

L. Review of Grants of Access. A person other than the requestor may file a request for review challenging an NRC staff determination granting access to SUNSI whose release would harm that person's interest independent of the proceeding.[32] Such a request for review must be filed with the Chief Administrative Judge within 5 days of the notification by the NRC staff of its grant of access, and the NRC staff may respond to a request for review within 5 days of receiving it. The Chief Administrative Judge will designate a single legal judge (assisted as appropriate by technical advisors) to rule on the challenge. Appeals of presiding officer decisions on access to SUNSI must be made pursuant to the provisions of the Additional Procedures Order that was issued with this notice.

M. The Commission expects that the NRC staff and the presiding officer will consider and resolve requests for access to SUNSI or SGI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the requirements in this notice. Attachment 2 to this order summarizes the target schedule for processing and resolving requests under these procedures.

*It is so ordered.*

Dated: January 27, 2022.

For the Commission.

Annette L. Vietti-Cook,
*Secretary of the Commission.*

ATTACHMENT 2—TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION AND SAFEGUARDS INFORMATION IN THIS PROCEEDING

| Day | Event/activity |
|---|---|
| 0 | Publication of **Federal Register** notice of intended operation, including order with instructions for access requests. |
| 10 | Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) and/or Safeguards Information (SGI) with information: Supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in this adjudicatory proceeding; demonstrating that access should be granted (e.g., showing technical competence for access to SGI); and, for SGI, including application fee for fingerprint/background check. |
| 20 | Nuclear Regulatory Commission (NRC) staff informs the requestor of the staff's determination on whether the request for access provides a reasonable basis to believe standing can be established and shows (1) need for SUNSI or (2) need to know for SGI. (For SUNSI, NRC staff also informs any person whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents). If NRC staff makes the finding of need to know for SGI and likelihood of standing, NRC staff continues processing the background check (including fingerprinting for a criminal history records check), and begins information processing (preparation of redactions or review of redacted documents), and readiness inspections. |
| 25 | If NRC staff finds no ''need,'' no ''need to know,'' or no likelihood of standing, the deadline for the requestor to file a request for review seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the Chief Administrative Judge. If NRC staff finds ''need'' for SUNSI, the deadline for any person whose interest independent of the proceeding would be harmed by the release of the information to file a request for review seeking a ruling to reverse the NRC staff's grant of access. |
| 30 | Deadline for NRC staff reply to requests for review of NRC staff determination(s). |
| 30 | (Receipt +20) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for protective order and draft non-disclosure affidavit. Deadline for applicant/licensee to file non-disclosure agreement for SUNSI. |
| 60 | Deadline for submitting a hearing request containing: (i) A demonstration of standing and (ii) all contentions whose formulation does not require access to SUNSI and/or SGI (+25 for answers to hearing request). |
| Staff SGI Determination Date + 7. | Deadline for requestor to seek reversal of a final adverse NRC Office of Administration trustworthiness or reliability determination under 10 CFR 2.336(f)(1)(iv). |
| Staff SGI Determination Date + 10[33]. | If NRC staff finds standing, need to know for SGI, and trustworthiness and reliability, deadline for NRC staff to file motion for protective order and draft non-disclosure affidavit. |
| A | If access granted: Issuance of presiding officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff. |
| A + 3 | Deadline for filing executed non-disclosure affidavits. Access provided to SUNSI and/or SGI consistent with decision issuing the protective order. |
| Receipt of Access + 20 days. | Deadline for submission of contentions whose development depends upon access to SUNSI and/or SGI. However, if more than 20 days remain between the requestor's access to the information and the deadline for filing the hearing request (as established in the notice of intended operation), the requestor may file its SUNSI or SGI contentions by that later deadline. |
| Contention Receipt + 14 days. | (Contention receipt + 14 days) Answers to contentions whose development depends upon access to SUNSI and/or SGI. |

[31] The time periods for filing requests for review (and responses thereto) under 10 CFR 2.336(f)(1)(iv) have been reduced to 7 days in order to expedite the proceeding and to be consistent with the 7-day period given in this order for interlocutory appeals (and answers thereto) of presiding officer determinations on access to SUNSI or SGI. Other than the time periods for filing, requests for review of final adverse determinations by the Office of Administration on trustworthiness and reliability (and NRC staff responses to requests for review) must comply with 10 CFR 2.336(f)(1)(iv).

[32] An NRC staff determination to grant access to SGI may not be challenged.

ATTACHMENT 2—TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION AND SAFEGUARDS INFORMATION IN THIS PROCEEDING—Continued

| Day | Event/activity |
|---|---|
| Filing of answers + 30 ..... | Decision on contention admissibility. |

[FR Doc. 2022–01983 Filed 2–1–22; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 52–025 and 52–026; NRC–2008–0252]**

## Southern Nuclear Operating Company, Inc.; Vogtle Electric Generating Plant, Units 3 and 4 Inspections, Tests, Analyses, and Acceptance Criteria

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Determination of the successful completion of inspections, tests, and analyses.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) staff has determined that specified inspections, tests, and analyses have been successfully completed, and that specified acceptance criteria are met for the Vogtle Electric Generating Plant (VEGP), Units 3 and 4.

**DATES:** Determinations of the successful completion of inspections, tests, and analyses for VEGP Units 3 and 4 are effective on the dates indicated in the NRC staff's verification evaluation forms for the inspections, tests, analyses, and acceptance criteria (ITAAC).

**ADDRESSES:** Please refer to Docket ID NRC–2008–0252 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2008–0252. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. (ET), Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Cayetano Santos, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–7270, email: *Cayetano.Santos@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Licensee Notification of Completion of ITAAC

Southern Nuclear Operating Company, Inc. Georgia Power Company, Oglethorpe Power Corporation, MEAG Power SPVM, LLC., MEAG Power SPVJ, LLC., MEAG Power SPVP, LLC., and the City of Dalton, Georgia, (hereafter called SNC or the licensee) has submitted ITAAC closure notifications (ICNs) under section 52.99(c)(1) of title 10 of the *Code of Federal Regulations* (10 CFR), informing the NRC that the licensee has successfully performed the required inspections, tests, and analyses, and that the acceptance criteria are met for:

*VEGP Unit 3 ITAAC*

2.1.01.04 (4), 2.1.02.08b (30), 2.1.02.09a (41), 2.1.02.09b.ii (43),, 2.1.02.11a.ii (47), 2.1.02.12a.iv (56), 2.1.02.15 (67), 2.1.03.07.i (78), 2.2.01.02a (91), 2.2.01.07.ii (108), 2.2.01.08 (109), 2.2.01.11a.iii (116), 2.2.01.11b (118), 2.2.02.01 (119), 2.2.02.02a (120), 2.2.02.11a.i (154), 2.2.03.01 (158), 2.2.03.08b.01 (175), 2.2.03.08c.vii (192), 2.2.03.08c.viii (193), 2.2.03.08c.ix (194), 2.2.03.12a.i (214), 2.2.04.02a (220), 2.2.04.12a.i (248), 2.3.02.02a (285), 2.3.02.05.i (291), 2.3.03.03c (322), 2.3.03.04 (324), 2.3.06.05a.i (361), 2.3.06.09b.ii (375), 2.3.07.02a (392), 2.3.07.07c (408), 2.3.10.05a.i (437), 2.3.13.02 (459), 2.3.13.05.i (462), 2.5.01.03e (515), 2.5.05.02.i (565), 2.5.05.03b (570), 2.5.05.04 (572), 2.6.06.01.i (637), 2.6.09.05a (644), C.2.6.09.03a (660), C.2.6.09.03b (661), C.2.6.09.09 (670), 2.7.04.03 (716), 3.3.00.01 (759), 3.3.00.02a.i.c (762), 3.3.00.02a.i.d (763), 3.3.00.07d.iv.a (806), 3.3.00.07d.iv.b (807), 3.3.00.07d.iv.c (808), 3.3.00.07d.v.a (809), 3.3.00.07d.v.b (810), 3.3.00.07d.v.c (811), 3.3.00.10.i (815), 3.3.00.10.ii (816), and E.3.9.06.00.04 (862).

*VEGP Unit 4 ITAAC*

2.2.03.08c.xii (197), 2.5.05.02.i (565) and 2.5.05.03b (570).

The ITAAC for VEGP Unit 3 are in Appendix C of the VEGP Unit 3 combined license (ADAMS Accession No. ML14100A106). The ITAAC for VEGP Unit 4 are in Appendix C of VEGP Unit 4 combined license (ADAMS Accession No. ML14100A135).

### II. Licensee ITAAC Post-Closure Notifications (IPCNs)

SNC has submitted an ITAAC IPCN under 10 CFR 52.99(c)(2), informing the NRC of new information that materially alters the basis for determining either that inspections, tests, or analyses was performed as required, or that acceptance criteria is met for:

*VEGP Unit 3 ITAAC*

2.5.02.07a (534).

*VEGP Unit 4 ITAAC*

Since the last **Federal Register** notice of the NRC staff's determinations of successful completion of inspections, tests, and analyses (86 FR 50381;

[33] The completion time for access determinations may vary based on the information revealed during the background check (including a criminal history records check), and because some portion of the background check is usually conducted by agencies other than the NRC, the processing time may vary and is difficult to predict with any certainty. However, the NRC staff will make its utmost efforts to complete all activities associated with requests for access to SGI as soon as possible.

September 8, 2021), the NRC staff has not made additional determinations of the successful completion of inspections, tests, and analyses based on licensee IPCNs submitted under 10 CFR 52.99(c)(2).

The ITAAC for VEGP Unit 3 are in Appendix C of the VEGP Unit 3 combined license (ADAMS Accession No. ML14100A106). The ITAAC for VEGP Unit 4 are in Appendix C of VEGP Unit 4 combined license (ADAMS Accession No. ML14100A135).

## III. NRC Staff Determination of Completion of ITAAC

The NRC staff has determined that the specified inspections, tests, and analyses have been successfully completed, and that the specified acceptance criteria are met. The documentation of the NRC staff's determination is in the ITAAC Closure Verification Evaluation Form (VEF) for each ITAAC. The VEF is a form that represents the NRC staff's structured process for reviewing ICNs and IPCNs.

Each ICN presents a narrative description of how the ITAAC was completed. The NRC's ICN review process involves a determination on whether, among other things: (1) Each ICN provides sufficient information, including a summary of the methodology used to perform the ITAAC, to demonstrate that the inspections, tests, and analyses have been successfully completed; (2) each ICN provides sufficient information to demonstrate that the acceptance criteria of the ITAAC are met; and (3) any NRC inspections for the ITAAC have been completed and any ITAAC findings associated with that ITAAC have been closed. The NRC's review process for IPCNs is similar to that for ICNs but focuses on how the licensee addressed the new, material information giving rise to the IPCN.

The NRC staff's determination of the successful completion of these ITAAC is based on information available at this time and is subject to the licensee's ability to maintain the condition that the acceptance criteria are met. If the NRC staff receives new information that suggests the NRC staff's determination on any of these ITAAC is incorrect, then the NRC staff will determine whether to reopen that ITAAC (including withdrawing the NRC staff's determination on that ITAAC). The NRC staff's determination will be used to support a subsequent finding, pursuant to 10 CFR 52.103(g), at the end of construction that all acceptance criteria in the combined license are met. The ITAAC closure process is not finalized for these ITAAC until the NRC makes an affirmative finding under 10 CFR 52.103(g). Any future updates to the status of these ITAAC can be found by selecting the link ''ITAAC Status Report'' on the NRC's websites: *https://www.nrc.gov/reactors/new-reactors/col-holder/vog3.html* and *https://www.nrc.gov/reactors/new-reactors/col-holder/vog4.html.*

This notice fulfills the NRC staff's obligations under 10 CFR 52.99(e)(1) to publish a notice in the **Federal Register** of the NRC staff's determination of the successful completion of inspections, tests, and analyses.

*Vogtle Electric Generating Plant Unit 3, Docket No. 5200025*

A complete list of the review status for VEGP Unit 3 ITAAC, including the submission date and ADAMS accession number for each ICN received, the ADAMS accession number for each VEF, and the ADAMS accession numbers for the inspection reports associated with these specific ITAAC can be found by selecting the link ''ITAAC Status Report'' at the NRC's website *https://www.nrc.gov/reactors/new-reactors/col-holder/vog3.html.*

*Vogtle Electric Generating Plant Unit 4, Docket No. 5200026*

A complete list of the review status for VEGP Unit 4 ITAAC, including the submission date and ADAMS accession number for each ICN and IPCN received, the ADAMS accession number for each VEF, and the ADAMS accession numbers for the inspection reports associated with these specific ITAAC, can be found by selecting the link ''ITAAC Status Report'' at the NRC's website *https://www.nrc.gov/reactors/new-reactors/col-holder/vog4.html.*

Dated: January 27, 2022.

For the Nuclear Regulatory Commission.

**Victor E. Hall,**

*Chief, Vogtle Project Office, Office of Nuclear Reactor Regulation.*

[FR Doc. 2022–02062 Filed 2–1–22; 8:45 am]

BILLING CODE 7590–01–P

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## NUCLEAR REGULATORY COMMISSION

**[Docket No. 50–219; License No. DPR–16; EA–21–041; NRC–2022–0034]**

## In the Matter of Holtec Decommissioning International, LLC; Oyster Creek Nuclear Generating Station

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Confirmatory order; issuance.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is issuing a Confirmatory Order to Holtec Decommissioning International, LLC (HDI) to memorialize the agreement reached during an alternative dispute resolution mediation session held on October 14, 2021. This Order will resolve any issues identified during an NRC inspection and investigation related to a (now-former) training superintendent at Oyster Creek Nuclear Generating Station (Oyster Creek), who was also responsible for performing armorer duties, and who deliberately failed to perform firearms maintenance activities and falsified records related to those activities. The Order includes a number of significant actions HDI has agreed to take that are expected to improve HDI's security performance at Oyster Creek and other sites in its fleet. The Confirmatory Order is effective upon issuance.

**DATES:** The confirmatory order was issued on January 26, 2022.

**ADDRESSES:** Please refer to Docket ID NRC–2022–0034 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0034. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The Confirmatory Order to Oyster Creek Nuclear Generating Station is available in ADAMS under Accession No. ML21362A447.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov*

or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. (ET), Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Marjorie M. McLaughlin, Region I, U.S. Nuclear Regulatory Commission, 2100 Renaissance Blvd., King of Prussia, PA 19140; telephone: 610–337–5240, email: *Marjorie.Mclaughlin@nrc.gov.*

**SUPPLEMENTARY INFORMATION:** The text of the Order is attached.

Dated: January 27, 2022.

For the Nuclear Regulatory Commission.

**Raymond K. Lorson,**

*Deputy Regional Administrator, NRC Region I.*

## Attached—Confirmatory Order

## United States of America

## Nuclear Regulatory Commission

In the Matter of: Holtec Decommissioning International, LLC
Oyster Creek Nuclear Generating Station.
05000219
DPR–16
EA–21–041

## Confirmatory Order Modifying License

## I

Holtec Decommissioning International, LLC (HDI or Licensee) is the holder of Renewed Facility Operating License No. DPR–16 issued on June 3, 2009, by the U.S. Nuclear Regulatory Commission (NRC or Commission) pursuant to Part 50 of *Title 10 of the Code of Federal* Regulations (10 CFR). The license authorizes the operation of Oyster Creek Nuclear Generating Station (facility) in accordance with conditions specified therein. The facility is located on the Licensee's site in Forked River, New Jersey.

This Confirmatory Order is the result of an agreement reached during an Alternative Dispute Resolution (ADR) mediation session conducted by video conference on October 14, 2021.

## II

On March 13, 2020, the NRC Office of Investigations (OI), Region I Field Office opened an investigation (OI Case No. 1–2020–007) at Oyster Creek. The investigation, which was completed on March 11, 2021, evaluated whether a (now-former) training superintendent at Oyster Creek, who was also responsible for performing armorer duties, deliberately failed to perform firearms maintenance activities and falsified records related to those activities. Based on the evidence gathered during the investigation, the NRC determined that the armorer deliberately failed to perform certain required firearms maintenance activities for calendar year 2019, that the armorer deliberately falsified records related to these activities, and that these falsified records were submitted to the NRC in response to an April 10, 2020, information request.

Specifically, the NRC identified that on the Licensee's 2019 firearms maintenance and testing logs that the Licensee submitted to the NRC in response to an information request for an NRC security inspection, the fields for ''date'' and ''performed by'' for annual material condition inspections were left blank, indicating to the NRC that the Licensee did not conduct this activity. On March 16, 2020, the armorer told an NRC Region I security inspector that Oyster Creek staff no longer performed this inspection and that the procedure was being changed to remove the requirement. However, the armorer acknowledged that the procedure change had not yet happened. Subsequently, in response to an April 10, 2020, information request from OI, the Licensee resubmitted its firearms logs to the NRC, and the ''date'' and ''performed by'' fields were filled out, which would indicate that the Licensee had completed the annual material condition inspections. The armorer informed OI that he filled in these fields after talking to the NRC inspector. He stated that he probably did not perform the inspections but maintained that he did not exactly remember what he did. The NRC determined that the annual material inspections were not performed in 2019 due to the armorer's deliberate failure to perform them and that the armorer deliberately falsified the records provided to the NRC to indicate that the inspections had been performed.

The NRC concluded that the deliberate failure of the armorer to perform required annual material condition inspections of firearms for calendar year 2019 caused the Licensee to be in violation of Title 10 of the *Code of Federal Regulations* (10 CFR) Part 73, Appendix B, Criterion VI.G, ''Weapons, Personal Equipment, and Maintenance,'' and procedures required by the Commission-approved Oyster Creek Training and Qualification Plan. Specifically, 10 CFR part 73, Appendix B, Criterion VI.G, ''Weapons, Personal Equipment, and Maintenance,'' Section 3(a), ''Firearms maintenance program,'' requires that each Licensee shall implement a firearms maintenance and accountability program in accordance with the Commission regulations and the Commission-approved training and qualification plan. The program must include, in part: (1) Semiannual test firing for accuracy and functionality; (2) Firearms maintenance procedures that include cleaning schedules and cleaning requirements; (3) Program activity documentation; and (4) Control and accountability (weapons and ammunition). The Oyster Creek Training and Qualification Plan is Appendix B to the site's Physical Security Plan. Section 20.5 of Revision 18 of the Training and Qualification Plan states, in part, that a testing and maintenance program for all assigned firearms is established to ensure that the firearms and related accessories function as intended. The program is described in facility procedures. Oyster Creek procedure SY–AA–150–103, Revision 0, ''Firearms Maintenance, Testing, and Accountability,'' constitutes the facility procedure for the testing, cleaning, and inspecting of security weapons. Step 4.2.4.2 states, in part, annually, perform the material condition inspection on all duty firearms. Step 2.3, in terms and definitions, defines ''annual'' as once per calendar year.

The NRC determined that the armorer's deliberate actions also caused the Licensee to provide information to the NRC regarding the annual material inspections of firearms that was not complete and accurate in all material respects, contrary to 10 CFR 50.9(a). Specifically, 10 CFR 50.9(a) requires, in part, that information provided to the Commission by a Licensee or information required by the Commission's regulations to be maintained by the Licensee shall be complete and accurate in all material respects. 10 CFR 73.70(e) states, in part, that each Licensee subject to the provisions of 10 CFR 73.55 shall keep documentation of all tests, inspections, and maintenance performed on security related equipment used pursuant to the requirements of this part for three years from the date of documenting the event. 10 CFR 73.55(a)(1) indicates that the Section applies to nuclear power reactor licensees that are licensed under 10 CFR part 50. Logs submitted to the NRC in response to an April 10, 2020, information request documented that annual material condition inspections had been performed on each of the Licensee's duty firearms; however, the Licensee had not performed the inspections. This information is material to the NRC because the NRC requires testing and maintenance of weapons to ensure they are in acceptable working condition. Accurate recordkeeping of such activities ensures

that the weapons maintenance program is fulfilling these requirements.

Through the investigation, the NRC also identified a third violation involving the failure by the armorer to perform required biennial firearms parts replacement. The NRC did not find sufficient evidence to conclude that this failure was willful. However, the failure caused the Licensee to be in violation of 10 CFR part 73, Appendix B, Criterion VI.G, ''Weapons, Personal Equipment, and Maintenance,'' Section 3(a), ''Firearms maintenance program,'' which requires that each Licensee shall implement a firearms maintenance and accountability program in accordance with the Commission regulations and the Commission-approved training and qualification plan. The program must include, in part: (1) Semiannual test firing for accuracy and functionality; (2) Firearms maintenance procedures that include cleaning schedules and cleaning requirements; (3) Program activity documentation; and (4) Control and accountability (weapons and ammunition). The Oyster Creek Training and Qualification Plan is Appendix B to the site's Physical Security Plan. Section 20.5 of Revision 18 of the Training and Qualification Plan states, in part, that a testing and maintenance program for all assigned firearms is established to ensure that the firearms and related accessories function as intended. The program is described in facility procedures. Oyster Creek procedure SY–AA–150–103, Revision 0, ''Firearms Maintenance, Testing, and Accountability,'' constitutes the facility procedure for the testing, cleaning, and inspecting of security weapons. Step 4.2.5, states, replace the following components on duty rifles biennially: Hammer spring, trigger spring, disconnector spring, extractor spring, ejector spring, and gas rings. SY–AA–150–103–F–04, Rifle Material Condition Inspection/Functionality/Accuracy Tests states, in part, biennially, replace the following components on contingency rifles and note this as being completed in the weapons maintenance log. Step 2.7 defines ''biennial'' as at least once every two years.

By letter, dated July 28, 2021 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML21176A049), the NRC notified the Licensee of the results of the investigation with an opportunity to: (1) Provide a response in writing, (2) attend a predecisional enforcement conference or (3) to participate in an ADR mediation session in an effort to resolve this matter.

In response to the NRC's offer, the Licensee requested the use of the NRC's ADR process to resolve differences it had with the NRC. On October 14, 2021, the NRC and the Licensee met in an ADR session mediated by a professional mediator, arranged through Cornell University's Institute on Conflict Resolution. The ADR process is one in which a neutral mediator, with no decision-making authority, assists the parties in reaching an agreement on resolving any differences regarding the dispute. This Confirmatory Order is issued pursuant to the agreement reached during the ADR process.

## III

During the ADR session, the Licensee and the NRC reached a preliminary settlement agreement. The elements of the agreement include the following:

Whereas, the NRC acknowledges that HDI has taken several corrective actions in response to the violations at Oyster Creek Nuclear Generating Station (Oyster Creek) so as to preclude the occurrence of similar violations in the future. These actions include:

1. Denying the former superintendent's unescorted access authorization and denoting his entry in the Personnel Access Data System to indicate that there is additional information.

2. Performing an internal fact-finding and accountability investigation and an apparent cause evaluation, which resulted in the following corrective measures:

a. Revising the firearms maintenance, testing, and accountability procedure to remove the requirement to replace parts biennially;

b. Completing the initial development of an electronic application that will track weapons upon their removal from their assigned positions;

c. Holding face-to-face meetings between the Oyster Creek Security Manager and site armorers to ensure understanding of procedural requirements, complete and accurate recordkeeping, and accurate ammunition accounting, including logging unused ammunition returned to the armory after range activities;

d. Conducting, over a two-month period, spot checks of security personnel logging security weapons, ammunition, and equipment into and out of the armory and performing ammunition counts.

3. Creating the position of Fleet Director of Security Operations and appointing an experienced nuclear security manager to the position as a concurrent role.

4. Initiating development of a standardized set of fleet security procedures.

Therefore, the parties agree to the following terms and conditions:

### 1. Terms and Conditions To Be Taken by HDI

*A. Items To Assure Restoration of Compliance*

1. Within 60 days of the date of the Confirmatory Order, HDI shall prepare a report of the maintenance status of all in-service and contingency weapons that are onsite at Oyster Creek as of the date of the Confirmatory Order. The report shall specify the dates on which each weapon was last test-fired, cleaned, serviced, and inspected. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the report available to the NRC for review during an inspection.

2. Within 180 days of the date of the Confirmatory Order, HDI shall complete a root cause evaluation of the events related to the violations at Oyster Creek described in this Confirmatory Order in accordance with HDI's corrective action program. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the evaluation available to the NRC for review during an inspection.

3. Within 180 days of the date of the Confirmatory Order, HDI shall review its process for performing and recording in-service and out-of-service weapons maintenance. The review shall include a comparison of Oyster Creek's process versus other nuclear sites, including at least one non-HDI nuclear site. The evaluation shall identify best practices and consider any changes needed at Oyster Creek and specify any identified corrective actions. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the results of the evaluation available to the NRC for review during an inspection.

*B. Items To Address Wrongdoing*

1. Within 60 days of the date of the Confirmatory Order, HDI shall communicate this issue to the security personnel at Oyster Creek and other HDI decommissioning nuclear reactor sites. The communication (which may be verbal or via written communication) will be conducted by the president of HDI and shall specify that wrongdoing and falsification of records are

unacceptable and shall also explain the specific actions staff must take when unable to complete required activities. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator. The letter shall also describe the content of the communication.

2. Within 180 days of the date of the Confirmatory Order, HDI will conduct training to be given to Security personnel at each of HDI's nuclear sites. The training will: (a) Emphasize the importance of complete and accurate information for all required records, correspondence, and communications with the NRC and its staff; (b) emphasize individual accountability and clearly express that willful or deliberate failures to comply with regulations, orders, or license requirements could result in significant individual enforcement by the NRC; and (c) reinforce that if any individual recognizes a non-compliance, they will immediately report the observation of the non-compliance. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the training materials available to the NRC for review during an inspection.

*C. Items To Address Armorer Function Weaknesses*

1. Within 240 days of the date of the Confirmatory Order, HDI shall evaluate its implementation of the armorer function at Oyster Creek. The evaluation shall include review of the staffing and responsibilities of the position, the methodology for tracking weapons maintenance status and activities, and supervisory involvement in verifying completion of required activities. The evaluation shall also include a comparison of HDI's weapons maintenance processes versus other nuclear reactor sites, including at least one non-HDI nuclear reactor site. The evaluation shall identify best practices and consider any changes needed at Oyster Creek and specify any identified corrective actions. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the results of the evaluation available to the NRC for review during an inspection.

2. Within 90 days of completing the evaluation described in Item C.1, HDI shall communicate (which may be verbal or in writing) to HDI Security management staff at Oyster Creek the results of the evaluation and any completed or pending corrective actions. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the content of the communication available to the NRC for review during an inspection.

*D. Items To Address Implementation of Security Program at Oyster Creek*

1. Within 365 days of the date of the Confirmatory Order, HDI shall administer training to HDI and Holtec Security International, LLC (HSI) Security staff at Oyster Creek that focuses on roles and expectations and that reinforces HDI's responsibility for assuring regulatory compliance. The training shall also include any insights developed from the root cause evaluation described in Item A.2. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the training materials available to the NRC for review during an inspection.

2. Within 365 days of the date of the Confirmatory Order, HDI shall evaluate the Oyster Creek security program to include the program's organizational effectiveness, the quality and effectiveness of site security procedures, the security organization's staffing, training, and communication of standards, expectations, management engagement and oversight, performance management, and the results of the root cause evaluation. The evaluation shall also include a review of the clarity for the security staff about lines of responsibility and reporting, and the performance and quality of how individual job performance results are evaluated, documented, and communicated. The results of the evaluation shall be placed in the Oyster Creek corrective action program. The evaluation team shall be comprised of no more than 50% HDI or HSI employees and the remaining participants shall be from an outside organization (such as a utility or industry group) including a safety culture expert, external to HDI and HSI. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the results of the evaluation and any related corrective actions available to the NRC for review during an inspection.

*E. Items To Address Corporate Security Oversight*

1. Within 90 days of the date of the Confirmatory Order, HDI shall install a Fleet Security Director position with sole responsibility for oversight of the security operations at all HDI nuclear sites. The Site Security Leads shall report to the Fleet Security Director and the Fleet Security Director shall report to the HDI President. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator. HDI shall maintain an individual in this position for a period of 5 years after the date of the Confirmatory Order or until fuel at all HDI nuclear sites is in dry storage, whichever is sooner.

2. Within 365 days of the date of the Confirmatory Order, HDI shall effect an evaluation of HDI's implementation of the corporate security program. The evaluation team shall be comprised of no more than 50% HDI or HSI employees, and the remaining participants shall be from an outside organization (such as a utility or an industry group). The evaluation shall assess HSI's and HDI's corporate security staffing resources, direct and indirect oversight, and performance management. The evaluation shall review the fleet implementation of the security programs at each HDI site to identify areas of strengths and weaknesses. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the results of the evaluation available to the NRC for review during an inspection.

*F. Effectiveness Reviews*

1. Within 90 days of completion of the evaluation described in D.2, HDI shall complete the first of four quarterly reviews of the effectiveness of the Oyster Creek security program and the corrective actions implemented in response to this issue. Within 30 days of completing each review, HDI shall inform the NRC of the completion of the review by sending a letter to the Region I Administrator.

2. The effectiveness reviews discussed in Item F.1 shall be conducted by a team that includes at least one individual from outside the HDI or HSI organization. For a period of one year after completion of the fourth review, the documented effectiveness reviews shall be made available to the NRC for review during an inspection.

*G. External Communication*

A. By December 31, 2023, HDI shall discuss this issue, including the results of all of the above-listed evaluations and resulting corrective actions, to the following industry working groups: (a)

The 2023 National Nuclear Security Conference; and (b) Region I Nuclear Security Association. The discussion shall include reference to any identified organizational weaknesses that HDI determined contributed to the issue. Within 30 days of completing each discussion, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the presentation materials available to the NRC for one year after the presentation for review during an inspection.

**2. Terms and Conditions To Be Taken by NRC**

A. The NRC agrees to issue a reduced civil penalty in the amount of $50,000.

B. The NRC agrees to not issue a separate Notice of Violation in addition to the Confirmatory Order but, rather, to describe the violations in the body of the Order instead.

C. The NRC agrees to include the following statement in the Confirmatory Order and related communications (*i.e.,* press release): As part of this agreement, HDI has committed to a number of significant actions that are expected to improve the security performance of the fleet. The NRC notes that, prior to this ADR session, HDI initiated some measures to address the issues raised by the apparent violation. The NRC will continue to monitor HDI's progress in this area.

D. For the NRC's future civil penalty assessment purposes as discussed in the NRC Enforcement Policy, the NRC agrees that the issuance of this Confirmatory Order will not be considered as escalated enforcement.

On January 19, 2022, HDI consented to issuing this Confirmatory Order with the commitments, as described in Section V below. HDI further agreed that this Confirmatory Order is to be effective upon issuance, the agreement memorialized in this Confirmatory Order settles the matter between the parties, and that it has waived its right to a hearing.

**IV**

HDI has committed to a number of significant actions that are expected to improve the security performance of the fleet. The NRC notes that, prior to the ADR session, HDI initiated some measures to address the issues raised by the apparent violations. The NRC will continue to monitor HDI's progress in this area. I find that HDI's actions completed, as described in Section III above, combined with the commitments as set forth in Section V are acceptable and necessary, and conclude that, with these commitments, the public health and safety are reasonably assured.

In view of the foregoing, I have determined that public health and safety require that HDI's commitments be confirmed by this Confirmatory Order. Based on the above and HDI's consent, this Confirmatory Order is effective upon issuance.

**V**

Accordingly, pursuant to Sections 81, 104b, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, 10 CFR part 50, 10 CFR part 72, and 10 CFR part 73, *it is hereby ordered, effective upon issuance, that license No. DPR–16 is modified as follows:*

*A. Items To Assure Restoration of Compliance*

1. Within 60 days of the date of the Confirmatory Order, HDI shall prepare a report of the maintenance status of all in-service and contingency weapons that are onsite at Oyster Creek as of the date of the Confirmatory Order. The report shall specify the dates on which each weapon was last test-fired, cleaned, serviced, and inspected. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the report available to the NRC for review during an inspection.

2. Within 180 days of the date of the Confirmatory Order, HDI shall complete a root cause evaluation of the events related to the violations at Oyster Creek described in this Confirmatory Order in accordance with HDI's corrective action program. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the evaluation available to the NRC for review during an inspection.

3. Within 180 days of the date of the Confirmatory Order, HDI shall review its process for performing and recording in-service and out-of-service weapons maintenance. The review shall include a comparison of Oyster Creek's process versus other nuclear sites, including at least one non-HDI nuclear site. The evaluation shall identify best practices and consider any changes needed at Oyster Creek and specify any identified corrective actions. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the results of the evaluation available to the NRC for review during an inspection.

*B. Items To Address Wrongdoing*

1. Within 60 days of the date of the Confirmatory Order, HDI shall communicate this issue to the security personnel at Oyster Creek and other HDI decommissioning nuclear reactor sites. The communication (which may be verbal or via written communication) will be conducted by the president of HDI and shall specify that wrongdoing and falsification of records are unacceptable and shall also explain the specific actions staff must take when unable to complete required activities. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator. The letter shall also describe the content of the communication.

2. Within 180 days of the date of the Confirmatory Order, HDI will conduct training to be given to Security personnel at each of HDI's nuclear sites. The training will: (a) Emphasize the importance of complete and accurate information for all required records, correspondence, and communications with the NRC and its staff; (b) emphasize individual accountability and clearly express that willful or deliberate failures to comply with regulations, orders, or license requirements could result in significant individual enforcement by the NRC; and (c) reinforce that if any individual recognizes a non-compliance, they will immediately report the observation of the non-compliance. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the training materials available to the NRC for review during an inspection.

*C. Items To Address Armorer Function Weaknesses*

1. Within 240 days of the date of the Confirmatory Order, HDI shall evaluate its implementation of the armorer function at Oyster Creek. The evaluation shall include review of the staffing and responsibilities of the position, the methodology for tracking weapons maintenance status and activities, and supervisory involvement in verifying completion of required activities. The evaluation shall also include a comparison of HDI's weapons maintenance processes versus other nuclear reactor sites, including at least one non-HDI nuclear reactor site. The evaluation shall identify best practices and consider any changes needed at Oyster Creek and specify any identified corrective actions. Within 30 days of completing this action, HDI shall inform

the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the results of the evaluation available to the NRC for review during an inspection.

2. Within 90 days of completing the evaluation described in Item C.1, HDI shall communicate (which may be verbal or in writing) to HDI Security management staff at Oyster Creek the results of the evaluation and any completed or pending corrective actions. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the content of the communication available to the NRC for review during an inspection.

*D. Items To Address Implementation of Security Program at Oyster Creek*

1. Within 365 days of the date of the Confirmatory Order, HDI shall administer training to HDI and Holtec Security International, LLC (HSI) Security staff at Oyster Creek that focuses on roles and expectations and that reinforces HDI's responsibility for assuring regulatory compliance. The training shall also include any insights developed from the root cause evaluation described in Item A.2. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the training materials available to the NRC for review during an inspection.

2. Within 365 days of the date of the Confirmatory Order, HDI shall evaluate the Oyster Creek security program to include the program's organizational effectiveness, the quality and effectiveness of site security procedures, the security organization's staffing, training, and communication of standards, expectations, management engagement and oversight, performance management, and the results of the root cause evaluation. The evaluation shall also include a review of the clarity for the security staff about lines of responsibility and reporting, and the performance and quality of how individual job performance results are evaluated, documented, and communicated. The results of the evaluation shall be placed in the Oyster Creek corrective action program. The evaluation team shall be comprised of no more than 50% HDI or HSI employees and the remaining participants shall be from an outside organization (such as a utility or industry group) including a safety culture expert, external to HDI and HSI. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the results of the evaluation and any related corrective actions available to the NRC for review during an inspection.

*E. Items To Address Corporate Security Oversight*

1. Within 90 days of the date of the Confirmatory Order, HDI shall install a Fleet Security Director position with sole responsibility for oversight of the security operations at all HDI nuclear sites. The Site Security Leads shall report to the Fleet Security Director and the Fleet Security Director shall report to the HDI President. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator. HDI shall maintain an individual in this position for a period of 5 years after the date of the Confirmatory Order or until fuel at all HDI nuclear sites is in dry storage, whichever is sooner.

2. Within 365 days of the date of the Confirmatory Order, HDI shall effect an evaluation of HDI's implementation of the corporate security program. The evaluation team shall be comprised of no more than 50% HDI or HSI employees, and the remaining participants shall be from an outside organization (such as a utility or an industry group). The evaluation shall assess HSI's and HDI's corporate security staffing resources, direct and indirect oversight, and performance management. The evaluation shall review the fleet implementation of the security programs at each HDI site to identify areas of strengths and weaknesses. Within 30 days of completing this action, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the results of the evaluation available to the NRC for review during an inspection.

*F. Effectiveness Reviews*

1. Within 90 days of completion of the evaluation described in D.2, HDI shall complete the first of four quarterly reviews of the effectiveness of the Oyster Creek security program and the corrective actions implemented in response to this issue. Within 30 days of completing each review, HDI shall inform the NRC of the completion of the review by sending a letter to the Region I Administrator.

2. The effectiveness reviews discussed in Item F.1 shall be conducted by a team that includes at least one individual from outside the HDI or HSI organization. For a period of one year after completion of the fourth review, the documented effectiveness reviews shall be made available to the NRC for review during an inspection.

*G. External Communication*

1. By December 31, 2023, HDI shall discuss this issue, including the results of all of the above-listed evaluations and resulting corrective actions, to the following industry working groups: (a) The 2023 National Nuclear Security Conference; and (b) Region One Nuclear Security Association. The discussion shall include reference to any identified organizational weaknesses that HDI determined contributed to the issue. Within 30 days of completing each discussion, HDI shall inform the NRC that the action is complete by sending a letter to the Region I Administrator and shall make the presentation materials available to the NRC for one year after the presentation for review during an inspection.

*H. Civil Penalty*

1. Within 30 days of the date of issuance of the Confirmatory Order, HDI will pay a civil penalty of $50,000 through one of the following two methods:

a. Submit the payment with the enclosed invoice to this Order (EA–21–041) to the following address: Office of the Chief Financial Officer, U.S. Nuclear Regulatory Commission, P.O. Box 979051, St. Louis, MO 63197

OR

b. Submit the payment in accordance with NUREG/BR–0254.

In addition, at the time payment is made, the licensee shall submit a statement indicating when and by what method payment was made, to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852–2738.

This agreement is binding upon successors and assigns of HDI. The Regional Administrator, Region I may, in writing, relax or rescind any of the above conditions upon demonstration by HDI or its successors of good cause.

**VI**

In accordance with 10 CFR 2.202 and 10 CFR 2.309, any person adversely affected by this Confirmatory Order, other than HDI, may request a hearing within thirty (30) calendar days of the date of issuance of this Confirmatory Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made in writing to the Director, Office of

Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension.

All documents filed in NRC adjudicatory proceedings, including a request for hearing and petition for leave to intervene (petition), any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities that request to participate under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Detailed guidance on making electronic submissions may be found in the Guidance for Electronic Submissions to the NRC and on the NRC website at *https://www.nrc.gov/site-help/e-submittals.html.* Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit adjudicatory documents. Submissions must be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed so that they can obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First-class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing adjudicatory documents in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the Commission or the presiding officer. If you do not have an NRC-issued digital ID certificate as described above, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or personal phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. For example, in some instances, individuals provide home addresses in order to demonstrate proximity to a facility or site. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the presiding officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

If a person (other than HDI) requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Confirmatory Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f).

If a hearing is requested by a person whose interest is adversely affected, the Commission will issue an order designating the time and place of any hearings. If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section V above shall be final 30 days

from the date of this Confirmatory Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section V shall be final when the extension expires if a hearing request has not been received.

For the Nuclear Regulatory Commission.

Raymond K. Lorson,

*Deputy Regional Administrator, NRC Region I.*

Dated this 26th day of January, 2022.

[FR Doc. 2022–02068 Filed 2–1–22; 8:45 am]

**BILLING CODE 7590–01–P**

## OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

### Proposed Information Collection; Comment Request

**AGENCY:** Occupational Safety and Health Review Commission.

**ACTION:** 60-Day notice of information collection; request for comments.

**SUMMARY:** Under the Paperwork Reduction Act (PRA) of 1995, the Occupational Safety and Health Review Commission (OSHRC) offers the public and Federal agencies the opportunity to comment regarding OSHRC's intent to request an extension of an information collection (IC) that was approved through emergency clearance procedures by the Office of Management and Budget in January 2022. The information is collected through OSHRC's Request for a Medical Exception to the COVID–19 Vaccination Requirement form. The IC is assigned OMB Control No. 3202–0005, which is set to expire on July 31, 2022. This 60-Day Notice informs the public and Federal agencies that they may submit comments to OSHRC regarding this IC.

**DATES:** Submit written comments regarding this collection of information by April 4, 2022.

**ADDRESSES:** You may submit comments by any of the following methods:

- *Email: OSHRC_Privacy@oshrc.gov.* Include ''PRA, OMB Control No. 3202–0005'' in the subject line of the message.
- *Fax:* (202) 606–5417.
- *Mail:* One Lafayette Centre, 1120 20th Street NW, Ninth Floor, Washington, DC 20036–3457.
- *Hand Delivery/Courier:* Same as mailing address.

*Instructions:* All submissions must include your name, return address, and email address, if applicable. Please clearly label submissions as ''PRA, OMB Control No. 3202–0005.''

**FOR FURTHER INFORMATION CONTACT:** Privacy Officer, via telephone at (202) 606–5410, or via email at *OSHRC_Privacy@oshrc.gov.*

**SUPPLEMENTARY INFORMATION:** To comply with Executive Order (E.O.) 14043, ''Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees'' (Sept. 9, 2021), and guidance from the Safer Federal Workforce Task Force, OSHRC created and received emergency clearance in January 2022 to collect information through the following form: ''Request for a Medical Exception to the COVID–19 Vaccination Requirement.'' The information collected is used to determine whether an employee is entitled under section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791, to a medical exception to the vaccination requirements for federal employees set forth in E.O. 14043.

The OMB control number assigned to this form was obtained through emergency clearance and is therefore valid for only six months, expiring on July 31, 2022. In anticipation of future requests from its employees, OSHRC is specifically requesting an extension of its IC. Prior to submitting an IC request to the Office of Information and Regulatory Affairs, 5 CFR 1320.8(d)(1) requires agencies to provide a 60-day notice in the **Federal Register** and ''otherwise consult with members of the public and affected agencies.'' Thus, through this notice, OSHRC is soliciting public comments that include: (1) Whether the proposed collection is necessary for the agency to perform its mission; (2) the accuracy of the estimated burden specified below; (3) ways for the agency to enhance the quality, usefulness, and clarity of the IC; and (4) ways for the agency to minimize the burden without reducing the quality of the IC.

*Title of Collection:* Request for a Medical Exception to the COVID–19 Vaccination Requirement.

*OMB Control Number:* 3202–0005.

*Form Number:* Not applicable.

*Type of Review:* Extension of an approved collection.

*Affected Public:* OSHRC employees.

*Total Estimated Annual Burden Hours:* 9.

*Estimated Average Burden Hours per Respondent:* 3.

*Frequency of Response:* As required.

*Total Estimated No. of Annual Responses:* 3.

**Cynthia L. Attwood,**

*Chairman.*

[FR Doc. 2022–02124 Filed 2–1–22; 8:45 am]

**BILLING CODE 7600–01–P**

## OFFICE OF PERSONNEL MANAGEMENT

### Privacy Act of 1974; System of Records

**AGENCY:** Office of Personnel Management.

**ACTION:** Notice of modified systems of records.

**SUMMARY:** In accordance with the Privacy Act of 1974, the Office of Personnel Management (OPM) is modifying the systems of records listed in this notice to incorporate two routine uses related to breach of personally identifiable information (PII) pursuant to the Office of Management and Budget's Memorandum 17–12. The first routine use deals with the breach of an agency's own records, and the second addresses the disclosure of agency records to assist other agencies in their efforts to respond to a breach of their own records. The new routine use that addresses breaches of an agency's own records replaces the one OPM previously published November 30, 2015 at 80 FR 74815.

**DATES:** Please submit comments on or before March 4, 2022. These new routine uses are effective March 9, 2022.

**ADDRESSES:** You may submit written comments by one of the following methods:

*Federal Rulemaking Portal: http://www.regulations.gov*

All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov,* as they are received, without change, including any personal identifiers or contact information. Email: *privacy@opm.gov.*

**FOR FURTHER INFORMATION CONTACT:** Marc Flaster, Senior Advisor to the Chief Privacy Officer, 202–606–2115.

**SUPPLEMENTARY INFORMATION:** On November 30, 2015, the Office of Personnel Management (OPM) published a routine use for all of its systems of records to permit disclosing information when necessary to respond to breaches of OPM's own records. Subsequently, on January 3, 2017, the Office of Management and Budget published Memorandum 17–12, Preparing for and Responding to a Breach of Personally Identifiable Information, which established two model routine uses, one on disclosure of information related to breaches of an

agency's own records, similar to what OPM published in 2015, and the second concerning the disclosure of agency records to assist other agencies in their efforts to respond to a breach. The latter would facilitate providing agencies with information to locate and contact individuals potentially affected by a breach, or provide information related to the agency's programs. OPM is now modifying all of the systems of records identified in this Notice to include the two routine uses set forth in OMB M 17–12 and rescinding the routine use published in 2015.

Office of Personnel Management.

**Alexys Stanley,**

*Regulatory Affairs Analyst.*

**SYSTEM NAME AND NUMBER:**

The systems of records to be modified by including the two new routine uses described in this Notice are set forth below. An asterisk (*) designates the last publication of the complete document in the **Federal Register**. Any history prior to the last publication in the **Federal Register** is omitted for clarity.

| SORN No. | SORN Name | Federal Register cites. |
|---|---|---|
| OPM CENTRAL–1 | Civil Service Retirement and Insurance Records | 73 FR 15013.* 80 FR 74815. |
| OPM CENTRAL–2 | Complaints and Inquiries Records | 60 FR 63075. 80 FR 74815. |
| OPM CENTRAL–4 | Inspector General Investigations Case File | 60 FR 63075. 80 FR 74815. |
| OPM CENTRAL–5 | Intergovernmental Personnel Act Assignment Records | 64 FR 60249.* |
| OPM CENTRAL–6 | Administrative Law Judge Application Records | 60 FR 63075. 80 FR 74815. |
| OPM CENTRAL–7 | Litigation and Claims Records | 60 FR 63075. 80 FR 74815. |
| OPM CENTRAL–8 | Privacy Act/Freedom of Information Act (PA/FOIA) Case Records | 64 FR 53424.* 80 FR 74815. |
| OPM CENTRAL–9 | Personnel Investigations Records | 75 FR 28307.* 80 FR 74815. |
| OPM CENTRAL–10 | Federal Executive Institute Program Participants Records | 64 FR 59221.* 80 FR 74815. |
| OPM CENTRAL–11 | Presidential Management Fellows (PMF) Program Records | 77 FR 61791.* 80 FR 74815. |
| OPM CENTRAL–13 | Executive Personnel Records | 64 FR 60247.* 80 FR 74815. |
| OPM CENTRAL–14 | Debarment or Suspension Records for Federal Employee Health Benefits | 60 FR 63075.* 80 FR 74815. |
| OPM CENTRAL–15 | Health Claims Data Warehouse | 78 FR 23313.* 80 FR 74815. |
| OPM CENTRAL–16 | Health Claims Disputes External Review Services | 76 FR 70512.* 80 FR 74815. |
| OPM CENTRAL–18 | Federal Employees Health Benefits Program Claims Data Warehouse | 76 FR 35052. 80 FR 74815. |
| OPM CENTRAL–19 | External Review Records for Multi-State Plan (MSP) Program | 78 FR 65011. 80 FR 74815. |
| OPM CENTRAL–23 | FEHB Program Enrollment | 86 FR 6377. |
| OPM CENTRAL–X | Federal Competency Assessment Tool | 72 FR 60396. 80 FR 74815. |
| OPM GOVT–1 | General Personnel Records | 77 FR 73694.* 80 FR 74815. |
| OPM GOVT–2 | Employee Performance File System Records | 71 FR 35342.* 80 FR 74815. |
| OPM GOVT–3 | Records of Adverse Actions, Performance Based Reductions In Grade and Removal Actions, and Terminations of Probationers. | 71 FR 35342.* 80 FR 74815. |
| OPM GOVT–5 | Recruiting, Examining and Placement Records | 79 FR 16834.* 80 FR 74815. |
| OPM GOVT–6 | Personnel Research and Test Validation Records | 71 FR 35342.* 80 FR 74815. |
| OPM GOVT–7 | Applicant Race, Sex, National Origin, and Disability Status Records | 71 FR 35342.* 80 FR 74815. |
| OPM GOVT–9 | File on Position Classification Appeals, Job Grading Appeals, Retained Grade or Pay Appeals, Fair Labor Standard Act (FLSA) Claims and Complaints, Federal Civilian Employee Compensation and Leave Claims, and Settlement of Accounts for Deceased Civilian Officers and Employees. | 78 FR 60331.* 80 FR 74815. |
| OPM GOVT–10 | Employee Medical File Systems Records | 75 FR 35099.* 80 FR 74815. |
| OPM Internal-1 | Defense Mobilization Emergency Cadre Records | 64 FR 72705.* 80 FR 74815. |
| OPM Internal-2 | Negotiated Grievance Procedure Records | 60 FR 63075. 80 FR 74815. |
| OPM Internal-3 | Security Officer Control Files | 65 FR 14635.* 80 FR 74815. |

| SORN No. | SORN Name | **Federal Register** cites. |
|---|---|---|
| OPM Internal-4 | Health Program Records | 64 FR 51807.*<br>80 FR 74815. |
| OPM Internal-5 | Pay, Leave, and Travel Records | 64 FR 61949.*<br>80 FR 74815. |
| OPM Internal-6 | Appeal and Administrative Review Records | 60 FR 63075.<br>80 FR 74815. |
| OPM Internal-7 | Complaints and Inquiries Records | 60 FR 63075.<br>80 FR 74815. |
| OPM Internal-8 | Employee Counseling Services Program Records | 60 FR 63075.<br>80 FR 74815. |
| OPM Internal-9 | Employee Locator Card Files (PDF file) | 64 FR 51807.*<br>60 FR 63075.<br>80 FR 74815. |
| OPM Internal-10 | Motor Vehicle Operator and Accident Report Records | 60 FR 63075.<br>80 FR 74815. |
| OPM Internal-11 | Administrative Grievance Records | 60 FR 63075.<br>80 FR 74815. |
| OPM Internal-12 | Telephone Call Detail Records | 64 FR 54934.<br>80 FR 74815. |
| OPM Internal-13 | Parking Program Records | 65 FR 540.<br>80 FR 74815. |
| OPM Internal-14 | Photo Identification and Visitor Access Control Records | 64 FR 73108.<br>80 FR 74815. |
| OPM Internal-15 | OPM Child Care Tuition Assistance Records | 65 FR 30643.<br>80 FR 74815. |
| OPM Internal-16 | Adjudications Officer Control Files | 79 FR 30202.*<br>66 FR 42568.<br>80 FR 74815. |
| OPM Internal-17 | Web-Enabled Voting Rights System (WEVRS) | 71 FR 38190.<br>80 FR 74815. |
| OPM Internal-18 | CyberCorps®: Scholarship For Service (SFS) | 79 FR 42064.*<br>74 FR 42336.<br>80 FR 74815. |
| OPM Internal-19 | Investigation Training Records | 79 FR 8515.<br>80 FR 74815. |
| OPM Internal-20 | Integrity Assurance Officer Control Files | 80 FR 2447.<br>80 FR 74815. |
| OPM Internal-21 | Correspondence Management for the U.S. Office of Personnel Management | 80 FR 72455.* |

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

The appropriate OPM program, as identified in each notice, governs each respective system of records.

**SYSTEM MANAGERS:**

The applicable program executive is identified in each notice.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in the systems identified above may be disclosed outside OPM as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

• To appropriate agencies, entities and persons when (1) OPM suspects or has confirmed that there has been a breach of the system of records, (2) OPM has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, OPM (including its information systems, programs and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with OPM's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

• To another Federal agency or Federal entity, when OPM determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

**HISTORY:**

See System Name and Number above.

[FR Doc. 2022–02057 Filed 2–1–22; 8:45 am]

**BILLING CODE 6325–38–P**

## OFFICE OF SCIENCE AND TECHNOLOGY POLICY

### Request for Information to the Update of the National Artificial Intelligence Research and Development Strategic Plan

**AGENCY:** Office of Science and Technology Policy.

**ACTION:** Request for information.

**SUMMARY:** The Office of Science and Technology Policy, on behalf of the National Science and Technology Council's (NSTC) Select Committee on Artificial Intelligence (Select Committee), the NSTC Machine Learning and AI Subcommittee (MLAI–SC), the National AI Initiative Office (NAIIO), and the Networking and Information Technology Research and

Development (NITRD) National Coordination Office (NCO), requests input from all interested parties on updating the National Artificial Intelligence Research and Development Strategic Plan. Through this Request for Information (RFI), OSTP, the Select Committee, NAIIO, and NITRD NCO seek input from the public, including academic, State, and industry groups; those directly performing Artificial Intelligence (AI) research and development (R&D); and those directly affected by such R&D, on the ways in which the strategic plan should be revised and improved. The public input provided in response to this RFI will assist OSTP, the Select Committee, MLAI–SC, NAIIO, and NITRD NCO in updating the National Artificial Intelligence Research and Development Strategic Plan.

**DATES:** Interested persons are invited to submit comments on or before 11:59 p.m. (ET) on March 4, 2022.

**ADDRESSES:** Comments submitted in response to this notice may be sent by any of the following methods:

- *Email: AI-RFI@nitrd.gov.* Email submissions should be machine-readable and not be copy-protected. Submissions should include ''RFI Response: National Artificial Intelligence Research and Development Strategic Plan'' in the subject line of the message.
- *Mail:* AI R&D RFI Response Team, Attn: Faisal D'Souza, NCO, 2415 Eisenhower Avenue, Alexandria, VA 22314, USA.

*Instructions:* Response to this RFI is voluntary. Each individual or institution is requested to submit only one response. Submissions must not exceed 10 pages (exclusive of a cover page) in 12 point or larger font, with a page number provided on each page. Responses should include the name of the person(s) or organization(s) filing the comment.

Responses to this RFI may be posted online at *https://www.ai.gov.* Therefore, we request that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this RFI.

In accordance with FAR 15.202(3), responses to this notice are not offers and cannot be accepted by the Government to form a binding contract. Responders are solely responsible for all expenses associated with responding to this RFI.

**FOR FURTHER INFORMATION CONTACT:** Faisal D'Souza at 202–459–9681 or *AI-RFI@nitrd.gov,* or by post mailing to 2415 Eisenhower Avenue, Alexandria, VA 22314, USA. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m. (ET) Monday through Friday.

**SUPPLEMENTARY INFORMATION:**

*Background:* In 2019, the *National Artificial Intelligence Research and Development Strategic Plan: 2019 Update* was released by NSTC's Select Committee on AI to guide government efforts in AI R&D. The plan set out eight strategic aims:

*Strategy 1:* Make long-term investments in AI research.

*Strategy 2:* Develop effective methods for human-AI collaboration.

*Strategy 3:* Understand and address the ethical, legal, and societal implications of AI.

*Strategy 4:* Ensure the safety and security of AI systems.

*Strategy 5:* Develop shared public datasets and environments for AI training and testing.

*Strategy 6:* Measure and evaluate AI technologies through standards and benchmarks.

*Strategy 7:* Better understand the national AI R&D workforce needs.

*Strategy 8:* Expand Public-Private Partnerships to accelerate advances in AI.

On January 01, 2021, the National AI Initiative Act of 2020, as part of the National Defense Authorization Act for FY2021 5103(d)(2) became law. The National AI Initiative Act calls for regular updates to the National AI R&D Strategic Plan to include ''goals, priorities, and metrics for guiding and evaluating how the agencies carrying out the National AI Initiative will:

(A) Determine and prioritize areas of artificial intelligence research, development, and demonstration requiring Federal Government leadership and investment;

(B) support long-term funding for interdisciplinary artificial intelligence research, development, demonstration, and education;

(C) support research and other activities on ethical, legal, environmental, safety, security, bias, and other appropriate societal issues related to artificial intelligence;

(D) provide or facilitate the availability of curated, standardized, secure, representative, aggregate, and privacy-protected data sets for artificial intelligence research and development;

(E) provide or facilitate the necessary computing, networking, and data facilities for artificial intelligence research and development;

(F) support and coordinate Federal education and workforce training activities related to artificial intelligence; and

(G) support and coordinate the network of artificial intelligence research institutes.''

The OSTP, the Select Committee, MLAI–SC, NAIIO, and NITRD NCO seek input on potential revisions to the strategic plan to reflect updated priorities related to AI R&D. Responses could include suggestions as to the addition, removal, or modification of strategic aims, including suggestions to address OSTP's priorities of ensuring the United States leads the world in technologies that are critical to our economic prosperity and national security, and to maintaining the core values behind America's scientific leadership, including openness, transparency, honesty, equity, fair competition, objectivity, and democratic values. Responses could include suggestions of AI R&D focus areas that could create solutions to address societal issues such as equity, climate change, healthcare, and job opportunities, especially in communities that have been traditionally underserved. Comments for the strategic plan are welcomed regarding how AI R&D can help address harms due to disparate treatment of different demographic groups; research that informs the intersection of AI R&D and application with privacy and civil liberties; AI R&D to help address the underrepresentation of certain demographic groups in the AI workforce; and AI R&D to evaluate and address bias, equity, or other concerns related to the development, use, and impact of AI. Responses could also include comments on strategic directions related to international cooperation on AI R&D and on providing inclusive pathways for more Americans to participate in AI R&D. Additionally, comments are invited as to existing strategic aims, along with their past or future implementation by the Federal government. Following the receipt of comments, OSTP, the Select Committee, and NAIIO, in consultation with the NSTC Subcommittee on Machine Learning and AI and the NITRD AI R&D Interagency Working Group, will consider the input provided in updating the strategic plan.

*Reference: National Artificial Intelligence Research and Development Strategic Plan:* 2019 Update: *https://www.nitrd.gov/pubs/National-AI-RD-Strategy-2019.pdf.*

*National Defense Authorization Act for FY2021 5103(d)(2): https://www.congress.gov/116/crpt/hrpt617/CRPT-116hrpt617.pdf#page=1214.*

Submitted by the Office of Science and Technology Policy on January 28, 2022.

**Stacy Murphy,**

*Operations Manager, White House Office of Science and Technology Policy.*

[FR Doc. 2022–02161 Filed 2–1–22; 8:45 am]

**BILLING CODE 3270–F1–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–94082; File No. SR–CBOE–2021–071]**

## Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Designation of Longer Period for Commission Action on a Proposed Rule Change To Adopt a New Trading Session That Will Operate After the Close of the Regular Trading Hours Session

January 27, 2022.

On December 15, 2021, Cboe Exchange, Inc. filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt a new forty-five-minute trading session that will operate after the close of the Regular Trading Hours session. The proposed rule change was published for comment in the **Federal Register** on December 23, 2021.[3] The Commission has received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act [4] provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is February 6, 2022.

The Commission hereby is extending the 45-day time period for Commission action on the proposed rule change. The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, pursuant to Section 19(b)(2) of the Act,[5] the Commission designates March 23, 2022, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–CBOE–2021–071).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022–02079 Filed 2–1–22; 8:45 am]

**BILLING CODE 8011–01–P**

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 93819 (December 17, 2021), 86 FR 73038.

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–94079; File No. SR–ICEEU–2022–002]**

## Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the ICE Clear Europe Delivery Procedures

January 27, 2022.

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 January 18, 2022, ICE Clear Europe Limited (''ICE Clear Europe'' or the ''Clearing House'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule changes described in Items I, II and III below, which Items have been prepared primarily by ICE Clear Europe. ICE Clear Europe filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(4)(ii) thereunder,[4] such that the proposed rule change was immediately effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

(a) The principal purpose of the proposed amendments is for ICE Clear Europe to amend its Delivery Procedures (''Delivery Procedures'') on the basis of certain settlement discipline requirements under the European Union's Central Securities Depositories Regulation [5] (the ''CSDR'') and Settlement Discipline Regulatory Technical Standards [6] (the ''RTS''). These requirements are set to come into force on 1 February 2022.[7] A copy of the proposed amendments to the Delivery Procedures is attached [sic] as Exhibit 5.

### II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe 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. ICE Clear Europe has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

*(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

(a) Purpose

ICE Clear Europe is proposing to amend its Delivery Procedures due to new settlement discipline requirements contained in the CSDR and RTS, which take effect on 1 February 2022. The settlement discipline requirements, which include settlement failure reporting and cash penalties for settlement failures, would impose certain requirements on ICE Clear Europe as a central counterparty and market participant in its interaction with EU-based settlement facilities. Specifically, the requirements apply to securities that the Clearing House settles on a European Union (''EU'') central securities depository (''CSD'') under F&O Contracts that are equity or bond futures and options, where the underlying is traded on an EU trading venue or cleared by another EU-based CCP.

The settlement discipline requirements that will come into effect

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(4)(ii).

[5] Regulation (EU) 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012.

[6] Commission Delegated Regulation (EU) 2018/1229 of 25 May 2018 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on settlement discipline.

[7] Capitalized terms used but not defined herein have the meanings specified in the Delivery Procedures or, if not defined therein, the ICE Clear Europe Clearing Rules.

on 1 February 2022 will include settlement failure reporting and cash penalties for settlement failures.[8] In the context of ICE Clear Europe, the requirements will apply with respect to Euro-Denominated Government Bond Futures and Options Contracts (covered in Part W of the Delivery Procedures) and Financials & Softs Equity Futures and Options (covered in Part Z of the Delivery Procedures), where the underlying deliverable is listed on an EU exchange or cleared via an EU CCP and settlement occurs through an EU settlement system.[9]

A change would also be introduced as regards the holding accounts for deliveries of deliverable EU emissions allowances pursuant to futures contracts on such allowances, to ensure that the CSDR regime does not inadvertently interfere with emissions deliveries.

Given the anticipated entry into force and application of elements of the CSDR and the RTS, ICE Clear Europe proposes to update its Delivery Procedures as described below.

General Provisions of Delivery Procedures

The General Provisions section of the Delivery Procedures would be amended to add new Paragraphs 22 and 23. Paragraph 22 would address the liabilities for penalties or costs assessed under the CSDR because of a delay or failure in matching for settlement. Specifically, it would provide that the Buyer and Seller would each indemnify the Clearing House in accordance with Rule 111 in respect of costs or penalties for any delay or failure in matching arising under the CSDR or otherwise, save to the extent that the Clearing House or its settlement agent is at fault for such failure or delay. The amount of such cost or penalty would be charged to such Clearing Member. Paragraph 23 would address penalties or costs assessed under CSDR in respect of late settlement. Specifically, it would provide that the Seller would indemnify the Clearing House in accordance with Rule 111 in respect of costs or penalties for any delay or failure in settlement arising under the CSDR or otherwise, save to the extent that the Clearing House or its settlement agent is at fault in respect of such failure or delay. The amount of such costs or penalties would be charged to such Clearing Member.

The CSDR and RTS feature a two-tier scheme for penalty collection and distribution in respect of settlement fails, which is as follows: (1) Where the failing or receiving participant is a CCP, CCPs are to collect and distribute penalties using information provided by CSDs; and (2) in all other circumstances, CSDs collect and distribute the penalties. ICE Clear Europe holds securities at EU CSDs through nominees, rather than as a direct participant. As such, ICE Clear Europe is not necessarily known by or identified to the CSDs as a CCP. Therefore, CSDs would collect penalties in respect of securities to be delivered under F&O Contracts that ICE Clear Europe clears in accordance with scenario 2. It is possible that when Buyers or Sellers are late to match or Sellers are late to settle (as applicable); this would have run-on impacts on the Clearing House's ability to onwards deliver securities. If the Clearing House does not deliver in a timely fashion because of this late matching, it could be subject to a cash penalty under CSDR. In these circumstances, the late Clearing Member would be required to indemnify ICE Clear Europe. These amendments reflect the existing position under the general indemnity in Rule 111, but provide clarity that such indemnity will be applicable in the particular circumstances described in these paragraphs.

Part A: ICE Endex Deliverable EU Emissions Contracts

Amendments would be made to Part A of the Delivery Procedures to ensure that the new settlement discipline procedures under the CSDR and RTS will not apply to the physical delivery of Carbon Emissions Allowances (''EUA'') or Aviation Emissions Allowances (''EUAA''). The amendments are intended to preserve the Clearing House's current approach with respect to settlement of emissions futures contracts and ensure that CSDR will not interfere with deliveries under such contracts.

The definition of ''Registry Account'' would be amended, to set down the national administrators of registry accounts that may be used, and to confirm that no registry account may be held by or through a CSD as intermediary or account holder. Paragraph 9 of Part A of the Delivery Procedures would be added to provide that no Clearing Member, Customer, Transferor or Transferee to whom or from whom delivery is to be made of an EUA or EUAA may be registered as a CSD under the CSDR. Additionally, Paragraph 9 would provide that pursuant to the definition of ''Registry Account'', no EUAs or EUAAs may be settled by or through a CSD. Accordingly, Buyers and Sellers would not be bound by the settlement discipline provisions set out in the CSDR and, accordingly, the Clearing House would not administer buy-ins, cash penalties, cash compensation or other requirements under the CSDR and its delegated regulations in respect of EUAs or EUAAs. The amendments would provide that Buyers and Sellers acknowledge that neither the Clearing House nor any other Person would offer them the protections related to settlement set forth under CSDR and their sole remedies in the case of settlement failure would be as set forth in the Delivery Procedures. In connection with these changes, ICE Clear Europe would also add new definitions of ''CSD'' and ''CSDR''.

Part W: Euro-Denominated Government Bonds Contracts

The Delivery Timetable in Part W of the Delivery Procedures would be amended to provide that Clearing Members who have failed to deliver (including those whose Customer or Transferor has failed to deliver) by 8:00 on the Delivery Day would be required to contact the Clearing House to provide reasons for such failures and confirm

[8] Although the CSDR and RTS provide for additional settlement discipline measures, including certain mandatory buy-in requirements, relevant EU authorities have indicated that the entry into force of such provisions will be delayed. See press statement from the European Commission dated 25 November 2021, available here: *https://ec.europa.eu/commission/presscorner/detail/en/mex_21_6293.*

The European Securities and Markets Authorities (''ESMA'') issued a public statement which notes that although the legislators have agreed upon an amendment to the CSDR that could give effect to the delay described in the foregoing paragraph, it is anticipated that this will not enter into force prior to the settlement discipline rules becoming applicable on 1 February 2022. Given this situation, ESMA has indicated that it expects national regulators to not prioritize supervisory actions in relation to the buy-in regime. ESMA, Public Statement, Supervisory approach on the implementation of the CSDR buy-in provisions, 17 December 2021, ESMA70–156–5153.

A number of major trade associations have also issued a public statement confirming that in their view EU legislators do not expect market participants to take further action towards implementation of the mandatory buy-in requirements, but that other CSDR settlement discipline measures will be implemented by 1 February 2022. Joint Statement, Industry Approach to CSDR Settlement Discipline Regime dated 22 December 2021, available here: *https://www.afme.eu/Portals/0/DispatchFeaturedImages/Industry%20Approach%20to%20CSDR%20Settlement%20Discipline%20Regime%20FINAL%2022122021.pdf.*

Accordingly, ICE Clear Europe is not proposing to make amendments to its Delivery Procedures with respect to the CSDR buy-in regime at this time.

[9] Although the UK has adopted some aspects of the CSDR under the European Union (Withdrawal) Act 2018, none of the EU settlement discipline provisions that were meant to come into force by 1 February 2022 will be implemented in the UK. Financial Services Update, Statement made on 23 June 2020, available here: *https://questions-statements.parliament.uk/written-statements/detail/2020-06-23/HCWS309.*

any measures taken to facilitate delivery. Such information would notify the Clearing House of such delivery failure and allow it to take any action it deems necessary under the Rules and Procedures.

A new Paragraph 1.9 would be added to Part W which would empower ICE Clear Europe to debit cash penalties imposed by the relevant settlement system from Clearing Members in delivery default and to credit cash penalties to the account of the Clearing Member that is affected by the settlement fail. Although, as described above, it is anticipated that CSDs will administer cash penalties for ICE Clear Europe-cleared trades, the Clearing House will retain this power in case its account structure changes and it would be required to administer penalties under the CSDR.

Part Z: Financials and Softs Equity Futures/Options

Part Z of the Delivery Procedures would be amended to add a similar new provision to Paragraph 3.3 which empowers ICE Clear Europe to debit cash penalties imposed by a relevant settlement system from Clearing Members in delivery default and to credit cash penalties to the account of the Clearing Member that is affected by the settlement fail. Although, as described above, it is anticipated that CSDs will administer cash penalties for ICE Clear Europe-cleared trades, ICE Clear Europe will retain this power in case its account structure changes and it would be required to administer penalties under the CSDR.

Paragraph 5 of Part Z would also be amended to expand the categories of information that would be made available by the Clearing House upon Clearing members' early exercise or expiry of a physically delivered Equity Future or Option Contract, or the execution of a stock contingent trade. Specifically, the amendments would add the following information to the report for early exercise or expiry: (i) Cash consideration to be delivered or received, (ii) stock identifying ISIN code to be delivered and (iii) CSD settlement location. For stock contingent trades, the relevant report would be expanded to include certain information about the associated option. These amendments are intended to reflect what is generally included in the report already in practice.

(b) Statutory Basis

ICE Clear Europe believes that the proposed amendments to the Delivery Procedures are consistent with the requirements of Section 17A of the Act [10] and the regulations thereunder applicable to it. In particular, Section 17A(b)(3)(F) of the Act [11] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, the safeguarding of securities and funds in the custody or control of the clearing agency or for which it is responsible, and the protection of investors and the public interest. The proposed changes to the Delivery Procedures are designed to address and accommodate certain settlement discipline provisions under the CSDR and RTS that will come into effect on 1 February 2022. Principally, the proposed amendments would address potential fines that may be imposed under the CSDR and RTS in connection with settlement failures relating to deliveries of certain securities underlying F&O Contracts, and enhance reporting to the Clearing House in the case of certain settlement failures under such contracts. In particular, the proposed amendments explicitly address the possibility of fines for settlement failures in the context of settlement of government bond futures and options and equity futures and options cleared by the Clearing House, where the underlying is listed or cleared on an EU facility and settlement occurs through an EU settlement facility. The proposed amendments also clarify that the CSDR settlement discipline provisions would not apply to settlement of certain emissions futures contracts. The proposed amendments will thus clarify the role, responsibilities and liabilities of the Clearing House, Clearing Members and designated transferors and transferees in the context of settlement failures that may occur with respect to securities delivered in settlement of specified F&O Contracts. The proposed amendments would not otherwise change the manner in which such contracts are cleared and settled. As a result, in ICE Clear Europe's view, the proposed amendments would be consistent with the prompt and accurate clearance and settlement of the contracts and the protection of investors, consistent with the requirements of Section 17A(b)(3)(F) of the Act.[12] The proposed amendments are also consistent with the public interest, including as reflected in the policies of the CSDR and RTS. (In ICE Clear Europe's view, the proposed amendments would not affect the safeguarding of funds or securities in the custody or control of the clearing agency or for which it is responsible, within the meaning of Section 17A(b)(3)(F).[13])

Rule 17Ad–22(e)(1) requires that a clearing agency ''establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, provide for a well-founded, clear, transparent and enforceable legal basis for each aspect of its activities in all relevant jurisdictions.'' [14] The proposed amendments are intended to address new requirements under EU law applicable to settlement activity conducted by the Clearing House with EU settlement facilities relating to underlying securities traded or cleared on EU facilities. As such, the proposed amendments support the Clearing House's legal framework for operation in the EU, consistent with the requirements of Rule 17Ad–22(e)(1).[15]

In addition, Rule 17Ad–22(e)(10) [16] provides that ''[e]ach covered clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable [. . .] 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.'' As discussed above, the proposed amendments would revise the Delivery Procedures for affected F&O Contracts as a result of the applicable CSDR and RTS settlement discipline provisions, particularly as they relate to fines for settlement failures and provision of additional information regarding settlement failures. The proposed amendments thus clarify the obligations of the Clearing House, Clearing Members and others with respect to settlement failures under such contracts. The proposed amendments also clarify that the CSDR settlement discipline provisions will not affect settlement under certain emissions contracts. The proposed amendments do not otherwise affect the procedures for delivery under such contracts. As a result, ICE Clear Europe believes the amendments are consistent with the requirements of Rule 17Ad–22(e)(10).[17]

[10] 15 U.S.C. 78q–1.

[11] 15 U.S.C. 78q–1(b)(3)(F).

[12] 15 U.S.C. 78q–1(b)(3)(F).

[13] 15 U.S.C. 78q–1(b)(3)(F).

[14] 17 CFR 240.17Ad–22(e)(1).

[15] 17 CFR 240.17Ad–22(e)(1).

[16] 17 CFR 240.17Ad–22(e)(10).

[17] 17 CFR 240.17Ad–22(e)(10).

*(B) Clearing Agency's Statement on Burden on Competition*

ICE Clear Europe does not believe the proposed amendments would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed amendments to the Delivery Procedures are intended to address new settlement discipline procedures applicable to certain contracts as provided in the CSDR and RTS. Although the procedures could result in certain additional costs to Clearing Members, if certain fines were imposed as a result of a settlement failure, those additional costs result from the requirements of relevant EU legislation applicable to settlements in the affected underlying securities which would be applicable to all market participants for the relevant contracts and it would be inappropriate for the Clearing House to bear the cost of late delivery fines, which should reasonably be passed on to the Clearing Members responsible for delivery failures. Furthermore, any such additional costs would result from a failure by the relevant Clearing Member or its customer to comply in a timely manner with its settlement obligations as specified under EU legislation. Accordingly, ICE Clear Europe does not believe the amendments would adversely affect competition among Clearing Members, materially affect the cost of clearing, adversely affect access to clearing for Clearing Members or their customers, or otherwise adversely affect competition in clearing services. Accordingly, ICE Clear Europe does not believe that the amendments would impose any impact or burden on competition that is not 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 amendments have not been solicited or received by ICE Clear Europe. ICE Clear Europe will notify the Commission of any comments received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [18] and paragraph (f) of Rule 19b–4 [19] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**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–ICEEU–2022–002 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–ICEEU–2022–002. 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 Europe and on ICE Clear Europe's website at *https://www.theice.com/notices/Notices.shtml?regulatoryFilings.*

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–ICEEU–2022–002 and should be submitted on or before February 23, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022–02078 Filed 2–1–22; 8:45 am]

**BILLING CODE 8011–01–P**

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f).

[20] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–94092; File No. SR–BOX–2021–06]**

## Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing of Amendment Nos. 2 and 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 2 and 3, To Adopt Rules Governing the Trading of Equity Securities on the Exchange Through a Facility of the Exchange Known as BSTX LLC

January 27, 2022.

**Introduction**

On May 12, 2021, BOX Exchange LLC (''Exchange'' or ''BOX'') 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 adopt rules governing the listing and trading of equity securities on the Exchange through a facility of the Exchange to be known as BSTX LLC (''BSTX''). The proposed rule change was published for comment in the **Federal Register** on June 2, 2021.[3] On July 13, 2021, the Commission extended the time period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change, to August 31, 2021.[4] On August 18, 2021, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 92017 (May 25, 2021), 86 FR 29634 (''Notice''). Comments on the proposed rule change can be found at: *https://www.sec.gov/comments/sr-box-2021-06/srbox202106.htm.*

[4] *See* Securities Exchange Act Release No. 92387 (July 13, 2021), 86 FR 38140 (July 19, 2021).

change as originally filed.[5] On August 27, 2021, the Commission published notice of Amendment No. 1 and instituted proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act[6] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.[7] On November 23, 2021, the Commission designated a longer period for Commission action on the proposed rule change, as modified by Amendment No. 1.[8] On December 20, 2021, the Exchange filed Amendment No. 2, which replaced and superseded the proposed rule change, as modified by Amendment No. 1.[9] On January 20, 2022, the Exchange filed partial Amendment No. 3 to the proposed rule change.[10] The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment Nos. 2 and 3, from interested persons and is approving the proposed rule change, as modified by Amendment Nos. 2 and 3, on an accelerated basis.

## II. Description of the Proposal, as Modified by Amendment Nos. 2 and 3

As set forth in the OIP and Amendment Nos. 2 and 3,[11] the Exchange proposes to adopt listing standards for certain equity securities (''Securities'') along with rules governing the trading of Securities through a facility of the Exchange known as BSTX.[12] BSTX would operate a fully automated, price/time priority execution system (''BSTX System'') for the trading of Securities.[13] Under the proposed rules, Securities would be NMS stocks, as defined in Rule 600(b)(54),[14] that meet BSTX listing standards and that trade on the BSTX System.[15] BSTX would serve as the listing market for eligible companies and issuers of exchange traded products (''ETPs'').[16] The Exchange states that it is not proposing rules that would support the extension of unlisted trading privileges (''UTP'') to NMS stocks listed on other national securities exchanges.[17]

The Exchange proposes rules for participation on BSTX, business conduct for BSTX Participants,[18]

[5] In Amendment No. 1, the Exchange revised the proposal to: (i) Eliminate the proposed suspension of unlisted trading privileges for thinly traded securities; (ii) modify proposed rule text regarding the order parameter that would allow participants to indicate a preference for same day or next day settlement to clarify that, based on how the preferences of the two sides of an executed trade compare, the Exchange will transmit matched order information to a registered clearing agency for settlement as indicated to the extent that such settlement timing may be permitted under the rules, policies, and procedures of the registered clearing agency; (iii) modify aspects of the proposed market data blockchain to remove the Exchange's ability to change the content of the market data blockchain through a regulatory circular, remove the unique identification number from the types of member-specific market data, specify that anonymized, general market data will pertain to displayed orders, and add that the Exchange may provide permission for non-members to view the anonymized, general market data; (iv) add rule text regarding the Exchange's proposed market data products; (v) eliminate a proposed rule regarding issuer conversion of a security to listing on BSTX; (vi) provide additional description of several aspects of the proposal, including the market data blockchain and the possibility to settle on a same-day or next-day basis; and (vii) make technical and conforming changes. Amendment No. 1 is available on the Commission's website at: *https://www.sec.gov/comments/sr-box-2021-06/srbox202106-9159349-247726.pdf.*

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 92796, 86 FR 49416 (September 2, 2021) (''OIP'').

[8] *See* Securities Exchange Act Release No. 93649, 86 FR 68023 (November 30, 2021).

[9] In Amendment No. 2, the Exchange revised the proposal to: (i) Provide additional information regarding the connectivity and co-location services that will be offered at the Exchange's primary data center, including equidistant cabling arrangements; (ii) state that, pursuant to its authority under proposed BSTX Rule 26101, the Exchange would not permit an issuer to list a new class of securities on BSTX that is not distinct from an existing class of securities of the issuer; (iii) modify proposed rule text regarding the proposed market data blockchain to clarify that non-members will have access to anonymized, general market data and specify what fields are included in this data, to specify that the market data will apply to trading activity for regular trading hours, and to clarify that users will view the data through an application programming interface; (iv) modify proposed rule text related to the proposed order parameter that would be used to preference same-day settlement to add a cut-off time by which an execution must occur to be eligible for same-day settlement; (v) modify certain proposed rules to bring them into closer alignment with the rules of other national securities exchanges on which equity securities are traded, including rules regarding securities eligible for trading, prohibitions against trading ahead of customer orders, round lots, minimum price variants, auctions used to open or reopen trading, the dissemination of market data concerning such auctions, risk controls, market maker registration process and obligations, business conduct, trading practices, maintaining books and records, off-exchange transactions, scope of the minor rule violation plan, trade reporting and the dissemination of quotations, clearly erroneous executions, and locking and crossing quotations; (vi) eliminate a proposed rule regarding an audit trail that has been superseded by rules pertaining to the Consolidated Audit Trail; (vii) modify certain proposed listing standards to comply with the thresholds in Rule 3a51–1, and bring the proposed listing standards into closer alignment with the rules of other national securities exchanges on which equities securities are traded, including with respect to the listing of secondary classes and preferred stock, the required number of market makers, requirements for securities of foreign issuers that would apply to the listing of Canadian issuers, the listing of securities that are subject to an exemption from Exchange Act registration, the method of computing the payment of cash in lieu of fractional shares, the settlement timing of securities transactions, requirements to notify the Exchange before engaging in activities relating to a proxy contest, requirements that listed companies establish and maintain an internal audit function, the calculation of regulatory transaction fees under Section 31 of the Exchange Act, and the distribution of funds in the event of liquidation of the Exchange; (viii) eliminate a proposed listing requirement that an applicant provide a legal opinion that its security qualifies as a security under applicable United States securities laws; (ix) provide additional description to clarify operation of the proposed market data blockchain and proposed order parameter that would be used to preference same-day or next-day settlement; and (x) make technical and conforming changes. Amendment No. 2 is available on the Commission's website at: *https://www.sec.gov/comments/sr-box-2021-06/srbox202106-20110109-264393.pdf* (''Amendment No. 2'').

[10] In Amendment No. 3, the Exchange revised the proposal to make certain changes to the proposed listing rules in proposed BSTX Rule 26000 to promote consistency with the definition of ''penny stock'' under Exchange Act Rule 3a51–1, including by defining ''public distribution'' and ''public shareholder'' consistently with Rule 3a51–1, changing references to ''Market Value of Listed Securities'' to ''Total Value of Market Capitalization,'' and eliminating initial listing standards for preferred stock that were based on the rules of NYSE American. Amendment No. 3 is available on the Commission's website at: *https://www.sec.gov/comments/sr-box-2021-06/srbox202106-20112225-265310.pdf* (''Amendment No. 3'').

[11] *See* OIP, *supra* note 7; Amendment No. 2, *supra* note 9; Amendment No. 3, *supra* note 10.

[12] *See* OIP, *supra* note 7, 86 FR at 49416. Pursuant to a separate proposed rule change, the Exchange proposes to establish BSTX as a facility of the Exchange that will operate a market for the trading of securities (''BSTX Market'') and adopt the BSTX Third Amended and Restated LLC Agreement. *See* Securities Exchange Act Release No. 93094 (September 21, 2021), 86 FR 53365 (September 27, 2021) (SR–BOX–2021–14) (Notice of Filing of Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, in Connection with the Proposed Establishment of BSTX as a Facility of the Exchange) (''Amended BSTX Governance Proposal''); Amendment No. 2, *supra* note 9, at 7. Among other things, the Amended BSTX Governance Proposal sets forth the proposed ownership structure for BSTX. The Exchange states that without Commission approval of the trading rules, the Exchange would not permit BSTX to commence operations of the BSTX Market, and that the Exchange's regulatory oversight responsibilities with respect to BSTX would not be triggered unless SR–BOX–2021–14 is approved by the Commission. *See* Amended BSTX Governance Proposal, 86 FR at 53366. The Exchange also states that without approved rules pertaining to the governance structure of BSTX as a facility of the Exchange, the Exchange will not commence operation of BSTX. *See* Amendment No. 2, *supra* note 9, at 9.

[13] *See* OIP, *supra* note 7, 86 FR at 49416.

[14] 17 CFR 242.600(b)(54).

[15] *See* OIP, *supra* note 7, 86 FR at 49417. The Exchange proposes listing standards that, according to the Exchange, are similar to the listing standards of NYSE American LLC (''NYSE American''). *See id.* at 49439.

[16] *See id.* at 49417.

[17] *See id.* The Exchange also states that, therefore, it would only trade Securities listed on BSTX unless and until it proposes and receives Commission approval for rules that would support trading in other types of securities, including through the extension of UTP to other NMS stocks. *See id.*

[18] ''BSTX Participant'' would be defined as a Participant or Options Participant that is authorized to trade securities on the Exchange. *See* proposed BSTX Rule 17000(a)(12). *See also* proposed BOX Rules 100(a)(41) (defining ''Options Participant'' to mean a Participant registered with the Exchange for

financial and operational provisions for BSTX Participants, supervision, trading practices, discipline, trading on the BSTX System, market making, and listing Securities on BSTX.[19] The Exchange proposes to offer several proprietary market data products that are similar to those offered by other national securities exchanges, as well as a historical market data product that utilizes blockchain technology.[20] Specifically, the Exchange proposes to record and disseminate certain information regarding orders and executions on BSTX on a proprietary market data feed that BSTX would operate using a proprietary blockchain system (''BSTX Market Data Blockchain'').[21] The Exchange states that the BSTX Market Data Blockchain would be accessible through an application program interface (''API'') available through the internet, and the Exchange would control all aspects of the BSTX Market Data Blockchain and the associated API.[22]

The Exchange states that two types of information would be available on the BSTX Market Data Blockchain. Each BSTX Participant would be able to see its own order and transaction information related to its own trading activity on BSTX (''Participant Proprietary Data'').[23] In addition, all BSTX Participants and non-BSTX Participants with permission to view the BSTX Market Data Blockchain would be able to see anonymized, general market data related to all trading activity occurring on BSTX (''General Market Data'').[24] The Exchange states that information would be posted to the BSTX Market Data Blockchain on a delayed basis of at least five minutes.[25] The Exchange states that the General Market Data that would be available on the BSTX Market Data Blockchain would contain substantively similar information as would be available through the Exchange's proprietary market data feeds.[26] The Exchange further states that the BSTX Market Data Blockchain would not impact the ability of Securities to trade on other national securities exchanges or over-the-counter (''OTC'').[27]

According to the Exchange, all transactions in Securities would clear and settle in accordance with the rules, policies, and procedures of registered clearing agencies.[28] The Exchange states that BSTX anticipates that The Depository Trust Company (''DTC'') would serve as the securities depository for Securities and that confirmed trades in Securities on BSTX would be transmitted to National Securities Clearing Corporation (''NSCC'') for clearing.[29] The Exchange proposes to introduce an optional order parameter that would allow BSTX Participants to indicate a preference for settlement on a shorter settlement cycle than the standard two business day (''T+2'') settlement cycle. Specifically, the Exchange proposes that BSTX Participants would be able to utilize an order parameter that would indicate a preference for settlement on a same day (''T+0'') or next day (''T+1'') basis when certain conditions are met.[30] The Exchange states that orders in a Security that include a parameter indicating a preference for settlement on a T+0 basis or on a T+1 basis would only result in executions that would actually settle more quickly than on a T+2 basis if, and only if, all of the specified conditions are met and the execution that is transmitted by BSTX to NSCC is eligible for T+0 or T+1 settlement under the rules, policies, and procedures of a registered clearing agency.[31] The Exchange states that any such preference would only become operative if the order happened to execute against another order that also includes a parameter indicating a preference for settlement on a T+0 or T+1 basis.[32] According to the Exchange, an order with a preference for faster settlement would continue to interact with any other order against which it is marketable, and a resulting execution would always settle using the latest settlement timing associated with the two matching orders.[33] The Exchange also states that the possibility of a shortened settlement time would have no impact on the Exchange's proposed price/time priority structure for order matching.[34]

## III. Discussion and Commission Findings

After careful review of the proposed rule change, as modified by Amendment Nos. 2 and 3, the Commission finds that the proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.[35] Specifically, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Exchange Act,[36] which requires, among other things, that the rules of a national securities 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, and 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. Section 6(b)(5) also requires that the rules of a national securities exchange not be designed to permit unfair discrimination among customers, issuers, brokers, or dealers. Further, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(1) of the Exchange Act,[37] which requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purposes of the Exchange Act, and to comply and enforce compliance by its members and

purposes of participating in options trading on the Exchange); and 100(a)(42) (defining ''Participant'' to mean a firm or organization that is registered with the Exchange pursuant to BOX Rule 2000 Series for purposes of participating in trading on a facility of the Exchange, including an Options Participant and BSTX Participant).

[19] *See* OIP, *supra* note 7, 86 FR at 49417.

[20] *See* proposed BSTX Rule 22060. The Exchange states that its rule concerning market data products is substantially similar to that of MEMX LLC (''MEMX''). *See* OIP, *supra* note 7, 86 FR at 49424 & n.154.

[21] *See* proposed BSTX Rules 17000(a)(9) and 17020.

[22] *See* OIP, *supra* note 7, 86 FR at 49420. The Exchange states that only the Exchange would have direct access to the underlying data on the private blockchain. *See id.*

[23] *See id.*

[24] *See id.*

[25] *See id.* at 49421. *See also infra* note 156 (describing that by ''five minute delay,'' the Exchange means that market data would be uploaded once every five minutes).

[26] *See* OIP, *supra* note 7, 86 FR at 49421.

[27] *See id.* at 49423. The Exchange states that it is proposing to use blockchain technology for purposes of the BSTX Market Data Blockchain and that, to the extent the Exchange proposes future applications of blockchain technology to the Exchange's business, the Exchange would file such proposal with the Commission. *See* Amendment No. 2, *supra* note 9, at 29 n.52. The Commission notes that the Exchange's current proposal does not involve the trading of digital tokens and such a proposal, or any other additional use of blockchain technology, would require that the Exchange file a proposed rule change pursuant to Section 19(b) and Rule 19b–4 of the Exchange Act.

[28] *See* OIP, *supra* note 7, 86 FR at 49418. The Exchange also states that the operation of the BSTX Market Data Blockchain would have no impact or effect on the manner in which a Security clears and settles. *See id.*

[29] *See id.*

[30] *See id.* at 49423; proposed BSTX Rule 25060(h).

[31] *See* OIP, *supra* note 7, 86 FR at 49424.

[32] *See id.*

[33] *See id.* at 49425.

[34] *See id.* at 49424.

[35] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[36] 15 U.S.C. 78f(b)(5).

[37] 15 U.S.C. 78f(b)(1).

persons associated with its members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the exchange, and with Sections 6(b)(6) and 6(b)(7) of the Exchange Act,[38] which require a national securities exchange to provide fair procedures for the disciplining of members and persons associated with members. The Commission also finds that the proposed rule change, as amended, is consistent with Section 11A of the Exchange Act,[39] and, consistent with Section 6(b)(8) of the Exchange Act, does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[40] The Commission further finds that the proposed rule change, as amended, is consistent with the public interest, the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act, as required by Rule 19d–1(c)(2) under the Exchange Act,[41] which governs minor rule violation plans.

The Exchange proposes to adopt rules governing the trading of Securities under the proposed rules through a facility of the Exchange known as BSTX, which will function in a manner similar to equities trading platforms that the Commission has approved for other national securities exchanges.[42] With the exception of the proposed BSTX Market Data Blockchain and optional order parameter for preferencing settlement on a T+0 or T+1 basis, the Exchange's proposed rules for BSTX are substantively similar to the corresponding rules of other equities exchanges. As discussed below, the Commission believes that the proposed rule change, as modified by Amendment Nos. 2 and 3, is consistent with the Exchange Act.

*A. BSTX Participants*

The Exchange proposes to adopt BSTX Rule 18000, which will set forth requirements for participation on BSTX. A ''BSTX Participant'' will be a new category of Exchange participant for effecting transactions on the BSTX System. All BOX Participants would be eligible to participate in BSTX provided that they become a BSTX Participant pursuant to the proposed rules.[43] A BSTX Participant must complete the BSTX Participation Application, Participation Agreement, and User Agreement;[44] be an existing Participant or Options Participant or become a Participant or Options Participant of the Exchange pursuant to BOX Rule 2000 Series and continue to abide by all applicable provisions in BOX Rule 2000 Series;[45] and provide such other information as required by the Exchange.[46] BSTX Participants would be required to comply with, among other things, financial responsibility requirements established by Rule 15c3–1 under the Exchange Act and applicable books and records requirements, and be a member or participant of a registered clearing agency or clear security transactions through another BSTX Participant that is a member or participant of a registered clearing agency.[47] In addition, proposed BSTX Rule 18020 would require associated persons of a BSTX Participant to be bound by the rules of the Exchange to the same extent as each BSTX Participant and allow the Exchange to discipline, suspend, or terminate the registration with the Exchange of any person associated with a BSTX Participant for violation of the Exchange rules.[48]

The Exchange also proposes rules for business conduct for BSTX Participants, financial and operational provisions for BSTX Participants, and rules for supervision, trading practices, discipline, and market making.[49] According to the Exchange, the proposed BSTX Rule 19000 Series would specify business conduct requirements that are substantially similar to those of other national securities exchanges,[50] which pertain to: Just and equitable principles of trade; adherence to law; use of fraudulent devices; false statements; know your customer; fair dealing with customers; suitability; prompt receipt and delivery of securities; charges for services performed; use of information obtained in a fiduciary capacity; publication of transactions and quotations; offers at stated prices; payments involving publications that influence the market price of a security; customer confirmations; disclosure of a control relationship with an issuer of securities; discretionary accounts; improper use of customers' securities or funds and a prohibition against guarantees and sharing in accounts; the extent to which sharing in accounts is permissible; communications with customers and the public; gratuities; telemarketing; mandatory systems testing; and short interest reporting. The Exchange states that the proposed business conduct rules are identical to those of other national securities exchanges, other than changes to defined terms and certain other provisions that would not apply to the trading of Securities on the BSTX System.[51]

According to the Exchange, the proposed BSTX Rule 20000 Series would specify financial and operational rules for BSTX Participants associated with maintenance and furnishing of books and records, financial reports, net capital compliance, early warning notifications pursuant to Rule 17a–11 under the Exchange Act, authority of the Chief Regulatory Officer to impose certain restrictions, margin, day-trading margin, customer account information, maintaining records of customer complaints, and disclosure of financial

[38] 15 U.S.C. 78f(b)(6) and (b)(7).

[39] 15 U.S.C. 78k–1.

[40] 15 U.S.C. 78f(b)(8).

[41] 17 CFR 240.19d–1(c)(2).

[42] BSTX's rules, including its rules relating to participation on BSTX and business conduct, financial and operational, supervisory, and trading practice rules, and certain trading, market making, and listing rules, are similar to existing national securities exchanges' trading and listing rules. *See, e.g.,* Rules of the Cboe BZX Exchange, Inc. (''Cboe BZX''), Investors Exchange LLC (''IEX''), and NYSE American.

[43] *See* OIP, *supra* note 7, 86 FR at 49417. The Exchange proposes defined terms for use in the BSTX Rules, and states that terms defined elsewhere in the BOX Rules shall have the same meaning. *See* proposed BSTX Rule 17000. The Exchange also proposes to specify that the proposed BSTX Rules apply to the trading of securities by BSTX Participants approved for such trading, the listing of securities, and related matters pertaining to the trading of securities, and that unless specific BSTX Rules related to securities govern or the context otherwise requires, the provisions of the existing BOX Rules shall be applicable to BSTX Participants and the trading of securities on the BSTX System. *See* proposed BSTX Rule 17010. Further, the Exchange proposes to make conforming changes to certain existing BOX Rules that would apply to BSTX Participants, but currently only contemplate trading in options. *See* Amendment No. 2, *supra* note 9, at 123; proposed BOX Rules 100, 2020, 2060, 3180, 7130, 7150, 7230, 7245, IM–8050–3, 11010, 11030, and 12140.

[44] *See* Exhibits 3A, 3B, and 3C, respectively.

[45] The BOX Rule 2000 Series requires, among other things, that a Participant (including a BSTX Participant) remain a member of another registered national securities exchange or national securities association. *See* OIP, *supra* note 7, 86 FR at 49448 n.320.

[46] *See* proposed BSTX Rule 18000.

[47] *See* proposed BSTX Rule 18010(b). *See also* Exhibits 3F and 3G.

[48] *See* proposed BSTX Rule 18020(b).

[49] *See* proposed BSTX Rule Series 19000, 20000, 21000, 23000, 24000, 25000, and 25200.

[50] *See* Amendment No. 2, *supra* note 9, at 48 (citing to Cboe BZX Rules Chapter III and IEX Rules Chapter 3).

[51] *See* OIP, *supra* note 7, 86 FR at 49427. For example, the Exchange is not proposing to adopt a rule contained in other national securities exchanges' business conduct rules relating to disclosures that broker-dealers give to their customers regarding the risks of effecting securities transactions during times other than Regular Trading Hours because executions may only occur during Regular Trading Hours on the BSTX System. *See id.* at 49427 n.113 (citing to IEX Rule 3.290 and Cboe BZX Rule 3.21). ''Regular Trading Hours'' would mean the time between 9:30 a.m. and 4:00 p.m. Eastern Time (''ET''). *See* proposed BSTX Rule 17000(a)(29).

condition.[52] The Exchange represents that the financial and operational requirements are substantially similar to those of other national securities exchanges.[53] Further, the Exchange proposes to adopt supervisory requirements for BSTX Participants in the proposed BSTX Rule 21000 Series, which, according to the Exchange, are substantially similar to those of other national securities exchanges.[54] The proposed supervisory requirements pertain to enforcing written procedures to appropriately supervise the BSTX Participant's conduct and compliance with applicable regulatory requirements, designation of an individual to carry out written supervisory procedures, maintenance and keeping of records carrying out the BSTX Participant's written supervisory procedures, review of activities of each BSTX Participant's offices, including periodic examination of customer accounts to detect and prevent irregularities or abuses, prevention of the misuse of material non-public information, and implementation of an anti-money laundering compliance program.[55]

The proposed BSTX Rule 22000 Series would provide, among other things, that BSTX Participants must comply with requirements with respect to comparison and settlement, borrowing and deliveries in accordance with Rule 203 of Regulation SHO, forwarding of proxy and other issuer-related materials, commissions, regulatory services agreements, and conditions and limitations on transactions involving Exchange employees.[56] Proposed BSTX Rule 22070 would generally provide that the rules of the Exchange would not prohibit, condition, or limit the ability of any BSTX Participant, including a BSTX Participant acting as an agent, to effect any transaction otherwise than on the Exchange with another person in any security listed on the Exchange or to which UTP on the Exchange has been extended.[57] The Exchange represents that these miscellaneous requirements are substantially similar to rules of other national securities exchanges.[58] The Exchange also proposes to adopt the BSTX Rule 23000 Series relating to trading practice requirements for BSTX Participants, including prohibiting forms of market manipulation and specifying certain obligations broker-dealers have to their customers, such as the duty of best execution.[59] The Exchange represents that the trading practice rules are substantially similar to those of other national securities exchanges.[60]

With respect to the imposition of suspension and disciplinary actions, the Exchange states that it proposes to adopt the BSTX Rule 24000 Series, which would provide that the Exchange rules[61] pertaining to discipline and suspension of Exchange Participants that have been approved by the Commission shall be applicable to BSTX Participants and trading on the BSTX System.[62]

The Exchange proposes to allow firms to register as Market Makers and Designated Market Makers (''DMMs'')[63] with affirmative and negative market making obligations.[64] A BSTX Participant registered as a BSTX Market Maker, including a DMM, would be required to engage in a course of dealing for its own account in the maintenance of a fair and orderly market.[65] Among other things, each Market Maker must maintain two-sided quotes during the regular market session for each Security in which it is registered as a Market Maker.[66] A non-DMM Market Maker may temporarily withdraw its Market Maker status,[67] and any BSTX Market Maker, other than a DMM, may voluntarily terminate its registration with the Exchange.[68] If the Exchange finds any substantial or continued failure by a BSTX Market Maker to engage in a course of dealings specified in proposed BSTX Rule 25220(a),[69] the

[52] *See* OIP, *supra* note 7, 86 FR at 49428.

[53] *See id.* at 49428 & n.116 (citing to Cboe BZX Rules Chapter VI and IEX Rules Chapter 5). The Exchange states that the proposed BSTX Rule 20000 Series also incorporates existing rules of the Exchange or another self-regulatory organization (''SRO'') by reference. *See id.* at 49428.

[54] *See id.*

[55] *See id.* at 49428 & n.128 (citing to Cboe BZX Rules Chapter V and IEX Rule 5.150).

[56] *See* proposed BSTX Rule 22000 Series.

[57] *See* Amendment No. 2, *supra* note 9, at 58; proposed BSTX Rule 22070. The Exchange states that the proposed rule is consistent with the requirements of Rules 19c–1 and 19c–3 under the Exchange Act and substantially similar to rules of other national securities exchanges. *See* Amendment No. 2, *supra* note 9, at 58 (citing to, for example, Cboe BZX Rule 13.6).

[58] *See* OIP, *supra* note 7, 86 FR at 49429 & n.138 (citing to Cboe BZX Rules Chapter XIII and IEX Rule 6.180).

[59] According to the Exchange, the proposed BSTX Rule 23000 Series would specify trading practice requirements related to: (i) Market manipulation; (ii) fictitious transactions; (iii) excessive sales by a BSTX Participant; (iv) manipulative transactions; (v) dissemination of false information; (vi) prohibition against trading ahead of customer orders; (vii) joint activity; (viii) influencing data feeds; (ix) trade shredding; (x) best execution; (xi) publication of transactions and changes; (xii) trading ahead of research reports; (xiii) front running of block transactions; and (xiv) a prohibition against disruptive quoting and trading activity. *See id.* at 49429.

[60] *See id.* at 49429 & n.155 (citing to Cboe BZX Rules Chapter XII). The Exchange states that the proposed minimum price improvement standards in proposed BSTX Rule 23050(h) are consistent with those of other national securities exchanges and the Financial Industry Regulatory Authority (''FINRA''). *See* Amendment No. 2, *supra* note 9, at 62 (citing to Cboe BZX Rule 12.6.06).

[61] *See* BOX Rule 11000 Series (Summary Suspension), 12000 Series (Discipline), 13000 Series (Review of Certain Exchange Actions), and 14000 Series (Arbitration).

[62] *See* OIP, *supra* note 7, 86 FR at 49430–31; proposed BSTX Rule 24000. In addition, the Exchange proposes to amend its Minor Rule Violation Plan to add certain rules relating to BSTX to the list of rules eligible for minor rule violation plan treatment, by amending BOX Rule 12140 and adopting proposed BSTX Rule 24010 (Penalty for Minor Rule Violations). *See* Amendment No. 2, *supra* note 9, at 121.

[63] ''Designated Market Maker'' or ''DMM'' would be defined as a BSTX Participant registered as a DMM pursuant to the BSTX Rule 25200 Series. *See* proposed BSTX Rule 17000(a)(20).

[64] *See* proposed BSTX Rule 25200 Series. The Exchange states that rules relating to market makers are similar to the rules of other national securities exchanges. *See* Amendment No. 2, *supra* note 9, at 95–102 (citing to IEX Rules 11.150 and 11.151 and NYSE American Rules 7.20E through 7.26E). The Exchange states that proposed BSTX Rule 25200 differs from IEX Rule 11.150 in that IEX makes the registration effective on the trading day after the request is entered, whereas the Exchange would have discretion to make registration effective the day the request is entered with notice provided to the prospective BSTX Market Maker. *See id.* at 95 n.277.

[65] *See* proposed BSTX Rule 25220. The Exchange states that proposed BSTX Rule 25220 is substantially similar to NYSE American Rule 7.23E, with certain exceptions, and IEX Rule 11.151. According to the Exchange, the proposed BSTX rule differs from NYSE American Rule 7.23E in that, among other things, the proposed BSTX rule specifies the minimum quotation increment for securities priced above $1.00 per share and below $1.00 per share and requires Market Maker quotations to be firm for their displayed size and automatically executable. *See* Amendment No. 2, *supra* note 9, at 97–98. *See also infra* note 66.

[66] *See* proposed BSTX Rule 25220(a)(1). The Exchange proposes that the quotes must be entered within the ''Designated Percentage,'' which according to the Exchange would be the same as that required of market makers on other national securities exchanges. *See* Amendment No. 2, *supra* note 9, at 96 (citing to IEX Rule 11.151). The Exchange notes, however, that the Defined Percentage and ''Defined Limit,'' which is the percentage by which price movements cause a Market Maker or DMM's quotations to fall outside of the national best bid and offer (''NBBO'') or last sale price, differ from NYSE American Rule 7.23E in that the Exchange specifies Defined Percentage and Defined Limit with reference to securities that are part of the S&P500 Index, Russell 1000 Index, or a pilot list of exchange traded products. The Exchange states its belief that the difference does not pose any novel requirements and is similar to the market maker requirements of IEX. *See id.* at 98 (citing to IEX Rules 11.151(a)(6), (7), (11), and 11.151(b)(1)).

[67] *See* proposed BSTX Rule 25220(d). According to the Exchange, the process by which a DMM may temporarily withdraw from its DMM status is similar to the process applicable to a non-DMM Market Maker. *See* proposed BSTX Rule 25240(b)(4); OIP, *supra* note 7, 86 FR at 49438.

[68] *See* proposed BSTX Rule 25210(d).

[69] *See supra* note 66; proposed BSTX Rule 25220(a).

Exchange would subject the Market Maker to disciplinary action or suspension or revocation of the registration by the Exchange in one or more of the Securities in which the Market Maker is registered.[70]

Proposed BSTX Rule 25230 sets forth certain requirements for Market Maker Authorized Traders (''MMATs''), which are individuals permitted to enter orders only for the account of the Market Maker or DMM for which they are registered.[71] The proposed rule specifies, among other things, eligibility for registration as a MMAT, the Exchange's ability to suspend an individual's registration as a MMAT, and the process for voluntary withdrawal of a MMAT via written request of the BSTX Participant for which the MMAT is registered.[72] The Exchange represents that the proposed provisions related to MMATs are substantially similar to those of other national securities exchanges.[73] Proposed BSTX Rule 25240 sets forth the registration and obligations of DMMs.[74] Among other things, a DMM must be registered as a Market Maker and, in addition to meeting the obligations of Market Makers set forth in proposed BSTX Rule 25220,[75] the DMM must maintain a bid or offer at the NBBO at least 25% of the day as measured across all Securities that have been assigned to the DMM.[76] Proposed BSTX Rule 25240 further provides that all BSTX-listed Securities may be assigned to a DMM and there would be no more than one DMM per BSTX-listed Security.[77] A BSTX Participant registered as a DMM in a Security may also be registered as a Market Maker in that Security only if the BSTX Participant maintains information barriers between the trading unit operating as a DMM and the trading unit operating as a non-DMM Market Maker in the same Security.[78] Proposed BSTX Rule 25250 would set forth the allocation and reallocation of Securities to DMMs.[79] Among other things, the proposed rule would set forth when a Security is eligible for allocation or reallocation, as well as the eligibility of DMMs to participate in the allocation process.[80] The proposed rule further sets forth the allocation process—whether the issuer selects the DMM directly, delegates the selection to the Exchange, or opts to proceed with listing without a DMM, in which case a minimum of four non-DMM Market Makers must be assigned to its Security.[81]

In the event that a listed company wishes to change its DMM, proposed BSTX Rule 25250(c) sets forth the reallocation process.[82] Should a DMM lose its registration or voluntarily withdraw its registration, the DMM would be ineligible, under the Exchange's ''Allocation Freeze Policy,'' for future allocations for a six-month period.[83] For companies that list Securities through an initial public offering, the allocation decision would remain effective for 18 months.[84] The proposed rule also sets forth criteria the Exchange may consider for applicants that are not currently DMMs to be allocated a Security as a DMM.[85]

The Exchange proposes the DMM combination review policy in BSTX Rule 25260.[86] A DMM combination would require proponents of the combination to make a written submission to the Office of the Corporate Secretary of the Exchange addressing certain enumerated factors for the Exchange to consider in reviewing the proposed combination, and as well as the procedures the Exchange would follow in approving or disapproving a combination.[87] The proposed rule also sets forth the timeline for the Exchange to approve or disapprove a combination, the ability of the Exchange to grant conditional approvals, and the ability to have the Exchange's board of directors to review a disapproval decision.[88]

The Exchange's rules with respect to participation on BSTX, including the proposed affirmative and negative obligations for Market Makers and DMMs, and the proposed business conduct, financial and operational, supervision, and trading practice rules, raise no novel regulatory issues. The Commission finds that these proposed rules are consistent with the Exchange Act, and Section 6(b)(5) of the Exchange Act in particular,[89] because by setting forth these requirements for different types of participants, they establish a framework for what entities will participate in BSTX and how they will interact with other BSTX Participants and fulfill their obligations, which should help to promote just and equitable principles of trade, perfect the mechanism of a national market system and, in general, protect investors and the public interest. The Commission also finds that these proposed rules subject BSTX Participants, including BSTX Market Makers and DMMs, to appropriate discipline for improper conduct, consistent with Sections 6(b)(6) and 6(b)(7) of the Exchange Act.[90]

*B. BSTX System*

The Exchange proposes that BSTX would operate the BSTX System as a fully automated, price-time priority execution system.[91] The BSTX System would operate as an ''automated trading center'' under Rule 600(b)(7) of Regulation NMS and would display ''automated quotations'' under Rule 600(b)(6) of Regulation NMS at all times, except in the event that a system malfunction renders the BSTX System incapable of displaying automated quotations.[92] BSTX's best-priced quotation in an NMS stock would be a

[70] *See* proposed BSTX Rule 25220(c).

[71] *See* proposed BSTX Rule 25230.

[72] *See id.*

[73] *See* Amendment No. 2, *supra* note 9, at 98 (citing to NYSE American Rule 7.21E and Cboe BZX Rule 11.6).

[74] *See* proposed BSTX Rule 25240. The Exchange represents that proposed BSTX Rule 25240 is substantially similar to NYSE American Rule 7.24E, except the Exchange would not be required to assign a DMM if the Security has an adequate number of BSTX Market Makers assigned to such Security. The Exchange states that the purpose of this requirement is to acknowledge the possibility that a Security need not necessarily have a DMM, provided that each Security has been assigned at least four active Market Makers, consistent with proposed the Market Maker requirement in BSTX Rule 26106. *See* Amendment No. 2, *supra* note 9, at 99–100.

[75] *See supra* notes 65–66.

[76] *See* proposed BSTX Rule 25240(c).

[77] *See* proposed BSTX Rule 25240(a).

[78] *See* proposed BSTX Rule 25240(b)(3).

[79] *See* proposed BSTX Rule 25250.

[80] *See* proposed BSTX Rule 25250(a). The Exchange states that the process by which the Exchange would handle a DMM that fails to meet its obligations, as proposed in BSTX Rule 25250(a)(4), is substantially similar to NYSE American Rule 7.25E(a)(4). *See* OIP, *supra* note 7, 86 FR at 49438 & n.254.

[81] *See* proposed BSTX Rule 25250(b). *See also* Exhibit 3D. The Exchange states that the proposed rule is similar to NYSE American Rule 7.25E(b). *See* Amendment No. 2, *supra* note 9, at 101.

[82] *See* proposed BSTX Rule 25250(c). The Exchange represents that the proposed reallocation policy is substantially similarly to corresponding provisions in NYSE American Rule 7.25E(c). *See* OIP, *supra* note 7, 86 FR at 49439.

[83] *See* proposed BSTX Rule 25250(d); OIP, *supra* note 7, 86 FR at 49439 (stating that the proposed rule is substantially similar to NYSE American Rule 7.25E(d)).

[84] *See* proposed BSTX Rule 25250(e); OIP, *supra* note 7, 86 FR at 49439 (stating that the proposed rule is substantially similar to NYSE American Rule 7.25E(e)).

[85] *See* proposed BSTX Rule 25250(f); OIP, *supra* note 7, 86 FR at 49439 (stating that the proposed rule is substantially similar to NYSE American Rule 7.25E(f)).

[86] *See* proposed BSTX Rule 25260.

[87] *See id.*

[88] *See id.* The Exchange represents that the proposed rule is substantially similar to NYSE American Rule 7.26E. *See* OIP, *supra* note 7, 86 FR at 49439.

[89] 15 U.S.C. 78f(b)(5).

[90] 15 U.S.C. 78f(b)(6) and (7).

[91] *See* OIP, *supra* note 7, 86 FR at 49416.

[92] 17 CFR 242.600(b)(6) and (b)(7). *See* Amendment No. 2, *supra* note 9, at 86; proposed BSTX Rule 25100(c).

''protected quotation'' under Rules 600(b)(70) and 600(b)(71) of Regulation NMS.[93] Only a BSTX Participant approved for trading on the BSTX System or a person associated with such a BSTX Participant would be able to effect any transactions on the BSTX System.[94]

Order Types and Instructions

Proposed BSTX Rule 25060(c) provides that BSTX Participants may enter orders to the BSTX System as limit orders or Inter-Market Sweep Orders (''ISOs'').[95] The BSTX System would only support two time-in-force (''TIF'') designations: DAY and IOC.[96] Under proposed BSTX Rule 25060(d), all orders would be given a default TIF of DAY.[97] DAY orders may queue during the Pre-Opening Phase [98] or before the resumption of trading following a trading halt, may trade only during Regular Market Hours, and, if unexecuted at the close of the trading day (4:00 p.m. ET), would be cancelled by the BSTX System.[99] BSTX Participants may also designate orders as IOC, which overrides the default TIF of DAY.[100] IOC orders are not accepted by the BSTX System during the Pre-Opening Phase, and during Regular Trading Hours, IOC orders will execute in whole or in part immediately upon receipt by the BSTX System.[101] The BSTX System would not support modification of resting orders, and to change the price or quantity of an order resting on the BSTX Book,[102] a BSTX Participant must cancel the resting order and submit a new order, which would result in a new time stamp for purposes of BSTX Book priority.[103] The Exchange states that all orders on BSTX would be displayed.[104] With the exception of the order parameter to preference faster settlement,[105] the order types and instructions the Exchange has proposed for the BSTX System are similar to those approved by the Commission and currently available on other national securities exchanges [106] and raise no new regulatory issues. The Commission finds these proposed rules are consistent with the Exchange Act, and Section 6(b)(5) [107] of the Exchange Act in particular, because they establish the types of orders and modifiers that all BSTX Participants may use and provide transparency regarding how orders would operate on the BSTX System, which should help promote just and equitable principles of trade, foster coordination with persons engaged in facilitating transactions in securities, and remove impediments to and perfect the mechanism of a national market system.

Auctions

The Exchange proposes that order entry in BSTX-listed Securities [108] may commence at 8:30 a.m. ET during the Pre-Opening Phase, in which orders are placed on the BSTX Book but do not generate executions until Regular Trading Hours begin at 9:30 a.m. ET.[109] The Exchange states that, similar to how its opening process works for options trading, BSTX would calculate and disseminate a theoretical opening price (''TOP'') from the time that the BSTX System commences accepting orders to BSTX Participants for the current orders resting on the BSTX Book during the Pre-Opening Phase.[110] The Exchange proposes to disseminate the TOP and other Broadcast Information pursuant to proposed BSTX Rule 25040(a)(3) during the Pre-Opening Phase.[111] Broadcast Information would be recalculated and disseminated via electronic means (*i.e.,* market data feeds) every five seconds.[112]

At the time of the opening match (*i.e.,* 9:30 a.m. ET), the BSTX System would establish a single price at which the BSTX-listed Security would be opened (''BSTX Official Opening Price''), which would be the TOP at the moment of the Opening Auction, provided that the resulting price must be within the Collar Price Range.[113] The Exchange states that the BSTX System would determine a single price at which a BSTX-listed Security would be opened by calculating the optimum number of shares that could be matched at a price, taking into consideration all the orders

[93] 17 CFR 242.600(b)(70) and (b)(71). *See* OIP, *supra* note 7, 86 FR at 49435 & n.210.

[94] *See* OIP, *supra* note 7, 86 FR at 49431; proposed BSTX Rule 25000(a). The Exchange represents that proposed BSTX Rule 25000 is substantially similar to IEX Rule 11.140. *See* Amendment No. 2, *supra* note 9, at 65 n.175.

[95] *See* proposed BSTX Rule 25060(c). The Exchange states that if a BSTX Participant fails to specify a limit price with respect to its limit order, such order shall be rejected. ISOs must be limit orders, are ineligible for routing, may be submitted with a limit price during Regular Trading Hours, and must have a time-in-force of immediate-or-cancel (''IOC''). *See* OIP, *supra* note 7, 86 FR at 49434 & n.202.

[96] *See* OIP, *supra* note 7, 86 FR at 49434; proposed BSTX Rule 25060(d).

[97] *See* OIP, *supra* note 7, 86 FR at 49434; proposed BSTX Rule 25060(d)(1).

[98] ''Pre-Opening Phase'' would mean the time between 8:30 a.m. and 9:30 a.m. ET. *See* proposed BSTX Rule 17000(a)(28).

[99] *See* OIP, *supra* note 7, 86 FR at 49434; proposed BSTX Rule 25060(d)(1).

[100] *See* OIP, *supra* note 7, 86 FR at 49434; proposed BSTX Rule 25060(d)(2).

[101] *See id.*

[102] ''BSTX Book'' would mean the electronic book of orders on each Security maintained by the BSTX System. *See* proposed BSTX Rule 17000(a)(10).

[103] *See* OIP, *supra* note 7, 86 FR at 49434; proposed BSTX Rule 25060(f).

[104] *See* OIP, *supra* note 7, 86 FR at 49434. The Exchange states that the BSTX System will not support hidden orders, undisplayed liquidity, price sliding, pegged orders, or other order type features that add complexity upon the initial launch of BSTX. *See id.*

[105] *See infra* notes 190–207 and accompanying text.

[106] *See, e.g.,* Cboe BZX Rule 11.9(d).

[107] 15 U.S.C. 78f(b)(5).

[108] Although the Exchange initially plans to only support trading in securities listed on BSTX, the Exchange states that it may in the future propose to trade securities listed on other national securities exchanges, subject to any necessary changes to its rules to support its trading pursuant to Section 19(b) and Rule 19b–4 of the Exchange Act. The Exchange also states that for such reason it proposes to adopt an opening process for non-BSTX-listed securities as a placeholder for potential trading of securities listed on other national securities exchanges in the future. The Exchange states that the proposed process for opening securities listed on other national securities exchanges is similar to the existing rules of another national securities exchange. *See* proposed BSTX Rule 25040(e); Amendment No. 2, *supra* note 9, at 74–75 (citing to Cboe BZX Rule 11.24).

[109] *See* OIP, *supra* note 7, 86 FR at 49431. During the Pre-Opening Phase, orders may not be cancelled or modified from 9:28 a.m. to 9:30 a.m. Orders received during the 10 seconds prior to the Opening Auction would be rejected. *See* proposed BSTX Rule 25040(a)(1). ''Opening Auction'' would be defined as the process of crossing orders in BSTX-listed Securities to open the market. *See* proposed BSTX Rule 25040(a)(6). The Exchange states that these provisions are consistent with the rules of other equities exchanges. *See* Amendment No. 2, *supra* note 9, at 68 n.185 (citing to IEX Rules 11.350(c)(1)(B) and (C)).

[110] *See* OIP, *supra* note 7, 86 FR at 49431; proposed BSTX Rule 25040(a)(2). The TOP is the price at which the Opening Auction would occur at the current time, if that time were the opening, according to the Opening Auction procedures in proposed BSTX Rule 25040(a)(6). *See* proposed BSTX Rule 25040(a).

[111] *See* OIP, *supra* note 7, 86 FR at 49431–32. Specifically, in addition to the TOP, ''Broadcast Information'' would include: (i) ''Paired Orders,'' which is the quantity of shares that would execute at the TOP; (ii) the ''Imbalance Quantity,'' which is the number of shares that may not be matched with other orders at the TOP at the time of dissemination; and (iii) the ''Imbalance Side,'' which is the buy/sell direction of any imbalance at the time of dissemination. *See* Amendment No. 2, *supra* note 9, at 68–69.

[112] *See* Amendment No. 2, *supra* note 9, at 69; proposed BSTX Rule 25040(a)(4). The Exchange states that Cboe BZX similarly broadcasts opening auction information every five seconds. *See* Amendment No. 2, *supra* note 9, at 69 n.189 (citing to Cboe BZX Rule 11.23(b)(2)(A)).

[113] *See* Amendment No. 2, *supra* note 9, at 69–70. *See* proposed BSTX Rule 25040(a)(5) for a definition of the ''Collar Price Range.'' As the BSTX Official Opening Price is determined and the matched shares are executed in the Opening Auction, the BSTX System would proceed to move the Security from the Pre-Opening Phase to the continuous or regular trading phase and disseminate the opening trade price, if any. Any orders that remain unexecuted in the Opening Auction, including any remaining portion of a partially executed order, would be moved onto the BSTX Book for the regular trading phase and would retain their price/time priority consistent with proposed BSTX Rule 25080. *See* proposed BSTX Rule 25040(a)(7).

on the BSTX Book.[114] The Exchange states that the requirement that the BSTX Official Opening Price must be within the Collar Price Range is designed to ensure that a Security opens in a fair and orderly manner and under market conditions where there is sufficient quotation interest (*e.g.,* a NBBO), the market is not crossed, and where the opening price will not drastically depart from the market at the time of the auction or the preceding day's closing price.[115] The Exchange proposes that when the BSTX System cannot determine an opening price from the Opening Auction, BSTX would nevertheless open the Security for trading and move all trading interest received during the Pre-Opening Phase to the BSTX Book, and that in such case, the BSTX Official Opening Price would be the Final Last Sale Eligible Trade.[116]

The Exchange states that the opening process for initial public offerings of Securities (''Initial Security Offerings'') would be generally the same as regular market openings.[117] However, in advance of an Initial Security Offering auction (''Initial Security Offering Auction''), the Exchange would announce a ''Quote-Only Period'' of between 15 and 30 minutes plus a short random period prior to the Initial Security Offering Auction.[118] Orders may not be submitted to participate in an Initial Security Offering Auction until the beginning of the Quote-Only Period.[119] All orders associated with the Initial Security Offering Auction must be received prior to the end of the Quote-Only Period in order to participate in the auction.[120] Limit orders with TIF of DAY submitted during the Quote-Only Period would be eligible to participate in the Initial Security Offering Auction.[121] According to the Exchange, it would disseminate Broadcast Information at the commencement of the Quote-Only Period as with regular market openings, and Broadcast Information would be re-calculated and disseminated via electronic means every five seconds.[122] Orders would be matched and executed at the conclusion of the Quote-Only Period, rather than at 9:30 a.m. ET.[123] Following the initial cross at the end of the Quote-Only Period wherein orders will execute based on price/time priority, consistent with proposed BSTX Rule 25080, the Exchange would transition to normal trading pursuant to proposed BSTX Rule 25040(a)(6).[124]

The Exchange also proposes a process for reopening trading following a ''trading halt,'' a halt or pause in trading initiated by the Exchange, or a Limit Up-Limit Down Trading Pause[125] (''Halt Auctions'').[126] For Halt Auctions, the Exchange proposes that in advance of reopening, the Exchange would announce a Quote-Only Period that would be five minutes prior to the Halt Auction, and that all orders associated with the Halt Auction must be received prior to the end of the Quote-Only Period in order to participate in the auction.[127] According to the Exchange, it would disseminate the same Broadcast Information as it does for an Initial Security Offering Auction, except it would also disseminate to market participants the applicable Halt Auction Reference Price and the Halt Auction Collars, and would similarly provide notification of any extension to the Quote-Only Period as with an Initial Security Offering Auction.[128] The transition to normal trading would also occur in the same manner as for Initial Security Offering Auctions.[129]

[114] *See* Amendment No. 2, *supra* note 9, at 69; proposed BSTX Rule 25040(a)(6)(ii). The Exchange states that the determination of the opening match price is consistent with the manner in which the Exchange opens options trading. *See* Amendment No. 2, *supra* note 9, at 69. Proposed BSTX Rule 25040(a)(6)(ii) would further provide that the BSTX Official Opening Price is the price which results in the matching of the highest number of shares. If two or more prices would satisfy this maximum quantity criteria, the price leaving the fewest resting shares in the BSTX Book would be selected as the BSTX Official Opening Price. Where two or more prices would satisfy the maximum quantity criteria and leave the fewest shares in the BSTX Book, the price closest to the previous day's last round lot trade occurring during Regular Trading Hours on the Exchange (''BSTX Official Closing Price'') will be selected as the BSTX Official Opening Price. *See* proposed BSTX Rules 25040(a)(5)(ii) and (6)(ii).

[115] *See* OIP, *supra* note 7, 86 FR at 49432; proposed BSTX Rule 25040(a)(5).

[116] *See* Amendment No. 2, *supra* note 9, at 70; proposed BSTX Rule 25040(a)(7). *See also* proposed BSTX Rule 25040(a)(5)(ii) (defining ''Final Last Sale Eligible Trade'').

[117] *See* OIP, *supra* note 7, 86 FR at 49432.

[118] *See id.;* proposed BSTX Rule 25040(b)(1). The Quote-Only Period may be extended in certain cases where (i) there is no TOP; (ii) the underwriter requests an extension; (iii) the TOP moves the greater of 10% or 50 cents in the 15 seconds prior to the initial cross; or (iv) in the event of a technical or systems issue at the Exchange that may impair the ability of BSTX Participants to participate in the Initial Security Offering Auction or of the Exchange to complete the Initial Security Offering Auction. *See* proposed BSTX Rule 25040(b)(2). In the event of any extension to the Quote-Only Period or a trading pause, the Exchange proposes to notify market participants regarding the circumstances and length of the extension. *See* OIP, *supra* note 7, 86 FR at 49432; proposed BSTX Rule 25040(b)(4).

[119] *See* proposed BSTX Rule 25040(b)(1).

[120] *See id.*

[121] *See id.* Orders marked IOC submitted during the Quote-Only Period would be rejected. *See id.*

[122] *See* Amendment No. 2, *supra* note 9, at 71; proposed BSTX Rule 25040(b)(3).

[123] *See* OIP, *supra* note 7, 86 FR at 49432; proposed BSTX Rule 25040(b)(5).

[124] *See* Amendment No. 2, *supra* note 9, at 71–72; proposed BSTX Rule 25040(b)(5).

[125] *See* proposed BSTX Rule 25050(g). The Exchange states that proposed BSTX Rule 25050 regarding trading halts is substantially similar to other national securities exchange rules adopted in connection with the NMS Plan to Address Extraordinary Market Volatility (''LULD Plan'')—for example, IEX Rule 11.280—with certain exceptions, such as excluding rules relating to order types and other aspects of the LULD Plan that would not be supported by the Exchange, including market orders and auction orders. *See* Amendment No. 2, *supra* note 9, at 78–79. The Exchange would cancel all resting orders in a non-BSTX listed security subject to a trading halt, reject any incoming orders in that security, and will only resume accepting orders following a broadcast message to BSTX Participants indicating a forthcoming re-opening of trading. *See* OIP, *supra* note 7, 86 FR at 49433; proposed BSTX Rule 25050(d). In addition, the Exchange proposes to reserve the right to halt or suspend trading in other circumstances where the Exchange deems it necessary to do so for the protection of investors and the public interest, or pursuant to any other Exchange rule or policy. *See* OIP, *supra* note 7, 86 FR at 49434; proposed BSTX Rule 25050(f). Proposed BSTX Rule 25010(d) would allow for the CEO, President, or Chief Regulatory Officer, or such person's designee, provided the designee is a senior officer, to halt or suspend trading in securities. The Exchange states that while comparable rules of other national securities exchanges (*e.g.,* IEX Rule 11.110(c) and BOX Rule 7020) may not currently specify that the Chief Regulatory Officer has the authority, both of these comparable rules contemplate the CEO or President delegating the task to a senior officer, which could be the Chief Regulatory Officer. The Exchange states that it does not believe that the addition of the Chief Regulatory Officer would expand the authority of who can declare a trading halt or suspend trading. *See* Amendment No. 2, *supra* note 9, at 65 n.176.

[126] *See* Amendment No. 2, *supra* note 9, at 72; proposed BSTX Rule 25040(c).

[127] *See* Amendment No. 2, *supra* note 9, at 72–73; proposed BSTX Rule 25040(c)(1). Limit orders with TIF of DAY submitted during the Quote-Only Period would be eligible to participate in the Halt Auction, whereas orders marked IOC submitted during the Quote-Only Period would be rejected. *See* OIP, *supra* note 7, 86 FR at 49432; proposed BSTX Rule 25040(c)(1). In addition, Halt Auctions would be subject to the proposed Halt Auction Collars, which the Exchange states are substantially similar to those provided by Cboe BZX, and are designed to ensure that the Exchange is able to re-open trading in a Security in a fair and orderly manner. To the extent a Halt Auction is unable to be performed due to the absence of a TOP or the TOP is outside the proposed Halt Auction Collars, the Exchange would extend the period of Halt Auction for an additional five minutes (''Initial Extension Period''). After the Initial Extension Period, the Exchange proposes that the Quote-Only Period be extended for additional five-minute periods, should a Halt Auction be unable to be performed due to absence of a TOP or because the TOP is outside the proposed Halt Auction Collars (''Additional Extension Period''), until a Halt Auction occurs. *See* Amendment No. 2, *supra* note 9, at 72 n.206 and n.207; proposed BSTX Rule 25040(c)(2).

[128] *See* Amendment No. 2, *supra* note 9, at 73; proposed BSTX Rule 25040(c)(3). In addition, the Exchange represents that if a trading halt is triggered by the Exchange or if the Exchange is unable to reopen trading at the end of the trading halt due to a systems or technology issue, the Exchange will immediately notify the single plan processor responsible for consolidation of information for the security pursuant to Rule 603 of Regulation NMS under the Exchange Act. *See* proposed BSTX Rule 25040(c)(4).

[129] *See* OIP, *supra* note 7, 86 FR at 49432.

In the event a disruption occurs that prevents the execution of an Initial Security Offering Auction or Halt Auction, including any extensions, the Exchange proposes to apply certain contingency procedures.[130] For a disruption in an Initial Security Offering Auction, the Exchange would publicly announce that the Quote-Only Period for the Initial Security Offering Auction will reset for the subject Security, cancel all orders on the BSTX Book, and disseminate a new scheduled time for the Quote-Only Period and opening match.[131] Similarly, for a disruption in a Halt Auction, the Exchange would publicly announce that no Halt Auction will occur and all orders in the halted Security on the BSTX Book will be cancelled, after which the Exchange will open the Security for trading without an auction.[132]

The Exchange has not proposed to operate a closing auction. Instead, the Exchange proposes that the BSTX Official Closing Price will be the last round lot trade occurring during Regular Trading Hours on BSTX.[133] The Exchange states that it believes this method is a simple and fair way to establish the closing price of a Security, and is consistent with the overall proposed simplified market structure for BSTX that does not include order types such as market-on-close or limit-on-close.[134]

The Commission believes that the proposed opening, re-opening, and closing procedures are reasonably designed to provide for an orderly opening or re-opening of trading or close of trading on BSTX, and thus are consistent with the Exchange Act, and in particular the Section 6(b)(5) goals of removing impediments to the mechanism of a national market system and protecting investors and the public interest.[135]

Order Priority and Execution

The Exchange proposes BSTX Rule 25080 to govern the execution of orders on the BSTX System.[136] The proposed rule provides that orders of BSTX Participants shall be ranked and maintained in the BSTX Book according to price/time priority, such that within each price level, all orders shall be organized by the time of entry.[137] Further, the proposed rule provides that an order would be cancelled back to the BSTX Participant if, based on market conditions, BSTX Participant instructions, applicable Exchange Rules, and/or the Exchange Act and the rules and regulations thereunder, such order is not executable and cannot be posted to the BSTX Book.[138] Specifically, proposed BSTX Rules 25080(b)(1) through (3) provide that executions occurring on BSTX will comply with Regulation SHO, Regulation NMS, including Rule 611, and the LULD Plan.[139] In addition, proposed BSTX Rule 25130 prohibits BSTX Participants from engaging in a pattern or practice of displaying quotations that lock or cross a protected quotation, unless an exception applies, and provides that the BSTX System will reject any order or quotation that would lock or cross a protected quotation of another national securities exchange at the time of entry.[140]

To meet their regulatory responsibilities under Rule 611(a) of Regulation NMS, other trading centers will be required to have sufficient notice of new protected quotations, as well as all necessary information (such as final technical specifications).[141] The Commission believes that it would be a reasonable policy and procedure under Rule 611(a) to require that industry participants begin treating BSTX's best bid and best offer as a protected quotation as soon as possible but no later than 90 days after BOX begins operation of its equities trading platform. The Commission has taken the same position with other new equities exchanges.[142]

In light of the foregoing, the Commission finds that the proposed BSTX trading rules are consistent with the Exchange Act and, in particular, Section 6(b)(5) of the Exchange Act, because they set forth a fair and transparent process for establishing order priority and are reasonably designed to ensure compliance with Commission rules concerning quoting and executions, which should promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system, and protect investors and the public interest.[143]

Market Data Products

The Exchange proposes to offer proprietary market data products, including BSTX Depth-of-Book, BSTX Top-of-Book, and BSTX Last Sale.[144] The Exchange states that its proposed rule regarding market data product offerings is substantially similar to the rules of another national securities exchange.[145]

In addition, the Exchange proposes to offer a historical market data product, known as the BSTX Market Data Blockchain, that would provide information about trading on the BSTX System.[146] The BSTX Market Data Blockchain would operate as a private, permission-based blockchain that will allow BSTX Participants to see detailed information on their own trading activity on BSTX and anonymized information with respect to the trading activity of other BSTX Participants. According to the Exchange, BSTX Participants would have no obligations with respect to providing information to, accessing, maintaining, or using the BSTX Market Data Blockchain.[147] Each BSTX Participant would be assigned a BSTX Market Data Blockchain address that corresponds to the BSTX Participant's trading activity on

[130] *See id.* at 49432–33; proposed BSTX Rule 25040(d).

[131] *See* OIP, *supra* note 7, 86 FR at 49432–33; proposed BSTX Rule 25040(d)(1).

[132] *See* OIP, *supra* note 7, 86 FR at 49433; proposed BSTX Rule 25040(d)(2).

[133] *See* Amendment No. 2, *supra* note 9, at 77–78; proposed BSTX Rule 25040(a)(5)(ii).

[134] *See* Amendment No. 2, *supra* note 9, at 78.

[135] 15 U.S.C. 78f(b)(5).

[136] *See* proposed BSTX Rule 25080.

[137] *See* OIP, *supra* note 7, 86 FR at 49434; proposed BSTX Rule 25080(a).

[138] *See* proposed BSTX Rule 25080(b). The Exchange states that sell orders cannot execute at a price below the best bid in the marketplace and buy orders cannot execute at a price above the best offer in the marketplace. *See* OIP, *supra* note 7, 86 FR at 49434.

[139] *See* proposed BSTX Rules 25080(b)(1)–(3).

[140] *See* OIP, *supra* note 7, 86 FR at 49437; proposed BSTX Rule 25130. The Exchange states that the proposed rule is substantially similar to the rules of other national securities exchanges. *See* Amendment No. 2, *supra* note 9, at 93 (citing to IEX Rule 11.310 and Cboe BZX Rule 11.20).

[141] *See* Securities Exchange Act Release No. 53829 (May 18, 2006), 71 FR 30038, 30041 (May 24, 2006) (File No. S7–10–04) (extending the compliance dates for Rule 610 and Rule 611 of Regulation NMS under the Exchange Act).

[142] *See, e.g.,* Securities Exchange Act Release Nos. 85828 (May 10, 2019), 84 FR 21841 (May 15, 2019) (File No. 10–234) (order granting registration of Long-Term Stock Exchange, Inc.); and 88806 (May 4, 2020), 85 FR 27451 (May 8, 2020) (File No. 10–237) (order granting registration of MEMX).

[143] 15 U.S.C. 78f(b)(5).

[144] *See* proposed BSTX Rule 22060. BSTX Depth-of-Book is a data feed that contains all displayed orders for securities traded on the Exchange, order executions, order cancellations, order modifications, order identification numbers, administrative messages, and auction information disseminated pursuant to proposed BSTX Rule 25040 (Auctions). *See* proposed BSTX Rule 22060(a). BSTX Top-of-Book is an uncompressed data feed that offers top of book quotations and execution information based on orders entered into the BSTX System, as well as auction information disseminated pursuant to proposed BSTX Rule 25040 (Auctions). *See* proposed BSTX Rule 22060(b). BSTX Last Sale is an uncompressed data feed that offers only execution information based on orders entered into the BSTX System. *See* proposed BSTX Rule 22060(c).

[145] *See* OIP, *supra* note 7, 86 FR at 49429 (citing to MEMX Rule 13.8).

[146] *See* proposed BSTX Rule 22060(d); OIP, *supra* note 7, 86 FR at 49420.

[147] *See* OIP, *supra* note 7, 86 FR at 49420.

BSTX.[148] The Exchange would issue login credentials to each user, including any non-BSTX Participant that chooses to subscribe.[149] The BSTX Market Data Blockchain would generally operate by collecting information from two sources, which the Exchange would then translate into information capable of being recorded to the BSTX Market Data Blockchain.[150] Specifically, the data provided would be collected from (i) the BSTX System, with respect to information such as executed transactions; and (ii) each BSTX Participant's order/message passing through the financial information exchange (''FIX'') gateway through which all orders and messages pass to connect to the BSTX System.[151] The Exchange states that the BSTX Market Data Blockchain does not require any affirmative action on the part of the BSTX Participants in order for the information to be recorded, but rather captures trading activity that occurs on BSTX in the normal course of trading.[152]

The BSTX Market Data Blockchain would provide two types of information for Regular Trading Hours: (i) Participant Proprietary Data with respect to the specific BSTX Participant; [153] and (ii) General Market Data made available to all BSTX Participants and non-BSTX Participants that subscribe.[154] The Exchange represents that no BSTX Participant, or non-BSTX Participant, would have access to the Participant Proprietary Data of another BSTX Participant.[155] Both types of data would be available on a delayed basis of at least five minutes, with each new block of market data showing market data for the preceding five minutes.[156] According to the Exchange, the BSTX Market Data Blockchain would not function as a substitute for real-time market data.[157]

A BSTX Participant, through the API, would be able to run searches of its previous orders and trading activity using the BSTX Market Data Blockchain. The Participant Proprietary Data would be visible to the specific BSTX Participant in sequential order of when each action occurred [158] and the General Market Data, available to both BSTX Participants and non-BSTX Participants, would allow viewers to observe the historical orders, executions, and other events (*e.g.,* cancelations) received by and occurring on BSTX, which is generally the same information available through subscribing to proprietary data feeds of other exchanges.[159] The Exchange also proposes to append timestamps to the information made available through the BSTX Market Data Blockchain, which would indicate the time to the microsecond at which an order posted to the BSTX Book or that the BSTX System took other actions with respect to an order.[160] A BSTX Participant would have the ability to download market data from the BSTX Market Data Blockchain and could potentially use the data to back test trading strategies or evaluate executions received on BSTX.[161]

The Exchange also proposes to periodically audit, at least bi-annually, the BSTX Market Data Blockchain to help ensure the proper functioning of the BSTX Market Data Blockchain and the accuracy of the information thereon.[162] The Exchange states that it expects to initially audit the BSTX Market Data Blockchain more frequently, likely monthly, during the first year of operations to ensure the BSTX Market Data Blockchain operates as intended.[163]

The Exchange states that as a system of the Exchange, the BSTX Market Data Blockchain will be subject to the requirements of the Exchange Act, including Regulation Systems Compliance and Integrity (''Regulation SCI'') and that the Exchange has in place, among other requirements of Regulation SCI, robust safeguards to protect against any possible system intrusion to the market data blockchain.[164] The Exchange states that any unauthorized access to the API through which data on the BSTX Market Data Blockchain may be accessed would not allow for any intruder to modify, delete, or otherwise change any data on the BSTX Market Data Blockchain.[165]

The Exchange states that the benefits of the BSTX Market Data Blockchain are twofold: (1) BSTX Participants may find the information useful to them for a

[148] *See* proposed BSTX Rule 17020(b).

[149] *See* Amendment No. 2, *supra* note 9, at 19 & n.36; proposed BSTX Rule 17020(b).

[150] *See* OIP, *supra* note 7, 86 FR at 49420.

[151] *See id.* The Exchange states that BSTX Participants (and non-BSTX Participants to which the BSTX Market Data Blockchain is made available by the Exchange) would only be able to access the information contained on the BSTX Market Data Blockchain through the API, and only the Exchange would have direct access to the underlying data on the private blockchain. *See id.* The Exchange further states that the FIX gateway and the BSTX System are the same sources of information used to generate consolidated market data. *See id.* at 49420 n.39.

[152] *See id.* at 49420.

[153] *See id.* Under proposed BSTX Rule 17020(c)(1), a BSTX Participant would be able to see the following information with respect to all orders and messages submitted by the BSTX Participant and any executions of such orders: (i) Symbol, side (buy/sell), limit price, quantity, time-in-force; (ii) order type (*e.g.,* limit order, ISO); (iii) order capacity (principal/agent); (iv) short/long sale order marking; and (v) message type (*e.g.,* order, modification, cancelation).

[154] *See id.* Under proposed BSTX Rule 17020(c)(2), this would include, in an anonymized format, all displayed orders, modifications, cancelations, and executions occurring on BSTX (*i.e.,* the user may see the symbol, side (buy/sell), limit price, quantity, and message type), along with administrative data and other information from the Exchange (*e.g.,* trading halts or technical messages). *See* Amendment No. 2, *supra* note 9, at 22–23; proposed BSTX Rule 17020(c)(2). The Exchange states that the BSTX Market Data Blockchain would not include details regarding the T+0 or T+1 order matching preference or matched trades bound for shorter settlement. *See* Amendment No. 2, *supra* note 9, at 41 n.73.

[155] *See* OIP, *supra* note 7, 86 FR at 49421. The Exchange states that since no BSTX Participant, or non-BSTX Participant, would be provided with access to trading information of another BSTX Participant, it would not allow for reverse engineering of trading strategies or otherwise compromise the confidential nature of each BSTX Participant's trading information. *See id.*

[156] *See* Amendment No. 2, *supra* note 9, at 25. The Exchange specifies that the market data uploaded as part of each block would contain the most recent transactions on the Exchange, aged only a few seconds, as well as market data for the preceding five minutes, such that the oldest market data on each new block would be aged at least five minutes. *See id.* at 25 n.44.

[157] *See* OIP, *supra* note 7, 86 FR at 49421. The Exchange states that consolidated market data or proprietary market data are disseminated on a sub-second, or sub-millisecond, timescale and that even the consolidated securities information processor's 99th percentile of quote latency today is below 100 microseconds. *See id.* at 49421 n.44. The Exchange also states that, to promote clarity with respect to how a BSTX Participant may use the BSTX Market Data Blockchain, proposed BSTX Rule 17020(c)(3) would provide that information available on the BSTX Market Data Blockchain does not act as a substitute for any recordkeeping obligations of a BSTX Participant. *See id.* at 49422.

[158] The BSTX Participant would be able to filter the different information fields or run searches for a particular item (*e.g.,* only showing cancel orders or only showing activity in a particular symbol). *See id.* at 49421.

[159] Similar to the Participant Proprietary Data, the General Market Data would generally be visible in sequential order of when each action occurred, although viewers would also have the ability to filter the different information fields or run searches for a particular symbol. The Exchange states that the General Market Data would differ from the Exchange's propriety market data feed, which provides real-time snapshots of the order book, including depth-of-book quotations and quantity of shares available at each price point. Additionally, the General Market Data would show viewers, in an anonymized format, the sequential entry of each order, modification, or cancelation in the order book in each symbol as historical orders and transaction information, rather than real-time snapshots. *See id.* at 49421 n.42.

[160] *See id.* at 49421.

[161] *See id.* at 49422.

[162] *See id.;* proposed BSTX Rule 17020(d). *See also* proposed BSTX Rule 17020(c)(3) (stating that information available on the BSTX Market Data Blockchain does not act as a substitute for any recordkeeping obligations of a BSTX Participant).

[163] *See* OIP, *supra* note 7, 86 FR at 49422.

[164] *See* Amendment No. 2, *supra* note 9, at 27. The Exchange states that it has classified the BSTX Market Data Blockchain as an ''SCI system'' and not as an ''indirect SCI system.'' *See id.*

[165] *See* OIP, *supra* note 7, 86 FR at 49422.

variety of purposes, such as to review the BSTX Participant's trading activity on BSTX, determine what the market was at a particular point in time on BSTX for a given Security, evaluate equation quality, help confirm the accuracy of their internal trading data, or download the data to back-test trading strategies; and (2) help familiarize BSTX Participants with the use and capabilities of blockchain technology in a manner that does not impose any burden on them or other market participants.[166] The Exchange also states that BSTX Securities would be eligible for trading on other national securities exchanges that extend UTP to them and that the BSTX Market Data Blockchain would not impact the ability of Securities to trade on other national securities exchanges or OTC.[167]

One commenter states that the United States should support blockchain technologies like BSTX to be competitive globally, and that blockchain affords more efficiency and transparency.[168] Another commenter states that blockchain will bring the advantages of better security, higher transparency, more trust, and a fairer marketplace to the sector.[169] This commenter also states that blockchain would afford savings in time and money, make the market safer against fraud, and help United States markets keep up with other global systems.[170] Another commenter states that the proposed five minute delay is not problematic given delays in other market data products.[171]

The Commission finds that the Exchange's proposed market data products are consistent with the Exchange Act. The Commission believes that the proposed BSTX Depth-of-Book, BSTX Top-of-Book, and BSTX Last Sale data products do not raise any novel regulatory issues.[172] The Commission also believes that the BSTX Market Data Blockchain would not result in the disclosure of novel information about trading activity on the BSTX System. A BSTX Participant viewing the Participant Proprietary Data would access the same underlying information that the BSTX Participant would already have from FIX messages sent to and received from the Exchange.[173] Further, the General Market Data would contain the same substantive information that could be found in BSTX's proprietary market data feeds and this information would be comparable to the proprietary market data distributed by other national securities exchanges. At the same time, the Commission believes that the BSTX Market Data Blockchain is reasonably designed to prevent other market participants from learning BSTX Participants' sensitive trading information. The BSTX Market Data Blockchain would not be a real-time market data product and would contain historical market data posted in five-minute increments. In addition, the Participant Proprietary Data accessible to each BSTX Participant would be specific to that BSTX Participant's orders and executions, and the General Market Data would be anonymized by displaying only the symbol, side (buy/sell), limit price, quantity, and message type. As an SCI system operated by an SCI entity, the BSTX Market Data Blockchain would also be subject to the requirements of Regulation SCI.[174]

National securities exchanges are not required to offer proprietary market data, but those that do so must offer such data in a manner that is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.[175] The Commission believes that the proposed dissemination of the Participant Proprietary Data is not designed to permit unfair discrimination because each BSTX Participant will have access to information specific to its own orders and executions through the Participant Proprietary Data. In the OIP, the Commission states that it was not clear what conditions, if any, the Exchange may place on non-BSTX Participants before granting access to the General Market Data.[176] In Amendment No. 2, the Exchange states that all BSTX Participants and non-BSTX Participants will have access to the same anonymized market data on the same terms through the General Market Data.[177] In addition, market participants would be able to obtain the same substantive information contained in the General Market Data through access to BSTX's other proprietary market data feeds. Further, the five-minute delay for the BSTX Market Data Blockchain would be a uniform delay for all BSTX Participants and non-BSTX Participants that subscribe, and the data on the BSTX Market Data Blockchain would not be available on a faster basis than other BSTX data products (and instead would be available on a slower basis).

For these reasons, the Commission finds that the Exchange's proposed market data products are consistent with the Exchange Act, and, in particular, Section 6(b)(5) of the Exchange Act[178] because they would prevent fraudulent and manipulative acts and practices, 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, protect investors and the public interest, and would not permit unfair discrimination among customers, issuers, brokers, or dealers; and with Section 6(b)(8) of the Exchange Act[179] because they would not impose any burden on competition not necessary or appropriate in furtherance of the Exchange Act. The Commission also finds that the proposed BSTX Market Data Blockchain is consistent with the Exchange Act, and Section 6(b)(7) of the Exchange Act[180] in particular, and its requirements that the rules of a national securities exchange provide a fair procedure for the prohibition or limitation by the exchange of any access to services, because the Exchange will

[166] *See id.*

[167] *See id.* at 49423.

[168] *See* Letter from Anonymous (June 15, 2021) (''Anonymous Letter II'').

[169] *See* Letter from Anonymous (June 21, 2021) (''Anonymous Letter III'').

[170] *See id. See also* Letter from Jonathan Seeley (September 20, 2021) (''Seeley Letter'') (stating that the proposed BSTX facility is designed to promote just and equitable principles of trade and remove impediments to a free and open national market system in a transparent and secure manner through the proposed use of blockchain technology and would not inappropriately burden competition); Letter from Tyler Hess (June 17, 2021) (stating that the commenter would like to see the development of financial institutions and securities exchanges that allow access to financial instruments and investments without the burdens and controls placed by traditional exchanges, and that the proposal represents the first steps in a free and equitable publicly auditable financial system).

[171] *See* Letter from Anonymous (September 6, 2021) (''Anonymous Letter IV'').

[172] *See supra* notes 144–145 and accompanying text.

[173] The Commission has previously approved proposals by national securities exchanges to offer a data product to a member of the exchange consisting of information regarding the member's own trading activity on the exchange. *See, e.g.,* Securities Exchange Act Release Nos. 78886 (September 20, 2016), 81 FR 66113 (September 26, 2016) (approving Nasdaq ''Trading Insights'' product); 91787 (May 6, 2021), 86 FR 26111 (May 12, 2021) (approving MIAX Emerald ''Liquidity Taker Event Report'').

[174] *See, e.g.,* 17 CFR 242.1001(a)(1) (requiring each SCI entity to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems have levels of capacity, integrity, resiliency, availability, and security adequate to maintain the SCI entity's operational capability and promote the maintenance of fair and orderly markets).

[175] *See* 15 U.S.C. 78f(b)(5).

[176] *See* OIP, *supra* note 7, 86 FR at 49454.

[177] *See* Amendment No. 2, *supra* note 9, at 25 (stating that the Exchange would make the General Market Data available to BSTX Participants and non-BSTX Participants for the same fee and on the same subscription terms, once the Exchange establishes a fee schedule pursuant to the proposed rule change process under the Exchange Act prior to the launch of BSTX).

[178] 15 U.S.C. 78f(b)(5).

[179] 15 U.S.C. 78f(b)(8).

[180] 15 U.S.C. 78f(b)(7).

not limit non-BSTX Participants' access to the BSTX Market Data Blockchain beyond applying the same general terms that apply to BSTX Participants.

Access to BSTX

The Commission received a comment stating that the proposal does not specifically address how participants shall access BSTX and that, by comparison, with respect to the trading of options, the Exchange does not currently enforce equidistant cabling among and between participants and its matching engine located in the same data center.[181] This commenter states that concerns regarding unfair discrimination and inappropriate burdens on competition could arise in the absence of confirmation that BOX will ensure that all co-location participants will enjoy the same opportunity for order execution regardless of their location in the data center relative to the BSTX matching engine.[182] Absent such confirmation, the commenter urges the Commission to disapprove the proposal.[183] In response, the Exchange states that BSTX will provide for equidistant cabling arrangements to ensure that all co-located BSTX Participants are on a level playing field in connecting to the BSTX matching engine.[184] The Exchange also states that BSTX plans to have equidistant cabling arrangements within the area of the data center that it controls, and that it will make technical details regarding those arrangements available to prospective BSTX Participants in certain specification documents after approval of BSTX as a new facility of the Exchange.[185]

In further response, in Amendment No. 2, the Exchange states that it will offer connectivity services at its primary data center (Equinix NY4 in Secaucus, NJ) and that connectivity to the Exchange in the primary data center for both order entry and market data dissemination is equalized for all Participants with equipment co-located in Equinix NY4.[186] Specifically, the Exchange states that all BSTX Participants co-located in the same data center would connect to BSTX through an equidistant cabling cabinet, which is a separate cabinet from the cabinet hosting the BSTX System and market data distribution system. The cross connects from the equidistant cabling cabinet to the cabinet hosting BSTX's systems are equidistant.[187] Additionally, the Exchange states that all cross connects from the equidistant cabling cabinet to each BSTX Participant's cabinet, wherever located in the data center, provide for equidistant connectivity.[188] As a result, even if BSTX Participant X's cabinet is closer in physical proximity to the equidistant cabling cabinet than BSTX Participant Y's cabinet, the arrangement is such that both BSTX Participant X and BSTX Participant Y have equidistant connectivity to the equidistant cabling cabinet and in turn to BSTX's systems.[189]

The Commission believes that Amendment No. 2 addresses the commenter's concern regarding whether all co-location participants will enjoy the same opportunity for order execution regardless of their location in the data center relative to the BSTX matching engine. As described above, the Exchange states in Amendment No. 2 that all BSTX Participants co-located in the data center would access BSTX's systems through an equidistant cabling cabinet that connects to each BSTX Participant's cabinet through fiber connections of equal length and that the cross connects from the equidistant cabling cabinet to the cabinet hosting BSTX's systems are also equidistant. This arrangement would prevent BSTX Participants located in closer proximity to the cabinet hosting the BSTX System and market data distribution system from having a shorter path to connect to BSTX's systems.

Clearance and Settlement

Under the Exchange's proposal, executions occurring as a result of orders matched against the BSTX Book will be transmitted by BSTX to a registered clearing agency to clear and settle pursuant to the rules, policies, and procedures of the registered clearing agency.[190] The Exchange states that Securities would be cleared and settled by NSCC and DTC in the same manner as those activities are performed by NSCC and DTC currently with respect to a class of NMS stock.[191] The Exchange also states that the operation of the BSTX Market Data Blockchain will have no impact or effect on the manner in which a Security clears and settles.[192]

The Exchange proposes to allow BSTX Participants to indicate a preference for settling faster than the standard T+2 settlement cycle.[193] Specifically, BSTX Participants would be able to submit an order with a preference for settlement on a T+0 basis (''Order with a T+0 Preference'') or on a T+1 basis (''Order with a T+1 Preference'').[194] The Exchange states that, based on discussions with representatives from The Depository Trust & Clearing Corporation (''DTCC''), BSTX believes that NSCC already has the authority under its rules, policies, and procedures to clear certain trades on T+1 or T+0 basis.[195] Orders with a T+0 Preference and Orders with a T+1 Preference would result in executions that settle more quickly than on a T+2 basis if, and only if, all of the conditions in proposed BSTX Rule 25060(h) are met and the execution that is transmitted by BSTX to NSCC is eligible for T+0 or T+1 settlement under the rules, policies, and procedures of the registered clearing agency.[196] For an

[181] *See* Letter from Andrew Stevens, General Counsel, IMC Chicago, LLC and Richard McDonald, Compliance Coordinator, Susquehanna International Group, LLP (June 28, 2021), at 2.

[182] *See id.*

[183] *See id.* at 3.

[184] *See* Letter from Lisa J. Fall, President, BOX Exchange LLC (July 1, 2021), at 1.

[185] *See id.* The Exchange also states that its options trading platform is an entirely separate facility of the Exchange with a separate ownership structure from BSTX, and BSTX will use separate data center operations and a different technology provider. *See id.* at 2.

[186] *See* Amendment No. 2, *supra* note 9, at 6.

[187] *See id.* at 6 n.6.

[188] *See id.* Specifically, the equidistant cabling cabinet contains equal length spools of fiber that connect to each external BSTX Participant cabinet in the data center, and all BSTX Participants must connect to BSTX through the equidistant cabling cabinet from their own external cabinets. *See id.*

[189] *See id.* The Exchange states that it believes that this structure is designed to prevent unfair discrimination between market participants, consistent with Section 6(b)(5) of the Exchange Act, by ensuring that all co-located BSTX Participants have equidistant connections to BSTX irrespective of where their equipment is located within the data center. *See id.*

[190] *See* proposed BSTX Rule 25100(d). *See also* proposed BSTX Rule 25140 for additional provisions regarding clearance and settlement.

[191] *See* OIP, *supra* note 7, 86 FR at 49418.

[192] *See id.*

[193] *See id.* at 49419.

[194] *See* proposed BSTX Rule 25140(h). The Exchange states that T+1 and T+0 are shorter settlement cycles than the longest settlement cycle of T+2 that is generally permitted under SEC Rule 15c6–1, for a security trade that involves a broker-dealer. *See* OIP, *supra* note 7, 86 FR at 49419 (citing 17 CFR 240.15c6–1). The Exchange states that under SEC Rule 15c6–1, with certain exceptions, a broker-dealer is not permitted to enter a contract for the purchase or sale of a security that provides for payment of funds and delivery of securities later than the second business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction. *See id.* at 49419 n.33.

[195] *See* OIP, *supra* note 7, 86 FR at 49423. The Exchange states that it understands that NSCC and DTC are already using this authority for shortened settlement times, and that DTCC makes data regarding T+0 and T+1 clearance and settlement through NSCC and DTC available on the DTCC website for review by the public. *See id.* at 49424.

[196] *See id.* at 49423–24; proposed BSTX Rule 25060(h). *See also* proposed BSTX Rule 25100(d). The Exchange states that it understands that under its current rules, policies, and procedures, NSCC accepts trades for T+0 settlement through its continuous net settlement system provided that they are received by NSCC before a cut-off time of

Order with a T+0 Preference to be eligible to be transmitted by BSTX to NSCC for same-day settlement, the resulting execution must occur on the BSTX System prior to the ''T+0 Cut-Off Time,'' which would be one minute before any applicable cut-off time established by NSCC for inclusion of T+0 settling trades in its continuous net settlement process established pursuant to its rules, policies, and procedures.[197] Any preference for T+0 or T+1 settlement included by a BSTX Participant would only become operative if the order happens to execute against another order from a BSTX Participant that also includes a parameter indicating a preference for settlement on a T+0 or T+1 basis.[198] The Exchange states that, at the time of order entry, any orders that include a parameter indicating a preference for faster settlement would be regular way orders that would be presumed to settle on a T+2 basis, just like any orders without such a parameter.[199]

The Exchange states that, in all cases, an order not marked with a preference for either T+0 or T+1 settlement would be assured under the settlement timing logic in proposed BSTX Rule 25060(h) of settlement on a T+2 basis. The Exchange also states that the possibility of a shortened settlement time would have no impact on the Exchange's proposed price/time priority structure for order matching.[200] The Exchange states that, as a result of this structure, all orders in Securities would be eligible to match and execute against any order against which they are marketable, with settlement to occur at the later settlement date of any two matching orders.[201] Therefore, according to the Exchange, only where an Order with a T+1 Preference or an Order with a T+0 Preference match with another Order with a T+1 Preference or Order with a T+0 Preference will those orders (or matching portions thereof) be eligible to settle more quickly than the standard settlement cycle of T+2.[202]

The Exchange states that it believes the proposal to allow BSTX Participants to access the shorter settlement cycles of T+1 and T+0 that are already being used by NSCC and DTC today represents a change that is both consistent with and in furtherance of broader industry efforts to move the standard settlement style to T+1.[203] The Exchange also states that it believes that providing an optional T+0 or T+1 settlement cycle to BSTX Participants could also incrementally and immediately provide market participants with the benefits of shorter settlement cycles.[204] The Exchange further states that it believes that BSTX Participants have an interest in being able to assess risk-reducing market functionality that is presently available and compatible with market structure and that this can reduce costs for market participants settling trading obligations in that Security and reduce settlement risk.[205]

According to the Exchange, because all orders in Securities submitted to BSTX would at the time of order entry be presumed to settle on a regular way T+2 basis and would interact with any other order against which the order is marketable, the Exchange believes that Orders with a T+0 Preference and Orders with a T+1 Preference would be considered ''protected'' within the meaning of Rule 611 under the Exchange Act.[206] The Exchange states that Orders with a T+0 Preference and Orders with a T+1 Preference would not fall within the exception for protected quotation status set forth in Rule 611(b)(2) under the Exchange Act, because they will only settle more quickly than T+2 when all of the conditions in proposed BSTX Rule 25060(h) are met and where faster settlement is consistent with the rules, policies, and procedures of a registered clearing agency.[207]

The Commission has received several comments expressing support for the proposal's use of a shortened settlement cycle under certain circumstances.[208] One commenter states in support of the proposal that BSTX would provide significant advantages over existing national securities exchanges by providing fairer conditions to market participants through reduced settlement times and more transparency.[209] This commenter states that T+0 settlement would improve market conditions for retail investors by reducing risk of failure to deliver on highly shorted stocks, and would reduce actual and opportunity costs by eliminating margin lending for the period before settlement and lost opportunities to reinvest.[210]

11:30 a.m. ET. DTCC provides on its website an overview of the cut-off times for participation in the continuous net settlement system process and other procedural considerations under its rules, policies, and procedures that are associated with processing trades for accelerated settlement on a T+0 or T+1 basis. *See* Amendment No. 2, *supra* note 9, at 34 n.62.

[197] *See* Amendment No. 2, *supra* note 9, at 35; proposed BSTX Rule 25060(h)(3). The BSTX System would not accept any new Orders with a T+0 Preference after the T+0 Cut-Off Time. *See* Amendment No. 2, *supra* note 9, at 36; proposed BSTX Rule 25060(h)(3). However, an Order with a T+0 Preference resting on the BSTX Book after the T+0 Cut-Off Time would still be able to execute against orders against which it is marketable, and would remain eligible for potential T+1 settlement to the extent it executed against an Order with a T+1 Preference. *See id.* According to the Exchange, it believes that a one minute buffer between its T+0 Cut-Off Time and NSCC's cut-off time for inclusion of such same-day settling trades in NSCC's continuous net settlement process would be sufficient time to allow the Exchange to transmit the relevant execution details to NSCC and for NSCC to include such same-day settling trades in its continuous net settlement system. *See* Amendment No. 2, *supra* note 9, at 35–36. The Exchange represents that it will monitor the application of the one minute buffer and whether it provides the Exchange and NSCC with sufficient time to prevent executed trades from being transmitted by the Exchange to NSCC after NSCC's cut-off time for inclusion of same-day settling trades in NSCC's continuous net settlement system, and the Exchange will submit additional rule changes in the future as may be necessary to increase the buffer if appropriate. *See id.* at 36. The Exchange also represents that it will post the then-applicable T+0 Cut-Off Time on the BSTX website to ensure BSTX Participants are adequately informed. *See id.* at 36 n.64.

[198] *See* OIP, *supra* note 7, 86 FR at 49424. Under the proposal, an Order with a T+0 Preference will execute against any order against which it is marketable and BSTX will transmit the matched order information to a registered clearing agency for settlement on a standard settlement cycle (T+2) pursuant to the rules, policies, and procedures of the registered clearing agency, except where: (i) the Order with a T+0 Preference executes against another Order with a T+0 Preference, in which case BSTX will transmit the matched order information to a registered clearing agency for settlement on the trade date as may be permitted by the rules, policies, and procedures of the registered clearing agency, subject to the limitations in proposed BSTX Rule 25060(h)(3); or (ii) the Order with a T+0 Preference executes against an Order with a T+1 Preference, in which case BSTX will transmit the matched order information to a registered clearing agency for settlement on the next trading day after the trade date (*i.e.,* T+1) as may be permitted by the rules, policies, and procedures of the registered clearing agency. *See* proposed BSTX Rule 25060(h)(1). An Order with a T+1 Preference will execute against any order against which it is marketable and BSTX will transmit the matched order information to a registered clearing agency for settlement on a standard settlement cycle (T+2), except where the Order with a T+1 Preference executes against another Order with a T+1 Preference or an Order with a T+0 Preference, in which case BSTX will transmit the matched order information to a registered clearing agency for settlement on the next trading day after the trade date (*i.e.,* T+1) as may be permitted by the rules, policies, and procedures of the registered clearing agency. *See* proposed BSTX Rule 25060(h)(2).

[199] *See* OIP, *supra* note 7, 86 FR at 49423.

[200] *See id.* at 49424.

[201] *See id.*

[202] *See id.*

[203] *See id.* at 49424–25.

[204] *See id.*

[205] *See id.* at 49425.

[206] *See id.* (citing 17 CFR 242.611(b)(2)).

[207] *See id.*

[208] *See* Letter from Meagan Darata, Utah Salt Supplements (June 21, 2021) (''Darata Letter''); Letter from Mark Nelson (June 10, 2021); Letter from Robert Shaw (June 11, 2021) (''Shaw Letter''); Letter from Neil Skinner (June 11, 2021) (''Skinner Letter'').

[209] *See* Skinner Letter, *supra* note 208.

[210] *See id.* This commenter also states that the commenter expects the reduced costs of operating the exchange to be passed on to prospective companies and issuers, thereby creating more opportunities for companies and asset holders to

Continued

Two commenters refer to recent problems that they characterize as arising from T+2 settlement and short selling,[211] and state that the proposal for a shorter settlement cycle would level the playing field for retail investors.[212] Another commenter states that if a particular trade does not meet the criteria or conditions on T+0 or T+1, the fallback option will be the standard settlement cycle, and that because shorter settlement will depend on the NSCC clearing system, addressing any adverse market effects is NSCC's responsibility.[213] Another commenter states that uncertainty regarding whether an order would receive faster settlement at the time of order entry would not affect the ability of a market participants to reap the potential benefits of faster settlement.[214] This commenter also states that there has been much recent public focus on the inefficiency of the current settlement system and that there is no evidence that the proposal would have adverse market effects.[215]

The Commission believes that the optional order parameter that would allow a BSTX Participant to place an Order with a T+0 Preference or Order with a T+1 Preference would permit BSTX Participants to take advantage of faster settlement timing provided by DTC and NSCC in manner that is consistent with fair and orderly markets. Use of the order parameter would be optional and would not have any effect on price/time execution priority. Therefore, any order placed by a BSTX Participant that prefers to settle on a T+2 basis (or any order routed to BSTX from another national securities exchange) would receive T+2 settlement and that order would not be disadvantaged in obtaining an execution due to the absence of a preference for faster settlement.[216] The Commission also believes that the proposal that Orders with a T+0 Preference must be executed on the BSTX System prior to the T+0 Cut-Off Time to be eligible for same-day settlement is reasonably designed to ensure that when BSTX transmits an order to the registered clearing agency for same-day settlement, the registered clearing agency will be able to include that trade in its continuous net settlement process.

For these reasons, the Commission finds that the proposed order parameter that BSTX Participants could use to preference faster settlement is consistent with the Exchange Act and, in particular, Section 6(b)(5)'s requirement to foster cooperation and coordination with persons engaged in clearing, settling, and processing information with respect to transactions in securities; 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.[217] The Commission also finds that the proposed order parameter for faster settlement is consistent with Section 6(b)(8)'s requirement that the proposal not impose any burden on competition not necessary or appropriate in further of the purposes of the Exchange Act, because the operation of this order parameter will not impact the ability of a market participant that instead prefers T+2 settlement to obtain an execution.[218]

*C. Eligibility for Listing and Trading on BSTX*

Once BSTX begins operations as a facility of the Exchange, a security would be considered for listing on BSTX only if such security is registered under both Section 12 of the Exchange Act[219] and Section 6 of the Securities Act of 1933 (''Securities Act''),[220] or such security to subject to an exemption under Regulation A.[221] An issuer may register a security pursuant to Section 12(b) by submitting to the Exchange a listing application that provides certain required information.[222] The Exchange will review the listing application and, if the listing application is approved, will certify to the Commission that it has approved the security for listing and registration.[223] Registration of the security will become effective thirty days after the receipt of such certification by the Commission or within a shorter period of time as the Commission may determine.[224] Once registration is effective, the Security would be eligible to be admitted to dealings on BSTX.[225]

The Exchange proposes that the only securities that will be eligible for trading on BSTX will be BSTX-listed securities.[226] The Exchange states that it is not proposing rules that would support its extension of UTP to other NMS stock.[227] However, according to the Exchange, BSTX-listed Securities would be eligible for trading on other national securities exchanges that extend UTP to them and would be able to trade on other national securities exchanges and OTC in the same manner as other NMS stock.[228]

Classes of Securities Eligible for Listing

The Exchange states that issuers on BSTX could include both: (i) New issuers who do not currently have any class of securities registered on a national securities exchange, and (ii) issuers who currently have securities registered on a national securities exchange and who are seeking registration of a new class of equity securities for listing on BSTX as Securities.[229] In the original Notice, the Exchange stated that while BSTX does not intend for Securities listed on BSTX to be fungible with any other class of securities from the same issuer, to the

offer securities, and resulting in a market boom as new market participants join the exchange. *See id.*

[211] *See* Letter from Anonymous (June 15, 2021) (''Anonymous Letter I''); Skinner Letter, *supra* note 208. *See also* Shaw Letter, *supra* note 208 (stating that, with the current issues regarding settlement time, the proposal to offer speedy settlement is one answer to improving the system).

[212] *See* Anonymous Letter I, *supra* note 211; Skinner Letter, *supra* note 208. *See also* Darata Letter, *supra* note 208 (stating that there is a wide power differential between retail and institutional traders).

[213] *See* Anonymous Letter IV, *supra* note 171.

[214] *See* Seeley Letter, *supra* note 170 (stating also that this uncertainty would not represent any additional inconsistency with the Exchange Act compared to current settlement systems and does not provide an appropriate basis for disapproving the proposal).

[215] *Id.*

[216] In the OIP, the Commission raises whether introducing the possibility for T+0 or T+1 settlement for on-exchange trades in NMS stocks pursuant to the rules of a single national securities exchange, at a time when the industry standard is T+2 settlement, might have any adverse market effects. *See* OIP, *supra* note 7, 86 FR at 49455. The Commission notes that no commenters raised any potential adverse market effects.

[217] 15 U.S.C. 78f(b)(5).

[218] 15 U.S.C. 78f(b)(8).

[219] 15 U.S.C. 78*l;* proposed BSTX Rule 26210.

[220] 15 U.S.C. 78f.

[221] *See* Amendment No. 2, *supra* note 9, at 10–11. *See also* 17 CFR 230.251. The Exchange states that IEX similarly allows for securities subject to an exemption from registration under Section 12(b) of the Exchange Act to be listed on IEX. *See* Amendment No. 2, *supra* note 9, at 11 n.20 (citing to IEX Rule 14.203).

[222] *See* proposed BSTX Rules 26210–26217; 15 U.S.C. 78*l*(b). Prior to submitting a listing application to the Exchange, the issuer would be required to participate in a confidential pre-application eligibility review, in which the Exchange will determine whether the issuer meets its listing criteria and is eligible to submit a listing application. *See* proposed BSTX Rule 26201.

[223] *See* proposed BSTX Rule 26210(b); 15 U.S.C. 78*l*(d). *See* Exhibits 3G, 3H, 3I, 3J, 3K, and 3L for agreements and forms related to the listing process.

[224] 15 U.S.C. 78*l*(d).

[225] *See* proposed BSTX Rule 26202. *See also* 15 U.S.C. 78*l*(d).

[226] *See* proposed BSTX Rule 25020(a) (providing that any class of securities listed on the Exchange shall be eligible to become designated for trading on the Exchange in accordance with the proposed BSTX Rule 26000 and 28000 Rule Series).

[227] *See* OIP, *supra* note 7, 86 FR at 49417. The Exchange also states that it would only trade BSTX-listed Securities on BSTX unless and until the Exchange proposes and receives Commission approval for rules that would support trading in other types of securities, including thorough any extension of UTP to other NMS stock. *See id.*

[228] *See id.* at 49423.

[229] *See* Amendment No. 2, *supra* note 9, at 13.

extent that two classes of an issuer's shares had identical voting and economic rights but were registered with the Commission as separate classes, the two classes of shares could be ''economically fungible'' with each other.[230] With respect to the Notice, one commenter states that BSTX appears to be contemplating that an issuer could list shares with identical voting and economic rights on BSTX and another exchange but designate the shares listed on BSTX as a separate class of the issuer's securities, with the only distinguishing factor between the two classes of securities being that the BSTX-listed securities would have the additional blockchain functionality.[231] The commenter states that, in the trading context, having two separate classes of an issuer's securities with identical economic and voting rights trading at the same time on different exchanges could result in investor and market confusion.[232] In Amendment No. 2, the Exchange states that BSTX does not intend for a Security listed on BSTX to be a unique class of security due only to the fact that certain trading activity in the Security on BSTX would be recorded on the BSTX Market Data Blockchain.[233] The Exchange also states that if an issuer sought to list a new class of securities on BSTX that is not distinct from an existing class of securities of the issuer, the Exchange would not allow such a class to be listed pursuant to its authority under proposed BSTX Rule 26101.[234] The Commission believes that Amendment No. 2 addresses the commenter's concern that an issuer could list one class of securities on BSTX and a separate class of securities on another national securities exchange, with both classes having identical voting and economic interests. Proposed BSTX Rule 26101 provides that the approval of an application for listing of a security for trading on BSTX is a matter solely within the discretion of the Exchange.[235] The Exchange's use of this discretionary authority to prevent an issuer from listing a class of securities on BSTX that is not distinct from an existing class of securities would prevent the listing of a class of securities that has the same voting and economic rights as another listed class of securities of that same issuer.

Initial and Continued Listing Standards

The Commission has consistently recognized the importance and significance of national securities exchange listing standards. Among other things, such listing standards help ensure that exchange-listed companies will have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets.[236] The standards, collectively, also provide investors and market participants with some level of assurance that the listed company has the resources, policies, and procedures to comply with the requirements of the Exchange Act and Exchange rules.[237]

The Exchange has proposed initial and continued listing standards for companies to be listed on BSTX that are substantially similar to the current rules for NYSE American.[238] These proposed listing standards relate to the listing and delisting of companies, including procedures and prerequisites for initial and continued listing on BSTX, the obligations of issuers with Securities listed on BSTX, as well as rules describing the application and qualification process, the suspension and delisting process, and procedures for review of the Exchange's listing determinations.[239] The Commission has previously determined that the initial and continued listing standards of NYSE American are consistent with the Exchange Act.[240] The Exchange states that it did not integrate certain sections of NYSE American's listing standards that the Exchange deemed were inapplicable to its operations, such as with respect to types of securities that the Exchange does not propose to make eligible for listing.[241] The Exchange also proposes to include certain listing standards that are substantially similar

[230] *See* Notice, *supra* note 3, 86 FR at 29636 & n.20.

[231] *See* Letter from Ellen Greene, Managing Director, Equities & Options Market Structure, Securities Industry and Financial Markets Association (September 27, 2021) (''SIFMA Letter''), at 2 (stating that ''the definition of 'class' of securities in Section 12(g)(5) of the Exchange Act contemplates that securities of an issuer that have identical economic and voting rights would be part of the same class of securities'').

[232] *See id.* (stating that ''issuers have dually-listed securities on two exchanges to meet the different listing standards of each of the exchanges, but the issuers have done so by listing the same class of securities on both exchanges'').

[233] *See* Amendment No. 2, *supra* note 9, at 13.

[234] *See id.*

[235] *See* proposed BSTX Rule 26101.

[236] The Commission has stated in approving national securities exchange listing requirements that the development and enforcement of adequate standards governing the listing of securities on an exchange is an activity of critical importance to the financial markets and the investing public. In addition, once a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that it continues to meet the exchange's standards for market depth and liquidity so that fair and orderly markets can be maintained. *See, e.g.,* Securities Exchange Act Release Nos. 90768 (December 22, 2020), 85 FR 85807, 85811 n.55 (December 29, 2020) (SR–NYSE–2019–67) (''NYSE 2020 Order''); 82627 (February 2, 2018), 83 FR 5650, 5653 n.53 (February 8, 2018) (SR–NYSE–2017–30) (''NYSE 2018 Order''); 81856 (October 11, 2017), 82 FR 48296, 48298 (October 17, 2017) (SR–NYSE–2017–31); 81079 (July 5, 2017), 82 FR 32022, 32023 (July 11, 2017) (SR–NYSE–2017–11). The Commission has stated that adequate listing standards, by promoting fair and orderly markets, are consistent with Section 6(b)(5) of the Exchange Act, in that they are, among other things, designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest. *See, e.g.,* NYSE 2020 Order, 85 FR at 85811 n.55; NYSE 2018 Order, 83 FR at 5653 n.53; Securities Exchange Act Release Nos. 87648 (December 3, 2019), 84 FR 67308, 67314 n.42 (December 9, 2019) (SR–NASDAQ–2019–059); 88716 (April 21, 2020), 85 FR 23393, 23395 n.22 (April 27, 2020) (SR–NASDAQ–2020–001).

[237] ''Meaningful listing standards are also important given investor expectations regarding the nature of securities that have achieved a national securities exchange listing, and the role of a national securities exchange in overseeing its market and assuring compliance with its listing standards.'' Securities Exchange Act Release No. 65708 (November 8, 2011), 76 FR 70799, 70802 (November 15, 2011) (SR–NASDAQ–2011–073). *See also, e.g.,* NYSE 2020 Order, *supra* note 236, 85 FR at 85811 n.56; Securities Exchange Act Release Nos. 65709 (November 8, 2011), 76 FR 70795 (November 15, 2011) (SR–NYSE–2011–38); 88389 (March 16, 2020), 85 FR 16163 (March 20, 2020) (SR–NASDAQ–2019–089). The Exchange, in addition to requiring companies seeking to list to meet the quantitative initial listing standards and once listed the quantitative continued listing standards, also requires listed companies to meet other qualitative requirements. *See, e.g.,* proposed BSTX Rules 26800 Series, Corporate Governance.

[238] *See* OIP, *supra* note 7, 86 FR at 49439 (citing Parts 1–12 of the NYSE American Company Guide). The Exchange states that it understands that the Commission has extended relief to NYSE American with respect to certain quantitative listing standards that do not meet the thresholds of Rule 3a51–1, and that initial listings of securities that do not meet such thresholds and are not subject to the relief provided to NYSE American would qualify as ''penny stocks'' and would be subject to additional regulation. *See* Amendment No. 2, *supra* note 9, at 106 (citing 17 CFR 240.3a51–1); Amendment No. 3, *supra* note 10, at 4–5. The Exchange states that it is not seeking relief related to Rule 3a51–1 and describes certain adjustments made to the proposed BSTX rules to meet the requirements in Rule 3a51–1. *See* Amendment No. 2, *supra* note 9, at 106; Amendment No. 3, *supra* note 10, at 4–5.

[239] *See* proposed BSTX Rules 26000 Series (BSTX Listing Rules Other Than for Exchange Traded Products), 26200 Series (Original Listing Procedures), 26300 Series (Additional Listings), 27000 Series (Suspension and Delisting), 27100 Series (Guide to Filing Requirements), and 27200 Series (Procedures for Review of Exchange Listing Determinations).

[240] *See, e.g.,* Securities Exchange Act Release Nos. 59050 (December 3, 2008), 73 FR 75144 (December 10, 2008) (SR-Amex-2008–70) (approving revisions to the listing process and removal of alternative listing standards for American Stock Exchange LLC (''Amex''), a predecessor to NYSE American); 53050 (January 3, 2006), 71 FR 1580 (January 10, 2006) (SR-Amex-2005–114) (approving change to initial listing standards for Amex).

[241] *See* Amendment No. 2, *supra* note 9, at 103 n.301. For example, the Exchange does not propose to list bonds, debentures, securities of foreign companies (other than Canadian companies), or investment trusts. *See id.* The Exchange also does not propose to allow the issuance of fractional shares of Securities. *See id.* at 114.

to the rules of other national securities exchanges.[242]

In addition, the Exchange has proposed initial and continued listing standards for ETP-related securities to be listed on BSTX that are substantially similar to the rules of NYSE Arca, Inc. (''NYSE Arca'').[243] These initial and continued listing standards relate to the specific types of ETPs that the Exchange proposes to make eligible for listing on BSTX.[244] The Exchange states that the proposed rules do not include certain products that are supported by NYSE Arca but that the Exchange does not plan to offer.[245] The Commission has previously determined that the ETP-related listing standards of NYSE Arca are consistent with the Exchange Act.[246]

Accordingly, the Commission finds that the Exchange's proposed initial and continued listing requirements, including the procedures for listing and delisting securities, are consistent with the Exchange Act, and Section 6(b)(5) of the Exchange Act [247] in particular, and its requirements that the rules of a national securities exchange be reasonably designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principals of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and that the rules not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Commission also finds that procedures for listing and delisting securities, including the procedures for challenging the Exchange's listing determinations, are consistent with Section 6(b)(7) of the Exchange Act,[248] which requires, among other things, that the rules of a national securities exchange provide a fair procedure for the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange.

Corporate Governance Standards

The development and enforcement of meaningful corporate governance listing standards for a national securities exchange is of substantial importance to financial markets and the investing public, especially given investor expectations regarding the nature of companies that have achieved an exchange listing for their securities.[249] The corporate governance standards embodied in the listing standards of national securities exchanges, in particular, play an important role in assuring that exchange-listed companies observe good governance practices including safeguarding the interests of shareholders.[250]

The Exchange proposes corporate governance standards in connection with Securities to be listed and traded on BSTX that are substantially similar to the corporate governance standards for listed issuers of NYSE American.[251] These corporate governance standards for listed issuers include policies relating to disclosures, the handling of stock dividends and splits, accounting, shareholder meetings and voting, and required notifications to the Exchange, as well as standards for the issuer's corporate structure and its board of directors and committees thereof.[252] Further, these standards include rules requiring a majority of directors on a listed issuer's board to be independent, rules and independence requirements relating to audit and compensation committees and the oversight of nominations, and rules requiring listed issuers to adopt codes of conduct applicable to all their directors, officers, and employees.[253] The Commission has previously determined that the corporate governance standards for listed issuers of NYSE American are consistent with the Exchange Act.[254] The Exchange also proposes to require listed companies to maintain an internal audit function pursuant to a rule that is substantially similar to the requirements of IEX.[255]

The Commission finds that BSTX's proposed corporate governance standards for listed issuers contained in BSTX's proposed rules are consistent with the Exchange Act, and in particular Section 6(b)(5) of the Exchange Act and its requirements that the rules of a national securities exchange be reasonably designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Commission further finds that BSTX's proposed rules satisfy the requirements of Section 10A(m) of the Exchange Act and Rule 10A–3 thereunder and Section 10C of the Exchange Act and Rule 10C–1 thereunder, relating to audit and compensation committees, respectively.[256] The Commission believes that BSTX's corporate governance standards for listed issuers that require a fully independent audit committee are designed to promote independent and objective review and oversight of the accounting and auditing practices of listed issuers and to enhance audit committee independence, authority, and responsibility by implementing the standards set forth in

[242] *See, e.g.,* Amendment No. 3, *supra* note 10, at 5–6 (stating that the Exchange is including initial listing standards for preferred securities and secondary classes based on Nasdaq Rule 5510).

[243] *See* OIP, *supra* note 7, 86 FR at 49442 (citing to NYSE Arca Rules 5.2–E(j)(3), 5.2–E(j)(6), 5.2–E(j)(8), 8.200–E, 8.201–E, 8.600–E, 8.601–E, and 8.900–E).

[244] *See* proposed BSTX Rules 28000 (Investment Company Units), 28001 (Equity Index-Linked Securities, Commodity-Linked Securities, Currency-Linked Securities, Fixed Income Index-Linked Securities, Futures-Listed Securities, and Multifactor Index-Linked Securities), 28002 (Exchange-Traded Fund Shares), 28003 (Trust Issued Receipts), 28004 (Commodity-Based Trust Shares), 28005 (Managed Fund Shares), 28006 (Active Proxy Portfolio Shares), and 28007 (Managed Portfolio Shares).

[245] *See* OIP, *supra* note 7, 86 FR at 49443 (stating that the Exchange will not support trading in a Nasdaq-100 Index Product, Currency Trust Shares, or Commodity Index Trust Shares).

[246] *See, e.g.,* Securities Exchange Act Release Nos. 44551 (July 12, 2001), 66 FR 37716 (July 19, 2001) (PCX–2001–14) (approving generic listing standards for investment company units and portfolio depository receipts for Pacific Exchange, Inc. (''PCX''), a predecessor to NYSE Arca); 52204 (August 3, 2005), 70 FR 46559 (August 10, 2005) (PCX–2005–63) (approving PCX's generic listing standards for index-linked securities); 78397 (July 22, 2016), 81 FR 49320 (July 27, 2016) (NYSEArca-2015–110) (approving NYSE Arca's generic listing standards for managed fund shares).

[247] 15 U.S.C. 78f(b)(5).

[248] 15 U.S.C. 78f(b)(7).

[249] *See, e.g.,* Securities Exchange Act Release Nos. 85374 (March 20, 2019), 84 FR 11354, 11356 (March 26, 2019); 91567 (April 14, 2021), 86 FR 20556, 20559 (April 20, 2021).

[250] *See, e.g.,* Securities Exchange Act Release Nos. 85374 (March 20, 2019), 84 FR 11354, 11356 (March 26, 2019); 91567 (April 14, 2021), 86 FR 20556, 20559 (April 20, 2021).

[251] *See* OIP, *supra* note 7, at 49442 (citing to NYSE American Sections 401–404, 501–522, 603–624, 701–726, 801–809, and 920–994).

[252] *See* proposed BSTX Rule 26400 Series (Disclosure Policies), 26500 Series (Dividends and Splits), 26600 Series (Accounting; Annual and Quarterly Reports), 26700 Series (Shareholders' Meetings, Approval and Voting of Proxies), 26800 Series (Corporate Governance), and 26900 Series (Additional Matters).

[253] *See* proposed BSTX Rules 26802, 26803, and 27807.

[254] *See, e.g.,* Securities Exchange Act Release Nos. 48863 (December 1, 2003), 68 FR 68432 (December 8, 2003) (SR–Amex–2003–65) (approving proposal to enhance the corporate governance requirements applicable to listed companies for Amex); 54851 (November 30, 2006), 71 FR 71201 (December 8, 2006) (SR–Amex–2006–48) (approving exchange's independent director and audit committee corporate governance standards for Amex).

[255] *See* Amendment No. 2, *supra* note 9, at 115 (citing to IEX Rule 14.414). *See also* proposed BSTX Rule 26801(i).

[256] *See* 15 U.S.C. 78j–1(m); 15 U.S.C. 78j–3; 17 CFR 240.10A–3; 17 CFR 240.10C–1.

Rule 10A–3.[257] In addition, the Commission believes that BSTX's proposed requirements relating to independent compensation committees for listed issuers would benefit investors by implementing the standards set forth in Rule 10C–1, which requires that the independent directors of a listed issuer oversee executive compensation matters, consider independence criteria before retaining compensation advisers, and have responsibility for the appointment, compensation, and oversight of these advisers.[258] Corporate governance standards play an important role in assuring that companies listed for trading on the national securities exchanges' markets have a reasoned, fair, and impartial approach for determining the compensation of corporate executives.[259] The Commission believes that the Exchange's rules will foster greater transparency, accountability, and objectivity in the oversight of compensation practices of listed issuers and in the decision-making processes of their compensation committees.[260]

*Regulation*

The Exchange states that in connection with the operation of BSTX, it will leverage many of the Exchange's existing regulatory structures.[261] The Exchange states that it will extend its Regulatory Services Agreement with FINRA to cover BSTX Participants and trading on the BSTX System, and this Regulatory Services Agreement will govern many aspects of the regulation and discipline of BSTX Participants.[262] According to the Exchange, the Exchange will regulate the listing of Securities, authorize BSTX Participants to trade on the BSTX System, and conduct surveillance of Security trading on the BSTX System.[263] The Exchange states that, consistent with the Exchange's existing regulatory structure, the Exchange's Chief Regulatory Officer will have general supervision of the regulatory operations of BSTX, including responsibility for overseeing the surveillance, examination, and enforcement functions and for administering all regulatory services agreements applicable to BSTX.[264] The Exchange states that its existing Regulatory Oversight Committee will be responsible for overseeing the adequacy and effectiveness of the Exchange's regulatory and self-regulatory organization responsibilities, including those applicable to BSTX.[265]

The Exchange proposes specific business conduct and operational rules for BSTX Participants that include rules covering similar subject matter as existing Exchange Rules applicable to Options Participants.[266] The Exchange also proposes to adopt proposed BSTX Rule 24000 (Discipline and Summary Suspension), which provides that the provisions of the Exchange's existing BOX Rule 11000 Series (Summary Suspension), 12000 Series (Discipline), 13000 Series (Review of Certain Exchange Actions), and 14000 Series (Arbitration) shall be applicable to BSTX Participants and trading on the BSTX System.[267] According to the Exchange, the Exchange already has Rules pertaining to discipline and suspension of Exchange Participants that it proposes to extend to BSTX Participants and trading on the BSTX System.[268]

In addition to the Exchange's other disciplinary rules, the Exchange's Minor Rule Violation Plan (''MRVP'') specifies those uncontested minor rule violations with sanctions not exceeding $2,500 that would not be subject to the provisions of Rule 19d–1(c)(1) under the Exchange Act[269] requiring that an SRO promptly file notice with the Commission of any final disciplinary action taken with respect to any person or organization.[270] The Exchange's MRVP includes the policies and procedures set forth in existing BOX Rule 12140 (Imposition of Fines for Minor Violations).[271] The Exchange proposes to amend its MRVP to add certain rules relating to BSTX to the list of rules eligible for MRVP treatment, by amending BOX Rule 12140 and adopting proposed BSTX Rule 24010.[272] Specifically, the Exchange proposes to modify BOX Rule 12140 to specify that rules and penalties relating to trading on BSTX are set forth in proposed BSTX Rule 24010.[273] The Exchange also proposes to set forth a fine schedule for violations of certain rules related to activity on BSTX and provide that a subsequent violation is calculated on the basis of a rolling 12-month period.[274] The Exchange states that the rules that it proposes to include in its MRVP are comparable to the rules included in the MRVPs of other national securities exchanges.[275]

The Exchange represents that it plans to join the multi-party Rule 17d–2 Plan for Allocation of Regulatory Responsibilities Regarding Regulation NMS and is in the process of joining certain Rule 17d–2 agreements, including those applicable to equities trading and equities market surveillance.[276] The Exchange states that it is a participant in the NMS plan related to the Consolidated Audit Trail, and that it intends to join the Order Execution Quality Disclosure Plan, the LULD Plan, and the applicable plans for the consolidation and dissemination of

[257] *See* Securities Exchange Act Release No. 47654 (April 9, 2003), 68 FR 18788 (April 16, 2003).

[258] *See* Securities Exchange Act Release No. 67220 (June 20, 2012), 77 FR 38422, 38425 (June 27, 2012).

[259] *See* proposed BSTX Rule 26805. *See, e.g.,* Securities Exchange Act Release No. 68640 (January 11, 2013), 78 FR 4554, 4563 (January 22, 2013) (SR–NASDAQ–2012–109) (''Nasdaq 2012 Order'') (approving proposal relating to rules for compensation committees for listed companies).

[260] *See, e.g.,* Nasdaq 2012 Order, *supra* note 259 (finding Nasdaq compensation committee rules consistent with the Exchange Act). *See also, e.g.,* Securities Exchange Act Release Nos. 68639 (January 11, 2013), 78 FR 4570 (January 22, 2013) (order approving NYSE's compensation committee rules, which was cited by Nasdaq as precedent for a subsequent amendment to its own rules that was filed on an immediately effective basis); 71037 (December 11, 2013), 78 FR 76179 (December 16, 2013) (SR–NASDAQ–2013–147).

[261] *See* OIP, *supra* note 7, 86 FR at 49448.

[262] *See id.* The Exchange states that, as is the case with the Exchange's options trading platform, the Exchange will supervise FINRA and bear ultimate regulatory responsibility for BSTX. *See id.*

[263] *See id.*

[264] *See id.*

[265] *See id.* at 49448–49.

[266] *See id.* at 49427–30 (discussing proposed BSTX Rules regarding Business Conduct for BSTX Participants (Rule 19000 Series), Financial and Operational Rules for BSTX Participants (Rule 20000 Series), Supervision (Rule 21000 Series) and Miscellaneous Provisions (Rule 22000 Series)).

[267] *See id.* at 49430–31; proposed BSTX Rule 24000. The Exchange proposes to make conforming edits to certain existing Exchange Rules to expand their coverage to all Participants. *See* proposed BOX Rules 11010 and 11030.

[268] *See* OIP, *supra* note 7, 86 FR at 49431.

[269] 17 CFR 240.19d–1(c)(1).

[270] *See* OIP, *supra* note 7, 86 FR at 49443.

[271] *See id.*

[272] *See* Amendment No. 2, *supra* note 9, at 121.

[273] *See* OIP, *supra* note 7, 86 FR at 49443; proposed BOX Rule 12140(f). The Exchange also proposes to make conforming changes to replaced references to ''Options Participant'' with ''Participant.'' *See* proposed BOX Rule 12140.

[274] *See* proposed BSTX Rule 24010. The Exchange proposes that violations of the following rules would be appropriate for dispositions under the MRVP: proposed BSTX Rule 19180 (Communications with the Public), proposed BSTX Rule 20000 (Maintenance, Retention and Furnishing of Records), proposed BSTX Rule 25070 (Consolidated Audit Trail), proposed BSTX Rule 25130 (Locking or Crossing Quotations in NMS Stocks), proposed BSTX Rule 25210(a)(1) (BSTX Market Maker Two-Sided Quote Obligation), and proposed BSTX Rule 25120 (Short Sales). *See* proposed BSTX Rule 24010(b).

[275] *See* Amendment No. 2, *supra* note 9, at 122 (citing to IEX Rule 9.218, Cboe BZX Rule 8.15.01, and MIAX Pearl Rule 1014(d)(15)).

[276] *See id.* at 143. Rule 17d–2 provides that any two or more SROs may file with the Commission a plan for allocating among such SROs the responsibility to receive regulatory reports from persons who are members or participants of more than one of such SROs to examine such persons for compliance, or to enforce compliance by such persons, with specified provisions of the Exchange Act, the rules and regulations thereunder, and the rules of such SROs, or to carry out other specified regulatory functions with respect to such persons. *See* 17 CFR 240.17d–2.

market data.[277] The Exchange also states that it will ensure that its membership in the Intermarket Surveillance Group extends to the BSTX facility.[278]

According to the Exchange, the Exchange will perform automated surveillance of trading on BSTX for the purposes of maintaining a fair and orderly market at all times and monitor BSTX to identify unusual trading patterns and determine whether particular trading activity requires further regulatory investigation by FINRA.[279] The Exchange states that it will oversee the process for determining and implementing trading halts, identifying and responding to unusual market conditions, and administering the Exchange's process for identifying and remediating ''clearly erroneous trades'' pursuant to proposed BSTX Rule 25110.[280]

The Exchange has also proposed BSTX Rules 25050 and 25080(b)(3) to comply with the LULD Plan.[281] Proposed BSTX Rule 25080(b)(3) provides that, for any execution to occur during Regular Trading Hours, such executions must comply with the LULD plan, as set forth in BSTX Rule 25050.[282] Proposed BSTX Rule 25050 describes the Exchange's order handling procedures to comply with the LULD Plan.[283]

The Exchange's proposed regulatory structure raises no new regulatory issues. Accordingly, the Commission finds that the Exchange's proposed regulatory structure, including the Exchange's proposed application of its existing rules to BSTX and BSTX Participants' conduct, the Exchange's commitment to establish new or expand existing agreements with third-parties including FINRA for purposes such as surveillance, member discipline, and overseeing and enforcing compliance with BSTX rules, and proposed BSTX Rule 25050 requiring compliance with the LULD Plan are consistent with the Exchange Act and, in particular, the Section 6(b)(5) requirement that a national securities exchange's rules be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system, and protect investors and the public interest.[284] The Commission also finds that the Exchange's proposed regulatory structure is consistent with the requirements of Section 6(b)(1) of the Exchange Act, which requires a national securities exchange to be so organized and have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its members and persons associated with its members, with the Exchange Act and the rules and regulations thereunder, and the rules of the Exchange,[285] and with Sections 6(b)(6) and 6(b)(7) of the Exchange Act,[286] which require an Exchange to provide fair procedures for the disciplining of members and persons associated with members.

Finally, the Commission finds that the proposed changes to the Exchange's MRVP are consistent with the public interest, the protection of investors, or otherwise in furtherance of the purpose of the Exchange Act, as required by Rule 19d–1(c)(2) under the Exchange Act,[287] which governs minor rule violation plans. The Commission believes that BOX Rule 12140 is an effective way to discipline a member for a minor violation of a rule. The Commission believes that the Exchange's proposal to add rules related to BSTX to the list of rules that are eligible for minor rule violation plan treatment is consistent with the Exchange Act because it may help the Exchange's ability to better carry out its oversight and enforcement responsibilities.

In approving the proposed changes to the Exchange's MRVP, the Commission in no way minimizes the importance of complying with the Exchange's rules and all other rules subject to fines under BOX Rule 12140 and proposed BSTX Rule 24010. The Commission believes that a violation of any SRO's rules, as well as Commission rules, is a serious matter. However, BOX Rule 12140 and proposed BSTX Rule 24010 provide a reasonable means of addressing rule violations that may not rise to the level of requiring formal disciplinary proceedings, while providing greater flexibility in handling certain violations. Consistent with its rules and the requirements of the Exchange Act, the Commission expects that the Exchange will continue to conduct surveillance with due diligence and make a determination based on its findings, on a case-by-case basis, whether a fine of more or less than the recommended amount is appropriate for a violation under BOX Rule 12140 and proposed BSTX Rule 24010 or whether a violation requires formal disciplinary action.

*Section 11(a) of the Exchange Act*

Section 11(a)(1) of the Exchange Act[288] prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises investment discretion (collectively, ''covered accounts'') unless an exception applies. Rule 11a2–2(T) under the Exchange Act,[289] known as the ''effect versus execute'' rule, provides exchange members with an exemption from the Section 11(a)(1) prohibition. Rule 11a2–2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute transactions on the exchange. To comply with Rule 11a2–2(T)'s conditions, a member: (i) Must transmit the order from off the exchange floor; (ii) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution;[290] (iii) may not be affiliated with the executing member; and (iv) with respect to an account over which the member or an associated person has investment discretion, neither the member nor its associated person may retain any compensation in connection with effecting the transaction except as provided in the Rule.

In a letter to the Commission, the Exchange requests that the Commission concur with the Exchange's conclusion that Exchange members that enter orders into the BSTX System satisfy the conditions of Rule 11a2–2(T).[291] For the reasons set forth below, the Commission believes that members entering orders into the BSTX System could satisfy the requirements of Rule 11a2–2(T).

The Rule's first condition is that orders for covered accounts be transmitted from off the exchange floor. In the context of automated trading

[277] *See* Amendment No. 2, *supra* note 9, at 144.

[278] *See id.*

[279] *See* OIP, *supra* note 7, 86 FR at 49449. The Exchange states that it currently does this for options. *See id.*

[280] *See id.*

[281] *See id.* at 49433. The Exchange represents that it intends to join the LULD Plan prior to the commencement of trading Securities. *See id.*

[282] *See* proposed BSTX Rule 25080(b)(3).

[283] *See* proposed BSTX Rule 25050. *See also supra* note 125 (discussing how proposed BSTX Rule 25050 is substantially similar to the rules of other national securities exchanges adopted in connection with the LULD Plan).

[284] *See* 15 U.S.C. 78f(b)(5).

[285] 15 U.S.C. 78f(b)(1).

[286] 15 U.S.C. 78f(b)(6) and (b)(7).

[287] 17 CFR 240.19d–1(c)(2).

[288] 15 U.S.C. 78k(a)(1).

[289] 17 CFR 240.11a2–2(T).

[290] This prohibition also applies to associated persons. The member may, however, participate in clearing and settling the transaction.

[291] *See* Letter from Lisa Fall, President, BOX, dated December 23, 2021 (''BSTX 11(a) Letter'') available on the Commission's website at: *https://www.sec.gov/comments/sr-box-2021-06/srbox202106-20110741-264607.pdf.*

systems, the Commission has found that the off-floor transmission condition is met if a covered account order is transmitted from a remote location directly to an exchange's floor by electronic means.[292] The Exchange has represented that BSTX does not have a physical trading floor, and the BSTX System will receive orders from members electronically through remote terminals or computer-to-computer interfaces.[293] The Commission believes that the BSTX System satisfies this off-floor transmission condition.

The second condition states that the member and any associated person not participate in the execution of its order after the order has been transmitted. The Exchange has represented that at no time following the submission of an order is a member or an associated person of the member able to acquire control or influence over the result or timing of the order's execution.[294] According to the Exchange, the execution of a member's order is determined solely by what quotes and orders are present in the BSTX System at the time the member submits the order, and the order priority based on the BSTX rules.[295] Accordingly, the Commission believes that a member and its associated persons do not participate in the execution of an order submitted to the BSTX System.

The third condition states that the order be executed by an exchange member who is unaffiliated with the member initiating the order. The Commission has stated that this condition is satisfied when automated exchange facilities are used, as long as the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange.[296] The Exchange has represented that the design of the BSTX System ensures that no member has any special or unique trading advantage in the handling of its orders after transmitting its orders to the Exchange.[297] Based on the Exchange's representation that the design of the BSTX System ensures that no member has any special or unique trading advantage in the handling of its orders after transmitting its orders to BSTX, the Commission believes that the BSTX System satisfies this condition of Rule 11a2–2(T).

Fourth, in the case of a transaction effected for an account with respect to which the initiating member or an associated person thereof exercises investment discretion, neither the initiating member nor any associated person thereof may retain any compensation in connection with effecting the transaction, unless the person authorized to transact business for the account has expressly provided otherwise by written contract referring to Section 11(a) of the Exchange Act and Rule 11a2–2(T) thereunder.[298] Members trading for covered accounts over which they exercise investment discretion must comply with this condition in order to rely on the rule's exemption.[299]

## IV. Solicitation of Comments on Amendment Nos. 2 and 3 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment Nos. 2 and 3 are consistent with the Exchange Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BOX–2021–06 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–BOX–2021–06. 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

[292] *See, e.g.,* Securities Exchange Act Release Nos. 78101 (June 17, 2016), 81 FR 41141 (June 23, 2016) (order approving IEX exchange registration); 75650 (August 7, 2015), 80 FR 48600 (August 13, 2015) (order approving EDGX Options as an options trading facility of the EDGX Exchange, Inc.); 61419 (January 26, 2010), 75 FR 5157 (February 1, 2010) (order approving the BATS Options as an options trading facility of the BATS Exchange, Inc.); 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004) (order approving the Boston Options Exchange as an options trading facility of the Boston Stock Exchange); 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (order approving Archipelago Exchange as electronic trading facility of the Pacific Exchange); 29237 (May 24, 1991), 56 FR 24853 (May 31, 1991) (regarding NYSE's Off-Hours Trading Facility); 15533 (January 29, 1979), 44 FR 6084 (January 31, 1979) (''1979 Release''); and 14563 (March 14, 1978), 43 FR 11542 (March 17, 1978) (''1978 Release'') (regarding NYSE's Designated Order Turnaround System).

[293] *See* BSTX 11(a) Letter, *supra* note 291, at 3.

[294] *See id.* at 4.

[295] *See id.* The Exchange states that a member may cancel or modify the order, or modify the instructions for executing the order, provided such cancellations or modifications are transmitted from off an exchange floor. *See id.* at 3 (citing the 1978 Release). The Commission has stated that the non-participation requirement is satisfied under such circumstances, so long as such modifications or cancellations are also transmitted from off the floor. *See* 1978 Release, *supra* note 292 (stating that the ''non-participation requirement does not prevent initiating members from canceling or modifying orders (or the instructions pursuant to which the initiating member wishes orders to be executed) after the orders have been transmitted to the executing member, provided that any such instructions are also transmitted from off the floor'').

[296] In considering the operation of automated execution systems operated by an exchange, the Commission has stated that while there is not an independent executing exchange member, the execution of an order is automatic once it has been transmitted into the system. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution requirement of Rule 11a2–2(T). *See* 1979 Release, *supra* note 292.

[297] *See* BSTX 11(a) Letter, *supra* note 291, at 4. The Exchange also states that access to the BSTX Market Data Blockchain will not allow a member or an associated person of such member to acquire control or influence over the result or timing of an order's execution. *See id.*

[298] 17 CFR 240.11a2–2(T)(a)(2)(iv). In addition, Rule 11a2–2(T)(d) requires a member or associated person authorized by written contract to retain compensation, in connection with effecting transactions for covered accounts over which such member or associated persons thereof exercises investment discretion, to furnish at least annually to the person authorized to transact business for the account a statement setting forth the total amount of compensation retained by the member in connection with effecting transactions for the account during the period covered by the statement. *See* 17 CFR 240.11a2–2(T)(d). *See also* 1978 Release, *supra* note 292 (stating ''[t]he contractual and disclosure requirements are designed to assure that accounts electing to permit transaction-related compensation do so only after deciding that such arrangements are suitable to their interests'').

[299] *See* BSTX 11(a) Letter, *supra* note 291, at 4–5.

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–BOX–2021–06, and should be submitted on or before February 23, 2022.

## V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment Nos. 2 and 3

The Commission finds good cause to approve the proposed rule change, as modified by Amendment Nos. 2 and 3, prior to the thirtieth day after the date of publication of notice of the filing of Amendment Nos. 2 and 3 in the **Federal Register**. The Commission notes that the original proposal and the proposal as modified by Amendment No. 1 were published for comment in the **Federal Register**.[300]

In Amendment No. 2, the Exchange revised the proposal to: (i) Provide additional information regarding the connectivity and co-location services that will be offered at the Exchange's primary data center, including equidistant cabling arrangements; (ii) state that, pursuant to its authority under proposed BSTX Rule 26101, the Exchange would not permit an issuer to list a new class of securities on BSTX that is not distinct from an existing class of securities of the issuer; (iii) modify proposed rule text regarding the proposed BSTX Market Data Blockchain to clarify that non-BSTX Participants will have access to anonymized, general market data and specify what fields are included in this data, to specify that the market data will apply to trading activity for regular trading hours, and to clarify that users will view the data through an application programming interface; (iv) modify proposed rule text related to the proposed order parameter that would be used to preference T+0 settlement to add the T+0 Cut-Off Time by which an execution must occur to be eligible for T+0 settlement; (v) provide additional description to clarify operation of the proposed BSTX Market Data Blockchain and proposed optional order parameter for T+0 or T+1 settlement; and (vi) make technical and conforming changes. The Commission believes that these changes help to clarify the proposal and address concerns raised by commenters regarding the Exchange's equidistant cabling arrangements and the potential for listing a class of securities that has the same economic and voting rights as a class of securities listed on another national securities exchange. The Commission also believes that the changes regarding General Market Data on the BSTX Market Data Blockchain help to clarify access for non-BSTX Participants and how the Exchange will anonymize the data. The Commission further believes that the addition of the T+0 Cut-Off Time will help to ensure that trades submitted to NSCC for T+0 settlement are received by NSCC before NSCC's cut-off time and thus can be settled using the consolidated net settlement process, and that the additional explanation regarding the order parameter for T+0 and T+1 settlement helps to clarify how this functionality will operate.

In addition, the Exchange made several changes in Amendment No. 2 to bring the proposed rules into closer alignment with the rules of other national securities exchanges on which equities securities are traded, including by: (i) Modifying certain trading rules regarding securities eligible for trading, prohibitions against trading ahead of customer orders, round lots, minimum price variants, auctions used to open or reopen trading, the dissemination of market data concerning such auctions, risk controls, market maker registration process and obligations, business conduct, trading practices, maintaining books and records, off-exchange transactions, scope of the MRVP, trade reporting and the dissemination of quotations, clearly erroneous executions, and locking and crossing quotations; (ii) eliminating a proposed rule regarding an audit trail that has been superseded by rules pertaining to the Consolidated Audit Trail; (iii) modifying certain proposed listing standards regarding the listing of secondary classes and preferred stock, the required number of market makers, requirements for securities of foreign issuers that would apply to the listing of Canadian issuers, the listing of securities subject to an exemption from Exchange Act registration, the method of computing the payment of cash in lieu of fractional shares, the settlement timing of securities transactions, requirements to notify the Exchange before engaging in activities relating to a proxy contest, requirements that listed companies establish and maintain an internal audit function, the calculation of regulatory transaction fees under Section 31 of the Exchange Act, and the distribution of funds in the event of liquidation of the Exchange; and (iv) eliminating a proposed listing requirement that an applicant provide a legal opinion that its security qualifies as a security under applicable United States securities laws. The Exchange also made changes in Amendment Nos. 2 and 3 to certain quantitative listing requirements to comply with the thresholds and other terminology in Rule 3a51–1. The Commission believes that these changes help make these aspects of the proposal substantially similar to the existing rules of national securities exchanges.

Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,[301] to approve the proposed rule change, as modified by Amendment Nos. 2 and 3, on an accelerated basis.

## VI. Conclusion

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Exchange Act[302] and Rule 19d–1(c)(2) thereunder,[303] that the proposed rule change (SR–BOX–2021–06), as modified by Amendment Nos. 2 and 3 thereto, be, and it hereby is, approved on an accelerated basis.

Although the Commission's approval of the proposed rule change is final, and the proposed rules are therefore effective, it is further ordered that the operation of BSTX is conditioned on the satisfaction of the requirements below:

A. *Participation in National Market System Plans Relating to Equities Trading.* BOX must join all relevant national market system plans related to BSTX equities trading, including: (1) The Consolidated Tape Association Plan, the Consolidated Quotation Plan, and the Nasdaq UTP Plan (or any successors thereto); (2) the National Market System Plan to Address Extraordinary Market Volatility; and (3) the National Market System Plan Establishing Procedures Under Rule 605 of Regulation NMS.

B. *Regulatory Services Agreement and Rule 17d–2 Agreements.* BOX must ensure that all necessary changes are made to its Regulatory Services Agreement with FINRA and must be a party to the multi-party Rule 17d–2 agreements applicable to BSTX equities trading and equities market surveillance.

C. *Intermarket Surveillance Group.* BOX must ensure that its membership in the Intermarket Surveillance Group extends to the BSTX facility.

D. *Governance Structure.* BOX must ensure, consistent with the requirements of Section 19(b) and Rule 19b–4, that it has adopted a rule establishing BSTX as a facility of the Exchange.[304]

[300] *See* Notice, *supra* note 3; OIP, *supra* note 7.

[301] 15 U.S.C. 78f(b)(2).

[302] 15 U.S.C. 78s(b)(2).

[303] 17 CFR 240.19d–1(c)(2).

[304] *See also supra* note 12 and accompanying text.

[305] 17 CFR 200.30–3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[305]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022–02086 Filed 2–1–22; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–94088; File Nos. SR–MIAX–2021–59, SR–PEARL–2021–57]**

## Self-Regulatory Organizations; Miami International Securities Exchange, LLC, MIAX PEARL, LLC; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Changes To Amend the Fee Schedules To Adopt a Tiered-Pricing Structure for Certain Connectivity Fees

January 27, 2022.

### I. Introduction

On December 1, 2021, Miami International Securities Exchange LLC, LLC (''MIAX'') and MIAX PEARL, LLC (''MIAX Pearl'') (collectively, the ''Exchanges'') each filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change (File Numbers SR–MIAX–2021–59 and SR–PEARL–2021–57) to amend the MIAX Fee Schedule and MIAX Pearl Options Fee Schedule (collectively, the ''Fee Schedules'') to adopt a tiered pricing structure for certain connectivity fees. The proposed rule changes were immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] The proposed rule changes were published for comment in the **Federal Register** on December 20, 2021.[4] Under Section 19(b)(3)(C) of the Act,[5] the Commission is hereby: (i) Temporarily suspending File Numbers SR–MIAX–2021–59 and SR–PEARL–2021–57; and (ii) instituting proceedings to determine whether to approve or disapprove File Numbers SR–MIAX–2021–59 and SR–PEARL–2021–57.

### II. Background and Description of the Proposed Rule Changes

MIAX and the MIAX Pearl options facility have a shared connectivity infrastructure that permits Members and non-Members to connect directly to either or both of the Exchanges, and thereby access the associated Exchanges' trading platforms, market data systems, test systems, and disaster recovery facilities via a single, shared connection.[6] Prior to implementation of the proposed rule changes, a market participant connecting to the primary or secondary facility of either or both of the Exchanges options platforms via a 10 gigabit ultra-low latency (''10Gb ULL'') fiber connection was assessed a monthly fee of $10,000 per connection.[7] The Exchanges proposes to modify their respective Fee Schedules to adopt a tiered pricing structure for 10Gb ULL fiber connections as follows:

- $9,000 each for the 1st and 2nd 10Gb ULL connections;
- $11,000 each for the 3rd and 4th 10Gb ULL connections; and
- $13,000 for each additional connection 10Gb ULL connection.[8]

These fees (the ''Proposed Access Fees'') are assessed in any month the Member or non-Member is credentialed to use any of the Exchanges' APIs or market data feeds in the Exchanges' production environment, pro-rated when a Member or non-Member adds or deletes a connection.[9]

### III. Suspension of the Proposed Rule Changes

Pursuant to Section 19(b)(3)(C) of the Act,[10] at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,[11] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (''SRO'') 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. As discussed below, the Commission believes a temporary suspension of the proposed rule changes is necessary and appropriate to allow for additional analysis of the proposed rule changes' consistency with the Act and the rules thereunder.

In support of the proposals, the Exchanges argue that the proposed tiered pricing structure for 10Gb ULL connections is reasonable, equitable, and not unfairly discriminatory because the new tiers result in a majority of 10Gb ULL purchasers either saving money or paying the same amount.[12] As discussed further below, the Exchanges state that ''a higher fee to a Member or non-Member that utilizes numerous connections is directly related to the increased costs the Exchange incurs in providing and maintaining those additional connections.'' [13] The Exchanges also maintain that the tiered pricing structure will encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchanges and should better enable the Exchanges to monitor and provide access to the Exchanges' network to ensure sufficient capacity and headroom in the System.[14]

In further support of the proposals, the Exchanges argue that the Proposed Access Fees are reasonable because they will permit recovery of the Exchange's costs in providing the associated services and will not result in the Exchange generating a supra-

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as ''establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.'' 15 U.S.C. 78s(b)(3)(A)(ii).

[4] *See* Securities Exchange Act Release Nos. 93775 (December 14, 2021), 86 FR 71996 (''MIAX Notice''); 93774 (December 14, 2021), 86 FR 71952 (''Pearl Notice''). For ease of reference, citations to statements generally applicable to both notices are to the MIAX Notice.

[5] 15 U.S.C. 78s(b)(3)(C).

[6] *See* MIAX Notice, *supra* note 4 at 71998.

[7] *See id.* 1Gb connections to the primary/secondary facility, and 1Gb and 10Gb connections to the disaster recovery facility are subject to separate monthly charges that are not affected by the proposed rule changes. As the MIAX Pearl filing relates only the MIAX Pearl Options Fee Schedule, fees for the MIAX Pearl Equities facility also are outside the scope of the proposed rule changes.

[8] The Exchanges initially filed the proposed fee changes on July 30, 2021. *See* Securities Exchange Act Release Nos. 92643 (August 11, 2021), 86 FR 46034 (August 17, 2021) (SR–MIAX–2021–35), 92644 (August 11, 2021), 86 FR 46055 (August 17, 2021) (SR–PEARL–2021–36). These filings were withdrawn by the Exchanges. The Exchanges filed new proposed fee changes with additional justification (SR–MIAX–2021–41 and SR–PEARL–2021–45), which were the subject of a Suspension of and Order Instituting Proceedings. *See* Securities Exchange Act Release No. 93639 (November 22, 2021), 86 FR 67758 (November 29, 2021). The Exchanges subsequently withdrew those filings and replaced them with the instant filings to provide additional information and a revised justification for the proposal, which is discussed herein. *See* Securities Exchange Act Release No. 93733 (December 7, 2021), 86 FR 71108 (December 14, 2021) (Notice of Withdrawal); *see also* MIAX Notice and Pearl Notice, *supra* note 4 at 71997, 71984, respectively.

[9] *See* MIAX Notice, *supra* note 4, at 71998. The Exchanges state that they deem connectivity fees to be access fees, and records these fees as part of its ''Access Fees'' revenue in its financial statements. *Id.* at 71999.

[10] 15 U.S.C. 78s(b)(3)(C).

[11] 15 U.S.C. 78s(b)(1).

[12] *See* MIAX Notice, *supra* note 4, at 72004. The Exchanges state that approximately 80% of the firms that purchased at least one 10Gb ULL connection experienced a decrease in their monthly connectivity fees, while approximately 20% of firms experienced an increase in their monthly connectivity fees. *See id.*

[13] *See id.*

[14] *See* MIAX Notice, *supra* note 4, at 72004.

competitive profit.[15] Specifically, the Exchanges state that the Proposed Access Fees are based on a ''cost-plus model,'' designed to result in ''cost recovery plus present the possibility of a reasonable return.'' [16] According to the Exchanges, employing a ''conservative methodology'' that ''strictly considers only those costs that are most clearly directly related to the provision and maintenance of 10Gb ULL connectivity,'' they estimate the total projected 2021 cost to offer 10Gb ULL connections at $15.9 million, representing $3.9 in third-party cost and $12 million in internal cost.[17] To arrive at these figures, the Exchanges state that they undertook a thorough internal analysis of nearly every expense on each Exchanges' general expense ledger to determine whether each such expense related to the Proposed Access Fees, and, if such expense did so relate, to determine what portion (or percentage) of such expense supported the access services.[18] They state that this process entailed discussions with each Exchange department head to identify the expenses that support the access services associated with the Proposed Access Fees, review of the expenses holistically on an Exchange-wide level with assistance from the internal finance department, and then assessment of the total expense, with no expense allocated twice.[19]

The Exchanges state that the $3.9 million projected 2021 third-party expense is the sum of fees paid to: (1) Equinix, for data center services (approximately 62% of the Exchanges' total applicable Equinix expense); (2) Zayo Group Holdings, Inc. for network services (approximately 62%); (3) various other services providers, including ''Secure Financial Transaction Infrastructure'' (''SFTI'') (approximately 75%); and (4) various other hardware and software providers (approximately 51%).[20] Likewise, the Exchanges state that the $12 million projected 2021 internal expense, is the sum of: (1) Employee compensation and benefits expense allocated to the Proposed Access Fees ($6.1 million, which is 28% of the total projected expense of $12.6 million for MIAX and $9.2 million for MIAX Pearl for employee compensation and benefits);[21] (2) depreciation and amortization expense allocated to the Proposed Access Fees ($5.3 million, which the Exchanges estimated as 70% of the total projected expense of $4.8 million for MIAX and $2.9 million for MIAX Pearl for depreciation and amortization); and (3) occupancy expense ($0.6 million, which the Exchanges estimated as 53% of the Exchanges' total projected expense of $0.6 million for MIAX and $0.5 million for MIAX Pearl for occupancy). Converting the projected annualized expense figure to a monthly figure, the Exchanges estimate an average monthly cost of offering the services associated with the Proposed Access Fees at $1,325,000.[22]

Regarding revenue, the Exchanges represent that revenue for the month of October 2021 was approximately $1,684,000 (including pro-rated charges), attributable to the purchase of 154 10Gb ULL connections at the proposed tiered rates. Accordingly, the Exchanges calculated a $359,000 monthly profit for October 2021 and a profit margin of 21.3%. As a baseline, the Exchanges used revenue for July 2021 before introduction of the Proposed Access Fees, which they represented was $1,547,620, attributable to the purchases of a total of 156 10Gb ULL connections, to calculate the baseline monthly profit margin of 14.4%.

The Exchanges maintain that a 6.9% profit margin increase from July 2021 (before introduction of the Proposed Access Fees) to October 2021 (after the introduction of the Proposed Access Fees) is reasonable.[23] They also argue that a 21.3% rate of return is reasonable because it will allow them to ''to continue to recoup [their] expenses and continue to invest in [their] technology infrastructure.'' [24] They add that this profit margin does not take into account: (i) Fluctuations in revenue as a result of Members and non-Members adding and dropping connections at any time based on their own business decisions, which they frequently do; (ii) future price increases from third parties; and (iv) inflationary pressure on capital items that they need to purchase to maintain the Exchanges' technology and systems, which have resulted in price increases upwards of 30% on network equipment due to supply chain shortages, and in turn result in higher overall costs associated with ongoing system maintenance.[25] In addition, although they do not assert that competitive forces constrain the Proposed Access Fees, they maintain that the Proposed Access Fees are reasonable when compared to the fees of other options exchanges, as the Exchanges' proposed fees for 10Gb ULL connections even at the proposed highest tier are lower than those of other options exchanges with similar market share.[26]

As noted above, the Exchanges also argue that the tiered structure of the Proposed Access Fees results in an equitable allocation of fees that are not unfairly discriminatory, noting that after implementation of the Proposed Access Fees, a majority of 10Gb ULL purchasers either were saving money or paying the same amount.[27] They further explain that firms that primarily route orders for best execution generally only need a limited number of connections to fulfill that obligation and connectivity costs will likely to be lower for these firms.[28] Addressing the fee increases experienced by some 10Gb ULL purchasers, the Exchanges urge that the increases for these firms are justified because the new fees ''apply to all

[15] *See id.* at 71998, 72003.

[16] *See id.* at 71999.

[17] *See id.* at 72001. The 2021 costs are projected because each Exchange's most recent Audited Unconsolidated Financial Statement is for 2020, with projections utilizing the same presentation methodology as used in their previously-filed Audited Financial Statements. *See id.* at 72000.

[18] *See id.* at 72001. The Exchanges also state that expenses associated with the MIAX Pearl equities market are accounted for separately. *See id.;* Pearl Notice at 71957.

[19] *See id.* The Exchanges also state that the $15.9 million in expense is ''directly related to the access services associated with the Proposed Access Fees, and not any other product or service offered by the Exchange or MIAX Pearl, and does not include general costs of operating matching engines and other trading technology. *Id.* at 72001.

[20] *See id.* at 72001.

[21] For employee compensation and benefit costs, for example, the Exchanges included the time spent by employees of several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development (who create the business requirement documents that the Technology staff use to develop network features and enhancements), Trade Operations, Finance (who provide billing and accounting services relating to the network), and Legal (who provide legal services relating to the network, such as rule filings and various license agreements and other contracts). *See id.* at 72002.

[22] *See id.* at 72003.

[23] *See id.* at 72003.

[24] *Id.*

[25] *Id.* at 72000.

[26] *Id.* at 72005. The Exchanges assert that when compared to fees charged by and market shares (for the month of November 2021, as of November 26, 2021) for The NASDAQ Stock Market LLC (''Nasdaq''), Nasdaq ISE LLC (''ISE''), Nasdaq PHLX LLC (''Phlx''), and NYSE American LLC, that the Exchanges' proposed tiered-pricing structure is ''significantly lower'' than these competing options exchanges with similar market share. *Id.* For example, the Exchanges state that the affiliated exchanges Nasdaq, ISE and Phlx charge a monthly fee of $10,000 per 10Gb fiber connection and $15,000 per 10Gb Ultra fiber connection, while the highest tier of the Exchanges' proposed fee structure is $2,000 less per month. *Id.*

[27] *See* MIAX Notice, *supra* note 4, at 72004. The Exchanges state that approximately 80% of the firms that purchased at least one 10Gb ULL connection experienced a decrease in their monthly connectivity fees, while approximately 20% of firms experienced an increase in their monthly connectivity fees as a result of the proposed tiered-pricing structure when compared to the flat monthly fee structure. *See id.*

[28] *See id.* at 72004.

Members and non-Members in the same manner based on the amount of 10Gb ULL connectivity they require based on their own business decisions and usage of Exchange resources.'' [29] They explain that the firms experiencing higher fees are those engaged in advanced trading strategies that typically require multiple connections and generate higher costs for the Exchanges by utilizing more of the Exchanges' resources.[30] Responding to prior comment that the Exchanges had not demonstrated that a firm purchasing more than two or four 10Gb ULL connections would use Exchange resources at a greater rate per connection than those purchasing fewer, the Exchanges state that ''more connections purchased by a firm likely results in greater expenditure of Exchange resources and increased cost to the Exchange.'' [31] The Exchanges describe firms that primarily route orders seeking best-execution and purchase only a limited number of connections as those that ''also generally send less orders and messages over those connections, resulting in less strain on Exchange resources.'' [32] In contrast the Exchanges describe firms that purchase more than two to four 10Gb ULL connections as those that ''essentially do so for competitive reasons amongst themselves and choose to utilize numerous connections based on their business needs and desire to attempt to access the market quicker by using the connection with the least amount of latency.'' [33] According to the Exchanges, these firms are generally engaged in sending liquidity-removing orders to the Exchange and seek to add more connections so they can access resting liquidity ahead of their competitors, and this type of usage of the 10Gb ULL connections is more costly to the Exchange, as a result of, among other things, frequently adding and dropping connections mid-month to determine which connections have the least latency, which results in increased costs to the Exchange to constantly make changes in the data center which results in ''disproportionate pull on Exchange resources to provide the additional connectivity.'' [34]

To date, the Commission has not received any comment letters on the revised justifications for the Proposed Access Fees.

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchanges' present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.[35] The instructions to Form 19b–4, on which exchanges file their proposed rule changes, specify that such statement ''should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.'' [36]

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities; [37] (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; [38] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[39]

In temporarily suspending the Exchanges' fee changes, the Commission intends to further consider whether the proposals to modify fees for certain connectivity options and implement a tiered pricing fee structure is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule changes satisfy the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[40]

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.[41]

## IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Changes

In addition to temporarily suspending the proposals, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C) [42] and 19(b)(2)(B) [43] of the Act to determine whether the Exchanges' proposed rule changes should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule changes. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule changes to inform the Commission's analysis of whether to approve or disapprove the proposed rule changes.

Pursuant to Section 19(b)(2)(B) of the Act,[44] the Commission is providing notice of the grounds for possible disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of whether the Exchanges have sufficiently demonstrated how the proposed rule changes are consistent with Sections 6(b)(4),[45] 6(b)(5),[46] and 6(b)(8) [47] of the Act. Section 6(b)(4) of the Act requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. Section 6(b)(5) of the Act requires that the rules of a national securities exchange be designed, among

[29] *See id.*

[30] *See id.* at 72004, 72006.

[31] *See id.* at 72004, 72008.

[32] *See id.* at 72004.

[33] *See id.*

[34] *See id.* at 72005.

[35] *See* 17 CFR 240.19b–4 (Item 3 entitled ''Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change'').

[36] *Id.*

[37] 15 U.S.C. 78f(b)(4).

[38] 15 U.S.C. 78f(b)(5).

[39] 15 U.S.C. 78f(b)(8).

[40] *See* 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

[41] For purposes of temporarily suspending the proposed rule changes, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[42] 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

[43] 15 U.S.C. 78s(b)(2)(B).

[44] 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *See id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. *See id.*

[45] 15 U.S.C. 78f(b)(4).

[46] 15 U.S.C. 78f(b)(5).

[47] 15 U.S.C. 78f(b)(8).

other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Section 6(b)(8) of the Act requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Commission asks that commenters address the sufficiency of the Exchanges' statements in support of the proposals, which are set forth in the MIAX Notice and the Pearl Notice, in addition to any other comments they may wish to submit about the proposed rule changes. In particular, the Commission seeks comment on the following aspects of the proposals and asks commenters to submit data where appropriate to support their views:

1. *Cost Estimates and Allocation.* The Exchanges state that they are not asserting that the Proposed Access Fees are constrained by competitive forces, but rather set forth a ''cost-plus model,'' employing a ''conservative methodology'' that ''strictly considers only those costs that are most clearly directly related to the provision and maintenance of 10Gb ULL connectivity to estimate such costs.'' [48] Setting forth their costs in providing 10Gb ULL connectivity, and as summarized in greater detail above, the Exchanges project $15.9 million in aggregate annual estimated costs for 2021 as the sum of: (1) $3.9 million in third-party expenses paid in total to Equinix (62% of the total applicable expense) for data center services; Zayo Group Holdings, for network services (62% of the total applicable expense); SFTI for connectivity support, Thompson Reuters, NYSE, Nasdaq, and Internap and others (75% of the total applicable expense) for content, connectivity services, and infrastructure services; and various other hardware and software providers (51% of the total applicable expense) supporting the production environment, and (2) $12 million in internal expenses, allocated to (a) employee compensation and benefit costs ($6.1 million, approximately 28% of the Exchanges' total applicable employee compensation and benefits expense); (b) depreciation and amortization ($5.3 million, approximately 70% of the Exchanges' total applicable depreciation and amortization expense); and (c) occupancy costs ($0.6 million, approximately 53% of the Exchanges' total applicable occupancy expense). Do commenters believe that the Exchanges have provided sufficient detail about how they determined which costs are most clearly directly associated with providing and maintaining 10Gb ULL connectivity? The Exchanges describe a process involving all Exchange department heads, including the finance department, but do not specify further what principles were applied in making these determinations or arriving at particular allocations. Do commenters believe further explanation is necessary? For employee compensation and benefit costs, for example, the Exchanges calculated an allocation of employee time in several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development, Trade Operations, Finance, and Legal, but do not provide the job titles and salaries of persons whose time was accounted for, or explain the methodology used to determine how much of an employee's time is devoted to that specific activity. What are commenters' views on whether the Exchanges have provided sufficient detail on the identity and nature of services provided by third parties? Across all of the Exchanges' projected costs, what are commenters' views on whether the Exchanges have provided sufficient detail on the elements that go into connectivity costs, including how shared costs are allocated and attributed to connectivity expenses, to permit an independent review and assessment of the reasonableness of purported cost-based fees and the corresponding profit margin thereon? Should the Exchanges be required to identify for what services or fees the remaining percentage of un-allocated expenses are attributable to (*e.g.,* what services or fees are associated with the 30% of applicable depreciation and amortization expenses the Exchanges do not allocate to the Proposed Access Fees)? Do commenters believe that the costs projected for 2021 are generally representative of expected costs going forward (to the extent commenters consider 2021 to be a typical or atypical year), or should an exchange present an estimated range of costs with an explanation of how profit margins could vary along the range of estimated costs?

2. *Revenue Estimates and Profit Margin Range.* The Exchanges provide a single monthly revenue figure as the basis for calculating the profit margin of 21.3%. Do commenters believe this is reasonable? If not, why not? The Exchanges state that their proposed fee structure is ''designed to cover [their] costs with a limited return in excess of such costs,'' and believes that a 21.3% margin is such a limited return over such costs.[49] The profit margin is also dependent on the accuracy of the cost projections which, if inflated (intentionally or unintentionally), may render the projected profit margin meaningless. The Exchanges acknowledge that this margin may fluctuate from month to month due to changes in the number of connections purchased, and that costs may increase.[50] The Exchanges do not account for the possibility of cost decreases, however. What are commenters' views on the extent to which actual costs (or revenues) deviate from projected costs (or revenues)? Do commenters believe that the Exchanges' methodology for estimating the profit margin is reasonable? Should the Exchanges provide a range of profit margins that they believe are reasonably possible, and the reasons therefor?

3. *Reasonable Rate of Return.* Do commenters agree with the Exchanges that their expected 21.3% profit margin would constitute a reasonable rate of return over cost for 10GB ULL connectivity? If not, what would commenters consider to be a reasonable rate of return and/or what methodology would they consider to be appropriate for determining a reasonable rate of return? What are commenters' views regarding what factors should be considered in determining what constitutes a reasonable rate of return for 10Gb ULL connectivity fees? Do commenters believe it relevant to an assessment of reasonableness that the Exchanges' proposed fees for 10Gb ULL connections, even at the highest tier, are lower than those of other options exchanges to which the Exchanges have compared the Proposed Access Fees? Should an assessment of reasonable rate of return include consideration of factors other than costs; and if so, what factors should be considered, and why?

4. *Periodic Reevaluation.* The Exchanges have not addressed whether they believe a material deviation from the anticipated profit margin would warrant the need to make a rule filing pursuant to Section 19(b) of the Act to increase or decrease the fees accordingly. In light of the impact that the number of subscribers has on connectivity profit margins, and the

[48] *See* MIAX Notice, *supra* note 4, at 71999 and n.28.

[49] *See* MIAX Notice, *supra* note 4, at 71999, 72000.

[50] *See id.*

potential for costs to decrease (or increase) over time, what are commenters' views on the need for exchanges to commit to reevaluate, on an ongoing and periodic basis, their cost-based connectivity fees to ensure that they stay in line with their stated profitability target and do not become unreasonable over time, for example, by failing to adjust for efficiency gains, cost increases or decreases, and changes in subscribers? How formal should that process be, how often should that reevaluation occur, and what metrics and thresholds should be considered? How soon after a new connectivity fee change is implemented should an exchange assess whether its subscriber estimates were accurate and at what threshold should an exchange commit to file a fee change if its estimates were inaccurate? Should an initial review take place within the first 30 days after a connectivity fee is implemented? 60 days? 90 days? Some other period?

5. *Tiered Structure for 10Gb ULL Connections.* The Exchanges state that the proposed tiered fee structure is designed to decrease the monthly fees for those firms that connect to the Exchange(s) as part of their best execution obligations and generally tend to send the least amount of orders and messages over those connections, because such firms generally only purchase a limited number of connections, and also ''generally send less orders and messages over those connections, resulting in less strain on Exchange resources.'' [51] According to the Exchanges, 80% of firms have not experienced a fee increase as a result of the tiered structure. However, firms that purchase five or more connections will see a 30% increase in their fees for each connection above the fourth. Regarding these firms, the Exchanges have not asserted that it is 30% more costly for the Exchanges to offer such connections to these firms, but instead argue generally that these firms are ''likely'' to result in greater expenditure of Exchange resources and increased cost to the Exchange.[52] Do commenters believe that the price differences between the tiers are supported by the Exchanges' assertions that it set the level of its proposed fees in a manner that it is equitable and not unfairly discriminatory? Do commenters believes the Exchanges should demonstrate how the proposed tiered fee levels correlate with tiered costs (*e.g.,* by providing cost information broken down by tier, messaging and order volumes through the additional 10Gb ULL connections by tier, and/or mid-month add/drop of connection rates by tier)? Do commenters believe that the Exchanges should provide more detail about the costs that firms purchasing three or more or five or more 10Gb ULL connections impose on the Exchanges, to permit an assessment of the Exchanges' statement that the Proposed Access Fees ''do not depend on any distinctions between Members, customers, broker-dealers, or any other entity, because they are solely determined by the individual Member's or non-Member's business needs and its impact on the Exchanges resources?'' [53]

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 [SRO] that proposed the rule change.'' [54] 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,[55] 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 Act and the applicable rules and regulations.[56] Moreover, ''unquestioning reliance'' on an SRO's representations in a proposed rule change would not be sufficient to justify Commission approval of a proposed rule change.[57]

The Commission believes it is appropriate to institute proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposals are consistent with the Act, any potential comments or supplemental information provided by the Exchanges, and any additional independent analysis by the Commission.

## V. Request for Written Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Sections 6(b)(4), 6(b)(5), and 6(b)(8), or any other provision of the Act, or the rules and regulations thereunder. The Commission asks that commenters address the sufficiency and merit of the Exchanges' statements in support of the proposals, in addition to any other comments they may wish to submit about the proposed rule changes. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[58]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposals should be approved or disapproved by February 23, 2022. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by March 9, 2022.

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 Nos. SR–MIAX–2021–59 and SR–PEARL–2021–57 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 Numbers SR–MIAX–2021–59 and SR–PEARL–2021–57. These file numbers 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 changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the

[51] *See* MIAX Notice, *supra* note 4, at 72004.

[52] *See id.*

[53] *See id.*

[54] 17 CFR 201.700(b)(3).

[55] *See id.*

[56] *See id.*

[57] *See Susquehanna Int'l Group, LLP* v. *Securities and Exchange Commission,* 866 F.3d 442, 446–47 (D.C. Cir. 2017) (rejecting the Commission's reliance on an SRO's own determinations without sufficient evidence of the basis for such determinations).

[58] 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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 filings also will be available for inspection and copying at the principal office of each 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 Numbers SR–MIAX–2021–59 and SR–PEARL–2021–57 and should be submitted on or before February 23, 2022. Rebuttal comments should be submitted by March 9, 2022.

## VI. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(3)(C) of the Act,[59] that File Numbers SR–MIAX–2021–59 and SR–PEARL–2021–57 be, and hereby are, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule changes should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[60]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022–02083 Filed 2–1–22; 8:45 am]

**BILLING CODE 8011–01–P**

[59] 15 U.S.C. 78s(b)(3)(C).

[60] 17 CFR 200.30–3(a)(57) and (58).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–94086; File No. SR–NYSEAMER–2022–06]**

## Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the NYSE American Options Fee Schedule

January 27, 2022.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on January 21, 2022, 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, II, and III 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 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 the NYSE American Options Fee Schedule (the ''Fee Schedule'') regarding the Floor Broker Fixed Cost Prepayment Incentive Program. The Exchange proposes to implement the fee change effective January 21, 2022.[4] The proposed 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 purpose of this filing is to modify the Floor Broker Fixed Cost Prepayment Incentive Program (the ''FB Prepay Program''), a prepayment incentive program that allows Floor Broker organizations (each, a ''Floor Broker'') to prepay certain of their annual Eligible Fixed Costs in exchange for volume rebates, as set forth in the Fee Schedule.[5]

Currently, the FB Prepay Program offers participating Floor Brokers an opportunity to qualify for rebates by achieving growth in billable manual volume by a certain percentage as measured against one of two benchmarks (the ''Percentage Growth Incentive''). Specifically, the Percentage Growth Incentive is designed to encourage Floor Brokers to increase their average daily volume (''ADV'') in billable manual contract sides to qualify for a Tier; each Tier of the FB Prepay Program corresponds to an annual rebate equal to the greater of the ''Total Percentage Reduction of pre-paid annual Eligible Fixed Costs'' or the annualization of the monthly ''Alternative Rebate.'' [6] In either case, participating Floor Brokers receive their annual rebate amount in the following January.[7] Floor Brokers that wish to participate in the FB Prepay Program for the following calendar year must notify the Exchange no later than the last business day of December in the current year.[8]

As further described below, the Exchange proposes to modify the qualifying benchmarks, growth percentage requirements, and rebate amounts for the FB Prepay Program, and further proposes to offer Floor Brokers that participate in the FB Prepay Program additional per contract credits for certain QCC trades. The Exchange also proposes to adjust the basis for the calculation of a participating Floor Broker's Eligible Fixed Costs for the following calendar year.

The Exchange proposes to implement the fee changes effective January 21, 2022.

Proposed Rule Change

The Exchange proposes to modify the benchmarks that Floor Brokers that participate in the FB Prepay Program must meet to qualify for the Percentage Growth Incentive. Currently, to qualify for the Percentage Growth Incentive, a Floor Broker must increase their ADV for the calendar year above the greater

[4] The Exchange originally filed to amend the Fee Schedule on December 29, 2021 (SR–NYSEAmer–2021–50), with an effective date of January 3, 2022, then withdrew such filing and amended the Fee Schedule on January 12, 2022 (SR–NYSEAmer–2022–02), which latter filing the Exchange withdrew on January 21, 2022.

[5] *See* Fee Schedule, Section III.E.1, Floor Broker Fixed Cost Prepayment Incentive Program (the ''FB Prepay Program''), *available here: https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf.* ''Eligible Fixed Costs'' include monthly ATP Fees, the Floor Access Fee, and certain monthly Floor communication, connectivity, equipment and booth or podia fees, as set forth in the table in Section III.E.1.

[6] *See id.* The Percentage Growth Incentive excludes Customer volume, Firm Facilitation trades, and QCCs. Any volume calculated to achieve the Firm Monthly Fee Cap and the Strategy Execution Fee Cap, regardless of whether either of these caps is achieved, will likewise be excluded from the Percentage Growth Incentive because fees on such volume are already capped and therefore do not increase billable manual volume. *See id.*

[7] *See* Fee Schedule, Section III.E.1.

[8] *See id.*

of (1) 20,000 contract sides in billable manual ADV, or (2) 105% of the Floor Broker's total billable manual ADV in contract sides during the second half of 2017.[9] The Exchange proposes to modify each of the minimum thresholds to qualify for the Percentage Growth Incentive. Specifically, the Exchange proposes to (1) modify the first benchmark to increase the requisite minimum contract sides in billable manual ADV from 20,000 to 30,000, and (2) modify the second benchmark from 105% of the Floor Broker's total billable manual ADV in contract sides during the second half of 2017 (*i.e.,* July through December 2017) to the Floor Broker's total billable manual ADV in contract sides during the second half of 2020 (*i.e.,* July through December 2020).[10]

The Exchange believes that 30,000 ADV is a reasonable minimum threshold above which a participating Floor Broker would need to increase volume to earn a rebate under the FB Prepay Program, particularly in light of the increased options volume executed by Floor Brokers in the past year. The Exchange notes that Floor Brokers that are new to the Exchange would also be eligible to qualify for the Percentage Growth Incentive based on this minimum threshold. For Floor Brokers that exceed 30,000 ADV in growth, the Exchange believes that it is reasonable to continue to use each Floor Broker's historical volume as a benchmark against which to measure growth and also believes that updating the benchmark to account for the Floor Broker's more recent activity on the Exchange is reasonable. The Exchange further believes that, in light of the market volatility in the first half of 2020 and the unusually high volumes observed in 2021, Floor Broker activity in the second half of 2020 would be an appropriate benchmark against which to measure volume for purposes of the FB Prepay Program. All Floor Brokers that aim to achieve the rebate would still be required to increase volume executed on the Exchange, and the total annual rebate available for achieving each Tier would continue to be the same regardless of whether the Floor Broker qualifies based on growth over 30,000 ADV contract sides or its second half of 2020 volume, as proposed.

The Exchange also proposes to modify the growth requirement for Tier 2 to decrease the requirement from 30% to 20%. The Exchange further proposes to increase the Alternative Rebate amounts for all Tiers, as set forth in the table below. Finally, the Exchange proposes to eliminate Tier 4. The Exchange believes eliminating this Tier is reasonable in light of the proposed changes described above, including because Tier 3, as modified, would offer participating Floor Brokers an Alternative Rebate amount greater than the amount currently offered by Tier 4. The Exchange believes the proposed modifications would continue to incentivize Floor Brokers to participate in the FB Prepay Program by making Tier 2 more achievable and by enhancing the rebate amount available across all Tiers through the Alternative Rebate.

The following table reflects the proposed changes (with deletions in brackets and new text in italics):

FB PREPAYMENT PROGRAM INCENTIVES

[Based on annual ADV in contract sides for the calendar year]

| Tier | Percentage growth incentive | Total percentage reduction of pre-paid annual eligible fixed costs | Alternative rebate |
|---|---|---|---|
| Tier 1 | 5 | 10 | [$2,000] *$8,000*/month. |
| Tier 2 | [30] *20* | 50 | [$4,000] *$16,000*/month. |
| Tier 3 | 50 | 80 | [$8,000] *$24,000*/month. |
| [Tier 4 | 100 | 100 | $16,000/month] |

Thus, as proposed, a participating Floor Broker would qualify for the Percentage Growth Incentive by executing ADV growth in manual billable contract sides that is 5%, 20%, 50%, or 100% over the greater of (1) 30,000 contract sides ADV, or (2) 100% of their ADV during the second half of 2020 (*i.e.,* July through December 2020). A Floor Broker that participates in the FB Prepay Program and achieves a Percentage Growth Incentive Tier, as modified, will continue to be eligible for an annual rebate that is the greater of the ''Total Percentage Reduction of pre-paid annual Eligible Fixed Costs'' or the ''Alternative Rebate'' based on the Tier achieved. A Floor Broker that is new to the Exchange (or one that did not execute at least 30,000 contract sides in billable manual ADV in the second half of 2020) would continue to have the ability to qualify for the Percentage Growth Incentive by executing at least 30,000 contract sides in manual billable ADV, increased by the specified percentages during the year. The total rebate available for achieving each Tier would be the same regardless of whether the Floor Broker qualifies based on 100% of its second half of 2020 volume or the minimum 30,000 ADV contract sides benchmark.

The Exchange also proposes to provide participants in the FB Prepay Program with the opportunity to qualify for enhanced credits on QCC transactions. Specifically, Floor Brokers that participate in the FB Prepay Program and increase their QCC credit eligible contracts in a month by at least 20% over the greater of their second half of 2021 average monthly QCC credit eligible volume or 1,500,000 contracts will receive an additional credit of $0.04 per contract on the first 300,000 QCC credit eligible QCC trades and an additional credit of $0.01 per contract on all QCC credit eligible QCC trades above 300,000, subject to the monthly maximum credit per Floor Broker firm. The Exchange believes that the proposed credits would provide an additional incentive for Floor Brokers to participate in the FB Prepay Program.

Finally, the Exchange proposes to modify the date it will use for the calculation of a Floor Broker's Eligible Fixed Costs for the following calendar year. The FB Prepay Program currently specifies that a Floor Broker that commits to the program will be invoiced in January for Eligible Fixed Costs,

[9] *See* Fee Schedule, Section III.E.1, FLOOR BROKER FIXED COST PREPAYMENT INCENTIVE PROGRAM (the ''FB Prepay Program'').

[10] *See* proposed Fee Schedule, FLOOR BROKER FIXED COST PREPAYMENT INCENTIVE PROGRAM (the ''FB Prepay Program'').

based on annualizing their Eligible Fixed Costs incurred in the previous November.[11] The Exchange proposes to modify the Fee Schedule to specify that the annualization of Eligible Fixed Costs would be based on costs incurred in November 2020. The Exchange believes that Floor Brokers' costs as of November 2020 would more accurately reflect Eligible Fixed Costs for the coming calendar year based on anticipated fixed costs in 2022.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[13] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Proposed Rule Change Is Reasonable

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [14]

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[15] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in November 2021, the Exchange had less than 8% market share of executed volume of multiply-listed equity and ETF options trades.[16]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain options exchange transaction fees. Stated otherwise, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

The Exchange believes the proposed modifications to the FB Prepay Program are reasonable because participation in the program is optional, and Floor Brokers can elect to participate and seek to qualify for the Percentage Growth Incentive as they see fit. The Exchange also believes that the proposed change is reasonably designed to encourage Floor Brokers to provide liquidity on the Exchange, to continue to incent Floor Brokers to participate in the FB Prepay Program, and to ensure that Floor Brokers that are new to the Exchange (or Floor Brokers that did not execute more than 30,000 ADV in contract sides) could also participate in the program, including by continuing to offer two alternative means to achieve the same rebate at each Tier. The Exchange believes that 30,000 ADV is a reasonable minimum threshold above which a participating Floor Broker would need to increase volume in order to realize the proposed Percentage Growth Incentive (and is on a similar playing field with Floor Brokers that exceeded this volume requirement in 2020). For Floor Brokers that exceeded 30,000 ADV in the second half of 2020, the Exchange believes it is reasonable to use each Floor Broker's historical volume as a benchmark against which to measure future growth to achieve the Percentage Growth Incentive and further believes that activity in the second half of 2020 would provide an appropriate updated benchmark in light of the market volatility in the first half of 2020 and the unusually high volumes observed in 2021.

In addition, the Exchange believes that the proposed changes to the Percentage Growth Incentive are reasonable because they are designed to continue to incent Floor Broker participation in the FB Prepay Program by making Tier 2 more achievable and by offering increased rebate amounts and therefore are designed to encourage increased executions by Floor Brokers on the Exchange, which activity would benefit all market participants.

Moreover, the proposed change to offer participants in the FB Prepay Program credits on QCC transactions is reasonable because it would provide Floor Brokers with the opportunity to earn additional credits that they otherwise would not receive, based on their QCC trading activity. The Exchange believes that such credits would encourage Floor Brokers to increase both their billable volume and their QCC transactions executed on the Exchange, which would benefit all market participants by expanding liquidity and providing more trading opportunities, including to non-Floor Broker market participants (as well as participating Floor Brokers who do not reach the volume thresholds, as proposed).

The Exchange also believes that the proposed change with respect to the date used for the calculation of Eligible Fixed Costs is reasonable because it expects Floor Broker organizations' November 2020 costs to provide a more accurate basis for annualizing Eligible Fixed Costs for the coming calendar year based on anticipated fixed costs in 2022.

Finally, to the extent the proposed change continues to attract greater volume and liquidity to the Exchange Floor, the Exchange believes the proposed change would improve the Exchange's overall competitiveness and strengthen its market quality for all market participants. In the backdrop of the competitive environment in which the Exchange operates, the proposed rule change is a reasonable attempt by the Exchange to increase the depth of its market and improve its market share relative to its competitors.

[11] The Fee Schedule currently provides that the ''Exchange will not issue any refunds in the event that a Floor Broker organization's prepaid Eligible Fixed Costs exceeds such actual annual costs, except that the Exchange will refund certain of the prepaid Eligible Fixed costs that were waived for Qualifying Firms, as defined, and set forth in, Sections III.B and IV.'' *See* Fee Schedule, Section III.E.1, FLOOR BROKER FIXED COST PREPAYMENT INCENTIVE PROGRAM (the ''FB Prepay Program''). The Exchange proposes clarifying changes to (1) delete the word ''such'' from the description of actual Eligible Fixed Costs, and (2) delete the reference to the circumstances under which the Exchange would refund certain prepaid Eligible Fixed Costs, as the Fee Schedule no longer provides for a waiver to Qualifying Firms in connection with COVID–19 related considerations. *See* Securities Exchange Act Release No. 92559 (August 4, 2021), 86 FR 43700 (August 10, 2021) (SR–NYSEAmer–2021–34) (removing language from the Fee Schedule associated with COVID–19 related fee waivers).

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4) and (5).

[14] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7–10–04) (''Reg NMS Adopting Release'').

[15] The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, *available here: https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Monthly-Weekly-Volume-Statistics.*

[16] Based on a compilation of OCC data for monthly volume of equity-based options and monthly volume of ETF-based options, *see id.,* the Exchange's market share in equity-based options was 9.09% for the month of November 2020 and 7.06% for the month of November 2021.

The Proposed Rule Change Is an Equitable Allocation of Credits and Fees

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits. The proposal is based on the amount and type of business that Floor Brokers transact on the Exchange, and Floor Brokers are not obligated to participate in the FB Prepay Program or attempt to trade sufficient volume to qualify for one of the Percentage Growth Incentive Tiers. In addition, all participating Floor Brokers have the opportunity to qualify for the same rebate at each Tier through two alternatives means (*i.e.,* growth over the greater of at least 30,000 contract sides in billable ADV or the Floor Broker's total billable manual ADV in the second half of 2020). The Exchange also notes that the proposed changes are designed to encourage Floor Brokers that have previously enrolled in the FB Prepay Program to reenroll for the upcoming year, as well as to attract Floor Brokers that have not yet participated in the program.

Moreover, the Exchange believes that the proposed modifications to the FB Prepay Program are an equitable allocation of fees and credits because they would apply to participating Floor Brokers equally and are intended to encourage the important role performed by Floor Brokers in facilitating the execution of orders via open outcry and providing opportunities to obtain price improvement, a function which the Exchange wishes to support for the benefit of all market participants. The Exchange further believes that the proposed change with respect to the calculation of Eligible Fixed Costs is equitable because it would continue to be based on each Floor Broker organization's annualized costs and because the November 2020 basis for annualizing costs would provide a more accurate reflection of Eligible Fixed Costs for the coming calendar year based on anticipated fixed costs in 2022.

To the extent that the proposed change continues to incent Floor Brokers to participate in the FB Prepay Program and achieve the volume required to qualify for the Percentage Growth Incentive, the increased order flow would continue to make the Exchange a more competitive venue for, among other things, order execution. Similarly, to the extent the proposed change, and, in particular, the proposed additional credit for QCC transactions, encourages Floor Brokers to participate in a greater variety of transactions on the Exchange, the resulting increased order flow would likewise continue to make the Exchange a more competitive venue for order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange thereby improving market-wide quality and price discovery.

The Proposed Rule Change Is Not Unfairly Discriminatory

The Exchange believes the proposed modifications to the FB Prepay Program are not unfairly discriminatory because they would apply to all similarly-situated Floor Brokers. The proposal is based on the amount and type of business transacted on the Exchange, and Floor Brokers are not obligated to participate in the FB Prepay Program or try to achieve any of the Percentage Growth Incentive Tiers.

The Exchange also believes that the proposed change is not unfairly discriminatory to non-Floor Brokers because it is intended to encourage Floor Brokers to continue facilitating the execution of orders via open outcry and providing opportunities to obtain price improvement, a function that benefits all market participants.

To the extent that the proposed change continues to attract participation in the FB Prepay Program and incent Floor Brokers to increase volume to qualify for the Percentage Growth Incentive, the increased order flow would continue to make the Exchange a more competitive venue for, among other things, order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange thereby improving market-wide quality and price discovery.

In addition, to the extent that the proposed change attracts a variety of transactions to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange Floor, thereby improving market-wide quality and price discovery. The resulting increased volume and liquidity would provide more trading opportunities and tighter spreads to all market participants and thus would 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, protect investors and the public interest.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [17]

*Intramarket Competition.* The Exchange believes the proposed change will continue to incent Floor Brokers to participate in the FB Prepay Program and encourage order flow to be directed to the Exchange Floor, which would enhance the quality of quoting and may increase the volumes of contracts traded on the Exchange. To the extent that the proposed change imposes an additional competitive burden on non-Floor Brokers, the Exchange believes that any such burden would be appropriate because of Floor Brokers' important role in facilitating the execution of orders via open outcry and providing opportunities for price improvement, and the Exchange believes the proposed change is designed to encourage and support that function.

In addition, to the extent that the proposed change in fact encourages Floor Broker volume, all market participants should benefit from the improved market liquidity. Enhanced market quality and increased transaction volume that results from the anticipated increase in order flow directed to the Exchange will benefit all market participants and improve competition on the Exchange.

*Intermarket Competition.* The Exchange believes that the proposed change would promote competition

[17] *See* Reg NMS Adopting Release, *supra* note 14, at 37499.

between the Exchange and other execution venues by encouraging additional orders to be sent to the Exchange Floor for execution. The proposed modifications to the FB Prepay Program are designed to continue to incent Floor Broker participation in the program, including by making the incentives more achievable and increasing the amounts of the rebates available. The Exchange thus believes that the proposed change would continue to encourage Floor Brokers to execute orders on the Floor of the Exchange, which would increase volume and liquidity, to the benefit of all market participants by providing more trading opportunities and tighter spreads.

Given the robust competition for volume among options markets, implementing programs to attract order flow, such as the proposed modifications to the FB Prepay Program, are consistent with the above-mentioned goals of the Act.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [18] of the Act and subparagraph (f)(2) of Rule 19b–4 [19] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

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 under Section 19(b)(2)(B) [20] of the Act to determine whether the proposed rule change should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEAMER–2022–06 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–2022–06. 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–2022–06, and should be submitted on or before February 23, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022–02081 Filed 2–1–22; 8:45 am]

**BILLING CODE 8011–01–P**

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f)(2).

[20] 15 U.S.C. 78s(b)(2)(B).

[21] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–94089; File No. SR–EMERALD–2021–42]**

## Self-Regulatory Organizations; MIAX Emerald, LLC; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Change To Amend the MIAX Emerald Fee Schedule To Adopt a Tiered Pricing Structure for Certain Connectivity Fees

January 27, 2022.

**I. Introduction**

On December 1, 2021, MIAX Emerald, LLC (''MIAX Emerald'' 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'' or ''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change (File Number SR–EMERALD–2021–42) to amend the Exchange's Fee Schedule (''Fee Schedule'') to adopt a tiered pricing structure for certain connectivity fees. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] The proposed rule change was published for comment in the **Federal Register** on December 20, 2021.[4] Under Section 19(b)(3)(C) of the Act,[5] the Commission is hereby: (i) Temporarily suspending File Number SR–EMERALD–2021–42; and (ii) instituting proceedings to determine whether to approve or disapprove File Number SR–EMERALD–2021–42.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as ''establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.'' 15 U.S.C. 78s(b)(3)(A)(ii).

[4] *See* Securities Exchange Act Release No. 93776 (December 14, 2021), 86 FR 71983 (''Notice'').

[5] 15 U.S.C. 78s(b)(3)(C).

## II. Background and Description of the Proposed Rule Change

MIAX Emerald has a connectivity infrastructure that permits Members and non-Members to connect directly to the Exchange, and access the Exchange's trading platforms, market data systems, test systems, and disaster recovery facilities.[6] Prior to implementation of the proposed rule change, a market participant connecting to the primary or secondary facility of the Exchange options platform via a 10 gigabit ultra-low latency (''10Gb ULL'') fiber connection was assessed a monthly fee of $10,000 per connection.[7] The Exchange proposes to modify the Fee Schedule to adopt a tiered pricing structure for 10Gb ULL fiber connections as follows:

- $9,000 each for the 1st and 2nd 10Gb ULL connections;
- $11,000 each for the 3rd and 4th 10Gb ULL connections; and
- $13,000 for each additional connection 10Gb ULL connection.[8]

These fees (the ''Proposed Access Fees'') are assessed in any month the Member or non-Member is credentialed to use any of the Exchange's APIs or market data feeds in the Exchange's production environment, pro-rated when a Member or non-Member adds or deletes a connection.[9]

## III. Suspension of the Proposed Rule Changes

Pursuant to Section 19(b)(3)(C) of the Act,[10] at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,[11] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (''SRO'') 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. As discussed below, the Commission believes a temporary suspension of the proposed rule changes is necessary and appropriate to allow for additional analysis of the proposed rule changes' consistency with the Act and the rules thereunder.

In support of the proposal, the Exchange argues that the proposed tiered pricing structure for 10Gb ULL connections is reasonable, equitable, and not unfairly discriminatory because the new tiers result in a majority of 10Gb ULL purchasers either saving money or paying the same amount.[12] As discussed further below, the Exchange states that ''a higher fee to a Member or non-Member that utilizes numerous connections is directly related to the increased costs the Exchange incurs in providing and maintaining those additional connections.''[13] The Exchange also maintains that the tiered pricing structure will encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchange and should better enable the Exchange to monitor and provide access to the Exchange's network to ensure sufficient capacity and headroom in the System.[14]

In further support of the proposal, the Exchange argues that the Proposed Access Fees are reasonable because they will permit recovery of the Exchange's costs in providing the associated services and will not result in the Exchange generating a supra-competitive profit.[15] Specifically, the Exchange states that the Proposed Access Fees are based on a ''cost-plus model,'' designed to result in ''cost recovery plus present the possibility of a reasonable return.''[16] According to the Exchange, employing a ''conservative methodology'' that ''strictly considers only those costs that are most clearly directly related to the provision and maintenance of 10Gb ULL connectivity,'' it estimates the total projected 2021 cost to offer 10Gb ULL connections at $7.2 million, representing $1.7 million in third-party cost and $5.5 million in internal cost.[17] To arrive at these figures, the Exchange states that it undertook a thorough internal analysis of nearly every expense on each Exchange's general expense ledger to determine whether each such expense related to the Proposed Access Fees, and, if such expense did so relate, to determine what portion (or percentage) of such expense supported the access services.[18] The Exchange states that this process entailed discussions with each Exchange department head to identify the expenses that support the access services associated with the Proposed Access Fees, review of the expenses holistically on an Exchange-wide level with assistance from the internal finance department, and then assessment of the total expense, with no expense allocated twice.[19]

The Exchange states that the $1.7 million projected 2021 third-party expense is the sum of fees paid to: (1) Equinix, for data center services (approximately 62% of the Exchange's total applicable Equinix expense); (2) Zayo Group Holdings, Inc. for network services (approximately 62%); (3) various other services providers, including ''Secure Financial Transaction Infrastructure'' (''SFTI'') (approximately 89%); and (4) various other hardware and software providers (approximately 51%).[20] Likewise, the Exchange states that the $5.5 million projected 2021 internal expense, is the sum of: (1) Employee compensation and benefits expense allocated to the Proposed Access Fees ($3.2 million, which is 33% of the total projected expense of $9.7 million for employee compensation and benefits);[21] (2)

[6] *See* Notice, *supra* note 4 at 71984.

[7] *See id.* 1Gb connections to the primary/secondary facility, and 1Gb and 10Gb connections to the disaster recovery facility are subject to separate monthly charges that are not affected by the proposed rule changes.

[8] The Exchange initially filed the proposed fee change on July 30, 2021. *See* Securities Exchange Act Release No. 92645 (August 11, 2021), 86 FR 46048 (August 17, 2021) (SR–EMERALD–2021–23). That filing was withdrawn by the Exchange. The Exchange filed new proposed fee changes with additional justification (SR–EMERALD–2021–29), which were the subject of a Suspension of and Order Instituting Proceedings. *See* Securities Exchange Act Release No. 93644 (November 22, 2021), 86 FR 67750 (November 29, 2021). The Exchange subsequently withdrew that filing and replaced it with the instant filing to provide additional information and a revised justification for the proposal, which is discussed herein. *See* Securities Exchange Act Release No. 93736 (December 7, 2021), 86 FR 70878 (December 13, 2021) (Notice of Withdrawal); *see also* Notice, *supra* note 4 at 71984.

[9] *See* Notice, *supra* note 4, at 71985. The Exchange state that it deems connectivity fees to be access fees, and records these fees as part of its ''Access Fees'' revenue in its financial statements. *Id.* at 71985.

[10] 15 U.S.C. 78s(b)(3)(C).

[11] 15 U.S.C. 78s(b)(1).

[12] *See* Notice, *supra* note 4, at 71990. The Exchange states that approximately 60% of the firms that purchased at least one 10Gb ULL connection experienced a decrease in their monthly connectivity fees, while approximately 40% of firms experienced an increase in their monthly connectivity fees. *See id.* at 71991.

[13] *See id.*

[14] *See* Notice, *supra* note 4, at 71992.

[15] *See id.* at 71985, 71987.

[16] *See id.* at 71986.

[17] *See id.* at 71986, 71987, 71988, 71989. The 2021 costs are projected because the Exchange's most recent Audited Unconsolidated Financial Statement is for 2020, with projections utilizing the same presentation methodology as used in their previously-filed Audited Financial Statements. *See id.* at 71986.

[18] *See id.* at 71986.

[19] *See id.* at 71987. The Exchange also states that the $7.2 million in expense is ''directly related to the access services associated with the Proposed Access Fees, and not any other product or service offered by the Exchange, and does not include general costs of operating matching engines and other trading technology. *Id.* at 71987.

[20] *See id.* at 71988–99.

[21] For employee compensation and benefit costs, for example, the Exchange included the time spent by employees of several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development (who create the business requirement documents that the Technology staff use to develop network features

Continued

depreciation and amortization expense allocated to the Proposed Access Fees ($2 million, which the Exchange estimated as 63% of the total projected expense of $3.1 million for depreciation and amortization); and (3) occupancy expense ($0.3 million, which the Exchange estimated as 53% of the Exchange's total projected expense of $0.5 million for occupancy). Converting the projected annualized expense figure to a monthly figure, the Exchange estimates an average monthly cost of offering the services associated with the Proposed Access Fees at $600,000.[22]

Regarding revenue, the Exchange represents that revenue for the month of October 2021 was approximately $1,146,714 (including pro-rated charges), attributable to the purchase of 100 10Gb ULL connections at the proposed tiered rates. Accordingly, the Exchange calculated a $546,714 monthly profit for October 2021 and a profit margin of 47%. As a baseline, the Exchange used revenue for July 2021 before introduction of the Proposed Access Fees, which it represented was $971,905, attributable to the purchases of a total of 98 10Gb ULL connections, to calculate the baseline monthly profit margin of 38%.

The Exchange maintains that a 9% profit margin increase from July 2021 (before introduction of the Proposed Access Fees) to October 2021 (after the introduction of the Proposed Access Fees) is reasonable.[23] The Exchange also argues that a 47% rate of return is reasonable because it will allow them to ''to continue to recoup its expenses and continue to invest in its technology infrastructure.'' [24] The Exchange adds that this profit margin does not take into account: (i) Fluctuations in revenue as a result of Members and non-Members adding and dropping connections at any time based on their own business decisions, which they frequently do; (ii) future price increases from third parties; and (iv) inflationary pressure on capital items that it needs to purchase to maintain the Exchange's technology and systems, which have resulted in price increases upwards of 30% on network equipment due to supply chain shortages, and in turn result in higher overall costs associated with ongoing system maintenance.[25] In addition, although the Exchange does not assert that competitive forces constrain the Proposed Access Fees, it maintains that the Proposed Access Fees are reasonable when compared to the fees of other options exchanges, as the Exchange's proposed fees for 10Gb ULL connections even at the proposed highest tier are lower than those of other options exchanges with similar market share.[26]

As noted above, the Exchange also argues that the tiered structure of the Proposed Access Fees results in an equitable allocation of fees that are not unfairly discriminatory, noting that after implementation of the Proposed Access Fees, a majority of 10Gb ULL purchasers either were saving money or paying the same amount.[27] The Exchange further explains that firms that primarily route orders for best execution generally only need a limited number of connections to fulfill that obligation and connectivity costs will likely to be lower for these firms.[28] Addressing the fee increases experienced by some 10Gb ULL purchasers, the Exchange urges that the increases for these firms are justified because the new fees ''apply to all Members and non-Members in the same manner based on the amount of 10Gb ULL connectivity they require based on their own business decisions and usage of Exchange resources.'' [29] The Exchange explains that the firms experiencing higher fees are those engaged in advanced trading strategies that typically require multiple connections and generate higher costs for the Exchange by utilizing more of the Exchange's resources.[30] Responding to prior comment that the Exchange had not demonstrated that a firm purchasing more than two or four 10Gb ULL connections would use Exchange resources at a greater rate per connection than those purchasing fewer, the Exchange states that ''more connections purchased by a firm likely results in greater expenditure of Exchange resources and increased cost to the Exchange.'' [31] The Exchange describes firms that primarily route orders seeking best-execution and purchase only a limited number of connections as those that ''also generally send less orders and messages over those connections, resulting in less strain on Exchange resources.'' [32] In contrast the Exchange describes firms that purchase more than two to four 10Gb ULL connections as those that ''essentially do so for competitive reasons amongst themselves and choose to utilize numerous connections based on their business needs and desire to attempt to access the market quicker by using the connection with the least amount of latency.'' [33] According to the Exchange, these firms are generally engaged in sending liquidity-removing orders to the Exchange and seek to add more connections so they can access resting liquidity ahead of their competitors, and this type of usage of the 10Gb ULL connections is more costly to the Exchange, as a result of, among other things, frequently adding and dropping connections mid-month to determine which connections have the least latency, which results in increased costs to the Exchange to constantly make changes in the data center which results in ''disproportionate pull on Exchange resources to provide the additional connectivity.'' [34]

To date, the Commission has not received any comment letters on the revised justifications for the Proposed Access Fees.

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.[35] The instructions to Form 19b–4, on which exchanges file their proposed rule changes, specify that such statement ''should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.'' [36]

and enhancements), Trade Operations, Finance (who provide billing and accounting services relating to the network), and Legal (who provide legal services relating to the network, such as rule filings and various license agreements and other contracts). *See id.* at 71989.

[22] *See id.* at 71990.

[23] *See id.*

[24] *Id.*

[25] *Id.* at 71986–87 and 71990.

[26] *Id.* at 71992. The Exchange asserts that when compared to fees charged by and market shares (for the month of November 2021, as of November 26, 2021) for The NASDAQ Stock Market LLC (''Nasdaq''), Nasdaq ISE LLC (''ISE''), Nasdaq PHLX LLC (''Phlx''), and NYSE American LLC, the Exchange's proposed tiered pricing structure is ''significantly lower'' than these competing options exchanges with similar market share. *Id.* For example, the Exchange states that the affiliated exchanges Nasdaq, ISE and Phlx charge a monthly fee of $10,000 per 10Gb fiber connection and $15,000 per 10Gb Ultra fiber connection, while the highest tier of the Exchange's proposed fee structure is $2,000 less per month. *Id.*

[27] *See id.* at 71991. The Exchange state that approximately 60% of the firms that purchased at least one 10Gb ULL connection experienced a decrease in their monthly connectivity fees, while approximately 40% of firms experienced an increase in their monthly connectivity fees as a result of the proposed tiered pricing structure when compared to the flat monthly fee structure. *See id.*

[28] *See id.* at 71991.

[29] *See id.*

[30] *See id.*

[31] *See id.*

[32] *See id.*

[33] *See id.*

[34] *See id.* at 71991–92.

[35] *See* 17 CFR 240.19b–4 (Item 3 entitled ''Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change'').

[36] *Id.*

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;[37] (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;[38] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[39]

In temporarily suspending the Exchange's fee changes, the Commission intends to further consider whether the proposals to modify fees for certain connectivity options and implement a tiered pricing fee structure is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule changes satisfy the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[40]

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.[41]

## IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)[42] and 19(b)(2)(B)[43] of the Act to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[44] the Commission is providing notice of the grounds for possible disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of whether the Exchange has sufficiently demonstrated how the proposed rule change is consistent with Sections 6(b)(4),[45] 6(b)(5),[46] and 6(b)(8)[47] of the Act. Section 6(b)(4) of the Act requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. Section 6(b)(5) of the Act requires that the rules of a national securities exchange be designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Section 6(b)(8) of the Act requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following aspects of the proposals and asks commenters to submit data where appropriate to support their views:

1. *Cost Estimates and Allocation.* The Exchange states that it is not asserting that the Proposed Access Fee are constrained by competitive forces, but rather sets forth a ''cost-plus model,'' employing a ''conservative methodology'' that ''strictly considers only those costs that are most clearly directly related to the provision and maintenance of 10Gb ULL connectivity to estimate such costs.''[48] Setting forth its costs in providing 10Gb ULL connectivity, and as summarized in greater detail above, the Exchange projects $7.2 million in aggregate annual estimated costs for 2021 as the sum of: (1) $1.7 million in third-party expenses paid in total to Equinix (62% of the total applicable expense) for data center services; Zayo Group Holdings, for network services (62% of the total applicable expense); SFTI for connectivity support, Thompson Reuters, NYSE, Nasdaq, and Internap and others (89% of the total applicable expense) for content, connectivity services, and infrastructure services; and various other hardware and software providers (51% of the total applicable expense) supporting the production environment, and (2) $5.5 million in internal expenses, allocated to (a) employee compensation and benefit costs ($3.2 million, approximately 33% of the Exchange's total applicable employee compensation and benefits expense); (b) depreciation and amortization ($2 million, approximately 63% of the Exchange's total applicable depreciation and amortization expense); and (c) occupancy costs ($0.3 million, approximately 53% of the Exchange's total applicable occupancy expense). Do commenters believe that the Exchange has provided sufficient detail about how it determined which costs are most clearly directly associated with providing and maintaining 10Gb ULL connectivity? The Exchange describes a process involving all Exchange department heads, including the finance department, but do not specify further what principles were applied in making these determinations or arriving at particular allocations. Do commenters believe further explanation is necessary? For employee compensation and benefit costs, for example, the Exchange calculated an allocation of employee time in several departments, including

[37] 15 U.S.C. 78f(b)(4).

[38] 15 U.S.C. 78f(b)(5).

[39] 15 U.S.C. 78f(b)(8).

[40] *See* 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

[41] For purposes of temporarily suspending the proposed rule changes, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[42] 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

[43] 15 U.S.C. 78s(b)(2)(B).

[44] 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *See id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. *See id.*

[45] 15 U.S.C. 78f(b)(4).

[46] 15 U.S.C. 78f(b)(5).

[47] 15 U.S.C. 78f(b)(8).

[48] *See* Notice, *supra* note 4, at 71986 and n.28.

Technology, Back Office, Systems Operations, Networking, Business Strategy Development, Trade Operations, Finance, and Legal, but did not provide the job titles and salaries of persons whose time was accounted for, or explain the methodology used to determine how much of an employee's time is devoted to that specific activity. What are commenters' views on whether the Exchange has provided sufficient detail on the identity and nature of services provided by third parties? Across all of the Exchange's projected costs, what are commenters' views on whether the Exchange has provided sufficient detail on the elements that go into connectivity costs, including how shared costs are allocated and attributed to connectivity expenses, to permit an independent review and assessment of the reasonableness of purported cost-based fees and the corresponding profit margin thereon? Should the Exchange be required to identify for what services or fees the remaining percentage of un-allocated expenses are attributable to (*e.g.,* what services or fees are associated with the 37% of applicable depreciation and amortization expenses the Exchange does not allocate to the Proposed Access Fees)? Do commenters believe that the costs projected for 2021 are generally representative of expected costs going forward (to the extent commenters consider 2021 to be a typical or atypical year), or should an exchange present an estimated range of costs with an explanation of how profit margins could vary along the range of estimated costs?

2. *Revenue Estimates and Profit Margin Range.* The Exchange provides a single monthly revenue figure as the basis for calculating the profit margin of 47%. Do commenters believe this is reasonable? If not, why not? The Exchange states that their proposed fee structure is ''designed to cover its costs with a limited return in excess of such costs,'' and believes that a 47% margin is such a limited return over such costs.[49] The profit margin is also dependent on the accuracy of the cost projections which, if inflated (intentionally or unintentionally), may render the projected profit margin meaningless. The Exchange acknowledges that this margin may fluctuate from month to month due to changes in the number of connections purchased, and that costs may increase.[50] The Exchange does not account for the possibility of cost decreases, however. What are commenters' views on the extent to which actual costs (or revenues) deviate from projected costs (or revenues)? Do commenters believe that the Exchange's methodology for estimating the profit margin is reasonable? Should the Exchange provide a range of profit margins that it believes are reasonably possible, and the reasons therefor?

3. *Reasonable Rate of Return.* Do commenters agree with the Exchange that its expected 47% profit margin would constitute a reasonable rate of return over cost for 10GB ULL connectivity? If not, what would commenters consider to be a reasonable rate of return and/or what methodology would they consider to be appropriate for determining a reasonable rate of return? What are commenters' views regarding what factors should be considered in determining what constitutes a reasonable rate of return for 10Gb ULL connectivity fees? Do commenters believe it relevant to an assessment of reasonableness that the Exchange's proposed fees for 10Gb ULL connections, even at the highest tier, are lower than those of other options exchanges to which the Exchange has compared the Proposed Access Fees? What are commenters' views regarding the difference in profit margins between the Exchange, at 47%, and that of its affiliates (MIAX and PEARL Options), at 21.3%? Do commenters believe that this profit margin difference between affiliates for the same Proposed Access Fees is appropriate given the Exchange's Proposed Access Fees are not for shared 10Gb ULL connectivity; why or why not? Should an assessment of reasonable rate of return include consideration of factors other than costs; and if so, what factors should be considered, and why?

4. *Periodic Reevaluation.* The Exchange has not addressed whether it believes a material deviation from the anticipated profit margin would warrant the need to make a rule filing pursuant to Section 19(b) of the Act to increase or decrease the fees accordingly. In light of the impact that the number of subscribers has on connectivity profit margins, and the potential for costs to decrease (or increase) over time, what are commenters' views on the need for exchanges to commit to reevaluate, on an ongoing and periodic basis, their cost-based connectivity fees to ensure that they stay in line with their stated profitability target and do not become unreasonable over time, for example, by failing to adjust for efficiency gains, cost increases or decreases, and changes in subscribers? How formal should that process be, how often should that reevaluation occur, and what metrics and thresholds should be considered? How soon after a new connectivity fee change is implemented should an exchange assess whether its subscriber estimates were accurate and at what threshold should an exchange commit to file a fee change if its estimates were inaccurate? Should an initial review take place within the first 30 days after a connectivity fee is implemented? 60 days? 90 days? Some other period?

5. *Tiered Structure for 10Gb ULL Connections.* The Exchange states that the proposed tiered fee structure is designed to decrease the monthly fees for those firms that connect to the Exchange as part of their best execution obligations and generally tend to send the least amount of orders and messages over those connections, because such firms generally only purchase a limited number of connections, and also ''generally send less orders and messages over those connections, resulting in less strain on Exchange resources.'' [51] According to the Exchange, 60% of firms have not experienced a fee increase as a result of the tiered structure. However, firms that purchase five or more connections will see a 30% increase in their fees for each connection above the fourth. Regarding these firms, the Exchange has not asserted that it is 30% more costly for the Exchange to offer such connections to these firms, but instead argue generally that these firms are ''likely'' to result in greater expenditure of Exchange resources and increased cost to the Exchange.[52] Do commenters believe that the price differences between the tiers are supported by the Exchange's assertion that it set the level of its proposed fees in a manner that it is equitable and not unfairly discriminatory? Do commenters believe the Exchange should demonstrate how the proposed tiered fee levels correlate with tiered costs (*e.g.,* by providing cost information broken down by tier, messaging and order volumes through the additional 10Gb ULL connections by tier, and/or mid-month add/drop of connection rates by tier)? Do commenters believe that the Exchange should provide more detail about the costs that firms purchasing three or more or five or more 10Gb ULL connections impose on the Exchange, to permit an assessment of the Exchange's statement that the Proposed Access Fees ''do not depend on any distinctions between Members, customers, broker-dealers, or any other entity, because they are solely determined by the individual Member's or non-Member's

[49] *See* Notice, *supra* note 4, at 71986, 71990.

[50] *See id.*

[51] *See* Notice, *supra* note 4, at 71991.

[52] *See id.*

business needs and its impact on the Exchange resources?'' [53]

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 [SRO] that proposed the rule change.'' [54] 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,[55] 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 Act and the applicable rules and regulations.[56] Moreover, ''unquestioning reliance'' on an SRO's representations in a proposed rule change would not be sufficient to justify Commission approval of a proposed rule change.[57]

The Commission believes it is appropriate to institute proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposals are consistent with the Act, any potential comments or supplemental information provided by the Exchange, and any additional independent analysis by the Commission.

## V. Request for Written Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Sections 6(b)(4), 6(b)(5), and 6(b)(8), or any other provision of the Act, or the rules and regulations thereunder. The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[58]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by February 23, 2022. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by March 9, 2022.

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 No. SR–EMERALD–2021–42 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–2021–42. 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 changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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 filings also will be available for inspection and copying at the principal office of each 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–2021–42 and should be submitted on or before February 23, 2022. Rebuttal comments should be submitted by March 9, 2022.

## VI. Conclusion

*It is therefore ordered,* pursuant to Section 19(b)(3)(C) of the Act,[59] that File Number SR–EMERALD–2021–42 be, and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[60]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022–02084 Filed 2–1–22; 8:45 am]

**BILLING CODE 8011–01–P**

[53] *See id.*

[54] 17 CFR 201.700(b)(3).

[55] *See id.*

[56] *See id.*

[57] *See Susquehanna Int'l Group, LLP* v. *Securities and Exchange Commission,* 866 F.3d 442, 446–47 (D.C. Cir. 2017) (rejecting the Commission's reliance on an SRO's own determinations without sufficient evidence of the basis for such determinations).

[58] 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[59] 15 U.S.C. 78s(b)(3)(C).

[60] 17 CFR 200.30–3(a)(57) and (58).

# SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–94075; File No. SR–NYSE–2022–03]**

## Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt a Listing Standard for Rights

January 27, 2022.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on January 13, 2022, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

## I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt a listing standard for rights. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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

Listed companies sometimes seek to raise capital from their existing shareholders by granting rights to subscribe for additional shares of the issuer's listed securities to all shareholders of record. The issuer may elect to make its rights either transferrable or non-transferable and may wish to have transferrable rights traded on the Exchange. Historically, the Exchange has traded short-term rights (*i.e.,* rights with a subscription period of less than 90 days) pursuant to Section 703.03 of the NYSE Listed Company Manual (''Manual'') on an unlisted basis.[4]

While Section 703.03 provides for the unlisted trading of short-term rights, it does not enable the issuer to list such rights on the Exchange. Nor does the Manual currently provide any mechanism for the trading or listing of rights with a life of 90 days or longer. The Exchange proposes to amend Section 703.12 of the Manual, which currently provides for the listing of warrants, to create a proposed Part (II) of that rule. Part (I) of Section 703.12, as amended, would consist of the current warrant listing provisions, while proposed Part (II) would set forth new listing requirements for rights.[5]

For purposes of proposed Section 703.12(II), the term ''rights'' refers to the privilege offered to holders of record of issued equity securities to subscribe (usually on a pro rata basis) for additional securities of the same class.

Under proposed Section 703.12(II), to be listed on the Exchange, rights must be issued to purchase or receive a security that is already listed on the Exchange or that will be listed concurrent with the rights. The rights holders would not be entitled to any privileges of the holders of common stock (*e.g.,* dividends, preemptive rights, or voting rights). If the rights are exercisable into listed common stock, the listing of the rights and the underlying common stock would be subject to the NYSE shareholder approval policy as set forth in Section 312.00 of the Manual.

For initial listing, rights would need to meet the following requirements under proposed Section 703.12(II):

(1) At least 400,000 issued;

(2) The underlying security must be listed on the Exchange; and

(3) At least 100 public holders of round lots.

The proposed rule would state that, for purposes of such rule, ''public holders'' excludes holders that are directors, officers, or their immediate families and holders of other concentrated holdings of 10 percent or more of the company's total outstanding shares.

The Exchange notes that the numerical requirements set forth above are identical to those included in Nasdaq's rule for the listing of rights on Nasdaq Capital Market.[6] The Exchange also notes that the Nasdaq listing provisions for rights would currently enable an NYSE-listed company to list its rights on Nasdaq, while such a company would not currently be able to list its rights on the NYSE.

Proposed Section 703.12(II) would provide that the continued listing of rights is contingent on the underlying security remaining listed on the Exchange. If the security underlying a listed right ceased to be listed on the Exchange, the Exchange would promptly initiate suspension and delisting procedures with respect to the listed rights.[7] In such case, the issuer of the listed rights would not be eligible to avail itself of the provisions of Sections 802.02 and 802.03, and any such listed rights would be subject to delisting procedures as set forth in Section 804.00.

The proposed listing standard would note that the general instructions for preparation and filing of a listing application are described in Section 703.01. The proposed listing standard would also note that the form of listing application and information regarding supporting documents required in connection with the listing of rights are available on the Exchange's website or from the Exchange upon request.

The Exchange notes that its proposed listing standards for rights differ from the those of Nasdaq Capital Market in two respects:

First, Nasdaq Marketplace Rules 5515 and 5560 require, respectively, a listed right to have at least three registered and active market makers at the time of initial listing and a continued listing requirement to have at least two registered and active market makers, one of which may be a market maker entering a stabilizing bid. The Exchange has not included these requirements, as they are not applicable to our market model, in which the rights would be allocated to a Designated Market Maker for trading.

Second, the applicable Nasdaq Capital Market rules provide that a right may be listed if the underlying security is listed on Nasdaq or is a Covered Security and will be subject to delisting if that ceases to be the case. The Exchange's proposal provides that rights may only be listed as an initial matter (and remain listed) if the underlying security is listed on the NYSE and not if it is a Covered Security. The Exchange has taken this approach to be consistent with its existing requirements for the listing of warrants and also because Covered Securities listed on other exchanges are subject to lower initial and continued listing standards than are applicable to NYSE listed securities.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act'') generally.[8] Section 6(b)(5)[9] requires, among other things, that exchange rules 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 facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect the public interest and the interests of investors, promote just and equitable principles of trade and that they are not designed to

[4] When trading unlisted short-term rights under Section 703.03 of the Manual, the Exchange relies on the exemption from Exchange Act Section 12(a) registration requirements provided under Exchange Act Rule 12a–4.

[5] The Exchange proposes to change a reference in Part (I) of Section 703.12 from ''Para. 312.00'' to ''Section 312.00'' to conform to references elsewhere within the rule.

[6] *See* Nasdaq Marketplace Rule 5515.

[7] Specifically, the Exchange would immediately suspend trading in the rights upon delisting of the underlying security and would not trade the rights pending completion of any appeal by the issuer.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

permit unfair discrimination between issuers, brokers or dealers.

The Exchange believes that the proposal is designed to protect the public interest and the interests of investors, by providing a listed trading market for the shareholders of NYSE listed companies who receive transferable rights from the issuer and who would otherwise not have the ability to list the rights on the same exchange as the underlying securities.

The Exchange notes that the requirements of the proposed rule are identical to those for the listing of rights on Nasdaq Capital Market as set forth in Sections 5515 and 5560 of the Nasdaq Marketplace rules, with the exception of the provisions described above with respect to market makers and the ability to list rights where the underlying security is a Covered Security not listed on the exchange listing the rights. The Exchange believes that these differences are consistent with the protection of investors and the public interest because: (i) The market maker requirement is irrelevant to the NYSE market model, in which the rights will be allocated to a Designated Market Maker for trading; and (ii) as other exchanges have continued listing standards for equity securities that are less stringent than those of the NYSE, the approach of excluding rights with respect to Covered Securities listed on other markets ensures that rights can only be listed with respect to underlying securities that are qualified for listing on the NYSE. Furthermore, the Exchange believes that it is not unfairly discriminatory to limit the listing of rights to those with respect to NYSE listed equities, as the purpose is not to discriminate among issuers, but rather to enhance investor protection by ensuring that rights can only be listed if the underlying security meets the more stringent continued listing standards applied by the NYSE.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposal would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. There would be no burden on competition among companies listed on the NYSE, as all NYSE-listed companies would be able to list their rights under the same rule provisions. Similarly, the proposed rule would not impose any burden on intermarket competition, as any rights that could be listed under the proposed rule would also be eligible for listing on Nasdaq. The Exchange believes the proposal enhances competition for listing by providing issuers with a choice of listing venues between the NYSE and Nasdaq when they list their rights. The Exchange believes that limiting the listing of rights to those with respect to NYSE listed equities does not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act, as the purpose is not to discriminate among issuers, but rather to enhance investor protection by ensuring that rights can only be listed if the underlying security meets the more stringent continued listing standards applied by the NYSE.

*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 [10] and Rule 19b–4(f)(6) thereunder.[11]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act [12] normally does not become operative for 30 days after the date of its filing. However, pursuant to Rule 19b–4(f)(6)(iii),[13] 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 to allow the Exchange to list rights that would qualify for listing under the proposed rule prior to the expiration of the 30-day operative delay. The Exchange states that such waiver would be consistent with the protection of investors and the public interest because the proposed rule change is substantially similar to the rules of another national securities exchange.[14] For this reason, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.[15]

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 (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2022–03 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2022–03. 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 (*https://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

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 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.

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] *See supra* note 6, and accompanying text.

[15] 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).

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2022–03, and should be submitted on or before February 23, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022–02076 Filed 2–1–22; 8:45 am]

**BILLING CODE 8011–01–P**

[16] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–94087; File Nos. SR–MIAX–2021–60, SR–EMERALD–2021–43]**

## Self-Regulatory Organizations; Miami International Securities Exchange, LLC, MIAX Emerald, LLC; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Changes To Amend Fee Schedules To Adopt Tiered-Pricing Structures for Additional Limited Service MIAX and MIAX Emerald Express Interface Ports

January 27, 2022.

### I. Introduction

On December 1, 2021, Miami International Securities Exchange, LLC (''MIAX'') and MIAX Emerald, LLC (''MIAX Emerald'') (each an ''Exchange''; collectively, the ''Exchanges'') each filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change (File Numbers SR–MIAX–2021–60 and SR–EMERALD–2021–43) to amend the MIAX Options Fee Schedule and MIAX Emerald Fee Schedule (collectively, the ''Fee Schedules'') to adopt a tiered-pricing structure for additional limited service express interface ports. Each proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] The proposed rule changes were published for comment in the **Federal Register** on December 20, 2021.[4] Under Section 19(b)(3)(C) of the Act,[5] the Commission is hereby: (i) Temporarily suspending File Numbers SR–MIAX–2021–60 and SR–EMERALD–2021–43; and (ii) instituting proceedings to determine whether to approve or disapprove File Numbers SR–MIAX–2021–60 and SR–EMERALD–2021–43.

### II. Background and Description of the Proposed Rule Changes

Limited Service MIAX Express Interface Ports and Limited Service MIAX Emerald Express Interface Ports (collectively, ''Limited Service MEI Ports'') provide Market Makers[6] with the ability to send eQuotes and quote purge messages, and are also capable of receiving administrative information.[7] Currently, each Exchange allocates two Limited Service MEI Ports, free of charge, per matching engine to which a Market Maker connects. Market Makers may request additional Limited Service MEI Ports for each matching engine to which they connect for an additional monthly fee for each such additional port. Prior to the proposed rule changes, each Exchange charged a flat $100 monthly fee for each such additional port. Each Exchange has proposed to adopt a tiered-pricing structure.[8] For both MIAX and MIAX Emerald, the first and second Limited Service MEI Ports for each matching engine would remain free of charge. For MIAX, the additional Limited Service MEI Port fees for each matching engine would increase from $100 to: (i) $150 for the third and fourth Limited Service MEI Ports; (ii) $200 for the fifth and sixth Limited Service MEI Ports; and (iii) $250 for the seventh or more Limited Service MEI Ports.[9] For MIAX Emerald, the additional Limited Service MEI Port fees for each matching engine would increase from $100 to: (i) $200 for the third and fourth Limited Service MEI Ports; (ii) $300 for the fifth and sixth Limited Service MEI Ports; and (iii) $400 for the seventh to fourteenth Limited Service MEI Ports.[10]

### III. Suspension of the Proposed Rule Changes

Pursuant to Section 19(b)(3)(C) of the Act,[11] at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,[12] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (''SRO'') 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. As discussed below, the Commission believes a temporary suspension of the proposed rule changes is necessary and appropriate to allow for additional analysis of the proposed rule changes' consistency with the Act and the rules thereunder.

In support of the proposed tiered-pricing structures and associated fee increases, the Exchanges state that such fees (which they refer to as ''Proposed Access Fees'') are reasonable because

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as ''establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.'' 15 U.S.C. 78s(b)(3)(A)(ii).

[4] *See* Securities Exchange Act Release Nos. 93771 (December 14, 2021), 86 FR 71940 (December 20, 2021) (SR–MIAX–2021–60) (''MIAX Notice''); 93772 (December 14, 2021), 86 FR 71965 (December 20, 2021) (SR–EMERALD–2021–43) (''MIAX Emerald Notice''). For ease of reference, citations to statements generally applicable to both notices are to the MIAX Notice.

[5] 15 U.S.C. 78s(b)(3)(C).

[6] Defined at MIAX Rule 100 and MIAX Emerald Rule 100.

[7] *See, e.g.,* MIAX Notice, *supra* note 4, at 71941 n.15.

[8] The Exchanges initially filed the proposed fee changes on August 2, 2021. *See* Securities Exchange Act Release Nos. 92661 (August 13, 2021), 86 FR 46737 (August 19, 2021) (SR–MIAX–2021–37); 92662 (August 13, 2021), 86 FR 46726 (August 19, 2021) (SR–EMERALD–2021–25). These filings were withdrawn by the Exchanges. The Exchanges filed new proposed fee changes with additional justification (SR–MIAX–2021–43 and SR–EMERALD–2021–31, which were the subject of a Suspension of and Order Instituting Proceedings. *See* Securities Exchange Act Release No. 93640 (November 22, 2021), 86 FR 67745 (November 29, 2021). The Exchanges subsequently withdrew those filings and replaced them with the instant filings to provide additional information and a revised justification for the proposals, which are discussed herein. *See also* Securities Exchange Act Release No. 91857 (May 12, 2021), 86 FR 26973 (May 18, 2021) (MIAX–2021–19) (allowing purchase of any number of additional Limited Service MEI Ports and stating that, at a continued monthly fee of $100 for each additional port, the Exchange anticipates generating an annual loss from the provision).

[9] *See* MIAX Notice, *supra* note 4, at 71941.

[10] *See* MIAX Emerald Notice, *supra* note 4, at 71966–67. The MIAX Emerald Fee Schedule states that Market Makers are limited to twelve additional Limited Service MEI Ports per matching engine, for a total of fourteen per matching engine. *See* MIAX Emerald Fee Schedule 5.d.ii.

[11] 15 U.S.C. 78s(b)(3)(C).

[12] 15 U.S.C. 78s(b)(1).

they will permit recovery of the Exchanges' costs in providing access services to supply additional Limited Service MEI Ports and will not result in the Exchanges generating a supra-competitive profit.[13] Specifically, the Exchanges state that the Proposed Access Fees are based on a ''cost-plus model,'' designed to result in ''cost recovery plus present the possibility of a reasonable return.'' [14] Each Exchange provides an analysis of its revenues, costs, and profitability associated with the Proposed Access Fees, which they argue employs a ''conservative methodology'' that ''strictly considers only those costs that are most clearly directly related to the provision and maintenance of additional Limited Service MEI Ports.'' [15] The Exchanges state that this analysis reflects an extensive cost review in which the Exchanges analyzed nearly every expense item in the Exchanges' general expense ledgers to determine whether each such expense relates to the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the access services associated with the Proposed Access Fees.[16] They state that this process entailed discussions with each Exchange department head to identify the expenses that support the access services associated with the Proposed Access Fees, review of the expenses holistically on an Exchange-wide level with assistance from the internal finance department, and then assessment of the total expense, with no expense allocated twice.[17]

For 2021, the total annual cost for providing the access services associated with the Proposed Access Fees is projected by the Exchanges to be approximately $1.32 million for MIAX (or approximately $110,000 per month on average) and $0.88 million for MIAX Emerald (or approximately $73,333.33 per month on average).[18] As described in more detail in the MIAX Notice and MIAX Emerald Notice, the total annual cost for each Exchange is comprised of the following, all of which the Exchanges state are directly related to the access services associated with the Proposed Access Fees: [19]

- Third-party expense, relating to fees paid by the Exchanges to third-parties for certain products and services. This included allocating a portion of fees paid to: (1) Equinix for data center services; (2) Zayo Group Holdings, Inc. for network services; (3) Secure Financial Transaction Infrastructure, which supports connectivity and feeds; (4) various other service providers for content, connectivity, and infrastructure services; and (5) various other hardware and software providers; and
- internal expense, relating to the internal costs of the Exchanges to provide the access services associated with the Proposed Access Fees. This included allocating a portion of the Exchanges': (1) Employee compensation and benefits expenses for full-time employees that support the access services associated with the Proposed Access Fees; (2) depreciation and amortization of hardware and software used to provide the access services associated with the Proposed Access Fees; and (3) occupancy expenses for leased office space for staff that provide the access services associated with the Proposed Access Fees.

MIAX estimated its baseline revenues from additional Limited Service MEI Ports in July 2021 (the month prior to the implementation of the Proposed Access Fees) to be approximately $124,800 (for a baseline profit margin of approximately 12 percent); and estimated its revenues from additional Limited Service MEI Ports in November 2021 to be approximately $248,950 (a profit margin of approximately 56 percent).[20] MIAX Emerald estimated its baseline revenues from additional Limited Services MEI Ports in July 2021 to be approximately $62,500 (for a baseline *loss* margin of approximately 17.3 percent); and estimated its revenues from additional Limited Service MEI Ports in November 2021 to be approximately $216,600 (a profit margin of approximately 66 percent).[21] Each Exchange believes its profit margin will allow it to begin to recoup its expenses and continue to invest in its technology infrastructure, and believes that the proposed profit margin increase (44 percent increase for MIAX, 83.3 percent increase for MIAX Emerald) is reasonable because it represents a reasonable rate of return.[22] The Exchanges add that the profit margin: (i) May fluctuate from month to month based on the uncertainty of predicting how many ports may be purchased as Members and non-Members add and drop ports at any time based on their own business decisions, which they frequently do; (ii) may decrease due to future increased costs to procure the third-party services; and (iii) may decrease due to inflationary pressure on capital items that the Exchanges need to purchase to maintain their technology and systems, which have resulted in price increases upwards of 30 percent on network equipment due to supply chain shortages, and in turn resulted in higher overall costs associated with ongoing system maintenance.[23]

In addition, although the Exchanges do not assert that competitive forces constrain the Proposed Access Fees, they maintain that the Proposed Access Fees are reasonable when compared to the fees of other options exchanges. The Exchanges provide port fees for competing exchanges which, according to the Exchanges, demonstrate that the Proposed Access Fees are similar to or significantly lower than fees charged by competing options exchanges with similar market share.[24]

The Exchanges also argue that the proposed tiered-pricing structures result in an equitable allocation of fees that are not unfairly discriminatory. The Exchanges state that they sought to design their proposed tiered-pricing structures to set the amount of the fee to relate to the number of ports a firm purchases.[25] The Exchanges state that the fees will ''apply to all Members and non-Members in the same manner based on the amount of additional Limited Service MEI Ports they require based on their own business decisions and usage of Exchange resources.'' [26] The Exchanges states that firms that primarily route orders seeking best-execution generally do not utilize additional Limited Service MEI Ports and ''also generally send less orders and messages over those connections, resulting in less strain on Exchange resources.'' [27] By contrast, the Exchanges contend that those firms that purchase higher amounts of Limited Service MEI Ports are primarily those that engage in advanced trading strategies, rather than order-routing

[13] *See, e.g.,* MIAX Notice, *supra* note 4, at 71942.

[14] *See, e.g., id.*

[15] *See, e.g., id.*

[16] *See, e.g., id.* at 71943. Each Exchange also states that no expense amount is allocated twice; and the expenses in each Exchange's analysis only cover its own options market, not those of any affiliate. *See, e.g., id.* at 71945.

[17] *See, e.g., id.* at 71943. Each Exchange also states that its projected total annual expense is ''directly related to the access services associated with the Proposed Access Fees, and not any other product or service offered by the Exchange,'' and does not include general costs of operating matching engines and other trading technology. *See, e.g., id.* at 71944.

[18] *See* MIAX Notice, *supra* note 4, at 71943; MIAX Emerald Notice, *supra* note 4, at 71969.

[19] *See, e.g.,* MIAX Notice, *supra* note 4, at 71944–47.

[20] *See* MIAX Notice, *supra* note 4, at 71943.

[21] *See* MIAX Emerald Notice, *supra* note 4, at 71969.

[22] *See, e.g.,* MIAX Notice, *supra* note 4, at 71947.

[23] *See, e.g., id.* at 71943.

[24] *See, e.g., id.* at 71948–49.

[25] *See, e.g., id.* at 71948.

[26] *See, e.g., id.* at 71947.

[27] *See, e.g., id.* at 71948.

firms seeking best execution;[28] that such firms ''essentially do so for competitive reasons amongst themselves and choose to utilize numerous ports based on their business needs and desire to attempt to access the market quicker by using the connection with the least amount of latency;''[29] that such firms typically generate a disproportionate amount of messages and order traffic, usually billions per day across the Exchanges, which consume the Exchanges' resources and significantly contribute to the overall network access expense for storage and network transport capabilities;[30] that such firms tend to frequently add and drop ports mid-month to determine which ports have the least latency, which results in increased costs to the Exchanges to constantly make changes in their data centers and a ''disproportionate pull'' on Exchange resources to provide the additional port access;[31] and that the more ports purchased by a Market Maker ''likely results in greater expenditures of Exchange resources and increased cost to the Exchange.''[32]

In addition, the Exchanges state that the proposed tiered-pricing structures result in an equitable allocation of fees that are not unfairly discriminatory because they are designed to encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchanges and would enable the Exchanges to better monitor and provide access to the Exchanges' networks to ensure sufficient capacity and headroom in their systems.[33]

To date, the Commission has not received any comment letters on the revised justifications for the Proposed Access Fees.[34]

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchanges' present proposals, they are required to provide a statement supporting the proposals' basis under the Act and the rules and regulations thereunder applicable to the exchanges.[35] The instructions to Form 19b–4, on which exchanges file their proposed rule changes, specify that such statement ''should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.''[36]

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require, among other things, that the rules of an exchange: (1) Provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;[37] (2) be designed to perfect the mechanism of a free and open market and a national market system and to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;[38] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[39]

In temporarily suspending the Exchanges' proposed rule changes, the Commission intends to further consider whether the proposed additional Limited Service MEI Port fees are consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule changes satisfy the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[40]

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.[41]

## IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Changes

In addition to temporarily suspending the proposals, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)[42] and 19(b)(2)(B)[43] of the Act to determine whether the Exchanges' proposed rule changes should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule changes. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule changes to inform the Commission's analysis of whether to approve or disapprove the proposed rule changes.

Pursuant to Section 19(b)(2)(B) of the Act,[44] the Commission is providing notice of the grounds for possible disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of whether the Exchanges have sufficiently demonstrated how the proposed rule changes are consistent with Sections 6(b)(4),[45] 6(b)(5),[46] and 6(b)(8)[47] of the Act. Section 6(b)(4) of the Act requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. Section 6(b)(5) of the Act requires that the rules of a national securities exchange be designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to

[28] *See, e.g., id.*

[29] *See, e.g., id.*

[30] *See, e.g., id.* at 71947–48.

[31] *See, e.g., id.* at 71948.

[32] *See, e.g., id.*

[33] *See, e.g., id.* at 71947.

[34] Comments received on the previous filings are available on the Commission's website at: *https://www.sec.gov/comments/sr-miax-2021-37/srmiax202137.htm* (SR–MIAX–2021–37); *https://www.sec.gov/comments/sr-emerald-2021-25/sremerald202125.htm* (SR–EMERALD–2021–25); *https://www.sec.gov/comments/sr-miax-2021-43/srmiax202143.htm* (SR–MIAX–2021–43); *https://www.sec.gov/comments/sr-emerald-2021-31/sremerald202131.htm* (SR–EMERALD–2021–31).

[35] *See* 17 CFR 240.19b–4 (General Instructions for Form 19b–4—Information to be Included in the Complete Form—Item 3 entitled ''Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change'').

[36] *See id.*

[37] 15 U.S.C. 78f(b)(4).

[38] 15 U.S.C. 78f(b)(5).

[39] 15 U.S.C. 78f(b)(8).

[40] *See* 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

[41] For purposes of temporarily suspending the proposed rule changes, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[42] 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

[43] 15 U.S.C. 78s(b)(2)(B).

[44] 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *See id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. *See id.*

[45] 15 U.S.C. 78f(b)(4).

[46] 15 U.S.C. 78f(b)(5).

[47] 15 U.S.C. 78f(b)(8).

permit unfair discrimination between customers, issuers, brokers, or dealers. Section 6(b)(8) of the Act requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Commission asks that commenters address the sufficiency of the Exchanges' statements in support of the proposals, which are set forth in the MIAX Notice and MIAX Emerald Notice, in addition to any other comments they may wish to submit about the proposed rule changes. In particular, the Commission seeks comment on the following aspects of the proposals and asks commenters to submit data where appropriate to support their views:

1. *Cost Estimates and Allocation.* The Exchanges state that they are not asserting that the Proposed Access Fees are constrained by competitive forces, but rather set forth a ''cost-plus model,'' employing a ''conservative methodology'' that ''strictly considers only those costs that are most clearly directly related to the provision and maintenance of additional Limited Service MEI Ports.'' [48] As summarized in greater detail above, MIAX and MIAX Emerald project $1.32 million and $0.88 million, respectively, in aggregate annual estimated costs for 2021 for additional Limited Service MEI Ports. Do commenters believe that the Exchanges have provided sufficient detail about how they determined (a) which categories and sub-categories of third-party and internal expenses are most clearly directly associated with providing and maintaining *additional* Limited Service MEI Ports, (b) the total annual expenses associated with such categories/sub-categories, and (c) what percentage of each such expense should be allocated as actually supporting the *additional* Limited Service MEI Ports (as opposed to, for example, allocated to the first two ''free'' Limited Service MEI Ports or other types of ports or connectivity services offered by the Exchanges)? The Exchanges describe a process involving all Exchange department heads, including the finance department, but do not specify further what principles were applied in making these determinations or arriving at particular allocations. Do commenters believe further explanation is necessary? For employee compensation and benefit costs, for example, the Exchanges calculated an allocation of employee time in several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development, and Trade Operations, but do not provide the job titles and salaries of persons whose time was accounted for, or explain the methodology used to determine how much of an employee's time is devoted to providing and maintaining additional Limited Service MEI Ports. What are commenters' views on whether the Exchanges have provided sufficient detail on the identity and nature of services provided by third parties? Across all of the categories and sub-categories of third-party and internal expenses that the Exchanges identified as being clearly directly associated with providing and maintaining additional Limited Service MEI Ports, what are commenters' views on whether the Exchanges have provided sufficient detail on how they selected such categories/sub-categories and how shared costs within or among such categories/sub-categories are allocated to additional Limited Service MEI Ports, to permit an independent review and assessment of the reasonableness of purported cost-based fees and the corresponding profit margin thereon? Should the Exchanges be required to identify the categories/sub-categories of expenses that they deemed *not* to be clearly directly associated with additional Limited Service MEI Ports, and/or what Exchange products or services account for the *un*-allocated percentage of those categories/sub-categories of expenses that were deemed to be associated with additional Limited Service MEI Ports (*e.g.,* what products or services are associated with the approximately 95 percent and 98 percent, respectively, of applicable depreciation and amortization expenses that MIAX and MIAX Emerald do *not* allocate to the Proposed Access Fees)? Do commenters believe that the costs projected for 2021 are generally representative of expected costs going forward (to the extent commenters consider 2021 to be a typical or atypical year), or should an exchange present an estimated range of costs with an explanation of how profit margins could vary along the range of estimated costs?

2. *Revenue Estimates and Profit Margin Range.* MIAX and MIAX Emerald use a single monthly revenue figure (November 2021) as the basis for calculating their projected profit margins of 56 percent and 66 percent, respectively. Yet the Exchanges acknowledge that the number of ports purchased fluctuates from month to month as Members and non-Members add and drop ports.[49] Do commenters believe a single month provides a reasonable basis for a revenue projection? If not, why not? The profit margin is also dependent on the accuracy of the cost projections which, if inflated (intentionally or unintentionally), may render the projected profit margin meaningless. The Exchanges acknowledge that the profit margin may decrease if costs increase,[50] but they do not account for the possibility of cost decreases. What are commenters' views on the extent to which actual costs (or revenues) deviate from projected costs (or revenues)? Do commenters believe that the Exchanges' methodology for estimating the profit margin is reasonable? Should the Exchanges provide a range of profit margins that they believe are reasonably possible, and the reasons therefor?

3. *Reasonable Rate of Return.* The Exchanges state that their Proposed Access Fees are ''designed to cover [their] costs with a limited return in excess of such costs,'' and believe that their 56 percent and 66 percent profit margins are such a limited return over such costs.[51] Do commenters agree with the Exchanges that their expected 56 percent and 66 percent profit margins would constitute reasonable rates of return over costs for additional Limited Service MEI Ports? If not, what would commenters consider to be a reasonable rate of return and/or what methodology would they consider to be appropriate for determining a reasonable rate of return? The Exchanges state that they chose to initially provide additional Limited Service MEI Ports at a discounted price and to forego revenue that they otherwise could have generated from assessing higher fees.[52] Do commenters believe that this should be considered in the ''reasonableness'' assessment? Do commenters believe it relevant to an assessment of reasonableness that, according to the Exchanges, the Exchanges' Proposed Access Fees are similar to or lower than fees charged by competing options exchanges with similar market share? Should an assessment of reasonable rate of return include consideration of factors other than costs; and if so, what factors should be considered, and why?

4. *Periodic Reevaluation.* The Exchanges have not addressed whether they believe a material deviation from the anticipated profit margin would warrant the need to make a rule filing pursuant to Section 19(b) of the Act to increase or decrease the fees accordingly. In light of the impact that

[48] *See, e.g.,* MIAX Notice, *supra* note 4, at 71942.

[49] *See, e.g., id.* at 71943.

[50] *See, e.g., id.*

[51] *See, e.g., id.* at 71943, 71947.

[52] *See, e.g., id.* at 71943–44.

the number of ports purchased has on profit margins, and the potential for costs to decrease (or increase) over time, what are commenters' views on the need for exchanges to commit to reevaluate, on an ongoing and periodic basis, their cost-based connectivity fees to ensure that the fees stay in line with their stated profitability projections and do not become unreasonable over time, for example, by failing to adjust for efficiency gains, cost increases or decreases, and changes in subscribers? How formal should that process be, how often should that reevaluation occur, and what metrics and thresholds should be considered? How soon after a new connectivity fee change is implemented should an exchange assess whether its revenue and/or cost estimates were accurate and at what threshold should an exchange commit to file a fee change if its estimates were inaccurate? Should an initial review take place within the first 30 days after a connectivity fee is implemented? 60 days? 90 days? Some other period?

5. *Tiered Structure for Additional Limited Service MEI Ports.* The Exchanges state that the proposed tiered fee structures are designed to set the amount of the fees to relate to the number of ports a firm purchases [53] and that ''[c]harging a higher fee to a Market Maker that utilizes numerous ports is directly related to the increased costs the [Exchanges incur] in providing and maintaining those additional ports.'' [54] According to the Exchanges, firms that purchase numerous Limited Service MEI Ports are primarily those that engage in advanced trading strategies, typically generate a disproportionate amount of messages and order traffic, and frequently add or drop ports mid-month, and thus that ''it is equitable for these firms to experience increased port costs based on their disproportionate pull on Exchange resources to provide the additional port access.'' [55] The Proposed Access Fees would not just increase the previous $100 per additional Limited Service MEI Port fee, but would *progressively* increase the fee up to 2.5-fold on MIAX (up to $250 per port for seven or more ports), and up to four-fold on MIAX Emerald (up to $400 per port for seven or more ports). However, the Exchanges have not specifically asserted that it is, for example, 2.5 times more costly for MIAX, or four times more costly for MIAX Emerald, to provide the seventh or more ports. Instead, the Exchanges argue generally that the more ports purchased by a Market Maker ''likely'' results in greater expenditure of Exchange resources and increased cost to the Exchange.[56] Do commenters believe that the fees for each tier, as well as the fee differences between the tiers, are supported by the Exchanges' assertions that they set the tiered-pricing structure in a manner that is equitable and not unfairly discriminatory? Do commenters believe that the Exchanges should demonstrate how the proposed tiered fee levels correlate with tiered costs (*e.g.,* by providing cost information broken down by tier, messaging volumes through the additional Limited Service MEI Ports by tier, and/or mid-month add/drop rates by tier) to better substantiate, by tier, the ''disproportionate pull'' on the Exchanges' resources as a firm increases the number of additional Limited Service MEI Ports that it purchases and to permit an assessment of the Exchanges' statement that the Proposed Access Fees ''are solely determined by the individual Member's or non-Member's business needs and its impact on the Exchanges resources''? [57]

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 [SRO] that proposed the rule change.'' [58] 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,[59] 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 Act and the applicable rules and regulations.[60] Moreover, ''unquestioning reliance'' on an SRO's representations in a proposed rule change would not be sufficient to justify Commission approval of a proposed rule change.[61]

The Commission believes it is appropriate to institute proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposals are consistent with the Act, any potential comments or supplemental information provided by the Exchanges, and any additional independent analysis by the Commission.

## V. Request for Written Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above, as well as any other relevant concerns. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Sections 6(b)(4), 6(b)(5), and 6(b)(8), or any other provision of the Act, or the rules and regulations thereunder. The Commission asks that commenters address the sufficiency and merit of the Exchanges' statements in support of the proposals, in addition to any other comments they may wish to submit about the proposed rule changes. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[62]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposals should be approved or disapproved by February 23, 2022. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by March 9, 2022.

Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Nos. SR–MIAX–2021–60 and SR–EMERALD–2021–43 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 Numbers SR–MIAX–2021–60 and SR–EMERALD–2021–43. These file numbers should be included on the

[53] *See, e.g., id.* at 71948.

[54] *See, e.g., id.* at 71947.

[55] *See, e.g., id.* at 71947–48.

[56] *See, e.g., id.* at 71948.

[57] *See, e.g., id.* at 71947.

[58] 17 CFR 201.700(b)(3).

[59] *See id.*

[60] *See id.*

[61] *See Susquehanna Int'l Group, LLP* v. *Securities and Exchange Commission,* 866 F.3d 442, 446–47 (D.C. Cir. 2017) (rejecting the Commission's reliance on an SRO's own determinations without sufficient evidence of the basis for such determinations).

[62] 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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 (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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 filings also will be available for inspection and copying at the principal office of each 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 Numbers SR–MIAX–2021–60 and SR–EMERALD–2021–43 and should be submitted on or before February 23, 2022. Rebuttal comments should be submitted by March 9, 2022.

## VI. Conclusion

*It is therefore ordered,* pursuant to Section 19(b)(3)(C) of the Act,[63] that File Numbers SR–MIAX–2021–60 and SR–EMERALD–2021–43 be, and hereby are, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule changes should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[64]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022–02082 Filed 2–1–22; 8:45 am]

**BILLING CODE 8011–01–P**

[63] 15 U.S.C. 78s(b)(3)(C).

[64] 17 CFR 200.30–3(a)(57) and (58).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–94083; File No. SR–NYSEAMER–2022–07]**

## Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the NYSE American Options Fee Schedule

January 27, 2022.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on January 21, 2022, 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, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE American Options Fee Schedule (''Fee Schedule'') to modify certain Market Maker incentives. The Exchange proposes to implement the fee change effective January 21, 2022.[4] The proposed 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 purpose of this filing is to modify certain incentives available to NYSE American Options Market Makers (''Market Makers''), as set forth below.

Currently, Market Makers are entitled to reduced per contract rates for Electronic options transactions as set forth in Section I.C. of the Fee Schedule, NYSE American Options Market Maker Sliding Scale—Electronic (the ''Sliding Scale'').[5] These lower per contract rates are applicable to monthly volume within a given tier (expressed as Market Maker Electronic ADV as a percentage of TCADV), such that the lower per contract rate applies to volume that falls within the range specified for each tier.[6]

The Exchange also offers a prepayment program to Market Makers, in which Market Maker firms may prepay a portion of the fees they incur on Electronic transactions, including CUBE transactions, ATP Fees, and other fees (the ''Prepayment Program''). Market Makers who participate in the Prepayment Program are entitled to further reduced rates on the Sliding Scale.[7]

The Exchange now proposes to modify the requirements to qualify for the Market Maker rates set forth in Tiers 1 through 4 of the Sliding Scale and to adjust the Prepayment Program Participant Rate for non-take volume in Tier 1, as modified. The Exchange also proposes to eliminate Tier 5 of the Sliding Scale. These proposed changes are reflected in the table below with deletions in brackets and new text in italics.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange originally filed to amend the Fee Schedule on December 29, 2021 (SR–NYSEAmer–2021–51), with an effective date of January 3, 2022, then withdrew such filing and amended the Fee Schedule on January 12, 2022 (SR–NYSEAmer–2022–03), which latter filing the Exchange withdrew on January 21, 2022.

[5] *See* Fee Schedule, Section I.C., NYSE American Options Market Maker Sliding Scale—Electronic, *available at: https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf.*

[6] In calculating Market Maker Electronic monthly volumes, the Exchange will exclude any volumes attributable to QCC trades, CUBE Auctions, or Strategy Execution Fee Caps as these transactions are subject to separate pricing described in Sections I.F., I.G. and I.J. of the Fee Schedule, respectively. *Id.*

[7] *See* Fee Schedule, Section I.D., Prepayment Program.

| Tier | Market Maker Electronic ADV as a % of TCADV | Rate per contract for non-take volume [1] | Rate per contract for take volume [1] | Prepayment Program Participant Rates | |
|---|---|---|---|---|---|
| | | | | Rate per contract for non-take volume [1] | Rate per contract for take volume [1] |
| 1 | 0.00% to [0.20] *0.25%* | $0.25 | $0.25 | [$0.22] *$0.21* | $0.24 |
| 2 | >[0.20% to 0.65%] *0.25% to 0.70%* | 0.22 | 0.24 | 0.18 | 0.22 |
| 3 | >[0.65% to 1.40%] *0.70% to 1.50%* | 0.12 | 0.17 | 0.09 | 0.13 |
| 4 | >[1.40% to 2.00%] *1.50%* | 0.09 | 0.14 | 0.06 | 0.10 |
| [5 | >2.00% | 0.06 | 0.09 | 0.03 | 0.06] |

The Exchange believes that the proposed changes will continue to encourage Market Makers to direct orders and quotes to the Exchange and to incent Market Makers to participate in the Prepayment Program to receive reduced rates on Electronic options transactions, among other benefits. Although the Exchange proposes slight increases to the ranges covered by each of Tiers 1 through 4, the Exchange believes that the Sliding Scale, as modified, would continue to offer a significant reduction in overall transaction rates for Market Makers, as well as additional reductions for Market Makers that participate in the Prepayment Program. The Exchange further believes that the proposed reduction to the Tier 1 rate per contract for non-take volume for Prepayment Program participants will likewise continue to encourage those Market Makers to participate in the program and to direct orders and quotes to the Exchange to benefit from the reduced rates under the program. Finally, the Exchange proposes to eliminate Tier 5 on the Sliding Scale because it has not successfully incented Market Makers to achieve the requisite volume to earn the corresponding per contract rates.

Currently, the Exchange also offers Market Makers that participate in the Prepayment Program a reduced rate on Manual transactions, as set forth in Section I.A. of the Fee Schedule at footnote 6.[8] Specifically, for each contract transacted manually, Market Makers receive a $0.02 per contract discount, and NYSE American Options Specialists/e-Specialists receive a $0.01 per contract discount. The Exchange proposes to eliminate these reduced rates on Manual transactions for participants in the Prepayment Program because this incentive has not impacted their participation in Manual transactions.[9]

The Exchange proposes to implement these changes effective January 12 [sic], 2022.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[11] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Proposed Rule Change Is Reasonable

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [12]

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[13] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in November 2021, the Exchange had less than 8% market share of executed volume of multiply-listed equity and ETF options trades.[14]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain options exchange transaction fees. Stated otherwise, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

The Exchange believes the proposed modifications to the Sliding Scale tier requirements for Market Makers and the rates available to Prepayment Program participants are reasonable because they would continue to incent Market Makers, including Prepayment Program participants, to direct orders and quotes to the Exchange and because the Sliding Scale fee structure, as modified, would remain in line with a similarly structured program on another options exchange.[15] The Exchange also believes the elimination of Tier 5 of the Sliding Scale and the reduced Manual rates for Prepayment Program participants is reasonable, as neither incentive has fulfilled its intended purpose to date.

To the extent the proposed change continues to attract greater volume and liquidity to the Exchange, the Exchange believes the proposed change would improve the Exchange's overall competitiveness and strengthen its market quality for all market

[8] *See* Fee Schedule, Section I.A., Rates for Options transactions, note 6.

[9] To effect this change, the Exchange also proposes to delete the references to footnote 6 in the ''Participant'' column of the table in Section I.A. and to designate footnote 6 as ''Reserved.''

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4) and (5).

[12] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7–10–04) (''Reg NMS Adopting Release'').

[13] The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, *available here: https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Monthly-Weekly-Volume-Statistics.*

[14] Based on a compilation of OCC data for monthly volume of equity-based options and monthly volume of ETF-based options, *see id.,* the Exchange's market share in multiply-listed equity and ETF options the Exchange's market share in equity-based options decreased from 9.09% for the month of November 2020 to 7.06% for the month of November 2021.

[15] *See* CBOE Options Exchange Fee Schedule, Liquidity Provider Sliding Scale and footnote 10, *available at: https://www.cboe.com/publish/feeschedule/CBOEFeeSchedule.pdf* (providing liquidity providers that prepay monthly fees with reduced transaction rates).

participants. In the backdrop of the competitive environment in which the Exchange operates, the proposed rule change is a reasonable attempt by the Exchange to increase the depth of its market and improve its market share relative to its competitors.

While the Exchange cannot predict the extent to which Market Makers would choose to participate in the Prepayment Program or seek to achieve the Sliding Scale tiers, the Exchange believes that Market Makers would continue to be encouraged to take advantage of the favorable rates available in the Sliding Scale tiers and through the Prepayment Program, thereby increasing order flow to the Exchange and promoting market quality for all market participants.

The Proposed Rule Change is an Equitable Allocation of Credits and Fees

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits. The proposal is based on the amount and type of business transacted on the Exchange, and Market Makers can opt to participate in the Prepayment Program or not, and to achieve one of the tiers on the Sliding Scale, or not. Moreover, to the extent the proposal is designed to continue to encourage Market Makers to commit capital to the Exchange as a demonstration of long-term participation on the Exchange as a primary execution venue, the Exchange believes that the proposed modifications to incent Market Maker participation in the Prepayment Program are an equitable allocation of fees and credits. In addition, to the extent that the proposed change continues to incent Market Makers to increase volume on the Exchange in order to qualify for the Sliding Scale rates, the resulting increased order flow would continue to make the Exchange a more competitive venue for, among other things, order execution.

The Exchange believes that eliminating Tier 5 of the Sliding Scale and the reduced Manual rates for Prepayment Program participants is an equitable allocation of fees and credits because these incentives have not successfully encouraged the intended Market Maker activity.

Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange, thereby improving market-wide quality and price discovery.

The Proposed Rule Change Is Not Unfairly Discriminatory

The Exchange believes the proposed modifications are not unfairly discriminatory because they would apply and be available to all similarly-situated market participants on an equal and non-discriminatory basis. Specifically, the proposal is based on the amount and type of business transacted on the Exchange, and Market Makers are not obligated to participate in the Prepayment Program or try to achieve any of the Sliding Scale tiers that would provide for reduced rates. In addition, because Market Makers have increased obligations with respect to trading on the Exchange, the Exchange believes that the proposed changes are not unfairly discriminatory to non-Market Makers and further believes that the proposed change would continue to incent Market Makers to both participate in the Prepayment Program and increase orders and quotes directed to the Exchange. To the extent that the proposed change attracts a variety of transactions to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange, thereby improving market-wide quality and price discovery. The resulting increased volume and liquidity would provide more trading opportunities and tighter spreads to all market participants and thus would 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.

The Exchange further believes that the elimination of Sliding Scale Tier 5 and the reduced Manual rates for Prepayment Program participants is not unfairly discriminatory because the reduced rates have not been effective in incenting Market Makers to execute sufficient volume to qualify for the tier or to execute Manual transactions, as applicable.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For the foregoing 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, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [16]

*Intramarket Competition.* The proposed change is designed to attract additional order flow to the Exchange by offering competitive rates based on increased volumes on the Exchange, including further reduced rates for Market Makers that participate in the Prepayment Program. The Exchange believes that the proposed modifications to the Sliding Scale and other incentives available to Market Makers would continue to incent Market Makers to direct additional volume to the Exchange. Greater liquidity benefits all market participants on the Exchange, and increased volume from Market Makers would increase opportunities for execution of other trading interest. The proposed modifications would apply to all similarly-situated Market Makers and, because Market Makers have increased obligations with respect to trading on the Exchange, are not unfairly discriminatory to non-Market Makers, and thus would not impose a disparate burden on competition among market participants on the Exchange.

*Intermarket Competition.* The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed

[16] *See* Reg NMS Adopting Release, *supra* note 12, at 37499.

equity and ETF options trades.[17] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in November 2021, the Exchange had less than 8% market share of executed volume of multiply-listed equity and ETF options trades.[18]

The Exchange believes that the proposed rule change reflects this competitive environment because it modifies the Exchange's fees in a manner designed to continue to encourage Market Makers to direct trading interest to the Exchange, to provide liquidity and to attract order flow. Specifically, the Exchange believes that the modifications to the Sliding Scale would continue to offer a significant reduction in overall transaction rates for Market Makers, as well as additional reductions for Market Makers that participate in the Prepayment Program. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market quality and increased opportunities for price improvement.

The Exchange also believes that the proposed change would promote competition between the Exchange and other execution venues, by encouraging additional orders to be sent to the Exchange for execution.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[19] of the Act and subparagraph (f)(2) of Rule 19b–4[20] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

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 under Section 19(b)(2)(B)[21] of the Act to determine whether the proposed rule change should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEAMER–2022–07 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–NYSEAMER–2022–07. 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 (*https://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–2022–07, and should be submitted on or before February 23, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022–02080 Filed 2–1–22; 8:45 am]

**BILLING CODE 8011–01–P**

[17] *See supra* note 13.

[18] Based on a compilation of OCC data for monthly volume of equity-based options and monthly volume of ETF-based options, *see id.,* the Exchange's market share in multiply-listed equity and ETF options the Exchange's market share in equity-based options decreased from 9.09% for the month of November 2020 to 7.06% for the month of November 2021.

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(2).

[21] 15 U.S.C. 78s(b)(2)(B).

[22] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–94076; File No. SR–NASDAQ–2022–006]**

## Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change To Enable Exchange Members To Enter Midpoint Extended Life Orders and M–ELO Plus Continuous Book Orders With an Immediate-or-Cancel Time-in-Force Instruction

January 27, 2022.

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 January 19, 2022, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to enable Exchange members to enter Midpoint Extended Life Orders (''M–ELOs'') and M–ELO Plus Continuous Book (''M–ELO+CB'') Orders with an immediate-or-cancel (''IOC'') Time-in-Force (''TIF'') instruction.[3]

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules,* at the principal

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Citations herein to the Nasdaq Rule 4000 Series shall refer to Equity 4.

office of the Exchange, and at the Commission's Public Reference Room.

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

### *A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend Rule 4702(b)(14) and (by implication) 4702(b)(15) to enable Exchange members to enter M–ELO and M–ELO+CB Orders with an IOC time-in-force instruction.

On March 7, 2018, the Commission issued an order approving the Exchange's proposal to adopt the M–ELO as a new Order Type.[4] A M–ELO is a non-displayed order that is available to all members but interacts only with other M–ELOs and M–ELO+CBs. It is priced at the midpoint between the National Best Bid and Offer (''NBBO'') and it does not become eligible for execution until at least 10 milliseconds elapse after its entry (the ''Holding Period'').[5] Once the Holding Period elapses, a M–ELO becomes eligible for execution against other M–ELOs and M–ELO+CBs on a time-priority basis.[6]

A M–ELO+CB is an Order Type that has all the characteristics and attributes of a M–ELO Order, except that a M–ELO+CB that satisfies the Holding Period is eligible to execute (at the midpoint of the NBBO) against other eligible M–ELO+CBs, eligible M–ELOs, and also eligible non-displayed Orders with Midpoint Pegging and Midpoint Peg Post-Only Orders (''Midpoint Orders'') resting on the Exchange's Continuous Book.[7]

Presently, neither M–ELO nor M–ELO+CB Orders may be entered with a TIF of IOC. An Order with a TIF of IOC is one that is designated to deactivate immediately after determining whether the Order is marketable.[8] In the Exchange's proposal to establish the M–ELO Order Type, the Exchange explained that it decided to exclude IOCs from M–ELOs since it deemed the IOC TIF, by its nature, to be ''inconsistent with the Holding Period requirement of the proposal.''[9] That is, the Exchange designed M–ELO to provide a space where investors with longer time horizons, including institutional investors, can interact exclusively with each other—by virtue of a mutually-applicable Holding Period—without fear that aggressive order types could trade with M–ELOs or M–ELO+CBs to the detriment of such M–ELOs and M–ELO+CBs immediately upon entry and without waiting 10 milliseconds before doing so, such as immediately before a change in the NBBO for a particular security (*i.e.,* risk of adverse selection). Nevertheless, institutional investors—which again are the primary beneficiaries and users of M–ELO and M–ELO+CB—have approached the Exchange recently to request the ability to enter IOC instructions for their M–ELO and M–ELO+CB Orders as a means of assisting them in sourcing liquidity on the Exchange's M–ELO/M–ELO+CB Book so that they can minimize the opportunity costs of utilizing M–ELO and M–ELO+CB Orders and thus render use of M–ELO and M–ELO+CB more efficient and productive for participants.

That is, the functionality would provide users with an indication as to whether eligible contra-side liquidity would be available to their M–ELO or M–ELO+CB Orders and allow these users to streamline their decision-making process of whether to send additional M–ELO or M–ELO+CB Orders to the Exchange or to seek liquidity elsewhere.[10] It would also enable participants whose M–ELO or M–ELO+CB Orders do not satisfy the conditions for a Holding Period to commence upon Order entry to have those Orders cancel immediately rather than be held by the System until such time as the conditions are met, which would allow these participants to assess whether they wish to submit new M–ELO or M–ELO+CB Orders that would satisfy the conditions to commence a Holding Period upon entry.

To avoid introducing the risks of adverse selection associated with enabling IOC in these contexts (discussed above), brokers representing institutional investors requested that when they enter M–ELO and M–ELO+CB Orders (which are eligible to commence a Holding Period upon entry) with an IOC instruction, the IOC instruction should activate only at the expiration of the 10 millisecond Holding Period, rather than immediately upon Order entry. In other words, only after the 10 millisecond Holding Period elapses would the System check to see if a M–ELO or M–ELO+CB Order with an IOC TIF is able to execute immediately against contra-side resting liquidity; if so, the Order will execute as it would currently, but if not, the System will automatically cancel the Order rather than keep it on the Book. If the Order at the time of entry is unable to begin the Holding Period (because, for example, it is entered with a limit price that is not at or better than the midpoint of the NBBO, if there is no NBB or NBO at the time of entry, or the NBBO is crossed at the time of entry), then the Order will be automatically cancelled immediately.

The Exchange agrees with the participants that requested this IOC functionality that when modified in this manner, its use with M–ELO and M–ELO+CB would serve a beneficial purpose that is not inconsistent with the Exchange's intentions and designs for these Order Types. That is, it would

[4] *See* Securities Exchange Act Release No. 34–82825 (Mar. 7, 2018), 83 FR 10937 (Mar. 13, 2018) (order approving SR–NASDAQ–2017–074).

[5] In 2020, the Commission issued an order approving the Exchange's proposal to shorten the Holding Period for M–ELO and M–ELO+CB Orders from one half second to 10 milliseconds. *See* Securities Exchange Act Release No. 34–88743 (April 24, 2020), 85 FR 24068 (April 30, 2020) (order approving SR–NASDAQ–2020–011). If a member modifies a MELO or M–ELO+CB during the Holding Period, other than to decrease the size of the order or to modify the marking of a sell order as long, short, or short exempt, then such modification will cause the Holding Period to reset.

[6] If a member modifies a M–ELO or M–ELO+CB after the Holding Period elapses, other than to decrease the size of the order or to modify the marking of a sell order as long, short, or short exempt, then such modification will trigger a new Holding Period for the order.

[7] A M–ELO+CB is eligible to execute against a Midpoint Order if: (i) The Midpoint Order has the Midpoint Trade Now Attribute enabled; (ii) no other order is resting on the Continuous Book that has a more aggressive price than the current midpoint of the NBBO; (iii) the Midpoint Order has rested on the Exchange's Continuous Book for a minimum of 10 milliseconds after the NBBO midpoint falls within the limit set by the participant; and (iv) the Midpoint Order satisfies any minimum quantity requirement of the M–ELO+CB. A buy (sell) M–ELO+CB is ranked in time order at the midpoint among other buy (sell) M–ELO+CBs, buy (sell) Midpoint Extended Life Orders, and buy (sell) Midpoint Orders, as of the time when such Orders become eligible to execute. *See* Rule 4702(a)(15); *see also* Securities Exchange Act Release No. 34–86938 (September 11, 2019), 84 FR 48978 (September 17, 2019) (order approving SR–NASDAQ–2019–048).

[8] Rule 4703(a)(1).

[9] *See* Securities Exchange Act Release No. 34–81311 (August 3, 2017), 82 FR 37248 (August 9, 2017) (SR–NASDAQ–2017–074).

[10] The Exchange understands that some participants representing institutional investor orders have developed methods that mimic the functions of IOC.

permit IOC users to check the M–ELO or M–ELO+CB Book for contra-side liquidity, but not in an aggressive or riskless fashion.[11] Users of the IOC functionality in this context would still need to endure the Holding Period before utilizing it, and then execute against contra-side interest if it is available upon expiration of that Holding Period. While the proposal would provide for immediate cancellation of M–ELO and M–ELO+CB Orders that do not meet the conditions for a Holding Period to commence upon entry, the cancellation of these M–ELOs and M–ELO+CBs would only indicate that such Orders are not eligible to enter the Holding Period (*i.e.,* the NBBO is crossed at the time of entry, there is no NBB or NBO at the time of entry, or the Order is entered with a limit price that is not at or better than the NBBO midpoint) and would not indicate whether there are available contra-side M–ELOs or M–ELO+CBs at the time of entry on Nasdaq. The Exchange also notes that, in other contexts, the use of IOCs is routine and recognized as a prudent way to seek liquidity in a fragmented market, and its use in this context, as modified, should not be controversial.

Accordingly, the Exchange now proposes to amend Rule 4702(b)(14) (and implicitly, Rule 4702(b)(15)), because it would incorporate amendments to Rule 4702(b)(14)) to permit members to enter M–ELO and M–ELO+CB Orders with a TIF instruction of IOC, with the caveat that, when used for these Order Types, the IOC instruction will activate upon the expiration of the Holding Period, unless the Order is unable to begin the Holding Period upon entry, in which case it will cancel immediately.

As part of the surveillance the Exchange currently performs, M–ELOs and M–ELO+CBs with IOC would be subject to real-time surveillance to determine if they are being abused by market participants. In addition, as is the case for ordinary M–ELOs and M–ELO+CBs, the Exchange will monitor the use of M–ELOs and M–ELO+CBs with IOC with the intent to apply additional measures, as necessary, to ensure their usage is appropriately tied to the intent of the Order Types. The Exchange is committed to determining whether there is opportunity or prevalence of behavior that is inconsistent with normal risk management behavior, such as excessive cancellations. Manipulative abuse is subject to potential disciplinary action under the Exchange's Rules, and other behavior that is not necessarily manipulative but nonetheless frustrates the purposes of the M–ELO or M–ELO+CB Order Types may be subject to penalties or other participant requirements to discourage such behavior, should it occur.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Section 6(b)(5) of the Act,[13] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The proposal will assist market participants in sourcing liquidity on the Exchange's M–ELO/M–ELO+CB Book so that they can minimize the opportunity costs associated with utilizing M–ELO and M–ELO+CB Orders and thus render use of M–ELO and M–ELO+CB more efficient and productive. At the same time, the proposal avoids exposing M–ELO and M–ELO+CB orders to the risks of adverse selection associated with aggressive IOC by proposing that, when used in the contexts of M–ELO and M–ELO+CB Orders, the IOC instruction will activate only at the expiration of the 10 millisecond Holding Period, rather than immediately upon Order entry, as orders with a TIF of IOC do in other contexts. The exception to this is if the M–ELO or M–ELO+CB Order with an IOC instruction is unable to begin the Holding Period upon entry, as will occur if the Market is crossed at the time of entry, there is no NBB or NBO at the time of entry, or the Order is entered with a limit price that is not at or better than the NBBO midpoint. In such cases, the Order will be cancelled immediately upon entry. Doing so is consistent with the spirit of the IOC instruction, in that the market participant is indicating a desire for their Order to persist for the minimum period possible, while a M–ELO or M–ELO+CB Order that is ineligible to begin the Holding Period upon entry could potentially persist in a held state until it is cancelled by the System at the end of Market Hours. Crucially, the immediate cancel of an Order that is ineligible to begin the Holding Period upon entry does not provide information to the participant about the underlying state of the M–ELO/M–ELO+CB Book.[14] When used in this context, IOC will not be useful to participants engaging in strategies that are time sensitive. Thus, this proposal will not frustrate the underlying design of M–ELO and M–ELO+CB Orders, which again is to provide investors, including institutional investors, with longer time horizons to safely interact with each other without interacting with aggressive or time sensitive orders.

*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 not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the proposal will enhance the utility and efficiency of the M–ELO and M–ELO+CB Order Types, which in turn will render the Exchange a more attractive venue for market participants that stand to benefit from these Order Types. The proposed IOC instruction will not burden intra-market competition as it will be available for use by all market participants.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

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.

[11] Nasdaq reiterates that by design, spread-crossing orders do not interact with MELO or M–ELO+CB Orders.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] The existence of resting interest on the M–ELO/M–ELO+CB Book is not a prerequisite for the Order to enter the Holding Period. Therefore, the cancellation of these M–ELOs and M–ELO+CBs only indicate that such Orders are not eligible to enter the Holding Period (*i.e.,* the NBBO is crossed at the time of entry, there is no NBB or NBO at the time of entry, or the Order is entered with a limit price that is not at or better than the NBBO midpoint) and does not indicate whether there are available contra-side M–ELOs or M–ELO+CBs at the time of entry on Nasdaq. Consequently, the IOC instruction cannot be exploited to check the Book for liquidity in a riskless fashion (*e.g.,* by cancelling before the Holding Period expires).

## 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 (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2022–006 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2022–006. 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 (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2022–006 and should be submitted on or before February 23, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022–02077 Filed 2–1–22; 8:45 am]

**BILLING CODE 8011–01–P**

[15] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–94091]**

## Order Granting Application by Nasdaq PHLX LLC for an Exemption Pursuant to Section 36(a) of the Exchange Act From the Rule Filing Requirements of Section 19(b) of the Exchange Act With Respect to Certain Rules Incorporated by Reference

January 27, 2022.

Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') has filed with the Securities and Exchange Commission (''Commission'') an application for an exemption under Section 36(a)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] from the rule filing requirements of Section 19(b) of the Exchange Act[2] with respect to certain rules of the Financial Industry Regulatory Authority, Inc. (''FINRA'') that the Exchange seeks to incorporate by reference.[3] Section 36 of the Exchange Act, subject to certain limitations, authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class thereof, from any provision of the Exchange Act or rule thereunder, if necessary or appropriate in the public interest and consistent with the protection of investors.

The Exchange has requested, pursuant to Rule 0–12 under the Exchange Act,[4] that the Commission grant the Exchange an exemption from the rule filing requirements of Section 19(b) of the Exchange Act for changes to the Exchange's rules that are effected solely by virtue of a change to a cross-referenced FINRA rule. Specifically, the Exchange requests that it be permitted to incorporate by reference changes made to the FINRA rules that are cross-referenced in the Exchange's rules identified below, without the need for the Exchange to file separately similar proposed rule changes pursuant to Section 19(b) of the Exchange Act:[5]

- General 9, Section 1(a) (Prohibition Against Trading Ahead of Customer Orders) cross-references FINRA Rule 5320 (except for FINRA Rule 5320.02(b) and the reference to FINRA Rule 6420 in FINRA Rule 5320).
- Options 10, Section 20 (Options Communications) cross-references FINRA Rule 2220 (except for FINRA Rule 2220(c)).

The Exchange represents that the FINRA rules listed above are regulatory rules and not trading rules.[6] The Exchange represents that, as a condition to the requested exemption from Section 19(b) of the Exchange Act, the Exchange will provide written notice to its members and member organizations whenever FINRA proposes a change to FINRA Rule 2220 or 5320.[7] The Exchange states that such notice will alert its members, member organizations, and associated persons to the proposed FINRA rule change and give them an opportunity to comment on the proposal.[8] The Exchange further represents that it will inform members, member organizations, and associated persons in writing when the Commission approves any such proposed rule changes.[9]

According to the Exchange, this exemption is appropriate because it would result in the Exchange's rules pertaining to prohibition against trading ahead of customer orders and options communications being consistent with the relevant cross-referenced FINRA rules at all times, thus ensuring consistent regulation of joint members of Phlx and FINRA.[10] The Exchange further states that, even if members are not joint members of Phlx and FINRA, the exemption is appropriate because it will permit its rules to remain consistent with FINRA's rules and ensure consistent treatment of industry members with respect to the aforementioned rules.[11]

The Commission has issued exemptions similar to the Exchange's

[1] 15 U.S.C. 78mm(a)(1).

[2] 15 U.S.C. 78s(b).

[3] *See* Letter from Angela S. Dunn, Principal Associate General Counsel, Phlx, to J. Matthew DeLesDernier, Assistant Secretary, Commission, dated August 26, 2021 (''Exemptive Request'').

[4] 17 CFR 240.0–12.

[5] *See* Exemptive Request, *supra* note 3, at 2.

[6] *See id.* at 2, n.8. The Exchange also states that it is not ''cherry picking'' because the Exchange would be incorporating categories of rules. *See id.*

[7] *See id.* at 2–3. The Exchange represents that it will provide such notice via a posting on the same website location where the Exchange posts its own rule filings pursuant to Rule 19b–4(l) within the time frame required by such rule. *See id.* at 3, n.9. The website posting will include a link to the location on FINRA's website where the applicable proposed rule change is posted. *See id.*

[8] *See id.* at 3.

[9] *See id.*

[10] *See id.* at 2.

[11] *See id.*

request.[12] In granting similar exemptions, the Commission stated that it would consider similar future exemption requests, provided that:

- An SRO wishing to incorporate rules of another SRO by reference has submitted a written request for an order exempting it from the requirement in Section 19(b) of the Exchange Act to file proposed rule changes relating to the rules incorporated by reference, has identified the applicable originating SRO(s), together with the rules it wants to incorporate by reference, and otherwise has complied with the procedural requirements set forth in the Commission's release governing procedures for requesting exemptive orders pursuant to Rule 0–12 under the Exchange Act; [13]
- The incorporating SRO has requested incorporation of categories of rules (rather than individual rules within a category) that are not trading rules (*e.g.,* the SRO has requested incorporation of rules such as margin, suitability, or arbitration); and
- The incorporating SRO has reasonable procedures in place to provide written notice to its members each time a change is proposed to the incorporated rules of another SRO.[14]

The Commission believes that the Exchange has satisfied each of these conditions. The Commission also believes that granting the Exchange an exemption from the rule filing requirements under Section 19(b) of the Exchange Act will promote efficient use of the Commission's and the Exchange's resources by avoiding duplicative rule filings based on simultaneous changes to identical rule text sought by more than one SRO.[15] The Commission therefore finds it appropriate in the public interest and consistent with the protection of investors to exempt the Exchange from the rule filing requirements under Section 19(b) of the Exchange Act with respect to the above-described FINRA rules it has incorporated by reference. This exemption is conditioned upon the Exchange promptly providing written notice to its members whenever FINRA changes a rule that the Exchange has incorporated by reference.

Accordingly, IT IS ORDERED, pursuant to Section 36 of the Exchange Act,[16] that the Exchange is exempt from the rule filing requirements of Section 19(b) of the Exchange Act solely with respect to changes to the rules identified in the Exemptive Request, provided that the Exchange promptly provides written notice to its members whenever FINRA proposes to change a rule that the Exchange has incorporated by reference.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022–02085 Filed 2–1–22; 8:45 am]

**BILLING CODE 8011–01–P**

[12] *See, e.g.,* Securities Exchange Act Release Nos. 83296 (May 21, 2018), 83 FR 24362 (May 25, 2018) (order granting NYSE National, Inc.'s exemptive request relating to rules of FINRA incorporated by reference); 83040 (April 12, 2018), 83 FR 17198 (April 18, 2018) (order granting MIAX PEARL, LLC's exemptive request relating to rules of the Miami International Securities Exchange, LLC incorporated by reference); 76998 (January 29, 2016), 81 FR 6066, 6083–84 (February 4, 2016) (order granting application for registration as a national securities exchange of ISE Mercury, LLC and exemptive request relating to rules of certain self-regulatory organizations (''SROs'') (including FINRA) incorporated by reference); 61534 (February 18, 2010), 75 FR 8760 (February 25, 2010) (order granting BATS Exchange, Inc.'s exemptive request relating to rules incorporated by reference by the BATS Exchange Options Market rules) (''BATS Options Market Order''); 61152 (December 10, 2009), 74 FR 66699, 66709–10 (December 16, 2009) (order granting application for registration as a national securities exchange of C2 Options Exchange, Incorporated and exemptive request relating to rules of the Chicago Board Options Exchange, Incorporated, incorporated by reference).

[13] *See* 17 CFR 240.0–12 and Securities Exchange Act Release No. 39624 (February 5, 1998), 63 FR 8101 (February 18, 1998) (Commission Procedures for Filing Applications for Orders for Exemptive Relief Pursuant to Section 36 of the Exchange Act; Final Rule).

[14] *See* BATS Options Market Order, *supra* note 12 (citing Securities Exchange Act Release No. 49260 (February 17, 2004), 69 FR 8500 (February 24, 2004) (order granting exemptive request relating to rules incorporated by reference by several SROs) (''2004 Order'')).

[15] *See* BATS Options Market Order, *supra* note 12, 75 FR at 8761; *see also* 2004 Order, *supra* note 14, 69 FR at 8502.

[16] 15 U.S.C. 78mm.

[17] 17 CFR 200.30–3(a)(76).

## SURFACE TRANSPORTATION BOARD

**[Docket No. FD 36560]**

## BNSF Railway Company—Lease Exemption—Union Pacific Railroad Company

On November 9, 2021, BNSF Railway Company (BNSF) filed a petition under 49 U.S.C. 10502 seeking exemption from the prior approval requirements of 49 U.S.C. 11323–25 for BNSF to lease from Union Pacific Railroad Company (UP) approximately 25 miles of rail line extending from Sterling, Colo., near UP milepost 56.71, to Union, Colo., near UP milepost 81.1, on UP's Julesburg Subdivision (the Line).[1]

The petition explains that BNSF and its predecessors have operated over the Line since 1900, and that, concurrently with the petition, BNSF filed a verified notice of exemption pursuant to 49 CFR 1180.2(d)(7) pertaining to a trackage rights agreement to supersede the agreement that had been in effect since 1951. (Pet. 2.) [2] According to the petition, BNSF and UP have agreed to enter into a lease that would modify certain roles and responsibilities set forth in the new trackage rights agreement; in particular, the lease would ''allow BNSF to occupy UP's property for the purposes of maintenance, construction, repair, and renewal of the track and appurtenant structures and facilities on the Line.'' (Pet. 2.) [3] BNSF states that by permitting maintenance responsibilities to shift to BNSF, the sole user of the Line, the lease will streamline maintenance activity and produce more efficient rail operations. (Pet. 2.) According to BNSF, the lease transaction will have no adverse impact on commercial or operational access to the Line. (*Id.* at 5; *see also id.* at 6–7 (stating that the lease ''is simply intended to produce more efficient rail operations by streamlining the Line's maintenance activities'' and ''will have no adverse impact on the national, regional, or local rail industry'').) [4]

BNSF asserts that the Board has previously exempted similar lease agreements from the prior approval requirements of sections 11323–25 pursuant to section 10502, and that the Board should grant this petition and exempt the lease for the same reasons. (Pet. 3.)

### Discussion and Conclusions

Under 49 U.S.C. 11323(a)(2), prior Board approval is required for a rail carrier to lease the property of another rail carrier. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) Regulation is not necessary to carry out the rail

[1] An executed, redacted version of the lease agreement was filed with the petition for exemption. An unredacted version was submitted to the Board under seal along with a motion for protective order, which was granted by decision served on November 24, 2021.

[2] Notice of the trackage rights exemption was published in the **Federal Register** on November 24, 2021 (86 FR 67111), and the exemption took effect on December 9, 2021. *See BNSF Ry.—Trackage Rts. Exemption—Union Pac. R.R.,* FD 36561 (STB served Nov. 24, 2021).

[3] BNSF's reference to ''construction'' is in connection with the planned repair and maintenance of the existing Line. (*See* Pet. 2.) Therefore, the Board does not construe that reference as involving any new line of railroad for which construction authority would be needed pursuant to 49 U.S.C. 10901, and this decision does not grant any such authority.

[4] Pursuant to 49 CFR 1121.3(d), BNSF certifies that the lease does not contain a provision or agreement that may limit future interchange with a third-party connecting carrier. (Pet. 7–8.)

transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed transaction through an application for review and approval under 49 U.S.C. 11323–25 is not necessary here to carry out the rail transportation policy. The proposed transaction would simply permit maintenance responsibilities for the Line to shift to BNSF, the sole user of the Line. As described in the petition, the lease is intended to streamline maintenance activity and would produce more efficient rail operations over the Line with no adverse competitive impacts. Therefore, the proposed transaction would promote a safe and efficient rail transportation system, (49 U.S.C. 10101(3)), foster sound economic conditions in transportation and ensure effective competition, (49 U.S.C. 10101(5)), encourage honest and efficient management, (49 U.S.C. 10101(9)), and promote energy conservation, (49 U.S.C. 10101(14)). Further, an exemption from the application process would expedite regulatory action, (49 U.S.C. 10101(2)), and reduce regulatory barriers to entry and exit, (49 U.S.C. 10101(7)). Other aspects of the rail transportation policy would not be adversely affected.

Regulation of the proposed transaction is also not necessary to protect shippers from the abuse of market power.[5] Nothing in the record indicates that any shipper would lose an existing rail service option as a result of the proposed lease transaction. According to the petition, the transaction will have no adverse impact on commercial or operational access to the Line. (*See* Pet. 5 (noting that the lease agreement specifically states that nothing contained in the lease would ''amend, change or supersede the commercial access . . . terms as provided for in the Trackage Rights Agreement'').) BNSF states that it will continue to provide common carrier service to shippers over the Line and that there will be no material change in the service provided to shippers, because the lease simply shifts the Line's maintenance responsibilities to BNSF, the sole user of the Line. (*Id.* at 6.) Indeed, the lease transaction should benefit shippers by producing more efficient rail operations by streamlining the Line's maintenance activities.

[5] Because the Board concludes that regulation is not needed to protect shippers from the abuse of market power, it is unnecessary to determine whether the transaction is limited in scope. *See* 49 U.S.C. 10502(a).

Moreover, no shippers or other parties have filed any objections to the proposed transaction.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of employees. Accordingly, as a condition to granting this exemption, the Board will impose the standard employee protective conditions in *Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc.,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway—Lease & Operate—California Western Railroad,* 360 I.C.C. 653 (1980).

The proposed lease is exempt from both the environmental reporting requirements under 49 CFR 1105.6(c) and the historic reporting requirements under 49 CFR 1105.8(b).

*It is ordered:*

1. Under 49 U.S.C. 10502, the Board exempts from the prior approval requirements of 49 U.S.C. 11323–25 BNSF's lease of the Line, subject to the employee protective conditions in *Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc.,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway—Lease & Operate—California Western Railroad,* 360 I.C.C. 653 (1980).

2. Notice of the exemption will be published in the **Federal Register** on February 2, 2022.

3. The exemption will become effective on March 4, 2022.

4. Petitions to stay must be filed by February 14, 2022.

5. Petitions for reconsideration and petitions to reopen must be filed by February 22, 2022.

Decided: January 25, 2022.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

**Jeffrey Herzig,**

*Clearance Clerk.*

[FR Doc. 2022–02144 Filed 2–1–22; 8:45 am]

BILLING CODE 4915–01–P

## TENNESSEE VALLEY AUTHORITY

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** Tennessee Valley Authority (TVA).

**ACTION:** 30-Day notice of submission of information collection approval request to OMB.

**SUMMARY:** Tennessee Valley Authority (TVA) provides notice of submission of this information clearance request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The general public and other federal agencies are invited to comment. TVA previously published a 60-day notice of the proposed information collection for public review (December 10, 2021) and no comments were received.

**DATES:** The OMB will consider all written comments received on or before March 4, 2022.

**ADDRESSES:** Written comments for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

**SUPPLEMENTARY INFORMATION:**

*Type of Request:* New collection.

*Title of Information Collection:* Distribution Technology Capability Assessment.

*Frequency of Use:* Every 2 years.

*Type of Affected Public:* State, local, and tribal governments; small businesses; non-profit organizations.

*Small Businesses or Organizations Affected:* Yes.

*Federal Budget Functional Category Code:* 455.

*Estimated Number of Annual Responses:* 153.

*Estimated Total Annual Burden Hours:* 306.

*Estimated Average Burden Hours per Response:* 2.0.

*Need For and Use of Information:* As the Balancing Authority of the region, TVA must ensure the electrical grid is reliable. With the growth of Distributed Energy Resources (DER) on the distribution system, TVA and the Local Power Companies (LPCs) must work in tighter coordination to ensure the DER generation does not impact the reliability of the bulk electric system. To support this goal, TVA must understand the current distribution capabilities of the LPCs. Examples of capabilities include but are not limited to customer analytics, advanced asset management, advanced AMI, automated switching, DER monitoring & control, grid planning and voltage optimization. To ease access and completion, information will be submitted online. Once collected, the information will be reviewed by TVA staff and consultants to determine each LPC's state of and plan for system modernization and will inform strategic investment roadmaps and implementation plans that are being developed as part of the Regional Grid Transformation initiative. Summary

level information will be provided to the participating LPCs to allow them to gauge where they stand in terms of their technical capabilities compared to their peers which could help give them useful information that informs their individual priorities and investment plans.

**Rebecca L. Coffey,**

*Agency Records Officer.*

[FR Doc. 2022–02125 Filed 2–1–22; 8:45 am]

**BILLING CODE 8120–08–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Docket No. FAA–2016–6772; Summary Notice No. –2022–03]**

### Petition for Exemption; Summary of Petition Received; Cobalt Air, LLC

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

**ACTION:** Notice.

**SUMMARY:** This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion nor omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

**DATES:** Comments on this petition must identify the petition docket number and must be received on or before February 22, 2022.

**ADDRESSES:** Send comments identified by docket number FAA–2016–6772 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at (202) 493–2251.

*Privacy:* In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *https://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.dot.gov/privacy.*

*Docket:* Background documents or comments received may be read at *https://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Sean O'Tormey at 202–267–4044, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

**Timothy R. Adams,**

*Deputy Executive Director, Office of Rulemaking.*

### Petition for Exemption

*Docket No.:* FAA–2016–6772.

*Petitioner:* Cobalt Air, LLC.

*Section(s) of 14 CFR Affected:* § 135.419(a).

*Description of Relief Sought:* Petitioner Cobalt Air, LLC seeks an exemption from the exclusive use requirement referenced in § 135.419(a). Because the FAA has not previously granted exemptions from the exclusive use requirement referenced in § 135.419(a), the FAA seeks comments on the request for relief from § 135.419(a) for the Pilatus PC–12 aircraft. *See* Petitioner's First Amended Request for Exemption and Request for Consolidation with Pending Request for Reconsideration of Denial (June 4, 2019), *available at https://www.regulations.gov/document/FAA-2016-6772-0004.*

[FR Doc. 2022–02116 Filed 2–1–22; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Docket No. FAA–2022–0116]**

### Air Transportation of the COVID–19 Vaccines

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, the FAA invites public comments about its intention to request the Office of Management and Budget (OMB) grant emergency approval for a new information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments is waived, as this is an emergency action in response to the COVID–19 public health emergency. This action would enable the FAA to collect voluntary information from air carriers authorized to conduct operations under the Code of Federal Regulations that participate or have participated in transport of the COVID–19 vaccines to support continued operational safety and efficiency.

**DATES:** Written comments should be submitted by March 4, 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:** Ben Supko, Executive Director, FAA Office of Hazardous Materials Safety (AXH–1), by email at: *hazmatinfo@faa.gov;* phone: (202) 267–7211.

**SUPPLEMENTARY INFORMATION:**

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including (a) whether the proposed collection of information is necessary for the FAA's performance; (b) the accuracy of the estimated burden; (c) ways for the FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information.

*OMB Control Number:* To be determined.

*Title:* Air Transportation of the COVID–19 Vaccines.

*Form Numbers:* N/A.

*Type of Review:* Clearance of a new information collection.

*Background:* The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information is waived, as this is an emergency action regarding transport of the COVID–19 vaccines. The FAA seeks this information collection in connection with the FAA

COVID–19 Vaccine Air Transport Team's work with air carriers, and other aviation stakeholders to aid in the safe, expeditious, and efficient transport of the COVID–19 vaccines. This new collection would enable the FAA to collect voluntary information from air carriers authorized to operate under parts 121 and 135 of title 14, Code of Federal Regulations (14 CFR) that participate or have participated in transport of the COVID–19 vaccines.

The continuing mission of the FAA is to provide the safest, most efficient aerospace system in the world. The FAA's authority on aviation safety is found in title 49, United States Code (U.S.C.). The authority described in 49 U.S.C. 106(f) vests final authority in the Administrator to carry out all functions, powers, and duties of the Administration relating to the promulgation of regulations, rules, orders, circulars, bulletins, and other official publications of the Administration. Section 44701(a)(5) of title 49, U.S.C. also requires the Administrator to promulgate regulations and minimum standards for other practices, methods, and procedures the Administrator finds necessary for safety in air commerce and national security. Pursuant to 49 U.S.C. 44701(b)(1), the Administrator may prescribe minimum safety standards for an air carrier to whom an air carrier operating certificate is issued under 49 U.S.C. 44705. When prescribing a regulation or minimum standard under section 44701(a) or (b), the Administrator must consider the duty of an air carrier to provide service with the highest possible degree of safety in the public interest, as prescribed by 49 U.S.C. 44701(d). Regulations and minimum standards necessary for the safe and efficient air transport of the COVID–19 vaccines are within the scope of these authorities and are in the public interest. The safe and efficient distribution of COVID–19 vaccines helps save lives, reduce the severity of COVID–19 illnesses and the associated strains on healthcare systems, and facilitate economic recovery.

The FAA has worked closely with air carriers, industry associations, and other aviation stakeholders to address safety matters, such as changed packaging configurations, data loggers, and increased dry ice limits in the context of air carrier operations to support transport of the COVID–19 vaccines. For example, on December 10, 2020, the FAA issued ''Safety Alert for Operators 20017,'' [1] which identifies specific considerations related to the air transport of dry ice.

Since December 4, 2020, the Department of Transportation and the FAA have led a recurrent Vaccine Distribution Engagement Meeting (VDEM) to bring together government and industry to share ideas, successes, challenges, and ask questions related to transporting the COVID–19 vaccines. Aviation industry associations, air carriers, government partners, and other stakeholders have engaged to provide information and voice concerns—with no consensus recommendations sought for any governmental action—related to the logistics of transport by air of the COVID–19 vaccines. The entities represented at the recurrent VDEMs have collaborated to successfully transport the COVID–19 vaccines, while upholding the highest standards of aviation safety.

During VDEMs, both FAA and industry stakeholders identified common interest in querying participants to capture lessons learned. Accordingly, the FAA seeks voluntary information from air carriers authorized to operate under 14 CFR parts 121 and 135 that participate or have participated in transport of the COVID–19 vaccines. Information collected from these stakeholders may further enhance safety efforts and facilitate development of pertinent regulations, minimum standards, guidance, and other information.

**Questions**

1. Did the volume of vaccines transported per pound of dry ice increase over the duration of the COVID–19 pandemic? Please provide data that captures the change.
2. Were there observed lower sublimation rates due to improved packaging technology or other factors, and to what factors do you attribute these lower sublimation rates?
3. What risk mitigations have you utilized to enable safe and efficient air operations with larger than normal quantities of dry ice?
4. Was there anything that limited your ability to transport COVID–19 vaccines efficiently while maintaining aviation safety? If so, please describe.
5. What are key takeaways or accomplishments from the COVID–19 vaccine transportation effort over the past year that show the value of working closely with shippers, airframe manufacturers, and the FAA for data-driven safe and efficient operations?
6. What additional regulations, minimum standards, guidance, or other information would you like to see concerning the air transport of dry ice?

*Respondents:* The FAA estimates that a total of 39 entities will voluntarily submit responses for this information collection request.

*Frequency:* The FAA expects the submissions warrant a one-time burden to take place over the next three to six months for entities that choose to comply. The FAA may conduct this survey additional times, depending upon the duration of the COVID–19 pandemic, any significant developments in COVID–19 vaccine logistics and transport, and interest from VDEM participants.

*Estimated Average Burden per Response:* 5 hours reporting and 0 hours recordkeeping.

*Estimated Total Annual Burden:* 195 hours reporting and 0 hours recordkeeping.

Issued in Washington, DC, on January 27, 2022.

**Daniel Benjamin Supko,**

*Executive Director, FAA, Office of Hazardous Materials Safety.*

[FR Doc. 2022–02017 Filed 2–1–22; 8:45 am]

BILLING CODE 4910–13–P

[1] Available at: *https://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/safo/all_safos/media/2020/SAFO20017.pdf.*

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

**[Docket No. FRA–2022–0002–N–2]**

### Proposed Agency Information Collection Activities; Comment Request

**AGENCY:** Federal Railroad Administration (FRA), U.S. Department of Transportation (DOT).

**ACTION:** Notice of information collection; request for comment.

**SUMMARY:** Under the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, FRA seeks approval of the Information Collection Request (ICR) abstracted below. Before submitting this ICR to the Office of Management and Budget (OMB) for approval, FRA is soliciting public comment on specific aspects of the activities identified in the ICR.

**DATES:** Interested persons are invited to submit comments on or before April 4, 2022.

**ADDRESSES:** Written comments and recommendations for the proposed ICR should be submitted on *regulations.gov* to the docket, Docket No. FRA–2022–0002. All comments received will be posted without change to the docket,

including any personal information provided. Please refer to the assigned OMB control number in any correspondence submitted. FRA will summarize comments received in response to this notice in a subsequent notice and include them in its information collection submission to OMB for approval.

**FURTHER INFORMATION CONTACT:** Ms. Hodan Wells, Information Collection Clearance Officer, at email: *hodan.wells@dot.gov* or telephone: (202) 493–0440.

**SUPPLEMENTARY INFORMATION:** The PRA, 44 U.S.C. 3501–3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to provide 60-days' notice to the public to allow comment on information collection activities before seeking OMB approval of the activities. *See* 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. Specifically, FRA invites interested parties to comment on the following ICR regarding: (1) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways for FRA to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology. *See* 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1).

FRA believes that soliciting public comment may reduce the administrative and paperwork burdens associated with the collection of information that Federal regulations mandate. In summary, FRA reasons that comments received will advance three objectives: (1) Reduce reporting burdens; (2) organize information collection requirements in a ''user-friendly'' format to improve the use of such information; and (3) accurately assess the resources expended to retrieve and produce information requested. *See* 44 U.S.C. 3501.

The summaries below describe the ICRs that FRA will submit for OMB clearance as the PRA requires:

*Title:* Certification of Glazing Materials.

*OMB Control Number:* 2130–0525.

*Abstract:* The collection of information is set forth under 49 CFR part 223, which requires the certification and permanent marking of glazing materials by the manufacturer. The manufacturer is also responsible for making available test verification data to railroads and to FRA upon request.

*Type of Request:* Extension without change (with changes in estimates) of a currently approved collection.

*Affected Public:* Businesses (railroads and manufacturers of glazing materials).

*Form(s):* N/A.

*Respondent Universe:* 704 railroads and 5 manufacturers.

*Frequency of Submission:* On occasion.

*Reporting Burden:*

| CFR section [1] | Respondent universe | Total annual responses | Average time per response | Total annual burden hours | Total cost equivalent |
|---|---|---|---|---|---|
| | ..... | (A) | (B) | (C) = A * B | (D) = C * wage rate [2] |
| 223.3(c)—Application—Locomotives, passenger cars, and cabooses less than 50 years old and not used exclusively for excursion, educational, recreational, or private transportation purposes. | 704 railroads | 400 marked tools (small hammers with instructions). | 30 minutes | 200.00 hours | $11,978.00 |
| 223.11(c)—Requirements for existing locomotives built or rebuilt prior to July 1, 1980, equipped with certified glazing in all locomotive cab windows. | 704 railroads | 10 renewal waivers | 4 hours | 40.00 hours | 4,609.60 |
| —(d)(1) Locomotive placed in designated service due to a damaged or broken cab window—Stenciled ''Designated Service—DO NOT OCCUPY''. | 704 railroads | 15 stencilings | 3 minutes | .75 hour | 44.92 |
| —(d)(2) Locomotives removed from service until broken or damaged windows are replaced with certified glazing. | Glazing certification for locomotive replacement windows is done at the time of manufacturing. Consequently, there is no additional burden associated with this requirement. | | | | |
| 223.13(c)—Requirements for existing cabooses built or rebuilt prior to July 1, 1980, equipped with certified glazing in all windows. | 704 railroads | 2 renewal waivers | 4 hours | 8.00 hours | 921.92 |
| —(d) Cabooses removed from service until broken or damaged windows are replaced with certified glazing. | Glazing certification for caboose replacement windows is done at the time of manufacturing. Consequently, there is no additional burden associated with this requirement. | | | | |
| 223.15(c)—Requirements for existing passenger cars built or rebuilt prior to July 1, 1980, equipped with certified glazing in all windows plus four emergency windows. | 704 railroads | 2 renewal waivers | 4 hours | 8 hours | 922 |
| —(d) Passenger cars removed from service until broken/damaged windows are replaced with certified glazing. | Glazing certification for passenger car replacement windows is done at the time of manufacturing. Consequently, there is no additional burden associated with this requirement. | | | | |
| Appendix A—(b)(16)—Certification of glazing materials—Manufacturers to certify in writing that glazing material meets the requirements of this section. | 5 manufacturers | 10 certifications | 30 minutes | 5.00 hours | 387.20 |
| —(c) Identification and marking of each unit of glazing material. | 5 manufacturers | 25,000 marked pieces | 480 pieces per hour | 52.08 hours | 3,119.07 |

| CFR section [1] | Respondent universe | Total annual responses | Average time per response | Total annual burden hours | Total cost equivalent |
|---|---|---|---|---|---|
| | ..... | (A) | (B) | (C) = A * B | (D) = C * wage rate [2] |
| Total | 704 railroads + 5 manufacturers. | 25,439 responses | N/A | 314 hours | 21,983 |

*Total Estimated Annual Responses:* 25,439.

*Total Estimated Annual Burden:* 314 hours.

*Total Estimated Annual Burden Hour Dollar Cost Equivalent:* $21,983.

*Title:* Disqualification Proceedings.

*OMB Control Number:* 2130–0529.

*Abstract:* FRA regulations at 49 CFR part 209, subpart D, explain FRA's responsibilities, and the rights and responsibilities of railroads and railroad employees, regarding disqualification procedures. For example, § 209.331, enforcement of a disqualification order, requires: (a) A railroad employing or formerly employing a disqualified individual to disclose the terms and conditions of the order to the individual's new or prospective employer railroad; (b) a railroad considering hiring an individual in a safety-sensitive position to inquire from the individual's prior employer railroad whether the individual is serving under a disqualification order; and (c) a disqualified individual to inform the individual's employer of the disqualification order, provide a copy of the order to the employer, inform a prospective employer railroad of the disqualification order, and provide a copy of the order.

*Type of Request:* Extension without change (with changes in estimates) of a currently approved collection.

*Affected Public:* Businesses.

*Form(s):* N/A.

*Respondent Universe:* 86,000 railroad employees and 754 railroads.

*Frequency of Submission:* On occasion.

*Reporting Burden:*

| CFR section [3] | Respondent universe | Total annual responses | Average time per response | Total annual burden hours | Total cost equivalent |
|---|---|---|---|---|---|
| | ..... | (A) | (B) | (C) = A * B | (D) = C * wage rate |
| 209.307(a)—Reply—Within 30 days after receipt of the notice of proposed disqualification issued under § 209.305, the respondent shall reply in writing to the charges. | 86,000 employees | 12 replies | 3 hours | 36.00 hours | $2,224.44 |
| —(b) Reply—Request for an extension | 86,000 employees | 2 requests | 30 minutes | 1.00 hour | 61.79 |
| 209.309(a)–(b)—Informal response by railroad employee to a notice of proposed disqualification. | The estimated paperwork burden associated with this regulatory requirement is covered under § 209.307. | | | | |
| —(h) Informal response—Request for an extension. | 86,000 employees | 4 requests | 30 minutes | 2.00 hours | 123.58 |
| 209.331(a)—Enforcement of disqualification order—A railroad that employs or formerly employed an individual serving under a disqualification order must inform other prospective employers. | 754 railroads | 1 notification letter + 1 information letter. | 30 minutes + 30 minutes. | 1 hour | 77.44 |
| —(b) Enforcement of disqualification order—Personnel background check. | This is a common practice for the railroad industry to do routine personnel checks on individuals whom they are planning on hiring. Thus, there is no burden associated with this requirement. | | | | |
| —(c) Enforcement of disqualification order—Individual subject to disqualification order to inform employer and provide copy to employer within 5 days after receipt of such order. | 86,000 employees | 1 disqualification letter + 1 copy of disqualification letter. | 30 minutes + 30 minutes. | 1 hour | 61.79 |
| Total | 86,000 employees + 754 railroads. | 22 responses | N/A | 41.00 hours | 2,549 |

*Total Estimated Annual Responses:* 22.

*Total Estimated Annual Burden:* 41 hours.

*Total Estimated Annual Burden Hour Dollar Cost Equivalent:* $2,549.

Under 44 U.S.C. 3507(a) and 5 CFR 1320.5(b) and 1320.8(b)(3)(vi), FRA informs all interested parties that a respondent is not required to respond to, conduct, or sponsor a collection of information that does not display a currently valid OMB control number.

*Authority:* 44 U.S.C. 3501–3520.

**Brett A. Jortland,**

*Deputy Chief Counsel.*

[FR Doc. 2022–02108 Filed 2–1–22; 8:45 am]

BILLING CODE 4910–06–P

[1] The current inventory exhibits a total burden of 269 hours while the total burden of this notice is 314 hours. As part of its review of this ICR renewal, FRA determined some of the previous estimates were outdated.

[2] Throughout this notice, the dollar equivalent cost is derived from the Surface Transportation Board's 2020 Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes a 75-percent overhead charge.

[3] The current inventory exhibits a total burden of 5 hours while the total burden of this notice is 41 hours. As part of its review of this ICR renewal, FRA determined some of the previous estimates were outdated. Additionally, the requirements under §§ 209.311 through 209.327 are exempted from the PRA under 5 CFR 1320.4(a)(2). Since these provisions pertain to an administrative action or investigation, there is no PRA burden associated with these requirements.

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

### Public Workshop on Corporate Average Fuel Economy Reporting Templates

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Notification to postpone public workshop.

**SUMMARY:** This notice announces that the National Highway Traffic Safety Administration (NHTSA) will be postponing the workshop originally scheduled for January 27, 2022. The workshop was intended to present three new compliance reporting templates for the Corporate Average Fuel Economy (CAFE) Program. The workshop will be rescheduled for later this year.

**DATES:** NHTSA will reschedule the workshop for later this year.

**FOR FURTHER INFORMATION CONTACT:** If you have questions concerning the public workshop postponement, please contact NHTSA staff at *NHTSA.Communication@dot.gov* or Chris Lamance at (202) 366–9525. For any legal questions, contact Michael Kuppersmith at *michael.kuppersmith@dot.gov* or (202) 366–9957. For questions concerning the workshop discussions contact Maurice Hicks at *Maurice.Hicks@dot.gov* or (202) 366–5289.

**SUPPLEMENTARY INFORMATION:** 49 CFR part 537, ''Automotive Fuel Economy Report,'' requires manufacturers to provide early model year projections on automobiles demonstrating how they intend to comply with CAFE standards. The regulation requires manufacturers to submit a pre-model year report by December 31st before the model year and a mid-model year report by July 31st of the model year. When NHTSA received and reviewed manufacturers' projection reports for MYs 2013 through 2015, the agency observed that most did not conform to the requirements specified in Part 537. In a 2015 notice of proposed rulemaking, NHTSA proposed to amend Part 537 to require a new data format for manufacturers' CAFE projection reporting template.[1] However, NHTSA did not adopt the proposed data format from the 2015 proposed rule after receiving adverse comments from manufacturers.[2]

After identifying the sources of manufacturers' concerns, in the April 2020 CAFE final rule, NHTSA established a new standardized template for reporting PMY and MMY information, as specified in 49 CFR 537.7(b) and (c), as well as for the supplementary information required by 49 CFR 537.8. The new template allows manufacturers to build out the required confidential versions of CAFE reports specified in 49 CFR part 537 and to produce automatically the required non-confidential versions by clicking a button within the template. The standardized template assists manufacturers in providing the agency with all necessary data, thereby helping manufacturers to ensure they are complying with CAFE regulations. The template organizes the required data in a manner consistent with NHTSA and EPA regulations and simplifies the reporting process by incorporating standardized responses consistent with those provided to EPA. The template collects the relevant data, calculates intermediate and final values in accordance with EPA and NHTSA methodologies, and aggregates all the final values required by NHTSA regulations in a single summary worksheet. Thus, NHTSA believes that the standardized template will benefit both the agency and manufacturers by helping to avoid reporting errors, such as data omissions and miscalculations, and will ultimately simplify and streamline reporting. NHTSA requires that manufacturers use the standardized Projection Reporting Template for all PMY, MMY, and supplementary CAFE reports beginning in MY 2023. NHTSA also modified its existing compliance database to accept and import the standardized template and automatically aggregate manufacturers' data. This allows NHTSA to execute its regulatory obligations to the public more efficiently and effectively. Overall, the template helps to ensure compliance with data requirements under EPCA/EISA and drastically reduce the industry and government's burden for reporting in accordance with the Paperwork Reduction Act.[3] The reporting template is available for download through the PIC located at: *https://one.nhtsa.gov/cafe_pic/home*—see ''Light Duty Templates: NHTSA CAFE Projections Reporting Template''.

To reduce the burden on all parties, encourage compliance, and facilitate quicker NHTSA credit transaction approval, in April 2020 final rule, NHTSA added a new template to standardize the information parties submit to the agency to request a credit transaction. Often manufacturers inconsistently submit the information required by 49 CFR 536.8, making it difficult for NHTSA to process transactions. The credit transaction template is a simple spreadsheet that credit holders and trading parties fill out. When completed, parties are able to click a button on the spreadsheet to generate a credit transaction summary, and if applicable, credit trade confirmation, the latter of which needs to be signed by both trading entities. The credit trade confirmation serves as an acknowledgement that the parties have agreed to trade credits. The completed credit trade summary, and a PDF copy of the signed trade confirmation must be submitted to NHTSA. Using the Credit Transaction Template simplifies the credit trading process for OVSC and manufacturers, and helps to ensure that trading parties follow the requirements for a credit transaction found in 49 CFR 536.8(a).[4] Additionally, the credit trade confirmation includes an acknowledgement of the ''error or fraud'' provisions in 49 CFR 536.8(f)–(g), and the finality provision of 49 CFR 536.8(g). The credit transaction template is available for download through the PIC located at: *https://one.nhtsa.gov/cafe_pic/home*—see ''Light Duty Templates: NHTSA CAFE Credit Transaction Template''.

Finally, NHTSA adopted requirements in the 2020 final rule requiring manufacturers to submit the costs of all credit trade contracts to the agency starting September 1, 2022. NHTSA intends to use this information to determine the true cost of compliance for all manufacturers. This information would allow NHTSA to better assess the impact of its regulations on the industry and provide more insightful information in developing future rulemakings. NHTSA also adopted requirements allowing manufacturers to submit the information confidentially, in accordance with 49 CFR part 512.[5] This confidential information would be held by secure electronic means in NHTSA's database systems. As for public information, NHTSA intends to use the information to provide more credit reports on the PIC such as aggregated credit transactions or data comparable to the credit information which EPA makes available to the public.

In response to NHTSA new templates, manufacturers have identified errors and offered suggestions for improvements. As a result, in the

[1] 80 FR 40540 (Jul. 13, 2015).

[2] 81 FR 73958 (Oct. 25, 2016).

[3] 44 U.S.C. 3501 *et seq.*

[4] Submitting a properly completed template and accompanying transaction letter will satisfy the trading requirements in 49 CFR part 536.

[5] *See also* 49 U.S.C. 32910(c).

August 2021 CAFE NPRM,[6] NHTSA proposed changes to its new reporting and credit templates as well as established a new standardized template to collect information on the monetary and non-monetary costs of credit trades. NHTSA has identified a series of monetary and non-monetary factors which it believes to be important to the costs associated with credit trading in the CAFE program which predicated the development of its new credit value template.[7] The agency believes this information will allow for a better assessment of the true costs of compliance. NHTSA further notes that greater government oversight is needed over the CAFE credit market and it needs to understand the full range of complexity in transactions, monetary and non-monetary, in addition to the range of partnerships and cooperative agreements between credit account holders—which may impact the price of credit trades.[8] NHTSA proposed that manufacturers should start using both credit templates starting September 1, 2022. Note, the credit value template is available for download through the PIC located at: *https://one.nhtsa.gov/cafe_pic/home*—see ''Light Duty Templates: NHTSA CAFE Credit Value Reporting Template''.

In the August 2021 rulemaking, NHTSA also committed to demonstrate its templates through a workshop designed to give manufacturers an open forum for communicating directly with the agency.

**Otto G. Matheke, III,**

*Director of the Office of Vehicle Safety Compliance.*

[FR Doc. 2022–02088 Filed 2–1–22; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

**[Docket No. PHMSA–2022–0005]**

### Pipeline Safety: Information Collection Activities

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, PHMSA invites public comments about the Agency's intention to request Office of Management and Budget (OMB) approval to renew four information collections that are scheduled to expire in 2022. PHMSA has reviewed each information collection and considers them vital to maintaining pipeline safety. As such, PHMSA will request renewal from OMB, without change, for each information collection.

**DATES:** Interested persons are invited to submit comments on or before April 4, 2022.

**ADDRESSES:** Comments may be submitted in the following ways:

*E-Gov Website: https://www.regulations.gov.* This site allows the public to submit comments on any **Federal Register** notice issued by any agency.

*Fax:* 1–202–493–2251.

*Mail:* Docket Management Facility; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590–0001.

*Hand Delivery:* Room W12–140 on the ground level of DOT, West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

*Instructions:* Identify the docket number, PHMSA–2022–0005, at the beginning of your comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided. You should know that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). Therefore, you may want to review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000, (65 FR 19477) or visit *https://www.regulations.gov* before submitting any such comments.

*Docket:* For access to the docket or to read background documents or comments, go to *https://www.regulations.gov* at any time or to Room W12–140 on the ground level of DOT, West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. If you wish to receive confirmation of receipt of your written comments, please include a self-addressed, stamped postcard with the following statement: ''Comments on: PHMSA–2022–0005.'' The Docket Clerk will date stamp the postcard prior to returning it to you via the U.S. mail. Please note that due to delays in the delivery of U.S. mail to Federal offices in Washington, DC, we recommend that persons consider an alternative method (internet, fax, or professional delivery service) of submitting comments to the docket and ensuring their timely receipt at DOT.

*Privacy Act Statement:* DOT may solicit comments from the public regarding certain general notices. 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 *www.dot.gov/privacy.*

*Confidential Business Information:* Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this notice, it is important that you clearly designate the submitted comments as CBI. Pursuant to 49 CFR 190.343, you may ask PHMSA to give confidential treatment to information you give to the Agency by taking the following steps: (1) Mark each page of the original document submission containing CBI as ''Confidential''; (2) send PHMSA, along with the original document, a second copy of the original document with the CBI deleted; and (3) explain why the information you are submitting is CBI. Unless you are notified otherwise, PHMSA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this notice. Submissions containing CBI should be sent to Angela Hill, DOT, PHMSA, 1200 New Jersey Avenue SE, PHP–30, Washington, DC 20590–0001. Any commentary PHMSA receives that is not specifically designated as CBI will be placed in the public docket for this matter.

**FOR FURTHER INFORMATION CONTACT:** Angela Hill by telephone at 202–366–1246 or by email at *Angela.Hill@dot.gov.*

**SUPPLEMENTARY INFORMATION:** Title 5, Code of Federal Regulations (CFR) section 1320.8(d), requires PHMSA to

[6] *https://www.regulations.gov/document/NHTSA-2021-0053-0012/comment.*

[7] UCS, Detailed Comments, NHTSA–2018–0067–12039; Jason Schwartz, Detailed Comments, NHTSA–2018–0067–12162.

[8] Honda, Detailed Comments, NHTSA–2018–0067–11819.

provide interested members of the public and affected agencies the opportunity to comment on information collection and recordkeeping requests before they are submitted to OMB for approval. This notice identifies four information collection requests that PHMSA will submit to OMB for renewal and requests comment from interested parties. The four information collections (including their expiration dates) are as follows: (1) OMB control number 2137–0589, Response Plans for Onshore Oil Pipelines (6/30/22); (2) OMB control number 2137–0610, Pipeline Integrity Management in High Consequence Areas Gas Transmission Pipeline Operators (6/30/22); (3) OMB control number 2137–0624, Control Room Management Human Factors (6/30/22); and (4) OMB control number 2137–0631, Excess Flow Valves—New Customer Notifications (12/31/22).

The following information is provided for these information collections: (1) Title of the information collection; (2) OMB control number; (3) Current expiration date; (4) Type of request; (5) Abstract of the information collection activity; (6) Description of affected public; (7) Estimate of total annual reporting and recordkeeping burden; and (8) Frequency of collection.

PHMSA will request a three-year term of approval for each of the following information collection activities. PHMSA requests comments on the following information:

1. *Title:* Response Plans for Onshore Oil Pipelines.

*OMB Control Number:* 2137–0589.

*Current Expiration Date:* 6/30/2022.

*Type of Request:* Renewal of a currently approved information collection.

*Abstract:* Title 49 CFR part 194 requires an operator of an onshore oil pipeline facility to prepare and submit an oil spill response plan to PHMSA for review and approval. This mandatory recordkeeping requirement details operators' plans to prepare for emergency situations involving oil spills. This mandatory information collection is used by PHMSA to determine if an operator is compliant with the requirements in part 194. Plans are submitted and/or updated annually. This information collection covers operators' submission of facility response plans for onshore hazardous liquid pipeline facilities.

*Affected Public:* Operators of onshore oil pipeline facilities.

*Annual Reporting and Recordkeeping Burden:*

*Total Annual Responses:* 540.

*Total Annual Burden Hours:* 73,980.

*Frequency of Collection:* On occasion.

2. *Title:* Pipeline Integrity Management in High Consequence Areas Gas Transmission Pipeline Operators.

*OMB Control Number:* 2137–0610.

*Current Expiration Date:* 6/30/2022.

*Type of Request:* Renewal of a currently approved information collection.

*Abstract:* This mandatory information collection request pertains to gas transmission operators that are required to comply with PHMSA's Gas Transmission Integrity Management Program regulations. The information collection requires gas transmission operators in high consequence areas to maintain a written integrity management program and keep records that demonstrate compliance with 49 CFR part 192, subpart O. Operators must maintain their integrity management records for the life of the pipeline, and PHMSA and/or state regulators may review those records as a part of inspections. Gas transmission operators are also required to report to PHMSA certain actions related to their integrity management program. This information collection supports DOT's strategic goal of safety by reducing the number of incidents in natural gas transmission pipelines.

*Affected Public:* Gas transmission operators.

*Annual Reporting and Recordkeeping Burden:*

*Estimated number of responses:* 733.

*Estimated annual burden hours:* 1,018,807.

*Frequency of Collection:* On occasion.

3. *Title:* Control Room Management Human Factors.

*OMB Control Number:* 2137–0624.

*Current Expiration Date:* 6/30/2022.

*Type of Request:* Renewal of a currently approved information collection.

*Abstract:* Operators of gas and hazardous liquid pipelines must develop, implement, and submit a human factors management plan designed to reduce risks associated with human factors in each control room. The information is used by PHMSA to determine compliance with federal pipeline safety regulations and is also used by agency and state officials to assist federal and state pipeline safety inspectors who audit this information when they conduct compliance inspections as well as to provide background for failure investigations.

*Affected Public:* Operators of natural gas and hazardous liquid pipelines.

*Estimated number of responses:* 2,702.

*Estimated annual burden hours:* 127,328.

*Frequency of collection:* On occasion.

4. *Title:* Excess Flow Valves—New Customer Notifications.

*OMB Control Number:* 2137–0631.

*Current Expiration Date:* 12/31/2022.

*Type of Request:* Renewal with no change of a currently approved information collection.

*Abstract:* This information collection covers the reporting and recordkeeping requirements for gas pipeline operators associated with customer notifications pertaining to the installation of excess flow valves. Gas pipeline operators must notify customers of their right to request the installation of excess flow valves and keep records of those notifications. This information collection includes example of language that can be used to notify natural gas customers of their right to request the installation of an excess flow valve pursuant to § 192.383(d). Use of the language is voluntary but would comply with federal regulatory requirements.

*Affected Public:* Natural gas pipeline operators.

*Annual Reporting and Recordkeeping Burden:*

*Estimated number of responses:* 4,448.

*Estimated annual burden hours:* 4,448.

*Frequency of Collection:* On occasion.

Comments are invited on:

(a) The need for the renewal and revision of these collections of information for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(b) The accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

*Authority:* The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued in Washington, DC, under authority delegated in 49 CFR 1.97.

**John A. Gale,**

*Director, Standards and Rulemaking Division.*

[FR Doc. 2022–02048 Filed 2–1–22; 8:45 am]

**BILLING CODE 4910–60–P**

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

**[Docket No. PHMSA–2022–0004]**

### Pipeline Safety: Pipeline Safety Enhancement Programs

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Notice.

**SUMMARY:** This notice outlines how PHMSA will review and process Pipeline Safety Enhancement Program (PSEP) requests from pipeline owners and operators (PSEP applicants or applicants) to implement safety-enhancing testing programs for innovative technologies and operational practices on natural gas and hazardous liquid (HL) pipeline facilities. PHMSA will review each PSEP application and provide regulatory oversight of each approved PSEP, in accordance with the Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2020 (PIPES Act of 2020), to ensure the safety measures in each achieve a level of safety greater than the level of safety provided by the federal pipeline safety regulations (PSR).

**FOR FURTHER INFORMATION CONTACT:**

*General:* Ms. Kay McIver by telephone at 202–366–0113, or by email at *kay.mciver@dot.gov.*

*Technical:* Mr. Steve Nanney by telephone at 713–272–2855, or by email at *steve.nanney@dot.gov.*

**SUPPLEMENTARY INFORMATION:** Section 104 of the PIPES Act of 2020 (Pub. L. 116–260 (Division R)) incorporated within the federal pipeline safety laws (49 U.S.C. 60101 *et seq.*) at section 60142, authorizes the establishment of PSEPs to evaluate innovative technologies and operational practices providing more robust protection of public safety and the environment than the existing PSR governing natural gas and HL pipeline facilities. PHMSA's review of PSEP applications, and its subsequent regulatory oversight of approved PSEPs, will build on PHMSA's longstanding, proven special permit processes to ensure robust stakeholder engagement and careful consideration of public safety concerns, potential environmental impacts, and state interests. PHMSA may subsequently undertake rulemakings to revise the PSR to accommodate promising technological and operational practices evaluated in PSEPs.

Pipeline owners and operators (collectively, operators) may only apply for a PSEP through December 21, 2023. A PSEP shall not exceed a duration of three (3) years after the approval date. Only natural gas pipeline facilities regulated under 49 CFR part 192 and HL pipeline facilities regulated under 49 CFR part 195 are eligible for PSEPs. Congress has not granted PHMSA authority to renew PSEPs following that initial, three-year period. PHMSA will review PSEP applications and waive compliance with one or more of the provisions of the PSR while imposing compliance conditions that will be set out in an order approving the PSEP. PHMSA will, consistent with a statutory requirement in the PIPES Act of 2020, administer PSEPs to ensure they achieve a level of safety that is greater than the level of safety required by the PSR.

### Application Process

PSEP applications must follow the following requirements:

(1) Applications must be submitted to the PHMSA Associate Administrator for Pipeline Safety in accordance with 49 CFR 190.341(b)(2).

(2) Applications must contain information in accordance with 49 CFR 190.341(c), as elaborated and supplemented below in Items 3 through 11.

(3) Applications must include a draft environmental assessment (DEA) in accordance with 49 CFR 190.341(c)(8).

a. PHMSA will review each DEA to ensure it complies with the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* as implemented by the Council on Environmental Quality regulations at 40 CFR parts 1500–1508, U.S. Department of Transportation (DOT) Order No. 5610.1C, and any other pertinent regulations or policies implementing NEPA, as applicable.

b. PHMSA will analyze the PSEP application to determine whether the proposed action could have a significant impact on the human environment. PHMSA will analyze applications for potential risks to public safety and impacts to the environment that could result from PHMSA's decision to grant, grant with additional conditions, or deny the application.

c. The DEA that the applicant provides must provide an analysis, consistent with principles set forth in DOT Order 5610.2C, of whether the proposed action will have disproportionately high and adverse human health or environmental effects on minority and low-income populations. Such analysis must include demographic information about the community within a half-mile vicinity on each side of the pipeline and past the pipeline endpoints of the relevant site(s). The applicant must use the U.S. Environmental Protection Agency Environmental Justice mapping and screening tool called EJSCREEN for its environmental justice analysis.

d. As part of its review of an application, PHMSA will evaluate whether the application, if granted, will impact the likelihood or consequence of a pipeline failure as compared to the operation of the pipeline in full compliance with the PSR.

e. PHMSA will provide, on request, an example environmental assessment, a template, and the environmental justice information requirements for applicants to use in generating and submitting a DEA.

(4) Applications must include a map of the pipeline segment affected by the testing program at a 1:24,000 scale showing the county and state roads and highways. PHMSA may request maps with additional information based upon the testing program.

(5) Applications must identify each of (i) the applicant's entire natural gas or HL pipeline system (as appropriate) including the mileage of pipeline facilities that are regulated under either 49 CFR part 192 (gas pipeline) or part 195 (HL pipeline); and (ii) the mileage of pipeline, and resulting percentage of the applicant's natural gas or HL pipeline system, that would be subject to the PSEP application.

(6) Applications must not include pipeline segments that are located in, or which could affect, [1] high consequence areas (HCAs) as defined in 49 CFR 192.903 for gas pipelines, or HCAs, including unusually sensitive areas (USAs), as defined in 49 CFR 195.450 and 195.6, respectively, for HL pipelines. Pipeline facilities located in, or which could affect, HCAs and USAs are prohibited from PSEPs.

(7) Applications must identify safety measures for the PSEP that are designed to achieve a level of safety that is greater than the level of safety required by either 49 CFR part 192 or 49 CFR part 195, as applicable. Applications must also identify the specific provisions of the PSR for which a waiver is sought.

(8) Applications must include the accident and incident record of the operator for the past 10 years.

(9) Applications must describe each operator's safety management system (SMS) for all its 49 CFR part 192 and 49 CFR part 195 regulated pipelines and identify the SMS procedures that would

[1] PHMSA expects this eligibility limitation will ensure adequate protection for areas (specifically, HCAs) that the PSR recognize as being particularly vulnerable to the public safety and the environmental risks from natural gas or HL pipeline facilities in the vicinity.

be applicable to the PSEP, to include any processes and procedures that provide a framework to disclose and manage risk, promote a learning environment, and continuously improve pipeline safety and integrity.

(10) Applications must describe the safety technology or operational practice that the applicant is proposing, including any research and development program that the technology or operational practice underwent.

**Public Notice**

Prior to PHMSA approving each PSEP application, PHMSA will publish a notice in the **Federal Register** and solicit comments on the PSEP application. PHMSA will assign a docket number in the Federal Docket Management System (FDMS) located at *www.Regulations.gov* for each PSEP application, the docket will include the **Federal Register** notice alerting the public of the application and will include all other pertinent documents for public review, including public comments.

The comment period will be for a minimum of 90 days for each PSEP application. Comments received after the closing date will be evaluated if it is possible to do so without incurring additional expense or delay.

**Limitations in Mileage and Prohibited Areas**

Per 49 U.S.C. 60142, all PSEPs approved by PHMSA may not, in the aggregate, apply to more than 5 percent of the total miles of either natural gas or HL pipelines in the United States that are regulated by PHMSA or a state authority under 49 U.S.C. 60105 or 60106. Furthermore, the aggregate mileage of each of an operator's natural gas or HL pipeline miles in PSEPs must be limited to the lesser of either (1) 1,000 miles; or (2) 38 percent of the total miles of natural gas or HL pipelines in the operator's natural gas system or HL system that are regulated by PHMSA or a state authority under 49 U.S.C. 60105 or 60106. Finally, PSEPs will not apply to pipeline segments located within, or which could affect, HCAs as defined in 49 CFR 195.450 and 192.903, including USAs as defined in 49 CFR 195.6.

**Safety Standards and PHMSA Review Considerations**

Each PSEP must incorporate innovative safety technologies and operational practices improving the reliability, accuracy, durability, or certainty of pipeline safety technologies, techniques, or methods. Safety measures for a proposed PSEP must be designed to achieve, and will be evaluated by PHMSA to ensure, a level of safety that is *greater than* the level of safety required by either 49 CFR part 192 for natural gas pipelines or 49 CFR part 195 for HL pipelines, as applicable. This standard exceeds the minimum level of safety that is required for issuance of a special permit, as described in 49 CFR 190.341(d)(2). PHMSA will only waive safety regulations in either 49 CFR part 192 or part 195 that would otherwise prevent the use of the safety technology or operational practice to be tested.

In evaluating each PSEP application to ensure a level of safety greater than the level of safety required by either 49 CFR part 192 for natural gas pipelines or 49 CFR part 195 for HL pipelines, PHMSA will consider information in the PSEP application as well as the following:

(1) The applicant's pipeline accident or incident record;

(2) Whether the applicant has an SMS in place; and how the application proposes to eliminate or mitigate potential safety and environmental risks throughout the duration of the program;

(3) Whether the proposed safety technology or operational practice has been adequately tested through a research and development program, collaborative research development organizations, or other institutions; and

(4) Comments received in the docket for that PSEP application.

PHMSA will publish its decision on whether to grant or deny the proposed PSEP application, in the docket for that application. PHMSA may, in granting a PSEP application, impose such conditions as PHMSA determines are appropriate. The effective date of a PSEP will not be made retroactive to a date preceding the publication date of PHMSA's decision.

**Data and Findings**

Operators must submit to PHMSA detailed findings and an annual report with a summary of data collected as a result of participation in the PSEP. PHMSA will make the annual report for each ongoing testing program available to the public on PHMSA's website (at *www.phmsa.dot.gov/pipeline/special-permits-state-waivers/special-permits-and-state-waivers-overview*) and in the corresponding FDMS located at *www.Regulations.gov.*

**Authority To Revoke Participation**

Pursuant to the PIPES Act of 2020, PHMSA shall immediately revoke a PSEP if:

(1) The operator has an accident or incident involving death or personal injury necessitating in-patient hospitalization and the testing program is determined to be the cause of, or a contributing factor to, that accident or incident.

(2) The operator fails to comply with the terms and conditions of the testing program.

(3) PHMSA determines that continuation of the PSEP by the operator would be unsafe or would not be consistent with the public safety and environmental protection goals and objectives of 49 CFR part 192 or part 195, as applicable.

Because the statute mandates PHMSA ''immediately'' revoke a PSEP in the event of the above conditions, such revocations will not be subject to the ''show cause'' process for special permits set forth in 49 CFR 190.341(j)(2). PHMSA may, in the event of a violation of a PSEP's terms and conditions, pursue enforcement action as contemplated by 49 CFR 190.341(m).

**States' Rights**

Following publication in the **Federal Register** of a notice announcing a PSEP, PHMSA will send that notice directly to each state in which a pipeline segment within the proposed PSEP is located. Those states may submit comments in the pertinent docket, or request exemption from a proposed PSEP by sending the request to the PHMSA Associate Administrator for Pipeline Safety for any proposed PSEP either prior to, or within 30 days after, PHMSA grants a PSEP. If a state has not submitted an exemption request in the above defined interval, the state shall not enforce any law (including regulations) that is inconsistent with the PSEP order in effect in the state.

**PHMSA Reports to Congress**

PHMSA will submit a report to Congress at the conclusion of each PSEP and make those reports available to the public on PHMSA's website at: *www.phmsa.dot.gov/pipeline/special-permits-state-waivers/special-permits-and-state-waivers-overview* and in the FDMS located at *www.Regulations.gov* for each operator's application in the assigned docket number. The report will contain:

(1) The findings and conclusions determined by PHMSA with respect to the testing program; and

(2) Any recommendations by PHMSA with respect to the testing program, including any recommendations for amendments to laws (including the PSR) and the establishment of standards, that:

a. Would enhance the safe operation of interstate gas or HL pipeline facilities; and

b. Are technically, operationally, and economically feasible.

**Regulatory Updates**

If a report to Congress discussed above indicates that it is practicable to establish technically, operationally, and economically feasible standards for the use of a safety-enhancing technology and any corresponding operational practices implemented by the testing program described in the report, PHMSA may commence a rulemaking action to promulgate regulations that:

(1) Allow operators of interstate gas or HL pipeline facilities to use the relevant technology or practice to the extent practicable; and

(2) Establish technically, operationally, and economically feasible standards for the capability and deployment of the technology or practice.

**Confidential Business Information**

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA; 5 U.S.C. 552), CBI is exempt from public disclosure. If PSEP application information or data contains commercial or financial information that is customarily treated as private by the PSEP applicant, that the PSEP applicant actually treats as private, and that is relevant to the PSEP, it is important that the PSEP applicant clearly designates the submitted information or data as CBI. Pursuant to 49 CFR 190.343, a PSEP applicant may ask PHMSA to give confidential treatment to information the PSEP applicant gives to the Agency by taking the following steps: (1) Mark each page of the original document submission containing CBI as ''Confidential''; (2) send PHMSA, along with the original document, a second copy of the original document with the CBI deleted; and (3) explain why the information you are submitting is CBI. Submissions containing CBI should be sent to Kay McIver, DOT, PHMSA–PHP–80, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. Any information or data PHMSA receives that is not specifically designated as CBI will be placed in the public docket for the pertinent PSEP application.

**Paperwork Reduction Act Compliance**

PHMSA will be coordinating with the Office of Information and Regulatory Affairs within the Office of Management and Budget in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Issued in Washington, DC, on January 28, 2022, under authority delegated in 49 CFR 1.97.

**Alan K. Mayberry,**

*Associate Administrator for Pipeline Safety.*

[FR Doc. 2022–02159 Filed 2–1–22; 8:45 am]

BILLING CODE 4910–60–P

## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

### Agency Information Collection Activities: Information Collection Renewal; Comment Request; Interagency Statement on Complex Structured Finance Transactions

**AGENCY:** Office of the Comptroller of the Currency (OCC), Treasury.

**ACTION:** Notice and request for comment.

**SUMMARY:** The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection as required by the Paperwork Reduction Act of 1995 (PRA). An agency may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment concerning the renewal of an information collection titled ''Interagency Statement on Complex Structured Finance Transactions.''

**DATES:** Comments must be submitted on or before April 4, 2022.

**ADDRESSES:** Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, Attention: 1557–0229, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

*Instructions:* You must include ''OCC'' as the agency name and ''1557–0229'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Following the close of this notice's 60-day comment period, the OCC will publish a second notice with a 30-day comment period. You may review comments and other related materials that pertain to this information collection beginning on the date of publication of the second notice for this collection by the method set forth in the next bullet.

- *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Hover over the ''Information Collection Review'' tab and click on ''Information Collection Review'' drop-down menu. From the ''Currently under Review'' drop-down menu, select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0229'' or ''Interagency Statement on Complex Structured Finance Transactions.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.
- For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.

**FOR FURTHER INFORMATION CONTACT:** Shaquita Merritt, OCC Clearance Officer, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the OMB for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of title 44 requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the OCC is publishing notice of the renewal of the collection

of information set forth in this document.

*Title:* Interagency Statement on Complex Structured Finance Transactions.

*OMB Control No.:* 1557–0229.

*Description:* The Interagency Statement on Complex Structured Finance Transactions [1] describes the types of internal controls and risk management procedures that the agencies (OCC, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and the Securities and Exchange Commission) consider particularly effective in helping financial institutions identify and address the reputational, legal, and other risks associated with complex structured finance transactions. Those internal controls and risk management procedures form the basis of this information collection.

*Affected Public:* Businesses or other for-profit.

*Type of Review:* Regular.

*Estimated Number of Respondents:* 9.

*Estimated Annual Burden:* 225 hours.

*Frequency of Response:* On occasion.

Comments submitted in response to this notice will be summarized, included in the request for OMB approval, and become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the information collection burden;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

**Theodore J. Dowd,**

*Deputy Chief Counsel, Office of the Comptroller of the Currency.*

[FR Doc. 2022–02115 Filed 2–1–22; 8:45 am]

**BILLING CODE 4810–33–P**

[1] 72 FR 1372 (January 11, 2007).

## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

### Agency Information Collection Activities: Information Collection Renewal; Submission for OMB Review; Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions With Total Consolidated Assets of $250 Billion or More Under the Dodd-Frank Wall Street Reform and Consumer Protection Act

**AGENCY:** Office of the Comptroller of the Currency (OCC), Treasury.

**ACTION:** Notice and request for comment.

**SUMMARY:** The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection as required by the Paperwork Reduction Act of 1995 (PRA). In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC proposed revisions to a regulatory reporting requirement for national banks and Federal savings associations titled, ''Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions with Total Consolidated Assets of $250 Billion or More under the Dodd-Frank Wall Street Reform and Consumer Protection Act,'' and is now seeking comment on the final version of those revisions.

**DATES:** Comments must be received by March 4, 2022.

**ADDRESSES:** Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, 1557–0319, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

*Instructions:* You must include ''OCC'' as the agency name and ''1557–0319'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Written comments and recommendations for the proposed information collection should also 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.

On October 27, 2021, the OCC published a notice for 60 days of comment concerning this collection, 86 FR 59447. You may review comments and other related materials that pertain to this information collection following the close of the 30-day comment period for this notice by the method set forth in the next bullet.

- Viewing Comments Electronically: Go to *www.reginfo.gov.* Hover over the ''Information Collection Review'' tab and click on ''Information Collection Review'' drop-down menu. From the ''Currently under Review'' drop-down menu, select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0319'' or ''Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions with Total Consolidated Assets of $250 Billion or More under the Dodd-Frank Wall Street Reform and Consumer Protection Act.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.
- For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.

**FOR FURTHER INFORMATION CONTACT:** Shaquita Merritt, OCC Clearance Officer, (202) 649–5490, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th St. SW, Washington, DC 20219. In addition, copies of the templates referenced in this notice can be found on the OCC's website under News and Issuances (*https://www.occ.treas.gov/tools-forms/forms/bank-operations/stress-test-reporting.html*).

**SUPPLEMENTARY INFORMATION:** The OCC is requesting comment on the following revision to an approved information collection:

*Title:* Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions with Total Consolidated Assets of $250 Billion or More under the Dodd-Frank Wall Street Reform and Consumer Protection Act.

*OMB Control No.:* 1557–0319.

*Description:* Section 165(i)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act [1] (Dodd-Frank Act) requires certain financial companies, including national banks and Federal savings associations, to conduct annual stress tests [2] and requires the primary financial regulatory agency [3] of those financial companies to issue regulations implementing the stress test requirements.[4] Under section 165(i)(2), a covered institution is required to submit to the Board of Governors of the Federal Reserve System (Board) and to its primary financial regulatory agency a report at such time, in such form, and containing such information as the primary financial regulatory agency may require.[5]

On October 9, 2012, the OCC published in the **Federal Register** a final rule implementing the section 165(i)(2) annual stress test requirement.[6] This rule describes the reports and information collections required to meet the reporting requirements under section 165(i)(2). These information collections will be given confidential treatment (5 U.S.C. 552(b)(4)) to the extent permitted by law.

In 2012, the OCC first implemented the reporting templates referenced in the final rule. *See* 77 FR 49485 (August 16, 2012) and 77 FR 66663 (November 6, 2012). The OCC uses the data collected to assess the reasonableness of the stress test results of covered institutions and to provide forward-looking information to the OCC regarding a covered institution's capital adequacy. The OCC also may use the results of the stress tests to determine whether additional analytical techniques and exercises could be appropriate to identify, measure, and monitor risks at the covered institution. The stress test results are expected to support ongoing improvement in a covered institution's stress testing practices with respect to its internal assessments of capital adequacy and overall capital planning. The OCC proposed new changes to these templates on October 27, 2021.[7]

The OCC recognizes that many covered institutions with total consolidated assets of $250 billion or more are required to submit reports using reporting form FR Y–14A.[8] The OCC also recognizes the Board has made modifications to the FR Y–14A and, to the extent practical, the OCC is keeping its reporting requirements consistent with the Board's FR Y–14A to minimize burden on covered institutions. Therefore, the OCC is revising its reporting requirements to mirror the Board's FR Y–14A for covered institutions with total consolidated assets of $250 billion or more.

The OCC's changes include only limited updates to reflect the changes made by the Board, and the OCC reporting forms will substantially resemble the forms used by the OCC last year. Many of the changes made by the Board are inapplicable to OCC-regulated institutions and involve new items that would not be collected by the OCC under the proposed changes. For example, the OCC's, Board's, and Federal Deposit Insurance Corporation's January 6, 2021 final rule revising risk-based capital requirements included new items on the FR Y–14A that are inapplicable at the depository institution level (for example, ''outstanding eligible long-term debt'') and will therefore not be collected under the OCC's revisions. Similarly, in 2021 the OCC's reporting forms did not collect certain items collected on the 2021 FR Y–14A (for example, line items related to the stress capital buffer), and the OCC's 2022 forms also do not include these items. The OCC's 2022 changes include the minimal adjustments necessary to align line items with placement on the 2022 FR Y–14A.

The OCC did not receive any comments on the proposed revisions.

*Type of Review:* Revision.

*Affected Public:* Businesses or other for-profit.

*Estimated Number of Respondents:* 8.

*Estimated Total Annual Burden:* 4,744 hours.

The OCC believes that the systems that covered institutions use to prepare the FR Y–14 reporting templates and submit to the Board will also be used to prepare the reporting templates described in this notice. On October 27, 2021, the OCC published a notice for 60 days of comment concerning this collection, 86 FR 59447. No comments were received. Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

**Theodore J. Dowd,**

*Deputy Chief Counsel, Office of the Comptroller of the Currency.*

[FR Doc. 2022–02268 Filed 2–1–22; 8:45 am]

**BILLING CODE 4810–33–P**

[1] Public Law 111–203, 124 Stat. 1376, July 2010.

[2] 12 U.S.C. 5365(i)(2)(A).

[3] 12 U.S.C. 5301(12).

[4] 12 U.S.C. 5365(i)(2)(C).

[5] 12 U.S.C. 5365(i)(2)(B).

[6] 77 FR 61238 (October 9, 2012) (codified at 12 CFR part 46).

[7] 86 FR 59447 (Oct. 27, 2021).

[8] *http://www.federalreserve.gov/reportforms.*

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Notice of Renewal of the Art Advisory Panel of the Commissioner of Internal Revenue

**AGENCY:** Internal Revenue Service, Treasury.

**ACTION:** Notice of Renewal of the Art Advisory Panel of the Commissioner of Internal Revenue.

**SUMMARY:** The charter for the Art Advisory Panel has been renewed for a two-year period beginning January 26, 2022.

**FOR FURTHER INFORMATION CONTACT:** Robin B. Lawhorn, 400 West Bay Street, Suite 252, Jacksonville, FL 32202. Telephone (904) 661–3198 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:** Notice is hereby given under section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. 2), that the Art Advisory Panel of the Commissioner of Internal Revenue, a necessary committee that is in the public interest, has been renewed for an additional two years beginning on *1/26/2022.*

The Panel helps the Internal Revenue Service review and evaluate the acceptability of property appraisals submitted by taxpayers in support of the

fair market value claimed on works of art involved in Federal Income, Estate or Gift taxes in accordance with sections 170, 2031, and 2512 of the Internal Revenue Code of 1986, as amended.

For the Panel to perform this function, Panel records and discussions must include tax return information. Therefore, the Panel meetings will be closed to the public since all portions of the meetings will concern matters that are exempted from disclosure under the provisions of section 552b(c)(3), (4), (6) and (7) of Title 5 of the U.S. Code. This determination, which is in accordance with section 10(d) of the Federal Advisory Committee Act, is necessary to protect the confidentiality of tax returns and return information as required by section 6103 of the Internal Revenue Code.

**Charles P. Rettig,**

*Commissioner of Internal Revenue.*

[FR Doc. 2022–02101 Filed 2–1–22; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### United States Mint

### Establish Prices for United States Mint Numismatic Products

**AGENCY:** United States Mint, Department of the Treasury.

**ACTION:** Notice.

**SUMMARY:** The United States Mint is announcing new pricing for the following new United States Mint numismatic products in accordance with the table below:

| SKU | Product | Current price | New price |
|---|---|---|---|
| 22WBA | 2022 American Women Quarters 100-Coin Bag™—Maya Angelou (P) | n/a | $40.00 |
| 22WBB | 2022 American Women Quarters 100-Coin Bag™—Maya Angelou (D) | n/a | 40.00 |
| 22WBC | 2022 American Women Quarters 100-Coin Bag™—Sally Ride (P) | n/a | 40.00 |
| 22WBD | 2022 American Women Quarters 100-Coin Bag™—Sally Ride (D) | n/a | 40.00 |
| 22WBE | 2022 American Women Quarters 100-Coin Bag™—Wilma Mankiller (P) | n/a | 40.00 |
| 22WBF | 2022 American Women Quarters 100-Coin Bag™—Wilma Mankiller (D) | n/a | 40.00 |
| 22WBG | 2022 American Women Quarters 100-Coin Bag™—Nina Otero-Warren (P) | n/a | 40.00 |
| 22WBH | 2022 American Women Quarters 100-Coin Bag™—Nina Otero-Warren (D) | n/a | 40.00 |
| 22WBJ | 2022 American Women Quarters 100-Coin Bag™—Anna May Wong (P) | n/a | 40.00 |
| 22WBK | 2022 American Women Quarters 100-Coin Bag™—Anna May Wong (D) | n/a | 40.00 |
| 22WRA | 2022 American Women Quarters 2-Roll Set™—Maya Angelou (P&D) | n/a | 36.00 |
| 22WRB | 2022 American Women Quarters 3-Roll Set™—Maya Angelou (P&D&S) | n/a | 54.00 |
| 22WRC | 2022 American Women Quarters 2-Roll Set™—Sally Ride (P&D) | n/a | 36.00 |
| 22WRD | 2022 American Women Quarters 3-Roll Set™—Sally Ride (P&D&S) | n/a | 54.00 |
| 22WRE | 2022 American Women Quarters 2-Roll Set™—Wilma Mankiller (P&D) | n/a | 36.00 |
| 22WRF | 2022 American Women Quarters 3-Roll Set™—Wilma Mankiller (P&D&S) | n/a | 54.00 |
| 22WRG | 2022 American Women Quarters 2-Roll Set™—Nina Otero-Warren (P&D) | n/a | 36.00 |
| 22WRH | 2022 American Women Quarters 3-Roll Set™—Nina Otero-Warren (P&D&S) | n/a | 54.00 |
| 22WRJ | 2022 American Women Quarters 2-Roll Set™—Anna May Wong (P&D) | n/a | 36.00 |
| 22WRK | 2022 American Women Quarters 3-Roll Set™—Anna May Wong (P&D&S) | n/a | 54.00 |
| 22W01 | 2022 American Women Quarters Ornament™—Maya Angelou | n/a | 30.95 |
| 22W02 | 2022 American Women Quarters Ornament™—Sally Ride | n/a | 30.95 |
| 22W03 | 2022 American Women Quarters Ornament™—Wilma Mankiller | n/a | 30.95 |
| 22W04 | 2022 American Women Quarters Ornament™—Nina Otero-Warren | n/a | 30.95 |
| 22W05 | 2022 American Women Quarters Ornament™—Anna May Wong | n/a | 30.95 |
| 22WP | 2022 American Woman Quarters Proof Set™ | n/a | 21.00 |
| 22WS | 2022 American Woman Quarters Silver Proof Set™ | n/a | 73.00 |

*For Further Information About Rolls & Bags, Ornaments Contact:* Angela Hicks, Marketing Specialist, Sales and Marketing—202–354–7750.

*For Further Information About Proof Sets Contact:* Anne Janeski, Marketing Specialist, Sales and Marketing—202–306–9666; United States Mint; 801 9th Street NW, Washington, DC 20220.

*Authority:* 31 U.S.C. 5111, 5112, 5132, & 9701.

**Eric Anderson,**

*Executive Secretary, United States Mint.*

[FR Doc. 2022–02155 Filed 2–1–22; 8:45 am]

**BILLING CODE P**

# FEDERAL REGISTER

Vol. 87 Wednesday,

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Part II

## Department of the Interior

Fish and Wildlife Service

50 CFR Part 20

Migratory Bird Hunting; 2022–23 Frameworks for Migratory Bird Hunting Regulations; Proposed Rule

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 20**

**[Docket No. FWS–HQ–MB–2021–0057; FF09M2200–223–FXMB1231099BPP0]**

**RIN 1018–BF07**

# Migratory Bird Hunting; 2022–23 Frameworks for Migratory Bird Hunting Regulations

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; supplemental.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service or we) is proposing to establish the 2022–23 hunting regulations for certain migratory game birds. We annually prescribe outside limits (which we call frameworks) within which States may select hunting seasons. Frameworks specify the outside dates, season lengths, shooting hours, bag and possession limits, and areas where migratory game bird hunting may occur. These frameworks are necessary to allow State selections of seasons and limits and to allow harvest at levels compatible with migratory game bird population status and habitat conditions. Migratory game bird hunting seasons provide opportunities for recreation and sustenance, and aid Federal, State, and Tribal governments in the management of migratory game birds.

**DATES:** You must submit comments on the proposed migratory bird hunting frameworks by March 4, 2022.

**ADDRESSES:**

*Comments:* You may submit comments on the proposals by one of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* In the Search box, enter the docket number or RIN for this rulemaking (presented above in the document headings). For best results, do not copy and paste either number; instead, type the docket number or RIN into the Search box using hyphens. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment.''
- *U.S. Mail:* Public Comments Processing, Attn: FWS–HQ–MB–2021–0057; U.S. Fish and Wildlife Service, MS: JAO/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We will not accept emailed or faxed comments. We will post all comments on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Review of Public Comments and Flyway Council Recommendations, below, for more information).

**FOR FURTHER INFORMATION CONTACT:** Jerome Ford, U.S. Fish and Wildlife Service, Department of the Interior, (202) 208–1050.

**SUPPLEMENTARY INFORMATION:**

## Process for Establishing Annual Migratory Game Bird Hunting Regulations

As part of the Department of the Interior's retrospective regulatory review, in 2015 we developed a schedule for migratory game bird hunting regulations that is more efficient and establishes hunting season dates earlier than was possible under the previous process. Under the current process, we develop proposed hunting season frameworks for a given year in the fall of the prior year. We then finalize those frameworks a few months later, thereby enabling the State agencies to select and publish their season dates in early summer. We provided a detailed overview of the current process in the August 3, 2017, **Federal Register** (82 FR 36308). This proposed rule is the second in a series of proposed and final rules that establish regulations for the 2022–23 migratory game bird-hunting season.

## Regulations Schedule for 2022

The process for promulgating annual regulations for the hunting of migratory game birds involves the publication of a series of proposed and final rulemaking documents. On August 31, 2021, we published in the **Federal Register** (86 FR 48649) a proposal to amend 50 CFR part 20. The proposal provided a background and overview of the migratory bird hunting regulations process, and addressed the establishment of seasons, limits, and other regulations for hunting migratory game birds under §§ 20.101 through 20.107, 20.109, and 20.110 of subpart K. This document is the second in a series of proposed and final rules for promulgating annual migratory game bird hunting regulations. Major steps in the 2022–23 regulatory cycle relating to open public meetings and **Federal Register** notifications were illustrated in the diagram at the end of the August 31, 2021, proposed rule. For this regulatory cycle, we have combined elements of the document that is described in the diagram as Supplemental Proposals with the document that is described as Proposed Season Frameworks.

Further, in the August 31, 2021, proposed rule we explained that all sections of subsequent documents outlining hunting frameworks and guidelines would be organized under numbered headings, which were set forth at 86 FR 48649. This and subsequent documents will refer only to numbered items requiring attention. Because we will omit those items not requiring attention, the remaining numbered items may be discontinuous, and the list will appear incomplete.

We provided the meeting dates and locations for the Service Regulations Committee (SRC) and Flyway Council meetings on Flyway calendars posted on our website at *https://www.fws.gov/birds/management/flyways.php.* We announced the April SRC meeting in the March 25, 2021, **Federal Register** (86 FR 15957) and on our website. The August 31, 2021, proposed rule provided detailed information on the proposed 2022–23 regulatory schedule and announced the September SRC meeting. The SRC conducted an open meeting with the Flyway Council Consultants on April 6, 2021, to discuss preliminary issues for the 2022–23 regulations, and on September 28–29, 2021, to review information on the current status of migratory game birds and develop recommendations for the 2022–23 regulations for these species.

This supplemental proposed rule provides the regulatory alternatives for the 2022–23 duck hunting season and provides proposed frameworks for the 2022–23 migratory bird hunting season. It will lead to final frameworks from which States may select season dates, shooting hours, areas, and limits. We have considered all pertinent comments received through September 2021, which includes comments submitted in response to our August 31 proposed rulemaking document and comments from the September SRC meeting. In addition, new proposals for certain regulations are provided for public comment. The comment period is specified above under **DATES**. We anticipate publishing final regulatory frameworks for migratory game bird hunting in the **Federal Register** around May 2022.

## Population Status and Harvest

Each year we publish reports that provide detailed information on the status and harvest of certain migratory game bird species. These reports are available at the address indicated under **FOR FURTHER INFORMATION CONTACT** or from our website at *https://www.fws.gov/birds/surveys-and-data/reports-and-publications/population-status.php.*

We used the following annual reports published in August 2021 in the development of proposed frameworks for the migratory bird hunting regulations: Adaptive Harvest Management, 2022 Hunting Season; American Woodcock Population Status, 2021; Band-tailed Pigeon Population Status, 2021; Migratory Bird Hunting Activity and Harvest During the 2019–20 and 2020–21 Hunting Seasons; Mourning Dove Population Status, 2021; Status and Harvests of Sandhill Cranes, Mid-continent, Rocky Mountain, Lower Colorado River Valley and Eastern Populations, 2021; and Waterfowl Population Status, 2021.

Our long-term objectives continue to include providing opportunities to harvest portions of certain migratory game bird populations and to limit harvests to levels compatible with each population's ability to maintain healthy, viable numbers. Migratory game bird hunting seasons provide opportunities for recreation and sustenance, and aid Federal, State, and Tribal governments in the management of migratory game birds. Having taken into account the zones of temperature and the distribution, abundance, economic value, breeding habits, and times and lines of flight of migratory birds, we conclude that the proposed hunting seasons provided for herein are compatible with the current status of migratory bird populations and long-term population goals. Additionally, we are obligated to, and do, give serious consideration to all information received during the public comment period.

## Review of Public Comments and Flyway Council Recommendations

The preliminary proposed rulemaking, which appeared in the August 31, 2021, **Federal Register**, opened the public comment period for migratory game bird hunting regulations and described the proposed regulatory alternatives for the 2022–23 duck hunting season. Comments and recommendations are summarized below and numbered in the order used in the August 31, 2021, proposed rule (see 86 FR 48649).

We received recommendations from all four Flyway Councils at the April and September SRC meetings; all recommendations are from the September meeting unless otherwise noted. Some recommendations supported continuation of last year's frameworks. Due to the comprehensive nature of the annual review of the frameworks performed by the Councils, support for continuation of last year's frameworks is assumed for items for which no recommendations were received. Council recommendations for changes in the frameworks are summarized below. As explained earlier in this document, we have included only the numbered items pertaining to issues for which we received recommendations. Consequently, the issues do not follow in successive numerical order.

We seek additional information and comments on the recommendations in this supplemental proposed rule. New proposals and modifications to previously described proposals are discussed below. Wherever possible, proposals are discussed under headings corresponding to the numbered items in the August 31, 2021, proposed rule.

## General

*Written Comments:* Several commenters protested the entire migratory bird hunting regulations process, the killing of all migratory birds, and questioned the status and habitat data on which the migratory bird hunting regulations are based.

*Service Response:* As we indicated above under Population Status and Harvest, our long-term objectives continue to include providing opportunities to harvest portions of certain migratory game bird populations and to limit harvests to levels compatible with each population's ability to maintain healthy, viable numbers. Sustaining migratory bird populations and ensuring a variety of sustainable uses, including harvest, is consistent with the guiding principles by which migratory birds are to be managed under the conventions between the United States and several foreign nations for the protection and management of these birds. We have taken into account available information and considered public comments and continue to conclude that the hunting seasons provided for herein are compatible with the current status of migratory bird populations and long-term population goals. In regard to the regulations process, the Flyway Council system of migratory bird management has been a longstanding example of State–Federal cooperative management since its establishment in 1952 in the regulation development process and bird population and habitat monitoring. However, as always, we continue to seek new ways to streamline and improve the process and ensure adequate conservation of the resource.

## 1. Ducks

### *A. General Harvest Strategy*

*Council Recommendations:* The Atlantic, Mississippi, Central, and Pacific Flyway Councils recommended adoption of the liberal regulatory alternative for their respective flyways.

*Service Response:* As we stated in the August 31, 2021, proposed rule, we intend to continue use of Adaptive Harvest Management (AHM) to help determine appropriate duck-hunting regulations for the 2022–23 season. AHM is a tool that permits sound resource decisions in the face of uncertain regulatory impacts and provides a mechanism for reducing that uncertainty over time. We use an AHM protocol (decision framework) to evaluate four regulatory alternatives, each with a different expected harvest level, and choose the optimal regulation for duck hunting based on the status and demographics of mallards for the Mississippi, Central, and Pacific Flyways, and based on the status and demographics of a suite of four species (eastern waterfowl) in the Atlantic Flyway (see below, and the earlier referenced report ''Adaptive Harvest Management, 2022 Hunting Season'' for more details). We have specific AHM protocols that guide appropriate bag limits and season lengths for species of special concern, including black ducks, scaup, and pintails, within the general duck season. These protocols use the same outside season dates and lengths as those regulatory alternatives for the 2022–23 general duck season.

For the 2022–23 hunting season, we will continue to use independent optimizations to determine the appropriate regulatory alternative for mallard stocks in the Mississippi, Central, and Pacific Flyways and for eastern waterfowl in the Atlantic Flyway. This means that we will develop regulations for mid-continent mallards, western mallards, and eastern waterfowl independently based on the breeding stock(s) that contributes primarily to each Flyway. We detailed implementation of AHM protocols for mid-continent and western mallards in the July 24, 2008, **Federal Register** (73 FR 43290), and for eastern waterfowl in the September 21, 2018, **Federal Register** (83 FR 47868).

We also stated in the August 31, 2021, proposed rule that the coronavirus pandemic and associated travel restrictions and human health concerns in the United States and Canada prevented the Service and their partners from performing the Waterfowl Breeding Population and Habitat Survey (WBPHS) and estimating waterfowl

breeding abundances and habitat conditions in the spring of 2021 in some cases. As a result, AHM protocols have been adjusted only as necessary to inform decisions on duck hunting regulations based on model predictions of breeding abundances and habitat conditions. In most cases, system models specific to each AHM decision framework have been used to predict breeding abundances from the available information (*e.g.,* 2019 observations). However, for some system state variables (*i.e.,* pond numbers and mean latitude), we have used updated time series models to forecast 2021 values based on the most recent information. These technical adjustments are described in detail in the report entitled ''Adaptive Harvest Management, 2022 Hunting Season'' referenced above under Population Status and Harvest.

Atlantic Flyway

For the Atlantic Flyway, we set duck-hunting regulations based on the status and demographics of a suite of four duck species (eastern waterfowl) in eastern Canada and the Atlantic Flyway States: green-winged teal, common goldeneye, ring-necked duck, and wood duck. For purposes of the assessment, eastern waterfowl stocks are those breeding in eastern Canada and Maine (Federal WBPHS fixed-wing surveys in strata 51–53, 56, and 62–70, and helicopter plot surveys in strata 51–52, 63–64, 66–68, and 70–72) and in Atlantic Flyway States from New Hampshire south to Virginia (Atlantic Flyway Breeding Waterfowl Survey, AFBWS). Abundance estimates for green-winged teal, ring-necked ducks, and goldeneyes are derived annually by integrating fixed-wing and helicopter survey data from eastern Canada and Maine (WBPHS strata 51–53, 56, and 62–72). Counts of green-winged teal, ring-necked ducks, and goldeneyes in the AFBWS are negligible and therefore excluded from population estimates for those species. Abundance estimates for wood ducks in the Atlantic Flyway (Maine south to Florida) are estimated by integrating data from the AFBWS and the North American Breeding Bird Survey. Counts of wood ducks from the WBPHS are negligible and therefore excluded from population estimates.

For the 2022–23 hunting season, we evaluated alternative harvest regulations for eastern waterfowl using: (1) A management objective of 98 percent of maximum long-term sustainable harvest for eastern waterfowl; (2) the 2022–23 regulatory alternatives; and (3) current stock-specific population models and associated weights. Based on the liberal regulatory alternative selected for the 2021–22 duck hunting season, the 2021 abundances of 1.02 million observed wood ducks, and 0.34 million American green-winged teal, 0.71 million ring-necked ducks, and 0.59 million goldeneyes predicted for the eastern survey area and Atlantic Flyway, the optimal regulation for the Atlantic Flyway is the liberal alternative. Therefore, we concur with the recommendation of the Atlantic Flyway Council regarding selection of the liberal regulatory alternative as described in the August 31, 2021, proposed rule for the 2022–23 season.

The mallard bag limit in the Atlantic Flyway is based on a separate assessment of the harvest potential of eastern mallards (see xi. Other, below, for further discussion on the mallard bag limit in the Atlantic Flyway).

Mississippi and Central Flyways

For the Mississippi and Central Flyways, we set duck-hunting regulations based on the status and demographics of mid-continent mallards and habitat conditions (pond numbers in Prairie Canada). For purposes of the assessment, mid-continent mallards are those breeding in central North America (Federal WBPHS strata 13–18, 20–50, and 75–77), and in Michigan, Minnesota, and Wisconsin (State surveys).

For the 2022–23 hunting season, we evaluated alternative harvest regulations for mid-continent mallards using: (1) A management objective of maximum long-term sustainable harvest; (2) the 2022–23 regulatory alternatives; and (3) current population models and associated weights. Based on a liberal regulatory alternative selected for the 2021–22 hunting season, the 2021 model predictions of 8.62 million mid-continent mallards and 2.94 million ponds in Prairie Canada, the optimal regulation for the Mississippi and Central Flyways is the liberal alternative. Therefore, we concur with the recommendations of the Mississippi and Central Flyway Councils regarding selection of the liberal regulatory alternative as described in the August 31, 2021, proposed rule for the 2022–23 season.

Pacific Flyway

For the Pacific Flyway, we set duck-hunting regulations based on the status and demographics of western mallards. For purposes of the assessment, western mallards consist of two substocks and are those breeding in Alaska and Yukon Territory (Federal WBPHS strata 1–12) and those breeding in the southern Pacific Flyway including California, Oregon, Washington, and British Columbia (State and Provincial surveys) combined.

For the 2022–23 hunting season, we evaluated alternative harvest regulations for western mallards using: (1) A management objective of maximum long-term sustainable harvest; (2) the 2022–23 regulatory alternatives; and (3) the current population model. Based on a liberal regulatory alternative selected for the 2021–22 hunting season, and 2021 abundances of 1.17 million western mallards observed in Alaska (0.64 million) and predicted for the southern Pacific Flyway (0.53 million), the optimal regulation for the Pacific Flyway is the liberal alternative. Therefore, we concur with the recommendation of the Pacific Flyway Council regarding selection of the liberal regulatory alternative as described in the August 31, 2021, proposed rule for the 2022–23 season.

*B. Regulatory Alternatives*

*Council Recommendations:* At the April SRC meeting, the Atlantic, Mississippi, Central, and Pacific Flyway Councils recommended that AHM regulatory alternatives for duck hunting during the 2022–23 season remain the same as those used in the previous season.

*Service Response:* Consistent with Flyway Council recommendations, the AHM regulatory alternatives proposed for the Atlantic, Mississippi, Central, and Pacific Flyways in the August 31, 2021, proposed rule (86 FR 48649) will be used for the 2022–23 hunting season (see accompanying table at the end of that document for specific information). The AHM regulatory alternatives consist only of the maximum season lengths, framework dates, and bag limits for total ducks and mallards. Restrictions for certain species within these frameworks that are not covered by existing harvest strategies will be addressed elsewhere in these proposed frameworks. For those species with specific harvest strategies (pintails, black ducks, and scaup), those strategies will again be used for the 2022–23 hunting season.

*D. Special Seasons/Species Management*

i. Early Teal Seasons

Because a spring 2021 abundance estimate from the WBPHS for blue-winged teal was not available, we used time series models to predict their abundance. The predicted estimate was 5.83 million birds. Because this estimate is greater than 4.7 million birds, the special early teal season guidelines (see 79 FR 51403, August 28, 2014) indicate that a 16-day special early (September)

teal season with a 6-teal daily bag limit is appropriate for States in the Atlantic, Mississippi, and Central flyways.

ii. Early Teal-Wood Duck Seasons

In Florida, Kentucky, and Tennessee, in lieu of a special early teal season, a 5-consecutive-day teal-wood duck season may be selected in September. The daily bag limit may not exceed 6 teal and wood ducks in the aggregate, of which no more than 2 may be wood ducks. In addition, a 4-consecutive-day special early teal-only season may be selected in September either immediately before or immediately after the 5-consecutive-day teal-wood duck season. The daily bag limit is 6 teal.

iii. Black Ducks

*Council Recommendations:* The Atlantic and Mississippi Flyway Councils recommended continued use of the AHM protocol for black ducks, and adoption of the moderate regulatory alternative for their respective flyways. The Flyway-specific regulations consist of a daily bag limit of two black ducks and a season length of 60 days.

*Service Response:* The Service, Atlantic and Mississippi Flyway Councils, and Canada adopted an international AHM protocol for black ducks in 2012 (77 FR 49868; August 17, 2012) whereby we set black duck hunting regulations for the Atlantic and Mississippi Flyways (and Canada) based on the status and demographics of these birds. The AHM protocol clarifies country-specific target harvest levels and reduces conflicts over regulatory policies.

For the 2022–23 hunting season, we evaluated country-specific alternative harvest regulations using: (1) A management objective of 98 percent of maximum long-term sustainable harvest; (2) country-specific regulatory alternatives; and (3) current population models and associated weights. Based on the moderate regulatory alternative selected for the 2021–22 hunting season and the 2021 model predictions of 0.54 million breeding black ducks and 0.39 million breeding mallards (Federal WBPHS strata 51, 52, 63, 64, 66, 67, 68, 70, 71, and 72; core survey area), the optimal regulation for the Atlantic and Mississippi Flyways is the moderate alternative (and the liberal alternative in Canada). Therefore, we concur with the recommendations of the Atlantic and Mississippi Flyway Councils.

iv. Canvasbacks

*Council Recommendations:* The Atlantic, Mississippi, Central, and Pacific Flyway Councils recommended adoption of the liberal regulatory alternative for their respective flyways. The Flyway-specific regulations consist of a daily bag limit of two canvasbacks and a season length of 60 days in the Atlantic and Mississippi Flyways, 74 days in the Central Flyway, and 107 days in the Pacific Flyway.

*Service Response:* As we discussed in the March 28, 2016, **Federal Register** (81 FR 17302), the canvasback harvest strategy that we had relied on until 2015 was not viable under our new regulatory process because it required biological information that was not yet available at the time a decision on season structure needed to be made. We do not yet have a new harvest strategy to propose for use in guiding canvasback harvest management in the future. However, we have worked with technical staff of the four Flyway Councils to develop a decision framework (hereafter, decision support tool) that relies on the best biological information available to develop recommendations for annual canvasback harvest regulations. The decision support tool uses available information (1994–2014) on canvasback breeding population size in Alaska and north-central North America (Federal WBPHS traditional survey area, strata 1–18, 20–50, and 75–77), growth rate, survival, and harvest, and a population model to evaluate alternative harvest regulations based on a management objective of maximum long-term sustainable harvest. The decision support tool calls for a closed season when the population is below 460,000, a 1-bird daily bag limit when the population is between 460,000 and 480,000, and a 2-bird daily bag limit when the population is greater than 480,000. Because abundance estimates were not available from the WBPHS, we used two different methods to predict canvasback abundance during spring 2021. One used a population model initially developed in the 1990s, and the other used the time series of recent abundances from the WBPHS. Based on the resulting predictions of 639,239 and 677,422 canvasbacks, respectively, for the two approaches, we concur with the recommendations of the four Flyway Councils regarding selection of the liberal regulatory alternative for the 2022–23 season.

v. Pintails

*Council Recommendations:* The Atlantic, Mississippi, Central, and Pacific Flyway Councils recommended adoption of the liberal regulatory alternative with a 1-pintail daily bag limit for their respective flyways. The Flyway-specific regulations consist of a season length of 60 days in the Atlantic and Mississippi Flyways, 74 days in the Central Flyway, and 107 days in the Pacific Flyway.

*Service Response:* The Service and four Flyway Councils adopted an AHM protocol for pintail in 2010 (75 FR 44856; July 29, 2010) whereby we set pintail hunting regulations in all four Flyways based on the status and demographics of these birds.

For the 2022–23 hunting season, we evaluated alternative harvest regulations for pintails using: (1) A management objective of maximum long-term sustainable harvest, including a closed-season constraint of 1.75 million birds; (2) the regulatory alternatives; and (3) current population models and associated weights. Based on a liberal regulatory alternative with a 1-bird daily bag limit for the 2021–22 season, and the 2021 model predictions of 2.50 million pintails with the center of the population predicted to occur at a mean latitude of 55.47 degrees (Federal WBPHS traditional survey area, strata 1–18, 20–50, and 75–77), the optimal regulation for all four Flyways is the liberal alternative with a 1-pintail daily bag limit. Therefore, we concur with the recommendations of the four Flyway Councils.

vi. Scaup

*Council Recommendations:* The Atlantic, Mississippi, Central, and Pacific Flyway Councils recommended adoption of the restrictive regulatory alternative for the 2022–23 season. The Flyway-specific regulations consist of a 60-day season with a 1-bird daily bag limit during 40 consecutive days and a 2-bird daily bag limit during 20 consecutive days in the Atlantic Flyway, a 60-day season with a 2-bird daily bag limit during 45 consecutive days and a 1-bird daily bag limit during 15 consecutive days in the Mississippi Flyway, a 1-bird daily bag limit for 74 days in the Central Flyway (which may have separate segments of 39 days and 35 days), and an 86-day season with a 2-bird daily bag limit in the Pacific Flyway.

*Service Response:* The Service and four Flyway Councils adopted an AHM protocol for scaup in 2008 (73 FR 43290, July 24, 2008; and 73 FR 51124, August 29, 2008) whereby we set scaup hunting regulations in all four Flyways based on the status and demographics of these birds.

For the 2022–23 hunting season, we evaluated alternative harvest regulations for scaup using: (1) A management objective of 95 percent of maximum sustainable harvest; (2) the regulatory alternatives; and (3) the current population model. Based on a moderate regulatory alternative for the 2020–21

season, and the 2021 model prediction of 3.53 million scaup (Federal WBPHS traditional survey area, strata 1–18, 20–50, and 75–77), the optimal regulation for all four Flyways is the restrictive alternative. Therefore, we concur with the recommendations of the four Flyway Councils regarding selection of the restrictive alternative for the 2022–23 season.

xi. Other

*Council Recommendations:* The Atlantic Flyway Council recommended a mallard daily bag limit of two birds, only one of which could be female, for the Atlantic Flyway.

*Service Response:* We agree with the Atlantic Flyway Council's recommendation for a mallard daily bag limit of two birds, of which only one may be female, for the Atlantic Flyway. The Atlantic Flyway Council's eastern waterfowl AHM protocol (see above) did not specifically address bag limits for mallards. The number of breeding mallards in the northeastern United States (about two-thirds of the eastern mallard population in 1998) has decreased by about 38 percent since 1998, and the overall population has declined by about 1 percent per year during that time period. This situation has resulted in reduced harvest potential for that population. The Service conducted a Prescribed Take Level (PTL) analysis to estimate the allowable take (kill rate) for eastern mallards and compared that with the expected kill rate under the most liberal season length (60 days) considered as part of the eastern waterfowl AHM regulatory alternatives.

Using contemporary data and assuming a management objective of maximum long-term sustainable harvest, the PTL analysis estimated an allowable kill rate of 0.194–0.198. The expected kill rate for eastern mallards under a 60-day season and a 2-mallard daily bag limit in the U.S. portion of the Atlantic Flyway was 0.193 (SE = 0.016), which is slightly below (but not significantly different from) the point estimate of allowable kill at maximum long-term sustainable harvest. This estimate indicates that a 2-bird daily bag limit is sustainable at this time.

**2. Sea Ducks**

*Council Recommendations:* The Atlantic Flyway Council recommended three changes to the sea duck hunting regulations in the Atlantic Flyway: (1) Elimination of the special sea duck season; (2) reduction of the sea duck daily bag limit within the regular duck season to 4 sea ducks of which no more than 3 may be scoters, long-tailed ducks, or eiders, and no more than 1 may be a hen eider; and (3) retention of the exception that allows shooting of crippled waterfowl from a boat under power in the currently defined special sea duck areas in the Atlantic Flyway. These recommendations were consistent with the recommendations presented by the Atlantic Flyway Council during the April 6, 2021, SRC meeting for initial discussion. We announced these possible changes to sea duck hunting regulations in the Atlantic Flyway in the August 31, 2021, proposed rule to allow the greatest opportunity for public review and comment.

*Service Response:* We agree with the Atlantic Flyway Council's recommendations for the sea duck harvest regulations in the Atlantic Flyway. Special season regulations are used to provide additional hunting opportunity for species considered to be underutilized. We have authorized a special sea duck season (including eiders, long-tailed duck, and scoters) in the Atlantic Flyway since 1938. By 1973, 13 of the 17 Atlantic Flyway States allowed special seasons consisting of 107 days with a daily bag limit of 7 sea ducks. We reduced the scoter daily bag limit to 4 ducks in 1993. In 2016, we reduced the season length from 107 to 60 days and the daily bag limit from 6 to 5 sea ducks of which no more than 4 may be eiders, long-tailed ducks, or scoters. We anticipated the 2016 restrictions would reduce average annual sea duck harvest by approximately 25 percent compared to average annual harvest during the period 2011–2015. See the March 28, 2016, **Federal Register** (81 FR 17305) for a discussion of the Sea Duck Harvest Potential Assessment completed at that time.

The changes to the 2016 Atlantic Flyway sea duck regulations did not achieve the target reduction in total sea duck harvest. Therefore, we are supportive of the changes recommended by the Atlantic Flyway Council due to the continued concern regarding the status and trends of sea duck populations in the Atlantic Flyway, and our desire to reduce sea duck harvest in the Atlantic Flyway below the average annual harvest observed during 2011–2015. Regarding existing regulation that allows shooting of crippled waterfowl from a boat under power in the currently defined special sea duck area, the purpose of this regulation is to protect human safety and minimize duck crippling loss associated with hunting ducks at sea in the Atlantic Flyway. Protecting human safety and minimizing duck crippling loss are important considerations in duck hunting at sea regardless of whether this is during a special or regular duck hunting season.

**3. Mergansers**

*Council Recommendations:* The Atlantic Flyway Council recommended removing the species-specific restriction of two hooded mergansers beginning with the 2022–23 season. Hooded mergansers would become part of an aggregate merganser (common, red-breasted, and hooded) bag limit. The Mississippi and Central Flyway Councils supported the recommendation if an evaluation was conducted to determine the effects of the change on merganser populations and harvest.

*Service Response:* We agree with the Atlantic Flyway Council recommendation to remove the 2 hooded merganser daily bag limit and implementation of an aggregate merganser bag (common, red-breasted, and hooded) beginning with the 2022 season. The Service also agrees with the recommendation from the Mississippi Flyway Council that the Atlantic Flyway Council should conduct an evaluation of the regulation change on merganser populations and harvest. This assessment should be conducted following the completion of the 2024–25 season.

**4. Canada and Cackling Geese**

*B. Regular Seasons*

*Council Recommendations:* The Atlantic Flyway Council recommended 3 changes to the dark goose season framework in the Atlantic Flyway including:

1. Adopting the restrictive regulatory option as described in the Atlantic Flyway Council's Atlantic Population (AP) Canada Geese Harvest Strategy (30-day season between December 25 through January 25 with a daily bag limit of 1 goose) for all AP Canada geese zones in the U.S. portion of the Atlantic Flyway including North Carolina.

2. The addition of a special late season in Vermont, the Lake Champlain Zone of New York, and the AP Canada geese zones in Connecticut and Massachusetts. The season may be December 1–February 15 in Vermont, and the Lake Champlain Zone of New York and December 15–February 15 in the AP Canada geese zones of Connecticut and Massachusetts. The daily bag limit is 5 geese.

3. Eliminating the Southern James Bay Population (SJBP) of Canada geese zone in Pennsylvania with this area becoming part of Pennsylvania's Atlantic Flyway Resident Population (RP) of Canada geese zone.

The Pacific Flyway Council recommended several changes to the Canada and cackling goose and brant season framework in the Pacific Flyway. Specifically:

1. Increasing the daily bag limit for Canada and cackling geese and brant in Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming from 4 to 5 geese in the aggregate;

2. Changing the closing date for Canada and cackling geese and brant in Utah's Wasatch Front Zone from the first Sunday in February to February 15;

3. Approving a 3-segment season option for Canada and cackling geese in California's Balance of State Zone; and

4. Decreasing the daily bag limit for Canada and cackling geese in Washington's Southwest Permit Zone and Oregon's Northwest Permit Zone from 4 to 3 geese in the aggregate.

*Service Response:* We agree with the Atlantic Flyway Council's 3 recommended changes to the Canada and cackling goose season framework in the Atlantic Flyway. The Service and Atlantic Flyway Council have been concerned with the status of AP Canada geese for several years, and the restrictive regulatory alternative is commensurate with the population's status. More specifically, AP Canada geese declined in abundance precipitously (from 118,000 to 34,000 breeding pairs) between 1988 and 1995 due to high harvest pressure and poor production. Hunting season restrictions were enacted in response to the decline. These restrictions and several years of favorable nesting conditions and good gosling production resulted in a rapid recovery of the population, and by 2002 the breeding pair estimate had rebounded to 182,000. For the next 15 years, pair counts remained relatively stable, fluctuating between 161,000 and 216,000 breeding pairs. However, in the 2018 breeding season the breeding pair estimate dropped abruptly to 112,000, and gosling productivity was almost nonexistent. The 2019 breeding pair estimate was statistically similar to 2018, and productivity was near the long-term average. No breeding pair survey was conducted in 2020 or 2021 due to logistical constraints arising from the coronavirus pandemic.

In 2021, the Atlantic Flyway Council, in collaboration with the Service, updated their 2013 harvest strategy for AP Canada geese. The revision incorporated several additional years of experience on effects of contemporary harvest regulations on AP Canada geese abundance and recent advances in population modeling and other analytical tools. The harvest strategy supports the Council's 2008 management plan for AP Canada geese and is consistent with the overarching goal of the plan: To maintain AP Canada geese and their habitats at a level that provides optimum opportunities for people to use and enjoy geese on a sustainable basis.

Regarding the additional special late seasons in 3 areas, these areas account for a small proportion of the AP Canada goose harvest. Since 1999, the New England region (including AP, NAP, and RP Canada goose zones) has accounted for only 1.3% of all AP Canada goose band recoveries. The special late season occurs after most AP Canada geese have migrated from the region (early to mid-December). The objective of the special late season is to increase harvest of RP Canada geese while minimizing impacts to AP Canada geese. An existing late special season with a similar objective has been allowed in parts of New Jersey since 1994. The additional special late seasons will provide increased opportunity for hunters and an additional tool for State agencies to manage resident populations of geese.

Regarding the Council's recommendation to eliminate the SJBP Canada geese zone in Pennsylvania, the SJBP of Canada geese is no longer recognized as a separate population by the Service or the Atlantic and Mississippi Flyway Councils. The SJBP of Canada geese is now considered part of the larger Southern Hudson Bay Population (SHBP) of Canada geese, which is monitored and managed according to the Mississippi Flyway Council's management plan. Elimination of the SJBP Canada geese zone in Pennsylvania and incorporation of this area into the RP Canada geese zone will expose Canada geese in the area to slightly more liberal regulations but will not appreciably increase harvest of AP Canada geese. This change will simplify regulations, provide increased hunting opportunity, and provide increased opportunity to manage resident population of geese.

We agree with the Pacific Flyway Council's recommendation to increase the daily bag limit for Canada and cackling geese and brant in Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming from 4 to 5 geese in the aggregate. Cackling geese and brant are uncommon in interior States in the Pacific Flyway. The basic goose season framework for the Pacific Flyway includes these species in an aggregate bag limit for interior States because of the difficulty in hunter differentiation of these species and because harvest of cackling geese and brant is negligible to their population status. The western Canada goose is the primary subspecies of Canada goose occurring in interior States in the Pacific Flyway. There are two populations of western Canada goose in the Pacific Flyway: Rocky Mountain Population (RMP) and Pacific Population (PP). The most recent 3-year (2017–2019) average population estimate for RMP western Canada geese is 205,338 and is well above the Council's population objective of 117,000 geese. Similarly, the most recent 3-year (2017–2019) average population estimate for PP western Canada geese is 330,725 and is well above the Council's population objective of about 120,000 geese. Since 1970, western Canada goose abundance in the Pacific Flyway has increased 5.4% per year based on the Waterfowl Breeding Population and Habitat Survey. The Pacific Flyway Council's management plans for PP and RMP Canada geese prescribe liberalized hunting seasons when population status is over objective levels. The proposed change would simplify regulations in States split into two flyways (*i.e.,* Colorado, Montana, Wyoming, and New Mexico). Currently, there is a daily bag limit of 4 geese in the Pacific Flyway portions of these States and 5 geese in the Central Flyway portions.

We also agree with the Council's recommendation to change the closing date for Canada and cackling geese and brant in Utah's Wasatch Front Zone from the first Sunday in February to February 15. The western Canada goose is the primary subspecies of Canada goose in Utah. Abundance of RMP Canada geese is well above the Council's population objective (see above). The Utah Division of Wildlife Resources has been collecting data on Canada geese in urban areas along the Wasatch Front (*i.e.,* Salt Lake, Weber, Davis, and Utah Counties) since 2006. Data indicate abundance of urban geese has increased up to about 10,000 geese. Approximately 58.3% of all resident RMP Canada geese banded in Utah are harvested during the last 3 weeks of the season in the Wasatch Front Zone. Allowing a later closing date will provide additional flexibility to the State to address increasing depredation and nuisance complaints associated with Canada geese in urban areas and provide hunting opportunity.

We also agree with the Council's recommendation to allow a 3-segment split hunting season for Canada and cackling geese in California's Balance of State Zone. Current frameworks allow a 3-segment split for Canada and cackling geese, but this arrangement requires Pacific Flyway Council and Service approval and a 3-year evaluation by

each participating State. The primary subspecies of white-cheeked geese in California are the western Canada goose and Aleutian cackling goose. The current 3-year (2019–2021) average population estimate for Aleutian cackling geese is 168,009 and is well above the Council's population objective of 60,000 geese. Similarly, abundance of PP Canada geese is well above the Council's population objective (see above). Allowing the Canada and cackling geese season to be split into 3 segments will provide additional flexibility to the State to address increasing depredation and nuisance complaints associated with Canada and cackling geese and provide hunting opportunity. In addition, a 3-segment season would be consistent with the current light goose and white-fronted goose seasons in California's Balance of State Zone, which would help simplify regulations.

Finally, we also agree with the Council's recommendation that the daily bag limit for Canada and cackling geese in Washington's Southwest Permit Zone and Oregon's Northwest Permit Zone be reduced from 4 to 3 geese in the aggregate. The most recent 3-year (2018, 2019, 2021) average of available fall projected population estimates for minima cackling geese is 206,763 and is below the Council's population objective of 250,000 ± 10 percent (225,000–275,000). Band recovery data from hunter harvest of minima cackling geese indicates that most (77%) of the fall-winter harvest occurs in northwest Oregon and southwest Washington, and the next highest harvest area (6%) is western Alaska (Units 9, 17, and 18). Accordingly, the Pacific Flyway Council also recommended that the daily bag limit for Canada and cackling geese in parts of Alaska be reduced from 6 to 4 geese in the aggregate. The decrease in the daily bag limits is specifically intended to maintain objective abundance of minima cackling geese and is consistent with the Council's harvest strategy for these birds.

**6. Brant**

*Council Recommendations:* The Pacific Flyway Council recommended that the 2022–23 brant season frameworks be determined based on the harvest strategy in the Council's management plan for the Pacific population of brant pending results of the 2022 Winter Brant Survey (WBS). If results of the 2022 WBS are not available, results of the most recent WBS should be used.

*Service Response:* We agree with the Pacific Flyway Council's recommendation. As we discussed in the August 21, 2020, **Federal Register** (85 FR 51854), the harvest strategy used to determine the Pacific brant season frameworks does not fit well within the current regulatory process. In developing the annual proposed frameworks for Pacific brant, the Pacific Flyway Council and the Service use the 3-year average number of brant counted during the WBS in the Pacific Flyway to determine annual allowable season length and daily bag limits. The WBS is conducted each January, which is after the date that proposed frameworks are formulated in the regulatory process. However, the data are typically available by the expected publication of final frameworks. When we acquire the survey data, we will determine the appropriate allowable harvest for the Pacific brant season according to the harvest strategy in the Pacific Flyway Council's management plan for the Pacific population of brant published in the August 21, 2020, **Federal Register** (85 FR 51854) and publish the results in the final frameworks rule.

**8. Swans**

*Council Recommendations:* The Atlantic Flyway Council recommended the initial allocation of swan hunting permits of 347 in Delaware, 4,721 in North Carolina, and 532 in Virginia (5,600 total) for the 2022–23 seasons and allowing unissued swan hunting permits to be reallocated to States within the Atlantic Flyway.

*Service Response:* We agree with the Atlantic Flyway Council's recommendations for changes to the swan hunting permit allocation in the Atlantic Flyway. In 2021, the Atlantic Flyway Council updated an assessment to allocate allowable tundra swan hunting permits among States in the Atlantic Flyway based on the distribution of tundra swans from the 3 most recent Mid-winter Survey counts. The permit allocation is reevaluated every 3 years. The evaluation in 2021 provided that the 3-year (2019–2021) average distribution of tundra swan abundance during the Mid-winter Survey was 6.2% in Delaware, 84.3% in North Carolina, and 9.5% in Virginia. Given the current allowable harvest of 5,600 tundra swans in the Atlantic Flyway, the allocation of swan hunting permits is 347 in Delaware, 4,721 in North Carolina, and 532 in Virginia. This is a minor change from the 2021 season permit allocation, which was 67 in Delaware, 4,895 in North Carolina, and 638 in Virginia. Distributing allowable tundra swan harvest among States based on the distribution of tundra swans during winter is consistent with the Atlantic, Mississippi, Central, and Pacific Flyway Council's management plan for the Eastern Population (EP) of tundra swans and provides equitable hunting opportunity among States. Finally, a State may have insufficient applicants to issue all available swan hunting permits. The swan season framework currently allows a second permit to be issued to hunters from unissued permits remaining after the first drawing. Should permits still remain unissued, any portion of these unused permits would be available for temporary redistribution to other States with swan seasons in the flyway. This procedure is consistent with the Councils' management plan for EP tundra swans, provides the greatest tundra swan hunting opportunity, and maintains harvest within allowable limits for the population and within each flyway.

**9. Sandhill Cranes**

*Council Recommendations:* The Mississippi Flyway Council recommended a 1-year extension to the 3-year (2019, 2020, and 2021) experimental sandhill crane season in Alabama. The Central and Pacific Flyway Councils recommended that allowable harvest of Rocky Mountain Population (RMP) of cranes be determined based on the formula described in the Pacific and Central Flyway Councils' Management Plan for RMP cranes pending results of the fall 2021 abundance and recruitment surveys.

*Service Response:* We agree with the Mississippi Flyway Council's recommendation for a 1-year extension to the 3-year (2019, 2020, and 2021) experimental sandhill crane season in Alabama. As we provided above under Process for Establishing Annual Migratory Game Bird Hunting Regulations, we now develop proposed hunting season frameworks for a given year in the fall of the prior year. According to the Eastern Population Sandhill Crane Management Plan and Memorandum of Agreement between the Service and Atlantic Flyway Council, 3 years of data are needed for evaluation before experimental seasons can be approved as operational. Alabama will administer the third year of an experimental sandhill crane season during the 2021 hunting season, and has only 2 years of data to evaluate at the time of the proposed regulations for the 2022–23 season. Approval of an additional year for the 3-year experimental sandhill crane season in Alabama allows the season to continue during the 2022 hunting season when 3 years of experimental season data will be available and allow consideration of

an operational season beginning with the 2023 hunting season.

We agree with the Central and Pacific Flyway Councils' recommendations to determine allowable harvest of RMP cranes using the formula in the Pacific and Central Flyway Councils' management plan for RMP cranes pending results of the fall 2021 abundance and recruitment surveys. As we discussed in the March 28, 2016, **Federal Register** (81 FR 17302), the harvest strategy used to calculate the allowable harvest of RMP cranes does not fit well within the current regulatory process. In developing the annual proposed frameworks for RMP cranes, the Flyway Councils and the Service use the fall abundance and recruitment surveys of RMP cranes to determine annual allowable harvest. Results of the fall abundance and recruitment surveys of RMP cranes are released between December 1 and January 31 each year, which is after the date proposed frameworks are developed. However, the data are typically available by the expected publication of final frameworks. When we acquire the survey data, we will determine the appropriate allowable harvest for the RMP crane season according to the harvest strategy in the Central and Pacific Flyway Councils' management plan for RMP cranes published in the March 28, 2016, **Federal Register** (81 FR 17302) and publish the results in the final frameworks rule.

**16. Doves**

*Council Recommendations:* The Atlantic, Mississippi, Central, and Pacific Flyway Councils recommended adoption of the standard regulatory alternative as prescribed in the national mourning dove harvest strategy for their respective Mourning Dove Management Units. The standard regulatory alternative consists of a 90-day season and 15-bird daily bag limit for States within the Eastern and Central Management Units, and a 60-day season and 15-bird daily bag limit for States in the Western Management Unit.

*Service Response:* Based on the harvest strategies and current population status, we agree with the recommended selection of the standard season frameworks for doves in the Eastern, Central, and Western Management Units for the 2022–23 season.

**17. Alaska**

*Council Recommendations:* The Pacific Flyway Council recommended that the daily bag limit for Canada and cackling geese (*i.e.,* minima cackling geese) be reduced from 6 to 4 geese in the aggregate in Units 9, 17, and 18.

*Service Response:* We agree with the Pacific Flyway Council's recommendation. The most recent 3-year (2018, 2019, 2021) average of available fall projected population estimates for minima cackling geese is 206,763 and is below the Council's population objective of 250,000 ± 10 percent (225,000–275,000). Band recovery data from hunter harvest of minima cackling geese indicates that most (77%) of the fall-winter harvest occurs in northwest Oregon and southwest Washington, and the next highest harvest area (6%) is western Alaska (Units 9, 17, and 18). Accordingly, the Pacific Flyway Council also recommended that the daily bag limit for Canada and cackling geese in parts of Oregon and Washington be reduced from 4 to 3 geese in the aggregate. The decrease in the daily bag limits is specifically intended to maintain objective abundance of minima cackling geese and is consistent with the Council's harvest strategy for these birds.

**Public Comments**

The Department of the Interior's policy is, whenever possible, to afford the public an opportunity to participate in the rulemaking process. Accordingly, we invite interested persons to submit written comments, suggestions, or recommendations regarding the proposed regulations. Before promulgating final migratory game bird hunting regulations, we will consider all comments we receive. These comments, and any additional information we receive, may lead to final regulations that differ from these proposals.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES.** We will not accept comments sent by email or fax. We will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in **DATES**.

We may post all comments in their entirety—including your personal identifying information—on *https://www.regulations.gov.* 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. Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *https://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Migratory Bird Management, 5275 Leesburg Pike, Falls Church, Virginia. We will consider, but possibly may not respond in detail to, each comment. As in the past, we will summarize all comments we receive during the comment period and respond to them after the closing date in the preambles of any final rules.

**Required Determinations**

Based on our most current data, we are affirming our required determinations made in the August 31, 2021, proposed rule; for descriptions of our actions to ensure compliance with the following statutes and Executive Orders, see our August 31, 2021, proposed rule (86 FR 48649):

- National Environmental Policy Act (NEPA) Consideration;
- Endangered Species Act Consideration;
- Regulatory Flexibility Act;
- Small Business Regulatory Enforcement Fairness Act;
- Paperwork Reduction Act of 1995;
- Unfunded Mandates Reform Act;
- Executive Orders 12630, 12866, 12988, 13132, 13175, 13211, and 13563.

**Authority**

The rules that eventually will be promulgated for the 2022–23 hunting season are authorized under 16 U.S.C. 703–712 and 16 U.S.C. 742 a–j.

**List of Subjects in 50 CFR Part 20**

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

**Proposed Regulations Frameworks for 2022–23 Hunting Seasons on Certain Migratory Game Birds**

Pursuant to the Migratory Bird Treaty Act and delegated authorities, the Department of the Interior is proposing the following frameworks for outside dates, season lengths, shooting hours, bag and possession limits, and areas within which States may select seasons for hunting migratory game birds between the dates of September 1, 2022, and March 10, 2023. These frameworks are summarized below.

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**a. General**

*Outside Dates:* Outside dates are the earliest and latest dates within which States may establish hunting seasons. All outside dates specified below are inclusive.

*Season Lengths:* Season lengths are the maximum number of days hunting may occur within the outside dates for hunting seasons. Days are consecutive and concurrent for all species included in each season framework unless otherwise specified.

*Season Segments:* Season segments are the maximum number of consecutive-day segments the season lengths may be divided. The sum of the hunting days for all season segments may not exceed the season lengths allowed.

*Zones:* Unless otherwise specified, States may select hunting seasons by zones. Zones for duck seasons (and associated youth and veterans—active military waterfowl hunting days, gallinule seasons, and snipe seasons) and dove seasons may be selected only in years we declare such changes can be made (*i.e.,* open seasons for zones and splits) and according to federally established guidelines for duck and dove zones and split seasons.

*Area, Zone, and Unit Descriptions:* Areas open to hunting must be described, delineated, and designated as such in each State's hunting regulations and published in the **Federal Register** as a Federal migratory bird hunting frameworks final rule. Geographic descriptions related to regulations are contained in a later portion of this document.

*Shooting and Hawking (taking by falconry) Hours:* Unless otherwise specified, from one-half hour before sunrise to sunset daily.

*Possession Limits:* Unless otherwise specified, possession limits are three times the daily bag limits.

*Permits:* For some species of migratory birds, the Service authorizes the use of permits to regulate harvest or monitor their take by hunters, or both. In such cases, the Service determines the amount of harvest that may be taken during hunting seasons during its formal regulations-setting process, and the States then issue permits to hunters at levels predicted to result in the amount of take authorized by the Service. Thus, although issued by States, the permits would not be valid unless the Service approved such take in its regulations.

These federally authorized, State-issued permits are issued to individuals, and only the individual whose name and address appears on the permit at the time of issuance is authorized to take migratory birds at levels specified in the permit, in accordance with provisions of both Federal and State regulations governing the hunting season. The permit must be carried by the permittee when exercising its provisions and must be presented to any law enforcement officer upon request. The permit is not transferrable or assignable to another individual, and may not be sold, bartered, traded, or otherwise provided to another person. If the permit is altered or defaced in any way, the permit becomes invalid.

*i. Flyways and Management Units*

We generally set migratory bird hunting frameworks for the conterminous U.S. States by Flyway or Management Unit/Region. Frameworks for Alaska, Hawaii, Puerto Rico, and the Virgin Islands are contained in separate sections near the end of the frameworks portion of this document. The States included in the Flyways and Management Units/Regions are described below.

1. Waterfowl Flyways

*Atlantic Flyway:* Includes Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia.

*Mississippi Flyway:* Includes Alabama, Arkansas, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Ohio, Tennessee, and Wisconsin.

*Central Flyway:* Includes Colorado (east of the Continental Divide), Kansas, Montana (Counties of Blaine, Carbon, Fergus, Judith Basin, Stillwater, Sweetgrass, Wheatland, and all counties east thereof), Nebraska, New Mexico (east of the Continental Divide except the Jicarilla Apache Indian Reservation), North Dakota, Oklahoma, South Dakota, Texas, and Wyoming (east of the Continental Divide).

*Pacific Flyway:* Includes Arizona, California, Idaho, Nevada, Oregon, Utah, Washington, and those portions of Colorado, Montana, New Mexico, and Wyoming not included in the Central Flyway.

2. Mallard Management Units

*High Plains Management Unit:* Roughly defined as that portion of the Central Flyway that lies west of the 100th meridian. See Area, Unit, and Zone Descriptions, *Ducks (Including Mergansers) and Coots,* below, for specific boundaries in each State.

*Columbia Basin Management Unit:* In Washington, all areas east of the Pacific Crest Trail and east of the Big White Salmon River in Klickitat County; and in Oregon, the counties of Gilliam, Morrow, and Umatilla.

3. Mourning Dove Management Units

*Eastern Management Unit:* All States east of the Mississippi River, and Louisiana.

*Central Management Unit:* Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, and Wyoming.

*Western Management Unit:* Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington.

4. Woodcock Management Regions

*Eastern Management Region:* Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia.

*Central Management Region:* Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, and Wisconsin.

*ii. Definitions*

For the purpose of the hunting regulations listed below, the collective terms ''dark'' and ''light'' geese include the following species:

*Dark geese:* Canada geese, cackling geese, white-fronted geese, brant (except in Alaska, California, Oregon, Washington, and the Atlantic Flyway), and all other goose species except light geese.

*Light geese:* Snow (including blue) geese and Ross's geese.

*iii. Migratory Game Bird Seasons in the Atlantic Flyway*

In the Atlantic Flyway States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, North Carolina, and Pennsylvania, where Sunday hunting of migratory birds is prohibited statewide by State law or regulation, all Sundays are closed to the take of all migratory game birds.

**b. Season Frameworks**

*i. Special Youth and Veterans-Active Military Personnel Waterfowl Hunting Days*

*Outside Dates and Season Lengths:* States may select 2 days per duck-hunting zone, designated as ''Youth Waterfowl Hunting Days,'' and 2 days per duck-hunting zone, designated as ''Veterans and Active Military Personnel Waterfowl Hunting Days,'' in addition to their regular duck seasons. The days may be held concurrently or may be nonconsecutive. The Youth Waterfowl Hunting Days must be held outside any regular duck season on weekends, holidays, or other non-school days when youth hunters would have the maximum opportunity to participate. Both sets of days may be held up to 14 days before or after any regular duck-season frameworks or within any split of a regular duck season, or within any other open season on migratory birds.

*Daily Bag Limits:* The daily bag limits may include ducks, geese, swans, mergansers, coots, and gallinules. Bag limits are the same as those allowed in the regular season except in States that implement a hybrid season for scaup (*i.e.,* different bag limits during different portions of the season), in which case the bag limit will be 2 scaup per day. Flyway species and area restrictions would remain in effect.

*Participation Restrictions for Youth Waterfowl Hunting Days:* States may use their established definition of age for youth hunters. However, youth hunters must be under the age of 18. In addition, an adult at least 18 years of age must accompany the youth hunter into the field. This adult may not duck hunt but may participate in other seasons that are open on the special youth day. Swans may be taken only by participants possessing applicable swan permits.

*Participation Restrictions for Veterans and Active Military Personnel Waterfowl Hunting Days:* Veterans (as defined in section 101 of title 38, United States Code) and members of the Armed Forces on active duty, including members of the National Guard and Reserves on active duty (other than for training), may participate. Swans may be taken only by participants possessing applicable swan permits.

*ii. Special Early Teal Seasons*

Areas:

*Atlantic Flyway:* Delaware, Florida, Georgia, Maryland, North Carolina, South Carolina, and Virginia.

*Mississippi Flyway:* Alabama, Arkansas, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Ohio, Tennessee, and Wisconsin. The season in Minnesota is experimental.

*Central Flyway:* Colorado (part), Kansas, Nebraska, New Mexico (part), Oklahoma, and Texas.

*Outside Dates:* September 1–30.

*Season Lengths:* 16 days.

*Daily Bag Limits:* 6 teal.

*Shooting Hours:* One-half hour before sunrise to sunset, except in the States of Arkansas, Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, South Carolina, and Wisconsin, where the hours are from sunrise to sunset.

*iii. Special Early Teal-Wood Duck Seasons*

*Areas:* Florida, Kentucky, and Tennessee.

*Seasons:* In lieu of a special early teal season, a 5-day teal-wood duck season may be selected in September. The daily bag limit may not exceed 6 teal and wood ducks in the aggregate, of which no more than 2 may be wood ducks. In addition, a 4-day teal-only season may be selected in September either immediately before or immediately after the 5-day teal-wood duck season. The daily bag limit is 6 teal.

*iv. Duck, Merganser, Coot, and Goose Seasons*

1. Atlantic Flyway

a. Duck, Merganser, and Coot Seasons

*Outside Dates:* Saturday nearest September 24 (September 24)–January 31.

*Season Lengths and Daily Bag Limits:* 60 days. The daily bag limit is 6 ducks, including no more than 2 mallards (no more than 1 of which can be female), 2 black ducks, 1 pintail, 1 mottled duck, 1 fulvous whistling duck, 3 wood ducks, 2 redheads, 2 canvasbacks, 4 sea ducks (including no more than 3 scoters, 3 long-tailed ducks, or 3 eiders and no more than 1 female eider). The season for scaup may be split into 2 segments, with one segment consisting of 40 consecutive days with a 1-scaup daily bag limit, and the second segment consisting of 20 consecutive days with a 2-scaup daily bag limit. The daily bag limit of mergansers is 5. In States that include mergansers in the duck bag limit, the daily limit is the same as the duck bag limit. The daily bag limit of coots is 15.

*Closed Seasons:* There is no open season on the harlequin duck.

*Zones and Split Seasons:* Delaware, Florida, Georgia, Rhode Island, South Carolina, and West Virginia may split their seasons into 3 segments. Maine, Massachusetts, New Hampshire, New Jersey, and Vermont may select seasons in each of 3 zones; Pennsylvania may select seasons in each of 4 zones; and New York may select seasons in each of 5 zones; and all these States may split their season in each zone into 2 segments. Connecticut, Maryland, North Carolina, and Virginia may select seasons in each of 2 zones; and all these States may split their season in each zone into 3 segments. Connecticut, Maryland, North Carolina, and Virginia must conduct an evaluation of the impacts of zones and splits on hunter dynamics (*e.g.,* hunter numbers, satisfaction) and harvest during the 2021–25 seasons.

*Special Provisions:* The seasons, limits, and shooting hours should be the same between New York's Lake Champlain Zone and Vermont's Lake Champlain Zone, and between Vermont's Connecticut River Zone and New Hampshire's Inland Zone.

A craft under power may be used to shoot and retrieve dead or crippled sea ducks in the Sea Duck Area in the Atlantic Flyway. The Sea Duck Area includes all coastal waters and all waters of rivers and streams seaward from the first upstream bridge in Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, and New York; in New Jersey, all coastal waters seaward from the International Regulations for Preventing Collisions at Sea (COLREGS) Demarcation Lines shown on National Oceanic and Atmospheric Administration (NOAA) Nautical Charts and further described in 33 CFR 80.165, 80.501, 80.502, and 80.503; in any waters of the Atlantic Ocean and in any tidal waters of any bay that are separated by at least 1 mile of open water from any shore, island, and emergent vegetation in South Carolina and Georgia; and in any waters of the Atlantic Ocean and in any tidal waters of any bay that are separated by at least 800 yards of open water from any shore, island, and emergent vegetation in Delaware, Maryland, North Carolina, and Virginia; and provided that any such areas have been described, delineated, and designated as special sea duck hunting areas under the hunting regulations adopted by the respective States.

b. Special Early Canada and Cackling Goose Seasons

*Outside Dates and Season Lengths:* 15 days during September 1–15 in the Eastern Unit of Maryland; 30 days during September 1–30 in Connecticut, Florida, Georgia, New Jersey, Long Island Zone of New York, North Carolina, Rhode Island, and South Carolina; and 25 days during September 1–25 in the remainder of the Atlantic Flyway.

*Daily Bag Limits:* 15 geese in the aggregate.

*Shooting Hours:* One-half hour before sunrise to sunset, except that during any special early Canada and cackling goose season, shooting hours may extend to one-half hour after sunset if all other waterfowl seasons are closed in the specific applicable area.

c. Dark Goose Seasons

*Outside Dates, Season Lengths, and Daily Bag Limits:* Regulations are State and zone specific as provided below.

| Area | Outside dates | Season length | Season segments | Daily bag limit |
|---|---|---|---|---|
| *Connecticut:* | | | | |
| Atlantic Population (AP) Zone | Oct 10–Feb 5 | 30 | 2 | 1 |
| AP Zone Late Season Area (Special Season). | Dec 15–Feb 15 | 63 | 1 | 5 |
| North Atlantic Population (NAP) Zone | Oct 1–Jan 31 | 60 | 2 | 2 |
| NAP Late Season Area (Special Season) | Jan 15–Feb 15 | 32 | 1 | 5 |
| Resident Population (RP) Zone | Oct 1–Feb 15 | 80 | 3 | 5 |
| *Delaware* | Nov 15–Feb 5 | 30 | 2 | 1 |
| *Florida* | Oct 1–Mar 10 | 80 | 3 | 5 |
| *Georgia* | Oct 1–Mar 10 | 80 | 3 | 5 |
| *Maine:* | | | | |
| NAP North High Harvest Zone | Oct 1–Jan 31 | 60 | 2 | 2 |
| NAP South High Harvest Zone | Oct 1–Jan 31 | 60 | 2 | 2 |
| NAP Low Harvest Zone | Oct 1–Feb 15 | 70 | 2 | 3 |
| *Maryland:* | | | | |
| AP Zone | Nov 15–Feb 5 | 30 | 2 | 1 |
| RP Zone | Nov 15–Mar 10 | 80 | 3 | 5 |
| *Massachusetts:* | | | | |
| AP Zone | Oct 10–Feb 5 | 30 | 2 | 2 |
| AP Zone Late Season Area (Special season). | Dec 15–Feb 15 | 63 | 1 | 5 |
| NAP Zone | Oct 1–Jan 31 | 60 | 2 | 2 |
| NAP Late Season Area (Special season) | Jan 15–Feb 15 | 32 | 1 | 5 |
| *New Hampshire* | Oct 1–Jan 31 | 60 | 2 | 2 |
| *New Jersey:* | | | | |
| AP Zone | Fourth Saturday in Oct (22)–Feb 5 | 30 | 2 | 2 |
| NAP Zone | Oct 1–Jan 31 | 60 | 2 | 2 |
| NAP Late Season Area (Special season) | Jan 15–Feb 15 | 32 | 1 | 5 |
| *New York:* | | | | |
| AP Zone | Fourth Saturday in Oct (22)–Feb 5 | 30 | 2 | 2 |
| AP (Lake Champlain) Zone | Oct 10–Feb 5 | 30 | 2 | 2 |
| NAP High Harvest Zone | Oct 1–Jan 31 | 60 | 2 | 2 |
| NAP Low Harvest Zone | Oct 1–Feb 15 | 70 | 2 | 3 |
| Western Long Island RP Zone | Saturday nearest Sep 24 (24)–last day of Feb (28). | 107 | 3 | 8 |
| Remainder of RP Zone | Fourth Saturday in Oct (22)–last day of Feb (28). | 80 | 3 | 5 |
| AP (Lake Champlain) Zone Late Season (Special season). | Dec 1–Feb 15 | 77 | 1 | 5 |
| *North Carolina:* | | | | |
| Northeast Zone | Saturday prior to Dec 25 (24)–Jan 31 | 14 | 1 | 1 |
| RP Zone | Oct 1–Mar 10 | 80 | 3 | 5 |
| *Pennsylvania:* | | | | |
| AP Zone | Fourth Saturday in Oct (22)–Feb 5 | 30 | 2 | 1 |
| RP Zone | Fourth Saturday in Oct (22)–Mar 10 | 80 | 3 | 5 |
| *Rhode Island:* | | | | |
| Statewide | Oct 1–Jan 31 | 60 | 2 | 2 |

| Area | Outside dates | Season length | Season segments | Daily bag limit |
|---|---|---|---|---|
| Late Season Area (Special season) | Jan 15–Feb 15 | 32 | 2 | 5 |
| *South Carolina* | Oct 1–Mar 10 | 80 | 3 | 5 |
| *Vermont:* | | | | |
| Connecticut River Zone | Oct 1–Jan 31 | 60 | 2 | 3 |
| Interior Zone | Oct 10–Feb 5 | 30 | 2 | 2 |
| Lake Champlain Zone | Oct 10–Feb 5 | 30 | 2 | 2 |
| Connecticut, Interior, and Lake Champlain Zones Late Season (Special Season). | Dec 1–Feb 15 | 77 | 1 | 5 |
| *Virginia:* | | | | |
| AP Zone | Nov 15–Feb 15 | 30 | 2 | 1 |
| RP Zone | Nov 15–Mar 10 | 80 | 3 | 5 |
| *West Virginia* | Oct 1–Mar 10 | 80 | 3 | 5 |

d. Light Goose Seasons

*Outside Dates:* October 1–March 10.

*Season Lengths:* 107 days. Seasons may be split into 3 segments.

*Daily Bag limits:* 25 light geese. There is no possession limit.

e. Brant Seasons

*Outside Dates:* Saturday nearest September 24 (September 24)–January 31.

*Season Lengths:* 50 days. Seasons may be split into 2 segments.

*Daily Bag Limits:* 2 brant.

2. Mississippi Flyway

a. Duck, Merganser, and Coot Seasons

*Outside Dates:* Saturday nearest September 24 (September 24)–January 31.

*Season Lengths and Daily Bag Limits:* 60 days. The daily bag limit is 6 ducks, including no more than 4 mallards (no more than 2 of which may be females), 1 mottled duck, 2 black ducks, 1 pintail, 3 wood ducks, 2 canvasbacks, and 2 redheads. The season for scaup may be split into 2 segments, with one segment consisting of 45 days with a 2-scaup daily bag limit, and the second segment consisting of 15 days with a 1-scaup daily bag limit. The daily bag limit of mergansers is 5, only 2 of which may be hooded mergansers. In States that include mergansers in the duck bag limit, the daily limit is the same as the duck bag limit, only 2 of which may be hooded mergansers. The daily bag limit of coots is 15.

*Zones and Split Seasons:* Alabama, Arkansas, and Mississippi may split their seasons into 3 segments. Kentucky and Tennessee may select seasons in each of 2 zones; and Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio and Wisconsin may select seasons in each of 3 zones; and all these States may split their season in each zone into 2 segments. Illinois may select seasons in each of 4 zones. Louisiana may select seasons in each of 2 zones and may split their season in each zone into 3 segments. Louisiana must conduct an evaluation of the impacts of zones and splits on hunter dynamics (*e.g.,* hunter numbers, satisfaction) and harvest during the 2021–25 seasons.

b. Canada and Cackling Goose Seasons

*Outside Dates:* September 1 and February 15.

*Season Lengths:* 107 days, which may be split into 4 segments.

*Daily Bag Limits:* 5 geese in the aggregate.

*Shooting Hours:* One-half hour before sunrise to sunset, except that during September 1–15 shooting hours may extend to one-half hour after sunset for Canada and cackling geese if all other waterfowl and crane seasons are closed in the specific applicable area.

c. White-Fronted Goose Seasons

*Outside Dates:* September 1 and February 15.

*Season Lengths and Daily Bag Limits:* 74 days with a daily bag limit of 3 geese, 88 days with a daily bag limit of 2 geese, or 107 days with a daily bag limit of 1 goose. Seasons may be split into 4 segments.

d. Brant Seasons

*Outside Dates:* September 1 and February 15.

*Season Lengths and Daily Bag Limits:* 70 days with a daily bag limit of 2 brant or 107 days with a daily bag limit of 1 brant. Seasons may be split into 4 segments.

*Special Provisions:* In lieu of a separate brant season, brant may be included in the season for Canada and cackling geese with a daily bag limit of 5 geese in the aggregate.

e. Dark Goose Seasons

*Areas:* Alabama, Iowa, Indiana, Michigan, Minnesota, Ohio, and Wisconsin in lieu of separate seasons for Canada and cackling geese, white-fronted geese, and brant.

*Outside Dates:* September 1 and February 15.

*Season Lengths:* 107 days, which may be split into 4 segments.

*Daily Bag Limits:* 5 geese in the aggregate.

f. Light Goose Seasons

*Outside Dates:* September 1 and February 15.

*Season Lengths:* 107 days, which may be split into 4 segments.

*Daily Bag and Possession Limits:* The daily bag limit is 20 geese. There is no possession limit for light geese.

*3. Central Flyway*

a. Ducks, Merganser, and Coot Seasons

*Outside Dates:* Saturday nearest September 24 (September 24)–January 31.

*Season Lengths and Duck Daily Bag Limits:* 74 days, except in the High Plains Mallard Management Unit where the season length is 97 days and the last 23 days must be consecutive and may start no earlier than the Saturday nearest December 10 (December 10). The daily bag limit is 6 ducks, including no more than 5 mallards (no more than 2 of which may be females), 2 redheads, 3 wood ducks, 1 pintail, and 2 canvasbacks. The daily bag limit for scaup is 1, and the season for scaup may be split into 2 segments, with one segment consisting of 39 consecutive days and another segment consisting of 35 consecutive days. In Texas, the daily bag limit on mottled ducks is 1, except that no mottled ducks may be taken during the first 5 days of the season. In addition to the daily limits listed above, the States of Montana, North Dakota, South Dakota, and Wyoming, in lieu of selecting an experimental September teal season, may include an additional daily bag and possession limit of 2 and 6 blue-winged teal, respectively, during the first 16 days of the regular duck season in each respective duck hunting zone. These extra limits are in addition

to the regular duck bag and possession limits.

*Merganser Daily Bag Limits:* The daily bag limit is 5 mergansers, only 2 of which may be hooded mergansers. In States that include mergansers in the duck daily bag limit, the daily limit may be the same as the duck bag limit, only two of which may be hooded mergansers.

*Coot Daily Bag Limits:* The daily bag limit is 15 coots.

*Zones and Split Seasons:* Colorado, Kansas (Low Plains portion), Montana, Nebraska, New Mexico, Oklahoma (Low Plains portion), South Dakota (Low Plains portion), Texas (Low Plains portion), and Wyoming may select hunting seasons by zones.

North Dakota may split their season into 3 segments. Montana, New Mexico, Oklahoma, and Texas may select seasons in each of 2 zones; and Colorado, Kansas, South Dakota, and Wyoming may select seasons in each of 3 zones; and all these States may split their season in each zone into 2 segments. Nebraska may select seasons in each of 4 zones.

b. Special Early Canada and Cackling Goose Seasons

*Outside Dates and Seasons Lengths:* In Kansas, Nebraska, Oklahoma, South Dakota, and Texas, 30 days between September 1–30; in Colorado, New Mexico, Montana, and Wyoming, 15 days between September 1–15; and in North Dakota, 22 days between September 1–22.

*Daily Bag Limits:* 5 geese in the aggregate, except in Kansas, Nebraska, and Oklahoma, where the daily bag limit may not exceed 8 geese in the aggregate, and in North Dakota and South Dakota, where the daily bag limit may not exceed 15 geese in the aggregate.

*Shooting Hours:* One-half hour before sunrise to sunset, except that during September 1–15 shooting hours may extend to one-half hour after sunset if all other waterfowl and crane seasons are closed in the specific applicable area.

c. Canada Goose, Cackling Goose, and Brant Seasons

*Outside Dates:* Saturday nearest September 24 (September 24)–the Sunday nearest February 15 (February 13).

*Seasons and Daily Bag Limits:* In Kansas, Nebraska, North Dakota, Oklahoma, South Dakota, and the Eastern Goose Zone of Texas, 107 days with a daily bag limit of 8 geese; and in Colorado, Montana, New Mexico, and Wyoming, 107 days with a daily bag limit of 5 geese; and in Texas (Western Goose Zone), 95 days with a daily bag limit of 5 geese.

*Split Seasons:* Seasons may be split into 3 segments. Three-segment seasons require Central Flyway Council and U.S. Fish and Wildlife Service approval, and a 3-year evaluation by each participating State.

d. White-Fronted Goose Seasons

*Outside Dates:* Saturday nearest September 24 (September 24)–the Sunday nearest February 15 (February 13).

*Season Length and Daily Bag Limits:* Except as subsequently provided, either 74 days with a daily bag limit of 3 geese, or 88 days with a daily bag limit of 2 geese, or 107 days with a daily bag limit of 1 goose. In Texas (Western Goose Zone), 95 days with a daily bag limit of 2 geese. Seasons may be split into 3 segments.

e. Light Goose Seasons

*Outside Dates:* Saturday nearest September 24 (September 24)–March 10.

*Season Lengths:* 107 days. Seasons may be split into 3 segments.

*Daily Bag and Possession Limits:* The daily bag limit is 50 with no possession limit.

*Special Provisions:* In the Rainwater Basin Light Goose Area (East and West) of Nebraska, temporal and spatial restrictions that are consistent with the late-winter snow goose hunting strategy cooperatively developed by the Central Flyway Council and the Service are required.

*4. Pacific Flyway*

a. Duck, Merganser, Coot, and Gallinule Seasons

*Outside Dates:* Saturday nearest September 24 (September 24)–January 31.

*Season Lengths and Daily Bag Limits:* 107 days. The daily bag limit is 7 ducks and mergansers in the aggregate, including no more than 2 female mallards, 1 pintail, 2 canvasbacks, 2 scaup, and 2 redheads. For scaup, the season length is 86 days, which may be split according to applicable zones and split duck hunting configurations approved for each State. The daily bag limit of coots and gallinules is 25 in the aggregate.

*Zones and Split Seasons:* Montana and New Mexico may split their seasons into 3 segments. Arizona, Colorado, Oregon, Utah, Washington, and Wyoming may select seasons in each of 2 zones; Nevada may select seasons in each of 3 zones; and California may select seasons in each of 5 zones; and all these States may split their season in each zone into 2 segments. Idaho may select seasons in each of 4 zones.

*Special Provisions:* The seasons, limits, and shooting hours should be the same between the Colorado River Zone of California and the South Zone of Arizona.

b. Goose Seasons

i. Special Early Canada and Cackling Goose Seasons

*Outside Dates:* September 1–20.

*Season Lengths:* 15 days.

*Daily Bag Limits:* 5 geese in the aggregate, except in Pacific County, Washington, where the daily bag limit is 15 geese in the aggregate.

ii. Canada Goose, Cackling Goose, and Brant Seasons

*Outside Dates:* Except as subsequently provided, September 24 (September 24) and January 31.

*Season Lengths:* Except as subsequently provided, 107 days.

*Daily Bag Limits:* Except as subsequently provided, in Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming, the daily bag limit is 5 Canada and cackling geese and brant in the aggregate. In Oregon and Washington, the daily bag limit is 4 Canada and cackling geese in the aggregate. In California, the daily bag limit is 10 Canada and cackling geese in the aggregate.

*Split Seasons:* Seasons may be split into 3 segments. Three-segment seasons require Pacific Flyway Council and U.S. Fish and Wildlife Service approval and a 3-year evaluation by each participating State.

iii. Brant Seasons

*Areas:* California, Oregon, and Washington.

*Outside Dates:* September 24 (September 24) and January 31.

*Season Lengths and Daily Bag Limits:* Season lengths and daily bag limits will be based on the upcoming Winter Brant Survey results and the Pacific brant harvest strategy.

*Zones:* Washington and California may select seasons in each of 2 zones.

*Special Provisions:* In Oregon and California, the brant season must end no later than December 15.

iv. White-Fronted Goose Seasons

*Outside Dates:* Saturday nearest September 24 (September 24) and March 10.

*Season Lengths:* 107 days.

*Daily Bag Limits:* Except as subsequently provided, 10 geese.

*Split Seasons:* Seasons may be split into 3 segments. Three-segment seasons

require Pacific Flyway Council and U.S. Fish and Wildlife Service approval and a 3-year evaluation by each participating State.

v. Light Goose Seasons

*Outside Dates:* Saturday nearest September 24 (September 24) and March 10.

*Season Lengths:* 107 days. Seasons may be split into 3 segments.

*Daily Bag Limits:* 20 geese, except in Washington where the daily bag limit for light geese is 10 on or before the last Sunday in January (January 29).

California

*Balance of State Zone:* A Canada and cackling goose season may be selected with outside dates between the Saturday nearest September 24 (September 24) and March 10, and may be split into 3 segments. In the Sacramento Valley Special Management Area, the season on white-fronted geese must end on or before December 28, and the daily bag limit is 3 white-fronted geese. In the North Coast Special Management Area, hunting days that occur after January 31 should be concurrent with Oregon's South Coast Zone.

*Northeastern Zone:* The white-fronted goose season may be split into 3 segments.

Oregon

*Eastern Zone:* For Lake County only, the daily white-fronted goose bag limit is 1.

*Northwest Permit Zone:* A Canada and cackling goose season may be selected with outside dates between the Saturday nearest September 24 (September 24) and March 10 with a daily bag limit of 3 geese in the aggregate. Canada and cackling goose and white-fronted goose seasons may be split into 3 segments. In the Tillamook County Management Area, the hunting season is closed on geese.

*South Coast Zone:* A Canada and cackling goose season may be selected with outside dates between the Saturday nearest September 24 (September 24) and March 10 with a daily bag limit of 6 geese in the aggregate. Canada and cackling goose and white-fronted goose seasons may be split into 3 segments. Hunting days that occur after January 31 should be concurrent with California's North Coast Special Management Area.

Utah

*Wasatch Front Zone:* A Canada and cackling goose and brant season may be selected with outside dates between the Saturday nearest September 24 (September 24) and February 15.

Washington

*Areas 2 Inland and 2 Coastal (Southwest Permit Zone):* A Canada and cackling goose season may be selected in each zone with outside dates between the Saturday nearest September 24 (September 24) and March 10 with a daily bag limit of 3 geese in the aggregate. Canada and cackling goose and white-fronted goose seasons may be split into 3 segments.

*Area 4:* Canada and cackling goose and white-fronted goose seasons may be split into 3 segments.

Permit Zones

In Oregon and Washington permit zones, the hunting season is closed on dusky Canada geese. A dusky Canada goose is any dark-breasted Canada goose (Munsell 10 YR color value 5 or less) with a bill length between 40 and 50 millimeters. Hunting of geese will only be by hunters possessing a State-issued permit authorizing them to do so. Shooting hours for geese may begin no earlier than sunrise. Regular Canada and cackling goose seasons in the permit zones of Oregon and Washington remain subject to the Memorandum of Understanding entered into with the Service regarding monitoring the impacts of take during the regular Canada and cackling goose season on the dusky Canada goose population.

5. Swan Seasons

Pacific Flyway

*Areas:* Idaho, Montana, Nevada, and Utah.

*Outside Dates:* Saturday nearest September 24 (September 24)–January 31.

*Season Lengths:* 107 days. Seasons may be split into 2 segments.

*Permits:* Hunting is by permit only. Permits will be issued by the State. The total number of permits issued may not exceed 50 in Idaho, 500 in Montana, 650 in Nevada, and 2,750 in Utah. Permits will authorize the take of no more than 1 swan per permit. Only 1 permit may be issued per hunter in Montana and Utah; 2 permits may be issued per hunter in Nevada.

*Quotas:* The swan season in the respective State must end upon attainment of the following reported harvest of trumpeter swans: 20 in Utah and 10 in Nevada. There is no quota in Montana.

*Monitoring:* Each State must evaluate hunter participation, species-specific swan harvest, and hunter compliance in providing either species-determinant parts (at least the intact head) or bill measurements (bill length from tip to posterior edge of the nares opening, and presence or absence of yellow lore spots on the bill in front of the eyes) of harvested swans for species identification. Each State should use appropriate measures to maximize hunter compliance with the State's program for swan harvest reporting. Each State must achieve a hunter compliance of at least 80 percent in providing species-determinant parts or bill measurements of harvested swans for species identification, or subsequent permits will be reduced by 10 percent in the respective State. Each State must provide to the Service by June 30 following the swan season a report detailing hunter participation, species-specific swan harvest, and hunter compliance in reporting harvest. In Idaho and Montana, all hunters that harvest a swan must complete and submit a reporting card (bill card) with the bill measurement and color information from the harvested swan within 72 hours of harvest for species determination. In Utah and Nevada, all hunters that harvest a swan must have the swan or species-determinant parts examined by a State or Federal biologist within 72 hours of harvest for species determination.

*Other Provisions:* In Utah, the season is subject to the terms of the Memorandum of Agreement entered into with the Service in January 2019 regarding harvest monitoring, season closure procedures, and education requirements to minimize take of trumpeter swans during the swan season.

Atlantic and Central Flyways

*Areas:* Delaware, North Carolina, and Virginia in the Atlantic Flyway and North Dakota, South Dakota east of the Missouri River, and part of Montana in the Central Flyway.

*Outside Dates:* October 1–January 31 in the Atlantic Flyway and the Saturday nearest October 1 (October 2)–January 31 in the Central Flyway.

*Season Lengths:* 90 days in the Atlantic Flyway and 107 days in the Central Flyway.

*Permits:* Hunting is by permit only. Permits will be issued by the States. No more than 5,600 permits may be issued in the Atlantic Flyway including 347 in Delaware, 4,721 in North Carolina, and 532 in Virginia. No more than 4,000 permits may be issued in the Central Flyway including 500 in Montana, 2,200 in North Dakota, and 1,300 in South Dakota. Permits will authorize the take of no more than 1 swan per permit. A second permit may be issued to hunters from unissued permits remaining after the first drawing. Unissued permits may be reallocated to States within a Flyway.

*Monitoring:* Each State must evaluate hunter participation, species-specific swan harvest, and hunter compliance in providing measurements of harvested swans for species identification. Each State should use appropriate measures to maximize hunter compliance with the State's program for swan harvest reporting. Each State must achieve a hunter compliance of at least 80 percent in providing species-determinant measurements of harvested swans for species identification. Each State must provide to the Service by June 30 following the swan season a report detailing hunter participation, species-specific swan harvest, and hunter compliance in reporting harvest.

*Other Provisions:* In lieu of a general swan hunting season, States may select a season only for tundra swans. States selecting a season only for tundra swans must obtain harvest and hunter participation data. The season in Delaware is experimental.

6. Sandhill Crane Seasons

Mississippi Flyway

*Areas:* Alabama, Kentucky, Minnesota, and Tennessee.

*Outside Dates:* September 1–February 28 in Minnesota, and September 1–January 31 in Alabama, Kentucky, and Tennessee.

*Season Lengths:* 37 days in the designated portion of Minnesota's Northwest Goose Zone, and 60 days in Alabama, Kentucky, and Tennessee.

*Daily Bag and Possession Limits:* The daily bag limit is 1 crane in Minnesota, 2 cranes in Kentucky, and 3 cranes in Alabama and Tennessee. In Alabama, Kentucky, and Tennessee, the seasonal bag limit is 3 cranes.

*Permits:* Hunting is by permit only. Permits will be issued by the State.

*Other Provisions:* The number of permits, open areas, season dates, protection plans for other species, and other provisions of seasons must be consistent with Council management plans and approved by the Mississippi Flyway Council. The season in Alabama is experimental.

Central Flyway

*Areas:* Colorado, Kansas, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, and Wyoming.

*Outside Dates:* September 1–February 28.

*Season Lengths:* 37 days in Texas (Zone C), 58 days in Colorado, Kansas, Montana, North Dakota, South Dakota, and Wyoming, and 93 days in New Mexico, Oklahoma, and Texas.

*Daily Bag Limits:* 3 cranes, except 2 cranes in North Dakota (Area 2) and Texas (Zone C).

*Permits:* Each person participating in the regular sandhill crane season must have a valid Federal or State sandhill crane hunting permit.

Central and Pacific Flyways

*Areas:* Arizona, Colorado, Idaho, Montana, New Mexico, Utah, and Wyoming within the range of the Rocky Mountain Population (RMP) of sandhill cranes.

*Outside Dates:* September 1–January 31.

*Season Lengths:* 60 days. The season may be split into 3 segments.

*Daily Bag and Possession limits:* The daily bag limit is 3 cranes, and the possession limit is 9 cranes per season.

*Permits:* Hunting is by permit only. Permits will be issued by the State.

*Other Provisions:* Numbers of permits, open areas, season dates, protection plans for other species, and other provisions of seasons must be consistent with Councils' management plan and approved by the Central and Pacific Flyway Councils, with the following exceptions:

A. In Utah, 100 percent of the harvest will be assigned to the RMP crane quota;

B. In Arizona, monitoring the racial composition of the harvest must be conducted at 3-year intervals unless 100 percent of the harvest will be assigned to the RMP crane quota;

C. In Idaho, 100 percent of the harvest will be assigned to the RMP crane quota; and

D. In the Estancia Valley hunt area of New Mexico, the level and racial composition of the harvest must be monitored; greater sandhill cranes in the harvest will be assigned to the RMP crane quota.

7. Gallinule Seasons

Atlantic, Mississippi, and Central Flyways

*Outside Dates:* September 1–January 31.

*Season Lengths:* 70 days.

*Daily Bag Limits:* 15 gallinules.

*Zones and Split Seasons:* Seasons may be selected by zones established for duck hunting. The season in each zone may be split into 2 segments.

Pacific Flyway

States in the Pacific Flyway may select their hunting seasons between the outside dates for the season on ducks, mergansers, and coots; therefore, Pacific Flyway frameworks for gallinules are included with the duck, merganser, and coot frameworks.

8. Rail Seasons

*Areas:* Atlantic, Mississippi, and Central Flyways and the Pacific Flyway Portions of Colorado, Montana, New Mexico, and Wyoming.

*Outside Dates:* September 1–January 31.

*Season Lengths:* 70 days. Seasons may be split into 2 segments.

*Daily Bag Limits:*

*Clapper and King Rails:* In Connecticut, Delaware, Maryland, New Jersey, and Rhode Island, 10 rails in the aggregate. In Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia, 15 rails in the aggregate.

*Sora and Virginia Rails:* 25 rails in the aggregate.

9. Snipe Seasons

*Outside Dates:* September 1–February 28, except in Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Virginia, where the season must end no later than January 31.

*Season Lengths:* 107 days.

*Daily Bag limits:* 8 snipe.

*Zones and Split Seasons:* Seasons may be selected by zones established for duck seasons. The season in each zone may be split into 2 segments.

10. American Woodcock Seasons

*Areas:* Eastern and Central Management Regions.

*Outside Dates:* September 13–January 31.

*Season Lengths:* Except as subsequently provided, 45 days.

*Daily Bag Limits:* 3 woodcock.

*Zones and Split Seasons:* Seasons may be split into 2 segments. New Jersey may select seasons in each of 2 zones. The season in each zone may not exceed 36 days.

11. Band-Tailed Pigeon Seasons

California, Oregon, Washington, and Nevada

*Outside Dates:* September 15–January 1.

*Seasons Lengths:* 9 days.

*Daily Bag Limits:* 2 pigeons.

*Zones:* California may select seasons in each of 2 zones. The season in each zone may not exceed 9 days. The season in the North Zone must close by October 3.

Arizona, Colorado, New Mexico, and Utah

*Outside Dates:* September 1–November 30.

*Season Lengths:* 14 days.

*Daily Bag Limits:* 2 pigeons.

*Zones:* New Mexico may select seasons in each of 2 zones. The season in each zone may not exceed 14 days. The season in the South Zone may not open until October 1.

12. Dove Seasons

Eastern Management Unit

*Outside Dates:* September 1 and January 31.

*Season Lengths:* 90 days.

*Daily Bag Limits:* 15 mourning and white-winged doves in the aggregate.

*Zones and Split Seasons:* Seasons may be split into 3 segments; Alabama, Louisiana, and Mississippi may select seasons in each of 2 zones and may split their season in each zone into 3 segments.

Central Management Unit

*Outside Dates:* September 1 and January 15.

*Season Lengths:* 90 days.

All States Except Texas

*Daily Bag Limits:* 15 mourning and white-winged doves in the aggregate.

*Zones and Split Seasons:* Seasons may be split into 3 segments; New Mexico may select seasons in each of 2 zones and may split their season in each zone into 3 segments.

Texas

*Daily Bag Limits:* 15 mourning, white-winged, and white-tipped doves in the aggregate, of which no more than 2 may be white-tipped doves.

*Zones and Split Seasons:* Texas may select hunting seasons for each of 3 zones subject to the following conditions:

A. The season may be split into 2 segments, except in that portion of Texas in which the special white-winged dove season is allowed, where a limited take of mourning and white-tipped doves may also occur during that special season (see Special White-winged Dove Area in Texas, below).

B. A season may be selected for the North and Central Zones between September 1 and January 25; and for the South Zone between September 14 and January 25.

Special White-Winged Dove Season in Texas

In addition, Texas may select a hunting season of not more than 6 days, consisting of two 3-consecutive-day periods, for the Special White-winged Dove Area between September 1 and September 19. The daily bag limit may not exceed 15 white-winged, mourning, and white-tipped doves in the aggregate, of which no more than 2 may be mourning doves and no more than 2 may be white-tipped doves. Shooting hours are from noon to sunset.

Western Management Unit

*Outside Dates:* September 1 and January 15.

Idaho, Nevada, Oregon, Utah, and Washington

*Season Lengths:* 60 days.

*Daily Bag Limits:* 15 mourning and white-winged doves in the aggregate.

*Zones and Split Seasons:* Idaho, Nevada, Utah, and Washington may split their seasons into 2 segments. Oregon may select hunting seasons in each of 2 zones and may split their season in each zone into 2 segments.

Arizona and California

*Season Lengths:* 60 days, which may be split between 2 segments, September 1–15 and November 1–January 15.

*Daily Bag Limits:* In Arizona, during the first segment of the season, the daily bag limit is 15 mourning and white-winged doves in the aggregate, of which no more than 10 may be white-winged doves. During the remainder of the season, the daily bag limit is 15 mourning doves. In California, the daily bag limit is 15 mourning and white-winged doves in the aggregate, of which no more than 10 may be white-winged doves.

13. Alaska

a. Duck, Goose, Sandhill Crane, and Snipe Seasons

*Outside Dates:* Except as subsequently provided, September 1–January 26.

*Season Lengths:* Except as subsequently provided, 107 days for ducks, geese (except brant), sandhill cranes, and snipe. The season length for brant will be determined based on the upcoming brant winter survey results and the Pacific brant harvest strategy.

*Zones and Split Seasons:* A season may be established in each of 5 zones. The season in the Southeast Zone may be split into 2 segments.

*Closed Seasons:* The hunting season is closed on the spectacled eider and Steller's eider.

*Daily Bag and Possession Limits and Special Conditions:*

*Ducks:* The basic daily bag limit is 7 ducks. The basic daily bag limit in the North Zone is 10 ducks, and in the Gulf Coast Zone is 8 ducks. The basic daily bag limits may include 2 canvasbacks and may not include sea ducks.

In addition to the basic daily bag limits, the sea duck daily bag limit is 10, including 6 each of either harlequin or long-tailed ducks. Sea ducks include scoters, common and king eiders, harlequin ducks, long-tailed ducks, and common, hooded, and red-breasted mergansers.

*Light Geese:* The daily bag limit is 6 geese.

*Canada and Cackling Geese:* The daily bag limit is 4 geese in the aggregate with the following exceptions, and subject to the following conditions:

A. In Units 5 and 6, outside dates are September 28–December 16.

B. On Middleton Island in Unit 6, all hunting is by permit only. Each hunter is required to complete a mandatory goose identification class prior to being issued a permit. Hunters must check in and check out when hunting. The daily bag and possession limits are 1 Canada or cackling goose. The season will close if incidental harvest includes 5 dusky Canada geese. A dusky Canada goose is any dark-breasted Canada goose (Munsell 10 YR color value 5 or less) with a bill length between 40 and 50 millimeters.

C. In Unit 10, the daily bag limit is 6 Canada and cackling geese in the aggregate.

*White-fronted Geese:* The daily bag limit is 4 geese with the following exceptions:

A. In Units 9, 10, and 17, the daily bag limit is 6 geese.

B. In Unit 18, the daily bag limit is 10 geese.

*Emperor Geese:* The emperor geese season is subject to the following conditions:

A. All hunting is by permit only.

B. One goose may be harvested per hunter per season.

C. Total harvest may not exceed 500 geese.

D. In State Game Management Unit 8, the Kodiak Island Road Area is closed to hunting. The Kodiak Island Road Area consists of all lands and water (including exposed tidelands) east of a line extending from Crag Point in the north to the west end of Saltery Cove in the south and all lands and water south of a line extending from Termination Point along the north side of Cascade Lake extending to Anton Larsen Bay. Marine waters adjacent to the closed area are closed to harvest within 500 feet from the water's edge. The offshore islands are open to harvest, for example: Woody, Long, Gull, and Puffin islands.

*Brant:* The daily bag limit will be determined based on the upcoming brant winter survey results and the Pacific brant harvest strategy.

*Snipe:* The daily bag limit is 8 snipe.

*Sandhill Cranes:* The daily bag limit is 2 cranes in the Southeast, Gulf Coast, Kodiak, and Aleutian Zones, and Unit 17 in the North Zone. In the remainder of the North Zone (outside Unit 17), the daily bag limit is 3 cranes.

b. Tundra Swan Seasons

*Outside Dates:* September 1–October 31.

*Season Lengths:* 31 days.

*Daily Bag and Possession Limits and Special Conditions:* All hunting is by

permit only according to the following conditions.

A. In Unit 17, 200 permits may be issued; 3 tundra swans may be authorized per permit, and 1 permit may be issued per hunter per season.

B. In Unit 18, 500 permits may be issued; 3 tundra swans may be authorized per permit, and 1 permit may be issued per hunter per season.

C. In Unit 22, 300 permits may be issued; 3 tundra swans may be authorized per permit, and 1 permit may be issued per hunter per season.

D. In Unit 23, 300 permits may be issued; 3 tundra swans may be authorized per permit, and 1 permit may be issued per hunter per season.

14. Hawaii

a. Mourning Dove Season

*Outside Dates:* October 1–January 31.

*Season Lengths and Daily Bag Limits:* 65 days with a daily bag limit of 15 doves or 75 days with a daily bag of 12 doves.

*Note:* Mourning doves may be taken in Hawaii in accordance with shooting hours and other regulations set by the State of Hawaii, and subject to the applicable provisions of 50 CFR part 20.

15. Puerto Rico

a. Dove and Pigeon Seasons

*Outside Dates:* September 1–January 15.

*Season Lengths:* 60 days.

*Daily Bag Limits:* 30 Zenaida, mourning, and white-winged doves in the aggregate, of which 10 may be Zenaida doves and 3 may be mourning doves, and 5 scaly-naped pigeons.

*Closed Seasons:* There is no open season on the white-crowned pigeon and the plain pigeon, which are protected by the Commonwealth of Puerto Rico.

*Closed Areas:* There is no open season on doves or pigeons in the following areas: Municipality of Culebra, Desecheo Island, Mona Island, El Verde Closure Area, and Cidra Municipality and adjacent areas.

b. Duck, Coot, Gallinule, and Snipe Seasons

*Outside Dates:* October 1–January 31.

*Season Lengths:* 55 days. The season may be split into 2 segments.

*Daily Bag Limits:* 6 ducks, 6 gallinules, and 8 snipe.

*Closed Seasons:* There is no open season on the ruddy duck, white-cheeked pintail, West Indian whistling duck, fulvous whistling duck, and masked duck, which are protected by the Commonwealth of Puerto Rico. There is no open season on the purple gallinule, American coot, and Caribbean coot.

*Closed Areas:* There is no open season on ducks, gallinules, and snipe in the Municipality of Culebra and on Desecheo Island.

16. Virgin Islands

a. Dove and Pigeon Seasons

*Outside Dates:* September 1–January 15.

*Season Lengths:* 60 days.

*Daily Bag and Possession Limits:* 10 Zenaida doves.

*Closed Seasons:* There is no open season for ground-doves, quail-doves, and pigeons.

*Closed Areas:* There is no open season for migratory game birds on Ruth Cay (just south of St. Croix).

*Local Names for Certain Birds:* Zenaida dove, also known as mountain dove; bridled quail-dove, also known as Barbary dove or partridge; common ground-dove, also known as stone dove, tobacco dove, rola, or tortolita; scaly-naped pigeon, also known as red-necked or scaled pigeon.

b. Duck Seasons

*Outside Dates:* December 1–January 31.

*Season Lengths:* 55 days.

*Daily Bag Limits:* 6 ducks.

*Closed Seasons:* There is no open season on the ruddy duck, white-cheeked pintail, West Indian whistling-duck, fulvous whistling-duck, and masked duck.

17. Special Falconry Regulations

In accordance with 50 CFR 21.29, falconry is a permitted means of taking migratory game birds in any State except for Hawaii. States may select an extended season for taking migratory game birds in accordance with the following:

*Outside Dates:* September 1–March 10.

*Season Lengths:* For all hunting methods combined, the combined length of the extended season, regular season, and any special or experimental seasons must not exceed 107 days for any species or group of species in a geographical area. Each extended season may be split into 3 segments.

*Daily Bag Limits:* Falconry daily bag limits for all permitted migratory game birds must not exceed 3 birds in the aggregate, during extended falconry seasons, any special or experimental seasons, and regular hunting seasons in each State, including those that do not select an extended falconry season. Regular season bag limits do not apply to falconry. The falconry bag limit is not in addition to shooting limits.

*Note:* General hunting regulations, including seasons and hunting hours, apply to falconry.

**c. Area, Unit, and Zone Descriptions**

*Ducks (Including Mergansers) and Coots*

Atlantic Flyway

Connecticut

*North Zone:* That portion of the State north of I–95.

*South Zone:* Remainder of the State.

Maine

*North Zone:* That portion north of the line extending east along Maine State Highway 110 from the New Hampshire-Maine State line to the intersection of Maine State Highway 11 in Newfield; then north and east along Route 11 to the intersection of U.S. Route 202 in Auburn; then north and east on Route 202 to the intersection of I–95 in Augusta; then north and east along I–95 to Route 15 in Bangor; then east along Route 15 to Route 9; then east along Route 9 to Stony Brook in Baileyville; then east along Stony Brook to the U.S. border.

*Coastal Zone:* That portion south of a line extending east from the Maine-New Brunswick border in Calais at the Route 1 Bridge; then south along Route 1 to the Maine-New Hampshire border in Kittery.

*South Zone:* Remainder of the State.

Maryland

*Western Zone:* Allegany, Carroll, Garrett, Frederick and Washington Counties; and those portions of Baltimore, Howard, Prince George's, and Montgomery Counties west of a line beginning at I–83 at the Pennsylvania State line, following I–83 south to the intersection of I–83 and I–695 (Outer Loop), south following I–695 (Outer Loop) to its intersection with I–95, south following I–95 to its intersection with I–495 (Outer Loop), and following I–495 (Outer Loop) to the Virginia shore of the Potomac River.

*Eastern Zone:* That portion of the State not included in the Western Zone.

*Special Teal Season Area:* Calvert, Caroline, Cecil, Dorchester, Harford, Kent, Queen Anne's, St. Mary's, Somerset, Talbot, Wicomico, and Worcester Counties; that part of Anne Arundel County east of Interstate 895, Interstate 97, and Route 3; that part of Prince George's County east of Route 3 and Route 301; and that part of Charles County east of Route 301 to the Virginia State Line.

Massachusetts

*Western Zone:* That portion of the State west of a line extending south

from the Vermont State line on I–91 to MA 9, west on MA 9 to MA 10, south on MA 10 to U.S. 202, south on U.S. 202 to the Connecticut State line.

*Central Zone:* That portion of the State east of the Berkshire Zone and west of a line extending south from the New Hampshire State line on I–95 to U.S. 1, south on U.S. 1 to I–93, south on I–93 to MA 3, south on MA 3 to U.S. 6, west on U.S. 6 to MA 28, west on MA 28 to I–195, west to the Rhode Island State line; except the waters, and the lands 150 yards inland from the high-water mark, of the Assonet River upstream to the MA 24 bridge, and the Taunton River upstream to the Center Street-Elm Street bridge shall be in the Coastal Zone.

*Coastal Zone:* That portion of Massachusetts east and south of the Central Zone.

New Hampshire

*Northern Zone:* That portion of the State east and north of the Inland Zone beginning at the Jct. of Route 10 and Route 25–A in Orford, east on Route 25–A to Route 25 in Wentworth, southeast on Route 25 to Exit 26 of Route I–93 in Plymouth, south on Route I–93 to Route 3 at Exit 24 of Route I–93 in Ashland, northeast on Route 3 to Route 113 in Holderness, north on Route 113 to Route 113–A in Sandwich, north on Route 113–A to Route 113 in Tamworth, east on Route 113 to Route 16 in Chocorua, north on Route 16 to Route 302 in Conway, east on Route 302 to the Maine-New Hampshire border.

*Inland Zone:* That portion of the State south and west of the Northern Zone, west of the Coastal Zone, and includes the area of Vermont and New Hampshire as described for hunting reciprocity. A person holding a New Hampshire hunting license that allows the taking of migratory waterfowl or a person holding a Vermont resident hunting license that allows the taking of migratory waterfowl may take migratory waterfowl and coots from the following designated area of the Inland Zone: The State of Vermont east of Route I–91 at the Massachusetts border, north on Route I–91 to Route 2, north on Route 2 to Route 102, north on Route 102 to Route 253, and north on Route 253 to the border with Canada and the area of New Hampshire west of Route 63 at the Massachusetts border, north on Route 63 to Route 12, north on Route 12 to Route 12–A, north on Route 12–A to Route 10, north on Route 10 to Route 135, north on Route 135 to Route 3, north on Route 3 to the intersection with the Connecticut River.

*Coastal Zone:* That portion of the State east of a line beginning at the Maine-New Hampshire border in Rollinsford, then extending to Route 4 west to the city of Dover, south to the intersection of Route 108, south along Route 108 through Madbury, Durham, and Newmarket to the junction of Route 85 in Newfields, south to Route 101 in Exeter, east to Interstate 95 (New Hampshire Turnpike) in Hampton, and south to the Massachusetts border.

New Jersey

*Coastal Zone:* That portion of the State seaward of a line beginning at the New York State line in Raritan Bay and extending west along the New York State line to NJ 440 at Perth Amboy; west on NJ 440 to the Garden State Parkway; south on the Garden State Parkway to NJ 109; south on NJ 109 to Cape May County Route 633 (Lafayette Street); south on Lafayette Street to Jackson Street; south on Jackson Street to the shoreline at Cape May; west along the shoreline of Cape May beach to COLREGS Demarcation Line 80.503 at Cape May Point; south along COLREGS Demarcation Line 80.503 to the Delaware State line in Delaware Bay.

*North Zone:* That portion of the State west of the Coastal Zone and north of a line extending west from the Garden State Parkway on NJ 70 to the New Jersey Turnpike, north on the turnpike to U.S. 206, north on U.S. 206 to U.S. 1 at Trenton, west on U.S. 1 to the Pennsylvania State line in the Delaware River.

*South Zone:* That portion of the State not within the North Zone or the Coastal Zone.

New York

*Lake Champlain Zone:* That area east and north of a continuous line extending along U.S. 11 from the New York-Canada International boundary south to NY 9B, south along NY 9B to U.S. 9, south along U.S. 9 to NY 22 south of Keesville; south along NY 22 to the west shore of South Bay, along and around the shoreline of South Bay to NY 22 on the east shore of South Bay; southeast along NY 22 to U.S. 4, northeast along U.S. 4 to the Vermont State line.

*Long Island Zone:* That area consisting of Nassau County, Suffolk County, that area of Westchester County southeast of I–95, and their tidal waters.

*Western Zone:* That area west of a line extending from Lake Ontario east along the north shore of the Salmon River to I–81, and south along I–81 to the Pennsylvania State line.

*Northeastern Zone:* That area north of a continuous line extending from Lake Ontario east along the north shore of the Salmon River to I–81, south along I–81 to NY 31, east along NY 31 to NY 13, north along NY 13 to NY 49, east along NY 49 to NY 365, east along NY 365 to NY 28, east along NY 28 to NY 29, east along NY 29 to NY 22, north along NY 22 to Washington County Route 153, east along CR 153 to the New York-Vermont boundary, exclusive of the Lake Champlain Zone.

*Southeastern Zone:* The remaining portion of New York.

North Carolina

*Coastal Zone:* All counties and portions of counties east of I–95.

*Inland Zone:* All counties and portions of counties west of I–95.

Pennsylvania

*Lake Erie Zone:* The Lake Erie waters of Pennsylvania and a shoreline margin along Lake Erie from New York on the east to Ohio on the west extending 150 yards inland but including all of Presque Isle Peninsula.

*Northwest Zone:* The area bounded on the north by the Lake Erie Zone and including all of Erie and Crawford Counties and those portions of Mercer and Venango Counties north of I–80.

*North Zone:* That portion of the State east of the Northwest Zone and north of a line extending east on I–80 to U.S. 220, Route 220 to I–180, I–180 to I–80, and I–80 to the Delaware River.

*South Zone:* The remaining portion of Pennsylvania.

Vermont

*Lake Champlain Zone:* The U.S. portion of Lake Champlain and that area north and west of the line extending from the New York border along U.S. 4 to VT 22A at Fair Haven; VT 22A to U.S. 7 at Vergennes; U.S. 7 to VT 78 at Swanton; VT 78 to VT 36; VT 36 to Maquam Bay on Lake Champlain; along and around the shoreline of Maquam Bay and Hog Island to VT 78 at the West Swanton Bridge; VT 78 to VT 2 in Alburg; VT 2 to the Richelieu River in Alburg; along the east shore of the Richelieu River to the Canadian border.

*Interior Zone:* That portion of Vermont east of the Lake Champlain Zone and west of a line extending from the Massachusetts border at Interstate 91; north along Interstate 91 to U.S. 2; east along U.S. 2 to VT 102; north along VT 102 to VT 253; north along VT 253 to the Canadian border.

*Connecticut River Zone:* The remaining portion of Vermont east of the Interior Zone.

Virginia

*Western Zone:* All counties and portions of counties west of I–95.

*Eastern Zone:* All counties and portions of counties east of I–95.

Mississippi Flyway

Illinois

*North Zone:* That portion of the State north of a line extending west from the Indiana border along Peotone-Beecher Road to Illinois Route 50, south along Illinois Route 50 to Wilmington-Peotone Road, west along Wilmington-Peotone Road to Illinois Route 53, north along Illinois Route 53 to New River Road, northwest along New River Road to Interstate Highway 55, south along I–55 to Pine Bluff-Lorenzo Road, west along Pine Bluff-Lorenzo Road to Illinois Route 47, north along Illinois Route 47 to I–80, west along I–80 to I–39, south along I–39 to Illinois Route 18, west along Illinois Route 18 to Illinois Route 29, south along Illinois Route 29 to Illinois Route 17, west along Illinois Route 17 to the Mississippi River, and due south across the Mississippi River to the Iowa border.

*Central Zone:* That portion of the State south of the North Duck Zone line to a line extending west from the Indiana border along I–70 to Illinois Route 4, south along Illinois Route 4 to Illinois Route 161, west along Illinois Route 161 to Illinois Route 158, south and west along Illinois Route 158 to Illinois Route 159, south along Illinois Route 159 to Illinois Route 3, south along Illinois Route 3 to St. Leo's Road, south along St. Leo's Road to Modoc Road, west along Modoc Road to Modoc Ferry Road, southwest along Modoc Ferry Road to Levee Road, southeast along Levee Road to County Route 12 (Modoc Ferry entrance Road), south along County Route 12 to the Modoc Ferry route and southwest on the Modoc Ferry route across the Mississippi River to the Missouri border.

*South Zone:* That portion of the State south and east of a line extending west from the Indiana border along Interstate 70, south along U.S. Highway 45, to Illinois Route 13, west along Illinois Route 13 to Greenbriar Road, north on Greenbriar Road to Sycamore Road, west on Sycamore Road to N Reed Station Road, south on N Reed Station Road to Illinois Route 13, west along Illinois Route 13 to Illinois Route 127, south along Illinois Route 127 to State Forest Road (1025 N), west along State Forest Road to Illinois Route 3, north along Illinois Route 3 to the south bank of the Big Muddy River, west along the south bank of the Big Muddy River to the Mississippi River, west across the Mississippi River to the Missouri border.

*South Central Zone:* The remainder of the State between the south border of the Central Zone and the North border of the South Zone.

Indiana

*North Zone:* That part of Indiana north of a line extending east from the Illinois border along State Road 18 to U.S. 31; north along U.S. 31 to U.S. 24; east along U.S. 24 to Huntington; southeast along U.S. 224; south along State Road 5; and east along State Road 124 to the Ohio border.

*Central Zone:* That part of Indiana south of the North Zone boundary and north of the South Zone boundary.

*South Zone:* That part of Indiana south of a line extending east from the Illinois border along I–70; east along National Ave.; east along U.S. 150; south along U.S. 41; east along State Road 58; south along State Road 37 to Bedford; and east along U.S. 50 to the Ohio border.

Iowa

*North Zone:* That portion of Iowa north of a line beginning on the South Dakota Iowa border at Interstate 29, southeast along Interstate 29 to State Highway 20 to the Iowa-Illinois border. The south duck hunting zone is that part of Iowa west of Interstate 29 and south of State Highway 92 east to the Iowa-Illinois border. The central duck hunting zone is the remainder of the state.

*Central Zone:* The remainder of Iowa not included in the North and South zones.

*South Zone:* The south duck hunting zone is that part of Iowa west of Interstate 29 and south of State Highway 92 east to the Iowa-Illinois border.

Kentucky

*West Zone:* All counties west of and including Butler, Daviess, Ohio, Simpson, and Warren Counties.

*East Zone:* The remainder of Kentucky.

Louisiana

*East Zone:* That area of the State beginning at the Arkansas border, then south on U.S. Hwy 79 to State Hwy 9, then south on State Hwy 9 to State Hwy 147, then south on State Hwy 147 to U.S. Hwy 167, then south and east on U.S. Hwy 167 to U.S. Hwy 90, then south on U.S. Hwy 90 to the Mississippi State line.

*West Zone:* Remainder of the State.

Michigan

*North Zone:* The Upper Peninsula.

*Middle Zone:* That portion of the Lower Peninsula north of a line beginning at the Michigan-Wisconsin boundary line in Lake Michigan, directly due west of the mouth of Stoney Creek in section 31, T14N R18W, Oceana County, then proceed easterly and southerly along the centerline of Stoney Creek to its intersection with Scenic Drive, southerly on Scenic Drive to Stoney Lake Road in section 5, T13N R18W, Oceana County, easterly on Stoney Lake Road then both west and east Garfield Roads (name change only; not an intersection) then crossing highway U.S.–31 to State Highway M–20 (north of the town of New Era; also locally named Hayes Road) in section 33, T14N R17W, Oceana County, easterly on M–20 through Oceana, Newaygo, Mecosta, Isabella, and Midland Counties to highway U.S.–10 business route in the city of Midland, easterly on U.S.–10 Business Route (BR) to highway U.S.–10 at the Bay County line, easterly on U.S.–10 then crossing U.S.–75 to State Highway M–25 (west of the town of Bay City), easterly along M–25 into Tuscola County then northeasterly and easterly on M–25 through Tuscola County into Huron County, turning southeasterly on M–25 (near the town of Huron City; also locally named North Shore Road) to the centerline of Willow Creek in section 4, T18N R14E, Huron County, then northerly along the centerline of Willow Creek to the mouth of Willow Creek into Lake Huron, then directly due east along a line from the mouth of Willow Creek heading east into Lake Huron to a point due east and on the Michigan/U.S.-Canadian border.

*South Zone:* The remainder of Michigan.

Minnesota

*North Duck Zone:* That portion of the State north of a line extending east from the North Dakota State line along State Highway 210 to State Highway 23 and east to State Highway 39 and east to the Wisconsin State line at the Oliver Bridge.

*South Duck Zone:* The portion of the State south of a line extending east from the South Dakota State line along U.S. Highway 212 to Interstate 494 and east to Interstate 94 and east to the Wisconsin State line.

*Central Duck Zone:* The remainder of the State.

Missouri

*North Zone:* That portion of Missouri north of a line running west from the Illinois border at I–70; west on I–70 to Hwy 65; north on Hwy 65 to Hwy 41, north on Hwy 41 to Hwy 24; west on Hwy 24 to MO Hwy 10, west on Hwy 10 to Hwy 69, north on Hwy 69 to MO Hwy 116, west on MO Hwy 116 to Hwy 59, south on Hwy 59 to the Kansas border.

*Middle Zone:* The remainder of Missouri not included in other zones.

*South Zone:* That portion of Missouri south of a line running west from the Illinois border on MO Hwy 74 to MO Hwy 25; south on MO Hwy 25 to U.S. Hwy 62; west on U.S. Hwy 62 to MO Hwy 53; north on MO Hwy 53 to MO Hwy 51; north on MO Hwy 51 to U.S. Hwy 60; west on U.S. Hwy 60 to MO Hwy 21; north on MO Hwy 21 to MO Hwy 72; west on MO Hwy 72 to MO Hwy 32; west on MO Hwy 32 to U.S. Hwy 65; north on U.S. Hwy 65 to U.S. Hwy 54; west on U.S. Hwy 54 to the Kansas border.

Ohio

*Lake Erie Marsh Zone:* Includes all land and water within the boundaries of the area bordered by a line beginning at the intersection of Interstate 75 at the Ohio-Michigan State line and continuing south to Interstate 280, then south on I–280 to the Ohio Turnpike (I–80/I–90), then east on the Ohio Turnpike to the Erie-Lorain County line, then north to Lake Erie, then following the Lake Erie shoreline at a distance of 200 yards offshore, then following the shoreline west toward and around the northern tip of Cedar Point Amusement Park, then continuing from the westernmost point of Cedar Point toward the southernmost tip of the sand bar at the mouth of Sandusky Bay and out into Lake Erie at a distance of 200 yards offshore continuing parallel to the Lake Erie shoreline north and west toward the northernmost tip of Cedar Point National Wildlife Refuge, then following a direct line toward the southernmost tip of Wood Tick Peninsula in Michigan to a point that intersects the Ohio-Michigan State line, then following the State line back to the point of the beginning.

*North Zone:* That portion of the State, excluding the Lake Erie Marsh Zone, north of a line extending east from the Indiana State line along U.S. Highway (U.S.) 33 to State Route (SR) 127, then south along SR 127 to SR 703, then south along SR 703 and including all lands within the Mercer Wildlife Area to SR 219, then east along SR 219 to SR 364, then north along SR 364 and including all lands within the St. Mary's Fish Hatchery to SR 703, then east along SR 703 to SR 66, then north along SR 66 to U.S. 33, then east along U.S. 33 to SR 385, then east along SR 385 to SR 117, then south along SR 117 to SR 273, then east along SR 273 to SR 31, then south along SR 31 to SR 739, then east along SR 739 to SR 4, then north along SR 4 to SR 95, then east along SR 95 to SR 13, then southeast along SR 13 to SR 3, then northeast along SR 3 to SR 60, then north along SR 60 to U.S. 30, then east along U.S. 30 to SR 3, then south along SR 3 to SR 226, then south along SR 226 to SR 514, then southwest along SR 514 to SR 754, then south along SR 754 to SR 39/60, then east along SR 39/60 to SR 241, then north along SR 241 to U.S. 30, then east along U.S. 30 to SR 39, then east along SR 39 to the Pennsylvania State line.

*South Zone:* The remainder of Ohio not included in the Lake Erie Marsh Zone or the North Zone.

Tennessee

*Reelfoot Zone:* All or portions of Lake and Obion Counties.

*Remainder of State:* That portion of Tennessee outside of the Reelfoot Zone.

Wisconsin

*North Zone:* That portion of the State north of a line extending east from the Minnesota State line along U.S. Highway 10 to U.S. Highway 41, then north on U.S. Highway 41 to the Michigan State line.

*Open Water Zone:* That portion of the State extending 500 feet or greater from the Lake Michigan shoreline bounded by the Michigan State line and the Illinois State line.

*South Zone:* The remainder of the State.

Central Flyway

Colorado (Central Flyway Portion)

*Special Teal Season Area:* Lake and Chaffee Counties and that portion of the State east of Interstate Highway 25.

*Northeast Zone:* All areas east of Interstate 25 and north of Interstate 70.

*Southeast Zone:* All areas east of Interstate 25 and south of Interstate 70, and all of El Paso, Pueblo, Huerfano, and Las Animas Counties.

*Mountain/Foothills Zone:* All areas west of Interstate 25 and east of the Continental Divide, except El Paso, Pueblo, Huerfano, and Las Animas Counties.

Kansas

*High Plains:* That portion of the State west of U.S.–283.

*Low Plains Early Zone:* That part of Kansas bounded by a line from the Federal Hwy U.S.–283 and State Hwy 96 junction, then east on State Hwy 96 to its junction with Federal Hwy U.S.–183, then north on Federal Hwy U.S.–183 to its junction with Federal Hwy U.S.–24, then east on Federal Hwy U.S.–24 to its junction with Federal Hwy U.S.–281, then north on Federal Hwy U.S.–281 to its junction with Federal Hwy U.S.–36, then east on Federal Hwy U.S.–36 to its junction with State Hwy K–199, then south on State Hwy K–199 to its junction with Republic County 30th Road, then south on Republic County 30th Road to its junction with State Hwy K–148, then east on State Hwy K–148 to its junction with Republic County 50th Road, then south on Republic County 50th Road to its junction with Cloud County 40th Road, then south on Cloud County 40th Road to its junction with State Hwy K–9, then west on State Hwy K–9 to its junction with Federal Hwy U.S.–24, then west on Federal Hwy U.S.–24 to its junction with Federal Hwy U.S.–181, then south on Federal Hwy U.S.–181 to its junction with State Hwy K–18, then west on State Hwy K–18 to its junction with Federal Hwy U.S.–281, then south on Federal Hwy U.S.–281 to its junction with State Hwy K–4, then east on State Hwy K–4 to its junction with interstate Hwy I–135, then south on interstate Hwy I–135 to its junction with State Hwy K–61, then southwest on State Hwy K–61 to its junction with McPherson County 14th Avenue, then south on McPherson County 14th Avenue to its junction with McPherson County Arapaho Road, then west on McPherson County Arapaho Road to its junction with State Hwy K–61, then southwest on State Hwy K–61 to its junction with State Hwy K–96, then northwest on State Hwy K–96 to its junction with Federal Hwy U.S.–56, then southwest on Federal Hwy U.S.–56 to its junction with State Hwy K–19, then east on State Hwy K–19 to its junction with Federal Hwy U.S.–281, then south on Federal Hwy U.S.–281 to its junction with Federal Hwy U.S.–54, then west on Federal Hwy U.S.–54 to its junction with Federal Hwy U.S.–183, then north on Federal Hwy U.S.–183 to its junction with Federal Hwy U.S.–56, then southwest on Federal Hwy U.S.–56 to its junction with North Main Street in Spearville, then south on North Main Street to Davis Street, then east on Davis Street to Ford County Road 126 (South Stafford Street), then south on Ford County Road 126 to Garnett Road, then east on Garnett Road to Ford County Road 126, then south on Ford County Road 126 to Ford Spearville Road, then west on Ford Spearville Road to its junction with Federal Hwy U.S.–400, then northwest on Federal Hwy U.S.–400 to its junction with Federal Hwy U.S.–283, and then north on Federal Hwy U.S.–283 to its junction with Federal Hwy U.S.–96.

*Low Plains Late Zone:* That part of Kansas bounded by a line from the Federal Hwy U.S.–283 and State Hwy 96 junction, then north on Federal Hwy U.S.–283 to the Kansas-Nebraska State line, then east along the Kansas-Nebraska State line to its junction with the Kansas-Missouri State line, then

southeast along the Kansas-Missouri State line to its junction with State Hwy K–68, then west on State Hwy K–68 to its junction with interstate Hwy I–35, then southwest on interstate Hwy I–35 to its junction with Butler County NE 150th Street, then west on Butler County NE 150th Street to its junction with Federal Hwy U.S.–77, then south on Federal Hwy U.S.–77 to its junction with the Kansas-Oklahoma State line, then west along the Kansas-Oklahoma State line to its junction with Federal Hwy U.S.–283, then north on Federal Hwy U.S.–283 to its junction with Federal Hwy U.S.–400, then east on Federal Hwy U.S.–400 to its junction with Ford Spearville Road, then east on Ford Spearville Road to Ford County Road 126 (South Stafford Street), then north on Ford County Road 126 to Garnett Road, then west on Garnett Road to Ford County Road 126, then north on Ford County Road 126 to Davis Street, then west on Davis Street to North Main Street, then north on North Main Street to its junction with Federal Hwy U.S.–56, then east on Federal Hwy U.S.–56 to its junction with Federal Hwy U.S.–183, then south on Federal Hwy U.S.–183 to its junction with Federal Hwy U.S.–54, then east on Federal Hwy U.S.–54 to its junction with Federal Hwy U.S.–281, then north on Federal Hwy U.S.–281 to its junction with State Hwy K–19, then west on State Hwy K–19 to its junction with Federal Hwy U.S.–56, then east on Federal Hwy U.S.–56 to its junction with State Hwy K–96, then southeast on State Hwy K–96 to its junction with State Hwy K–61, then northeast on State Hwy K–61 to its junction with McPherson County Arapaho Road, then east on McPherson County Arapaho Road to its junction with McPherson County 14th Avenue, then north on McPherson County 14th Avenue to its junction with State Hwy K–61, then east on State Hwy K–61 to its junction with interstate Hwy I–135, then north on interstate Hwy I–135 to its junction with State Hwy K–4, then west on State Hwy K–4 to its junction with Federal Hwy U.S.–281, then north on Federal Hwy U.S.–281 to its junction with State Hwy K–18, then east on State Hwy K–18 to its junction with Federal Hwy U.S.–181, then north on Federal Hwy U.S.–181 to its junction with Federal Hwy U.S.–24, then east on Federal Hwy U.S.–24 to its junction with State Hwy K–9, then east on State Hwy K–9 to its junction with Cloud County 40th Road, then north on Cloud County 40th Road to its junction with Republic County 50th Road, then north on Republic County 50th Road to its junction with State Hwy K–148, then west on State Hwy K–148 to its junction with Republic County 30th Road, then north on Republic County 30th Road to its junction with State Hwy K–199, then north on State Hwy K–199 to its junction with Federal Hwy U.S.–36, then west on Federal Hwy U.S.–36 to its junction with Federal Hwy U.S.–281, then south on Federal Hwy U.S.–281 to its junction with Federal Hwy U.S.–24, then west on Federal Hwy U.S.–24 to its junction with Federal Hwy U.S.–183, then south on Federal Hwy U.S.–183 to its junction with Federal Hwy U.S.–96, and then west on Federal Hwy U.S.–96 to its junction with Federal Hwy U.S.–283.

*Low Plains Southeast Zone:* That part of Kansas bounded by a line from the Missouri-Kansas State line west on K–68 to its junction with I–35, then southwest on I–35 to its junction with Butler County, NE 150th Street, then west on NE 150th Street to its junction with Federal Hwy U.S.–77, then south on Federal Hwy U.S.–77 to the Oklahoma-Kansas State line, then east along the Kansas-Oklahoma State line to its junction with the Kansas-Missouri State line, then north along the Kansas-Missouri State line to its junction with State Hwy K–68.

Montana (Central Flyway Portion)

*Zone 1:* The Counties of Blaine, Carter, Daniels, Dawson, Fallon, Fergus, Garfield, Golden Valley, Judith Basin, McCone, Musselshell, Petroleum, Phillips, Powder River, Richland, Roosevelt, Sheridan, Stillwater, Sweet Grass, Valley, Wheatland, and Wibaux.

*Zone 2:* The Counties of Big Horn, Carbon, Custer, Prairie, Rosebud, Treasure, and Yellowstone.

Nebraska

*High Plains:* That portion of Nebraska lying west of a line beginning at the South Dakota-Nebraska border on U.S. Hwy 183; south on U.S. Hwy 183 to U.S. Hwy 20; west on U.S. Hwy 20 to NE Hwy 7; south on NE Hwy 7 to NE Hwy 91; southwest on NE Hwy 91 to NE Hwy 2; southeast on NE Hwy 2 to NE Hwy 92; west on NE Hwy 92 to NE Hwy 40; south on NE Hwy 40 to NE Hwy 47; south on NE Hwy 47 to NE Hwy 23; east on NE Hwy 23 to U.S. Hwy 283; and south on U.S. Hwy 283 to the Kansas-Nebraska border.

*Zone 1:* Area bounded by designated Federal and State highways and political boundaries beginning at the South Dakota-Nebraska border at U.S. Hwy 183; south along Hwy 183 to NE Hwy 12; east to NE Hwy 137; south to U.S. Hwy 20; east to U.S. Hwy 281; north to the Niobrara River; east along the Niobrara River to the Boyd County Line; north along the Boyd County line to NE Hwy 12; east to NE 26E Spur; north along the NE 26E Spur to the Ponca State Park boat ramp; north and west along the Missouri River to the Nebraska-South Dakota border; west along the Nebraska-South Dakota border to U.S. Hwy 183. Both banks of the Niobrara River in Keya Paha and Boyd counties east of U.S. Hwy 183 shall be included in Zone 1.

*Zone 2:* Those areas of the State that are not contained in Zones 1, 3, or 4.

*Zone 3:* Area bounded by designated Federal and State highways, County Roads, and political boundaries beginning at the Wyoming-Nebraska border at its northernmost intersection with the Interstate Canal; southeast along the Interstate Canal to the northern border of Scotts Bluff County; east along northern borders of Scotts Bluff and Morrill Counties to Morrill County Road 125; south to Morrill County Rd 94; east to County Rd 135; south to County Rd 88; east to County Rd 147; south to County Rd 88; southeast to County Rd 86; east to County Rd 151; south to County Rd 80; east to County Rd 161; south to County Rd 76; east to County Rd 165; south to County Rd 167; south to U.S. Hwy 26; east to County Rd 171; north to County Rd 68; east to County Rd 183; south to County Rd 64; east to County Rd 189; north to County Rd 70; east to County Rd 201; south to County Rd 60A; east to County Rd 203; south to County Rd 52; east to Keith County Line; north along the Keith County line to the northern border of Keith County; east along the northern boundaries of Keith and Lincoln Counties to NE Hwy 97; south to U.S. Hwy 83; south to E Hall School Rd; east to North Airport Road; south to U.S. Hwy 30; east to NE Hwy 47; south to NE Hwy 23; east on NE Hwy 23 to U.S. Hwy 283; south on U.S. Hwy 283 to the Kansas-Nebraska border; west along Kansas-Nebraska border to the Nebraska-Colorado border; north and west to the Wyoming-Nebraska border; north along the Wyoming-Nebraska border to its northernmost-intersection with the Interstate Canal.

*Zone 4:* Area encompassed by designated Federal and State highways and County Roads beginning at the intersection of U.S. Hwy 283 at the Kansas-Nebraska border; north to NE Hwy 23; west to NE Hwy 47; north to Dawson County Rd 769; east to County Rd 423; south to County Rd 766; east to County Rd 428; south to County Rd 763; east to NE Hwy 21; south to County Rd 761; east on County Rd 761 to County Road 437; south to the Dawson County Canal; southeast along Dawson County Canal; east to County Rd 444; south to

U.S. Hwy 30; east to U.S. Hwy 183; north to Buffalo County Rd 100; east to 46th Ave.; north to NE Hwy 40; east to NE Hwy 10; north to County Rd 220 and Hall County Husker Highway; east to Hall County S 70th Rd; north to NE Hwy 2; east to U.S. Hwy 281; north to Chapman Rd; east to 7th Rd; south to U.S. Hwy 30; north and east to NE Hwy 14; south to County Rd 22; west to County Rd M; south to County Rd 21; west to County Rd K; south to U.S. Hwy 34; west to NE Hwy 2; south to U.S. Hwy I–80; west to Gunbarrel Rd (Hall/Hamilton County line); south to Giltner Rd; west to U.S. Hwy 281; south to W 82nd St; west to Holstein Ave.; south to U.S. Hwy 34; west to NE Hwy 10; north to Kearney County Rd R and Phelps County Rd 742; west to Gosper County Rd 433; south to N Railway Street; west to Commercial Ave.; south to NE Hwy 23; west to Gosper County Rd 427; south to Gosper County Rd 737; west to Gosper County Rd 426; south to Gosper County Rd 735; east to Gosper County Rd 427; south to Furnas County Rd 276; west to Furnas County Rd 425.5/425; south to U.S. Hwy 34; east to NE Hwy 4; east to NE Hwy 10; south to U.S. Hwy 136; east to NE Hwy 14; south to NE Hwy 8; east to U.S. Hwy 81; north to NE Hwy 4; east to NE Hwy 15; north to U.S. Hwy 6; east to NE Hwy 33; east to SW 142 Street; south to W Hallam Rd; east to SW 100 Rd; south to W Chestnut Rd; west to NE Hwy 103; south to NE Hwy 4; west to NE Hwy 15; south to U.S. Hwy 136; east to Jefferson County Rd 578 Ave.; south to PWF Rd; east to NE Hwy 103; south to NE Hwy 8; east to U.S. Hwy 75; north to U.S. Hwy 136; east to the intersection of U.S. Hwy 136 and the Steamboat Trace (Trace); north along the Trace to the intersection with Federal Levee R–562; north along Federal Levee R–562 to the intersection with Nemaha County Rd 643A; south to the Trace; north along the Trace/Burlington Northern Railroad right-of-way to NE Hwy 2; west to U.S. Hwy 75; north to NE Hwy 2; west to NE Hwy 50; north to Otoe County Rd D; east to N 32nd Rd; north to Otoe County Rd B; west to NE Hwy 50; north to U.S. Hwy 34; west to NE Hwy 63; north to NE Hwy 66; north and west to U.S. Hwy 77; north to NE Hwy 109; west along NE Hwy 109 and Saunders County Rd X to Saunders County 19; south to NE Hwy 92; west to NE Hwy Spur 12F; south to Butler County Rd 30; east to County Rd X; south to County Rd 27; west to County Rd W; south to County Rd 26; east to County Rd X; south to County Rd 21 (Seward County Line); west to NE Hwy 15; north to County Rd 34; west to County Rd H; south to NE Hwy 92; west to U.S. Hwy 81; south to NE Hwy 66; west to Dark Island Trail, north to Merrick County Rd M; east to Merrick County Rd 18; north to NE Hwy 92; west to NE Hwy 14; north to NE Hwy 52; west and north to NE Hwy 91; west to U.S. Hwy 281; south to NE Hwy 58; west to NE Hwy 11; west and south to NE Hwy 2; west to NE Hwy 68; north to NE Hwy L82A; west to NE Hwy 10; north to NE Hwy 92; west to U.S. Hwy 183; north to Round Valley Rd; west to Sargent River Rd; west to Sargent Rd; west to NE Hwy S21A; west to NE Hwy 2; north to NE Hwy 91 to North Loup Spur Rd; north to North Loup River Rd; north and east along to Pleasant Valley/Worth Rd; east to Loup County Line; north along the Loup County Line to Loup-Brown County line; east along northern boundaries of Loup and Garfield Counties to NE Hwy 11; south to Cedar River Road; east and south to NE Hwy 70; east to U.S. Hwy 281; north to NE Hwy 70; east to NE Hwy 14; south to NE Hwy 39; southeast to NE Hwy 22; east to U.S. Hwy 81; southeast to U.S. Hwy 30; east to the Iowa-Nebraska border; south to the Missouri-Nebraska border; south to Kansas-Nebraska border; west along Kansas-Nebraska border to U.S. Hwy 283.

New Mexico (Central Flyway Portion)

*North Zone:* That portion of the State north of I–40 and U.S. 54.

*South Zone:* The remainder of New Mexico.

North Dakota

*High Plains:* That portion of the State south and west of a line beginning at the junction of U.S. Hwy 83 and the South Dakota State line, then north along U.S. Hwy 83 and I–94 to ND Hwy 41, then north on ND Hwy 41 to ND Hwy 53, then west on ND Hwy 53 to U.S. Hwy 83, then north on U.S. Hwy 83 to U.S. Hwy 2, then west on U.S. Hwy 2 to the Williams County line, then north and west along the Williams and Divide County lines to the Canadian border.

*Low Plains:* The remainder of North Dakota.

Oklahoma

*High Plains:* The Counties of Beaver, Cimarron, and Texas.

*Low Plains Zone 1:* That portion of the State east of the High Plains Zone and north of a line extending east from the Texas State line along OK 33 to OK 47, east along OK 47 to U.S. 183, south along U.S. 183 to I–40, east along I–40 to U.S. 177, north along U.S. 177 to OK 33, east along OK 33 to OK 18, north along OK 18 to OK 51, west along OK 51 to I–35, north along I–35 to U.S. 412, west along U.S. 412 to OK 132, then north along OK 132 to the Kansas State line.

*Low Plains Zone 2:* The remainder of Oklahoma.

South Dakota

*High Plains:* That portion of the State west of a line beginning at the North Dakota State line and extending south along U.S. 83 to U.S. 14, east on U.S. 14 to Blunt, south on the Blunt-Canning Road to SD 34, east and south on SD 34 to SD 50 at Lee's Corner, south on SD 50 to I–90, east on I–90 to SD 50, south on SD 50 to SD 44, west on SD 44 across the Platte-Winner bridge to SD 47, south on SD 47 to U.S. 18, east on U.S. 18 to SD 47, south on SD 47 to the Nebraska State line.

*Low Plains North Zone:* That portion of northeastern South Dakota east of the High Plains Unit and north of a line extending east along U.S. 212 to the Minnesota State line.

*Low Plains South Zone:* That portion of Gregory County east of SD 47 and south of SD 44; Charles Mix County south of SD 44 to the Douglas County line; south on SD 50 to Geddes; east on the Geddes Highway to U.S. 281; south on U.S. 281 and U.S. 18 to SD 50; south and east on SD 50 to the Bon Homme County line; the Counties of Bon Homme, Yankton, and Clay south of SD 50; and Union County south and west of SD 50 and I–29.

*Low Plains Middle Zone:* The remainder of South Dakota.

Texas

*High Plains:* That portion of the State west of a line extending south from the Oklahoma State line along U.S. 183 to Vernon, south along U.S. 283 to Albany, south along TX 6 to TX 351 to Abilene, south along U.S. 277 to Del Rio, then south along the Del Rio International Toll Bridge access road to the Mexico border.

*Low Plains North Zone:* That portion of northeastern Texas east of the High Plains Zone and north of a line beginning at the International Toll Bridge south of Del Rio, then extending east on U.S. 90 to San Antonio, then continuing east on I–10 to the Louisiana State line at Orange, Texas.

*Low Plains South Zone:* The remainder of Texas.

Wyoming (Central Flyway portion)

*Zone C1:* Big Horn, Converse, Goshen, Hot Springs, Natrona, Park, Platte, and Washakie Counties; and Fremont County excluding the portions west or south of the Continental Divide.

*Zone C2:* Campbell, Crook, Johnson, Niobrara, Sheridan, and Weston Counties.

*Zone C3:* Albany and Laramie Counties; and that portion of Carbon County east of the Continental Divide.

Pacific Flyway

Arizona

*North Zone:* Game Management Units 1–5, those portions of Game Management Units 6 and 8 within Coconino County, and Game Management Units 7, 9, and 12A.

*South Zone:* Those portions of Game Management Units 6 and 8 in Yavapai County, and Game Management Units 10 and 12B–45.

California

*Northeastern Zone:* That portion of California lying east and north of a line beginning at the intersection of Interstate 5 with the California-Oregon line; south along Interstate 5 to its junction with Walters Lane south of the town of Yreka; west along Walters Lane to its junction with Easy Street; south along Easy Street to the junction with Old Highway 99; south along Old Highway 99 to the point of intersection with Interstate 5 north of the town of Weed; south along Interstate 5 to its junction with Highway 89; east and south along Highway 89 to Main Street Greenville; north and east to its junction with North Valley Road; south to its junction of Diamond Mountain Road; north and east to its junction with North Arm Road; south and west to the junction of North Valley Road; south to the junction with Arlington Road (A22); west to the junction of Highway 89; south and west to the junction of Highway 70; east on Highway 70 to Highway 395; south and east on Highway 395 to the point of intersection with the California-Nevada State line; north along the California-Nevada State line to the junction of the California-Nevada-Oregon State lines; west along the California-Oregon State line to the point of origin.

*Colorado River Zone:* Those portions of San Bernardino, Riverside, and Imperial Counties east of a line from the intersection of Highway 95 with the California-Nevada State line; south on Highway 95 through the junction with Highway 40; south on Highway 95 to Vidal Junction; south through the town of Rice to the San Bernardino-Riverside County line on a road known as ''Aqueduct Road'' also known as Highway 62 in San Bernardino County; southwest on Highway 62 to Desert Center Rice Road; south on Desert Center Rice Road/Highway 177 to the town of Desert Center; east 31 miles on Interstate 10 to its intersection with Wiley Well Road; south on Wiley Well Road to Wiley Well; southeast on Milpitas Wash Road to the Blythe, Brawley, Davis Lake intersections; south on Blythe Ogilby Road also known as County Highway 34 to its intersection with Ogilby Road; south on Ogilby Road to its intersection with Interstate 8; east 7 miles on Interstate 8 to its intersection with the Andrade-Algodones Road/Highway 186; south on Highway 186 to its intersection with the U.S.-Mexico border at Los Algodones, Mexico.

*Southern Zone:* That portion of southern California (but excluding the Colorado River zone) south and east of a line beginning at the mouth of the Santa Maria River at the Pacific Ocean; east along the Santa Maria River to where it crosses Highway 101–166 near the City of Santa Maria; north on Highway 101–166; east on Highway 166 to the junction with Highway 99; south on Highway 99 to the junction of Interstate 5; south on Interstate 5 to the crest of the Tehachapi Mountains at Tejon Pass; east and north along the crest of the Tehachapi Mountains to where it intersects Highway 178 at Walker Pass; east on Highway 178 to the junction of Highway 395 at the town of Inyokern; south on Highway 395 to the junction of Highway 58; east on Highway 58 to the junction of Interstate 15; east on Interstate 15 to the junction with Highway 127; north on Highway 127 to the point of intersection with the California-Nevada State line.

*Southern San Joaquin Valley Zone:* All of Kings and Tulare Counties and that portion of Kern County north of the Southern Zone.

*Balance of State Zone:* The remainder of California not included in the Northeastern, Colorado River, Southern, and the Southern San Joaquin Valley Zones.

Colorado (Pacific Flyway Portion)

*Eastern Zone:* Routt, Grand, Summit, Eagle, and Pitkin Counties, those portions of Saguache, San Juan, Hinsdale, and Mineral Counties west of the Continental Divide, those portions of Gunnison County except the North Fork of the Gunnison River Valley (Game Management Units 521, 53, and 63), and that portion of Moffat County east of the northern intersection of Moffat County Road 29 with the Moffat-Routt County line, south along Moffat County Road 29 to the intersection of Moffat County Road 29 with the Moffat-Routt County line (Elkhead Reservoir State Park).

*Western Zone:* All areas west of the Continental Divide not included in the Eastern Zone.

Idaho

*Zone 1:* All lands and waters within the Fort Hall Indian Reservation, including private inholdings; Power County east of State Highway 37 and State Highway 39; and Bannock, Bear Lake, Bingham, Bonneville, Butte, Caribou, Clark, Fremont, Jefferson, Madison, and Teton Counties.

*Zone 2:* Benewah, Bonner, Boundary, Kootenai, and Shoshone Counties.

*Zone 3:* Power County west of State Highway 37 and State Highway 39, and Ada, Adams, Blaine, Boise, Camas, Canyon, Cassia, Clearwater, Custer, Elmore, Franklin, Gem, Gooding, Idaho, Jerome, Latah, Lemhi, Lewis, Lincoln, Minidoka, Nez Perce, Oneida, Owyhee, Payette, Twin Falls, and Washington Counties.

*Zone 4:* Valley County.

Nevada

*Northeast Zone:* Elko, Eureka, Lander, and White Pine Counties.

*Northwest Zone:* Carson City, Churchill, Douglas, Humboldt, Lyon, Mineral, Pershing, Storey, and Washoe Counties.

*South Zone:* Clark, Esmeralda, Lincoln, and Nye Counties.

*Moapa Valley Special Management Area:* That portion of Clark County including the Moapa Valley to the confluence of the Muddy and Virgin Rivers.

Oregon

*Zone 1:* Benton, Clackamas, Clatsop, Columbia, Coos, Curry, Douglas, Gilliam, Hood River, Jackson, Josephine, Lane, Lincoln, Linn, Marion, Morrow, Multnomah, Polk, Sherman, Tillamook, Umatilla, Wasco, Washington, and Yamhill, Counties.

*Zone 2:* The remainder of Oregon not included in Zone 1.

Utah

*Zone 1:* Box Elder, Cache, Daggett, Davis, Duchesne, Morgan, Rich, Salt Lake, Summit, Uintah, Utah, Wasatch, and Weber Counties, and that part of Toole County north of I–80.

*Zone 2:* The remainder of Utah not included in Zone 1.

Washington

*East Zone:* All areas east of the Pacific Crest Trail and east of the Big White Salmon River in Klickitat County.

*West Zone:* The remainder of Washington not included in the East Zone.

Wyoming (Pacific Flyway Portion)

*Snake River Zone:* Beginning at the south boundary of Yellowstone National Park and the Continental Divide; south

along the Continental Divide to Union Pass and the Union Pass Road (U.S.F.S. Road 600); west and south along the Union Pass Road to U.S.F.S. Road 605; south along U.S.F.S. Road 605 to the Bridger-Teton National Forest boundary; along the national forest boundary to the Idaho State line; north along the Idaho State line to the south boundary of Yellowstone National Park; east along the Yellowstone National Park boundary to the Continental Divide.

*Balance of State Zone:* The remainder of the Pacific Flyway portion of Wyoming not included in the Snake River Zone.

*Geese*

Atlantic Flyway

Connecticut

Early Canada and Cackling Goose Seasons

*South Zone:* Same as for ducks.

*North Zone:* Same as for ducks.

Regular Seasons

*AP Unit:* Litchfield County and the portion of Hartford County west of a line beginning at the Massachusetts border in Suffield and extending south along Route 159 to its intersection with I–91 in Hartford, and then extending south along I–91 to its intersection with the Hartford–Middlesex County line.

*NAP H–Unit:* That part of the State east of a line beginning at the Massachusetts border in Suffield and extending south along Route 159 to its intersection with I–91 in Hartford and then extending south along I–91 to State Street in New Haven; then south on State Street to Route 34, west on Route 34 to Route 8, south along Route 8 to Route 110, south along Route 110 to Route 15, north along Route 15 to the Milford Parkway, south along the Milford Parkway to I–95, north along I–95 to the intersection with the east shore of the Quinnipiac River, south to the mouth of the Quinnipiac River and then south along the eastern shore of New Haven Harbor to the Long Island Sound.

*Atlantic Flyway Resident Population (AFRP) Unit:* Remainder of the State not included in AP and NAP Units.

*South Zone:* Same as for ducks.

Maine

*North NAP–H Zone:* Same as North Zone for ducks.

*Coastal NAP–L Zone:* Same as Coastal Zone for ducks.

*South NAP–H Zone:* Same as South Zone for ducks.

Maryland

Early Canada and Cackling Goose Seasons

*Eastern Unit:* Calvert, Caroline, Cecil, Dorchester, Harford, Kent, Queen Anne's, St. Mary's, Somerset, Talbot, Wicomico, and Worcester Counties; and that part of Anne Arundel County east of Interstate 895, Interstate 97, and Route 3; that part of Prince George's County east of Route 3 and Route 301; and that part of Charles County east of Route 301 to the Virginia State line.

*Western Unit:* Allegany, Baltimore, Carroll, Frederick, Garrett, Howard, Montgomery, and Washington Counties and that part of Anne Arundel County west of Interstate 895, Interstate 97, and Route 3; that part of Prince George's County west of Route 3 and Route 301; and that part of Charles County west of Route 301 to the Virginia State line.

Regular Seasons

*Resident Population (RP) Zone:* Allegany, Frederick, Garrett, Montgomery, and Washington Counties; that portion of Prince George's County west of Route 3 and Route 301; that portion of Charles County west of Route 301 to the Virginia State line; and that portion of Carroll County west of Route 31 to the intersection of Route 97, and west of Route 97 to the Pennsylvania State line.

*AP Zone:* Remainder of the State.

Massachusetts

*NAP Zone:* Central and Coastal Zones (see duck zones).

*AP Zone:* The Western Zone (see duck zones).

*Special Late Season Area:* The Central Zone and that portion of the Coastal Zone (see duck zones) that lies north of the Cape Cod Canal, north to the New Hampshire State line.

New Hampshire

Same zones as for ducks.

New Jersey

*AP Zone:* North and South Zones (see duck zones).

*NAP Zone:* The Coastal Zone (see duck zones).

*Special Late Season Area:* In northern New Jersey, that portion of the State within a continuous line that runs east along the New York State boundary line to the Hudson River; then south along the New York State boundary to its intersection with Route 440 at Perth Amboy; then west on Route 440 to its intersection with Route 287; then west along Route 287 to its intersection with Route 206 in Bedminster (Exit 18); then north along Route 206 to its intersection with Route 94; then west along Route 94 to the toll bridge in Columbia; then north along the Pennsylvania State boundary in the Delaware River to the beginning point. In southern New Jersey, that portion of the State within a continuous line that runs west from the Atlantic Ocean at Ship Bottom along Route 72 to Route 70; then west along Route 70 to Route 206; then south along Route 206 to Route 536; then west along Route 536 to Route 322; then west along Route 322 to Route 55; then south along Route 55 to Route 553 (Buck Road); then south along Route 553 to Route 40; then east along Route 40 to route 55; then south along Route 55 to Route 552 (Sherman Avenue); then west along Route 552 to Carmel Road; then south along Carmel Road to Route 49; then east along Route 49 to Route 555; then south along Route 555 to Route 553; then east along Route 553 to Route 649; then north along Route 649 to Route 670; then east along Route 670 to Route 47; then north along Route 47 to Route 548; then east along Route 548 to Route 49; then east along Route 49 to Route 50; then south along Route 50 to Route 9; then south along Route 9 to Route 625 (Sea Isle City Boulevard); then east along Route 625 to the Atlantic Ocean; then north to the beginning point.

New York

*Lake Champlain Goose Area:* The same as the Lake Champlain Waterfowl Hunting Zone, which is that area of New York State lying east and north of a continuous line extending along Route 11 from the New York-Canada international boundary south to Route 9B, south along Route 9B to Route 9, south along Route 9 to Route 22 south of Keeseville, south along Route 22 to the west shore of South Bay along and around the shoreline of South Bay to Route 22 on the east shore of South Bay, southeast along Route 22 to Route 4, northeast along Route 4 to the New York-Vermont boundary.

*Northeast Goose Area:* The same as the Northeastern Waterfowl Hunting Zone, which is that area of New York State lying north of a continuous line extending from Lake Ontario east along the north shore of the Salmon River to Interstate 81, south along Interstate 81 to Route 31, east along Route 31 to Route 13, north along Route 13 to Route 49, east along Route 49 to Route 365, east along Route 365 to Route 28, east along Route 28 to Route 29, east along Route 29 to Route 22 at Greenwich Junction, north along Route 22 to Washington County Route 153, east along CR 153 to the New York-Vermont boundary, exclusive of the Lake Champlain Zone.

*East Central Goose Area:* That area of New York State lying inside of a continuous line extending from Interstate Route 81 in Cicero, east along Route 31 to Route 13, north along Route 13 to Route 49, east along Route 49 to Route 365, east along Route 365 to Route 28, east along Route 28 to Route 29, east along Route 29 to Route 147 at Kimball Corners, south along Route 147 to Schenectady County Route 40 (West Glenville Road), west along Route 40 to Touareuna Road, south along Touareuna Road to Schenectady County Route 59, south along Route 59 to State Route 5, east along Route 5 to the Lock 9 bridge, southwest along the Lock 9 bridge to Route 5S, southeast along Route 5S to Schenectady County Route 58, southwest along Route 58 to the NYS Thruway, south along the Thruway to Route 7, southwest along Route 7 to Schenectady County Route 103, south along Route 103 to Route 406, east along Route 406 to Schenectady County Route 99 (Windy Hill Road), south along Route 99 to Dunnsville Road, south along Dunnsville Road to Route 397, southwest along Route 397 to Route 146 at Altamont, west along Route 146 to Albany County Route 252, northwest along Route 252 to Schenectady County Route 131, north along Route 131 to Route 7, west along Route 7 to Route 10 at Richmondville, south on Route 10 to Route 23 at Stamford, west along Route 23 to Route 7 in Oneonta, southwest along Route 7 to Route 79 to Interstate Route 88 near Harpursville, west along Route 88 to Interstate Route 81, north along Route 81 to the point of beginning.

*West Central Goose Area:* That area of New York State lying within a continuous line beginning at the point where the northerly extension of Route 269 (County Line Road on the Niagara-Orleans County boundary) meets the international boundary with Canada, south to the shore of Lake Ontario at the eastern boundary of Golden Hill State Park, south along the extension of Route 269 and Route 269 to Route 104 at Jeddo, west along Route 104 to Niagara County Route 271, south along Route 271 to Route 31E at Middleport, south along Route 31E to Route 31, west along Route 31 to Griswold Street, south along Griswold Street to Ditch Road, south along Ditch Road to Foot Road, south along Foot Road to the north bank of Tonawanda Creek, west along the north bank of Tonawanda Creek to Route 93, south along Route 93 to Route 5, east along Route 5 to Crittenden-Murrays Corners Road, south on Crittenden-Murrays Corners Road to the NYS Thruway, east along the Thruway 90 to Route 98 (at Thruway Exit 48) in Batavia, south along Route 98 to Route 20, east along Route 20 to Route 19 in Pavilion Center, south along Route 19 to Route 63, southeast along Route 63 to Route 246, south along Route 246 to Route 39 in Perry, northeast along Route 39 to Route 20A, northeast along Route 20A to Route 20, east along Route 20 to Route 364 (near Canandaigua), south and east along Route 364 to Yates County Route 18 (Italy Valley Road), southwest along Route 18 to Yates County Route 34, east along Route 34 to Yates County Route 32, south along Route 32 to Steuben County Route 122, south along Route 122 to Route 53, south along Route 53 to Steuben County Route 74, east along Route 74 to Route 54A (near Pulteney), south along Route 54A to Steuben County Route 87, east along Route 87 to Steuben County Route 96, east along Route 96 to Steuben County Route 114, east along Route 114 to Schuyler County Route 23, east and southeast along Route 23 to Schuyler County Route 28, southeast along Route 28 to Route 409 at Watkins Glen, south along Route 409 to Route 14, south along Route 14 to Route 224 at Montour Falls, east along Route 224 to Route 228 in Odessa, north along Route 228 to Route 79 in Mecklenburg, east along Route 79 to Route 366 in Ithaca, northeast along Route 366 to Route 13, northeast along Route 13 to Interstate Route 81 in Cortland, north along Route 81 to the north shore of the Salmon River to shore of Lake Ontario, extending generally northwest in a straight line to the nearest point of the international boundary with Canada, south and west along the international boundary to the point of beginning.

*Hudson Valley Goose Area:* That area of New York State lying within a continuous line extending from Route 4 at the New York-Vermont boundary, west and south along Route 4 to Route 149 at Fort Ann, west on Route 149 to Route 9, south along Route 9 to Interstate Route 87 (at Exit 20 in Glens Falls), south along Route 87 to Route 29, west along Route 29 to Route 147 at Kimball Corners, south along Route 147 to Schenectady County Route 40 (West Glenville Road), west along Route 40 to Touareuna Road, south along Touareuna Road to Schenectady County Route 59, south along Route 59 to State Route 5, east along Route 5 to the Lock 9 bridge, southwest along the Lock 9 bridge to Route 5S, southeast along Route 5S to Schenectady County Route 58, southwest along Route 58 to the NYS Thruway, south along the Thruway to Route 7, southwest along Route 7 to Schenectady County Route 103, south along Route 103 to Route 406, east along Route 406 to Schenectady County Route 99 (Windy Hill Road), south along Route 99 to Dunnsville Road, south along Dunnsville Road to Route 397, southwest along Route 397 to Route 146 at Altamont, southeast along Route 146 to Main Street in Altamont, west along Main Street to Route 156, southeast along Route 156 to Albany County Route 307, southeast along Route 307 to Route 85A, southwest along Route 85A to Route 85, south along Route 85 to Route 443, southeast along Route 443 to Albany County Route 301 at Clarksville, southeast along Route 301 to Route 32, south along Route 32 to Route 23 at Cairo, west along Route 23 to Joseph Chadderdon Road, southeast along Joseph Chadderdon Road to Hearts Content Road (Greene County Route 31), southeast along Route 31 to Route 32, south along Route 32 to Greene County Route 23A, east along Route 23A to Interstate Route 87 (the NYS Thruway), south along Route 87 to Route 28 (Exit 19) near Kingston, northwest on Route 28 to Route 209, southwest on Route 209 to the New York-Pennsylvania boundary, southeast along the New York-Pennsylvania boundary to the New York-New Jersey boundary, southeast along the New York-New Jersey boundary to Route 210 near Greenwood Lake, northeast along Route 210 to Orange County Route 5, northeast along Orange County Route 5 to Route 105 in the Village of Monroe, east and north along Route 105 to Route 32, northeast along Route 32 to Orange County Route 107 (Quaker Avenue), east along Route 107 to Route 9W, north along Route 9W to the south bank of Moodna Creek, southeast along the south bank of Moodna Creek to the New Windsor-Cornwall town boundary, northeast along the New Windsor-Cornwall town boundary to the Orange-Dutchess County boundary (middle of the Hudson River), north along the county boundary to Interstate Route 84, east along Route 84 to the Dutchess-Putnam County boundary, east along the county boundary to the New York-Connecticut boundary, north along the New York-Connecticut boundary to the New York-Massachusetts boundary, north along the New York-Massachusetts boundary to the New York-Vermont boundary, north to the point of beginning.

*Eastern Long Island Goose Area (NAP High Harvest Area):* That area of Suffolk County lying east of a continuous line extending due south from the New York-Connecticut boundary to the northernmost end of Roanoke Avenue in the Town of Riverhead; then south on Roanoke Avenue (which becomes

County Route 73) to State Route 25; then west on Route 25 to Peconic Avenue; then south on Peconic Avenue to County Route (CR) 104 (Riverleigh Avenue); then south on CR 104 to CR 31 (Old Riverhead Road); then south on CR 31 to Oak Street; then south on Oak Street to Potunk Lane; then west on Stevens Lane; then south on Jessup Avenue (in Westhampton Beach) to Dune Road (CR 89); then due south to international waters.

*Western Long Island Goose Area (RP Area):* That area of Westchester County and its tidal waters southeast of Interstate Route 95 and that area of Nassau and Suffolk Counties lying west of a continuous line extending due south from the New York-Connecticut boundary to the northernmost end of Sound Road (just east of Wading River Marsh); then south on Sound Road to North Country Road; then west on North Country Road to Randall Road; then south on Randall Road to Route 25A, then west on Route 25A to the Sunken Meadow State Parkway; then south on the Sunken Meadow Parkway to the Sagtikos State Parkway; then south on the Sagtikos Parkway to the Robert Moses State Parkway; then south on the Robert Moses Parkway to its southernmost end; then due south to international waters.

*Central Long Island Goose Area (NAP Low Harvest Area):* That area of Suffolk County lying between the Western and Eastern Long Island Goose Areas, as defined above.

*South Goose Area:* The remainder of New York State, excluding New York City.

North Carolina

*Northeast Zone:* Includes the following counties or portions of counties: Bertie (that portion north and east of a line formed by NC 45 at the Washington County line to U.S. 17 in Midway, U.S. 17 in Midway to U.S. 13 in Windsor, U.S. 13 in Windsor to the Hertford County line), Camden, Chowan, Currituck, Dare, Hyde, Pasquotank, Perquimans, Tyrrell, and Washington.

*RP Zone:* Remainder of the State.

Pennsylvania

*Resident Canada and Cackling Goose Zone:* All of Pennsylvania except for the SJBP Zone and the area east of route SR 97 from the Maryland State Line to the intersection of SR 194, east of SR 194 to the intersection of U.S. Route 30, south of U.S. Route 30 to SR 441, east of SR 441 to SR 743, east of SR 743 to intersection of I–81, east of I–81 to intersection of I–80, and south of I–80 to the New Jersey State line.

*SJBP Zone:* The area north of I–80 and west of I–79 including in the city of Erie west of Bay Front Parkway to and including the Lake Erie Duck zone (Lake Erie, Presque Isle, and the area within 150 yards of the Lake Erie shoreline).

*AP Zone:* The area east of route SR 97 from Maryland State Line to the intersection of SR 194, east of SR 194 to intersection of U.S. Route 30, south of U.S. Route 30 to SR 441, east of SR 441 to SR 743, east of SR 743 to intersection of I–81, east of I–81 to intersection of I–80, south of I–80 to the New Jersey State line.

Rhode Island

*Special Area for Canada and Cackling Geese:* Kent and Providence Counties and portions of the towns of Exeter and North Kingston within Washington County (see State regulations for detailed descriptions).

South Carolina

*Canada and Cackling Goose Area:* Statewide except for the following area:

*East of U.S. 301:* That portion of Clarendon County bounded to the North by S–14–25, to the East by Hwy 260, and to the South by the markers delineating the channel of the Santee River.

*West of U.S. 301:* That portion of Clarendon County bounded on the North by S–14–26 extending southward to that portion of Orangeburg County bordered by Hwy 6.

Vermont

Same zones as for ducks.

Virginia

*AP Zone:* The area east and south of the following line—the Stafford County line from the Potomac River west to Interstate 95 at Fredericksburg, then south along Interstate 95 to Petersburg, then Route 460 (SE) to City of Suffolk, then south along Route 32 to the North Carolina line.

*SJBP Zone:* The area to the west of the AP Zone boundary and east of the following line: the ''Blue Ridge'' (mountain spine) at the West Virginia-Virginia border (Loudoun County-Clarke County line) south to Interstate 64 (the Blue Ridge line follows county borders along the western edge of Loudoun-Fauquier-Rappahannock-Madison-Greene-Albemarle and into Nelson Counties), then east along Interstate Route 64 to Route 15, then south along Route 15 to the North Carolina line.

*RP Zone:* The remainder of the State west of the SJBP Zone.

Mississippi Flyway

Arkansas

*Northwest Zone:* Baxter, Benton, Boone, Carroll, Conway, Crawford, Faulkner, Franklin, Johnson, Logan, Madison, Marion, Newton, Perry, Pope, Pulaski, Searcy, Sebastian, Scott, Van Buren, Washington, and Yell Counties.

*Remainder of State:* That portion of the State outside of the Northwest Zone.

Illinois

*North Zone:* That portion of the State north of a line extending west from the Indiana border along Interstate 80 to I–39, south along I–39 to Illinois Route 18, west along Illinois Route 18 to Illinois Route 29, south along Illinois Route 29 to Illinois Route 17, west along Illinois Route 17 to the Mississippi River, and due south across the Mississippi River to the Iowa border.

*Central Zone:* That portion of the State south of the North Goose Zone line to a line extending west from the Indiana border along I–70 to Illinois Route 4, south along Illinois Route 4 to Illinois Route 161, west along Illinois Route 161 to Illinois Route 158, south and west along Illinois Route 158 to Illinois Route 159, south along Illinois Route 159 to Illinois Route 3, south along Illinois Route 3 to St. Leo's Road, south along St. Leo's Road to Modoc Road, west along Modoc Road to Modoc Ferry Road, southwest along Modoc Ferry Road to Levee Road, southeast along Levee Road to County Route 12 (Modoc Ferry entrance Road), south along County Route 12 to the Modoc Ferry route and southwest on the Modoc Ferry route across the Mississippi River to the Missouri border.

*South Zone:* Same zone as for ducks.

*South Central Zone:* Same zone as for ducks.

Indiana

Same zones as for ducks.

Iowa

Same zones as for ducks.

Louisiana

*North Zone:* That portion of the State north of the line from the Texas border at State Hwy 190/12 east to State Hwy 49, then south on State Hwy 49 to Interstate 10, then east on Interstate 10 to Interstate 12, then east on Interstate 12 to Interstate 10, then east on Interstate 10 to the Mississippi State line.

*South Zone:* Remainder of the State.

Michigan

*North Zone:* Same as North duck zone.

*Middle Zone:* Same as Middle duck zone.

*South Zone:* Same as South duck zone.

*Allegan County Game Management Unit (GMU):* That area encompassed by a line beginning at the junction of 136th Avenue and Interstate Highway 196 in Lake Town Township and extending easterly along 136th Avenue to Michigan Highway 40, southerly along Michigan 40 through the city of Allegan to 108th Avenue in Trowbridge Township, westerly along 108th Avenue to 46th Street, northerly along 46th Street to 109th Avenue, westerly along 109th Avenue to I–196 in Casco Township, then northerly along I–196 to the point of beginning.

*Muskegon Wastewater GMU:* That portion of Muskegon County within the boundaries of the Muskegon County wastewater system, east of the Muskegon State Game Area, in sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, and 32, T10N R14W, and sections 1, 2, 10, 11, 12, 13, 14, 24, and 25, T10N R15W, as posted.

Minnesota

Same zones as for ducks.

Missouri

Same zones as for ducks.

Ohio

Same zones as for ducks.

Tennessee

*Reelfoot Zone:* The lands and waters within the boundaries of Reelfoot Lake WMA only.

*Remainder of State:* The remainder of the State.

Wisconsin

*North and South Zones:* Same zones as for ducks.

*Mississippi River Zone:* That area encompassed by a line beginning at the intersection of the Burlington Northern & Santa Fe Railway and the Illinois State line in Grant County and extending northerly along the Burlington Northern & Santa Fe Railway to the city limit of Prescott in Pierce County, then west along the Prescott city limit to the Minnesota State line.

Central Flyway

Colorado (Central Flyway Portion)

*Northern Front Range Area:* All areas in Boulder, Larimer, and Weld Counties from the Continental Divide east along the Wyoming border to U.S. 85, south on U.S. 85 to the Adams County line, and all lands in Adams, Arapahoe, Broomfield, Clear Creek, Denver, Douglas, Gilpin, and Jefferson Counties.

*North Park Area:* Jackson County.

*South Park Area:* Chaffee, Custer, Fremont, Lake, Park, and Teller Counties.

*San Luis Valley Area:* All of Alamosa, Conejos, Costilla, and Rio Grande Counties, and those portions of Saguache, Mineral, Hinsdale, Archuleta, and San Juan Counties east of the Continental Divide.

*Remainder:* Remainder of the Central Flyway portion of Colorado.

*Eastern Colorado Late Light Goose Area:* That portion of the State east of Interstate Highway 25.

Montana (Central Flyway Portion)

*Zone 1:* Same as Zone 1 for ducks and coots.

*Zone 2:* Same as Zone 2 for ducks and coots.

Nebraska

Dark Geese

*Niobrara Unit:* That area contained within and bounded by the intersection of the Nebraska-South Dakota border and U.S. Hwy 83, south to U.S. Hwy 20, east to NE Hwy 14, north along NE Hwy 14 to NE Hwy 59 and County Road 872, west along County Road 872 to the Knox County Line, north along the Knox County Line to the Nebraska-South Dakota border, west along the Nebraska-South Dakota border to U.S. Hwy 83. Where the Niobrara River forms the boundary, both banks of the river are included in the Niobrara Unit.

*Platte River Unit:* The area bounded starting at the northernmost intersection of the Interstate Canal at the Nebraska-Wyoming border, south along the Nebraska-Wyoming border to the Nebraska-Colorado border, east and south along the Nebraska-Colorado border to the Nebraska-Kansas border, east along the Nebraska-Kansas border to the Nebraska-Missouri border, north along the Nebraska-Missouri and Nebraska-Iowa borders to the Burt-Washington County line, west along the Burt-Washington County line to U.S. Hwy 75, south to Dodge County Road 4/ Washington County Road 4, west to U.S. Hwy 77, south to U.S. Hwy 275, northwest to U.S. Hwy 91, west to NE Hwy 45, north to NE Hwy 32, west to NE Hwy 14, north to NE Hwy 70, west to U.S. Hwy 281, south to NE Hwy 70, west along NE Hwy 70/91 to NE Hwy 11, north to the Holt County Line, west along the northern border of Garfield, Loup, Blaine, and Thomas Counties to the Hooker County Line, south along the Thomas-Hooker County Lines to the McPherson County Line, east along the south border of Thomas County to the Custer County Line, south along the Cust-Logan County lines to NE Hwy 92, west to U.S. Hwy 83, north to NE Hwy 92, west to NE Hwy 61, north to NE Hwy 2, west along NE Hwy 2 to the corner formed by Garden, Grant, and Sheridan Counties, west along the north borders of Garden, Morrill, and Scotts Bluff Counties to the intersection with the Interstate Canal, north and west along the Interstate Canal to the intersection with the Nebraska-Wyoming border.

*North-Central Unit:* Those portions of the State not in the Niobrara and Platte River zones.

Light Geese

*Rainwater Basin Light Goose Area:* The area bounded by the junction of NE Hwy 92 and NE Hwy 15, south along NE Hwy 15 to NE Hwy 4, west along NE Hwy 4 to U.S. Hwy 34, west along U.S. Hwy 34 to U.S. Hwy 283, north along U.S. Hwy 283 to U.S. Hwy 30, east along U.S. Hwy 30 to NE Hwy 92, east along NE Hwy 92 to the beginning.

*Remainder of State:* The remainder of Nebraska.

New Mexico (Central Flyway Portion)

Dark Geese

*Middle Rio Grande Valley Unit:* Sierra, Socorro, and Valencia Counties.

*Remainder:* The remainder of the Central Flyway portion of New Mexico.

North Dakota

*Missouri River Canada and Cackling Goose Zone:* The area within and bounded by a line starting where ND Hwy 6 crosses the South Dakota border; then north on ND Hwy 6 to I–94; then west on I–94 to ND Hwy 49; then north on ND Hwy 49 to ND Hwy 200; then west on ND Hwy 200; then north on ND Hwy 8 to the Mercer/McLean County line; then east following the county line until it turns south toward Garrison Dam; then east along a line (including Mallard Island) of Lake Sakakawea to U.S. Hwy 83; then south on U.S. Hwy 83 to ND Hwy 200; then east on ND Hwy 200 to ND Hwy 41; then south on ND Hwy 41 to U.S. Hwy 83; then south on U.S. Hwy 83 to I–94; then east on I–94 to U.S. Hwy 83; then south on U.S. Hwy 83 to the South Dakota border; then west along the South Dakota border to ND Hwy 6.

*Western North Dakota Canada and Cackling Goose Zone:* Same as the High Plains Unit for ducks, mergansers, and coots, excluding the Missouri River Canada Goose Zone.

*Rest of State:* Remainder of North Dakota.

South Dakota

Early Canada and Cackling Goose Seasons

*Special Early Canada and Cackling Goose Unit:* The Counties of Campbell, Clark, Codington, Day, Deuel, Grant, Hamlin, Marshall, Roberts, Walworth; that portion of Perkins County west of State Highway 75 and south of State Highway 20; that portion of Dewey County north of Bureau of Indian Affairs Road 8, Bureau of Indian Affairs Road 9, and the section of U.S. Highway 212 east of the Bureau of Indian Affairs Road 8 junction; that portion of Potter County east of U.S. Highway 83; that portion of Sully County east of U.S. Highway 83; portions of Hyde, Buffalo, Brule, and Charles Mix Counties north and east of a line beginning at the Hughes-Hyde County line on State Highway 34, east to Lees Boulevard, southeast to State Highway 34, east 7 miles to 350th Avenue, south to Interstate 90 on 350th Avenue, south and east on State Highway 50 to Geddes, east on 285th Street to U.S. Highway 281, and north on U.S. Highway 281 to the Charles Mix-Douglas County boundary; that portion of Bon Homme County north of State Highway 50; those portions of Yankton and Clay Counties north of a line beginning at the junction of State Highway 50 and 306th Street/County Highway 585 in Bon Homme County, east to U.S. Highway 81, then north on U.S. Highway 81 to 303rd Street, then east on 303rd Street to 444th Avenue, then south on 444th Avenue to 305th Street, then east on 305th Street/Bluff Road to State Highway 19, then south to State Highway 50 and east to the Clay/Union County Line; Aurora, Beadle, Brookings, Brown, Butte, Corson, Davison, Douglas, Edmunds, Faulk, Haakon, Hand, Hanson, Harding, Hutchinson, Jackson, Jerauld, Jones, Kingsbury, Lake, McCook, McPherson, Meade, Mellette, Miner, Moody, Oglala Lakota (formerly Shannon), Sanborn, Spink, Todd, Turner, and Ziebach Counties; and those portions of Minnehaha and Lincoln Counties outside of an area bounded by a line beginning at the junction of the South Dakota-Minnesota State line and Minnehaha County Highway 122 (254th Street) west to its junction with Minnehaha County Highway 149 (464th Avenue), south on Minnehaha County Highway 149 (464th Avenue) to Hartford, then south on Minnehaha County Highway 151 (463rd Avenue) to State Highway 42, east on State Highway 42 to State Highway 17, south on State Highway 17 to its junction with Lincoln County Highway 116 (Klondike Road), and east on Lincoln County Highway 116 (Klondike Road) to the South Dakota-Iowa State line, then north along the South Dakota-Iowa and South Dakota-Minnesota border to the junction of the South Dakota-Minnesota State line and Minnehaha County Highway 122 (254th Street).

Regular Seasons

*Unit 1:* Same as that for the Special Early Canada and Cackling Goose Unit.

*Unit 2:* All of South Dakota not included in Unit 1 and Unit 3.

*Unit 3:* Bennett County.

Texas

*Northeast Goose Zone:* That portion of Texas lying east and north of a line beginning at the Texas-Oklahoma border at U.S. 81, then continuing south to Bowie and then southeasterly along U.S. 81 and U.S. 287 to I–35W and I–35 to the juncture with I–10 in San Antonio, then east on I–10 to the Texas-Louisiana border.

*Southeast Goose Zone:* That portion of Texas lying east and south of a line beginning at the International Toll Bridge at Laredo, then continuing north following I–35 to the juncture with I–10 in San Antonio, then easterly along I–10 to the Texas-Louisiana border.

*West Goose Zone:* The remainder of the State.

Wyoming (Central Flyway Portion)

Dark Geese

*Zone G1:* Big Horn, Converse, Hot Springs, Natrona, Park, and Washakie Counties.

*Zone G1A:* Goshen and Platte Counties.

*Zone G2:* Campbell, Crook, Johnson, Niobrara, Sheridan, and Weston Counties.

*Zone G3:* Albany and Laramie Counties; and that portion of Carbon County east of the Continental Divide.

*Zone G4:* Fremont County excluding those portions south or west of the Continental Divide.

Pacific Flyway

Arizona

Same zones as for ducks.

California

*Northeastern Zone:* That portion of California lying east and north of a line beginning at the intersection of Interstate 5 with the California-Oregon line; south along Interstate 5 to its junction with Walters Lane south of the town of Yreka; west along Walters Lane to its junction with Easy Street; south along Easy Street to the junction with Old Highway 99; south along Old Highway 99 to the point of intersection with Interstate 5 north of the town of Weed; south along Interstate 5 to its junction with Highway 89; east and south along Highway 89 to main street Greenville; north and east to its junction with North Valley Road; south to its junction of Diamond Mountain Road; north and east to its junction with North Arm Road; south and west to the junction of North Valley Road; south to the junction with Arlington Road (A22); west to the junction of Highway 89; south and west to the junction of Highway 70; east on Highway 70 to Highway 395; south and east on Highway 395 to the point of intersection with the California-Nevada State line; north along the California-Nevada State line to the junction of the California-Nevada-Oregon State lines west along the California-Oregon State line to the point of origin.

*Klamath Basin Special Management Area:* Beginning at the intersection of Highway 161 and Highway 97; east on Highway 161 to Hill Road; south on Hill Road to N Dike Road West Side; east on N Dike Road West Side until the junction of the Lost River; north on N Dike Road West Side until the Volcanic Legacy Scenic Byway; east on Volcanic Legacy Scenic Byway until N Dike Road East Side; south on the N Dike Road East Side; continue east on N Dike Road East Side to Highway 111; south on Highway 111/Great Northern Road to Highway 120/Highway 124; west on Highway 120/Highway 124 to Hill Road; south on Hill Road until Lairds Camp Road; west on Lairds Camp Road until Willow Creek; west and south on Willow Creek to Red Rock Road; west on Red Rock Road until Meiss Lake Road/Old State Highway; north on Meiss Lake Road/Old State Highway to Highway 97; north on Highway 97 to the point of origin.

*Colorado River Zone:* Those portions of San Bernardino, Riverside, and Imperial Counties east of a line from the intersection of Highway 95 with the California-Nevada State line; south on Highway 95 through the junction with Highway 40; south on Highway 95 to Vidal Junction; south through the town of Rice to the San Bernardino-Riverside County line on a road known as ''Aqueduct Road'' also known as Highway 62 in San Bernardino County; southwest on Highway 62 to Desert Center Rice Road; south on Desert Center Rice Road/Highway 177 to the town of Desert Center; east 31 miles on Interstate 10 to its intersection with Wiley Well Road; south on Wiley Well Road to Wiley Well; southeast on Milpitas Wash Road to the Blythe, Brawley, Davis Lake intersections; south on Blythe Ogilby Road also known as

County Highway 34 to its intersection with Ogilby Road; south on Ogilby Road to its intersection with Interstate 8; east 7 miles on Interstate 8 to its intersection with the Andrade-Algodones Road/ Highway 186; south on Highway 186 to its intersection with the U.S.-Mexico border at Los Algodones, Mexico.

*Southern Zone:* That portion of southern California (but excluding the Colorado River zone) south and east of a line beginning at the mouth of the Santa Maria River at the Pacific Ocean; east along the Santa Maria River to where it crosses Highway 101 2012;166 near the City of Santa Maria; north on Highway 101 2012;166; east on Highway 166 to the junction with Highway 99; south on Highway 99 to the junction of Interstate 5; south on Interstate 5 to the crest of the Tehachapi Mountains at Tejon Pass; east and north along the crest of the Tehachapi Mountains to where it intersects Highway 178 at Walker Pass; east on Highway 178 to the junction of Highway 395 at the town of Inyokern; south on Highway 395 to the junction of Highway 58; east on Highway 58 to the junction of Interstate 15; east on Interstate 15 to the junction with Highway 127; north on Highway 127 to the point of intersection with the California-Nevada State line.

*Imperial County Special Management Area:* The area bounded by a line beginning at Highway 86 and the Navy Test Base Road; south on Highway 86 to the town of Westmoreland; continue through the town of Westmoreland to Route S26; east on Route S26 to Highway 115; north on Highway 115 to Weist Road; north on Weist Road to Flowing Wells Road; northeast on Flowing Wells Road to the Coachella Canal; northwest on the Coachella Canal to Drop 18; a straight line from Drop 18 to Frink Road; south on Frink Road to Highway 111; north on Highway 111 to Niland Marina Road; southwest on Niland Marina Road to the old Imperial County boat ramp and the water line of the Salton Sea; from the water line of the Salton Sea, a straight line across the Salton Sea to the Salinity Control Research Facility and the Navy Test Base Road; southwest on the Navy Test Base Road to the point of beginning.

*Balance of State Zone:* The remainder of California not included in the Northeastern, Colorado River, and Southern Zones.

*North Coast Special Management Area:* Del Norte and Humboldt Counties.

*Sacramento Valley Special Management Area:* That area bounded by a line beginning at Willows south on I–5 to Hahn Road; easterly on Hahn Road and the Grimes-Arbuckle Road to Grimes; northerly on CA 45 to the junction with CA 162; northerly on CA 45/162 to Glenn; and westerly on CA 162 to the point of beginning in Willows.

Colorado (Pacific Flyway Portion)

Same zones as for ducks.

Idaho

Canada and Cackling Geese and Brant

*Zone 1:* Bannock, Butte, Clark, Fremont, Jefferson, Madison, and Teton Counties; Bingham County, except that portion within the Blackfoot Reservoir drainage; Caribou County within the Fort Hall Indian Reservation; Power County east of State Highway 37 and State Highway 39; and all lands and waters within the Fort Hall Indian Reservation, including private in-holdings.

Zone 2: Bonneville County.

Zone 3: Ada, Adams, Blaine, Boise, Camas, Canyon, Cassia, Clearwater, Custer, Elmore, Franklin, Gem, Gooding, Idaho, Jerome, Latah, Lemhi, Lewis, Lincoln, Minidoka, Nez Perce, Oneida, Owyhee, Payette, Twin Falls, and Washington Counties; and Power County west of State Highway 37 and State Highway 39.

*Zone 4:* Bear Lake County; Bingham County within the Blackfoot Reservoir drainage; and Caribou County, except that portion within the Fort Hall Indian Reservation.

*Zone 5:* Valley County.

*Zone 6:* Benewah, Bonner, Boundary, Kootenai, and Shoshone Counties.

White-Fronted Geese

*Zone 1:* Bannock County; Bingham County except that portion within the Blackfoot Reservoir drainage; Caribou County within the Fort Hall Indian Reservation; Power County east of State Highway 37 and State Highway 39; and all lands and waters within the Fort Hall Indian Reservation, including private in-holdings.

*Zone 2:* Bear Lake, Bonneville, Butte, Clark, Fremont, Jefferson, Madison, and Teton Counties; Bingham County within the Blackfoot Reservoir drainage; and Caribou County except within the Fort Hall Indian Reservation.

*Zone 3:* Adams, Blaine, Camas, Clearwater, Custer, Franklin, Idaho, Latah, Lemhi, Lewis, Nez Perce, and Oneida Counties; and Power County west of State Highway 37 and State Highway 39.

*Zone 4:* Ada, Boise, Canyon, Cassia, Elmore, Gem, Gooding, Jerome, Lincoln, Minidoka, Owyhee, Payette, Twin Falls, and Washington Counties.

*Zone 5:* Valley County.

*Zone 6:* Benewah, Bonner, Boundary, Kootenai, and Shoshone Counties.

Light Geese

*Zone 1:* All lands and waters within the Fort Hall Indian Reservation, including private in-holdings; Bannock County; Bingham County east of the west bank of the Snake River, west of the McTucker boat ramp access road, and east of the American Falls Reservoir bluff, except that portion within the Blackfoot Reservoir drainage; Caribou County within the Fort Hall Indian Reservation; and Power County below the American Falls Reservoir bluff, and within the Fort Hall Indian Reservation.

*Zone 2:* Franklin and Oneida Counties; Bingham County west of the west bank of the Snake River, east of the McTucker boat ramp access road, and west of the American Falls Reservoir bluff; Power County, except below the American Falls Reservoir bluff and those lands and waters within the Fort Hall Indian Reservation.

*Zone 3:* Ada, Boise, Canyon, Cassia, Elmore, Gem, Gooding, Jerome, Lincoln, Minidoka, Owyhee, Payette, Twin Falls, and Washington Counties.

*Zone 4:* Adams, Blaine, Camas, Clearwater, Custer, Idaho, Latah, Lemhi, Lewis, and Nez Perce Counties.

*Zone 5:* Bear Lake, Bonneville, Butte, Clark, Fremont, Jefferson, Madison, and Teton Counties; Bingham County within the Blackfoot Reservoir drainage; and Caribou County except within the Fort Hall Indian Reservation.

*Zone 6:* Valley County.

*Zone 7:* Benewah, Bonner, Boundary, Kootenai, and Shoshone Counties.

Nevada

Same zones as for ducks.

New Mexico (Pacific Flyway Portion)

*North Zone:* The Pacific Flyway portion of New Mexico located north of I–40.

*South Zone:* The Pacific Flyway portion of New Mexico located south of I–40.

Oregon

*Northwest Permit Zone:* Benton, Clackamas, Clatsop, Columbia, Lane, Lincoln, Linn, Marion, Multnomah, Polk, Tillamook, Washington, and Yamhill Counties.

*Tillamook County Management Area:* That portion of Tillamook County beginning at the point where Old Woods Road crosses the south shores of Horn Creek, north on Old Woods Road to Sand Lake Road at Woods, north on Sand Lake Road to the intersection with McPhillips Drive, due west (~200 yards) from the intersection to the Pacific

coastline, south along the Pacific coastline to a point due west of the western end of Pacific Avenue in Pacific City, east from this point (~250 yards) to Pacific Avenue, east on Pacific Avenue to Brooten Road, south and then east on Brooten Road to Highway 101, north on Highway 101 to Resort Drive, north on Resort Drive to a point due west of the south shores of Horn Creek at its confluence with the Nestucca River, due east (~80 yards) across the Nestucca River to the south shores of Horn Creek, east along the south shores of Horn Creek to the point of beginning.

*Southwest Zone:* Those portions of Douglas, Coos, and Curry Counties east of Highway 101, and Josephine and Jackson Counties.

*South Coast Zone:* Those portions of Douglas, Coos, and Curry Counties west of Highway 101.

*Eastern Zone:* Baker, Crook, Deschutes, Grant, Harney, Jefferson, Klamath, Lake, Malheur, Union, Wallowa, and Wheeler Counties.

*Mid-Columbia Zone:* Gilliam, Hood River, Morrow, Sherman, Umatilla, and Wasco Counties.

Utah

*East Box Elder County Zone:* Boundary begins at the intersection of the eastern boundary of Public Shooting Grounds Waterfowl Management Area and SR–83 (Promontory Road); east along SR–83 to I–15; south on I–15 to the Perry access road; southwest along this road to the Bear River Bird Refuge boundary; west, north, and then east along the refuge boundary until it intersects the Public Shooting Grounds Waterfowl Management Area boundary; east and north along the Public Shooting Grounds Waterfowl Management Area boundary to SR–83.

*Wasatch Front Zone:* Boundary begins at the Weber-Box Elder County line at I–15; east along Weber County line to U.S.–89; south on U.S.–89 to I–84; east and south on I–84 to I–80; south on I–80 to U.S.–189; south and west on U.S.–189 to the Utah County line; southeast and then west along this line to the Tooele County line; north along the Tooele County line to I–80; east on I–80 to Exit 99; north from Exit 99 along a direct line to the southern tip of Promontory Point and Promontory Road; east and north along this road to the causeway separating Bear River Bay from Ogden Bay; east on this causeway to the southwest corner of Great Salt Lake Mineral Corporations (GSLMC) west impoundment; north and east along GSLMC's west impoundment to the northwest corner of the impoundment; north from this point along a direct line to the southern boundary of Bear River Migratory Bird Refuge; east along this southern boundary to the Perry access road; northeast along this road to I–15; south along I–15 to the Weber-Box Elder County line.

*Southern Zone:* Boundary includes Beaver, Carbon, Emery, Garfield, Grand, Iron, Juab, Kane, Millard, Piute, San Juan, Sanpete, Sevier, Washington, and Wayne Counties, and that part of Tooele County south of I–80.

*Northern Zone:* The remainder of Utah not included in the East Box Elder County, Wasatch Front, and Southern Zones.

Washington

*Area 1:* Skagit and Whatcom Counties, and that portion of Snohomish County west of Interstate 5.

*Area 2 Inland (Southwest Permit Zone):* Clark, Cowlitz, and Wahkiakum Counties, and that portion of Grays Harbor County east of Highway 101.

*Area 2 Coastal (Southwest Permit Zone):* Pacific County and that portion of Grays Harbor County west of Highway 101.

*Area 3:* All areas west of the Pacific Crest Trail and west of the Big White Salmon River that are not included in Areas 1, 2 Coastal, and 2 Inland.

*Area 4:* Adams, Benton, Chelan, Douglas, Franklin, Grant, Kittitas, Lincoln, Okanogan, Spokane, and Walla Walla Counties.

*Area 5:* All areas east of the Pacific Crest Trail and east of the Big White Salmon River that are not included in Area 4.

*Brant*

Pacific Flyway

California

*Northern Zone:* Del Norte, Humboldt, and Mendocino Counties.

*Balance of State Zone:* The remainder of the State not included in the Northern Zone.

Washington

*Puget Sound Zone:* Clallam, Skagit, and Whatcom Counties.

*Coastal Zone:* Pacific County.

*Swans*

Central Flyway

South Dakota

*Open Area:* Aurora, Beadle, Brookings, Brown, Brule, Buffalo, Campbell, Clark, Codington, Davison, Day, Deuel, Edmunds, Faulk, Grant, Hamlin, Hand, Hanson, Hughes, Hyde, Jerauld, Kingsbury, Lake, Marshall, McCook, McPherson, Miner, Minnehaha, Moody, Potter, Roberts, Sanborn, Spink, Sully, and Walworth Counties.

Pacific Flyway

Idaho

*Open Area:* Benewah, Bonner, Boundary, and Kootenai Counties.

Montana (Pacific Flyway Portion)

*Open Area:* Cascade, Chouteau, Hill, Liberty, and Toole Counties and those portions of Pondera and Teton Counties lying east of U.S. 287–89.

Nevada

*Open Area:* Churchill, Lyon, and Pershing Counties.

Utah

*Open Area:* Those portions of Box Elder, Weber, Davis, Salt Lake, and Toole Counties lying west of I–15, north of I–80, and south of a line beginning from the Forest Street exit to the Bear River National Wildlife Refuge boundary; then north and west along the Bear River National Wildlife Refuge boundary to the farthest west boundary of the Refuge; then west along a line to Promontory Road; then north on Promontory Road to the intersection of SR 83; then north on SR 83 to I–84; then north and west on I–84 to State Hwy 30; then west on State Hwy 30 to the Nevada-Utah State line; then south on the Nevada-Utah State line to I–80.

*Doves*

Alabama

*South Zone:* Baldwin, Coffee, Covington, Dale, Escambia, Geneva, Henry, Houston, and Mobile Counties.

*North Zone:* Remainder of the State.

Florida

*Northwest Zone:* The Counties of Bay, Calhoun, Escambia, Franklin, Gadsden, Gulf, Holmes, Jackson, Liberty, Okaloosa, Santa Rosa, Walton, Washington, Leon (except that portion north of U.S. 27 and east of State Road 155), Jefferson (south of U.S. 27, west of State Road 59 and north of U.S. 98), and Wakulla (except that portion south of U.S. 98 and east of the St. Marks River).

*South Zone:* The remainder of the State.

Louisiana

*North Zone:* That portion of the State north of a line extending east from the Texas border along State Highway 12 to U.S. Highway 190, east along U.S. Highway 190 to Interstate Highway 12, east along Interstate Highway 12 to Interstate Highway 10, then east along Interstate Highway 10 to the Mississippi border.

*South Zone:* The remainder of the State.

Mississippi

*North Zone:* That portion of the State north and west of a line extending west from the Alabama State line along U.S. Highway 84 to its junction with State Highway 35, then south along State Highway 35 to the Louisiana State line.

*South Zone:* The remainder of Mississippi.

Oregon

*Zone 1:* Benton, Clackamas, Clatsop, Columbia, Coos, Curry, Douglas, Gilliam, Hood River, Jackson, Josephine, Lane, Lincoln, Linn, Marion, Morrow, Multnomah, Polk, Sherman, Tillamook, Umatilla, Wasco, Washington, and Yamhill, Counties.

*Zone 2:* The remainder of Oregon not included in Zone 1.

Texas

*North Zone:* That portion of the State north of a line beginning at the International Bridge south of Fort Hancock; north along FM 1088 to TX 20; west along TX 20 to TX 148; north along TX 148 to I–10 at Fort Hancock; east along I–10 to I–20; northeast along I–20 to I–30 at Fort Worth; northeast along I–30 to the Texas-Arkansas State line.

*Central Zone:* That portion of the State lying between the North and South Zones.

*South Zone:* That portion of the State south and west of a line beginning at the International Bridge south of Del Rio, proceeding east on U.S. 90 to State Loop 1604 west of San Antonio; then south, east, and north along Loop 1604 to I–10 east of San Antonio; then east on I–10 to Orange, Texas.

*Special White-winged Dove Area:* Same as the South Zone.

*Band-Tailed Pigeons*

California

*North Zone:* Alpine, Butte, Del Norte, Glenn, Humboldt, Lassen, Mendocino, Modoc, Plumas, Shasta, Sierra, Siskiyou, Tehama, and Trinity Counties.

*South Zone:* The remainder of the State not included in the North Zone.

New Mexico

*North Zone:* North of a line following U.S. 60 from the Arizona State line east to I–25 at Socorro and then south along I–25 from Socorro to the Texas State line.

*South Zone:* The remainder of the State not included in the North Zone.

Washington

*Western Washington:* The State of Washington excluding those portions lying east of the Pacific Crest Trail and east of the Big White Salmon River in Klickitat County.

*American Woodcock*

New Jersey

*North Zone:* That portion of the State north of NJ 70.

*South Zone:* The remainder of the State.

*Sandhill Cranes*

Mississippi Flyway

Alabama

*Open Area:* That area north of Interstate 20 from the Georgia State line to the interchange with Interstate 65, then east of Interstate 65 to the interchange with Interstate 22, then north of Interstate 22 to the Mississippi State line.

Minnesota

*Northwest Zone:* That portion of the State encompassed by a line extending east from the North Dakota border along U.S. Highway 2 to State Trunk Highway (STH) 32, north along STH 32 to STH 92, east along STH 92 to County State Aid Highway (CSAH) 2 in Polk County, north along CSAH 2 to CSAH 27 in Pennington County, north along CSAH 27 to STH 1, east along STH 1 to CSAH 28 in Pennington County, north along CSAH 28 to CSAH 54 in Marshall County, north along CSAH 54 to CSAH 9 in Roseau County, north along CSAH 9 to STH 11, west along STH 11 to STH 310, and north along STH 310 to the Manitoba border.

Tennessee

*Southeast Crane Zone:* That portion of the State south of Interstate 40 and east of State Highway 56.

*Remainder of State:* That portion of Tennessee outside of the Southeast Crane Zone.

Central Flyway

Colorado

*Open Area:* The Central Flyway portion of the State except the San Luis Valley (Alamosa, Conejos, Costilla, Hinsdale, Mineral, Rio Grande, and Saguache Counties east of the Continental Divide) and North Park (Jackson County).

Kansas

*Central Zone:* That portion of the State within an area bounded by a line beginning where I–35 crosses the Kansas-Oklahoma border, then north on I–35 to Wichita, then north on I–135 to Salina, then north on U.S. 81 to the Nebraska border, then west along the Kansas-Nebraska border to its intersection with Hwy 283, then south on Hwy 283 to the intersection with Hwy 18/24, then east along Hwy 18 to Hwy 183, then south on Hwy 183 to Route 1, then south on Route 1 to the Oklahoma border, then east along the Kansas-Oklahoma border to where it crosses I–35.

*West Zone:* That portion of the State west of the western boundary of the Central Zone.

Montana

*Regular Season Open Area:* The Central Flyway portion of the State except for that area south and west of Interstate 90, which is closed to sandhill crane hunting.

*Special Season Open Area:* Carbon County.

New Mexico

*Regular-Season Open Area:* Chaves, Curry, De Baca, Eddy, Lea, Quay, and Roosevelt Counties.

*Special Season Open Areas:*

*Middle Rio Grande Valley Area:* The Central Flyway portion of New Mexico in Socorro and Valencia Counties.

*Estancia Valley Area:* Those portions of Santa Fe, Torrance, and Bernallilo Counties within an area bounded on the west by New Mexico Highway 55 beginning at Mountainair north to NM 337, north to NM 14, north to I–25; on the north by I–25 east to U.S. 285; on the east by U.S. 285 south to U.S. 60; and on the south by U.S. 60 from U.S. 285 west to NM 55 in Mountainair.

*Southwest Zone:* Area bounded on the south by the New Mexico-Mexico border; on the west by the New Mexico-Arizona border north to Interstate 10; on the north by Interstate 10 east to U.S. 180, north to NM 26, east to NM 27, north to NM 152, and east to Interstate 25; on the east by Interstate 25 south to Interstate 10, west to the Luna County line, and south to the New Mexico-Mexico border.

North Dakota

*Area 1:* That portion of the State west of U.S. 281.

*Area 2:* That portion of the State east of U.S. 281.

Oklahoma

*Open Area:* That portion of the State west of I–35.

South Dakota

*Open Area:* That portion of the State lying west of a line beginning at the South Dakota-North Dakota border and State Highway 25, south on State Highway 25 to its junction with State Highway 34, east on State Highway 34

to its junction with U.S. Highway 81, then south on U.S. Highway 81 to the South Dakota-Nebraska border.

Texas

*Zone A:* That portion of Texas lying west of a line beginning at the international toll bridge at Laredo, then northeast along U.S. Highway 81 to its junction with Interstate Highway 35 in Laredo, then north along Interstate Highway 35 to its junction with Interstate Highway 10 in San Antonio, then northwest along Interstate Highway 10 to its junction with U.S. Highway 83 at Junction, then north along U.S. Highway 83 to its junction with U.S. Highway 62, 16 miles north of Childress, then east along U.S. Highway 62 to the Texas-Oklahoma State line.

*Zone B:* That portion of Texas lying within boundaries beginning at the junction of U.S. Highway 81 and the Texas-Oklahoma State line, then southeast along U.S. Highway 81 to its junction with U.S. Highway 287 in Montague County, then southeast along U.S. Highway 287 to its junction with Interstate Highway 35W in Fort Worth, then southwest along Interstate Highway 35 to its junction with Interstate Highway 10 in San Antonio, then northwest along Interstate Highway 10 to its junction with U.S. Highway 83 in the town of Junction, then north along U.S. Highway 83 to its junction with U.S. Highway 62, 16 miles north of Childress, then east along U.S. Highway 62 to the Texas-Oklahoma State line, then south along the Texas-Oklahoma State line to the south bank of the Red River, then eastward along the vegetation line on the south bank of the Red River to U.S. Highway 81.

*Zone C:* The remainder of the State, except for the closed areas.

*Closed areas:*

A. That portion of the State lying east and north of a line beginning at the junction of U.S. Highway 81 and the Texas-Oklahoma State line, then southeast along U.S. Highway 81 to its junction with U.S. Highway 287 in Montague County, then southeast along U.S. Highway 287 to its junction with I–35W in Fort Worth, then southwest along I–35 to its junction with U.S. Highway 290 East in Austin, then east along U.S. Highway 290 to its junction with Interstate Loop 610 in Harris County, then south and east along Interstate Loop 610 to its junction with Interstate Highway 45 in Houston, then south on Interstate Highway 45 to State Highway 342, then to the shore of the Gulf of Mexico, and then north and east along the shore of the Gulf of Mexico to the Texas-Louisiana State line.

B. That portion of the State lying within the boundaries of a line beginning at the Kleberg-Nueces County line and the shore of the Gulf of Mexico, then west along the County line to Park Road 22 in Nueces County, then north and west along Park Road 22 to its junction with State Highway 358 in Corpus Christi, then west and north along State Highway 358 to its junction with State Highway 286, then north along State Highway 286 to its junction with Interstate Highway 37, then east along Interstate Highway 37 to its junction with U.S. Highway 181, then north and west along U.S. Highway 181 to its junction with U.S. Highway 77 in Sinton, then north and east along U.S. Highway 77 to its junction with U.S. Highway 87 in Victoria, then south and east along U.S. Highway 87 to its junction with State Highway 35 at Port Lavaca, then north and east along State Highway 35 to the south end of the Lavaca Bay Causeway, then south and east along the shore of Lavaca Bay to its junction with the Port Lavaca Ship Channel, then south and east along the Lavaca Bay Ship Channel to the Gulf of Mexico, and then south and west along the shore of the Gulf of Mexico to the Kleberg-Nueces County line.

Wyoming

*Area 7:* Campbell, Converse, Crook, Goshen, Laramie, Niobrara, Platte, and Weston Counties.

*Area 4:* All lands within the Bureau of Reclamation's Riverton and Boysen Unit boundaries; those lands within Boysen State Park south of Cottonwood Creek, west of Boysen Reservoir, and south of U.S. Highway 20–26; and all non-Indian owned fee title lands within the exterior boundaries of the Wind River Reservation, excluding those lands within Hot Springs County.

*Area 6:* Big Horn, Hot Springs, Park, and Washakie Counties.

*Area 8:* Johnson, Natrona, and Sheridan Counties.

Pacific Flyway

Arizona

*Zone 1:* Beginning at the junction of the New Mexico State line and U.S. Hwy 80; south along the State line to the U.S.-Mexico border; west along the border to the San Pedro River; north along the San Pedro River to the junction with Arizona Hwy 77; northerly along Arizona Hwy 77 to the Gila River; northeast along the Gila River to the San Carlos Indian Reservation boundary; south then east and north along the reservation boundary to U.S. Hwy 70; southeast on U.S. Hwy 70 to U.S. Hwy 191; south on U.S. Hwy 191 to the 352 exit on I–10; east on I–10 to Bowie-Apache Pass Road; southerly on the Bowie-Apache Pass Road to Arizona Hwy 186; southeasterly on Arizona Hwy 186 to Arizona Hwy 181; south on Arizona Hwy 181 to the West Turkey Creek-Kuykendall cutoff road; southerly on the Kuykendall cutoff road to Rucker Canyon Road; easterly on Rucker Canyon Road to the Tex Canyon Road; southerly on Tex Canyon Road to U.S. Hwy 80; northeast on U.S. Hwy 80 to the New Mexico State line.

*Zone 2:* Beginning at I–10 and the New Mexico State line; north along the State line to Arizona Hwy 78; southwest on Arizona Hwy 78 to U.S. Hwy 191; northwest on U.S. Hwy 191 to Clifton; westerly on the Lower Eagle Creek Road (Pump Station Road) to Eagle Creek; northerly along Eagle Creek to the San Carlos Indian Reservation boundary; southerly and west along the reservation boundary to U.S. Hwy 70; southeast on U.S. Hwy 70 to U.S. Hwy 191; south on U.S. Hwy 191 to I–10; easterly on I–10 to the New Mexico State line.

*Zone 3:* Beginning on I–10 at the New Mexico State line; westerly on I–10 to the Bowie-Apache Pass Road; southerly on the Bowie-Apache Pass Road to AZ Hwy 186; southeast on AZ Hwy 186 to AZ Hwy 181; south on AZ Hwy 181 to the West Turkey Creek-Kuykendall cutoff road; southerly on the Kuykendall cutoff road to Rucker Canyon Road; easterly on the Rucker Canyon Road to Tex Canyon Road; southerly on Tex Canyon Road to U.S. Hwy 80; northeast on U.S. Hwy 80 to the New Mexico State line; north along the State line to I–10.

Idaho

*Area 1:* All of Bear Lake County and all of Caribou County except that portion lying within the Grays Lake Basin.

*Area 2:* All of Teton County except that portion lying west of State Highway 33 and south of Packsaddle Road (West 400 North) and north of the North Cedron Road (West 600 South) and east of the west bank of the Teton River.

*Area 3:* All of Fremont County except the Chester Wetlands Wildlife Management Area.

*Area 4:* All of Jefferson County.

*Area 5:* All of Bannock County east of Interstate 15 and south of U.S. Highway 30; and all of Franklin County.

*Area 6:* That portion of Oneida County within the boundary beginning at the intersection of the Idaho-Utah border and Old Highway 191, then north on Old Highway 191 to 1500 S, then west on 1500 S to Highway 38, then west on Highway 38 to 5400 W,

then south on 5400 W to Pocatello Valley Road, then west and south on Pocatello Valley Road to 10000 W, then south on 10000 W to the Idaho-Utah border, then east along the Idaho-Utah border to the beginning point.

Montana

*Zone 1:* Those portions of Deer Lodge County lying within the following described boundary: Beginning at the intersection of I–90 and Highway 273, then westerly along Highway 273 to the junction of Highway 1, then southeast along said highway to Highway 275 at Opportunity, then east along said highway to East Side County road, then north along said road to Perkins Lane, then west on said lane to I–90, then north on said interstate to the junction of Highway 273, the point of beginning. Except for sections 13 and 24, T5N, R10W; and Warm Springs Pond number 3.

*Zone 2:* That portion of the Pacific Flyway, located in Powell County lying within the following described boundary: Beginning at the junction of State Routes 141 and 200, then west along Route 200 to its intersection with the Blackfoot River at Russell Gates Fishing Access Site (Powell-Missoula County line), then southeast along said river to its intersection with the Ovando-Helmville Road (County Road 104) at Cedar Meadows Fishing Access Site, then south and east along said road to its junction with State Route 141, then north along said route to its junction with State Route 200, the point of beginning.

*Zone 3:* Beaverhead, Gallatin, Jefferson, and Madison Counties.

*Zone 4:* Broadwater County.

*Zone 5:* Cascade and Teton Counties.

Utah

*Cache County:* Cache County.

*East Box Elder County:* That portion of Box Elder County beginning on the Utah-Idaho State line at the Box Elder-Cache County line; west on the State line to the Pocatello Valley County Road; south on the Pocatello Valley County Road to I–15; southeast on I–15 to SR–83; south on SR–83 to Lamp Junction; west and south on the Promontory Point County Road to the tip of Promontory Point; south from Promontory Point to the Box Elder-Weber County line; east on the Box Elder-Weber County line to the Box Elder-Cache County line; north on the Box Elder-Cache County line to the Utah-Idaho State line.

*Rich County:* Rich County.

*Uintah County:* Uintah and Duchesne Counties.

Wyoming

*Area 1:* All of the Bear River and Ham's Fork River drainages in Lincoln County.

*Area 2:* All of the Salt River drainage in Lincoln County south of the McCoy Creek Road.

*Area 3:* All lands within the Bureau of Reclamation's Eden Project in Sweetwater County.

*Area 5:* Uinta County.

**All Migratory Game Birds in Alaska**

*North Zone:* State Game Management Units 11–13 and 17–26.

*Gulf Coast Zone:* State Game Management Units 5–7, 9, 14–16, and 10 (Unimak Island only).

*Southeast Zone:* State Game Management Units 1–4.

*Pribilof and Aleutian Islands Zone:* State Game Management Unit 10 (except Unimak Island).

*Kodiak Zone:* State Game Management Unit 8.

**All Migratory Game Birds in the Virgin Islands**

*Ruth Cay Closure Area:* The island of Ruth Cay, just south of St. Croix.

**All Migratory Game Birds in Puerto Rico**

*Municipality of Culebra Closure Area:* All of the municipality of Culebra.

*Desecheo Island Closure Area:* All of Desecheo Island.

*Mona Island Closure Area:* All of Mona Island.

*El Verde Closure Area:* Those areas of the municipalities of Rio Grande and Loiza delineated as follows: (1) All lands between Routes 956 on the west and 186 on the east, from Route 3 on the north to the juncture of Routes 956 and 186 (Km 13.2) in the south; (2) all lands between Routes 186 and 966 from the juncture of 186 and 966 on the north, to the Caribbean National Forest Boundary on the south; (3) all lands lying west of Route 186 for 1 kilometer from the juncture of Routes 186 and 956 south to Km 6 on Route 186; (4) all lands within Km 14 and Km 6 on the west and the Caribbean National Forest Boundary on the east; and (5) all lands within the Caribbean National Forest Boundary whether private or public.

*Cidra Municipality and adjacent areas:* All of Cidra Municipality and portions of Aguas Buenas, Caguas, Cayey, and Comerio Municipalities as encompassed within the following boundary: beginning on Highway 172 as it leaves the municipality of Cidra on the west edge, north to Highway 156, east on Highway 156 to Highway 1, south on Highway 1 to Highway 765, south on Highway 765 to Highway 763, south on Highway 763 to the Rio Guavate, west along Rio Guavate to Highway 1, southwest on Highway 1 to Highway 14, west on Highway 14 to Highway 729, north on Highway 729 to Cidra Municipality boundary to the point of the beginning.

**Shannon A. Estenoz,**

*Assistant Secretary for Fish and Wildlife and Parks.*

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Part III

## Department of Commerce

National Oceanic and Atmospheric Administration

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Ferry Berth Improvements in Tongass Narrows in Ketchikan, Alaska; Notice

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XB709]**

### Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Ferry Berth Improvements in Tongass Narrows in Ketchikan, Alaska

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

**ACTION:** Notice; proposed incidental harassment authorization; request for comments on proposed authorization and possible renewal.

**SUMMARY:** NMFS has received a request from the Alaska Department of Transportation and Public Facilities (ADOT) for an Incidental Harassment Authorization (IHA) to take marine mammals incidental to the construction of four ferry berth facilities in Tongass Narrows in Ketchikan, Alaska: The Gravina Airport Ferry Layup Facility, the Gravina Freight Facility, the Revilla New Ferry Berth, and the Gravina Island Shuttle Ferry Berth Facility. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-time, one-year renewal that could be issued under certain circumstances and if all requirements are met, as described in Request for Public Comments at the end of this notice. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorizations and agency responses will be summarized in the final notice of our decision.

**DATES:** Comments and information must be received no later than March 4, 2022.

**ADDRESSES:** Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Written comments should be submitted via email to *ITP.Davis@noaa.gov.*

*Instructions:* NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. All comments received are a part of the public record and will generally be posted online at *www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** Leah Davis, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

**SUPPLEMENTARY INFORMATION:**

## Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

## National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an IHA) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

## Summary of Request

On August 19, 2021, NMFS received a request from the ADOT for an IHA to take marine mammals incidental to the construction of two ferry berth facilities in Tongass Narrows in Ketchikan, Alaska: The Gravina Airport Ferry Layup Facility and the Gravina Freight Facility. On December 17, 2021 we received a revised request that included additional work components associated with the Revilla New Ferry Berth and Upland Improvements and the New Gravina Island Shuttle Ferry Berth and Related Terminal Improvements in the same region. The application was deemed adequate and complete on January 4, 2022. ADOT's request is for take of a small number of eight species of marine mammals, by Level B harassment and Level A harassment. Of those eight species, five (Steller sea lion (*Eumetopias jubatus*), harbor seal (*Phoca vitulina richardii*), harbor porpoise (*Phocoena phocoena*), Dall's porpoise (*Phocoenoides dalli*) and minke whale (*Balaenoptera acutorostrata*)) may also be taken by Level A harassment. Neither the ADOT nor NMFS expects serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

NMFS previously issued two consecutive IHAs and a Renewal IHA to ADOT for this work (85 FR 673, January 7, 2020; 86 FR 23938, May 05, 2021).

ADOT complied with all the requirements (*e.g.,* mitigation, monitoring, and reporting) of the previous IHAs and information regarding their monitoring results may be found in the Description of Marine Mammals in the Area of Specified Activities and Marine Mammal Occurrence and Take Calculation and Estimation sections. An IHA for the first phase of construction of the Ketchikan-Gravina Access Project was issued to ADOT on December 20, 2019 (85 FR 673, January 7, 2020). Complete construction of two of those components, the Revilla New Ferry Berth and Upland Improvements and Gravina Island Shuttle Ferry Berth Facility/Related Terminal Improvements, did not occur within the timeframe authorized by the Phase 1 IHA and will not be finished before the expiration of the subsequent one-year renewal (86 FR 23938, May 05, 2021). Therefore, ADOT is requesting a new IHA for incidental take associated with the continued marine construction of these facilities. This proposed IHA would be valid for one year.

## Description of Proposed Activity

### *Overview*

ADOT is making improvements to existing ferry berths and constructing new ferry berths on Gravina Island and Revillagigedo (Revilla) Island in Tongass Narrows, near Ketchikan in southeast Alaska (Figure 1). These ferry facilities provide the only public access between the city of Ketchikan, AK on Revilla Island, and the Ketchikan International Airport on Gravina Island (Figure 1). The project's proposed activities that have the potential to take marine mammals, by Level A harassment and Level B harassment, include vibratory and impact pile driving, down-the-hole (DTH) operations for pile installation (rock socketing of piles and tension anchors to secure piles), and vibratory pile removal. The marine construction associated with the proposed activities is planned to occur over 91 non-consecutive days over one year beginning March 2022.

Improvement and construction of facilities is important to provide reliable access to the airport and facilitate growth and development in the region. Some of the existing ferry facilities are aging and periodically out-of-service for repairs or maintenance, and this project would provide redundant ferry berths to increase reliability. Ketchikan is Alaska's fifth largest city, with a population of approximately 8,125 (DCCED 2017), and has numerous marine facilities including fishing infrastructure, cruise and ferry terminals, and shipyards.

BILLING CODE 3510–22–P

**Figure 1-- Tongass Narrows Project Area**

BILLING CODE 3510–22–C

*Dates and Duration*

In-water construction is scheduled to begin on March 1, 2022, upon expiration of the current Phase I IHA (86 FR 23938; May 5, 2021). ADOT anticipates that construction would occur during daylight hours only with in-water construction occurring 6 days per week. ADOT anticipates that the project would require approximately 91 days of pile installation and removal

over the course of 7 or 8 months. Although it is anticipated that the project would be completed sooner, ADOT requests that the IHA be valid for a full year, from March 1, 2022 to February 28, 2023, to accommodate scheduling unknowns or delays.

ADOT plans to implement the Essential Fish Habitat (EFH) Conservation Recommendations developed by NMFS. No in-water work would occur between March 1 and June 15 for three project components: The Revilla New Ferry Berth and Upland Improvements, Gravina Airport Ferry Layup Facility, and Revilla Refurbish Existing Ferry Berth Facility.

*Specific Geographic Region*

The proposed construction project is located in Ketchikan, Alaska (Figure 1). Improvements to the Gravina Airport Ferry Layup Facility construction would occur in the same location as the existing layup dock facility. The new Gravina Freight Facility would be constructed in the same location as the existing barge offload facility. The New Gravina Island Shuttle Ferry Berth construction would occur slightly North of the Airport Ferry Layup Facility. Improvements and construction on Revilla Island would occur approximately 4 kilometers (km; 2.5 miles (mi)) north of downtown Ketchikan. The new Revilla Island Airport Shuttle Ferry Berth would be constructed immediately adjacent to the existing Revilla Island Ferry Berth.

Tongass Narrows is an approximately 13-mile-long, north-south-oriented marine channel situated between Revilla Island to the east and Gravina Island to the west. In the vicinity of the proposed project, Tongass Narrows is as little as 300 meters (m; 984 feet; ft) wide. Tongass Narrows is generally characterized by strong tidal currents and by steep bedrock or coarse gravel-cobble-boulder shoreline. Lower intertidal and shallow subtidal areas are often sandy or mixed gravel, sand, and shell, with varied amounts of silt. At other areas, however, such as at rocky points and along the northwestern shore of Pennock Island (which is located in the south end of Tongass Narrows, between Gravina and Revilla Islands), bedrock slopes steeply to subtidal depths. Subtidal habitats are a mix of bedrock outcrops or ledges, boulder-cobble slopes, and, where lower slopes permit, sandy gravel bottoms, often mixed with significant amounts of shell debris, similar to intertidal habitats.

Several small natural coves and areas protected by constructed breakwaters provide wave and current protection for marine habitats with sand or gravel bottoms with some areas of eelgrass (*Zostera marina*) beds. Extensive areas of riprap bank protection and fill occur along the northeastern shoreline of the City of Ketchikan. Construction of numerous buildings and docks on pilings over the intertidal and shallow subtidal zone has significantly modified the shorelines in these areas. Shoreline protection activities have similarly modified approximately 1 mile of the shoreline of Gravina Island in the vicinity of the airport and airport ferry terminal.

Water depths reach approximately 49 m (160 ft) in the middle of the Tongass Narrows between the airport and town, but generally do not exceed 18 m (60 ft) where piles would be installed. The channel bottom slopes at about 2:1 (horizontal: vertical) from opposite shores. Geological conditions in the vicinity of the project were recently evaluated (CH2M 2018). The substrate consists of approximately 18 to 23 m (60 to 75 ft) of very loose to very dense granular deltaic or alluvial sand and gravel. At approximately 18 to 23 m (60 to 75 ft) below the mudline, the substrate transitions to phyllite bedrock (CH2M 2018). Pile installation would occur in waters ranging in depth from less than 1 m (3.3 ft) nearshore to approximately 20 m (66 ft), depending on the structure and location.

Ongoing vessel activities throughout Tongass Narrows, land-based industrial and commercial activities, and regular aircraft operations result in elevated in-air and underwater sound conditions in the project area that increase with proximity to the proposed project component sites. Sound levels likely vary seasonally, with elevated levels during summer when the tourism and fishing industries are at their peaks.

*Detailed Description of Specific Activity*

Planned construction includes the installation and continued construction of new ferry facilities and the renovation of existing structures. As stated above, the four proposed construction components include: The Gravina Airport Ferry Layup Facility, the Gravina Freight Facility, the Revilla New Ferry Berth and Upland Improvements, and the New Gravina Island Shuttle Ferry Berth and Related Terminal Improvements. ADOT anticipates that work may occur at multiple sites concurrently, and that two hammers or DTH equipment could be used concurrently (discussed further in the Estimated Take section).

Gravina Airport Ferry Layup Facility

The new ferry layup dock and transfer bridge would support layup and maintenance of the airport ferry system. The current layup dock at the Gravina Airport Ferry Layup Facility is in disrepair and needs to be replaced. ADOT would remove the existing 265-ft (80.1-m)-long floating dock, mooring structures, and transfer bridge and construct a new 250-ft by 85-ft (76.2 m by 25.9 m) concrete or steel floating dock in its place. The floating dock would be restrained by two side-restraint float dolphins and three corner/mid-restraint float dolphins. A new 20-ft by 140-ft (6.1 m by 42.6 m) steel transfer bridge would provide access to the floating dock. It would be necessary to remove, relocate, and replenish the existing rock slope, demolish the existing concrete abutment, and construct a new pile-supported bridge abutment. The Gravina Airport Ferry Layup Facility construction and Gravina Freight Facility construction is anticipated to require a total of 47 days of in-water pile installation and removal.

Gravina Freight Facility

The new Gravina Freight Facility, located approximately 100 m from the Gravina Airport Ferry Layup Facility (Figure 1), would be constructed in the same location as the existing barge offload facility. This facility would provide improved access to Gravina Island for highway loads that cannot be accommodated by the shuttle ferry. The existing ramp would be widened and re-graded both above and below the high tide line. A new concrete plank or asphalt pavement ramp would be constructed in its place. Five breasting dolphins and one mooring dolphin would be constructed to support barge docking and would include pedestrian walkways for access by personnel. In addition, two new pile-supported mooring structures would be constructed above the high tide line. As stated above, the Gravina Airport Ferry Layup Facility construction and Gravina Freight Facility construction is anticipated to require a total of 47 days of in-water pile installation and removal.

Revilla New Ferry Berth and Upland Improvements

The new Revilla Island airport shuttle ferry berth is the only project component that would occur on Revilla Island, and is currently under construction immediately adjacent to the existing Revilla Island Ferry Berth (Figure 1). The new ferry berth consists of a 7,400 square ft ($ft^2$; 687.4 $m^2$) pile-supported approach trestle at the shore side of the ferry terminal and a 1,500 $ft^2$ (139.4 m) pile-supported approach

trestle extension located landside and north of the new approach trestle. A 25-ft by 142-ft (7.6 m by 43.2 m) steel transfer bridge with vehicle traffic lane and separated pedestrian walkway extends from the trestle to a new 2,200 $ft^2$ (204.3 $m^2$) steel float and apron. The steel float is supported by three guide pile dolphins. A bulkhead retaining wall is being constructed at the transition from uplands to the approach trestle. Two new stern berth dolphins with fixed hanging fenders and three new floating fender dolphins are being constructed to moor vessels. The new apron would be supported by three new guide pile dolphins. Water depths at the dolphins reach approximately 60 ft (18.2 m).

While construction on the Revilla New Ferry Berth is already underway, ADOT anticipates that it would not be complete before ADOT's current IHA (86 FR 23938; May 5, 2021) expires. Therefore, ADOT has requested take associated with the portion of the project that it anticipates may remain, which consists of installation of up to five tension anchors.

Upland improvements associated with the Revilla New Ferry Berth include reconstruction of terminal facilities, installation of utilities, and construction of improvements to existing staging/parking areas. Upland improvements are not anticipated to harass marine mammals, and therefore, are not discussed further in this document.

Gravina Island Shuttle Ferry Berth and Related Terminal Improvements

The new Gravina Island Airport Shuttle Ferry Berth is currently under construction (86 FR 23938; May 5, 2021) immediately adjacent to the existing Gravina Island Ferry Berth (Figure 1). The new facility consists of an approximately 7,000 $ft^2$ (650.3 $m^2$) pile-supported approach trestle at the shore side of the ferry terminal. A 25-ft by 142-ft (7.6 m by 43.2 m) steel transfer bridge with vehicle traffic lane and separated pedestrian walkway leads to a new 2,200 $ft^2$ (204.3 $m^2$) steel float and apron. The steel float is supported by three new guide pile dolphins. Ferry berthing is supported by two new stern berth dolphins and three new floating fender dolphins. To support the new facility, a new bulkhead retaining wall is being constructed between the existing ferry berth and the new approach trestle. A new fill slope measuring approximately 21,200 $ft^2$ (1,969.5 $m^2$) is being constructed west of the approach trestle. Upland improvements include widening of the ferry approach road, retrofits to the existing pedestrian walkway, installation of utilities, and construction of a new employee access walkway. Due to unforeseen construction delays encountered during the Phase 1 IHA construction period, ADOT anticipates that construction on the Gravina Island Shuttle Ferry Berth would not be completed before the expiration of the current IHA (86 FR 23938; May 5, 2021). Therefore, ADOT has requested take associated with the portion of the project that it anticipates may remain, which consists of up to 35 piles (both plumb and battered), 17–21 rock sockets, 28 tension anchors, and up to 4 micropile anchors (Table 1).

Across the four project sites, three methods of pile installation are anticipated. These include vibratory and impact hammers, use of DTH systems to make holes for rock sockets and tension and micropile anchors at some locations (Figure 1–3 of ADOT's IHA Application). Installation of steel piles through the sediment layer would be accomplished using vibratory or impact methods. Depending on the location, the pile would be advanced to refusal at bedrock. Where sediments are deep and rock socketing or anchoring (described below) is not required, the final approximately 10 ft (3 m) of driving would be conducted using an impact hammer so that the structural capacity of the pile embedment can be verified or proofed. Proofing is expected to require approximately 50 strikes over 15 minutes. Where sediments are shallow, an impact hammer would be used to seat the piles into competent bedrock before a DTH system is used to create holes for the rock sockets and/or tension anchors. The pile installation methods used would depend on sediment depth and conditions at each pile location.

Rock sockets are holes made in the bedrock where overlying sediments are too shallow to adequately secure the bottom portion of a pile using other methods. Rock sockets are constructed utilizing a DTH device which uses both rotary and percussion-type drill action. These devices consist of a drill bit that drills through the bedrock using both rotary and pulse impact mechanisms. This breaks up the rock to allow removal of the fragments, creating a hole that allows for insertion of the pile. The socket holes are just large enough for the pile to fit down in to provide lateral strength for the pile. The pile is usually advanced at the same time that drilling occurs (the bit has a flexible tip that can be retracted and pulled back up through the center of a pile). Rock socket holes would be up to 15 ft (4.6 m) into the bedrock. Drill cuttings are expelled from the top of the pile using compressed air and/or other fluids. It is estimated that use of DTH for rock sockets into the bedrock would take approximately 4–8 hours per pile. Some piles would be seated in rock sockets as well as anchored with tension anchors.

Tension anchors are comprised of a threaded steel rod grouted into the bedrock strata at a specified depth below the pile tip. The rod is tested and anchored to the top of the pile to resist uplift forces in the associated structure. Tension anchors are installed within piles that are DTH drilled or hammered into the bedrock below the elevation of the pile tip, after the pile has been driven through the sediment layer to refusal. A 6- or 8-inch-diameter steel pipe casing is inserted inside the larger-diameter production pile. A DTH hammer and bit is inserted into the casing, and a 6- to 8-inch-diameter hole is made into bedrock. The typical depth of the hole varies, but 20–30 ft (6.1–9.1 m) is common to meet engineering needs. Rock fragments would be removed through the top of the casing with compressed air. A steel rebar rod is then grouted into the drilled hole and affixed to the top of the pile.

Micropiles have a casing diameter of approximately 3 to 10 in. A DTH hammer device is used to create a hole in a manner identical to the rock sockets as described above. The micropile casing is inserted to depth and a steel reinforcement bar is inserted in the casing, and then grout is pumped into the casing. The construction of the Gravina Island Shuttle Ferry Berth could potentially utilize up to four micropiles. Because both tension anchors and micropiles require drilling an 8-inch-diameter hole, they are discussed together throughout this document.

Vibratory methods would also be used to remove temporary steel pipe piles. These proposed activities and the noise they produce have the potential to take marine mammals, by Level A harassment and Level B harassment of marine mammals.

Each of the project components would include installation of steel pipe piles that are 20, 24, or 30 inches in diameter (Table 1). Temporary piles would be installed and removed with a vibratory hammer. Some permanent piles would be battered (*i.e.,* installed at an angle). Approximately 50 impact strikes would be required for proofing each permanent pile, requiring approximately 15 minutes of active impact hammering per pile.

The estimated average installation rate for the project is one to one and a half permanent or two temporary pipe piles per day (Table 1). On some days,

more or fewer piles or partial piles may be installed. It would likely not be possible to install an individual permanent pile to refusal with a vibratory hammer, use DTH methods for the rock socket, impact proof, and install the tension anchor on the same day. The construction crew may use a single installation method for multiple piles on a single day or find other efficiencies to increase production; the anticipated ranges of possible values are provided in Table 1. The estimated removal rate for temporary piles is two steel pipe piles per day. On some days, more or fewer piles may be removed. It is estimated that the 40 temporary piles would be removed in 36 days.

In sum, approximately 91 days of pile installation and removal are anticipated (Table 1), and of the 102 piles which ADOT anticipates it will install, 40 of them will be installed and removed (for a total of 142 pile installations and removals).

Above-water work would consist of the installation of a concrete float, a transfer bridge and transition ramp, dock-mounted fenders, and utility lines. A utility and storage building would be constructed on top of the concrete float. No in-water noise is anticipated in association with above-water and upland construction activities, and no associated take of marine mammals is anticipated from the noise or visual disturbance. Therefore, above-water and upland construction activities are not discussed further in this document.

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**Table 1-- Pile Details for Each Project Component**

| Project Component / Pile Type | Number of Piles | Number of Rock Sockets | Number of Tension Anchors | Average Vibratory Duration Per Pile (minutes) | Average DTH Duration for Rock Sockets Per Pile (minutes) | Average DTH Duration for Rock Tension Anchors Per Pile (minutes) | Impact Strikes Per Pile | Estimated Total Number of Hours | Average Piles per Day (Range) | Days of Installation and Removal |
|---|---|---|---|---|---|---|---|---|---|---|
| Gravina Airport Ferry Layup Facility | | | | | | | | | | |
| 24" Pile Diameter | 8 (8 temporary[a]) | 0 | 0 | 15 | N/A | N/A | N/A | 4 | 2 (2-4) | 8 |
| 30" Pile Diameter | 14 (6 battered) | 8 | 12 | 15 | 360 | 120 | 50 | 81 | 1 (1-3) | 14 |
| Gravina Freight Facility | | | | | | | | | | |
| 20" Pile Diameter | 6 (battered) | 0 | 6 | 15 | N/A | 120 | 50 | 15 | 1 (1-3) | 6 |
| 24" Pile Diameter | 15 (12 temporary [a]) | 3 | 3 | 15 | 360 | 120 | 50 | 31.5 | 1.5 (1-4) | 15 |
| 30" Pile Diameter | 4 (2 battered) | 2 | 4 | 15 | 360 | 120 | 50 | 22 | 1 (1-3) | 4 |
| Revilla New Ferry Berth and Upland Improvements | | | | | | | | | | |
| 20" Pile Diameter | 8 (8 temporary [a]) | 0 | 0 | 15 | N/A | N/A | N/A | 2 | 2 (2-4) | 4 (removal only) |
| 24" Pile Diameter | N/A | N/A | 5 | N/A | N/A | 120 | N/A | 10 | 1.5 (1-3) | 4 |
| New Gravina Island Shuttle Ferry Berth/Related Terminal Improvements | | | | | | | | | | |
| 20" Pile Diameter | 12 (12 temporary [a]) | 0 | 0 | 15 | N/A | N/A | N/A | 6 | 2 (2-4) | 12 |
| 24" Pile Diameter | 35 (18 battered) | 21[b] | 28 | 30 | 120[c] | 120 | 50 | 125 | 1.5 (1-3) | 24 |
| Total | 102 | 34 | 58 | | | | | 296.5 | | 91 |

[a] Temporary piles would be installed and removed; it is assumed that the average vibratory duration per pile for both installation and removal would be 15 minutes.

[b] Up to four rock sockets could instead be micropile anchors.

[c] This value is a contractor estimate of the time needed to drill the rock sockets and differs from other estimates since there are different contractors for different components of the project.

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Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see Proposed Mitigation and Proposed Monitoring and Reporting).

## Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS's website (*https://www.fisheries.noaa.gov/find-species*).

Table 2 lists all species or stocks for which take is expected and proposed to be authorized for this specified activity, and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2021). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS's SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. Alaska SARs (*e.g.,* Muto *et al.* 2021). All values presented in Table 2 are the most recent available at the time of publication and are available in the draft 2021 SARs (Muto *et al.* 2021; available online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports*).

TABLE 2—MARINE MAMMAL SPECIES OR STOCKS FOR WHICH TAKE IS EXPECTED AND PROPOSED TO BE AUTHORIZED

| Common name | Scientific name | MMPA stock | ESA/MMPA status; strategic (Y/N) [1] | Stock abundance Nbest, (CV; $N_{min}$; most recent abundance survey) [2] | PBR | Annual M/SI [3] |
|---|---|---|---|---|---|---|
| **Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)** | | | | | | |
| Family Balaenidae: | | | | | | |
| Humpback whale | *Megaptera novaeangliae* | Central North Pacific | E, D, Y | 10,103 (0.3; 7,890; 2006) | 83 | 26 |
| Minke whale | *Balaenoptera acutorostrata* | Alaska | -, N | N.A.(See SAR; N.A.; see SAR) | UND | 0 |
| **Order Cetartiodactyla—Cetacea—Superfamily Odontoceti (toothed whales, dolphins, and porpoises)** | | | | | | |
| Family Delphinidae: | | | | | | |
| Killer whale | *Orcinus orca* | Alaska Resident | -, N | 2,347 (N.A.; 2,347; 2012) | 24 | 1 |
| | | West Coast Transient | -, N | 349 (N.A, 349; 2018) | 3.5 | 0.4 |
| | | Northern Resident | -, N | 302 (N.A.; 302; 2018 | 2.2 | 0.2 |
| Pacific white-sided dolphin | *Lagenorhynchus obliquidens* | North Pacific | -,-; N | 26,880 (N.A.; N.A.; 1990) | UND | 0 |
| **Family Phocoenidae** | | | | | | |
| Harbor porpoise | *Phocoena phocoena* | Southeast Alaska | -, Y | See SAR (see SAR; see SAR; 2012). | See SAR | 34 |
| Dall's porpoise | *Phocoenoides dalli* | Alaska | -, N | See SAR (see SAR; see SAR; 2015). | See SAR | 37 |
| **Order Carnivora—Superfamily Pinnipedia** | | | | | | |
| Family Otariidae (eared seals and sea lions): | | | | | | |
| Steller sea lion | *Eumetopias jubatus* | Eastern U.S. | -,-, N | 43,201 (see SAR; 43,201; 2017). | 2,592 | 112 |
| **Family Phocidae (earless seals)** | | | | | | |
| Harbor seal | *Phoca vitulina richardii* | Clarence Strait | -, N | 27,659 (See SAE; 24,854; 2015). | 746 | 40 |

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.* CV is coefficient of variation; $N_{min}$ is the minimum estimate of stock abundance. In some cases, CV is not applicable (N.A.).

[3] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury (M/SI) from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

All species that could potentially occur in the proposed survey areas are included in Table 3–1 of the IHA application. However, the spatial occurrence of gray whale and fin whale is such that take is not expected to

occur, and they are not discussed further beyond the explanation provided here. Gray whales have not been reported by any local experts or recorded in monitoring reports and it would be extremely unlikely for a gray whale to enter Tongass Narrows or the small portions of Revillagigedo Channel this project would impact. Similarly for fin whale, sightings have not been reported and it would be unlikely for a fin whale to enter the project area as they are generally associated with deeper, more offshore waters. The remaining eight species (with 10 managed stocks) in Table 2 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we have proposed authorizing it.

*Humpback Whale*

Humpback whales are found throughout Southeast Alaska in a variety of marine environments, including open-ocean, near-shore waters, and areas with strong tidal currents (Dahlheim *et al.* 2009). Most humpback whales are migratory and spend winters in the breeding grounds off either Hawaii or Mexico. Humpback whales generally arrive in Southeast Alaska in March and return to their wintering grounds in November. Some humpback whales depart late or arrive early to feeding grounds, and therefore the species occurs in Southeast Alaska year-round (Straley 1990; Straley *et al.* 2018). Current threats to humpback whales include vessel strikes, spills, climate change, and commercial fishing operations (Muto *et al.* 2021).

Humpback whales worldwide were designated as ''endangered'' under the Endangered Species Conservation Act in 1970, and were listed under the ESA at its inception in 1973. However, on September 8, 2016, NMFS published a final decision that changed the status of humpback whales under the ESA (81 FR 62259), effective October 11, 2016. The decision recognized the existence of 14 DPSs based on distinct breeding areas in tropical and temperate waters. Five of the 14 DPSs were classified under the ESA (4 endangered and 1 threatened), while the other 9 DPSs were delisted. Humpback whales found in the project area are predominantly members of the Hawaii DPS, which is not listed under the ESA. However, based on a comprehensive photo-identification study, members of the Mexico DPS, which is listed as threatened, are known to occur in Southeast Alaska. Members of different DPSs are known to intermix on feeding grounds; therefore, all waters off the coast of Alaska should be considered to have ESA-listed humpback whales. Approximately 2 percent of all humpback whales in Southeast Alaska and northern British Columbia are members of the Mexico DPS, while all others are members of the Hawaii DPS (Wade *et al.* 2021).

The DPSs of humpback whales that were identified through the ESA listing process do not necessarily equate to the existing MMPA stocks. The stock delineations of humpback whales under the MMPA are currently under review. Until this review is complete, NMFS considers humpback whales in Southeast Alaska to be part of the Central North Pacific stock, with a status of endangered under the ESA and designations of strategic and depleted under the MMPA (Muto *et al.* 2021).

Southeast Alaska is considered a biologically important area for feeding humpback whales between March and May (Ellison *et al.* 2012), though not currently designated as critical habitat (86 FR 21082; April 21, 2021). Most humpback whales migrate to other regions during the winter to breed, but rare events of over-wintering humpbacks have been noted, and may be attributable to staggered migration (Straley, 1990; Straley *et al.* 2018). It is thought that those humpbacks that remain in Southeast Alaska do so in response to the availability of winter schools of fish prey, which primarily includes overwintering herring (Straley *et al.* 2018). In Alaska, humpback whales filter feed on tiny crustaceans, plankton, and small fish such as walleye pollock, Pacific sand lance, herring, eulachon, and capelin (Witteveen *et al.* 2012). It is common to observe groups of humpback whales cooperatively bubble feeding. Group sizes in Southeast Alaska generally range from one to four individuals (Dahlheim *et al.* 2009).

No systematic studies have documented humpback whale abundance near Ketchikan. Anecdotal information (See Section 4 of IHA Application) suggests that this species is present in low numbers year-round in Tongass Narrows, with the highest abundance during summer and fall. Anecdotal reports suggest that humpback whales are seen only once or twice per month, while more recently it has been suggested that the occurrence is more regular, such as once per week on average, and more seasonal. Humpbacks observed in Tongass Narrows are generally alone or in groups of one to three individuals. Most humpback whales depart Alaska for their breeding grounds in October and November, and return in March and April. In August 2017, a group of six individuals was observed passing through Tongass Narrows several times per day, for several days in a row. Local residents reported that such high abundance is common in August and September. NMFS reported that in 2018 airport ferry personnel observed a lone humpback whale in the area every few days for several months and a group of two humpback whales every other week (Muto *et al.* 2019).

In the Biological Opinion for this project, NMFS assumed the occurrence of humpback whales in the project area to be one two individuals twice per week, year-round. The assumption was based on differences in abundance throughout the year, recent observations of larger groups of whales present during summer, and a higher than average frequency of occurrence in recent months.

The City of Ketchikan (COK) Rock Pinnacle project, which was located approximately 4 km southeast of the proposed project site, reported one humpback whale sighting of one individual during the project (December 2019 through January 2020) (Sitkiewicz 2020). During the Ward Cove Cruise Ship Dock Construction, located approximately 5 km northwest of the proposed project site, protected species observers (PSOs) observed 28 sightings of humpbacks on eighteen days of in water work that occurred between February and September 2020, with at least one humpback being recorded every month. A total of 42 individuals were recorded and group sizes ranged from solo whales to pods of up to six (Power Systems & Supplies of Alaska 2020). Humpbacks were recorded in each month of construction, with the most individuals (10) being recorded in May, 2020.

Humpback whales were sighted on 17 days out of 88 days of monitoring in Tongass Narrows in 2020 and 2021 (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). There were no sightings in January or February, but humpback whales were observed each month from October to December 2020 and May to June 2021 (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). There was only 1 day in June in which humpback whales were observed, but on that day there were four groups of whales—three pairs and one group of four (DOT&PF 2021d). In other months, humpback whale sightings were mostly individual animals and occasionally pairs. During November 2020, a single known individual (by fluke pattern) was observed repeatedly, accounting for 14 of the 26 sighting events that month (DOT&PF 2020). During monitoring, humpback whales were observed on average once a week.

*Minke Whale*

Minke whales are found throughout the northern hemisphere in polar, temperate, and tropical waters. The population status of minke whales is considered stable throughout most of their range. Historically, commercial whaling reduced the population size of this species, but given their small size, they were never a primary target of whaling and did not experience the severe population declines as did larger cetaceans.

The International Whaling Commission has identified a less concentrated stock throughout the eastern Pacific. NOAA further splits this stock between Alaska whales and resident whales of California, Oregon, and Washington (Muto *et al.,* 2021). Minke whales are found in all Alaska waters. There are no population estimates for minke whales in Alaska. Surveys in Southeast Alaska have consistently identified individuals throughout inland waters in low numbers (Dahlheim *et al.* 2009).

Minke whales in Southeast Alaska are part of the Alaska stock (Muto *et al.* 2021). Dedicated surveys for cetaceans in Southeast Alaska found that minke whales were scattered throughout inland waters from Glacier Bay and Icy Strait to Clarence Strait, with small concentrations near the entrance of Glacier Bay (Dahlheim *et al.* 2009). All sightings were of single minke whales, except for a single sighting of multiple minke whales. Surveys took place in spring, summer, and fall, and minke whales were present in low numbers in all seasons and years. No information appears to be available on the winter occurrence of minke whales in Southeast Alaska.

In Alaska, the minke whale diet consists primarily of euphausiids and walleye pollock. Minke whales are generally found in shallow, coastal waters within 200 m of shore (Zerbini *et al.* 2006) and are almost always solitary or in small groups of 2 to 3. In Alaska, seasonal movements are associated with feeding areas that are generally located at the edge of the pack ice (NMFS 2014).

There are no known occurrences of minke whales within the project area. Since their ranges extend into the project area and they have been observed in southeast Alaska, including in Clarence Strait (Dahlheim *et al.,* 2009), it is possible the species could occur near the project area. During the surveys by Dalheim *et al.* (2009), all but one encounter was with a single whale and, although infrequent, minke whales were observed during all seasons surveyed (spring, summer and fall). No minke whales where reported during the COK Rock Pinnacle Blasting Project (Sitkiewicz 2020). During marine mammal monitoring of Tongass Narrows in 2020 and 2021, there were no minke whales observed on 88 days of observations across 7 months (October 2020–February 2021; May–June 2021) (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). Future observations of minke whale in the project area are expected to be rare.

*Killer Whale*

Killer whales have been observed in all the world's oceans, but the highest densities occur in colder and more productive waters found at high latitudes (NMFS 2016). Killer whales occur along the entire Alaska coast, in British Columbia and Washington inland waterways, and along the outer coasts of Washington, Oregon, and California (NMFS 2016).

Based on data regarding association patterns, acoustics, movements, and genetic differences, eight killer whale stocks are now recognized within the Pacific U.S. Exclusive Economic Zone. This proposed IHA considers only the Eastern North Pacific Alaska Resident stock (Alaska Resident stock), Eastern North Pacific Northern Resident stock (Northern Resident stock), and West Coast Transient stock, because all other stocks occur outside the geographic area under consideration (Muto *et al.,* 2021).

There are three distinct ecotypes, or forms, of killer whales recognized: Resident, Transient, and Offshore. The three ecotypes differ morphologically, ecologically, behaviorally, and genetically. Surveys between 1991 and 2007 encountered resident killer whales during all seasons throughout Southeast Alaska. Both residents and transients were common in a variety of habitats and all major waterways, including protected bays and inlets. There does not appear to be strong seasonal variation in abundance or distribution of killer whales, but there was substantial variability between years during this study (Dahlheim *et al.,* 2009). Spatial distribution has been shown to vary among the different ecotypes, with resident and, to a lesser extent, transient killer whales more commonly observed along the continental shelf, and offshore killer whales more commonly observed in pelagic waters (Rice *et al.,* 2021).

No systematic studies of killer whales have been conducted in or around Tongass Narrows. Killer whales have been observed in Tongass Narrows year-round and are most common during the summer Chinook salmon run (May-July). During the Chinook salmon run, Ketchikan residents have reported pods of 20–30 whales and during the 2016/2017 winter a pod of 5 whales was observed in Tongass Narrows (84 FR 36891; July 30, 2019). Typical pod sizes observed within the project vicinity range from 1 to 10 animals and the frequency of killer whales passing through the action area is estimated to be once per month (Frietag 2017). Anecdotal reports suggest that large pods of killer whales (as many as 80 individuals, but generally between 25 and 40 individuals) are not uncommon in May, June, and July when the king salmon are running. During the rest of the year, killer whales occur irregularly in pods of 6 to 12 or more individuals. Large pods would be indicative of the Alaska resident population, which travels and hunts in large social groups.

Transient killer whales are often found in long-term stable social units (pods) of 1 to 16 whales. Average pod sizes in Southeast Alaska were 6.0 in spring, 5.0 in summer, and 3.9 in fall. Pod sizes of transient whales are generally smaller than those of resident social groups. Resident killer whales occur in larger pods, ranging from 7 to 70 whales that are seen in association with one another more than 50 percent of the time (Dahlheim *et al.,* 2009; NMFS 2016b). In Southeast Alaska, resident killer whale mean pod size was approximately 21.5 in spring, 32.3 in summer, and 19.3 in fall (Dahlheim *et al.,* 2009).

Although killer whales may occur in large numbers, they generally form large pods and would incur fewer work stoppages than their numbers suggest. Killer whales tend to transit through Tongass Narrows, and do not linger in the project area.

Marine mammal observations in Tongass Narrows during 2020 and 2021 support an estimate of approximately one group of killer whales a month in the project area. During 7 months of monitoring (October 2020–February 2021; May–June 2021), there were five killer whale sightings in 4 months (November, February, May, June) totaling 22 animals and sightings occurred on 5 out of 88 days of monitoring (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). Pod sizes ranged from two to eight animals (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). During the COK's monitoring for the Rock Pinnacle Removal project in December 2019 and January 2020, no killer whales were observed (Sitkiewicz 2020). Over 8 months of monitoring at the Ward Cove Cruise Ship Dock in 2020, killer whales were only observed on two days in March (Power Systems

and Supplies of Alaska, 2020). These observations included a sighting of one pod of two killer whales and a second pod of five individuals travelling through the project area.

*Pacific White-Sided Dolphin*

Pacific white-sided dolphins are a pelagic species inhabiting temperate waters of the North Pacific Ocean and along the coasts of California, Oregon, Washington, and Alaska (Muto *et al.,* 2021). Despite their distribution mostly in deep, offshore waters, they may also be found over the continental shelf and near shore waters, including inland waters of Southeast Alaska (Ferrero and Walker 1996). The North Pacific stock is found within the project area. The Pacific white-sided dolphin is distributed throughout the temperate North Pacific Ocean, north of Baja California to Alaska's southern coastline and Aleutian Islands. The North Pacific Stock ranges from Canada into Alaska (Muto *et al.,* 2021).

Pacific white-sided dolphins prey on squid and small schooling fish such as capelin, sardines, and herring (Morton 2006). They are known to work in groups to herd schools of fish and can dive underwater for up to 6 minutes to feed (Morton 2006). Group sizes have been reported to range from 40 to over 1,000 animals, but groups of between 10 and 100 individuals (Stacey and Baird 1991) occur most commonly. Seasonal movements of Pacific white-sided dolphins are not well understood, but there is evidence of both north-south seasonal movement (Leatherwood *et al.* 1984) and inshore-offshore seasonal movement (Stacey and Baird 1991).

Scientific studies and data are lacking relative to the presence or abundance of Pacific white-sided dolphins in or near Tongass Narrows. Although they generally prefer deeper and more-offshore waters, anecdotal reports suggest that Pacific white-sided dolphins have previously been observed in Tongass Narrows, although they have not been observed entering Tongass Narrows or nearby inter-island waterways in 15–20 years.

Pacific white-sided dolphins are rare in the inside passageways of Southeast Alaska. Most observations occur off the outer coast or in inland waterways near entrances to the open ocean. According to Muto *et al.* (2018), aerial surveys in 1997 sighted one group of 164 Pacific white-sided dolphins in Dixon entrance to the south of Tongass Narrows. Surveys in April and May from 1991 to 1993 identified Pacific white-sided dolphins in Revillagigedo Channel, Behm Canal, and Clarence Strait (Dahlheim and Towell 1994). These areas are contiguous with the open ocean waters of Dixon Entrance. Dalheim *et al.* (2009) frequently encountered Pacific white-sided dolphin in Clarence Strait with significant differences in mean group size and rare enough encounters to limit the seasonality investigation to a qualitative note that spring featured the highest number of animals observed. These observations were noted most typically in open strait environments, near the open ocean. Mean group size was over 20, with no recorded winter observations nor observations made in the Nichols Passage or Behm Canal, located on either side of the Tongass Narrows. Though generally preferring more pelagic, open-water environments, Pacific white-sided dolphin could be present within the action area during the construction period. This observational data, combined with anecdotal information, indicates there is a rare, however, slight potential for Pacific white-sided dolphins to occur in the project area.

During marine mammal monitoring of Tongass Narrows in 2020 and 2021, no Pacific white-sided dolphins were observed on 88 days of observations across 7 months (October 2020–February 2021; May–June 2021), which supports the anecdotal evidence that sightings of this species are rare (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). There were also no sightings of Pacific white-sided dolphins during the COK Rock Pinnacle Blasting Project during monitoring surveys conducted in December 2019 and January 2020 (Sitkiewicz 2020) or during monitoring surveys conducted between February and September 2020 as part of the Ward Cove Cruise Ship Dock (Power Systems and Supplies of Alaska, 2020).

*Harbor Porpoise*

In the eastern North Pacific Ocean, the harbor porpoise ranges from Point Barrow, along the Alaska coast, and down the west coast of North America to Point Conception, California. In Alaska, harbor porpoises are currently divided into three stocks, based primarily on geography: The Bering Sea stock, the Southeast Alaska stock, and the Gulf of Alaska stock. The Southeast Alaska stock ranges from Cape Suckling to the Canadian border (Muto *et al.* 2021). Harbor porpoises frequent primarily coastal waters in Southeast Alaska (Dahlheim *et al.* 2009) and occur most frequently in waters less than 100 m (328 ft) deep (Hobbs and Waite 2010; Dahlheim *et al.* 2015).

Abundance data for harbor porpoises in Southeast Alaska were collected during 18 seasonal surveys spanning 22 years, from 1991 to 2012 (Dahlheim *et al.* 2015). The project area and Tongass Narrows fall within the Clarence Strait to Ketchikan region, as identified by this study for the survey effort. Harbor porpoise densities in this region in summer were low, ranging from 0.01 to 0.02 harbor porpoises/km$^2$.

Studies of harbor porpoises reported no evidence of seasonal changes in distribution for the inland waters of Southeast Alaska (Dahlheim *et al.* 2009). Their small overall size, lack of a visible blow, low dorsal fins and overall low profile, and short surfacing time make them difficult to observe (Dahlheim *et al.* 2015), likely reducing identification and reporting of this species, and these estimates therefore may be low.

Calving occurs from May to August; however, this can vary by region. Harbor porpoises are often found traveling alone, or in small groups less than 10 individuals (Schmale 2008). According to aerial surveys of harbor porpoise abundance in Alaska conducted in 1991–1993, mean group size in Southeast Alaska was calculated to be 1.2 animals (Dahlheim *et al.* 2000).

Anecdotal reports (see Section 3 of the IHA Application) specific to Tongass Narrows indicate that harbor porpoises are rarely observed in the project area, and actual sightings are less common than those suggested by Dahlheim *et al.* (2015). Harbor porpoises prefer shallower waters (Dahlheim *et al.* 2015) and generally are not attracted to areas with elevated levels of vessel activity and noise such as Tongass Narrows. Harbor porpoises are expected to be present in the project area only a few times per year. Freitag (2017 as cited in 83 FR 22009; May 11, 2018) observed harbor porpoises in Tongass Narrows zero to one time per month and NMFS (83 FR 22009; May 11, 2018) has estimated that one group of harbor porpoises would enter Tongass Narrows each month.

Harbor porpoises were sighted on 3 days of in-water work during monitoring associated with the Ward Cove Cruise Ship Dock, with three sightings of 15 individuals sighted in March and April, 2020 (Power Systems and Supplies of Alaska, 2020). Solo individuals and pods of up to 10 were identified as swimming and travelling 2,500 m to 2,800 m from in-water work. During marine mammal monitoring of Tongass Narrows in 2020 and 2021, no harbor porpoises were observed on 88 days of observations across 7 months (October 2020–February 2021; May–June 2021), which supports the anecdotal evidence that harbor porpoise sightings are rare (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). Marine mammal

monitoring associated with the COK Rock Pinnacle Removal project also did not observe any harbor porpoise during surveys conducted in December 2019 and January 2020 (Sitkiewicz 2020).

*Dall's Porpoise*

Dall's porpoises are found throughout the North Pacific, from southern Japan to southern California north to the Bering Sea. Dall's porpoises are not listed as endangered or threatened under the ESA. All Dall's porpoises in Alaska are members of the Alaska stock, and those off California, Oregon, and Washington are part of a separate stock. This species can be found in offshore, inshore, and nearshore habitat, but prefer waters more than 600 ft (180 m) deep (Jefferson 2009).

No systematic studies of Dall's porpoise abundance or distribution have occurred in Tongass Narrows; however, surveys for cetaceans throughout Southeast Alaska were conducted between 1991 and 2007 (Dahlheim *et al.* 2009). The species is generally found in waters in excess of 600 ft (183 m) deep (Dahlheim *et al.* 2009, Jefferson 2009), which do not occur in Tongass Narrows. Jefferson *et al.* (2019) presents historical survey data showing few sightings in the Ketchikan area, and based on these occurrence patterns, concludes that Dall's porpoise rarely come into narrow waterways, like Tongass Narrows. Anecdotal reports suggest that Dall's porpoises are found northwest of Ketchikan near the Guard Islands, where waters are deeper, as well as in deeper waters to the southeast of Tongass Narrows. Should Dall's porpoises occur in the project area, they would likely be present in March or April, given past observations in the region. Despite generalized water depth preferences, Dall's porpoises may occur in shallower waters. This species has a tendency to bow-ride with vessels and may occur in the project area incidentally a few times per year.

The mean group size in Southeast Alaska is estimated at approximately three individuals (Dahlheim *et al.* 2009; Jefferson 2019). However, in the Ketchikan vicinity, Dall's porpoises are reported to typically occur in groups of 10–15 animals, with an estimated maximum group size of 20 animals (Freitag 2017, 83 FR 37473; August 1, 2018).

Dall's porpoises were positively identified on 2 days of in-water work during monitoring associated with the Ward Cove Cruise Ship Dock (Power Systems and Supplies of Alaska, 2020). A pod of three and a pod of five were recorded travelling at least 3,000 m from the construction site in April and May, respectively. During marine mammal monitoring of Tongass Narrows in 2020 and 2021, there were sightings of Dall's porpoises on 2 out of 88 days of observations across 7 months (October 2020–February 2021; May–June 2021)—once in November 2020 and once in February 2021. The pod sighted in November contained six animals; the pod observed in February had 10. Based on this recent data, there is no known pattern to their attendance in the project area, but they do occur rarely (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d).

*Steller Sea Lion*

Steller sea lions were listed as threatened range-wide under the ESA on November 26, 1990 (55 FR 49204). Steller sea lions were subsequently partitioned into the western and eastern DPSs (and MMPA stocks) in 1997 (62 FR 24345; May 5, 1997). The eastern DPS remained classified as threatened until it was delisted in November 2013. The current minimum abundance estimate for the eastern DPS of Steller sea lions is 43,201 individuals (Muto *et al.* 2021). The western DPS (those individuals west of 144° W longitude or Cape Suckling, Alaska) was upgraded to endangered status following separation of the DPSs, and it remains endangered today. There is regular movement of both DPSs across this 144° W longitude boundary (Jemison *et al.* 2013), however, due to the distance from this DPS boundary, it is likely that only eastern DPS Steller sea lions are present in the project area. Therefore, animals potentially affected by the project are assumed to be part of the eastern DPS.

There are several mapped and regularly monitored long-term Steller sea lion haulouts surrounding Ketchikan, such as West Rocks (36 miles/58 km) or Nose Point (37 miles/60 km), but none are known to occur within Tongass Narrows (Fritz *et al.* 2015). The nearest known Steller sea lion haulout is located approximately 20 miles (58 km) west/northwest of Ketchikan on Grindall Island (Figure 4–1 in application). Summer counts of adult and juvenile sea lions at this haulout since 2000 have averaged approximately 191 individuals, with a range from 6 in 2009 to 378 in 2008. Only two winter surveys of this haulout have occurred. In March 1993, a total of 239 individuals were recorded, and in December 1994, a total of 211 individuals were recorded. No sea lion pups have been observed at this haulout during surveys. Although this is a limited and dated sample, it suggests that abundance may be consistent year-round at the Grindall Island haulout.

No systematic studies of sea lion abundance or distribution have occurred in Tongass Narrows. Anecdotal reports suggest that Steller sea lions may be found in Tongass Narrows year-round, with an increase in abundance from March to early May during the herring spawning season, and another increase in late summer associated with salmon runs. Overall sea lion presence in Tongass Narrows tends to be lower in summer than in winter (FHWA 2017). During summer, Steller sea lions may aggregate outside the project area, at rookery and haulout sites. Monitoring during construction of the Ketchikan Ferry Terminal in summer (July 16 through August 17, 2016) did not record any Steller sea lions (ADOT&PF 2015); however, monitoring during construction of the Ward Cove Dock, located approximately 6 km northwest of the Project site, recorded 181 individual sea lions on 44 days between February and September 2020 (Power Systems & Supplies of Alaska, 2020). Most sightings occurred in February (45 sightings of 88 sea lions) and March (34 sightings of 45 sea lions); the fewest number of sightings were observed in May (1 sighting of 1 sea lion) (Power Systems & Supplies of Alaska, 2020). Sightings were of single individuals, pairs, and herds of up to 10 individuals.

Sea lions are known to transit through Tongass Narrows while pursuing prey. Steller sea lions are also known to follow fishing vessels, and may congregate in small numbers at seafood processing facilities and hatcheries or at the mouths of rivers and creeks containing hatcheries, where large numbers of salmon congregate in late summer. Three seafood processing facilities are located east of the proposed berth location on Revilla Island, and two salmon hatcheries operated by the Alaska Department of Fish & Game (ADF&G) are located east of the project area. Steller sea lions may aggregate near the mouth of Ketchikan Creek, where a hatchery upstream supports a summer salmon run. The Creek mouth is more than 4 km (2.5 mi) from both ferry berth sites, and is positioned behind the cruise ship terminal and within the small boat harbor. In addition to these locations, anecdotal information from a local kayaking company suggests that there are Steller sea lions present at Gravina Point, near the southwest entrance to Tongass Narrows.

A total of 181 Steller sea lions were sighted on 44 separate days during all months of Ward Cove Cruise Ship Dock construction (February through September, 2020) (Power Systems and

Supplies of Alaska, 2020). Most sightings occurred in February and March and the fewest sightings were in May. Sightings were of single individuals, pairs, and herds of up to 10 individuals.

The DOT&PF implemented a marine mammal monitoring program in Tongass Narrows for recent previous construction components of the Tongass Narrows Project (84 FR 34134; July 17, 2019). Monitoring took place from October 2020 through February 2021 and May through June 2021, and results indicated that Steller sea lion numbers were highest in January and February (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). Steller sea lions were observed in the Tongass Narrows Project area on 49 of 88 days between October 2020 and June 2021 (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). They were observed in every month that observations took place (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). Over the course of the 7 months of monitoring, there were 77 sightings of 92 individual animals (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). Sightings of Steller sea lions were most frequent in January and February and least common in May and June (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). Sightings were primarily of single animals, but animals were also present in pairs and groups up to five sea lions (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). This is consistent with Freitag (2017 as cited in 83 FR 22009; May 11, 2018), though groups of up to 80 individuals have been observed (HDR, Inc. 2003). On average over the course of a year, Steller sea lions occur in Tongass Narrows approximately three or four times per week (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d).

*Harbor Seal*

Harbor seals range from Baja California north along the west coasts of Washington, Oregon, California, British Columbia, and Southeast Alaska; west through the Gulf of Alaska, Prince William Sound, and the Aleutian Islands; and north in the Bering Sea to Cape Newenham and the Pribilof Islands. In 2010, harbor seals in Alaska were partitioned into 12 separate stocks based largely on genetic structure (Allen and Angliss 2010). Harbor seals in Tongass Narrows are recognized as part of the Clarence Strait stock. Distribution of the Clarence Strait stock ranges from the east coast of Prince of Wales Island from Cape Chacon north through Clarence Strait to Point Baker and along the east coast of Mitkof and Kupreanof Islands north to Bay Point, including Ernest Sound, Behm Canal, and Pearse Canal (Muto *et al.* 2021). The latest stock assessment analysis indicates that the current 8-year estimate of the Clarence Strait population trend is +138 seals per year, with a probability that the stock is decreasing of 0.413 (Muto *et al.* 2021). Harbor seals haul out on rocks, reefs, beaches, and drifting glacial ice, and feed in marine, estuarine, and occasionally fresh waters. Harbor seals are generally non-migratory, with local movements associated with such factors as tides, weather, season, food availability, and reproduction (Muto, *et al.* 2021).

No systematic studies of harbor seal abundance or distribution have occurred in Tongass Narrows. Aerial surveys conducted in August 2011 did not record any harbor seal haulouts in Tongass Narrows, but several haulouts were located on the outer shores of Gravina Island (London *et al.* 2015). There is no known harbor seal haulout in Tongass Narrows although seals have been observed hauled out on docks in Ketchikan Harbor. The closest listed haulout is located off the tip of Gravina Island, approximately 8 km (5 mi) northwest of Ward Cove (AFSC 2018).

Anecdotal observations indicate that harbor seals are common in Tongass Narrows, although no data exist to quantify abundance. Two salmon hatcheries operated by ADF&G are located east of the project area. Like Steller sea lions, harbor seals may aggregate near the mouth of Ketchikan Creek when salmon are running in summer. The creek mouth is more than 4 km (2.5 mi) from the project component sites, and is positioned behind both the cruise ship terminal and within the small boat harbor. In the project area, they tend to be more abundant during spring, summer and fall months when salmon are present in Ward Creek. Anecdotal evidence indicates that harbor seals typically occur in groups of 1–3 animals in Ward Cove (Spokely 2019). They were not observed in Tongass Narrows during a combined 63.5 hours of marine mammal monitoring that took place in 2001 and 2016 (OSSA 2001, Turnagain 2016). The COK conducted pinnacle rock blasting in December 2019 and January 2020 near the vicinity of the proposed project and recorded a total of 21 harbor seal sightings of 24 individuals over 76.2 hours of pre- and post-blast monitoring (Sitkiewicz 2020).

Harbor seals were sighted during every month of construction (February through September, 2020) associated with the Ward Cove Cruise Ship Dock, with most sightings in February and March and the fewest in July (Power Systems and Supplies of Alaska, 2020). There were 247 sighting events of 271 individuals. Sighting events were of solo individuals, pairs, and the occasional group of three.

Marine mammal monitoring occurred near the project site from October 2020 to February 2021 and resumed in May 2021 during Phase 1 of the previously issued IHA (85 FR 673; January 7, 2020). Harbor seals were observed in the Tongass Narrows Project area in every month in which observations took place, except during October 2020 when only 3 days of monitoring occurred (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). Harbor seals were sighted on 68 days out of 88 days of monitoring (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). They were mostly sightings of single animals, but animals were also present in pairs and groups up to five seals (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). Sightings of harbor seals were consistent over the course of 7 months of intermittent monitoring; they were observed 5 to 6 days per week on average (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d).

*Marine Mammal Hearing*

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 3.

TABLE 3—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

| Hearing group | Generalized hearing range* |
|---|---|
| Low-frequency (LF) cetaceans (baleen whales) | 7 Hz to 35 kHz. |
| Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales) | 150 Hz to 160 kHz. |
| High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*). | 275 Hz to 160 kHz. |
| Phocid pinnipeds (PW) (underwater) (true seals) | 50 Hz to 86 kHz. |
| Otariid pinnipeds (OW) (underwater) (sea lions and fur seals) | 60 Hz to 39 kHz. |

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.* 2006; Kastelein *et al.* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. Eight marine mammal species (six cetacean and two pinniped (one otariid and one phocid) species) have the reasonable potential to co-occur with the proposed survey activities. Please refer to Table 2. Of the cetacean species that may be present, two are classified as low-frequency cetaceans (*i.e.,* all mysticete species), two are classified as mid-frequency cetaceans (*i.e.,* all delphinid and ziphiid species and the sperm whale), and two are classified as high-frequency cetaceans (*i.e.,* harbor porpoise, Dall's porpoise and *Kogia spp.*).

**Potential Effects of Specified Activities on Marine Mammals and Their Habitat**

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The Estimated Take section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take section, and the Proposed Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

Acoustic effects on marine mammals during the specified activity can occur from impact and vibratory pile driving and removal and use of DTH equipment. The effects of underwater noise from ADOT's proposed activities have the potential to result in Level A or Level B harassment of marine mammals in the action area.

*Description of Sound Sources*

The marine soundscape is comprised of both ambient and anthropogenic sounds. Ambient sound is defined as the all-encompassing sound in a given place and is usually a composite of sound from many sources both near and far (ANSI 1995). The sound level of an area is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* waves, wind, precipitation, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (*e.g.,* vessels, dredging, aircraft, construction).

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise ''ambient'' or ''background'' sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

In-water construction activities associated with the project would include impact pile driving, vibratory pile driving and removal, and use of DTH equipment. The sounds produced by these activities fall into one of two general sound types: Impulsive and non-impulsive. Impulsive sounds (*e.g.,* explosions, gunshots, sonic booms, impact pile driving) are typically transient, brief (less than 1 second), broadband, and consist of high peak sound pressure with rapid rise time and rapid decay (ANSI 1986; NIOSH 1998; NMFS 2018). Non-impulsive sounds (*e.g.* aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems) can be broadband, narrowband or tonal, brief or prolonged (continuous or intermittent), and typically do not have the high peak sound pressure with rapid rise/decay time that impulsive sounds do (ANSI 1995; NIOSH 1998; NMFS 2018). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward 1997 in Southall *et al.* 2007).

Three types of hammers would be used on this project: Impact, vibratory, and DTH. Impact hammers operate by repeatedly dropping and/or pushing a heavy piston onto a pile to drive the pile into the substrate. Sound generated by impact hammers is characterized by rapid rise times and high peak levels, a potentially injurious combination (Hastings and Popper 2005). Vibratory hammers install piles by vibrating them and allowing the weight of the hammer to push them into the sediment. Vibratory hammers produce significantly less sound than impact hammers. Peak Sound Pressure Levels (SPLs) may be 180 dB or greater, but are generally 10 to 20 dB lower than SPLs generated during impact pile driving of the same-sized pile (Oestman *et al.*

2009). Rise time is slower, reducing the probability and severity of injury, and sound energy is distributed over a greater amount of time (Nedwell and Edwards 2002; Carlson *et al.* 2005).

A DTH hammer is essentially a drill bit that drills through the bedrock using a rotating function like a normal drill, in concert with a hammering mechanism operated by a pneumatic (or sometimes hydraulic) component integrated into to the DTH hammer to increase speed of progress through the substrate *(i.e.,* it is similar to a ''hammer drill'' hand tool). The sounds produced by the DTH method contain both a continuous non-impulsive component from the drilling action and an impulsive component from the hammering effect. Therefore, we treat DTH systems as both impulsive and continuous, non-impulsive sound source types simultaneously.

The likely or possible impacts of ADOT's proposed activity on marine mammals could involve both non-acoustic and acoustic stressors. Potential non-acoustic stressors could result from the physical presence of the equipment and personnel; however, any impacts to marine mammals are expected to primarily be acoustic in nature. Acoustic stressors include effects of heavy equipment operation during pile installation and removal and use of DTH.

*Acoustic Impacts*

The introduction of anthropogenic noise into the aquatic environment from pile driving and removal and DTH is the primary means by which marine mammals may be harassed from ADOT's specified activity. In general, animals exposed to natural or anthropogenic sound may experience physical and psychological effects, ranging in magnitude from none to severe (Southall *et al.* 2007, 2019). In general, exposure to pile driving and DTH noise has the potential to result in auditory threshold shifts and behavioral reactions (*e.g.,* avoidance, temporary cessation of foraging and vocalizing, changes in dive behavior). Exposure to anthropogenic noise can also lead to non-observable physiological responses such an increase in stress hormones. Additional noise in a marine mammal's habitat can mask acoustic cues used by marine mammals to carry out daily functions such as communication and predator and prey detection. The effects of pile driving and DTH noise on marine mammals are dependent on several factors, including, but not limited to, sound type (*e.g.,* impulsive vs. non-impulsive), the species, age and sex class (*e.g.,* adult male vs. mom with calf), duration of exposure, the distance between the pile and the animal, received levels, behavior at time of exposure, and previous history with exposure (Wartzok *et al.* 2004; Southall *et al.* 2007). Here we discuss physical auditory effects (threshold shifts) followed by behavioral effects and potential impacts on habitat.

NMFS defines a noise-induced threshold shift (TS) as a change, usually an increase, in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS 2018). The amount of threshold shift is customarily expressed in dB. A TS can be permanent or temporary. As described in NMFS (2018), there are numerous factors to consider when examining the consequence of TS, including, but not limited to, the signal temporal pattern (*e.g.,* impulsive or non-impulsive), likelihood an individual would be exposed for a long enough duration or to a high enough level to induce a TS, the magnitude of the TS, time to recovery (seconds to minutes or hours to days), the frequency range of the exposure (*i.e.,* spectral content), the hearing and vocalization frequency range of the exposed species relative to the signal's frequency spectrum (*i.e.,* how animal uses sound within the frequency band of the signal; *e.g.,* Kastelein *et al.* 2014), and the overlap between the animal and the source (*e.g.,* spatial, temporal, and spectral).

Permanent Threshold Shift (PTS)—NMFS defines PTS as a permanent, irreversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS 2018). Available data from humans and other terrestrial mammals indicate that a 40 dB threshold shift approximates PTS onset (see Ward *et al.* 1958, 1959; Ward 1960; Kryter *et al.* 1966; Miller 1974; Ahroon *et al.* 1996; Henderson *et al.* 2008). PTS levels for marine mammals are estimates, as with the exception of a single study unintentionally inducing PTS in a harbor seal (Kastak *et al.* 2008), there are no empirical data measuring PTS in marine mammals largely due to the fact that, for various ethical reasons, experiments involving anthropogenic noise exposure at levels inducing PTS are not typically pursued or authorized (NMFS 2018).

Temporary Threshold Shift (TTS)—A temporary, reversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS 2018). Based on data from cetacean TTS measurements (see Southall *et al.* 2007), a TTS of 6 dB is considered the minimum threshold shift clearly larger than any day-to-day or session-to-session variation in a subject's normal hearing ability (Schlundt *et al.* 2000; Finneran *et al.* 2000, 2002). As described in Finneran (2015), marine mammal studies have shown the amount of TTS increases with cumulative sound exposure level (SELcum) in an accelerating fashion: At low exposures with lower SELcum, the amount of TTS is typically small and the growth curves have shallow slopes. At exposures with higher SELcum, the growth curves become steeper and approach linear relationships with the noise SEL.

Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious (similar to those discussed in auditory masking, below). For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts. We note that reduced hearing sensitivity as a simple function of aging has been observed in marine mammals, as well as humans and other taxa (Southall *et al.* 2007), so we can infer that strategies exist for coping with this condition to some degree, though likely not without cost.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin (*Tursiops truncatus*), beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocoena asiaeorientalis*)) and five species of pinnipeds exposed to a limited number of sound sources (*i.e.,* mostly tones and octave-band noise) in laboratory settings (Finneran 2015). TTS was not observed in trained spotted (*Phoca largha*) and ringed (*Pusa hispida*) seals exposed to impulsive noise at levels matching previous predictions of TTS onset (Reichmuth *et al.* 2016). In general, harbor seals and harbor porpoises have a lower TTS onset than other measured pinniped or cetacean species (Finneran 2015). Additionally, the existing marine

mammal TTS data come from a limited number of individuals within these species. No data are available on noise-induced hearing loss for mysticetes. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Southall *et al.* (2007), Finneran and Jenkins (2012), Finneran (2015), and Table 5 in NMFS (2018).

Installing piles requires a combination of impact pile driving, vibratory pile driving, and DTH. For the project, these activities may occur at the same time (up to two hammers of any combination of hammer/drill type), though such an occurrence is anticipated to be infrequent and for short durations on any given day, given that pile installation and removal occurs intermittently to allow for adjusting piles and measuring and documenting progress. Therefore, there would likely be pauses in activities producing the sound during each day. Given these pauses and that many marine mammals are likely moving through the project area and not remaining for extended periods of time, the potential for TS declines.

*Behavioral Harassment*—Exposure to noise from pile driving and removal and DTH also has the potential to behaviorally disturb marine mammals. Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.,* Lusseau and Bejder 2007; Weilgart 2007; NRC 2005).

Disturbance may result in changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where sound sources are located. Pinnipeds may increase their haul out time, possibly to avoid in-water disturbance (Thorson and Reyff 2006). Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.,* species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.,* Richardson *et al.* 1995; Wartzok *et al.* 2003; Southall *et al.* 2007; Weilgart 2007; Archer *et al.* 2010). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.* 2012), and can vary depending on characteristics associated with the sound source (*e.g.,* whether it is moving or stationary, number of sources, distance from the source). In general, pinnipeds seem more tolerant of, or at least habituate more quickly to, potentially disturbing underwater sound than do cetaceans, and generally seem to be less responsive to exposure to industrial sound than most cetaceans. Please see Appendices B and C of Southall *et al.* (2007) for a review of studies involving marine mammal behavioral responses to sound.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.,* bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.,* Croll *et al.* 2001; Nowacek *et al.* 2004; Madsen *et al.* 2006; Yazvenko *et al.* 2007). A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal.

In 2016, ADOT documented observations of marine mammals during construction activities (*i.e.,* pile driving and DTH) at the Kodiak Ferry Dock (ABR 2016) in the Gulf of Alaska. In the marine mammal monitoring report for that project, 1,281 Steller sea lions were observed within the estimated Level B harassment zone during pile driving or DTH (*i.e.,* documented as potential take by Level B harassment). Of these, 19 individuals demonstrated an alert behavior, 7 were fleeing, and 19 swam away from the project site. All other animals (98 percent) were engaged in activities such as milling, foraging, or fighting and did not change their behavior. In addition, two sea lions approached within 20 m of active vibratory pile driving activities. Three harbor seals were observed within the disturbance zone during pile driving activities; none of them displayed disturbance behaviors. Fifteen killer whales and three harbor porpoise were also observed within the Level B harassment zone during pile driving. The killer whales were travelling or milling while all harbor porpoises were travelling. No signs of disturbance were noted for either of these species. Given the similarities in species, activities, and habitat, we expect similar behavioral responses of marine mammals to the ADOT's specified activity. That is, disturbance, if any, is likely to be temporary and localized (*e.g.,* small area movements). Monitoring reports from other recent pile driving and DTH projects in Alaska have observed similar behaviors, for example, the Biorka Island Dock Replacement Project (*https://www.fisheries.noaa.gov/action/incidental-take-authorization-faa-biorka-island-dock-replacement-project-sitka-ak*).

*Stress responses*—An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (*e.g.,* Seyle 1950; Moberg 2000). In many cases, an animal's first and sometimes most economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (*e.g.,* Moberg 1987; Blecha 2000). Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.* 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and

''distress'' is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficient to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well-studied through controlled experiments and for both laboratory and free-ranging animals (*e.g.,* Holberton *et al.* 1996; Hood *et al.* 1998; Jessop *et al.* 2003; Krausman *et al.* 2004; Lankford *et al.* 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker 2000; Romano *et al.* 2002b) and, more rarely, studied in wild populations (*e.g.,* Romano *et al.* 2002a). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as ''distress.'' In addition, any animal experiencing TTS would likely also experience stress responses (NRC 2003), however distress is an unlikely result of this project based on observations of marine mammals during previous, similar projects in the area.

*Masking*—Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.,* those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.* 1995). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.,* snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.,* pile driving, shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.,* signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.,* sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions. Masking of natural sounds can result when human activities produce high levels of background sound at frequencies important to marine mammals. Conversely, if the background level of underwater sound is high (*e.g.,* on a day with strong wind and high waves), an anthropogenic sound source would not be detectable as far away as would be possible under quieter conditions and would itself be masked.

*Airborne Acoustic Effects*—Pinnipeds that occur near the project site could be exposed to airborne sounds associated with pile driving and removal and DTH that have the potential to cause behavioral harassment, depending on their distance from these activities. Cetaceans are not expected to be exposed to airborne sounds that would result in harassment as defined under the MMPA.

Airborne noise would primarily be an issue for pinnipeds that are swimming or hauled out near the project site within the range of noise levels elevated above the acoustic criteria. We recognize that pinnipeds in the water could be exposed to airborne sound that may result in behavioral harassment when looking with their heads above water. Most likely, airborne sound would cause behavioral responses similar to those discussed above in relation to underwater sound. For instance, anthropogenic sound could cause hauled-out pinnipeds to exhibit changes in their normal behavior, such as reduction in vocalizations, or cause them to temporarily abandon the area and move further from the source. However, these animals would previously have been 'taken' because of exposure to underwater sound above the behavioral harassment thresholds, which are in all cases larger than those associated with airborne sound. Thus, the behavioral harassment of these animals is already accounted for in these estimates of potential take. Therefore, we do not believe that authorization of incidental take resulting from airborne sound for pinnipeds is warranted, and airborne sound is not discussed further here.

*Marine Mammal Habitat Effects*

ADOT's proposed activities at the project area would not result in permanent negative impacts to habitats used directly by marine mammals, but may have potential short-term impacts to food sources such as forage fish and may affect acoustic habitat (see masking discussion above). There are no known foraging hotspots or other ocean bottom structure of significant biological importance to marine mammals present in the marine waters of the project area during the construction window, but there are times of increased foraging during periods of forage fish and salmonid spawning. ADOT's construction activities in Tongass Narrows could have localized, temporary impacts on marine mammal habitat and their prey by increasing in-water sound pressure levels and slightly decreasing water quality. Increased noise levels may affect acoustic habitat (see masking discussion above) and adversely affect marine mammal prey in the vicinity of the project area (see discussion below). During DTH, impact and vibratory pile driving or removal, elevated levels of underwater noise would ensonify a portion of Tongass Narrows and nearby waters where both fishes and mammals occur and could affect foraging success. Additionally, marine mammals may avoid the area during construction, however, displacement due to noise is expected to be temporary and is not expected to result in long-term effects to the individuals or populations. Construction activities are of short duration and would likely have temporary impacts on marine mammal habitat through increases in underwater and airborne sound.

The area likely impacted by the project includes much of Tongass Narrows, but overall this area is relatively small compared to the available habitat in the surrounding area including Revillagigedo Channel, Behm Canal, and Clarence Strait. Pile installation/removal and DTH may temporarily increase turbidity resulting from suspended sediments. Any increases would be temporary, localized, and minimal. In general, turbidity associated with pile installation is localized to about a 25-ft radius around the pile (Everitt *et al.* 1980). Cetaceans are not expected to be close enough to the project pile driving areas to experience effects of turbidity, and pinnipeds could avoid localized areas of turbidity. Therefore, the impact from increased turbidity levels is expected to minimal for marine mammals. Furthermore, pile driving and removal at the project site would not obstruct movements or migration of marine mammals.

*In-water Construction Effects on Potential Prey*—Construction activities

would produce continuous (*i.e.,* vibratory pile driving and DTH) and intermittent (*i.e.* impact driving and DTH) sounds. Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.,* crustaceans, cephalopods, fish, zooplankton). Marine mammal prey varies by species, season, and location. Here, we describe studies regarding the effects of noise on known marine mammal prey.

Fish utilize the soundscape and components of sound in their environment to perform important functions such as foraging, predator avoidance, mating, and spawning (*e.g.,* Zelick and Mann 1999; Fay 2009). Depending on their hearing anatomy and peripheral sensory structures, which vary among species, fishes hear sounds using pressure and particle motion sensitivity capabilities and detect the motion of surrounding water (Fay *et al.* 2008). The potential effects of noise on fishes depends on the overlapping frequency range, distance from the sound source, water depth of exposure, and species-specific hearing sensitivity, anatomy, and physiology. Key impacts to fishes may include behavioral responses, hearing damage, barotrauma (pressure-related injuries), and mortality.

Fish react to sounds that are especially strong and/or intermittent low-frequency sounds. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. The reaction of fish to noise depends on the physiological state of the fish, past exposures, motivation (*e.g.,* feeding, spawning, migration), and other environmental factors. Hastings and Popper (2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pile driving on fish; several are based on studies in support of large, multiyear bridge construction projects (*e.g.,* Scholik and Yan 2001, 2002; Popper and Hastings 2009). Several studies have demonstrated that impulse sounds might affect the distribution and behavior of some fishes, potentially impacting foraging opportunities or increasing energetic costs (*e.g.,* Fewtrell and McCauley, 2012; Pearson *et al.* 1992; Skalski *et al.* 1992; Santulli *et al.* 1999; Paxton *et al.* 2017). However, some studies have shown no or slight reaction to impulse sounds (*e.g.,* Pena *et al.* 2013; Wardle *et al.* 2001; Jorgenson and Gyselman, 2009; Cott *et al.* 2012).

SPLs of sufficient strength have been known to cause injury to fish and fish mortality. However, in most fish species, hair cells in the ear continuously regenerate and loss of auditory function likely is restored when damaged cells are replaced with new cells. Halvorsen *et al.* (2012a) showed that a TTS of 4–6 dB was recoverable within 24 hours for one species. Impacts would be most severe when the individual fish is close to the source and when the duration of exposure is long. Injury caused by barotrauma can range from slight to severe and can cause death, and is most likely for fish with swim bladders. Barotrauma injuries have been documented during controlled exposure to impact pile driving (Halvorsen *et al.* 2012b; Casper *et al.* 2013).

The most likely impact to fish from pile driving and removal and DTH activities at the project area would be temporary behavioral avoidance of the area. The duration of fish avoidance of this area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated. Any behavioral avoidance by fish of the disturbed area would still leave significantly large areas of fish and marine mammal foraging habitat in the nearby vicinity in Revillagigedo Channel, Behm Canal, and Clarence Strait. Additionally, the City of Ketchikan within Tongass Narrows has a busy industrial water front, and human impact lessens the value of the area as foraging habitat. There are times of known seasonal marine mammal foraging in Tongass Narrows around fish processing/hatchery infrastructure or when fish are congregating, but the impacted areas of Tongass Narrows are a small portion of the total foraging habitat available in the region. In general, impacts to marine mammal prey species are expected to be minor and temporary due to the short timeframe of the project.

Construction activities, in the form of increased turbidity, have the potential to adversely affect eulachon, herring, and juvenile salmonid outmigratory routes in the project area. Salmon and forage fish, like eulachon and herring, form a significant prey base for Steller sea lions and are major components of the diet of many other marine mammal species that occur in the project area. Increased turbidity is expected to occur only in the immediate vicinity of construction activities and to dissipate quickly with tidal cycles. Given the limited area affected and high tidal dilution rates any effects on fish are expected to be minor.

Additionally, the presence of transient killer whales means some marine mammal species are also possible prey (harbor seals, harbor porpoises). ADOT's pile driving, pile removal and DTH activities are expected to result in limited instances of take by Level B and Level A harassment on these smaller marine mammals. That, as well as the fact that ADOT is impacting a small portion of the total available marine mammal habitat means that there would be minimal impact on these marine mammals as prey.

In summary, given the short daily duration of sound associated with individual pile driving and DTH events and the small area being affected relative to available nearby habitat, pile driving and DTH activities associated with the proposed action are not likely to have a permanent, adverse effect on any fish habitat, or populations of fish species or other prey. Thus, we conclude that impacts of the specified activity are not likely to have more than short-term adverse effects on any prey habitat or populations of prey species. Further, any impacts to marine mammal habitat are not expected to result in significant or long-term consequences for individual marine mammals, or to contribute to adverse impacts on their populations.

**Estimated Take**

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would primarily be by Level B harassment, as use of the acoustic sources (*i.e.,* impact and vibratory pile driving and DTH) have the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result, primarily for mysticetes, high frequency species and phocids because predicted auditory injury zones are larger than for mid-frequency species and otariids. Auditory injury is unlikely to occur for mid-frequency species and otariids. The proposed mitigation and monitoring

measures are expected to minimize the severity of such taking to the extent practicable.

As described previously, no mortality is anticipated or proposed to be authorized for this activity. Below we describe how the take is estimated.

Generally speaking, we estimate take by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) and the number of days of activities. We note that while these basic factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the proposed take estimate.

*Acoustic Thresholds*

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

*Level B Harassment for non-explosive sources*—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (*e.g.,* frequency, predictability, duty cycle), the environment (*e.g.,* bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.* 2007, Ellison *et al.* 2012). Based on what the available science indicates and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1 microPascal (μPa) (root mean square (rms)) for continuous (*e.g.,* vibratory pile-driving, DTH) and above 160 dB re 1 μPa (rms) for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources. This take estimation includes disruption of behavioral patterns resulting directly in response to noise exposure (*e.g.,* avoidance), as well as that resulting indirectly from associated impacts such as TTS or masking. ADOT's proposed activity includes the use of continuous (vibratory pile driving/removal and DTH) and impulsive (impact pile driving and DTH) sources, and therefore both the 120 and 160 dB re 1 μPa (rms) thresholds are applicable.

*Level A harassment for non-explosive sources*—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). ADOT's proposed activity includes the use of impulsive (impact pile driving and DTH) and non-impulsive (vibratory pile driving/removal and DTH) sources.

These thresholds are provided in Table 4 below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 4—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

| Hearing group | PTS onset acoustic thresholds * (received level) | |
|---|---|---|
| | Impulsive | Non-impulsive |
| Low-Frequency (LF) Cetaceans | *Cell 1:* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB | *Cell 2:* $L_{E,LF,24h}$: 199 dB. |
| Mid-Frequency (MF) Cetaceans | *Cell 3:* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB | *Cell 4:* $L_{E,MF,24h}$: 198 dB. |
| High-Frequency (HF) Cetaceans | *Cell 5:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB | *Cell 6:* $L_{E,HF,24h}$: 173 dB. |
| Phocid Pinnipeds (PW) (Underwater) | *Cell 7:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB | *Cell 8:* $L_{E,PW,24h}$: 201 dB. |
| Otariid Pinnipeds (OW) (Underwater) | *Cell 9:* $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB | *Cell 10:* $L_{E,OW,24h}$: 219 dB. |

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

**Note:** Peak sound pressure ($L_{pk}$) has a reference value of 1 μPa, and cumulative sound exposure level ($L_E$) has a reference value of 1μPa²s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript "flat" is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

*Ensonified Area*

Here, we describe operational and environmental parameters of the activity that will feed into identifying the area ensonified above the acoustic thresholds, which include source levels and transmission loss coefficient.

The sound field in the project area is the existing background noise plus additional construction noise from the proposed project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.,* impact pile driving, vibratory pile driving, vibratory pile removal, and DTH).

In order to calculate distances to the Level A harassment and Level B harassment sound thresholds for the methods and piles being used in this project, NMFS used acoustic monitoring data from other locations to develop source levels for the various pile types,

sizes and methods (Table 5). Note that piles of differing sizes have different sound source levels (SSLs).

Empirical data from recent ADOT sound source verification (SSV) studies at Ketchikan were used to estimate SSLs for vibratory and impact driving of 30-inch steel pipe piles (Denes *et al.* 2016). Data from Ketchikan was used because of its proximity to this proposed project in Tongass Narrows. However, the use of data from Alaska sites was not appropriate in all instances. Details are described below.

For vibratory driving of 24-inch steel piles, data from a Navy pile driving project in the Puget Sound, WA was reviewed (Navy 2015). From this review, ADOT determined the Navy's suggested source value of 161 dB rms was an appropriate proxy source value, and NMFS concurs. Because the source value of smaller piles of the same general type (steel in this case) are not expected to exceed a larger pile, the same 161 dB rms source value was used for 20-inch steel piles. This assumption conforms with source values presented in Navy (2015) for a project using 16-inch steel piles at Naval Base Kitsap in Bangor, WA.

ADOT used source values of 177 dB SEL and 190 dB rms for impact driving of 24-inch and 20-inch steel piles. These values were determined based on summary values presented in Caltrans (2015) for impact driving of 24-inch steel piles. NMFS concurs that the same source value was an acceptable proxy for impact driving of 20-inch steel piles.

Sound pressure levels in the water column resulting from DTH are not well studied. Because DTH hole creation includes both impulsive and continuous components, NMFS guidance currently recommends that it be treated as a continuous sound for Level B calculations and as an impulsive sound for Level A calculations (Table 11). In the absence of data specific to different hole sizes, current NMFS guidance recommends that calculation of Level B zones for DTH use the same continuous SSL of 167 dB SEL for all hole sizes (Heyvaert and Reyff 2021). Recommended SSLs for 30-inch and 24-inch holes as well as 8-inch holes for tension anchors and micropiles for use in the calculation of Level A harassment thresholds are provided by current NMFS guidance and in Table 5.

TABLE 5—ESTIMATES OF MEAN UNDERWATER SOUND LEVELS GENERATED DURING VIBRATORY AND IMPACT PILE INSTALLATION, DTH, AND VIBRATORY PILE REMOVAL

| Method and pile type<br>Vibratory hammer | SSL at 10 m<br>dB rms | | | Literature source |
|---|---|---|---|---|
| 30-inch steel piles | 162 | | | Denes *et al.* 2016. |
| 24-inch steel piles | 161 | | | Navy 2015. |
| 20-inch steel piles | 161 | | | Navy 2015. |
| DTH of rock sockets and tension anchors | dB rms | | | |
| All pile diameters | 167 | | | Heyvaert and Reyff 2021. |
| DTH of rock sockets and tension anchors | dB SELss | | dB peak | |
| 30-inch rock socket | 164 | | 194 | Reyff and Heyvaert 2019; Reyff 2020; Denes *et al.* 2016. |
| 24-inch rock socket | 159 | | 184 | Heyvaert and Reyff 2021. |
| 8-inch tension anchor/micropile | 144 | | 170 | Reyff 2020. |
| Impact hammer | dB rms | dB SEL | dB peak | |
| 30-inch steel piles | 195 | 181 | 209 | Denes *et al.* 2016. |
| 24-inch steel piles | 190 | 177 | 203 | Caltrans 2015. |
| 20-inch steel piles | 190 | 177 | 202 | Caltrans 2015. |

**Note:** It is assumed that noise levels during pile installation and removal are similar. SEL = sound exposure level; dB peak = peak sound level; rms = root mean square.

Simultaneous use of two impact, vibratory, or DTH hammers, or any combination of those equipment, could occur. Such occurrences are anticipated to be infrequent, would be for short durations on any given day, and ADOT anticipates that no more than two hammers would be operated concurrently. Simultaneous use of two hammers or DTH systems could occur at the same project site, or at two different, but nearby project sites. Simultaneous use of hammers could result in increased SPLs and harassment zone sizes given the proximity of the component driving sites and the physical rules of decibel addition. ADOT anticipates that concurrent use of two hammers producing continuous noise could occur on 44 days, which is half the anticipated number of days of construction (91 days) and represents complete overlap between the two contracts and/or represents use of two hammers by a single contractor. Although it is unlikely that overlap would be complete, ADOT anticipates, and NMFS concurs, this scenario represents the potential worst case scenario, given that a more accurate estimate is not possible, and concurrent operation of hammers would be incidental. Given that the use of more than one hammer for pile installation on the same day (whether simultaneous or not) would increase the number of piles installed per day, this would be anticipated to result in a reduction of the total number of days of pile installation. Table 6 shows how potential scenarios would reduce the total number of pile driving days and weeks. However, as described in the *Marine Mammal Occurrence and Take Calculation and Estimation* section below, ADOT has conservatively calculated take with the assumption that pile driving would occur on all 91 days.

TABLE 6—CALCULATED REDUCTION OF PILE DRIVING DAYS BASED ON PERCENTAGE OF PROJECT DAYS WITH TWO HAMMERS IN USE

| Percent overlap | Days of overlap | Days of work completed during overlap (2 hammers) | Remaining days of work with single hammer | Total number of days of work | Weeks of work |
|---|---|---|---|---|---|
| 0 | 0.0 | 0.0 | 91.0 | 91.0 | 15.2 |
| 10 | 9.1 | 18.2 | 72.8 | 81.9 | 13.7 |
| 20 | 18.2 | 36.4 | 54.6 | 72.8 | 12.1 |
| 30 | 27.3 | 54.6 | 36.4 | 63.7 | 10.6 |
| 40 | 36.4 | 72.8 | 18.2 | 54.6 | 9.1 |
| 50 | 45.5 | 91.0 | 0.0 | 45.5 | 7.6 |

NMFS (2018b) handles overlapping sound fields created by the use of more than one hammer differently for impulsive (impact hammer and Level A harassment zones for drilling with a DTH hammer) and continuous sound sources (vibratory hammer and Level B harassment zones for drilling with a DTH hammer; Table 7) and differently for impulsive sources with rapid impulse rates of multiple strikes per second (DTH) and slow impulse rates (impact hammering) (NMFS 2021). It is unlikely that the two impact hammers would strike at the same instant, and therefore, the SPLs would not be adjusted regardless of the distance between impact hammers. In this case, each impact hammer would be considered to have its own independent Level A harassment and Level B harassment zones.

When two DTH hammers operate simultaneously their continuous sound components overlap completely in time. When the Level B isopleth of one DTH sound source encompasses the isopleth of another DTH sound source, the sources are considered additive and combined using the following rules (Table 7). The method described below was based on one created by Washington State Department of Transportation (WSDOT) and has been updated and modified by NMFS (WSDOT 2020). For addition of two simultaneous DTH hammers, the difference between the two SSLs is calculated, and if that difference is between 0 and 1 dB, 3 dB are added to the higher SSL; if difference is between 2 or 3 dB, 2 dB are added to the highest SSL; if the difference is between 4 to 9 dB, 1 dB is added to the highest SSL; and with differences of 10 or more decibels, there is no addition.

When two continuous noise sources, such as vibratory hammers, have overlapping sound fields, there is potential for higher sound levels than for non-overlapping sources.

When two or more vibratory hammers are used simultaneously, and the isopleth of one sound source encompasses the isopleth of another sound source, the sources are considered additive and source levels are combined using the rules in Table 7, similar to described above for DTH.

TABLE 7—RULES FOR COMBINING SOUND SOURCE LEVELS GENERATED DURING PILE INSTALLATION

| Hammer types | Difference in SSL | Level A zones | Level B zones |
|---|---|---|---|
| Vibratory, Impact | Any | Use impact zones | Use largest zone. |
| Impact, Impact | Any | Use zones for each pile size and number of strikes. | Use zone for each pile size. |
| Vibratory, Vibratory or DTH, DTH | 0 or 1 dB | Add 3 dB to the higher source level | Add 3 dB to the higher source level. |
| | 2 or 3 dB | Add 2 dB to the higher source level | Add 2 dB to the higher source level. |
| | 4 to 9 dB | Add 1 dB to the higher source level | Add 1 dB to the higher source level. |
| | 10 dB or more | Add 0 dB to the higher source level | Add 0 dB to the higher source level. |

During pile driving, it is common for pile installation to start and stop multiple times as each pile is adjusted and its progress is measured and documented, though as stated above, for short durations, it is anticipated that multiple hammers could be in use simultaneously. Following an approach modified from WSDOT in their Biological Assessment manual (WSDOT 2020) and described in Table 8, decibel addition calculations were carried out for possible combinations of pile driving and DTH throughout the project area. The source levels included in Table 8 are used to estimate the Level A harassment zones and the Level B harassment zones.

TABLE 8—COMBINED SSLS (dB at 10 m) GENERATED DURING PILE INSTALLATION AND REMOVAL FOR COMBINATIONS OF TWO PIECES OF EQUIPMENT: IMPACT HAMMER, VIBRATORY HAMMER, AND DOWN-THE-HOLE DRILL

| Method | | | Vibratory (RMS) | | | DTH (RMS) | | | DTH (SEL) | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | Pile diameter | | 20 | 24 | 30 | 8 | 24 | 30 | 8 | 24 | 30 |
| | | SSL | 161 | 161 | 162 | 167 | 167 | 167 | 144 | 159 | 164 |
| Vibratory (RMS) | 20 | 161 | 164 | 164 | 165 | 168 | 168 | 168 | ..... | ..... | ..... |
| | 24 | 161 | 164 | 164 | 165 | 168 | 168 | 168 | ..... | ..... | ..... |
| | 30 | 162 | 165 | 165 | 165 | 168 | 168 | 168 | ..... | ..... | ..... |
| DTH (RMS) | 8 | 167 | 168 | 168 | 168 | 170 | 170 | 170 | ..... | ..... | ..... |

TABLE 8—COMBINED SSLS (dB at 10 m) GENERATED DURING PILE INSTALLATION AND REMOVAL FOR COMBINATIONS OF TWO PIECES OF EQUIPMENT: IMPACT HAMMER, VIBRATORY HAMMER, AND DOWN-THE-HOLE DRILL—Continued

| Method | | | Vibratory (RMS) | | | DTH (RMS) | | | DTH (SEL) | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | Pile diameter | | 20 | 24 | 30 | 8 | 24 | 30 | 8 | 24 | 30 |
| | | SSL | 161 | 161 | 162 | 167 | 167 | 167 | 144 | 159 | 164 |
| | 24 | 167 | 168 | 168 | 168 | 170 | 170 | 170 | ..... | ..... | ..... |
| | 30 | 167 | 168 | 168 | 168 | 170 | 170 | 170 | ..... | ..... | ..... |
| DTH (SEL) | 8 | 144 | ..... | ..... | ..... | ..... | ..... | ..... | 147 | 159 | 164 |
| | 24 | 159 | ..... | ..... | ..... | ..... | ..... | ..... | 159 | 162 | 165 |
| | 30 | 164 | ..... | ..... | ..... | ..... | ..... | ..... | 164 | 165 | 167 |

No addition is warranted for impact pile driving in combination with vibratory or impact pile driving or DTH (NMFS 2021).

*Level B Harassment Zones*

Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater TL is:

TL = B * Log10 (R1/R2),

Where:

TL = transmission loss in dB
B = transmission loss coefficient; for practical spreading equals 15
R1 = the distance of the modeled SPL from the driven pile, and
R2 = the distance from the driven pile of the initial measurement

The recommended TL coefficient for most nearshore environments is the practical spreading value of 15. This value results in an expected propagation environment that would lie between spherical and cylindrical spreading loss conditions, which is the most appropriate assumption for ADOT's proposed activity in the absence of specific modelling.

All Level B harassment isopleths are reported in Table 9 and Table 10 below. It should be noted that based on the geography of Tongass Narrows and the surrounding islands, sound would not reach the full distance of the Level B harassment isopleth in most directions. Generally, due to interaction with land, only a thin slice of the possible area is ensonified to the full distance of the Level B harassment isopleth.

The size of the Level B harassment zone during concurrent operation of two vibratory or DTH hammers would depend on the combination of sound sources and the decibel addition of two hammers producing continuous noise. Table 9 shows the distances to Level B harassment isopleths during simultaneous hammering from two sources, based on the combined SSL. Because the calculated Level B harassment isopleths for two sources are dependent upon the combined SSL, the Level B harassment zone for each combined sound source level included in Table 9 is consistent, regardless of the equipment combination. Please refer to Table 8 to determine which sound sources apply to each Combined SSL.

As noted previously, pile installation often involves numerous stops and starts of the hammer for each pile. Therefore, decibel addition is applied only when the adjacent continuous sound sources experience overlapping sound fields, which generally requires close proximity of driving locations.

TABLE 9— LEVEL B HARASSMENT ISOPLETHS FOR MULTIPLE VIBRATORY HAMMER ADDITIONS

| Combined SSL (dB) | Level B harassment isopleth (m) [a] |
|---|---|
| 164 | 8,577 |
| 165 | 10,000 |
| 166 | 11,659 |
| 167 | 13,594 |
| 168 | 15,849 |
| 169 | 18,478 |
| 170 | 21,544 |

[a] These larger zones are truncated to the southeast by islands, which prevent propagation of sound in that direction beyond the confines of Tongass Narrows. To the northwest of Tongass Narrows, combined sound levels that exceed 167 dB rms extend into Clarence Strait before attenuating to sound levels that are anticipated to be below 120 dB rms.

TABLE 10—LEVEL B HARASSMENT ISOPLETHS FOR SINGLE HAMMER USE BY ACTIVITY AND PILE SIZE

| Activity | Pile diameter (inch) | Level B harassment isopleth (m) |
|---|---|---|
| Vibratory Installation | 30 | 6,310 |
| | 24 | 5,412 |
| | 20 | ..... |
| Vibratory Removal | 24 | ..... |
| DTH Rock Sockets | 30 | 13,594 |

TABLE 10—LEVEL B HARASSMENT ISOPLETHS FOR SINGLE HAMMER USE BY ACTIVITY AND PILE SIZE—Continued

| Activity | Pile diameter (inch) | Level B harassment isopleth (m) |
|---|---|---|
| | 24 | ..... |
| DTH Tension Anchor/Micropile | 8 | ..... |
| Impact Installation | 30 | 2,154 |
| | 24 | 1,000 |
| | 20 | 1,000 |

*Level A Harassment Zones*

When the NMFS Technical Guidance (2016) was published, in recognition of the fact that ensonified area/volume could be more technically challenging to predict because of the duration component in the new thresholds, we developed a User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to help predict takes. We note that because of some of the assumptions included in the methods used for these tools, we anticipate that isopleths produced are typically going to be overestimates of some degree, which may result in some degree of overestimate of takes by Level A harassment. However, these tools offer the best way to predict appropriate isopleths when more sophisticated 3D modeling methods are not available, and NMFS continues to develop ways to quantitatively refine these tools, and will qualitatively address the output where appropriate. For stationary sources such as pile driving or removal and DTH using any of the methods discussed above, NMFS User Spreadsheet predicts the closest distance at which, if a marine mammal remained at that distance the whole duration of the activity, it would incur PTS. Inputs used in the User Spreadsheet are reported in Table 11 and Table 12, and the resulting isopleths are reported below in Table 13 and Table 14. Pile installation and removal can occur at variable rates, from a few minutes one day to many hours the next. ADOT anticipates that one permanent pile would be installed per day on 27 non-consecutive days, two temporary piles would be installed per day on 10 non-consecutive days, and two temporary piles would be removed per day on 10 days.

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**Table 11– NMFS User Spreadsheet Inputs For Single Hammer Use**

| Equipment Type | Vibratory Pile Driver (Installation of 30-inch steel piles) | Vibratory Pile Driver (Installation and Removal of 24-inch steel piles) | Vibratory Pile Driver (Installation of 20-inch steel piles) | DTH Rock Sockets (30-inch) | DTH Rock Sockets (24-inch) | DTH Tension Anchor (8-inch) | Impact Pile Driver (30-inch steel piles) | Impact Pile Driver (24-inch steel piles) | Impact Pile Driver (20-inch steel piles) |
|---|---|---|---|---|---|---|---|---|---|
| Spreadsheet Tab Used | A.1) Vibratory Pile Driving | A.1) Vibratory Pile Driving | A.1) Vibratory Pile Driving | E.2) DTH Pile Driving | E.2) DTH Pile Driving | E.2) DTH Pile Driving | E.1) Impact Pile Driving | E.1) Impact Pile Driving | E.1) Impact Pile Driving |
| Weighting Factor Adjustment (kHz) | 2.5 | 2.5 | 2.5 | 2 | 2 | 2 | 2 | 2 | 2 |
| SSL | 162[a] | 161[a] | 161[a] | 164[b] | 159[b] | 144[b] | 181[b] | 177[b] | 177[b] |
| Activity duration (hours) within 24 hours | 1 | 1 | 1 | 1 – 10 | 1 – 10 | 2-4 | | | |
| Number of piles per day | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |
| Strike rate strikes per second | | | | 15 | 15 | 25.83 | | | |
| Number of strikes per pile | | | | | | | 50 | 50 | 50 |

Propagation loss coefficient in all cases is 15.

* Duration estimates for DTH are based on assumption of multiple rock sockets and tension anchors being installed each day, with the maximum duration time for installation per day predicted to be 10 hours for rock socket DTH and 4 hours for tension anchor DTH.

** For specifics regarding the number of strikes and number of piles would be used in a given situation, please refer to Table 1.

[a] dB rms at 10m

[b] dB SEL at 10m

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Regarding implications for Level A harassment zones when two vibratory hammers are operating concurrently, given the small size of the estimated Level A harassment isopleths for all hearing groups during vibratory pile driving, the zone of any two hammers would not be expected to overlap. Therefore, compounding effects of multiple vibratory hammers operating concurrently are not anticipated, and NMFS has treated each source independently.

Regarding implications for Level A harassment zones when one vibratory hammer and one DTH hammer are operating concurrently, combining isopleths for these sources is difficult for a variety of reasons. First, vibratory pile driving relies upon non-impulsive PTS thresholds, while DTH/rock hammers use impulsive thresholds. Second, vibratory pile driving account for the duration to drive a pile, while DTH account for strikes per pile. Thus, it is difficult to measure sound on the same scale and combine isopleths from these impulsive and non-impulsive, continuous sources. Therefore, NMFS has treated each source independently at this time.

Regarding the operation of two DTH hammers concurrently, since DTH hammers are capable of multiple strikes per second, there is potential for multiple DTH/rock hammer sources' isopleths to overlap in space and time (a higher strike rate indicates a greater potential for overlap). Therefore, NMFS has calculated distances to Level A harassment isopleths, by hearing group

for simultaneous use of two DTH hammers (Table 14), using NMFS' User Spreadsheet. The inputs for these calculations are outlined in Table 12. When the Level A isopleth of one DTH sound source encompasses the isopleth of another DTH sound source, the sources are considered additive and combined using the rules in Table 7 as described above. The number of piles per day is altered to reflect only a single pile for all those that overlap in space and time (*i.e.,* no double counting of overlapping piles). The maximum strike rate and duration of the two DTH systems is used in the User Spreadsheet calculations.

TABLE 12—NMFS USER SPREADSHEET INPUTS FOR SIMULTANEOUS USE OF TWO DTH HAMMERS

| Spreadsheet tab used | E.2) DTH pile driving |
|---|---|
| Weighting Factor Adjustment (kHz) | 2 |
| SSL (dB SEL at 10m): [a] | |
| 8-in pile/8-in pile | 147 |
| 8-in pile, 24-in pile | 159 |
| 8-in pile, 30-in pile | 164 |
| 24-in pile, 24-in pile | 162 |
| 24-in pile, 30-in pile | 165 |
| 30-in pile, 30-in pile | 167 |
| Activity duration (minutes) within 24 hours [b] | 240 |
| Number of piles per day [b] | 1 |
| Strike rate (strikes per second) | [c] 15 or 25.83 |

[a] SSL reflects the combined SSLs calculated in Table 8.
[b] ADOT anticipates that DTH could occur at one site for up to 10 hours (600 minutes) per day, and overlap between two sites could occur for up to 4 hours (240 minutes) per day. Since the potential overlap in sources is accounted for in the SSL adjustment, and the total potential duration (even with two hammers) is accounted for in the ''Activity duration (minutes) within 24 hours,'' the ''Number of piles per day'' is assumed to be 1.
[c] 25.83 for combinations that include 8-in piles. 15 for all other combinations.

Level A harassment thresholds for impulsive sound sources (impact pile driving and DTH) are defined for both SELcum and Peak SPL with the threshold that results in the largest modeled isopleth for each marine mammal hearing group used to establish the Level A harassment isopleth. In this project, Level A harassment isopleths based on SELcum were always larger than those based on Peak SPL (for both single hammer use and simultaneous use of two hammers). It should be noted that there is a duration component when calculating the Level A harassment isopleth based on SELcum, and this duration depends on the number of piles that would be driven in a day and strikes per pile. For some activities, ADOT has proposed to drive variable numbers of piles per day throughout the project (See ''Average Piles per Day (Range)'' in Table 1), and determine at the beginning of each pile driving day, the maximum number or duration piles would be driven that day. Here, this flexibility has been accounted for by modeling multiple durations for the activity, and determining the relevant isopleths.

TABLE 13—DISTANCES TO LEVEL A HARASSMENT ISOPLETHS, BY HEARING GROUP, AND AREA OF LEVEL A HARASSMENT ZONES, FOR SINGLE HAMMER USE DURING PILE INSTALLATION AND REMOVAL

| Activity | Pile diameter(s) | Minutes per pile or strikes per pile | Level A harassment isopleth (m) | | | | | Level A harassment areas (km²) all hearing groups [a] |
|---|---|---|---|---|---|---|---|---|
| | | | LF | MF | HF | PW | OW | |
| Vibratory Installation | 30 | 60 minutes | 8 | 1 | 12 | 5 | 1 | <0.1 |
| | [b] 24 | 60 minutes | 7 | 1 | 11 | 5 | 1 | <0.1 |
| | 20 | 60 minutes | 7 | 1 | 11 | 5 | 1 | <0.1 |
| Vibratory Removal | 24 | 60 minutes | 7 | 1 | 11 | 5 | 1 | <0.1 |
| DTH Rock Sockets | 30 | 60 minutes | 773 | 28 | 920 | 414 | 31 | <0.9 |
| | | 300 minutes | 2,258 | 81 | 2,690 | 1,209 | 88 | <3.5 |
| | | 600 minutes | 3,584 | 128 | 4,269 | 1,918 | 140 | <6.6 |
| | 24 | 60 minutes | 359 | 13 | 427 | 192 | 15 | <0.2 |
| | | 300 minutes | 1,048 | 38 | 1,249 | 561 | 41 | <1.4 |
| | | 600 minutes | 1,664 | 60 | 1,982 | 891 | 65 | <2.4 |
| DTH Tension Anchor | 8 | 120 minutes | 82 | 3 | 98 | 44 | 4 | <0.1 |
| | | 240 minutes | 130 | 5 | 155 | 70 | 6 | <0.1 |
| Impact Installation | 30 | 50 strikes | 100 | 4 | 119 | 54 | 4 | <0.1 |
| | 24 | 50 strikes | 54 | 2 | 65 | 29 | 3 | <0.1 |
| | 20 | 50 strikes | 54 | 2 | 65 | 29 | 3 | <0.1 |

[a] Please refer to Table 6–4 of ADOT's IHA application for hearing group-specific areas.
[b] Includes vibratory installation and removal.

TABLE 14—DISTANCES TO LEVEL A HARASSMENT ISOPLETHS, BY HEARING GROUP FOR SIMULTANEOUS USE OF TWO DTH HAMMERS

| Activity combination | Level A harassment isopleth (m) | | | | |
|---|---|---|---|---|---|
| | LF | MF | HF | PW | OW |
| 8-in pile, 8-in pile | 206 | 7 | 245 | 110 | 8 |
| 8-in pile, 24-in pile | 1,297 | 46 | 1,545 | 694 | 51 |
| 8-in pile, 30-in pile | 2,796 | 99 | 3,329 | 1,496 | 109 |
| 24-in pile, 24-in pile | 1,431 | 51 | 1,705 | 766 | 56 |
| 24-in pile, 30-in | 2,268 | 81 | 2,702 | 1,214 | 88 |
| 30-in pile, 30-in pile | 3,084 | 110 | 3,673 | 1,650 | 120 |

Regarding implications for impact hammers used in combination with a vibratory hammer or DTH drill, the likelihood of these multiple sources' isopleths to completely overlap in time is slim primarily because impact pile driving is intermittent. Furthermore, non-impulsive, continuous sources rely upon non-impulsive TTS/PTS thresholds, while impact pile driving uses impulsive thresholds, making it difficult to calculate isopleths that may overlap from impact driving and the simultaneous action of a non-impulsive continuous source or one with multiple strikes per second. Thus, with such slim potential for multiple different sources' isopleths to overlap in space and time, specifications should be entered as ''normal'' into the User Spreadsheet for each individual source separately.

*Marine Mammal Occurrence and Take Calculation and Estimation*

In this section we provide the information about the presence, density, or group dynamics of marine mammals that will inform the take calculations. Additionally, we describe how the occurrence information is brought together to produce a quantitative take estimate for each phase. A summary of proposed take, including as a percentage of population for each of the species, is shown in Table 15.

*Steller Sea Lion*

Steller sea lion abundance in the Tongass Narrows area is not well known. No systematic studies of Steller sea lions have been conducted in or near the Tongass Narrows area. Steller sea lions are known to occur year-round and local residents report observing Steller sea lions approximately once or twice per week (based on communication outlined in Section 6 of ADOT's IHA application). Abundance appears to increase during herring runs (March to May) and salmon runs (July to September). Group sizes may reach up to 6 to 10 individuals (Freitag 2017 as cited in 83 FR 37473; August 1, 2018), though groups of up to 80 individuals have been observed (HDR, Inc. 2003).

ADOT conservatively estimates that one group of 10 Steller sea lions may be present in the project area each day, but this occurrence rate may as much as double (20 Steller sea lions per day) during periods of increased abundance associated with the herring and salmon runs (March to May and July to September). Therefore, ADOT anticipates that two large groups (20 individuals) may be taken by Level B harassment each day during these months. To be conservative, we assume all 91 days of work could be completed during these months of increased abundance and thus estimate 1,820 potential takes by Level B harassment of Steller sea lions in Tongass Narrows (*i.e.,* 2 groups of 10 sea lions per day × 91 construction days = 1,820 takes by Level B harassment; Table 15).

ADOT estimates that simultaneous use of two hammers (any combination) could occur on up to 44 days during the project. On those days, Level B harassment zones would extend into Clarence Strait. Steller sea lions are known to swim across Clarence Strait and to use offshore areas with deeper waters, although no estimates of at-sea density or abundance in Clarence Strait are available. Therefore, ADOT has conservatively estimated, and NMFS concurs, that during the 44 days with potential simultaneous use of two hammers, a group of 10 Steller sea lions may occur in the portion of the Level B harassment zone in Clarence Strait each day (one group of 10 sea lions per day × 44 days = 440 individuals). Therefore, the preliminary sum of estimated takes by Level B harassment of Steller sea lions between Tongass Narrows and Clarence Strait is 2,260 (1,820 + 440 = 2,260 takes by Level B harassment).

The largest Level A harassment zone for otariid pinnipeds could extend 140 m from the noise source for 10 hours of DTH using a single hammer, or 120 m from the noise source for 4 hours of DTH using two hammers for 30-in piles simultaneously. (As noted previously, ADOT estimates that simultaneous use of any two hammer types would occur on no more than 44 days). Zones for shorter durations and other activities would be smaller (Table 13). For some DTH activities, the estimated Level A harassment zone is larger than the proposed shutdown zone, and therefore, some Level A harassment could occur. Further, while unlikely, it is possible that a Steller sea lion could enter a shutdown zone without detection given the various obstructions along the shoreline, and remain in the zone long enough to be taken by Level A harassment before being observed and a shutdown occurring. ADOT therefore requests, and NMFS proposes to authorize, one take by Level A harassment on each of the 91 construction days (91 takes by Level A harassment). Take by Level B harassment proposed for authorization was calculated as the total calculated Steller sea lion takes by Level B harassment minus the takes by Level A harassment (2,260 takes − 91 takes by Level A harassment) for a total of 2,169 takes by Level B harassment. Therefore, ADOT requests, and NMFS proposes to authorize, 91 takes of Steller sea lion by Level A harassment and 2,169 takes of Steller sea lion by Level B harassment (2,260 total takes of Steller sea lion; Table 15).

*Harbor Seal*

Harbor seal densities in the Tongass Narrows area are not well known. No systematic studies of harbor seals have been conducted in or near Tongass Narrows. They are known to occur year-round with little seasonal variation in abundance (Freitag 2017 as cited in 83 FR 37473; August 1, 2018) and local experts estimate that there are about 1 to 3 harbor seals in Tongass Narrows every day, in addition to those that congregate near the seafood processing plants and fish hatcheries. NMFS has indicated that the maximum group size in Tongass Narrows is three individuals (83 FR 22009; May 11, 2018); however, ADOT monitoring in March 2021

observed several groups of up to 5 individuals. Based on this knowledge, the expected maximum group size in Tongass Narrows is five individuals. Harbor seals are known to be curious and may approach novel activity. For these reasons ADOT conservatively estimates that up to two groups of 5 harbor seals per group could be taken by Level B harassment due to project-related underwater noise each construction day for a total of 910 takes by Level B harassment of harbor seal in Tongass Narrows (*i.e.,* 2 groups of 5 harbor seals per day × 91 construction days = 910 total takes by Level B harassment of harbor seal; Table 15).

As noted above, ADOT estimates that simultaneous use of two hammers (any combination) could occur on up to 44 days during the project. On those days, Level B harassment zones would extend into Clarence Strait. Harbor seals are known to swim across Clarence Strait, although no estimates of at-sea density or abundance in Clarence Strait are available. It is likely that harbor seal abundance in Clarence Strait is lower than in Tongass Narrows, as harbor seals generally prefer nearshore waters. Therefore, ADOT has conservatively estimated, and NMFS concurs, that during the 44 days with potential simultaneous use of two hammers, a group of 5 harbor seals may occur in the portion of the Level B harassment zone in Clarence Strait each day (one group of 5 harbor seals per day × 44 days = 220 individuals). Therefore, the sum of total estimated takes by Level B harassment of harbor seals between Tongass Narrows and Clarence Strait is 1,130 (910 + 220 = 1,130 takes by Level B harassment).

The largest Level A harassment zone for harbor seals could extend 1,918 m from the noise source for 10 hours of DTH using a single hammer, or 1,640 m from the noise source for 4 hours of DTH using two hammers for 30-in piles simultaneously. (As noted previously, ADOT estimates that simultaneous use of any two hammer types would occur on no more than 44 days). Zones for shorter durations and other activities would be smaller (Table 13). Due to practicability concerns, NMFS proposes to require a 200 m shutdown zone for harbor seals during 24-in and 30-in DTH activities (Table 16). Therefore, for some DTH activities, the estimated Level A harassment zone is larger than the proposed shutdown zone, and therefore, some Level A harassment could occur. Harbor seals may enter and remain within the area between the Level A harassment zone and the shutdown zone for a duration long enough to be taken by Level A harassment. Additionally, while unlikely, it is possible that a harbor seal could enter a shutdown zone without detection given the various obstructions along the shoreline, and remain in the zone for a duration long enough to be taken by Level A harassment before being observed and a shutdown occurring.

To calculate take by Level A harassment, ADOT first calculated the ratio of the maximum Level A harassment isopleth for 30-in DTH using a single hammer minus the shutdown zone isopleth (1,918 m − 200 m shutdown zone = 1,718 m) to the Level B harassment zone isopleth (13,594 m; 1,718 m/13,594 m = 0.1264). ADOT multiplied the resulting ratio by the total potential take in Tongass Narrows, resulting in 116 takes by Level A harassment (*i.e.,* 910 takes by Level B harassment × 0.1264 = 116 takes by Level A harassment). NMFS reviewed, and concurs with and adopts this method. (Potential operation of two DTH hammers for 24-in/30-in or 30-in/30-in pile combinations would result in larger Level A harassment isopleths than 1,918 m, however, such concurrent work would rarely occur, if at all, and therefore, NMFS expects that calculating Level A harassment take using those zones would be overly conservative and unrealistic. Moreover, since the method used above assumes 30-inch DTH on all days it provided a precautionary cushion since activities with smaller Level A harassment zone sizes will occur on many days.) Take by Level B harassment proposed for authorization was calculated as the total calculated harbor seal takes by Level B harassment minus the takes by Level A harassment (1,130 takes − 116 takes by Level A harassment) for a total of 1,014 takes by Level B harassment. ADOT therefore requests, and NMFS proposes to authorize, 116 takes of harbor seal by Level A harassment and 1,014 takes of harbor seal by Level B harassment (1,130 total takes of harbor seal, Table 15).

*Harbor Porpoise*

Harbor porpoises are non-migratory; therefore, our occurrence estimates are not dependent on season. Freitag (2017 as cited in 83 FR 37473; August 1, 2018) observed harbor porpoises in Tongass Narrows zero to one time per month. Harbor porpoises observed in the project vicinity typically occur in groups of one to five animals with an estimated maximum group size of eight animals (83 FR 37473, August 1, 2018, Solstice 2018). ADOT's 2020 and 2021 monitoring program in Tongass Narrows did not result in sightings of this species; however, ADOT assumes an occurrence rate of one group per month in the following take estimations. For our analysis, we are considering a group to consist of five animals. Based on Freitag (2017), and supported by the reports of knowledgeable locals as described in ADOT's application, ADOT estimates that one group of five harbor porpoises could enter Tongass Narrows and potentially taken by Level B harassment due to project-related noise each month for a total of 15 potential harbor porpoise takes by Level B harassment in Tongass Narrows (*i.e.,* 1 group of 5 individuals × 3 months (91 days) = 15 harbor porpoises).

As noted above, ADOT estimates that simultaneous use of two hammers (any combination) could occur on up to 44 days during the project. On those days, the Level B harassment zone would extend into Clarence Strait. Harbor porpoises are known to swim across Clarence Strait and to use other areas of deep, open waters. Dahlheim *et al.* (2015) estimated a density of 0.02 harbor porpoises/km$^2$ in an area that encompasses Clarence Strait. ADOT estimates, and NMFS concurs that during the 44 days with potential simultaneous use of two hammers, 17 harbor porpoises (0.02 harbor porpoises/km$^2$ × 18.5 km$^2$ × 44 days = 17 harbor porpoises) may occur in the portion of the Level B harassment zone in Clarence Strait during the project (though ADOT and NMFS anticipate that this is a conservative estimate, given the entire 18.5 km$^2$ area would rarely be ensonified above the Level B harassment threshold). Therefore, the sum of total estimated takes by Level B harassment of harbor porpoise between Tongass Narrows and Clarence Strait is 32 (15 + 17 = 32 takes by Level B harassment).

The largest Level A harassment zone for harbor porpoises extends 4,269 m from the noise source for 10 hours of DTH using a single hammer, and 3,673 m from the noise source for 4 hours of DTH using two hammers for 30-in piles simultaneously. (As noted previously, ADOT estimates that simultaneous use of any two hammer types would occur on no more than 44 days). Zones for shorter durations and other activities would be smaller (Table 13). Due to practicability concerns, NMFS proposes to require a 500 m shutdown zone for high frequency cetaceans during 24-in and 30-in DTH activities. Therefore, for some DTH activities, the estimated Level A harassment zone is larger than the proposed shutdown zone, and therefore, some Level A harassment could occur. Harbor porpoises may enter and remain within the area between the Level A harassment zone

and the shutdown zone for a duration long enough to be taken by Level A harassment. Additionally, given the large size of required shutdown zones for some activities and the cryptic nature of harbor porpoises, it is possible that a harbor porpoise could enter a shutdown zone without detection and remain in the zone for a duration long enough to be taken by Level A harassment before being observed and a shutdown occurring.

To calculate take by Level A harassment, ADOT first calculated the ratio of the maximum Level A harassment isopleth for 30-in DTH using a single hammer minus the shutdown zone isopleth (4,269 m − 500 m = 3,769 m) to the Level B harassment zone isopleth (13,594 m; 3,769/13,594 = 0.2773). ADOT multiplied the resulting ratio by the total potential take in Tongass Narrows, resulting in 5 takes by Level A harassment (*i.e.,* 15 takes by Level B harassment × 0.2773 = 5 takes by Level A harassment). NMFS reviewed and concurs with this method. (Potential operation of two DTH hammers for 24-in/30-in or 30-in/30-in pile combinations would result in larger Level A harassment isopleths than 4,269 m, however, such concurrent work would rarely occur, if at all, and therefore, as described above, NMFS expects that calculating Level A harassment take using those zones is unnecessary.) Take by Level B harassment proposed for authorization was calculated as the total calculated harbor porpoise takes by Level B harassment minus the takes by Level A harassment (32 takes − 5 takes by Level A harassment) for a total of 27 takes by Level B harassment. ADOT therefore requests and NMFS proposes to authorize 5 takes by Level A harassment and 27 takes by Level B harassment (32 total takes of harbor porpoise, Table 15).

*Dall's Porpoise*

Dall's porpoises are expected to only occur in the project area a few times per year. Their relative rarity is supported by Jefferson *et al.'s* (2019) presentation of historical survey data showing very few sightings in the Ketchikan area and conclusion that Dall's porpoise generally are rare in narrow waterways, like the Tongass Narrows. ADOT's monitoring program from 2020 and 2021 recorded one sighting of 6 individuals over 23 days of observation, 16 days of observations with no sightings, and two sightings of 10 individuals in 14 days of observation; this equates to one sighting every approximately 17 days (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d) or approximately two sightings per month. This species is non-migratory; therefore, the occurrence estimates are not dependent on season. ADOT anticipates that one large Dall's porpoise pod (12 individuals) may be present in the project area and exposed to project related underwater noise twice each month during 3 months of construction (91 days rounded to 3 months) for a total of 72 potential takes by Level B harassment in Tongass Narrows (*i.e.,*2 groups of 12 Dall's porpoises per month × 3 months = 72 potential takes by Level B harassment).

As noted above, ADOT estimates that simultaneous use of two hammers (any combination) could occur on up to 44 days during the project. On those days, the Level B harassment zone would extend into Clarence Strait, where Dall's porpoises are known to occur. Jefferson *et al.* (2019) estimated an average density of 0.19 Dall's porpoises/km$^2$ in Southeast Alaska. ADOT estimates, and NMFS concurs, that during the 44 days with potential simultaneous use of two hammers, 155 Dall's porpoises (0.19 Dall's porpoises/km$^2$ × 18.5 km$^2$ × 44 days = 155 Dall's porpoises) may occur in the portion of the Level B harassment zone in Clarence Strait during the project (though ADOT and NMFS anticipate that this is a conservative estimate, given the entire 18.5 km$^2$ area would rarely be ensonified above the Level B harassment threshold). Therefore, the sum of total estimated takes by Level B harassment of harbor porpoise between Tongass Narrows and Clarence Strait is 227 (72 + 155 = 227 takes by Level B harassment).

The largest Level A harassment zone for Dall's porpoises extends 4,269 m from the noise source for 10 hours of DTH using a single hammer, and m from the noise source for 4 hours of DTH using two hammers for 30-in piles simultaneously. (As noted previously, ADOT estimates that simultaneous use of any two hammer types would occur on no more than 44 days). Zones for shorter durations and other activities would be smaller (Table 13). Due to practicability concerns, NMFS proposes to require a 500 m shutdown zone for high frequency cetaceans during 24-in and 30-in DTH activities. Therefore, for some DTH activities, the estimated Level A harassment zone is larger than the proposed shutdown zone, and therefore, some Level A harassment could occur. Dall's porpoises may enter and remain within the area between the Level A harassment zone and the shutdown zone and be exposed to sound levels for a duration long enough to be taken by Level A harassment. Additionally, given the large size of the required shutdown zones for some activities, it is possible that a Dall's porpoise could enter a shutdown zone without detection and remain in the zone for a duration long enough to taken by Level A harassment before being observed and a shutdown occurring.

To calculate take by Level A harassment, ADOT first calculated the ratio of the maximum Level A harassment isopleth for 30-in DTH using a single hammer minus the shutdown zone isopleth (4,269 m − 500 m = 3,769 m) to the Level B harassment zone isopleth (13,594 m; 3,769/13,594 = 0.2773). ADOT multiplied the resulting ratio by the total potential take in Tongass Narrows, resulting in 20 takes by Level A harassment (*i.e.,* 72 takes by Level B harassment × 0.2773 = 20 takes by Level A harassment). NMFS revised and concurs with this method. (Potential operation of two DTH hammers for 24-in/30-in or 30-in/30-in pile combinations would result in larger Level A harassment isopleths than 4,269 m, however, such concurrent work would rarely occur, if at all, and therefore, as described above, NMFS expects that calculating Level A harassment take using those zones is unnecessary.) Take by Level B harassment proposed for authorization was calculated as the total calculated Dall's porpoise takes by Level B harassment minus the takes by Level A harassment (227 takes − 20 takes by Level A harassment) for a total of 207 takes by Level B harassment. ADOT therefore requests and NMFS proposes to authorize 20 takes by Level A harassment, and 207 takes by Level B harassment (227 total takes of Dall's porpoise, Table 15).

*Pacific White-Sided Dolphin*

Pacific white-sided dolphins do not generally occur in the shallow, inland waterways of Southeast Alaska. There are no records of this species occurring in Tongass Narrows, and it is uncommon for individuals to occur in the proposed project area. However, historical sightings in nearby areas (Dahlheim and Towell 1994; Muto *et al.* 2018) and recent fluctuations in distribution and abundance mean it is possible the species could be present.

To account for the possibility that this species could be present in the project area, ADOT conservatively estimates, and NMFS concurs, that one large group (92 individuals) of Pacific white-sided dolphins may be taken by Level B harassment in Tongass Narrows during the proposed activity.

As noted above, ADOT estimates that simultaneous use of two hammers (any combination) could occur on up to 44 days during the project. On those days, the Level B harassment zone would

extend into Clarence Strait. However, no additional takes of Pacific white-sided dolphin are anticipated to occur due to simultaneous use of two hammers, given that Pacific white-sided dolphins are uncommon in the project area. Therefore, NMFS is proposing to authorize 92 takes by Level B harassment of Pacific white-sided dolphins.

ADOT did not request, nor does NMFS propose to authorize take by Level A harassment for this activity given that Pacific white-sided dolphins are uncommon in the project area. Further, considering the small Level A harassment zones for mid-frequency cetaceans (Table 13 and Table 14) in comparison to the required shutdown zones, it is unlikely that a Pacific white-sided dolphin would enter and remain within the area between the Level A harassment zone and the shutdown zone for a duration long enough to be taken by Level A harassment.

*Killer Whale*

Killer whales are observed in Tongass Narrows irregularly with peaks in abundance between May and July. During 7 months of intermittent marine mammal monitoring (October 2020–February 2021; May–June 2021), there were five killer whale sightings in 4 months (November, February, May, June) totaling 22 animals; sightings occurred on 5 out of 88 days of monitoring (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). Pod sizes ranged from two to eight animals (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). Previous incidental take authorizations in the Ketchikan area have estimated killer whale occurrence in Tongass Narrows at one pod per month, except during the peak period of May to July when estimates have included two pods per month (Freitag 2017 as cited in 83 FR 37473; August 1, 2018 and 83 FR 34134; July 17, 2019).

As noted above, ADOT estimates that simultaneous use of two hammers (any combination) could occur on up to 44 days during the project. On those days, the Level B harassment zone would extend into Clarence Strait. In estimating take by Level B harassment, ADOT assumed a pod size of 12 killer whales, that all 91 days of work would occur between May and July during the peaks in abundance, and that therefore, 2 pods may occur within the Level B harassment zone (including both Tongass Narrows and Clarence Strait) during each month of work, for a total of 72 takes by Level B harassment (2 groups × 12 individuals × 3 months = 72 killer whales). Therefore, ADOT estimates that a total of 72 killer whales may be taken by Level B harassment (*i.e.,* 2 pods of 12 individuals per month × 3 months (91 days) = 72 takes by Level B harassment). NMFS reviewed and concurs with this method, and proposes to authorize 72 takes by Level B harassment of killer whale.

ADOT did not request, nor does NMFS propose to authorize take by Level A harassment of killer whales for this activity. Considering the small Level A harassment zones for mid-frequency cetaceans (Table 13 and Table 14) in comparison to the required shutdown zones, it is unlikely that a killer whale would enter and remain within the area between the Level A harassment zone and the shutdown zone for a duration long enough to be taken by Level A harassment.

*Humpback Whale*

As discussed in the Description of Marine Mammals in the Area of Specified Activities section, locals have observed humpback whales an average of about once per week in Tongass Narrows, but there is evidence to suggest occurrence may be higher during some periods of the year. The December 19, 2019 Biological Opinion stated that based on observations by local experts, approximately one group of two individuals would occur in Tongass Narrows during ADOT's activity two times per seven days during pile driving, pile removal, and DTH activities throughout the year. The assumption was based on differences in abundance throughout the year, recent observations of larger groups of whales present during summer, and a higher than average frequency of occurrence in recent months (NMFS 2019). ADOT's 2020 and 2021 monitoring program documented a similar sighting rate, with 30 humpback whale sightings over 53 days of in-water pile driving; some of the sightings were believed to be repeated sightings of the same individual (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). ADOT therefore predicts, and NMFS concurs, that one group of two individuals may occur within the Level B harassment zones twice per week during the proposed activities. As noted previously, ADOT estimates that pile driving would occur over the course of 91 days (13 weeks). Therefore, ADOT estimates, and NMFS concurs that 52 takes by Level B harassment of humpback whales (1 group of 2 individuals × 2 groups per week × 13 weeks = 52 takes by Level B harassment) from the Central North Pacific stock may occur in Tongass Narrows.

As noted above, ADOT estimates that simultaneous use of two hammers (any combination) could occur on up to 44 days during the project. On those days, the Level B harassment zone would extend into Clarence Strait. Local specialists estimated that approximately four humpback whales could pass through or near the portion of the Level B harassment zone in Clarence Strait each day. Therefore, ADOT estimates, and NMFS concurs, that during the 44 days with potential simultaneous use of two hammers, 176 takes by Level B harassment of humpback whale could occur in Clarence Strait (4 humpback whales × 44 days = 176 takes by Level B harassment). Therefore, the sum of total estimated takes by Level B harassment of humpback whale between Tongass Narrows and Clarence Strait is 228 (52 + 176 = 228 takes by Level B harassment), and NMFS proposes to authorize 228 takes by Level B harassment of humpback whale.

As noted previously, Wade *et al.* (2021) estimates that approximately 2 percent of all humpback whales in Southeast Alaska and northern British Columbia are of the Mexico DPS, while all others are of the Hawaii DPS. However, NMFS has conservatively assumed here that 6.1 percent of the total humpback population in Southeast Alaska is from the Mexico DPS (Wade *et al.* 2016). Therefore, of the 228 takes of humpback whale proposed for authorization, NMFS expects that a total of 14 takes would be of individuals from the Mexico DPS. NMFS expects that all other instances of proposed take would be from the non-listed Hawaii DPS.

Take by Level A harassment of humpback whales is neither anticipated nor proposed to be authorized because of the expected effectiveness of the required monitoring and mitigation measures (see Proposed Mitigation section below for more details). For all pile driving and DTH activities, the shutdown zone exceeds the calculated Level A harassment zone. Humpbacks are usually readily visible, and therefore, we expect PSOs to be able to effectively implement the required shutdown measures prior to any humpback whales incurring PTS within Level A harassment zones.

*Minke Whales*

Minke whales may be present in Tongass Narrows year-round. Their abundance throughout Southeast Alaska is very low, and anecdotal reports have not included minke whales near the project area. ADOT's monitoring program in Tongass Narrows also did not report any minke whale sightings. However, minke whales are distributed throughout a wide variety of habitats and could occur near the project area.

Minke whales are generally sighted as solo individuals (Dahlheim *et al.* 2009).

As noted above, ADOT estimates that simultaneous use of two hammers (any combination) could occur on up to 44 days during the project. On those days, the Level B harassment zone would extend into Clarence Strait. Based on Freitag (2017; as cited in 83 FR 37473; August 1, 2018 and 83 FR 34134; July 17, 2019), ADOT estimates that three individual minke whales may occur near or within the Level B harassment zone (including both Tongass Narrows and Clarence Strait) every four months. Based on that estimated occurrence rate, NMFS estimates that three minke whales may occur in the Level B harassment zone during the proposed activities (occurring over approximately 3 months), and proposes to authorize 3 takes by Level B harassment of minke whales (Table 15).

The largest Level A harassment zone for minke whale extends 3,584 m from the noise source for 10 hours of DTH using a single hammer, and 3,084 m from the noise source for 4 hours of DTH using two hammers for 30-in piles simultaneously. (As noted previously, ADOT estimates that simultaneous use of any two hammer types would occur on no more than 44 days.) Zones for shorter durations and other activities would be smaller (Table 14). NMFS proposes to require a 1,500 m shutdown zone for minke whales during 24-in and 30-in DTH activities. Therefore, for some DTH activities, the estimated Level A harassment zone is larger than the proposed shutdown zone, and Level A harassment could occur.

To calculate take by Level A harassment, ADOT first calculated the ratio of the maximum Level A harassment isopleth for 30-in DTH using a single hammer minus the shutdown zone isopleth (3,584 m − 1,500 m = 2,084 m) to the Level B harassment zone isopleth (13,594 m; 2,084 m/13,594 m = 0.1533). ADOT multiplied the resulting ratio by the total potential take by Level B harassment, resulting in 1 take by Level A harassment (*i.e.,* 3 takes by Level B harassment × 0.1533 = 1 take by Level A harassment). NMFS reviewed and concurs with this method. (Potential operation of two DTH hammers for 24-in/30-in or 30-in/30-in pile combinations would result in larger Level A harassment isopleths than 4,269 m, however, such concurrent work would rarely occur, if at all, and therefore, as described above NMFS expects that calculating Level A harassment take using those zones is unnecessary.) Take by Level B harassment was calculated as the total potential minke whale takes by Level B harassment minus the takes by Level A harassment. ADOT therefore requests, and NMFS proposes to authorize 1 take by Level A harassment and 2 takes by Level B harassment (3 total takes of minke whale, Table 15).

TABLE 15—PROPOSED AMOUNT OF TAKE AS A PERCENTAGE OF STOCK ABUNDANCE, BY STOCK AND HARASSMENT TYPE

| Species | DPS/stock | Proposed authorized take | | | Percent of stock |
|---|---|---|---|---|---|
| | | Level A harassment | Level B harassment | Total | |
| Steller sea lion | Eastern U.S | 91 | 2,169 | 2,260 | 5.2 |
| Harbor seal | Clarence Strait | 116 | 1,014 | 1,130 | 4.1 |
| Harbor porpoise | Southeast Alaska | 5 | 27 | 32 | 2.5 |
| Dall's porpoise | Alaska | 20 | 207 | 227 | 1.7 |
| Pacific white-sided dolphin | North Pacific | 0 | 92 | 92 | 0.3 |
| Killer whale | Alaska Resident | | | | [a] 3.1 |
| | West Coast Transient | 0 | 72 | 72 | [a] 20.1 |
| | Northern Resident | | | | [a] 23.8 |
| Humpback whale | Central North Pacific | 0 | 228 | 228 | [b] 2.3 |
| Minke whale | Alaska | 1 | 2 | 3 | N/A |

**Proposed Mitigation**

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses. NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

Because of the need for an ESA Section 7 consultation for effects of the project on ESA listed humpback whales, there are a number of mitigation measures that go beyond, or are in addition to, typical mitigation measures we would otherwise require for this sort of project. The proposed measures are however typical for actions in the Ketchikan area. The mitigation measures included herein include measures that align with the 2019 Biological Opinion, and are subject to change, as required by NMFS' ESA Section 7 consultation. If Section 7 consultation warrants changes to these measures, NMFS expects that the new measures would align closely with those included in the recent proposed IHA for construction at the NOAA Port Facility

Project in Ketchikan, Alaska (86 FR 68223; December 1, 2021). ADOT must employ the following mitigation measures as included in the proposed IHA:

• Avoid direct physical interaction with marine mammals during construction activity. If a marine mammal comes within 10 m of such activity, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions (note that NMFS expects that a 10 m shutdown zone is sufficient to avoid direct physical interaction with marine mammals, but ADOT has conservatively proposed a 20 m shutdown zone to avoid physical interaction for in-water other than vessel transit);

• Ensure that construction supervisors and crews, the monitoring team and relevant ADOT staff are trained prior to the start of all pile driving and DTH activity, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood. New personnel joining during the project must be trained prior to commencing work;

• Pile driving activity must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within the harassment zone;

• For any marine mammal species for which take by Level B harassment has not been requested or authorized, in-water pile installation/removal and DTH will shut down immediately when the animals are sighted;

• Employ PSOs and establish monitoring locations as described in the Marine Mammal Monitoring Plan and Section 5 of the IHA. The Holder must monitor the project area to the maximum extent possible based on the required number of PSOs, required monitoring locations, and environmental conditions. For all pile driving and removal at least three PSOs must be used;

• The placement of the PSOs during all pile driving and removal and DTH activities will ensure that the entire shutdown zone is visible during pile installation;

• Monitoring must take place from 30 minutes prior to initiation of pile driving or DTH activity (*i.e.,* pre-clearance monitoring) through 30 minutes post-completion of pile driving or DTH activity;

• If in-water work ceases for more than 30 minutes, ADOT will conduct pre-clearance monitoring of both the Level B harassment zone and shutdown zone;

• Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead PSO to determine that the shutdown zones indicated in Table 16 are clear of marine mammals. Pile driving may commence following 30 minutes of observation when the determination is made that the shutdown zones are clear of marine mammals;

• If a marine mammal is observed entering or within the shutdown zones indicated in Table 16, pile driving must be delayed or halted. If pile driving is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone (Table 16) or 15 minutes have passed without re-detection of the animal (30 minutes for humpback whales);

• As required by the 2019 Biological Opinion, if waters exceed a sea state that restricts the PSOs' ability to make observations within the shutdown zone, in-water pile installation and removal will cease. Pile installation and removal will not be initiated or continue until the appropriate shutdown zone is visible in its entirety;

• For humpback whales, if the boundaries of the harassment zone have not been monitored continuously during a work stoppage, the entire harassment zone will be surveyed again to ensure that no humpback whales have entered the harassment zone that were not previously accounted for;

• In-water activities will take place only: Between civil dawn and civil dusk when PSOs can effectively monitor for the presence of marine mammals; during conditions with a Beaufort Sea State of 4 or less; when the entire shutdown zone and adjacent waters are visible (*e.g.,* monitoring effectiveness is not reduced due to rain, fog, snow, etc.). Pile driving may continue for up to 30 minutes after sunset during evening civil twilight, as necessary to secure a pile for safety prior to demobilization for the evening. PSO(s) will continue to observe shutdown and monitoring zones during this time. The length of the post-activity monitoring period may be reduced if darkness precludes visibility of the shutdown and monitoring zones;

• Vessel operators will implement the following required measures: Maintain a watch for marine mammals at all times while underway; remain at least and at least 91 m (100 yards (yd)) from all other listed marine mammals, travel at less than 5 knots (9 km/hr) when within 274 m (300 yd) of a whale; avoid changes in direction and speed when within 274 m (300 yd) of whales, unless doing so is necessary for maritime safety; not position vessel(s) in the path of whales, and will not cut in front of whales in a way or at a distance that causes the whales to change their direction of travel or behavior (including breathing/surfacing pattern); check the waters immediately adjacent to the vessel(s) to ensure that no whales will be injured when the propellers are engaged; adhere to the Alaska Humpback Whale Approach Regulations when transiting to and from the project site (see 50 CFR 216.18, 223.214, and 224.103(b)); not allow lines to remain in the water, and not throw trash or other debris overboard, thereby reducing the potential for marine mammal entanglement; follow established transit routes and travel <10 knots while in the harassment zones; follow the speed limit within Tongass Narrows (7 knots for vessels over 23 ft in length). If a whale's course and speed are such that it will likely cross in front of a vessel that is underway, or approach within 91 m (100 yards (yd)) of the vessel, and if maritime conditions safely allow, the engine will be put in neutral and the whale will be allowed to pass beyond the vessel, except that vessels will remain 460 m (500 yd) from North Pacific right whales; if a humpback whale comes within 10 m (32.8 ft) of a vessel during construction, the vessel will reduce speed to the minimum level required to maintain safe steerage and working conditions until the humpback whale is at least 10 m (32.8 ft) away from the vessel; vessels are prohibited from disrupting the normal behavior or prior activity of a whale by any other act or omission.

• ADOT must use soft start techniques when impact pile driving. Soft start requires contractors to provide an initial set of three strikes at reduced energy, followed by a 30-second waiting period, then two subsequent reduced-energy strike sets. A soft start must be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer; and

• If take by Level B harassment reaches the authorized limit for an authorized species, pile installation will be stopped as these species approach the Level B harassment zone to avoid additional take of them.

Further, on days when simultaneous use of two hammers producing continuous noise (two DTH hammers, one DTH and one vibratory hammer, or two vibratory hammers) is expected:

• When combinations of one DTH hammer with a vibratory hammer or two DTH hammers are used simultaneously, each PSO of the two contractors will have three PSOs working and the PSO teams will work together to monitor the entire area;

• One or more PSOs will be present at each construction site during in-water pile installation and removal so that Level A harassment zones and shutdown zones are monitored by a dedicated PSO at all times.

• The ADOT environmental coordinator for the project will implement coordination between or among the PSO contractors. ADOT will include in the contracts that PSOs must coordinate, collaborate, and otherwise work together to ensure compliance with project permits and authorizations.

The following specific mitigation measures will also apply to ADOT's in-water construction activities:

*Establishment of Level A Harassment Zones and Shutdown Zones*—For all pile driving/removal and DTH activities, ADOT will establish a shutdown zone (Table 16). The purpose of a shutdown zone is generally to define an area within which shutdown of activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones vary based on the activity type and duration and marine mammal hearing group (Table 16). For vibratory installation and removal and impact installation, shutdown zones will be based on the Level A harassment isopleth distances for each hearing group.

ADOT anticipates that the daily duration of DTH use may vary significantly, with large differences in maximum zones sizes possible depending on the work planned for a given day. Given this uncertainty and concerns related to ESA-listed humpback whales, ADOT would utilize a tiered system to identify and monitor the appropriate Level A harassment zones and shutdown zones, based on the maximum expected DTH duration. At the start of any work involving DTH, ADOT would first determine whether DTH may occur at two sites concurrently or just at one site. If DTH may occur at two sites concurrently, then ADOT would implement the Level A harassment zones and shutdown zones associated with simultaneous DTH use of the relevant pile sizes (Table 14 and Table 16). If DTH may only occur at one site, ADOT would then determine the maximum duration of DTH possible that day (according to the defined duration intervals in Table 16), which would determine the appropriate Level A harassment isopleth for that day (Table 13 and Table 14). This Level A harassment zone and associated shutdown zone must be observed by PSO(s) for the entire work day or until it is determined that, given the duration of activity for the day, the Level A harassment isopleth cannot exceed the next lower Level A harassment isopleth size in Table 13.

Due to practicability concerns, shutdown zones for some species during some activities may be smaller than the Level A harassment isopleths (Table 16). The placement of PSOs during all pile driving, pile removal, and DTH activities (described in detail in the Proposed Monitoring and Reporting Section) will ensure that the entire shutdown zones are visible during pile installation.

TABLE 16—SHUTDOWN ZONES AND LEVEL B HARASSMENT ISOPLETHS FOR EACH ACTIVITY

| Activity | Pile size (in) | Minutes per pile or strikes per pile | Shutdown distances (m) | | | | | | Level B harassment isopleth (m) |
|---|---|---|---|---|---|---|---|---|---|
| | | | LF (humpback whales) | LF (minke whales) | MF | HF | PW | OW | |
| Vibratory Installation | 30 | 60 min | 50 | | | 20 | | | 6,310 |
| | 24 | 60 min | | | | | | | 5,412 |
| | 20 | 60 min | | | | | | | |
| Vibratory Removal | 24 | 60 min | | | | | | | |
| DTH of Rock Sockets | 30 | 60 min | 780 | 1,500 | 30 | 500 | 200 | 40 | 13,594 |
| | | 120 min | 1,300 | | 50 | | | 50 | |
| | | 180 min | 1,700 | | 60 | | | 70 | |
| | | 240 min | 2,000 | | 70 | | | 80 | |
| | | 300 min | 2,300 | | 90 | | | 90 | |
| | | 360 min | 2,600 | | 100 | | | 100 | |
| | | 420 min | 2,900 | | | | | | |
| | | 480 min | 3,100 | | | | | | |
| | | 540 min | 3,400 | | | | | | |
| | | 600 min | 3,600 | | 130 | | | 100 | |
| | 24 | 60 min | 360 | 1,500 | 20 | 500 | 200 | 20 | |
| | | 120 min | 570 | | 30 | | | 30 | |
| | | 180 min | 750 | | 30 | | | 30 | |
| | | 240 min | 910 | | 40 | | | 40 | |
| | | 300 min | 1,100 | | 40 | | | 50 | |
| | | 360 min | 1,200 | | 50 | | | 50 | |
| | | 420 min | 1,400 | | 50 | | | 60 | |
| | | 480 min | 1,500 | | 60 | | | 60 | |
| | | 540 min | 1,600 | | 60 | | | 70 | |
| | | 600 min | 1,700 | | 60 | | | 70 | |
| DTH of Tension Anchor | 8 | 120 min | 90 | 90 | 20 | 100 | 50 | 20 | |
| | | 240 min | 130 | 130 | | 160 | 70 | | |
| Impact Installation | 30 | 50 strikes | 100 | 100 | 20 | 120 | 60 | 20 | 2,154 |
| | 24 | 50 strikes | 60 | 60 | | 70 | 30 | | 1,000 |
| | 20 | 50 strikes | | | | | | | |

TABLE 17—SHUTDOWN ZONES, BY HEARING GROUP FOR SIMULTANEOUS USE OF TWO DTH HAMMERS

| Activity combination | Level A harassment isopleth (m) | | | | |
|---|---|---|---|---|---|
| | LF | MF | HF | PW | OW |
| 8-in pile, 8-in pile | 210 | 20 | 250 | 110 | 20 |

TABLE 17—SHUTDOWN ZONES, BY HEARING GROUP FOR SIMULTANEOUS USE OF TWO DTH HAMMERS—Continued

| Activity combination | Level A harassment isopleth (m) | | | | |
|---|---|---|---|---|---|
| | LF | MF | HF | PW | OW |
| 8-in pile, 24-in pile | 1,300 | 50 | 500 | 200 | 60 |
| 8-in pile, 30-in pile | 2,800 | 100 | | | 110 |
| 24-in pile, 24-in pile | 1,440 | 60 | | | 60 |
| 24-in pile, 30-in | 2,270 | 90 | | | 90 |
| 30-in pile, 30-in pile | 3,090 | 110 | | | 120 |

ADOT also must abide by the terms and conditions of the December 19, 2019 Biological Opinion and Incidental Take Statement issued by NMFS pursuant to section 7 of the Endangered Species Act.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures provide the means effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

**Proposed Monitoring and Reporting**

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density).
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas).
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors.
- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks.
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat).
- Mitigation and monitoring effectiveness.

*Visual Monitoring*

Monitoring must be conducted by qualified, NMFS-approved PSOs, in accordance with the following:

- PSOs must be independent (*i.e.,* not construction personnel) and have no other assigned tasks during monitoring periods. At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued IHA. Other PSOs may substitute other relevant experience, education (degree in biological science or related field), or training for prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued IHA. Where a team of three or more PSOs is required, a lead observer or monitoring coordinator must be designated. The lead observer must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization. PSOs must be approved by NMFS prior to beginning any activity subject to this IHA; and
- PSOs must record all observations of marine mammals as described in the Section 5 of the IHA and the Marine Mammal Monitoring Plan, regardless of distance from the pile being driven. PSOs shall document any behavioral reactions in concert with distance from piles being driven or removed;

PSOs must have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary;

Additionally, as required by NMFS' December 2019 Biological Opinion, each PSO will be trained and provided with reference materials to ensure standardized and accurate observations and data collection.

ADOT must employ three PSOs during all pile driving and DTH. A minimum of one PSO (the lead PSO) must be assigned to the active pile driving or DTH location to monitor the shutdown zones and as much of the Level B harassment zones as possible. Two additional PSOs are also required, though the observation points may vary depending on the construction activity and location of the piles. To select the best observation locations, prior to start of construction, the lead PSO will stand at the construction site to monitor the Level A harassment zones while two or more PSOs travel in opposite directions from the project site along Tongass Narrows until they have reached the edge of the appropriate Level B harassment zone, where they will

identify suitable observation points from which to observe. When needed, an additional PSO will be stationed on the north end of Revilla Island observing to the northwest. See Figure 2–11 of ADOT's Marine Mammal Monitoring and Mitigation Plan for a map of proposed PSO locations. If visibility deteriorates so that the entire width of Tongass Narrows at the harassment zone boundary is not visible, additional PSOs may be positioned so that the entire width is visible, or work will be halted until the entire width is visible to ensure that any humpback whales entering or within the harassment zone are detected by PSOs.

When DTH use occurs, or simultaneous use of one DTH with a vibratory hammer or two DTH systems occurs, creating Level B harassment zones that exceed 13 km and 21 km, respectively, and Level A harassment zones that extend over 6 km, one additional PSO will be stationed at the northernmost land-based location at the entrance to Tongass Narrows (at least two PSOs total at that location, four PSOs on duty across all PSO locations). One of these PSO will focus on Tongass Narrows, specifically watching for marine mammals that could approach or enter Tongass Narrows and the project area. The second PSO will look out into Clarence Strait, watching for marine mammals that could swim through the ensonified area. No additional PSOs will be required at the southern-most monitoring location because the Level B harassment zones are truncated to the southeast by islands, which prevent propagation of sound in that direction beyond the confines of Tongass Narrows. Takes by Level B harassment will be recorded by PSOs and extrapolated based upon the number of observed takes and the percentage of the Level B harassment zone that was not visible.

Each construction contractor managing an active construction site and on-going in-water pile installation or removal will provide qualified, independent PSOs for their specific contract. The ADOT environmental coordinator for the project will implement coordination between or among the PSO contractors. It will be a required component of their contracts that PSOs coordinate, collaborate, and otherwise work together to ensure compliance with project permits and authorizations.

*Reporting*

A draft marine mammal monitoring report would be submitted to NMFS within 90 days after the completion of pile driving and removal activities, or 60 days prior to a requested date of issuance of any future IHAs for projects at the same location, whichever comes first. The report would include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. Specifically, the report must include:

- Dates and times (begin and end) of all marine mammal monitoring;
- Construction activities occurring during each daily observation period, including the number and type of piles driven or removed and by what method (*i.e.,* impact, vibratory or DTH) and the total equipment duration for vibratory removal or DTH for each pile or hole or total number of strikes for each pile (impact driving);
- PSO locations during marine mammal monitoring;
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;
- Upon observation of a marine mammal, the following information: Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting; Time of sighting; Identification of the animal(s) (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species; Distance and bearing of each marine mammal observed relative to the pile being driven for each sighting (if pile driving was occurring at time of sighting); Estimated number of animals (min/max/best estimate); Estimated number of animals by cohort (adults, juveniles, neonates, group composition, sex class, etc.); Animal's closest point of approach and estimated time spent within the harassment zone; Description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted from the activity (*e.g.,* no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);
- Number of marine mammals detected within the harassment zones and shutdown zones, by species;
- Table summarizing any incidents resulting in take of ESA-listed species;
- Detailed information about any implementation of any mitigation triggered (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting changes in behavior of the animal(s), if any;
- Description of other human activity within each monitoring period;
- Description of any deviation from initial proposal in pile numbers, pile types, average driving times, etc.;
- Brief description of any impediments to obtaining reliable observations during construction period;
- Description of any impediments to complying with these mitigation measures; and
- If visibility degrades to where the PSO(s) cannot view the entire impact or vibratory harassment zones, take of humpback whales would be extrapolated based on the estimated percentage of the monitoring zone that remains visible and the number of marine mammals observed.

If no comments are received from NMFS within 30 days, the draft final report would constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

*Reporting Injured or Dead Marine Mammals*

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the IHA-holder must immediately cease the specified activities and report the incident to the Office of Protected Resources (OPR) (*PR.ITP.MonitoringReports@noaa.gov*), NMFS and to the Alaska Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, ADOT must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the IHA. The IHA-holder must not resume their activities until notified by NMFS. The report must include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and

• General circumstances under which the animal was discovered.

**Negligible Impact Analysis and Determination**

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, our analysis applies to all species listed in Table 2 for which take could occur, given that NMFS expects the anticipated effects of the proposed pile driving/removal and DTH on different marine mammal stocks to be similar in nature. Where there are meaningful differences between species or stocks, or groups of species, in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, NMFS has identified species-specific factors to inform the analysis.

Pile driving and DTH activities associated with the project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment and, for some species, Level A harassment from underwater sounds generated by pile driving. Potential takes could occur if marine mammals are present in zones ensonified above the thresholds for Level B harassment or Level A harassment, identified above, while activities are underway.

NMFS does not anticipate that serious injury or mortality would occur as a result of ADOT's planned activity given the nature of the activity, even in the absence of required mitigation. Further, no take by Level A harassment is anticipated for Pacific white-sided dolphin, killer whale, or humpback whale, due to the likelihood of occurrence and/or required mitigation measures. As stated in the mitigation section, ADOT would implement shutdown zones that equal or exceed many of the Level A harassment isopleths shown in Table 13. Take by Level A harassment is authorized for some species (Steller sea lions, harbor seals, harbor porpoises, Dall's porpoises, and minke whales) to account for the potential that an animal could enter and remain within the area between a Level A harassment zone and the shutdown zone for a duration long enough to be taken by Level A harassment, and in some cases, to account for the possibility that an animal could enter a shutdown zone without detection given the various obstructions along the shoreline, and remain in the Level A harassment zone for a duration long enough to be taken by Level A harassment before being observed and a shutdown occurring. Any take by Level A harassment is expected to arise from, at most, a small degree of PTS because animals would need to be exposed to higher levels and/or longer duration than are expected to occur here in order to incur any more than a small degree of PTS. Additionally, and as noted previously, some subset of the individuals that are behaviorally harassed could also simultaneously incur some small degree of TTS for a short duration of time. Because of the small degree anticipated, though, any PTS or TTS potentially incurred here would not be expected to adversely impact individual fitness, let alone annual rates of recruitment or survival.

For all species and stocks, take would occur within a limited, confined area (adjacent to the project site) of the stock's range. Take by Level A harassment and Level B harassment would be reduced to the level of least practicable adverse impact through use of mitigation measures described herein. Further the amount of take proposed to be authorized is small when compared to stock abundance.

Behavioral responses of marine mammals to pile driving, pile removal, and DTH at the sites in Tongass Narrows are expected to be mild, short term, and temporary. Marine mammals within the Level B harassment zones may not show any visual cues they are disturbed by activities or they could become alert, avoid the area, leave the area, or display other mild responses that are not observable such as changes in vocalization patterns. Given that pile driving, pile removal, and DTH would occur for only a portion of the project's duration and often on nonconsecutive days, any harassment occurring would be temporary. Additionally, many of the species present in Tongass Narrows or Clarence Strait would only be present temporarily based on seasonal patterns or during transit between other habitats. These temporarily present species would be exposed to even smaller periods of noise-generating activity, further decreasing the impacts.

For all species except humpback whales, there are no known Biologically Important Areas (BIAs) near the project zone that would be impacted by ADOT's planned activities. For humpback whales, the whole of Southeast Alaska is a seasonal BIA from spring through late fall (Ferguson *et al.* 2015), however, Tongass Narrows and Clarence Strait are not important portions of this habitat due to development and human presence. Tongass Narrows is also a small passageway and represents a very small portion of the total available habitat. Also, while southeast Alaska is considered an important area for feeding humpback whales between March and May (Ellison *et al.* 2012), it is not currently designated as critical habitat for humpback whales (86 FR 21082; April 21, 2021).

More generally, there are no known calving or rookery grounds within the project area, but anecdotal evidence from local experts shows that marine mammals are more prevalent in Tongass Narrows and Clarence Strait during spring and summer associated with feeding on aggregations of fish, meaning the area may play a role in foraging. Because ADOT's activities could occur during any season, takes may occur during important feeding times. However, the project area represents a small portion of available foraging habitat and impacts on marine mammal feeding for all species, including humpback whales, should be minimal.

Any impacts on marine mammal prey that would occur during ADOT's planned activity would have, at most, short-term effects on foraging of individual marine mammals, and likely no effect on the populations of marine mammals as a whole. Indirect effects on marine mammal prey during the

construction are expected to be minor, and these effects are unlikely to cause substantial effects on marine mammals at the individual level, with no expected effect on annual rates of recruitment or survival.

In addition, it is unlikely that minor noise effects in a small, localized area of habitat would have any effect on the stocks' annual rates of recruitment or survival. In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activities would have only minor, short-term effects on individuals. The specified activities are not expected to impact rates of recruitment or survival and would, therefore, not result in population-level impacts.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No serious injury or mortality is anticipated or proposed for authorization;
- Take by Level A harassment of Pacific white-sided dolphin, killer whale, and humpback whale is not anticipated or proposed for authorization;
- ADOT would implement mitigation measures including soft-starts for impact pile driving and shutdown zones to minimize the numbers of marine mammals exposed to injurious levels of sound, and to ensure that take by Level A harassment is, at most, a small degree of PTS;
- The intensity of anticipated takes by Level B harassment is relatively low for all stocks and would not be of a duration or intensity expected to result in impacts on reproduction or survival;
- The only known area of specific biological importance covers a broad area of southeast Alaska for humpback whales, and the project area is a very small portion of that BIA. No other known areas of particular biological importance to any of the affected species or stocks are impacted by the activity, including ESA-designated critical habitat;
- The project area represents a very small portion of the available foraging area for all potentially impacted marine mammal species and stocks and anticipated habitat impacts are minor; and
- Monitoring reports from similar work in Tongass Narrows have documented little to no effect on individuals of the same species impacted by the specified activities.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

**Small Numbers**

As noted above, only small numbers of incidental take may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The instances of take NMFS proposes to authorize is below one third of the estimated stock abundance for all stocks (see Table 15). The number of animals that we expect to authorize to be taken from these stocks would be considered small relative to the relevant stocks' abundances even if each estimated taking occurred to a new individual, which is an unlikely scenario. Some individuals may return multiple times in a day, but PSOs would count them as separate takes if they cannot be individually identified.

The Alaska stock of Dall's porpoise has no official NMFS abundance estimate for this area, as the most recent estimate is greater than eight years old. The most recent estimate was 13,110 animals for just a portion of the stock's range. Therefore, the 227 takes of this stock proposed for authorization clearly represent small numbers of this stock.

Likewise, the Southeast Alaska stock of harbor porpoise has no official NMFS abundance estimate as the most recent estimate is greater than eight years old. The most recent estimate was 11,146 animals (Muto *et al.* 2021) and it is highly unlikely this number has drastically declined. Therefore, the 32 takes of this stock proposed for authorization clearly represent small numbers of this stock.

There is no current or historical estimate of the Alaska minke whale stock, but there are known to be over 1,000 minke whales in the Gulf of Alaska (Muto *et al.* 2018) so the 3 takes proposed for authorization clearly represent small numbers of this stock. Additionally, the range of the Alaska stock of minke whales is extensive, stretching from the Canadian Pacific coast to the Chukchi Sea, and ADOT's project area impacts a small portion of this range. Therefore, the 3 takes of minke whale proposed for authorization is small relative to estimated survey abundance, even if each proposed take occurred to a new individual.

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

**Unmitigable Adverse Impact Analysis and Determination**

In order to issue an IHA, NMFS must find that the specified activity will not have an ''unmitigable adverse impact'' on the subsistence uses of the affected marine mammal species or stocks by Alaska Natives. NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Harbor seals are the marine mammal species most regularly harvested for subsistence by households in Ketchikan and Saxman (a community a few miles south of Ketchikan, on the Tongass Narrows). Eighty harbor seals were harvested by Ketchikan residents in 2007, which ranked fourth among all communities in Alaska that year for harvest of harbor seals. Thirteen harbor seals were harvested by Saxman residents in 2007. In 2008, two Steller sea lions were harvested by Ketchikan-based subsistence hunters, but this is the only record of sea lion harvest by residents of either Ketchikan or Saxman. In 2012, the community of Ketchikan

had an estimated subsistence take of 22 harbor seals and 0 Steller sea lion (Wolf *et al.* 2013). NMFS is not aware of more recent data. Hunting usually occurs in October and November (ADF&G 2009), but there are also records of relatively high harvest in May (Wolfe *et al.* 2013). The Alaska Department of Fish and Game (ADF&G) has not recorded harvest of cetaceans from Ketchikan or Saxman (ADF&G 2018).

All project activities would take place within the industrial area of Tongass Narrows immediately adjacent to Ketchikan where subsistence activities do not generally occur. Both the harbor seal and the Steller sea lion may be temporarily displaced from the project area. The project also would not have an adverse impact on the availability of marine mammals for subsistence use at locations farther away, where these construction activities are not expected to take place. Some minor, short-term harassment of the harbor seals could occur, but given the information above, we would not expect such harassment to have effects on subsistence hunting activities.

Based on the description of the specified activity and the proposed mitigation and monitoring measures, NMFS has preliminarily determined that there will not be an unmitigable adverse impact on subsistence uses from ADOT's proposed activities.

**Endangered Species Act**

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS' Office of Protected Resources (OPR) consults internally whenever we propose to authorize take for endangered or threatened species, in this case with NMFS' Alaska Regional Office (AKRO).

NMFS OPR is proposing to authorize take of the Central North Pacific stock of humpback whales, of which a portion belong to the Mexico DPS of humpback whales, which are ESA-listed. On February 6, 2019, NMFS AKRO completed consultation with ADOT for Tongass Narrows Project and issued a Biological Opinion. Reinitiation of formal consultation was required to analyze changes to the action that were not considered in the February 2019 opinion (PCTS #AKR–2018–9806/ECO #AKRO–2018–01287). The original opinion considered the effects of only one project component being constructed at a time and did not analyze potential effects of concurrent pile driving which may cause effects to the listed species that were not considered in the original opinion; therefore, reinitiation of formal consultation was required. NMFS' AKRO issued a revised Biological Opinion to NMFS' OPR on December 19, 2019 which concluded that issuance of IHAs to ADOT is not likely to jeopardize the continued existence of Mexico DPS humpback whales. The effects of this proposed Federal action were adequately analyzed in NMFS' *Endangered Species Act (ESA) Section 7(a)(2) Biological Opinion for Construction of the Tongass Narrows Project (Gravina Access),* revised December 19, 2019, which concluded that the take NMFS proposes to authorize through this IHA would not jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify any designated critical habitat. Because the currently proposed take of Mexico DPS of humpback whales exceeds that authorized in the 2019 Biological Opinion, NMFS will need to reinitiate consultation on this project.

**Proposed Authorization**

As a result of these preliminary determinations, NMFS proposes to issue an IHA to ADOT for the construction of four facilities in the channel between Gravina Island and Revillagigedo (Revilla) Island in Ketchikan, Alaska: The Gravina Airport Ferry Layup Facility, the Gravina Freight Facility, the Revilla New Ferry Berth, and the Gravina Island Shuttle Ferry Berth Facility in Tongass Narrows, Alaska beginning in March 2022, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

**Request for Public Comments**

We request comment on our analyses, the proposed authorization, and any other aspect of this notice of proposed IHA for the proposed construction activities. We also request at this time comment on the potential Renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform decisions on the request for this IHA or a subsequent Renewal IHA.

On a case-by-case basis, NMFS may issue a one-time, one-year Renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical or nearly identical activities as described in the Description of Proposed Activities section of this notice is planned or (2) the activities as described in the Description of Proposed Activities section of this notice would not be completed by the time the IHA expires and a Renewal would allow for completion of the activities beyond that described in the *Dates and Duration* section of this notice, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to the needed Renewal IHA effective date (recognizing that the Renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA).
- The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the requested Renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: January 27, 2022.

**Kimberly Damon-Randall,**

*Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2022–02035 Filed 2–1–22; 8:45 am]

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